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**A CRITICAL APPRAISAL OF MASSIMILANO LATORRE AND
OTHERS VS UNION OF INDIA AND OTHERS VIS-A-VIS
COMPENSATORY JURISPRUDENCE**- Dr Sunaina¹**Abstract:**

State is equipped with varied modes of doing 'justice' to the disputing parties through its legislative, executive or judicial system. Justice done via the mode of judicial setup includes punishing the offender or passing an injunction order or paying compensation to the victim as per the law of the land. In matters of international law the duty of doing justice is heavily loaded on the State primarily through its legislative mode of doing justice where primary focus is to do justice to the nationals of different States while maintaining peace and not violating international norms at the same time. The burden of doing justice can become more onerous, complex and a delicate issue and a situation of conflict between the laws of the different lands may also arise leading to enhanced tension between nations in their cordial relations.

The Supreme Court of India recently in the case of Massimilano Latorre and others Vs Union of India and others closed all pending criminal cases filed against the two Italian marines in lieu of compensation of rupees ten crores to be paid by the Republic of Italy with the assurance by it that the case against the marines would be resumed in Italy. Four crores each to be given to the kin of the deceased victims' families and two crores to the owner of the boat. The marines were charged for gunning down two Indian fishermen in Kerala in 2012. Compensatory jurisprudence has now started spreading deep roots in criminal law as well, in addition to the civil law where damages and compensation are primary concerns. The notion of compensation has spread its wings from micro to macro levels. However, certain questions arise such as; whether compensation for serious crimes instead of punishment can be a better alternative to settle disputes between nationals of different countries for maintenance of peace among nations, etc. The present paper is an effort to analyse this Indian Supreme Court judgment in the light of compensatory jurisprudence.

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Key words: Compensation, Fishermen, India, Italy, Marine

1. Introduction:

State is equipped with varied modes of doing 'justice' to the disputing parties through its legislative, executive or judicial system. Justice done via the mode of judicial setup includes punishing the offender or passing an injunction order or paying compensation to the victim as per the law of the land. In matters of international law the duty of doing justice is heavily loaded on the State primarily through its legislative mode of doing justice where primary focus is to do justice to the nationals of different States while maintaining peace and not violating international norms at the same time. The burden of doing justice can become more onerous, complex and a delicate issue and a situation of conflict between the laws of the different lands may also arise leading to enhanced tension between nations in their cordial relations.

The Supreme Court of India recently in the case of Massimilano Latorre and others Vs Union of India and others² closed all pending criminal cases filed against the two Italian marines in lieu of compensation of rupees ten crore to be paid by the Republic of Italy with the assurance by it that the case against the marines would be resumed in Italy. Four crores each to be given to the kin of the deceased victims' families and two crores to be paid to the owner of the boat was the distribution of compensation. The marines were charged for gunning down two Indian fishermen in Kerala in 2012.

The compensatory jurisprudence has now started spreading deep roots in criminal law as well, in addition to the civil law where damages and compensation are primary concerns. The notion of compensation has spread its wings from micro to macro levels. However, certain questions arise such as; whether compensation for serious crimes instead of punishment can be a better alternative to settle disputes between nationals of different countries for maintenance of peace among nations, whether expansion of compensatory jurisprudence in international disputes is beneficial to the society, whether awarding of compensation to victims in serious criminal offences in the realm of international law is victim oriented etc.

2. Statement of the Problem:

The law is broadly classified as civil and criminal. Depending upon the gravity of the wrong or offence, compensation and/or punishments are decided. For serious offences like murder, rape etc, Indian criminal law does not permit settlement of disputes only through compensation. However in international matters the rule may be deviated. Problem statement revolves around determining the necessities for pressing on compensation in disputes in international affairs

² Special Leave Petition (Civil) No. 20370 of 2012 decided by Supreme Court of India on 15 June 2021
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through the prism of Supreme Court of India judgment in Massimilano Latorre and others Vs Union of India and others³.

3. Research Questions:

3.1 Whether compensation for serious crimes can be a better remedial alternative for conviction to settle international law disputes for maintenance of peace among nations?

3.2 Whether expansion of compensatory jurisprudence in international disputes is beneficial to the society?

3.3 Whether awarding of compensation to victims in serious criminal offences in the realm of international law is victim oriented?

3.4 Whether there can be serious repercussions if the disputing nations settle their subjects' disputes through compensation instead of punishment?

4. Hypothesis:

Settlement of disputes through compensation in international disputes is necessary for maintaining peace and tranquillity amongst member nations.

5. Historical background of compensatory jurisprudence:

In the initial years of human civilization when the humans started living together right to punish was with the individual due to absence of the notion of rule of law or any political institution though the concept of compensation also existed. Gradually, individual lost his right to punish and the offence used to be considered as the offence against the tribe or clan to which the individual belonged. From this era collective responsibility clan started replacing the victims' rights. With the advent of strong monarch after medieval period, criminal law changed in all its disciplines but position of victims' right to compensation remained unheard because of the notion that crime is breach of peace of State. So it was the State which had the right to punish and get monetary compensation. The ancient practice of reparation can be founded in the vedic period, manusamriti, code of Hammurabi, the Laws of Moses etc.

In the vedic period, justice was based on dharma. It was the duty of the king to uphold the law according to local customs and usages and the written codes. The king was the fountain head of justice. The Law of Moses provided three codes in the form of Commandments, Ordinances and Judgements. The Commandments provided laws of human freedom and provided a divine standard to which the sinner could compare himself and his actions and recognize that he was a sinner and needed a saviour. The Ordinances were designed to communicate God's grace in

³ Ibid

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both salvation and restoration to fellowship.⁴The Judgments were the social code designed to provide a true concept of a national function and freedom under the laws of divine establishment. The Law of Twelve Tables provided a valuable insight into Roman law and dealt with the concept of exemplary compensation. For example, when anyone, with fraudulent intent, appropriates property deposited with him for safe keeping, he shall be condemned to pay double its value. The Code of Hammurabi from ancient Mesopotamia was enacted by the sixth Babylonian king, Hammurabi who universalized the customs across his empire and stiffened the punishments associated with breaches. In Anglo-Saxons era, a wrong could be redeemed by way of compensation. One part of the compensation was given to the victim and other, to the King.

6. Analysis of Massimilano Latorre and others Vs Union of India and others⁵vis-a-vis compensatory jurisprudence in India:

Although loss of life and the mental trauma can never be duly compensated in terms of money however the rationale behind awarding of compensation lies in the state's welfare measure to provide some sort of social security to the victim or his/her kin. In India a comprehensive legislation on compensation to victims does not exist but can be found through various statutory laws in scattered form such as The Constitution of India, The Probation of Offenders Act, Indian Penal Code, Criminal Procedure Code, Motor Vehicles Act etc. The idea of giving justice demands that a sufferer must be duly compensated in addition to the punishment afflicted on the offender. Since accused is primarily responsible for the wrong done to the victim hence primary obligation would be on him to compensate the loss but where accused is not in a position to pay then compensation can be awarded by the State as State had failed in its duty to protect the life of the victim.

As per the ministry of External Affairs in India⁶ political relations between India and Italy are cordial and were established in 1947.⁷ There has been a regular exchange of visits at political and official levels between both countries. There are certain bilateral agreements between India and Italy such as Air Services Agreement (1959) Double Taxation Avoidance Agreement (1985), MOU on Defence Equipment (1994), Bilateral Investment Promotion Agreement (1995) and many more. One of the international instruments on law of sea that has been ratified by both the countries is United Nations Convention on the Law of the Sea, 1982.

⁴www.realtime.net/wdowd/topics/law_of_moses.html accessed on 14-02-2022

⁵ Special Leave Petition (Civil) No. 20370 of 2012 decided by Supreme Court of India on 15 June 2021

⁶http://mea.gov.in/Portal/ForeignRelation/India-Italy_Relations.pdf accessed on 16 February 2022

⁷ ibid

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In *Massimiliano Latorre and others Vs Union of India and others*⁸, the unfortunate incident occurred on 15 Feb 2012 in which two Indian fishermen who were onboard the boat named St. Antony registered in India, while fishing off the coast of Kerala, were fired at from a passing ship which was an Italian vessel sailing from Singapore to Egypt. The two fishermen died and FIR was registered under various Indian laws including the charge of murder against the Italian marine officials. As quoted by The Hindu newspaper “Marines had claimed they mistook the fishermen for pirates and that the shooting occurred in international waters. In its submissions, India had called on the Permanent Court of Arbitration UNCLOS tribunal to adjudge and declare that PCA has no jurisdiction with respect to the case submitted to it by Italy. However, a majority of the court's five- member bench ruled 4-1 that it had jurisdiction in the matter, and ruled 3-2 that the marines Massimiliano Latorre and Salvatore Girone held immunity. According to the Italian government, the marines were State officials exercising official functions. Ministry of External Affairs spokesperson Anurag Srivastava said, ‘The tribunal observed that India and Italy had concurrent jurisdiction over the incident and a valid legal basis to institute criminal proceedings against the marines. However, it found that the immunities enjoyed by the marines as State officials operate as an exception to the jurisdiction of the Indian courts and, hence, preclude them to judge the marines. India has taken note of the award and will be in touch with relevant entities on the matter.’ The Italian government, which was the plaintiff, said it would carry out the decision of the arbitration court in a spirit of cooperation with India. As a result, Italy will resume its criminal investigation into the *Enrica Lexie* case, while India is required to cease exercising its jurisdiction on the marines. The tribunal also held that India was entitled to compensation in connection with loss of life, physical harm, material damage to property including to St. Antony and moral harm suffered by the captain and other crew members, as Italy had breached India’s freedom of navigation rights”.⁹The Italian marines filed writ petition before the High Court of Kerala on the ground of jurisdiction which was dismissed by the High Court and upheld the jurisdiction. Later another writ was filed by the Italian marines before the Supreme Court of India under Article 32 of the Constitution seeking directions to take all steps to secure their interests and make over their interest to republic of Italy which resultantly made ex-gratia payment of compensation of amount of INR 21.7 million to the legal heirs of the deceased persons in the

⁸ Special Leave Petition (Civil) No. 20370 of 2012 decided by Supreme Court of India on 15 June 2021

⁹<https://www.thehindu.com/news/national/italian-marines-case-india-loses-jurisdiction/article31973247.ece> accessed on 18 February 2022

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month of April 2012. The Supreme Court also allowed the vessel to sail away, subject to certain terms and conditions along with all crew members. The Italian marine officials and the Republic of Italy preferred a Special Leave Petition under Article 136 of the Constitution of India on the ground that India and Italy having signed and ratified the 1982 United Nations Convention on the Law of the Sea agreed to settle the dispute concerning the incident in question as per the mechanism provided under Annex VII of the treaty. Also, in compliance of the Provisional Measures Order passed by the International Tribunal for the Law of the Sea in 2015 required both Italy and India to suspend all court proceedings till the award is delivered by the tribunal. Accordingly, the arbitral tribunal delivered its award on 21 May 2020. As per the arbitral tribunal award Italy will resume its criminal investigation in the events of the killing of Indian fishermen and both India and Italy will cooperate with each other in pursuit of that investigation. The Republic of Italy had agreed to the amount of INR 100 million to be paid by Italy as total compensation excluding the amount of INR 21.7 million already paid by Italy to the families of the victims. The Ministry of External Affairs, Government of India¹⁰ had also emphasised on the implementation of the arbitral award.

The extract of judgment is as follows:

“In view of the ... exercise of the powers under Article 142 of the Constitution of India, we dispose of/close the present proceedings by directing as under:

- (a) FIR No.2/2012 of Coastal PS, Neendakara, Kollam, Kerala re-registered as FIR No. R.C. No. 04/2013/NIA/DLI dated 4 April 2013, under Sections 302, 307, 427 read with Section 34 of the Indian Penal Code, 1860 and Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 registered by the National Investigation Agency, New Delhi, and all proceedings emanating there from including the proceedings pending before the Ld. Special Designated Court, Patiala House Courts, New Delhi are hereby quashed;
- (b) The Bail-Bonds ... executed by Chief Master Sergeant Massimiliano Latorre and Sergeant Major Salvatore Girone as also Mr. Vishal Talwar and Mr. Vikas Talwar who stood as Sureties, in connection with the aforementioned FIR before the Ld. Special Designated Court, Patiala House Courts, New Delhi and the Ld. Registrar General of this Court are hereby discharged;
- (c) The Ld. Registrar General of this Court shall release the original Bank Guarantees ... for Rs. Two Crores each, ... given on behalf of the two Sureties...;
- (d) All pending matters before this Hon'ble Court including (1) the Special Leave Petition (C)

¹⁰ vide Note Verbale No. WI(A)/415/06/2012 dated 26 Nov 2020

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No. 20370 of 2012, (2) Writ Petition (C) No. 236 of 2014, (3) Writ Petition (C) No. 919 of 2014 and all pending I.As in the said proceedings are disposed of with no order as to costs.

(e)As per the award dated 21.05.2020 and.... it is further directed that the Union of India, Republic of Italy and the State of Kerala shall cooperate with each other in pursuit of that investigation.”¹¹

Certain research questions that arise have been discussed below:

Whether compensation for serious crimes can be a better remedial alternative for conviction to settle international law disputes for maintenance of peace among nations?

No amount of money can buy/bring back a life. However, the notion of compensation in India is restorative from the perspective of victim. For serious offences like rape and murder Indian law does not permit compensation in lieu of punishment as the same can be misused by the dominant and powerful accused to escape conviction. When the disputes between nationals of different countries arise the onus becomes heavier as the whole world would be watching the actions of the disputing countries and compliance of international norms by them. In relations between and amongst member nations the most important norm is to comply with the treaties or agreements, if any, they have entered into and ratified. If the ratified terms and conditions are not complied with the reputation of a country can be doubted although *lexfori* holds the roots in any country. The sovereign nations are expected to honour the instruments which they voluntarily agree to comply with failing which no one would trust such treaties or conventions. Hence from this perspective it appears to be just that the pending proceedings were closed in India. But compensation alone is not sufficient in criminal law. Punishment is also necessary. Therefore, keeping this factor into consideration the condition for resuming of criminal investigation against the Italian marines is fully justified. The penal interests have not been done away with but rather equally retained with the difference that the same would continue in Italy instead of India. Now the actions on the part of Italy to keep its promises are under strict observation of the world.

Whether judgment is as per international norms?

India and Italy had signed and ratified the 1982 United Nations Convention on the Law of the Sea and according to its Annex VII disputes need to be settled as per the arbitral tribunal. The same was incorporated reflecting that international norms were duly applied and honoured. The only flaw was that since there was no limitation on the quantum of time period to decide, it took around eight years in the outcome of arbitral award. However, the Supreme Court of India took

¹¹ Para 7 of the judgment

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timely action in closing the pending criminal proceedings.

Whether expansion of compensatory jurisprudence in international disputes is beneficial to the society?

In international affairs effort is always on to retain and maintain peace in the society especially when the disputing nations enjoy cordial relations. India and Italy also have harmonious relations with each other. Conviction by one country can rather aggravate the matter and situation may become tensed. In such cases compensation can be a better option but at the same time the punitive side of the crime alleged was not at all ignored by the nations and compensation was accepted with the condition of resuming criminal investigation against offenders as per Italian law. This implies that neither the legislature nor the judiciary in India have accepted to substitute punishment with only compensation but to let the smooth, cordial and harmonious relations continue as a mode recognising awarding both compensation as well as punishment as per Italian law and doing complete justice.

Whether awarding of compensation to victims in serious criminal offences in the realm of international law is victim oriented?

The concept of justice is incomplete if compensation is not awarded while punishing the offender. Hence idea of justice requires that social security must be assured to the sufferer to prevent his/her further victimization. He/she may have to face societal ostracisation or boycott. Grant of compensation will help the victim become financially independent especially where he/she is poor or illiterate.

The contemporary global understanding of compensatory jurisprudence can be analysed through the various international instruments such as Universal Declaration of Human Rights, 1948, The European Convention for Protection of Human Rights and Fundamental Freedoms, 1950, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, Convention against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment, 1987, The Rome Statute of International Criminal Court, 1998, Optional Protocol to the Convention on Elimination of all Forms of Discrimination against Women, 1999, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violation of International Humanitarian Law, 2005, etc.

The common idea and essence of all these international instruments is to take some positive action towards victims of crime and help in their upliftment and progress. Even though life cannot be returned but at least some effort on the part of the State is expected for better future

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of the person who had to suffer because of the wrongdoer. Even in India the judiciary has recognised the compensatory jurisprudence. In *Dinesh alias Buddha Vs State of Rajasthan*¹² the accused was sentenced to ten years of rigorous imprisonment for committing rape upon an eight years old girl. A compensation of rupees 50000 was awarded by the court to be paid to the victim. In *Sarwan Singh Vs State of Punjab*¹³ a person died as a result of dispute amongst brothers in a family. A fine of rupees 3500 was imposed on each accused to be paid to the widow of the deceased as compensation. In *State Vs SidharthaVashisht and Others*¹⁴ also known as Jessica Lal case in which the accused Sidhartha alias Manu fired in the late midnight hours at bartender for non-service of liquor, was ordered to pay a compensation of rupees 50000 to the dependants of the victim and was sentenced to life imprisonment. In *Sukhdev Singh Vs State of Punjab*¹⁵ the Supreme Court increased the fine amount of rupees 2000 imposed on the offender to rupees 10000 so that the widow and the children of the deceased victim may be compensated. In *Balraj Vs State UP*¹⁶ the court held that power to award compensation is not ancillary to other sentences but in addition thereto, and directed the accused to pay rupees 10000 by way of compensation to the widow of the deceased. In *Trimbak Vs State of Maharashtra*¹⁷ there was a sudden quarrel which resulted in a person's death. The complainant was awarded a compensation of rupees 2000. Murder is terribly exhausting. Not only the victim suffers during his lifetime but even after his death the members of his family carry the burden of sufferings and pains all through their lives. Though a dead victim cannot be given a new life but the assistance of adequate compensation provided to the kin of the victim can definitely help in mitigating their hardships and hope for a better and a dignified life.¹⁸ Hence compensation is victim oriented.

Whether there can be serious repercussions if the nations settle their subjects' disputes through compensation instead of punishment?

Acceptance of compensation instead of conviction may have serious repercussions. This may set as a precedent and law of *lexfori* which is universally accepted may take a different turn. The rich and developed nations will then have an upper hand in getting the cases closed against their nationals by awarding huge amounts of compensation. The concept of sovereignty can also be affected. The concept of justice is a combination of punishment plus compensation.

¹² MANU/SC/8078/2006

¹³ AIR 1978 SC 1525

¹⁴ MANU/DE/9771/2006

¹⁵ 1982 SCC (Cr) 467

¹⁶ 1994 SCC (Cr) 823

¹⁷ MANU/SC/7284/2008

¹⁸ Albert Camus accessed from www.giga-usa.com/quotes/topics/murder_t001.htm on 12 February 2022

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However the beauty of the present case lies in the fact that conviction aspect has not been ignored at all but duty to do the needful has been shifted on to Italy to let the dispute reach its logical conclusion.

7. Conclusion:

Maintenance of peace at international level requires harmonious relations of nations. If disputes arise between or amongst them the primary step should be to resolve issues through amicable means. In such cases duty is to comply with the international norms and abide by them even if they are not in favour of one of the disputing parties. Legal recourse taken by the nations with their mutual understanding will always be beneficial to the society and cordial relations at international level. Parameters of justice i.e., (compensation plus punishment for the wrong doing) have been complied with and this judgment seems to be an act reflecting notions of justice.

