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WRIT PETITION NO. 135 OF 2012, 19 APRIL 2012

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION
(Under Article 32 of the Constitution of India)

Writ Petition (Civil) No. 135 of 2012

IN THE MATTER OF:

Republic of Italy
Through its Ambassador
& Ors. ...Petitioners

Versus

Union of India & Ors. ... Respondents

WITH

I.A. NO. OF 2012
(Application for Directions)

WITH

I.A. NO. OF 2012
(Application for exemption from filing official translation)

PAPER BOOK
(FOR INDEX, PLEASE SEE INSIDE)

ADVOCATE FOR THE PETITIONERS: **JAGJIT SINGH CHHABRA**

SYNOPSIS

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The Present Writ Petition has been filed impugning the failure of the Union Government to act in accordance with the Rule of law and its constitutional obligations, whereby it was obliged to assert its exclusive jurisdiction over Petitioners 2 and 3, both citizens of the Petitioner 1 country, in respect of an incident admittedly occurring at least 20.5 nautical miles from the coast of India.

The Petitioners No. 2 and 3 are highly decorated members of the regular armed forces of the Republic of Italy placed on the commercial vessel *M.V. Enrica Lexie* pursuant to a law enacted by the Republic of Italy requiring the presence of armed members of the regular army on board all commercial vessels to combat the scourge of piracy.

The enactment of this law was pursuant to Resolutions of the United Nations Security Council urging states to include provisions in their domestic law aimed at combating piracy. At the time of the incident, Petitioners were acting in exercise of their authority under Italian Law and their conduct has been adopted by the Republic of Italy as an act of State represented by its legally empowered military personnel.

It is admitted that the conduct in question occurred beyond the territorial waters of India in respect of which the Union of India can exercise its sovereign rights. It is submitted that under International

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Law, the incident that occurred was thus an incident between the Republic of Italy and the Republic of India [assuming that the fishing vessel was flying the Indian flag and/or is entitled to the protection in maritime law as that available to a registered vessel].

As such, any dispute arising out of the incidents of February 15th, 2012 during the course of which 2 fishermen fishing off the coast of India in an area of the High Seas were allegedly shot at and killed by Petitioners 2 and 3 is by definition one between two sovereign nations.

The Petitioners No. 2 and 3 have denied the allegation that there was any shooting on the vessel, and as a matter of accepted principles of international law and comity of nations, the allegation of excessive use of force or unnecessary use of force by its military be enquired into by the Republic of Italy.

Accordingly, the applicable legal regime governing such any dispute raised between the parties would comprise principles governing the international responsibility of sovereign nations under Public International Law. The parties to any such dispute, when raised before the appropriate forum, can only be the Republics of India and Italy.

Even assuming that there was an incident as alleged, it would only be the Republic of India that would have the locus to act in the matter.

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It is further submitted that the rights of Petitioner No.1 and its authorized personnel and the rights of Union of India would be governed inter alia by the United Nations Convention on the Law of the Sea [UNCLOS].

The State of Kerala is a constitutional unit of the Republic of India, and under the Indian constitution, it does not have any authority or power to deal with incidents that occur outside its territory – a fortiori in an area which at best would be a part of the Contiguous Zone.

Even assuming that being a coastal state, it has the power and jurisdiction over coastal waters [which premise is doubtful], in any event it cannot have any authority power or jurisdiction to deal with an incident that occurred outside coastal waters – a fortiori it would have no jurisdiction to deal with an incident outside Indian territorial waters.

The Republic of Italy [and other sovereigns of the world] recognize the Republic of India [the Union of India] and not individual constituent units of the Union. The State of Kerala, not being a subject of International Law has neither any rights nor obligations under the system of Public International Law and cannot initiate, maintain or participate in any proceedings involving the international legal responsibility of nation states.

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It is further submitted that immunities under international covenants cannot be bypassed by dubious means.

The Italian vessel was called to the Indian coast on admittedly a false premise- viz on a message to identify the suspected pirate vessel. It arrived at the Cochin harbor in good faith and in deference to the obligations upon States to cooperate in the matter of fighting piracy. The two marines – Petitioners 2 and 3 were then unlawfully abducted by the State of Kerala through its local police – on the artificial premise that they were at that time [i.e. the time of their arrest] present in India.

It is now settled law that international conventions are also a part of the domestic law unless they are contrary to an express legislation. This Hon'ble Court has also issued directions based on international conventions and construed municipal laws in harmony with international conventions.

The Union of India, it is submitted, under its constitution, owes a duty to take custody of these foreign nationals who have been, in law, abducted, by the police of the State of Kerala purporting to act under domestic law, and to hand over custody of these persons to the Republic of Italy.

The Petitioners 2 and 3 are lodged in Jail in Kerala purportedly under orders of the Courts of the State of Kerala. Their detention is patently illegal and a gross violation of their rights as well as of the

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rights of the Republic of Italy and corresponding duty of the Union of India.

The present proceedings inasmuch as they call into question the legality of an act of State of Kerala is, in complete violation of the principles of sovereign immunity, and are without authority of law in light not only of principles of Public International Law but also not in accordance with the framework of the Constitution of India.

Accordingly, the assertion of jurisdiction by the State of Kerala over the Petitioners and the arrest and detention of the Petitioners since February 19th, 2012 is without authority of law and as such liable to be set aside.

Writ Petition (c) No. 4542/2012 was filed by Petitioners 2 and 3 seeking quashing of the FIR registered against Petitioners 2 and 3 as well the proceedings instituted consequent thereto. The present petitions do not seek to challenge the legality of the FIR on various grounds taken in that petition although there may be an overlap of the larger principle of Public International law and the comity of nations by virtue of which the registration of the FIR also would be an act without jurisdiction and in serious violation of settled principles of public international law and comity of nations.

Besides those proceedings have failed to provide an expeditious remedy to the Petitioner. The written statement made before the Hon'ble Single Judge by the Assistant Solicitor General, appearing

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on behalf of the Union of India in the High Court avoided the preliminary jurisdictional question of whether the present dispute, properly cast, could at all be tried by the High Court since it related to the international legal responsibility of sovereign states. Submissions were heard and judgment was reserved by Learned Single Judge on April 2, 2012 and is yet to be pronounced. Meanwhile summer vacation holidays have commenced in the High Court of Kerala as of 14th April, 2012.

The Petitioners submit that the omission of the Union of India to participate in the proceedings before the High Court to assert its exclusive jurisdiction has led to the detention of Petitioners 2 and 3 in violation of the rule of law and the constitutional guarantee of due process.

LIST OF DATES AND EVENTS

August 2, 2011	The Ministry of Defence, Republic of Italy upon consultations with Foreign Affairs and the Ministry of Infrastructure and Transportations and taking into consideration periodic reports by the International Maritime Organisation in an effort to counter piracy and in order to ensure the freedom of navigation of merchant shipping and for the protection of vessels flying the Italian Flag in transit in

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	International sea areas enacted the urgent Government decree 107/2011 later converted by Laws of Parliament of Italy No. 130 of August 2, 2011 so as to protect Italian ships from piracy in International seas. Article 5 of the said legislation provided for deployment of Italian Military Navy contingents on Italian Vessels flying the Italian Flag in order to fight and curb the growing incidents of piracy on high seas. The members of the said Military Protection Detachments of the Italian Military Navy are treated as law enforcement officers while on board Italian vessels from piracy.
February 6, 2012	Military Deployment Order deploying 6 Italian Navy Officers termed as Team "LATORRE" to protect the vessel M.V. Enrica Lexie and to embark on the Vessel on February 11, 2012 from Galle, Sri Lanka was sent by the Italian Navy General Staff to the concerned Military attaches in New Delhi, India and Muscat, Oman. Team "LATTORE" was to disembark at Muscat Oman.

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February 14, 2012	Due to change in the next planned port of disembarkation from Muscat to Gibuti, a revised Military Deployment Order directing Team "LATORRE" to disembark at Gibuti on February 21, 2012 was sent by the Italian Navy General Staff.
February 15, 2012	While the Vessel was heading for Gibuti, there was an attempted piracy attack on the Vessel at about 20.5 Nautical Miles when the Master of the Vessel immediately set into motion the established international procedures to be undertaken by vessels during attempted piracy attacks including setting into motion the alarm, flash lights and horns. The Master also activated Ship Alert Security System (SASS) which sent out signals to the Italian Maritime Rescue and Coordination Centre (MRCC). The Master also reported the incident on the Mercury Chart which links together and transfers information to the community including several Navies across the world fighting piracy including to the Indian Navy Head Quarters. The "military report" was also done. A report was also sent to

	Maritime Security Centre – Horn of Africa (MSCHOA) at UK. Since the attempted attack was averted, the Vessel continued on its scheduled course of journey to Gibuti.
February 15, 2012	When the Vessel had sailed a further distance of almost 38 Nautical Miles, the Vessel received information by phone and email from the MRCC, Mumbai requesting the Vessel to come to Cochin Port to assist and identify suspected pirates who had been apprehended. The Petitioners, in good faith and despite the fact that they were under no legal obligation to do so, came to the port of Cochin at about midnight on February 16, 2012. It thereafter transpired that the communication from the MRCC was false to the knowledge of the authorities even at the time of sending the same and was admittedly made with a view to lure the Petitioners to Cochin.
February 15, 2012	The Respondent No. 3 i.e. Circle Inspector of Police registered an F.I.R. no. 2 of 2012 on the file of Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam

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	under Section 302 IPC read with Section 34 of the IPC. In the said F.I.R it is alleged that an Indian fishing boat namely "St.. Antony" which left Kollan Fishing Harbour for deep-sea fishing on February 7, 2012 with 11 crew members was fired at by an Italian Cargo ship at 33 nautical miles in international waters in which two fishermen died on the spot onboard the fishing vessel.
February 17, 2012	The Prosecution Office within the Military Tribunal of Rome directed the concerned Commanding Officer in charge of the Military Protection Detachment to conduct an inquiry into the events of February 15, 2012.
February 19, 2012	The Petitioner Nos. 1 and 2 were arrested at Wellington Island by the Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam.
February 20, 2012	The Petitioner No. 1 and 2 were produced before the Chief Judicial Magistrate, Kollam and the Circle Inspector of Police, Coastal Police Station, Neendakara filed the Remand Report in FIR 02/2012 with the

Chief Judicial Magistrate Court, Kollam. In the Remand Report, the Circle Inspector of Police now asserted that the incident took place at a distance of 22.5 nautical miles west from Thrikunnapuzha, Indian Coast.

February 22, 2012 The Petitioners challenged the jurisdiction of the State of Kerala and Circle Inspector of Police, Kollam District, Kerala to register the F.I.R and to conduct the investigation and the arrest or production of Italian Military Naval Officers before the Magistrate by filing the Writ Petition No. 4542 of 2012 under Article 226 of the Constitution of India before the High Court of Kerala at Ernakulam against (1) Union of India, (2) State of Kerala, (3) Circle Inspector of Police, Kollam District, interalia, seeking appropriate writ, order or direction for (i) quashing of FIR No. 2 of 2012 on the file of the Circle Inspector of Police, Neendakara, Kollam District as same being without jurisdiction, contrary to law, null and void and (ii) declaring the arrest and detention of the Italian Military Naval Officers and all proceedings subsequent thereunder as

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	without jurisdiction, contrary to law, null and void and (iii) immediate release of the Italian Military Naval Officers.
February 22 -26, 2012	Relatives of the deceased namely Ms. Doramma, Abhinaya Xavier (Minor), Aguna Xavier (Minor) and several Private Parties filed Petitions with the Hon'ble Kerala High Court to be impleaded in the Writ Petition no. 4542 of 2012 filed by the Petitioners.
February 24, 2012	The Prosecution Office within the Tribunal of Rome, Republic of Italy intimated the Ministry of Defence of Italy that it had initiated criminal proceedings under number 9463/2012 against the Petitioner No.1 and Petitioner No. 2 for the crime of murder. The Crime of murder under Section 575 of Italian Penal Code is punishable with imprisonment of at least 21 years.
February 27, 2012	The Respondents No. 2 and 3 filed their Statements in response to the Writ Petition filed by the Petitioners.

February 28, 2012	On behalf of Respondent No. 1, the Coast Guard filed its Statement with the Kerala High Court.
February 29, 2012	The Embassy of Italy sent communication to the Ministry of External Affairs-Government of India informing that the office of the Public Prosecutor in the Tribunal of Rome has initiated criminal proceedings against Petitioner No. 1 and 2 for the incident and sought (i) reports of the Indian Police and Judicial Authorities; (ii) post mortem report of the two victims, (iii) result of ballistic tests conducted by the Police; (iv) reports of the examination on the vessel on which the two victims were sailing.
February 29, 2012	The Embassy of Italy sent communication to the Ministry of External Affairs-Government of India asserting that Petitioners 1 and 2 were carrying out official functions for the protection of the Vessel from piracy and armed robbery in extra-territorial maritime zones and asserting

	jurisdictional immunity for the official acts of Petitioners 1 and 2.
March 1, 2012	The Petitioners filed its Reply/Rejoinder to the Statement filed by Respondents No. 2 and 3 and the Coast Guard.
March 2, 2012	Mr. Giampaolo Cutillo, Consul General of the Republic of Italy filed his Affidavit with the Kerala High Court stating and producing documents evidencing his appointment as the Consul General of Italy in India by the President of Italy and confirming his authorization to file the Writ Petition on behalf of the Republic of Italy.
March 5, 2012	Mr. Giampaolo Cutillo, Consul General of the Republic of Italy filed Additional Affidavit producing additional documents to show that Petitioner Nos. 1 and 2 acted within their official capacity and reasserting the exclusive Italian jurisdiction over the Petitioners 1 and 2 and invoking sovereign and functional immunity.
March 6, 2012	The Hon'ble Kerala High Court permitted Doramma, wife of Late Valentine to be

	impleaded in the Writ Petition as the Additional 4th Respondent.
March 6, 2012	The Hon'ble Kerala High Court permitted Abhinaya Xavier (Minor) and Aguna Xavier (Minor) through their Aunt S. Janetmary to be impleaded in the Writ Petition as Additional 5th and Additional 6th Respondent.
March 8 & 11, 2012	Respondent No. 4, 5 and 6 filed their Counter Affidavit in response to the Writ Petition filed by the Petitioners.
March 13, 2012	Respondent No. 2 and 3 filed their Counter Affidavit in response to the Writ Petition filed by the Petitioners.
March 15, 2012	Respondent No. 1 filed its Additional Statement in response to the Writ Petition in accordance with the directions of Hon'ble High Court.
March 17, 2012	Petitioner No. 3 filed the Rejoinder Affidavits to the Counter Affidavit filed by the Respondent No. 2, 3, 5, and 6.

March 20, 2012	After hearing arguments the Hon'ble Court directed the Petitioners to file their Written Submissions with the Hon'ble Kerala High Court.
March 27, 2012	Hon'ble Kerala High Court passed its Order in the Writ Petition no. 4542 of 2012. The Hon'ble Single Judge held that the Writ Petition was not supported by proper Affidavit of Petitioner No. 1 and 2 and is defective on this score and directed the Petitioners 1 and 2 to file fresh Affidavits.
March 30, 2012	The Petitioners No. 1 and 2 again filed their respective Affidavits in accordance with the directions of the Hon'ble Kerala High Court and after hearing further submissions the Court reserved Judgment in the Writ Petition and directed Petitioners to file Additional Written Submissions and directed the Respondents to file their Written Submissions.
April 2, 2012	The Petitioner filed their Additional Written Submissions inter-alia on the issues of Sovereign Immunity and the effect and purport of the Notification dated August 27,

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	1981. Respondent No. 2 filed its Written Notes of Arguments. The Ld. Single Judge reserved the Judgment.
April 14, 2012	Summer vacation period of the Kerala High Court commenced. Judgment is yet to be pronounced by the Learned Single Judge.
19.04.2012	Hence, the present Writ Petition.

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IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)
WRIT PETITION (CIVIL) NO. 135 OF 2012
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

1. Republic of Italy
Through its Ambassador
Embassy of Italy
50E, Chandragupta Marg,
Chanakyapuri, New Delhi — Petitioner No. 1

2. Mr. Massimilano Latorre,
Holder of Italian Passport
No. AA 1465972
(Chief Master Sargeant San
Marco Regiment, Italy)
Now presently at Central Prison
Trivandrum, Kerala
Through Ambassador, Italy in India — Petitioner No. 2

3. Mr. Salvatore Girone
Holder of Italian Passport
No. S 111982
(Sargeant San Marco
Regiment, Italy)
Now presently at Central Prison
Trivandrum, Kerala
Through Ambassador, Italy in India — Petitioner No. 3

Versus

1. Union of India
Through Secretary,
Ministry of Home Affairs
North Block
New Delhi. — Respondent No. 1

2. Union of India,
Through Secretary,
Ministry of External Affairs,
South Block,
New Delhi. — Respondent No. 2

3. State of Kerala,
Through Chief Secretary,
Government of Kerala,
Trivandrum, Kerala. — Respondent No. 3

WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA

To

The Chief Justice of India and His Companion Justices of the Hon'ble Supreme Court of India New Delhi

The Humble Petition of the Petitioners abovenamed;

MOST RESPECTFULLY SHOWETH:

1. That the Present Writ Petition has been filed under Article 32 of the Constitution of India seeking a direction to the Union of India to exercise its exclusive jurisdiction over incidents of the 15th of February 2012 during the course of which it is alleged that Petitioners 2 and 3, Mr. Massimilano Latorre and Mr. Salvatore Girone shot at a fishing vessel situated at least 20.5 nautical miles from the coast of India which action allegedly resulted in deaths, pursuant to which F.I.R No. 2 of 2012 dated 15.2.2012 was registered on the file of Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam under Section 302 IPC read with Section 34 of the IPC.

2. The petition raises the following question of law of far reaching public importance:

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a. Whether the initiation of legal proceedings, by the constituents of the Union of India which by their very nature relate to the conduct of another sovereign state constitute a violation of the principle of sovereign immunity and are therefore violative of Indian law and the Constitution of India?

b. Whether proceedings contrary to the principles embodied in customary international law generally and the United Nations Convention on the Law of the Sea in particular, are incompatible with the principles of rule of law and for that reason violative of Article 14 of the Constitution?

c. Whether a vessel, to the extent it relates to the functioning of the military of a sovereign nation on board a private vessel [flying the flag of that nation] in accordance with the law of that sovereign nation, enjoys, mutatis mutandis, the same rights of immunity granted to warships and thus cannot be 'diverted' or 'visited' and searched without the formal consent of the flag state?

d. Whether an alleged unnecessary or excessive use of force by the authorized military personnel discharging a duty under their domestic law which takes place in an area of the High Seas under the regime of the

contiguous zone [as defined in the United Nations Convention of the Law of the Sea] can only be actionable against the sovereign state and therefore any action on that score in any municipal courts or by any authorities acting under municipal Law is without the authority of law?

e. Whether initiation of legal proceedings and taking action under the Indian Criminal Procedure Code against authorized military personnel of the Italian Republic acting under the authority of Italian law and in respect of which the Republic of Italy takes full responsibility, is tantamount to initiation of proceedings against a sovereign nation and thereby constitutes a violation of the principles of sovereign immunity?

f. Whether the present incident is in the nature of a dispute between sovereign nations and can only be initiated by the Union of India against Petitioner 1?

g. Whether criminal proceedings can be initiated against Petitioners 2 and 3 by the State of Kerala despite the fact that the same relates to conduct carried out by members of the armed forces of a foreign nation acting in exercise of their official functions and are as such attributable to Petitioner 1 and could determine an international legal dispute involving Petitioner 1?

h. Whether the State of Kerala, can in accordance with law, exercise its jurisdiction over conduct admittedly taking place in areas of the High Seas under the regimes of the contiguous zone or the exclusive economic zone?

i. Whether the failure of the Union of India to assert its exclusive jurisdiction over the present incident and seek custody of Petitioners 2 and 3 leading to their prolonged detention without authority of law is in violation of the rule of law and the constitutional guarantee of due process as well as read with India's obligations under International Law?

3. The brief facts which necessitated the filing of the present writ petition are as under:-

4. The Petitioner No. 2 and 3 are Italian Military Naval Officials in active service of Petitioner No. 1 (Republic of Italy) with impeccable careers and credentials with permanent postings at San Marco Regiment, Italy. The Petitioner No. 2 is the Chief Master Sargeant in the Italian Military Navy and was enlisted in the Italian Military Navy in 1984 and trained at the Amphibian Force Centre. The Petitioner No. 2 was also trained for vessel boarding teams in 2001 and has vast practical and continuous maritime experience. The Petitioner No. 3 is the Sargeant in the Italian Military Navy in active duty

and was enlisted in the Italian Military Navy in 1996. The Petitioner No. 3 after training at the Amphibian Force Centre in 1996 also earned substantial practical and continuous maritime experience. Both Petitioners 2 and 3 are highly decorated Naval Officers for their participation in UN assignments in Lebanon, Kosovo, Afghanistan and Bosnia. Petitioner 1 is the Republic of Italy, represented in the present proceedings before this Hon'ble Court by the Ambassador of the Republic of Italy.

5. On August 2, 2011, the Republic of Italy, taking into consideration periodic recommendations and reports by the International Maritime Organisation as well as United Nations Security Council Resolutions, accepted by the Union of India, urging states to include provisions in their domestic law aimed at combating piracy as part of international co-operation to combat this menace enacted Law No. 130 of August 2, 2011 to protect Italian ships from piracy in International seas. Article 5 of the said legislation provides for deployment of Italian Military Navy contingents on Italian Vessels flying the Italian Flag in order to protect Italian merchant vessels from the threat posed by piracy on the High Seas. The members of the said Military Protection Detachments of the Italian Military Navy are treated as law enforcement officers while on board Italian vessels from piracy. Although posted on commercial vessels, members of

the armed forces retain their status as members of the regular army corps of the Italian army and are posted on board these vessels as part of their regular military service. True translated copy of Law of Parliament of Italy No. 130 of August 2, 2011 is annexed herewith as **ANNEXURE P1** (at Pages 46 to 81).

6. The Petitioner No. 2 as the team leader and the Petitioner No. 3 as the member of the Military Protection Detachment (*Nucleo Military di Protezione*) were deployed on board Italian vessel M.V. 'Enrica Lexie' (hereinafter also referred to as the "Vessel") along with 4 other Italian Military Naval Officers under the said Law No. 130/2011 enacted by the Parliament of the Republic of Italy. Petitioners 2 and 3 as well as the other officers were operating at the relevant time under the command and Orders of the Italian Navy General Staff to protect Italian Vessels flying the Italian Flag from Piracy in the seas. True translated copies of the Orders dated February 6, 2012 and February 14, 2012 from the Italian Navy General Staff are annexed herewith and marked as **ANNEXURE P2 (COLLY)** (at Pages 82 to 92)

7. On February 15, 2012 at about 1630 hours Indian Standard Time, while the Military Protection Detachment of 6 Italian Military Naval Officers termed as Team "LATORRE" were on board the Italian Vessel *M.V EnricaLexie* there was an

attempted piracy attack on the Vessel at approximately 20.5 Nautical Miles in the High Seas. The master of the Vessel immediately set into motion established international procedures to be undertaken by vessels during attempted piracy attacks including setting into motion the alarm, flash lights and horns. The Master of the Vessel also activated the Ship Alert Security System (SASS) which sent out signals to the Italian Maritime Rescue and Coordination Centre (MRCC). The "military report" of the incident was made. The Master also reported the incident on what is commonly know as the 'mercury chart', which acts as a forum for the sharing of information between several Navies across the world fighting piracy, including the Indian Navy Head Quarters. A report was also sent to Maritime Security Centre – Horn of Africa (MSCHOA) at UK.

8. Upon the aforesaid actions, the threatening boat that had attempted to attack the Vessel [or so it was bona fide perceived] then sailed towards the High Seas and the apprehended piracy attack was averted.

9. While the Vessel had sailed almost 38 nautical miles in the High Seas, it received information by phone and e-mail from the Maritime Rescue Coordination Centre, Mumbai requesting it to come to Cochin Port to assist and identify suspected pirates who had been apprehended. Accordingly,

in good faith the Vessel turned its course and came to the port of Cochin on February 16, 2012. The Master of the Vessel was under no obligation under law to change its course to be present at Cochin but only agreed to do so as part of a good faith effort to promote international cooperation in combating piracy. However, it subsequently transpired that the message emanating from the MRCC, Mumbai was made with complete knowledge on the part of the authorities responsible for the same that the contents of the same were false. The admitted object of this subterfuge was to secure the presence of Petitioners 2 and 3 in Cochin, yet no hint of the same was disclosed to the concerned officers on board the vessel. Copy of the e-mail dated February 15, 2012 sent by MRCC Mumbai is annexed herewith as **ANNEXURE P3** (at Pages 93 to =).

10. Upon docking in Cochin, the master of the Vessel was informed that F.I.R No. 2/2012 on the file of the Circle Inspector, Neendakara, Kollam, Kerala had been registered under Section 302 IPC read with Section 34 of the Indian Penal Code alleging that a fishing boat namely 'St. Antony' with 11 crew members was fired at by an Italian Cargo Ship at 33 nautical miles from the coastline of India, during the course of which two fishermen had been killed on the spot. Petitioners 2 and 3 were arrested on February 19, 2012 at Wellington Island by the Circle Inspector of Police, Coastal

Police Station, Neendakara, Kollam and have remained in judicial custody since this date. True translated copy of the F.I.R. No. 2 of 2012 dated 15.2.2012 registered with the Circle Inspector, P.S. Neendakara, Kollam under Section 302 IPC read with Section 34 IPC is annexed herewith as **ANNEXURE P4** (at Pages 94 to 98).

11. Even prior to the arrest of Petitioners 2 and 3 on February 19th, 2012, the Prosecution Office within the Military Tribunal of Rome had already directed the concerned Commanding Officer in charge of the Military Protection Detachment to conduct an inquiry into the events of February 15, 2012. True translated copy of the communication dated February 17, 2012 is annexed herewith and marked as **ANNEXURE P5** (at Pages 99 to 100). It is submitted that this enquiry has been ordered in view of the allegations relating to the incident, and it is further submitted that it is, as a matter of public international law, only Petitioner No.1 who has the power, authority and jurisdiction to conduct such an enquiry.

12. On February 20th, 2012, Petitioners 2 and 3 were produced before the Chief Judicial Magistrate, Kollam and the Circle Inspector of Police, Coastal Police Station Neendakara filed the Remand Report in FIR 02/2012 with the Chief Judicial Magistrate Court, Kollam. In the Remand Report, the Circle Inspector of Police now asserted that the incident took place

at a distance of 22.5 nautical miles west from Thrikunnapuzha, Indian Coast. Copy of the Remand Report dated 20.02.2012 is annexed herewith as **ANNEXURE P6** (at Pages 101 to 109).

13. Writ Petition No. 4542 of 2012 under Article 226 of the Constitution of India was filed on February 22nd, 2012 by the present Petitioners before the High Court of Kerala at Ernakulam against (1) Union of India, (2) State of Kerala, (3) Circle Inspector of Police, Kollam District. The present Petitioners, vide the said Writ Petition challenged the jurisdiction of the State of Kerala and Circle Inspector of Police, Kollam District, Kerala to register the F.I.R and to conduct the investigation and the arrest or production of Italian Military Naval Officers before the Magistrate. It was therefore prayed that the Hon'ble High court grant appropriate writ, order or direction for (i) quashing of FIR No. 2 of 2012 on the file of the Circle Inspector of Police, Neendakara, Kollam District as same being without jurisdiction, contrary to law, null and void and (ii) declaring the arrest and detention of the Italian Military Naval Officers and all proceedings subsequent thereunder as without jurisdiction, contrary to law, null and void and (iii) immediate release of the Italian Military Naval Officers. Copy of the Writ Petition No. 4542 of 2012 dated 22.2.2012 filed by the petitioners before the Hon'ble High Court of Kerala,

Ernakulam is annexed herewith as **ANNEXURE P7** (at Pages 110 to 131).

14. On February 22nd–26th, 2012 relatives of the deceased namely Ms. Doramma, Abhinaya Xavier (Minor), Aguna Xavier (Minor) and several Private Parties filed Petitions with the Hon'ble Kerala High Court to be impleaded in the Writ Petition no. 4542 of 2012 filed by the Petitioners. The Hon'ble Kerala High Court permitted Doramma, wife of Late Valentine as well as Abhinaya Xavier (Minor) and Aguna Xavier (Minor) through their Aunt S. Janetmary to be impleaded in the said Writ Petition as Additional 4th, 5th and Additional 6th Respondent respectively.

15. The Prosecution Office within the Tribunal of Rome, Republic of Italy on February 24th, 2012 intimated the Ministry of Defence of Italy that it had initiated criminal proceedings under No. 9463/2012 against the Petitioners 2 and 3. The Crime of murder under Section 575 of Italian Penal Code is punishable with imprisonment of at least 21 years. True translated copy of the Communication dated February 24, 2012 is annexed herewith and marked as **ANNEXURE P8** (at Pages 132 to =). True translated copy of the relevant provision of Italian Penal Code is annexed herewith as **ANNEXURE P9** (at Pages 133 to =).

16. The Respondents No. 2 and its investigating agency filed their joint Statements dated 27.2.2012 in response to the Writ Petition filed by the Petitioners. Copy of the statement dated 27.2.2012 filed by the respondent No. 2 and 3 in Writ Petition (C) No. 4542 of 2012 is annexed hereto and marked as **ANNEXURE P10** (at Pages134 to143).

17. On behalf of the Union of India, the Coast Guard filed its Statement dated 28.2.2012 with the Kerala High Court along with the Boarding Officers Report of February 16th-17th, 2012 as its appendix. Copy of the said Statement dated 28.2.2012 filed by the Coast Guard is annexed herewith and marked as **ANNEXURE P11** (at Pages144 to165).

18. The Embassy of Italy on February 29th, 2012 sent a communication to the Ministry of External Affairs, Government of India informing that the office of the Public Prosecutor in the Tribunal of Rome has initiated criminal proceedings against Petitioner NO. 1 and 2 for the incident and sought (i) reports of the Indian Police and Judicial Authorities; (ii) post mortem report of the two victims, (iii) result of ballistic tests conducted by the Police; (iv) reports of the examination on the vessel on which the two victims were sailing. True translated copy of the Communication dated February 29, 2012 is annexed herewith and marked as **ANNEXURE P12** (at Pages166 to167).

19. The Embassy of Italy sent a Verbal Note to the Ministry of External Affairs-Government of India asserting that Petitioners 2 and 3 were carrying out official functions for the protection of the Vessel from piracy in the High Seas and asserting jurisdictional immunity for the official acts of Petitioners 2 and 3. True translated copy of the Communication dated February 29, 2012 is annexed herewith as **ANNEXURE P13**. (at Pages 168 to 170).

20. On March 2nd, 2012, Mr. Giampaolo Cutillo, Consul General of the Republic of Italy filed his Affidavit before the Kerala High Court stating and producing documents evidencing his appointment as the Consul General of Italy in India by the President of the Republic of Italy and confirming his authorization to file the Writ Petition on behalf of the Republic of Italy. Copy of the Affidavit dated March 2nd 2012 filed by Mr. Giampaolo Cutillo is annexed herewith and marked as **ANNEXURE P14** (at Pages 171 to 175).

21. A Further Affidavit was filed by Mr. Giampaolo Cutillo on behalf of the Republic of Italy on March 5th, 2012 producing additional documents to show that acted within their official capacity and reasserting the exclusive Italian jurisdiction over the Petitioners 1 and 2 and invoking sovereign and functional immunity. Copy of the Affidavit dated March 5th 2012 filed by

Mr. Giampaolo Cutillo is annexed herewith and marked as **ANNEXURE P15** (at Pages176 to181).

22. The Union of India represented by the Assistant Solicitor General, High Court of Kerala filed its Additional Statement in response to the Writ Petition in accordance with the directions of Hon'ble High Court. Copy of the Statement filed by Assistant Solicitor General, High Court of Kerala dated 15.03.2012 is annexed herewith as **ANNEXURE P16** (at Pages182 to187).

23. The Hon'ble Kerala High Court on March 27th, 2012 passed its Order in the Writ Petition no. 4542 of 2012 holding that the Writ Petition was not supported by proper Affidavit of Petitioner No. 1 and 2 and was defective on this score and directed the Petitioners 1 and 2 to file fresh Affidavits. Copy of the Order dated March 27, 2012 passed by the Single Judge of the Kerala High Court is annexed herewith as **ANNEXURE P17** (at Pages188 to197).

24. Pursuant to the above order of the Hon'ble High Court of Kerala the Petitioner 2 and 3 filed their respective Affidavits and after hearing further submissions the Court directed Petitioners to file Additional Written Submissions. The Petitioners duly filed written submissions dated April 2, 2012 pursuant to the directions of the Court and the Court reserved the Judgment. Copies of the Affidavits filed by Petitioners

dated 27.03.2012 and 28.03.2012 are annexed herewith as **ANNEXURE P18 (COLLY)** (at Pages 198 to 203).

Copy of the Written Submission dated 02.04.2012 filed by the Petitioners is annexed herewith as **ANNEXURE P19**. (at Pages 204 to 226).

25. As on date, judgment is yet to be pronounced by the Learned Single Judge in WP No. 4542/2012. Summer vacations in the Hon'ble High Court of Kerala have commenced as of April 14th, 2012.

26. As already stated, Petitioners 2 and 3 were arrested on 19th February 2012 after the vessel, which had by then reached a distance of 38 nautical miles, was lured back to Indian territory on false pretexts. Aggrieved by continued detention of citizens and organs of Petitioner 1 without authority of law in what is in fact a dispute between two sovereign states relating to violations of international principles and treaties, if any, in connection with the conduct of officers of the armed forces acting under authority of Italian Law, Petitioner 1 is now constrained to approach this Hon'ble Court by way of the present Writ Petition. The petitioner submits that the very assumption of jurisdiction by Indian authorities constitutes a grave violation of the immunity of the Petitioner no.1 which violation has also resulted in illegal detention of citizens and

organs of Petitioner 1 by the authorities of the State of Kerala.

27. That Petitioners 2 and 3 and members of the armed forces of the Petitioner 1 country and their presence on the vessel in question was admittedly in discharge of their official duties as members of the armed forces in pursuance of an Italian national law requiring the presence of army personnel on board commercial vessels to protect them from piracy attacks. The conduct of Petitioners 2 and 3 are, in accordance with principles of Public International Law, attributable to the Republic of Italy and treated as the acts of one sovereign state. It is well settled that the determination of international disputes and responsibilities as well as all proceedings antecedent thereto must be *inter se* the federal/Central governments of the countries. Constituent elements of a federal polity, i.e., state governments, are not for this purpose regarded as 'subjects' of Public International Law and cannot initiate, maintain or participate in proceedings relating to the sovereign acts of one nation against another, neither can such status be conferred upon them by the Federal/Central government. It is submitted that proceedings, if any, may only be initiated by the Union of India at its discretion. The arrest and continued detention of Petitioners 2 and 3 by the State of Kerala is therefore without

the authority of law and based on a misconception as to the applicable legal regime.

28. That the continued acquiescence of the Union of India to the unlawful arrest and detention of Petitioners 2 and 3 by the State of Kerala is in violation of the long standing customary international law principles of international comity and sovereign equality among States enshrined in the United Nations General Assembly Resolution titled 'Declaration on principles of International Law Concerning Friendly Relations and Cooperation between States in accordance with the Charter of the United Nations' (Resolution No. 2625 (XXV) of 24 October 1970). These principles require that any proceedings, whether diplomatic or judicial, where the conduct of a foreign nation in the exercise of its sovereign functions is impugned, be conducted exclusively at the level of the federal or Central Government. The conduct of a sovereign nation cannot, as a matter of Public International Law, be impugned in proceedings initiated by a provincial/state government.

29. This Court has held in *PUCL v. Union of India* (1997) 3 SCC 433 and *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647 that principles of customary international law are deemed to be part of the domestic law absent any indication to the contrary in any statute. The Union of India is

therefore obliged as a matter of domestic law to assert its exclusive jurisdiction to maintain proceedings (at is discretion and of whatever nature) relating to the impugned conduct; which duty includes the obligation to protect the Petitioners 2 and 3 against the unlawful assertion of jurisdiction over them by the State of Kerala.

30. That the scheme of the Constitution of India also makes it clear that the Union of India is vested with exclusive jurisdiction in respect of formation, enforcement and adjudication of international legal obligations. Parliament alone has the power under Article 253 to legislate in respect of the implementation of any treaty, agreement or convention with any other country or countries or any decision made at any international conference. Further, Article 73(1)(b) explicitly provides that the executive power of the Union alone extends to "*the exercise of such rights, authority* ***and jurisdiction*** *as are* ***exercisable by the Government of India*** *by virtue of any treaty or agreement*". The Union Government has therefore acted in violation of its international legal obligations as well as the settled position under the Constitution of India in omitting to exercise its exclusive jurisdiction over the Petitioners 2 and 3 and thereby exposing Petitioners 2 and 3 to continued detention without authority of law.

31. That the international customary legal regime governing exercise of jurisdiction on members of the armed forces of a foreign nation during times of peace requires that such persons be turned over to their home country for trial in accordance with the military procedures present therein, due to the principles on State organs immunity. Even though the activity carried out by the Italian armed forces are conducted within the framework of peacetime maritime law, it is to consider that even during times of war or armed conflict such persons have an inviolable guarantee under the Geneva Conventions 1949 of detention only by competent authorities and in accordance with the procedure established by law. As held by the United States Supreme Court in *Hamdan v. Rumsfeld* 548 U.S 557 (2006), guarantees of due process are available even in times of armed conflict to unofficial enemy combatants, who are entitled to have charges brought against them by competent authorities before a judicial forum competent to hear such charges. At the very least, therefore, the Union of India is under an obligation under the Constitution and Public International Law to take custody of Petitioners 2 and 3 pending a final decision arrived by the Republic of India and Petitioner 1 as to the jurisdiction principles and immunities to be applied in proceedings against these persons. The continuing omission on the part of the Union of India to do so has resulted in the Petitioners 2

and 3 being subject to unlawful detention by the State of Kerala in violation of this obligation.

32. That the present facts suggest an incident between two nation states, any dispute arising therefrom would be governed by the principles of international legal responsibility wherein the *inter se* rights and obligations of the parties would be those existing between the Republic of India and Petitioner 1. The legal duty of care in this context would be owed to Petitioner 1 by the Union of India. No legal relationship exists between Petitioner 1 and the State of Kerala. The State of Kerala has taken undue advantage of the omission on the part of the Union of India to take the necessary towards resolution of the present incident with Petitioner 1 as co-equal sovereigns by way of subjecting the latter to its jurisdiction and by the continued detention of members of the armed forces of Petitioner 1 acting in discharge of their official duties. While Petitioner 1 has therefore been constrained to file a Writ Petition (C) No. 4542/2012 before the Hon'ble High Court at Ernakulam seeking quashing of the criminal proceedings initiated against Petitioners 2 and 3 herein, reliance on an affirmative duty of care to Petitioners 2 and 3 by virtue of a legal relationship between Petitioner 1 and the Republic of India is only possible by way of the present Writ Petition.

33. That the scheme of Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976), as is evident from Sections 3, 5, 7 and 15 thereof, contemplates limited jurisdiction by the Central Government over each of the maritime zones, i.e., the territorial waters, the contiguous zone and the Exclusive Economic Zone. As acknowledged in Sections 3(3), 5(2) and 7(2) this is on account of the fact that the existence, extension and exercise of jurisdiction over these zones is a direct consequent of rights granted under Public International Law, including the United Nations Convention on the Law of the Sea. No powers, rights or obligations can be nor are conferred under the Act upon the state government justifying the exercise of jurisdiction over conduct admittedly falling within these zones.

34. That the Territorial Waters makes it clear that the territory of India only extends to 12 nautical miles although the exercise of jurisdiction by the Central Government over the Exclusive Economic Zone of India is extended up to 200 nautical miles. The impugned conduct admittedly therefore was outside the territory of India, but in a zone in which the Central Government is entitled under the Territorial Waters Act as well as the UNCLOS to exercise specified sovereign rights not amounting to sovereignty over the zone. The Act nowhere contemplates conferral of jurisdiction on any coastal

state government in respect of any maritime zone adjacent to its coast. Therefore the present acts cannot as a matter or fact or law be regarded as having taken place within the territory of the State of Kerala. There is accordingly no basis in law for the arrest and detention of Petitioners 2 and 3 by police authorities in the State of Kerala.

35. That the provisions of the Territorial Waters act as well as the UNCLOS particularly (Articles 94 and 97) recognize the primacy of flag state jurisdiction, which mandates that Petitioner 1 has the pre-emptive right to try Petitioners 2 a 3 in accordance with its local laws. Petitioner 1 has brought to the notice of the State of Kerala as well as the Union of India that the facts as alleged amount to offences under its local laws and has repeatedly asserted its commitment to ensuring that Petitioners 2 and 3 are prosecuted to the full extent of the law for the same.

36. A Notification dated 27th August 1981 purporting to be issued under Section 7(7) of the Territorial Waters Act does not support the exercise of jurisdiction by a state over acts by another sovereign State .The republic of India has never purported to depart from her international obligations under Part V of the UNCLOS, which provide that a coastal state only enjoys sovereign rights, and not sovereignty over the EEZ. Any position to the contrary would no longer be tenable

in light of the observations of this Hon'ble Court in *AbanLoyd Chiles Offshore Ltd v. Union of India* (2008) 11 SCC 439, where it was held in this specific context that:

i.

"76. It may be noted that Indian position is consistent with the mandate of international law United Nations Convention on the Law of Sea, 1982 (UNCLOS, 1982) dated 07.10.1982 which has been signed by India as a member of the United Nations. Under UNCLOS, 1982, the territorial sovereignty of the coastal State extends beyond the land territory only upto the outer limits of the territorial sea which is equivalent to the expression in the Maritime Zones Act, 1976."

b. It is submitted that any reliance on Municipal law would in the present case be irrelevant to the controversy raised in this petition, which is based primarily on the rights and obligations to two sovereign nations [the Republics of India and Italy] in relation to such an incident that occurs in areas of the High Seas under the contiguous zone and regime relates to the conduct of the armed personnel of one of the Republics (in the present case Petitioner 1) and in respect of whose actions, the Republic [of Italy] accepts it to be an act in the course of discharge of duty cast by Italian law – and

in respect of any action for its violation the Republic of Italy alone would have jurisdiction.

37. That the arrest of Petitioners 2 and 3 by the State of Kerala amounts to an act of abduction inasmuch as the same is without authority of law and was admittedly obtained by luring the vessel flying the flag of Petitioner 1 and carrying Petitioners 2 and 3 back into the port of Cochin from its position 38 nautical miles from the Indian coast. This was achieved by way of a misleading message intentionally sent out by the Maritime Rescue Coordination Centre, Mumbai by phone and e-mail requesting it to come to Cochin Port to assist and identify suspected pirates who had been apprehended, when in fact the concerned authorities were aware no such persons had been apprehended. The Petitioners complied with this request in good faith and as part of Petitioner 1's commitment to international co-operation in the fight against piracy, despite being under no legal obligation to do so. However, the object of this subterfuge was clearly to obtain through intentional misrepresentation the presence of Petitioners 2 and 3 on Indian soil so as to facilitate the unlawful arrest and detention of the same.

38. That the provisions of the Criminal Procedure Code, 1973, particularly Section 188 thereof, provide that in respect of any

offence committed outside the territorial limits of India, no offence shall be inquired into or tried without the previous sanction of the Central Government. Thus, even if it were to be considered (contrary to the Territorial Waters act and other statutory provisions) that the State Government may exercise its jurisdiction in respect of activities in the contiguous or Exclusive Economic Zone, sanction for prosecution has admittedly not been obtained from the Central Government. The Union of India has nevertheless seen fit to allow such proceedings initiated in blatant disregard of statutory provisions, which omission is in continuing violation of the rights guaranteed under Part III and accordingly invites exercise of the jurisdiction of this Hon'ble Court under Article 32.

39. That this Hon'ble Court in *O. Konavalov v. Commander, Coast Guard Region* (2006) 4 SCC 620 and *Anwar v. State of J&K* (1971) 3 SCC 104 has confirmed that foreigners enjoy the protection of Articles 20, 21 and 22 of the Constitution of India including the right to protection of their personal liberty against arbitrary and unlawful detention. It is submitted that an authorized member of the Italian military force acting under the color of authority of Italian law can only be prosecuted for violation of his duty by the Republic of Italy and his conduct can only be evaluated in accordance with Italian law. In other words whether or not he committed an

offence can, as a matter of law, only be enquired into by the Republic of Italy and in accordance with Italian law. Any proceedings relating to any act done by him while discharging his duty – and that too in the contiguous zone – is ultra vires Indian law and all proceedings under Indian law and Indian municipal courts would be liable to be quashed by issuance of a writ of prohibition.

40. That the abduction and detention of Petitioners 2 and 3 is in violation of the principle of rule of law guaranteeing that no person shall be subject to detention of curtailment of his personal liberties without the 'due process of law' as provided for under Article 14 and 21 and articulated by the Hon'ble Court in *Maneka Gandhi v. Union of India* (1978) 1 SCC 248. This Hon'ble Court in *Subramanian Swamy v. Manmohan Singh* (2012) 3 SCC 64 has reiterated the centrality of the principle of due process of law in the context of initiation of criminal proceedings under the Criminal Procedure Code.

41. That continued acquiescence of the Union of India in the arrest and detention of Petitioners 2 and 3 by the State of Kerala without authority of law amounts to 'extraordinary rendition' by the Union of India, i.e., sanctifying of an act of abduction and detention without authority of law. The law in India [i.e. the Constitution of India as construed in this context with the customary international law] casts an affirmative duty

upon the Union of India to secure the two military officers [Petitioners 2 and 3], to free them from their illegal captivity, and to hand them over to the Republic of Italy to dealt with in accordance with Italian law.

42. Extraordinary rendition is in violation of India's International obligations under, *inter alia*, Article 3 of the Universal Declaration of Human Rights, which guarantees the "right to life, liberty and security of person" and Article 2(1) read with Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which requires the Union government to ensure to all persons within their territory "the right to liberty and security of person" and that "(N)o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

43. This Court in numerous decisions such as *Jolly George Varghese v. Bank of Cochin* (1980) 2 SCC 360, *UOI v. Association for Democratic Reforms* (2002) 5 SCC 294, *P.C Gupta v. State of Gujarat* 1995 Supp (2) SCC 182 has relied on provisions upon and enforced provisions of the ICCPR, to which India is Party. The Constitutional guarantees in Part III are to be read with the provisions contained in the said convention to guarantee that full protection of the due process of law be granted to foreign citizens and that positive

steps be taken by the Union of India to guarantee that they are not subject to abduction and arbitrary and unlawful detention.

44. That this Hon'ble Court in *Imtyaz Ahmed v. State of UP* (2012) 2 SCC 688 has reiterated the constitutional guarantee of right to access judicial remedies and free administration of justice in the context of the criminal justice system as a "fundamental and basic human right" in light of India's obligations under Article 14 of the ICCPR. It was further emphasized in by this Hon'ble Court in *Mohd. Hussain v. Govt of NCT of Delhi* (2012) 2 SCC 584 that the guarantee of access to justice and fair trial under the ICCPR and UDHR are "deep rooted in our constitutional scheme". It is therefore humbly submitted that it is incumbent upon the Court as the guardian of these constitutional freedoms to remedy the violations of constitutional and international obligations resulting from the abduction and continued detention of the servants of a foreign national acting under the colour of official authority.

45. The petitioner submits that the present incident vitally affects the sovereign interests of the Republic of Italy. Italian Military personnel discharging onerous duties in accordance with Italian law and as members of the Italian armed forces do so in the faith and belief that they would enjoy full protection

consistent the principles of international law and international conventions, and would be dealt with consistent with these principles that govern the relationship between friendly countries. If members of the Armed Forces of the Italian Republic are permitted to be dealt with under municipal laws of other states in respect of acts in purported discharge of their duties and in respect to which acts the Republic of Italy takes full responsibility, it would undermine the very basis on which such personnel are deployed in international waters. The various resolutions of the Security Council of the United Nations have called upon countries to take steps for combating piracy including military steps so that this scourge which affects India as much as it affects other nations can be eradicated. In discharge of its international duties the Republic of Italy has enacted legislation under which military personnel are deployed on such vessels. All this is done on the premise that any incident that happens in the High Seas would be dealt with in Italy and in accordance with Italian law – which course of action would accord with the customary international law relating to relationships between friendly countries. Actions in derogation of this salutary principle would vitally affect the interests of the Republic of Italy and in the ultimate analysis would also adversely affect the interests of India and other countries which collaborate in protection of international waters. It is therefore necessary, it is submitted,

that the law on this subject be laid down authoritatively and finally. Although there is a degree of overlap between the contentions and the grounds urged in this petition and the petition filed in the High Court, the latter principally challenges the criminal proceedings whereas the present petition raises larger issues as to sovereign immunity and other related issues of public international law and its implications on the Indian law and the Constitution and seeks release wider reliefs than [and in addition to] those sought in the High Court. Although this Hon'ble Court does not entertain petitions where similar petitions are pending in the high court or similar issues have been raised in the high court, it is not a jurisdictional bar and in the facts and circumstances of the case, with particular reference to the prolonged deprivation of freedom of Petitioners 1 and 2, who have been unlawfully detained since February 15th, 2012, it is respectfully submitted that the present petition deserves to be entertained.

46. That the Petitioners are filing the present writ petition inter alia on the following grounds:-

GROUNDS

A. That Petitioners 2 and 3 and members of the armed forces of the Petitioner 1 country and their presence on the vessel in question was admittedly in discharge of their official duties as

members of the armed forces in pursuance of an Italian national law requiring the presence of army personnel on board commercial vessels to protect them from piracy attacks. The conduct of Petitioners 2 and 3 are, in accordance with principles of Public International Law, attributable to the Republic of Italy and treated as the acts of one sovereign state. It is well settled that the determination of international disputes and responsibilities as well as all proceedings antecedent thereto must be *inter se* the federal/Central governments of the countries. Constituent elements of a federal polity, i.e., state governments, are not for this purpose regarded as 'subjects' of Public International Law and cannot initiate, maintain or participate in proceedings relating to the sovereign acts of one nation against another, neither can such status be conferred upon them by the Federal/Central government. On an appreciation of present facts, it is evident that proceedings, if any, may only be initiated by the Union of India at its discretion. The arrest and continued detention of Petitioners 2 and 3 by the State of Kerala is therefore without the authority of law and based on a misconception as to the applicable legal regime governing the facts at hand.

B. That the continued acquiescence of the Union of India to the unlawful arrest and detention of Petitioners 2 and 3 by the State of Kerala is in violation of the longstanding customary

international law principles of international comity and sovereign equality among states enshrined in the United Nations General Assembly Resolution titled 'Declaration on principles of International Law Concerning Friendly Relations and Cooperation between States in accordance with the Charter of the United Nations'(Resolution No. 2625 (XXV) of 24 October 1970). These principles require that any proceedings, whether diplomatic or judicial, where the conduct of a foreign nation in the exercise of its sovereign functions is impugned, be conducted exclusively at the level of the federal or Central Government. The conduct of a sovereign nation cannot, as a matter of Public International Law, be impugned in proceedings initiated by a provincial/state government. This Court has held in *PUCL v. Union of India* (1997) 3 SCC 433 and *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647 that principles of customary international law are deemed to be part of the domestic law absent any indication to the contrary in any statute. The Union of India is therefore obliged as a matter of domestic law to assert its exclusive jurisdiction to maintain proceedings (at is discretion and of whatever nature) relating to the impugned conduct; which duty includes the obligation to protect the Petitioners 2 and 3 against the unlawful assertion of jurisdiction over them by the State of Kerala.

C. That the scheme of the Constitution of India also makes it clear that the Union of India is vested with exclusive jurisdiction in respect of formation, enforcement and adjudication of international legal obligations. Parliament alone has the power under Article 253 to legislate in respect of the implementation of any treaty, agreement or convention with any other country or countries or any decision made at any international conference. Further, Article 73(1)(b) explicitly provides that the executive power of the Union alone extends to "*the exercise of such rights, authority* ***and jurisdiction*** *as are* ***exercisable by the Government of India*** *by virtue of any treaty or agreement*". The Union Government has therefore acted in violation of its international legal obligations as well as the settled position under the Constitution of India in omitting to exercise its exclusive jurisdiction over the Petitioners 2 and 3 and thereby exposing Petitioners 2 and 3 to continued detention without authority of law.

D. That the international customary legal regime governing exercise of jurisdiction on members of the armed forces of a foreign nation during times of peace requires that such persons be turned over to their home country for trial in accordance with the military procedures present therein, due to the principles on state organ immunity even though the

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activity carried out by the Italian armed forces are conducted within the framework of peacetime maritime law, it is to consider that even during times of war or armed conflict such persons have an inviolable guarantee under the Geneva Conventions 1949 of detention only by competent authorities and in accordance with the procedure established by law. As held by the United States Supreme Court in *Hamdan v. Rumsfeld* 548 U.S 557 (2006), guarantees of due process are available even in times of armed conflict to unofficial enemy combatants, who are entitled to have charges brought against them by competent authorities before a judicial forum competent to hear such charges. At the very least, therefore, the Union of India is under an obligation under the Constitution and Public International Law to take custody of Petitioners 2 and 3 pending a final decision arrived by the Republic of India and Petitioner 1 as to the jurisdiction principles and immunities to be applied in proceedings against these persons. The continuing omission on the part of the Union of India to do so has resulted in the Petitioners 2 and 3 being subject to unlawful detention by the State of Kerala in violation of this obligation.

E. That the present facts suggest an incident between two nation states, any dispute arising therefrom would be governed by the principles of international legal responsibility wherein the *inter se* rights and obligations of the parties

would be those existing between the Republic of India and Petitioner 1. The legal duty of care in this context would be owed to Petitioner 1 by the Union of India. No legal relationship exists between Petitioner 1 and the State of Kerala. The State of Kerala has taken undue advantage of the omission on the part of the Union of India to take the necessary towards resolution of the present incident with Petitioner 1 as co-equal sovereigns by way of subjecting the latter to its jurisdiction and by the continued detention of members of the armed forces of Petitioner 1 acting in discharge of their official duties. While Petitioner 1 has therefore been constrained to file a Writ Petition (C) No. 4542/2012 before the Hon'ble High Court at Ernakulam seeking quashing of the criminal proceedings initiated against Petitioners 2 and 3 herein, reliance on an affirmative duty of care to Petitioners 2 and 3 by virtue of a legal relationship between Petitioner 1 and the Republic of India is only possible by way of the present Writ Petition.

F. That the Territorial Waters makes it clear that the territory of India only extends to 12 nautical miles although the exercise of jurisdiction by the Central Government over the Exclusive Economic Zone of India is extended up to 200 nautical miles. The impugned conduct admittedly therefore was outside the territory of India, but in a zone in which the Central Government is entitled under the Territorial Waters Act as

well as the UNCLOS to exercise specified sovereign rights not amounting to sovereignty over the zone. There is accordingly no basis in law for the arrest and detention of Petitioners 2 and 3 by police authorities in the State of Kerala.

G. That the arrest of Petitioners 2 and 3 by the State of Kerala amounts to an act of abduction inasmuch as the same is without authority of law and was admittedly obtained by luring the vessel flying the flag of Petitioner 1 and carrying Petitioners 2 and 3 into the port of Cochin from its position 38 nautical miles from the Indian coast. This was achieved by way of a misleading message intentionally sent out by the Maritime Rescue Coordination Centre, Mumbai by phone and e-mail requesting it to come to Cochin Port to assist and identify suspected pirates who had been apprehended, when in fact the concerned authorities were aware no such persons had been apprehended. The Petitioners complied with this request in good faith and as part of Petitioner 1's commitment to international co-operation in the fight against piracy, despite being under no legal obligation to do so. However, the object of this subterfuge was clearly to obtain through intentional misrepresentation the presence of Petitioners 2 and 3 on Indian soil so as to facilitate the unlawful arrest and detention of the same.

H. A Notification dated 27th August 1981 purporting to be issued under Section 7(7) of the Territorial Waters Act does not support the exercise of jurisdiction by a state over acts by another sovereign State. The republic of India has never purported to depart from her international obligations under Part V of the UNCLOS, which provide that a coastal state only enjoys sovereign rights, and not sovereignty over the EEZ. Any position to the contrary would no longer be tenable in light of the observations of this Hon'ble Court in *Aban Loyd Chiles Offshore Ltd v. Union of India* (2008) 11 SCC 439, where it was held in this specific context that:

i.

> *"76. It may be noted that Indian position is consistent with the mandate of international law United Nations Convention on the Law of Sea, 1982 (UNCLOS, 1982) dated 07.10.1982 which has been signed by India as a member of the United Nations. Under UNCLOS, 1982, the territorial sovereignty of the coastal State extends beyond the land territory only upto the outer limits of the territorial sea which is equivalent to the expression in the Maritime Zones Act, 1976."*

b. It is submitted that any reliance on Municipal law would in the present case be irrelevant to the controversy raised in this petition, which is based primarily on the

rights and obligations to two sovereign nations [the Republics of India and Italy] in relation to such an incident that occurs in areas of the High Seas under the contiguous zone and regime relates to the conduct of the armed personnel of one of the Republics (in the present case Petitioner 1) and in respect of whose actions, the Republic [of Italy] accepts it to be an act in the course of discharge of duty cast by Italian law – and in respect of any action for its violation the Republic of Italy alone would have jurisdiction.

I. That this Hon'ble Court in *O. Konavalov v. Commander, Coast Guard Region* (2006) 4 SCC 620 and *Anwar v. State of J&K* (1971) 3 SCC 104 has confirmed that foreigners enjoy the protection of Articles 20, 21 and 22 of the Constitution of India including the right to protection of their personal liberty against arbitrary and unlawful detention.

J. That the abduction and detention of Petitioners 2 and 3 is in violation of the principle of rule of law guaranteeing that no person shall be subject to detention of curtailment of his personal liberties without the 'due process of law' as provided for under Article 14 and 21 and articulated by the Hon'ble Court in *Maneka Gandhi v. Union of India* (1978) 1 SCC 248. This Hon'ble Court in *Subramanian Swamy v. Manmohan Singh* (2012) 3 SCC 64 has reiterated the centrality of the

principle of due process of law in the context of initiation of criminal proceedings under the Criminal Procedure Code.

K. That continued acquiescence of the Union of India in the arrest and detention of Petitioners 2 and 3 by the State of Kerala without authority of law amounts to 'extraordinary rendition' by the Union of India, i.e., sanctifying of an act of abduction and detention without authority of law. Extraordinary rendition is in violation of India's International obligations under, *inter alia*, Article 3 of the Universal Declaration of Human Rights, which guarantees the "right to life, liberty and security of person" and Article 2(1) read with Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which requires the Union government to ensure to all persons within their territory "the right to liberty and security of person" and that "(N)o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". This Court in numerous decisions such as *Jolly George Varghese v. Bank of Cochin* (1980) 2 SCC 360, *UOI v. Association for Democratic Reforms* (2002) 5 SCC 294, *P.C Gupta v. State of Gujarat* 1995 Supp (2) SCC 182 has relied on provisions upon and enforced provisions of the ICCPR, to which India is a signatory. The Constitutional guarantees in Part III are to be read with the provisions contained in the said convention

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to guarantee that full protection of the due process of law be granted to foreign citizens and that positive steps be taken by the Union of India to guarantee that they are not subject to abduction and arbitrary and unlawful detention.

L. That this Hon'ble Court in *Imtyaz Ahmed v. State of UP* (2012) 2 SCC 688 has reiterated the constitutional guarantee of right to access judicial remedies and free administration of justice in the context of the criminal justice system as a "fundamental and basic human right" in light of India's obligations under Article 14 of the ICCPR. It was further emphasized in by this Hon'ble Court in *Mohd. Hussain v. Govt of NCT of Delhi* (2012) 2 SCC 584 that the guarantee of access to justice and fair trial under the ICCPR and UDHR are "deep rooted in our constitutional scheme". It is therefore humbly submitted that it is incumbent upon the Court as the guardian of these constitutional freedoms to remedy the violations of constitutional and international obligations resulting from the abduction and continued detention of the servants of a foreign national acting under the colour of official authority.

47. That the petitioners have not filed any petition before this Hon'ble Court/High Courts or any other Court praying for similar reliefs.

PRAYER

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In view of the facts and circumstances stated hereinabove, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to:-

i) Declare that any action by the Respondents in relation to the alleged incident referred to in Para 6 and 7 above, under the Criminal Procedure Code or any other Indian law, would be illegal and ultra vires and violative of Articles 14 and 21 of the Constitution of India; and

ii) Declare that the continued detention of Petitioners 2 and 3 by the State of Kerala is illegal and ultra vires being violative of the principles of sovereign immunity and also violative of Art.14 and 21 of the Constitution of India; and

iii) Issue writ of Mandamus and/or any other suitable writ, order or direction under Article 32 directing that the Union of India take all steps as may be necessary to secure custody of Petitioners 2 and 3 and make over their custody to Petitioner No. 1; and

iv) Pass any such further order as this Hon'ble Court may deem appropriate in the facts and circumstances of the case.

43

SETTLED BY:

Mr. Harish N. Salve,
Senior Advocate

FILED BY:

(JAGJIT SINGH CHHABRA)
ADVOCATE FOR PETITIONERS

DRAWN ON: 18.04.2012
FILED ON: 19.04.2012