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SPECIAL LEAVE PETITION 20370 OF 2012, 11 JULY 2012

IN THE SUPREME COURT OF INDIA
[Order XVI Rule 4(1)(a)]
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION
(Under Article 136 of the Constitution of India)

SPECIAL LEAVE PETITION (CIVIL) NO. 20370 OF 2012
(Against the final Judgment and Order dated 29.05.2012 passed by the Hon'ble High Court of Kerala at Ernakulam in W.P. (C) No. 4542 of 2012)
(WITH PRAYER FOR INTERIM RELIEF)

BETWEEN:

Massimilano Latorre & Ors. ...Petitioners

Versus

Union of India & Ors. ...Respondents

WITH

I.A. NO. 1 OF 2012
(Application for permission to file lengthy List of Dates and events)

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ADVOCATE FOR THE PETITIONERS: JAGJIT SINGH CHHABRA

SYNOPSIS

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The Petitioner No. 1 and 2 are Italian Military Naval Officials in active Military service of Petitioner No. 3 (Republic of Italy) with impeccable records and credentials and are permanently posted with the San Marco Regiment, Italy. The Petitioner No. 1 is Chief Master Sargeant in the Italian Military Navy and was enlisted in 1984 and trained at the Amphibian Force Centre. The Petitioner No. 1 was also trained for vessel boarding teams in 2001 and has vast practical and continuous maritime experience. The Petitioner No. 2 is Sargeant in the Italian Military Navy in active duty and was enlisted in 1997. The Petitioner No. 2 after training at the Amphibian Force Centre in 1996 also earned substantial practical and continuous maritime experience. Both Petitioners 1 and 2 are highly decorated Naval Officials who have received various medals and awards of honor for their meritorious service and gallantry and for participation in United Nations and NATO assignments in the Gulf War, Albania, Lebanon, Kosovo, Afghanistan and Bosnia.

The Petitioner No. 1 as the team leader and the Petitioner No. 2 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 Officials. Their deployment is under a special law enacted by the Italian Parliament i.e., Parliamentary Law No. 130/2011 and under the Command and Orders of the Italian Navy General Staff to protect Italian Vessels flying the Italian

Flag from Piracy in the seas. By virtue of this legislation, detachment members function as Law Enforcement Officers while onboard the Italian Vessel, and act under the authority of a law of the Republic of Italy. Under the Orders of the Italian Navy General Staff the Petitioner No. 1 and 2 embarked on the Vessel at Galle Sri Lanka on February 11, 2012 and were to disembark at Djibuti on February 21/22, 2012 and thereafter embark on another Italian Vessel for its protection against piracy attacks.

On February 15, 2012 at about 1630 hours Indian Standard Time, while the Military Protection Detachment of 6 Italian Military Naval Officials designated Team "LATORRE" was on board the Vessel there was a perceived piracy attack on the Vessel at 20.5 Nautical Miles off the coast of India in International Waters by a suspected pirate skiff which was closing in on the Vessel. The Master of the Vessel immediately set into motion established International procedures to be undertaken by vessels during attempted piracy attacks to warn the suspected pirate skiff including setting into motion the alarm, flashing search lights and horns. Inspite of all these warnings by the Vessel, the pirate skiff continued closing in on the vessel. The Military Protection Detachment were constrained to take protective action against the suspected pirate skiff which then aborted chasing the Vessel. The Master of the Vessel had 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

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was made. 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 Headquarters. A report was also sent to the Maritime Security Centre – Horn of Africa (MSCHOA) at UK.

Upon the Vessel taking the aforesaid protective action provoked by the threatening pirate skiff, and the suspected pirate skiff aborting the attempted attack, the Vessel then continued sailing towards the High Seas as the piracy attack was averted. While the Vessel had further sailed almost 38 nautical miles in International Waters, based on its piracy attack alert and intimation, it was specifically asked by the Maritime Rescue Coordination Centre, Mumbai (MRCC Mumbai) whether it had faced a piracy attack. The Vessel confirmed to MRCC Mumbai that it had faced an attack by pirates. The Vessel was requested on phone and by e-mail from MRCC Mumbai specifically referring to the Vessels reported piracy attack to come to Cochin Port to assist and identify the suspected pirates who had been apprehended and to assist the Coast Guard to complete the formalities of a pirate attack. Accordingly, in good faith the Vessel turned its course and came to the port of Cochin on February 16, 2012.

Nothing about the shooting of two persons was informed to the Crew who were informed of the investigations by the Respondent

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No. 2 for the alleged offence of murder of two persons only when the Vessel reached the outer anchorage off Kochi port. The Master of the Vessel was informed that an F.I.R No. 2 of 2012 on the file of the Circle Inspector, Neendakara, Kollam, Kerala has 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 a person on a ship having black paint on its top and red paint on its bottom at 33 nautical miles in International Waters in which two persons had been killed on the spot. The Petitioner No.1 and 2 Military Officials were arrested on February 19, 2012 by the Respondents No. 2 and 3.

The Petitioner No. 3 duly acknowledged that the entire protective action was undertaken by Petitioner No. 1 and 2 Military Officials on active Military duty in discharge of sovereign functions of Petitioner No. 3 and therefore claimed immunity of the said Military Officials from prosecution for the protective action/alleged incident in domestic Courts in India under India Penal Laws since it was the Petitioners clear stand that the actions of the military officials of the Italian Republic, acting under Military authority, were in law actions of the Republic of Italy, and Petitioner No. 3 took full responsibility of dealing with any issue that may be raised between the Republic of India and the Republic of Italy. The Military Naval Officials will be judged by the principles and rules of Italian law as it is the Republic of Italy and its institutions [military and judicial]

who would have the authority to deal with any inquiry and consequential legal proceedings against these officials.

The Petitioners accordingly challenged the jurisdiction of the Respondents (State of Kerala and Union of India) to register the F.I.R, proceed with the investigation, arrest and detain Petitioner No. 1 and 2 Military Officials by way of Writ Petition under Article 226 of the Constitution of India. It was interalia contended in the Writ Petition by the Republic of Italy through its Consul General that the protective action/alleged conduct of the Petitioners Military Naval Officials are directly attributable to the Republic of Italy being an act of State itself. Since the Petitioners No. 1 and 2 were on active Naval Military State duty, therefore on well settled principles of International Law had sovereign and functional immunity from being tried in local Municipal Courts in India under Indian Penal laws for the alleged incident.

It was contended in the Writ Petition that based on the Italian Parliamentary Law No. 130/2011, Military detachment Orders of the Italian Navy General Staff and the Representation by the Republic of Italy to the Union of India dated February 29, 2012 claiming sovereign immunity, the dispute properly cast was in the domain of Public International Law and the actions of Petitioner No.1 and 2 Military Officials were to be treated as sovereign acts attributable to the Republic of Italy and the continuance of proceedings would tantamount to the Republic of Italy being

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brought to trial in India contrary to a well settled International Public Law principle of sovereign equality of states and International Comity of States.

Support for these contentions was also taken from the International Law Commission "Draft Articles on Responsibility of States for Internationally Wrongful Act adopted by the General Assembly of the United Nations in Resolution 56/83 of December 12, 2001, and United Nations Convention on Jurisdictional Immunities of States and their Property, 2004 to which India is also a signatory, as well as precedents of the International Court of Justice, English Law and other International precedents.

It was contended that under the United Nations Convention on the Law of the Sea ("hereinafter referred to as **UNCLOS**") to which both India and Italy are Parties and particularly under Article 58 (2) read with Article 97 of UNCLOS, the exclusive jurisdiction for the protective action/alleged incident is the jurisdiction of the Court in the Republic of Italy which alone can initiate penal proceedings against the Petitioner No. 1 and 2 Military Officials for any alleged actions committed by them while on board the ship flying the Italian Flag. Further, Article 97(3) of UNCLOS unequivocally provides that no arrest or detention of the Ship even as a measure of investigation shall be ordered by any authority other than by the authority of the Flag State.

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Without prejudice to the foregoing, it was also contended in the Writ Petition that the protective action/alleged incident having taken place outside the territorial waters of India (having admittedly occurred as per the case of the prosecution atleast 20.5 nautical miles from the Indian Coast), the provisions of Section 3 and 4 of IPC could not been attracted and the Court in Kerala would have no jurisdiction to try the alleged incident. The initiation of criminal investigation can only be in accordance with the Code of Criminal Procedure, and that does not countenance any State acting in relation to offences allegedly committed outside its territory.

The Writ Petition was limited to legal issues of jurisdiction related to initiation of investigations, not to issues of fact as to what actually transpired. The only relevant fact was the situs of incident, which fact was no longer in issue.

The Learned Single Judge by the impugned Judgment dated May 29, 2012 however, has rejected the Writ Petition of the Petitioners, given findings of fact on issues that were pending investigation. The Learned Single Judge interalia upheld the jurisdiction of the State of Kerala over the incident based on interpretation of Notification No. S.O. 671 (E) dated August 27, 1981 which purportedly extended the entire Indian Penal Code to the Exclusive Economic Zone and based on provisions of the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed

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Platforms on Continental Shelf Act, 2002 (hereinafter referred to as **"SUA"**).

The Respondent No. 2 (State of Kerala) in its two written replies filed with the High Court of Kerala did not any where refer to or rely on the purported Notification No. S.O. 671 (E) dated August 27, 1981 or to the provisions of SUA, but referred to the same during the arguments to justify the assumption of jurisdiction in relation to the alleged incident.

The learned Single judge, it is submitted made the cardinal error of confusing the issues of jurisdiction in matters where the actions were taken under the authority of a Republic recognized by the Union of India, with the actions of persons in respect of which generally immunity is claimed on the footing that they are official acts. The second fundamental error was that the Learned judge came to the conclusion that the IPC applies through the entire economic zone, which is not only contrary to the principles of public international law, but also contrary to the understanding of the Union of India. The third fundamental error is that the learned Judge, on the assumption that the death of the victims occurred on an Indian vessel, came to the conclusion that the offence was committed in India – overlooking that the issues of authority of the Italian Republic and the actions of its officials and military personnel - in the context of sovereign immunity – would have to be seen in the context of the placement of the military personnel

and the duty being discharged by them – not the place where the action occurred. The fourth fundamental error is that since the alleged act was committed and consummated outside the territory of India, Indian Courts would not have jurisdiction, which crucial fact was overlooked by the Learned Single Judge.

LIST OF RELEVANT DATES

August 2, 2011	The Ministry of Defence, Republic of Italy upon consultations with the Ministry of 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 International seas enacted Government Decree 107/2011 later converted into Law of Parliament of Italy No. 130 of August 2, 2011 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 in the

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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. This document, which was filed and annexed to the Writ Petition, has been completely ignored by the Learned Single Judge. Copy of Law of Parliament of Italy No. 130 of August 2, 2011 is annexed hereto and marked as **ANNEXURE-P-1**. (Page No. 150-183)

October 11, 2011 Pursuant to the Law of Parliament of Italy No. 130 of August 2, 2011, the Protocol of Agreement was executed between the Ministry of Defence-Naval Staff and Italian Shipowners' Confederation (Confitarma). It is clear from the reading of various provisions of the Protocol of Agreement that the Petitioner No. 1 and 2 Military Officials while onboard the Vessel were discharging sovereign functions to protect the maritime interests of the Republic of Italy from piracy in International seas. Copy of the Protocol of Agreement dated 11.10.2011 between the Ministry of Defence-Naval Staff and

	Italian Shipowners' Confederation (Confitarma) is annexed hereto and marked as **ANNEXURE-P-2**. (Page No. 184-198)
February 6, 2012	Military Deployment Order deploying 6 Italian Military Naval Officials 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 scheduled to disembark at Muscat Oman. Copy of the Order dated February 6, 2012 from the Italian Navy General Staff is annexed hereto and marked as **ANNEXURE-P-3**. (Page No.199-206)
February 14, 2012	Due to change in the next planned port of disembarkation from Muscat to Djibuti, a revised Military Deployment Order directing Team "LATORRE" to disembark at Djibuti on February 21, 2012 was sent by the Italian Navy General Staff. Copy of the Order dated February 14, 2012 from the Italian Navy General Staff is annexed

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hereto and marked as **ANNEXURE-P-4**.

(Page No. 207 - 209)

February 15, 2012 While the Vessel with the Military Protection Detachment on board was heading for Djibouti , there was an attempted piracy attack on the Vessel in international waters at a location 20.5 Nautical Miles off the Indian Coast by a suspected pirate skiff which was closing in on the Vessel. The Master of the Vessel immediately set into motion the established international procedures to be undertaken by vessels during attempted piracy attacks to warn the suspected pirate skiff including setting into motion the alarm, flashing search lights and horns. The Military Protection Detachment was constrained to take protective action and the suspected pirate skiff then aborted chasing the Vessel. The Master had 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

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community including several Navies across the world fighting piracy including to the Indian Navy Head Quarters. The "Military Report" was also prepared and was also sent to Maritime Security Centre – Horn of Africa (MSCHOA) at UK. Since the attempted attack at 20.5 nautical miles in International Waters was averted, the Vessel continued on its scheduled course of journey to Djibuti.

February 15, 2012 When the Vessel had sailed a further distance of almost 38 Nautical Miles in International Waters, it was specifically asked by MRCC, Mumbai, whether it had faced an attack by pirates. The Vessel confirmed to MRCC, Mumbai that it had faced a piracy attack. The Vessel was then requested by phone and e-mail by the MRCC, Mumbai specifically referring to the Vessel's reported piracy attack to come to Cochin Port to assist and identify the suspected pirates who had been apprehended and to assist the Coast Guard to complete the formalities of a pirate attack. It is an admitted position that the

	Coast Guard tricked the Vessel to come to the port of Cochin. Accordingly, the Vessel turned course and came to the port of Cochin at about midnight on February 16, 2012. Copy of the e-mail dated February 15, 2012 sent by MRCC Mumbai is annexed hereto and marked as **ANNEXURE-P-5**. (Page No. 210)
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 the Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam 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 Kollam Fishing Harbour for deep-sea fishing on February 7, 2012 with 11 crew members were fired at by a person on a ship having black paint on its top and red paint on its bottom at 33 nautical miles in International Waters in which two persons died on the spot onboard the fishing boat. Copy of the F.I.R. No. 2 of 2012 dated 15.2.2012 registered with Coastal Police Station, Neendakara, Kollam under Section

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302 IPC read with Section 34 of the IPC is annexed hereto and marked as **ANNEXURE-P-6**. (Page No. 211 -215)

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. Copy of the communication dated February 17, 2012 from the prosecution office within the Military Tribunal of Rome is annexed hereto and marked as **ANNEXURE-P-7.** (Page No. 216-217)

February 16-19, 2012 — Importantly even during the four days of February 16-19, 2012, the Petitioner No. 3, through its Consul General, and Petitioners 1 and 2 Military Officials asserted that being Military Officials and performing State acts of protecting its Flag State Vessel in International Waters, they were subject only to the jurisdiction of Italian Courts/Italian Military Courts and also asserted sovereign and functional immunity of its naval military officials from prosecution in Indian Courts.

	The Respondents were aware of this position and it was only after vacillating and after 3 days, they wrongly asserted jurisdiction and arrested Petitioners 1 and 2 Military Officials on February 19, 2012.
February 19, 2012	The Petitioner No. 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 for the first time alleged that the incident took place at a distance of 22.5 nautical miles west from Thrikunnapuzha, Indian Coast. Copy of the Remand Report dated 20.2.2012 in Crime No. 2 of 2012 is annexed hereto and marked as **ANNEXURE-P-8**. (Page No. 218-225)

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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 further arrest and production of Italian Military Naval Officials 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 the same being without jurisdiction, contrary to law, null and void and (ii) declaring the arrest and detention of the Italian Military Naval Officials and all proceedings subsequent thereunder as without jurisdiction, contrary to law, null and void and (iii) immediate release of the Italian Military Naval Officials. Copy of the Writ Petition No. 4542/2012 dated 22.2.2012 filed by the Petitioners

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	before Hon'ble High Court of Kerala, Ernakulam is annexed hereto and marked as **ANNEXURE-P-9**. (Page No. 226-252)
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 High Court of Kerala to be impleaded in the Writ Petition No. 4542 of 2012 filed by the Petitioners. Copies of the Affidavits filed by the relatives of the deceased and several private parties i.e. Doramma dated 22.2.2012, Charles George dated 23.2.2012, Baisil Attipetty dated 24.2.2012 and S. Janetmary dated 26.2.2012 are annexed hereto and marked as **ANNEXURE-P-10 (COLLY)**. (Page No.253-271)
February 24, 2012	The Prosecution Office within the Tribunal of Rome, Republic of Italy notified the Ministry of Defence of Italy that it had initiated proceedings and investigation under number 9463/2012 against the Petitioner No.1 and 2 based on the reports of the Respondents. Copy of the Communication dated February 24, 2012 is

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annexed hereto and marked as **ANNEXURE-P-11**. (Page No. 272)

Copy of the relevant provision of Italian Penal Code is annexed hereto and marked as **ANNEXURE-P-12**. (Page No. 273)

February 27, 2012 — The Respondent No. 2 and 3 filed their joint Statement 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 (Civil) No. 4542 of 2012 is annexed hereto and marked as **ANNEXURE-P-13**. (Page No. 274 - 283)

February 28, 2012 — On behalf of Respondent No. 1, the Coast Guard filed its Statement with the High Court of Kerala unaccompanied by affidavit. The Boarding Report of February 16-17, 2012 (attached to the Coast Guard Statement) acknowledged that the incident took place outside Indian Territorial Waters at a distance of 20.5 Nautical Miles from the Indian coast. Copy of the Statement dated 28.2.2012 filed by the Coast Guard along with the Boarding Officers Report of

	February 16-17, 2012 is annexed hereto and marked as **ANNEXURE-P-14 (COLLY)**. (Page No. 284-305)
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 Military Officials 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; and (iv) reports of the examination on the boat on which the two victims were sailing. Copy of the Communication dated February 29, 2012 is annexed hereto and marked as **ANNEXURE-P-15**. (Page No. 306-307)
February 29, 2012	The Embassy of Italy sent communication to the Ministry of External Affairs-Government of India asserting that Petitioner No. 1 and 2 Military Officials were carrying out official functions for the

	protection of the Italian Flagged Vessel from piracy and armed robbery in International Waters and asserted jurisdictional immunity for the official acts of Petitioner No. 1 and 2 Military Officials. Copy of the Communication dated February 29, 2012 of the Republic of Italy to the Union of India asserting sovereign and functional immunity is annexed hereto and marked as **ANNEXURE-P-16**. (Page No.308-310)
March 1, 2012	The Petitioners filed its Reply/Rejoinder to the Statement filed by Respondents No. 2 and 3 and the Coast Guard. Copy of the Reply/Rejoinder on behalf of Petitioners dated 1.3.2012 to the statement filed on behalf of Respondent No. 2 and 3 and copy of the Reply/Rejoinder on behalf of Petitioners dated 1.3.2012 to the statement filed on behalf of Coast Guard are annexed hereto and marked as **ANNEXURE-P-17 (COLLY)**. (Page No. 311-319)
March 2, 2012	Pursuant to the directions of the Court, Mr. Giampaolo Cutillo, Consul General of the Republic of Italy filed his Affidavit with the

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High Court of Kerala 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. Copy of the Affidavit dated 2.3.2012 filed by Mr. Giampaolo Cutillo is annexed hereto and marked as **ANNEXURE-P-18**. (Page No.320-324)

March 5, 2012

Mr. Giampaolo Cutillo, Consul General of the Republic of Italy filed Additional Affidavit producing additional documents to show that Petitioner No. 1 and 2 Military Officials acted within their official capacity and reasserted the exclusive jurisdiction of Italy over the Petitioner No. 1 and 2 Military Officials to support the invocation of sovereign and functional immunity by the Petitioners. Copy of the Affidavit of Mr. Giampaolo Cutillo, Consul General of the Republic of Italy dated 5.3.2012 is annexed hereto and marked as **ANNEXURE-P-19**. (Page No. 325 – 330)

March 6, 2012	The Hon'ble High Court of Kerala permitted Doramma, wife of Late Valentine to be impleaded in the Writ Petition as the Additional 4th Respondent.
March 6, 2012	The Hon'ble High Court of Kerala permitted Abhinaya Xavier (Minor) and Aguna Xavier (Minor) through their next friend S. Janetmary to be impleaded in the Writ Petition as Additional 5th and Additional 6th Respondent.
March 7, 2012	The Respondent No. 1 through the Ministry of Shipping issued Notification MS Notice No. 7 of 2012 dated 7th March 2012 treating the incident as a mistake and an accident. The Director General of Shipping specifically also recorded in paragraph 4 of the said Notification that the alleged incident was one where the Vessel had mistaken the fishing boat to be a pirate skiff and the Notification states that the ship's security had assumed the persons to be pirates. The Respondent 1 through the Ministry of Shipping in Paragraph 6 itself admits that all areas outside the territorial

	waters ending at 12 nautical miles are High Risk Area's, in the context of piracy threats. The said Notification which was issued after filing of the Writ Petition was handed over to the Learned Single Judge and relied upon by the Petitioners during the course of the arguments and in the Written Submissions. Copy of the Ministry of Shipping Notification MS Notice No. 7 of 2012 dated March 7, 2012 is annexed hereto and marked as **ANNEXURE-P-20** (Page No. 331-334)
March 8 & 11, 2012	Respondent No. 4, 5 and 6 filed their Counter Affidavit in response to the Writ Petition filed by the Petitioners. Copy of the Counter Affidavit filed by Respondent 5 and 6 dated 8.3.2012 and copy of the Counter Affidavit filed by the Additional 4th Respondent dated 11.3.2012 are annexed hereto and marked as **ANNEXURE-P-21 (COLLY)**. (Page No. 335-384)
March 13, 2012	Respondent No. 2 and 3 after filing their Statement of Fact filed their Counter Affidavit in response to the Writ Petition filed by the Petitioners. Copy of the Counter

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	Affidavit on behalf of Respondent No. 2 and 3 dated 13.3.2012 in Writ Petition No. 4542 of 2012 is annexed hereto and marked as **ANNEXURE-P-22**. (Page No. 385-397)
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. Copy of the Statement filed by Assistant Solicitor General, High Court of Kerala dated 15.3.2012 in Writ Petition No. 4542 of 2012 is annexed hereto and marked as **ANNEXURE-P-23**. (Page No. 398-403)
March 17, 2012	Petitioner No. 3 filed the Rejoinder Affidavits to the Counter Affidavit filed by the Respondent No. 2, 3, 5, and 6. Copies of the Rejoinder Affidavits of Petitioner No. 3 to the Counter Affidavit filed on behalf of Respondent No. 2 and 3 and Rejoinder Affidavit of Respondent No. 3 to the Counter Affidavit filed on behalf of Respondent No. 5 and 6 dated 17.3.2012 in Writ Petition No. 4542 of 2012 are annexed hereto and marked as **ANNEXURE-P-24 (COLLY)**. (Page No. 404-433)

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March 20, 2012	After hearing arguments the Hon'ble Court directed the Petitioners to file their Written Submissions with the Hon'ble High Court of Kerala. Copy of the Written Submission on behalf of Petitioners dated 20.3.2012 in Writ Petition No. 4542 of 2012 is annexed hereto and marked as **ANNEXURE-P-25**. (Page No. 434--491)
March 27, 2012	Hon'ble High Court of Kerala passed an Interim 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 is defective on this score and directed the Petitioner No. 1 and 2 to file fresh Affidavits. Copy of the Order dated March 27, 2012 passed by the Single Judge of the High Court of Kerala in Writ Petition No. 4342 of 2012 is annexed hereto and marked as **ANNEXURE-P-26**. (Page No. 492-501)
March 30, 2012	The Petitioner No. 1 and 2 again filed their respective Affidavits in accordance with the directions of the Hon'ble High Court of Kerala and after hearing further

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submissions the Court reserved Judgment in the Writ Petition and directed the Petitioners to file Additional Written Submissions and directed the Respondents to file their Written Submissions. Copies of the Affidavit dated 27.3.2012 filed by Petitioner No. 1 and affidavits dated 28.3.2012 filed by Petitioner No. 2 and 3 in Writ Petition No. 4542 of 2012 are annexed hereto and marked as **ANNEXURE-P-27 (COLLY)**. (Page No. 502-507)

April 2, 2012

The Petitioners filed their Written Submissions inter-alia on the issues of Sovereign Immunity and the effect and purport of the Notification dated August 27, 1981. Respondent No. 2 filed its Written Notes of Arguments. Copy of the Written Submission dated 02.04.2012 filed by the Petitioners and copy of the Written Notes of Arguments filed by Respondent No. 2 dated 27.3.2012 are annexed hereto and marked as **ANNEXURE-P-28 (COLLY)**. (Page No. 508-549

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April 4, 2012	An Application under the Right to Information Act, 2005 made seeking response of the Respondent No. 1 as to whether the said Notification dated August 27, 1981 was inter-alia applicable, implemented and/or enforced.
April 19, 2012	The Petitioners filed Writ Petition No. 135 of 2012 under Article 32 of the Constitution of India seeking directions to the Respondent No. 1 to take all steps to secure the custody of the Petitioner No. 1 and 2 Military Officials and make over their custody to the Petitioner No. 3 herein.
April 23, 2012	The Legal Heirs of the Deceased persons filed their respective Affidavits withdrawing the Counter Affidavit/Objections made in the Writ Petition No. 4542 of 2012 filed by the Petitioners in the High Court of Kerala.
April 24, 2012	The Petitioner No. 3 made ex gratia payment to the legal heirs of the Deceased Persons on International humanitarian and compassionate grounds and as a gesture of goodwill.

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May 2, 2012 This Hon'ble Court passed final orders in SLP No. 11942 of 2012 allowing the Vessel M. V. Enrica Lexie to sail away subject to certain terms and conditions along with all 24 crew members namely (i) Umberto Vitelli, Master (ii) James Madley Samson Victor, Chief mate, (iii) Sahil Gupta, Second Officer, (iv) Luca Fumai, 2nd Officer, (v) Luigi Astro, Deck Cadet, (vi) Mario Massimino, Chief Engineer, (vii) Krishna Prasad Mishra, 2nd Engineer, (viii) Parveen Salaria, 3rd Engineer, (ix) Edward Joseph Fernandes, 4th Engineer, (x) Dhian Singh, Electrical officer, (xi) Appu Rao Mugu, Pumpman, (xii) Abdul Kadir Musa Tambe, Bosun, (xiii) Narendrakumar Naran Fulbaria, AB, (xiv) Ayyaj Yusuf Kumandan (xv) Venkata Ramana Kari, AB, (xvi) Bipinkumar Laxman Solanki, OS, (xvii) Mr. Thirumala Rao Kantamuchu (xviii) Vijay Anant Salvi, Fitter, (xix) Franzie Joaquim Viegas, Oiler, (xx) Pigneshkumar Kanayialal Tandel, Wiper, (xxi) Sebastio Antonio D Costa, Chief Cook, (xxii) George Herculano Fernandes, Messman, (xxiii) Ritenkumar

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Ishvarlal Tandel, Wiper, (xxiv) Carlo Noviello, Master SN and the remaining 4 members of the Military Protection Detachment namely (i) Seargeant Voglino Renato, (ii) 1st Corporal Andronico Massimo, (iii) 3rd Corporal Fontano Antonio and (iv) Corporal Conte Alessandro. In the said order, the Hon'ble Supreme Court noted that the Master of the Ship had no command or control over the Military Detachment Unit and the findings of the Learned Single Judge in the Impugned Judgment is contrary to the Judgment of this Hon'ble Court .

May 9, 2012 This Hon'ble Court passed an Order in the Article 32 Writ Petition filed by the Petitioners directing the State of Kerala through the Additional Director General of Police (Prisons) and the Director General of Police (State Police Chief) to consider the representation of the Petitioner No. 3 herein concerning the shifting of the Petitioner No. 1 and 2 Military Officials to a safe house and to decide on the representation within a week. The Hon'ble Supreme Court also

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gave permission to the Petitioner No. 1 and 2 Military Officials to apply for Bail.

May 18, 2012	The Kerala State Police filed Chargesheet against the Petitioner No. 1 and 2 with the Chief Judicial Magistrate, Kollam charging the Petitioner No. 1 and 2 with offences under Sections 302, 307, 427, 34 of the Indian Penal Code and Section 3 of the SUA Act.
May 23, 2012	The Respondent No. 1 responded to the RTI Application dated April 4, 2012 by stating that the Respondent 1 did not have any record available regarding the issuance of the said Notification. The Respondent No. 1 in its response however provided clarifications/Office Memorandum of the Ministry of External Affairs and of the Ministry of Home Affairs clarifying and confirming that the said Notification of 1981 was issued prior to the Government of India signing the 1982 Convention on the Law of the Seas and was now to be given a restricted interpretation and that the investigation and in inquiry into an IPC

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	offence committed within EEZ have to be restricted only to the safety zone upto 500 meters breadth around the artificial islands and the installations in the Exclusive Economic Zone in view of signing of UNCLOS by India in 1982. This fact was suppressed by the Respondents from the Hon'ble High Court of Kerala and clearly contradicts the conclusion of the Learned Single Judge in relation to the assumption of jurisdiction by Respondents over the incident, based on the said Notification.
May 25, 2012	The Chief Judicial Magistrate committed the case against Petitioner No. 1 and 2 to trial to the Court of Sessions, Kollam.
May 29, 2012	The Impugned Judgment passed by the Learned Single Judge of the High Court of Kerala in Writ Petition No. 4542 of 2012 dismissing the Writ Petition with costs. The Learned Single Judge interalia upheld the assumption of jurisdiction by Respondents 2 and 3 primarily on the two grounds. Firstly, under the Notification No. S.O. 671 (e) dated August 27, 1981, the entire IPC

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has been extended to the EEZ and the territorial jurisdiction of Respondents 2 and 3 is not limited to 12 Nautical Miles but extends to the entire Exclusive Economic Zone up to 200 Nautical Miles of the Indian Coast. Secondly, under the provisions of the SUA Act, the Respondents 2 and 3 have jurisdiction up to 200 Nautical Miles i.e. over the entire EEZ of India. On both counts, the Judgment is fallacious, as the said Notification has been clarified by the Respondent No.1 to have restrictive interpretation and to make the provisions of the IPC applicable only upto 500 meters breadth around the artificial islands and the installations in the Exclusive Economic Zone. As far as the SUA Act is concerned, the Learned Single Judge completely overlooked the provisions of the SUA Act which makes the SUA Act completely inapplicable to the present case. The Learned Single Judge has also failed to correctly deal with the issue of sovereign immunity and functional immunity raised by the Petitioners and on an untenable

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interpretation of the principles of International laws, perfunctorily rejected the important issues raised by the Petitioners.

July 11, 2012

Hence, the present Special Leave Petition.

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IN THE SUPREME COURT OF INDIA
[Order XVI Rule 4(1)(a)]
CIVIL APPELLATE JURISDICTION
(Under Article 136 of the Constitution of India)

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2012

(Against the final judgment and order dated 29.05.2012 passed by the Hon'ble High Court of Kerala at Ernakulam in W.P. (C) No. 4542 of 2012)

(WITH PRAYER FOR INTERIM RELIEF)

BETWEEN

		POSITION OF THE PARTIES	
		In The High Court	In this Hon'ble Court
1.	Massimilano Latorre Holder of Italian Passport No. AA 1465972, (Chief Master Sargeant San Marco Regiment, Italy). Aged about 45 years Son of Mr. Tommaso Latorre Residing at Reggimento San Marco Strada per San Vito dei Normanni 72100 Brindisi, Italy. Presently at Trident Hotel Bristow Road, Willingdon Island Cochin, Kerala, 682003.	Petitioner No. 1	Petitioner No. 1
2.	Salvatore Girone, Holder of Italian Passport No. S 111982, (Sargeant San Marco Regiment, Italy). Aged about 33 years, Son of Mr. Michele Girone Residing at Via Della Rosa Azzura 2 Bari, Italy Presently at Trident Hotel in Cochin Bristow Road, Willingdon Island Cochin, Kerala, 682003.	Petitioner No. 2	Petitioner No. 2

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3.	Republic of Italy, Through its Chargé d'affaires Mr. Ugo Astuto, Embassy of Italy 50E, Chandragupta Marg Chanakyapuri, New Delhi.	Petitioner No. 3	Petitioner No. 3

AND

1.	Union of India, Through Secretary, Ministry of Home Affairs, New Delhi-110001.	Respondent No. 1	Contesting Respondent No. 1
2.	State of Kerala, Through Chief Secretary, Government of Kerala, Trivandrum-695001.	Respondent No. 2	Contesting Respondent No. 2
3.	Circle Inspector of Police, Neendakara Coastal Police Station, Kollam District, Kerala-691001.	Respondent No. 3	Contesting Respondent No. 3
4.	Ms. Doramma W/O. Valentine (Late) Derrick Villa R/o Villa Moothakkara Kollam, Kerala.	Respondent No. 4	Proforma Respondent No. 4
5.	Abhinaya Xavier (Minor), Represented by her next Friend S. Janetmary, 85A (New No. 17/237), South Erayumanthurai, Kovilvilagam, Thuthoor (P), Poothurai, Kanyakumari District, Tamil Nadu.	Respondent No. 5	Proforma Respondent No. 5
6.	AGUNA Xavier (Minor), Represented by her next Friend S. Janetmary, 85A (New No. 17/237), South Erayumanthurai, Kovilvilagam, Thuthoor (P), Poothurai, Kanyakumari District, Tamil Nadu.	Respondent No. 6	Proforma Respondent No. 6

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PETITION UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA

To

Hon'ble the Chief Justice of India and His Companion Judges of the Supreme Court of India.

The humble petition of the above named petitioner:

MOST RESPECTFULLY SHOWETH AS UNDER:

1. The Petitioners above named respectfully submits that this Petition seeking Special Leave to Appeal against the final Judgment and Order dated 29.05.2012 passed by the Hon'ble High Court of Kerala at Ernakulam in W.P. (C) No. 4542 of 2012, whereby the Learned Single Judge dismissed the Petition. It is stated that the impugned judgment and order is in utter disregard of express provisions of law and also the law settled earlier by another coordinate bench on a similar issue and also the binding law declared by this Hon'ble Court and thereby, merits immediate interference by this Hon'ble Court.

2. **QUESTIONS OF LAW.**

The following questions of law arise for consideration by this Hon'ble Court: -

i) Whether the jurisdiction of Indian Courts and application of penal laws of India can be invoked in respect of conduct admittedly occurring beyond the territorial waters of India and involving foreign military personnel acting in an official capacity and in discharge of official functions of a sovereign nation?

ii) Whether the actions of the military personnel deployed on board vessels pursuant to Italian law, and in respect of which the Republic [who they represent] takes full responsibility would constitute acts of a sovereign [i.e. Republic of Italy] and thus be entitled to sovereign immunity?

iii) Whether conduct attributable to a foreign sovereign can be made subject to the domestic jurisdiction of another co-equal sovereign in view of the customary international law norms of sovereign equality and international comity?

iv) Whether it is open to an Indian Court to examine a claim for sovereign immunity made by the Republic of Italy in order to ascertain whether it has been correctly made, or must the Court proceed on the footing that the immunity has rightly been claimed, and then adjudicate upon the validity of the action questioned on the basis of such a claim?

v) Whether it was open to the Court, in adjudicating a claim of sovereign immunity to ignore a domestic foreign law

proclaiming the official status of the individuals in question and the consistent position of a foreign sovereign that such persons form part of its regular military services?

vi) Whether the issue of applicability of sovereign immunity has to be adjudicated in the first instance, and unrelated to the consequences of what would be the position in Indian law if the claim were to be declined, and thus whether the finding that the claim was to be declined because the acts alleged would constitute a "murder" under Indian law is fallacious?

vii) Whether the interpretation placed on the functions exercised by the Italian marines on board the *Enrica Lexie* fails to take note of international legal obligations of all nation states including India under various UN Security Council Regulations mandating international co-operation in measures to combat piracy?

viii) Whether the interpretation of functional sovereign immunity in the impugned order deprives the privilege extended by one sovereign nation to another of all legal content inasmuch as it finds that such immunity is displaced by characterization of the impugned conduct as prima facie criminal in nature?

ix) Whether actions of a foreign sovereign State in the nature of sovereign functions performed by its representatives or officers and attributable to the State can be called into

question or prosecuted against in domestic court of India or whether such acts enjoy functional immunity and sovereign immunity from prosecution in any other State except the State for whom the Acts are performed under the well settled Principles of International Law, sovereignty and comity of States?

x) Whether the dispute relating to alleged incident, subject matter of F.I.R in question, when properly cast relates to determination of the international legal responsibility of the Republic of Italy for the acts of members of its armed forces, which acts are in Public International Law regarded as sovereign acts attributable to Italy and therefore whether the alleged conduct has to be viewed as that involving the State rather than individual actions of Petitioner No. 1 and 2 herein?

xi) Whether the impugned proceedings and F.I.R and all proceedings thereto amount to subjecting Republic of Italy to the domestic penal laws of India, which is contrary to well established canons of International Law as well as being contrary to the constitutional mandate enshrined in Article 51(c) of the Constitution of India to "foster respect for international law and treaty obligations"?

xii) Whether once the Republic of Italy has taken responsibility for the protective action/alleged incident then even if the

Petitioner No. 1 and 2 purportedly acted in a manner contrary to rules or used excessive or unnecessary force, their conduct is to be judged in accordance with Italian Laws and in municipal courts of Italy where the investigations have already been launched by the competent Prosecution Authority at Rome?

xiii) Whether the Objective Territorial Principle can have any application in the present case, since the impugned act both admittedly commenced and was consummated outside the territory of India?

xiv) Whether the impugned judgment errs in applying the principles enunciated in the *Lotus* case to find objective territorial jurisdiction, even while acknowledging that the same was no longer good law and had been overridden by the relevant provisions of the UNCLOS?

xv) Whether the impugned judgment errs in reliance on Section 179 of the Criminal Procedure Code and the 'effective principle' of jurisdiction inasmuch as both the impugned act and the consequence ensuing from the same have both admittedly taken place beyond the jurisdiction of the Court that is now trying the alleged offences?

xvi) Whether extra-territorial application can be given to Indian Penal Laws in respect of a maritime zone in which India

exercises only limited sovereign rights and not sovereignty as per its own domestic law as well as relevant international conventions including the UNCLOS?

xvii) Whether the impugned order is based on a misapplication of the relevant provisions of the Territorial Waters Act, 1976 inasmuch as it fails to draw a distinction between provision for the exercise of sovereignty over the territorial waters as opposed to limited sovereign rights over the other maritime zones, which distinction has been reaffirmed by this Hon'ble Court in *Abanloyd Chiles Offshore Ltd v. Union of India (2008) 11 SCC439*?

xviii) Whether the interpretation placed on provisions of the Territorial Waters Act, 1976 result in extra-territorial application of the same despite the absence of any indication to this effect in the plain language of the statute?

xix) Whether the impugned judgement misconstrues the import of Article 27 of the UNCLOS inasmuch as this provision demonstrates that even in respect of the territorial waters, a zone in respect of which it enjoys sovereignty, the exercise of criminal jurisdiction of the coastal state ordinarily defers to the primacy of jurisdiction of the flag state, which principle therefore applies with greater force to the other maritime zones, in respect of which the coastal state only exercises limited sovereign rights?

xx) Whether the scheme of the Territorial Waters Act, more specifically, Sections 3, 5 and 7 thereof make it clear that any action in respect of the maritime zones may only be taken by the Central Government and that State Government has no role and exercises no jurisdiction in respect of such zones?

xxi) Whether the State of Kerala can claim territorial jurisdiction to try the alleged offences in light of the admitted position that Section 188A of the Indian Penal Code has not been enacted into law?

xxii) Whether the interpretation placed by the Court on Notification No. S.O. 671 dated August 27, 1981 purporting to be issued under Section 7(7) of the Territorial Waters Act is flawed for it would render such notification ultra vires the Territorial Waters Act inasmuch as it would give extraterritorial jurisdiction to Indian authorities over a zone in respect of which the 1976 Act only grants limited sovereign rights and not sovereignty?

xxiii) Whether the Notification No. S.O. 671 dated August 27, 1981 purporting to be issued under Section 7(7) of the Territorial Waters Act can be invoked by the Respondents for justifying the exercise of jurisdiction in the present case when the Respondent No. 1 has itself immediately after signing of UNCLOS mandated a restrictive interpretation to the

Notification through its Office Memorandum No. 2/2/83 dated June, 1983 and clarified that it will not apply to the entire Exclusive Economic Zone but only to a limited area of upto 500 meters breadth around artificial islands and the installations in the Exclusive Economic Zone?

xxiv) Whether the reliance by the Learned Single Judge in the impugned judgment on the above referred Notification would tantamount to interpreting the Notification issued pursuant to Section 7(7) of the Territorial Waters Act as affording extra territorial jurisdiction over foreign nationals in a zone where the Union does not assert territorial sovereignty in the first place and whether such an interpretation would be contrary to provisions of the UNCLOS and Respondent No. 1's Office Memorandum No. 2/2/83 dated June, 1983 as well as articulation of the rights enjoyed by the Coastal State in Exclusive Economic Zone in Part V of UNCLOS and would also be in conflict with settled position in *Abanloyd Chiles Offshore Ltd versus Union of India (2008) 11 SCC439*?

xxv) Whether the provisions of Section 3 of Indian Penal Code can be invoked in relation to the alleged incident of protective action for sustaining the present prosecution in the Court in Kerala and the registration of F.I.R and proceeding thereunder by the Kerala State Police when the said provision does not in itself grant extraterritorial application to

the provisions of the code but only gives effect to provisions for extra-territorial application contained in another Indian Law?

xxvi) Whether Section 2 of the IPC dealing with punishment of offences committed within India can have any application to the present case, wherein the alleged offences admittedly took place beyond the territorial waters of India?

xxvii) Whether the interpretation of SUA by the Learned Single Judge is sustainable in law and whether the institution of the investigation and prosecution of the Petitioners by the State of Kerala without following the provisions of Section 4 and 12 of SUA are null and void and without jurisdiction and is contrary to the observation of Supreme Court in *General Officer Commanding Vs. CBI and Another 2012 (5) SCALE 58*?

xxviii) Whether the Learned Single Judge failed to take into account the relevant documents on record for determining the issue of sovereign and functional immunity thereby vitiating his Judgment and whether the findings of the Learned Single Judge on principles of international law are erroneous?

xxix) Whether the proceedings against the Petitioners 1 and 2 for alleged acts done in International Waters are in violation of Article 20 (1) of the Constitution of India which prohibits

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conviction for any offence except for violation of the law in force at the time of the commission of the alleged offence?

3. **DECLARATION IN TERMS OF RULES 4 (2)**

The Petitioners states that no other petition seeking Special Leave to Appeal has been filed by them against the impugned final Judgment and Order dated 29.05.2012 passed by the Hon'ble High Court of Kerala at Ernakulam in W.P. (C) No. 4542 of 2012.

4. **DECLARATION IN TERMS OF RULE 6**

The Annexures-P-1 to P-28 produced along with the SLP are true copies of the pleadings/documents, which formed part of the records of the case in the Court below against whose order the leave to appeal is sought for in this petition.

5. **GROUNDS:**

Leave to Appeal is sought for on the following grounds:

Manifestly Erroneous Interpretation of Territorial Waters Act and Notification No. S.O. 671 (E) dated August 27, 1981

A. That the impugned judgment is irreconcilable with Sections 3, 5, and 7 of the Territorial Waters Act and various provisions of the UNCLOS as interpreted by this Hon'ble Court in *Aban Loyd Chiles Offshore Ltd v. Union of India (2008) 11 SCC 439* inasmuch as it fails to appreciate the distinction between

the exercise of sovereignty over the territorial waters as contrasted with the exercise of only limited sovereign rights over the other maritime zones.

B. That in light of the admitted position that the impugned Acts took place beyond the territorial waters of India, provisions of Indian domestic penal law cannot be extended extraterritorially to impugn the conduct of foreign nations on board ships flying a foreign flag. Provisions of the Territorial Waters Act do not permit such extension. Notifications issued thereunder cannot therefore be interpreted as having such effect.

C. That the scheme of the Territorial Waters act, particularly Sections 3, 5 and 7 thereof, makes it clear that the exercise of jurisdiction in respect of the maritime zones can only be undertaken by the Central Government. No powers or jurisdiction of any state government is contemplated in respect of such zones. The State of Kerala is not empowered under the 1976 Act to exercise any jurisdiction over conduct admittedly taking place in the maritime zones as has been sought to be done in the present case.

D. That this Hon'ble Court in *Aban Loyd Chiles Offshore Ltd v. Union of India* (2008) 11 SCC 439 has confirmed that the Territorial Waters Act of 1976 is consistent with and to be interpreted in light of provisions of the UNCLOS (to which

India is a signatory), which provide for the primacy of flag state jurisdiction and exercise of preemptive criminal jurisdiction by the flag state over vessels flying its flag.

E. That the conclusion of the Learned Single Judge that the Respondents have jurisdiction over the alleged incident in view of the Notification No. S.O. 671 (E) dated August 27, 1981 is manifestly erroneous for the following reasons:

(i) The said Notification did not form part of the pleadings before the Hon'ble High Court and was adverted to for the first time by the Respondent No. 3 only during the course of oral submissions. However, the Learned Single Judge has inexplicably noted that the arguments made by the Petitioners against the applicability of the Notification was without the support of pleadings, though the Petitioners had in their Written Submissions filed on March 20, 2012 and April 2, 2012 specifically controverted the applicability of the said Notification.

(ii) The interpretation of the Learned Single Judge is contrary to the clarification in the Office Memoranda of Respondent No. 1 on the scope of the Notification. The Respondents and more particularly Respondent No. 3 deliberately suppressed this from the Hon'ble Court. As per the Office Memorandum No. 2/2/83 dated June, 1983, the Notification is mandated to be given restricted

interpretation and the provisions of IPC would not be applicable to the Exclusive Economic Zone as has been interpreted by the Learned Single Judge. On the basis of the aforementioned alone, the Order of the Learned Single Judge is liable to be set aside.

(iii) That the Respondent No. 1 vide Office Memorandum and clarifications therein given in 1983 after signing of UNCLOS by India has itself mandated that the said Notification has to be given a restricted meaning and that the provisions of IPC can only be applied to safety zones around artificial islands and installations and that to an area 500 meters breadth around the said installations (since they are assets of Union of India). The subsequent Office Memorandum and clarifications therein clearly answers the arguments of the Respondents relating to Jurisdiction and render manifestly erroneous the interpretation of Jurisdiction given by the Learned Single Judge. In view of the clear clarifications of the Respondent No. 1, the conclusion and findings of the Learned Single Judge on this ground are erroneous and liable to be set aside.

(iv) The subsequent clarification and interpretation mandated by the Respondent No. 1 falsifies the current stand of the Respondent No. 2 that the IPC Sections

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302 and 34 have been extended to the Contiguous Zone and Exclusive Economic Zone and also makes untenable the Single Judge's conclusions on the Notification.

(v) The scope of the Notification has to be understood in the context of the Territorial Waters Act and the UNCLOS, to which both India and Italy are Parties. Section 3 of the Act provides that the sovereignty of India extends to the Territorial Waters of India, the limit of which is specified in Section 3(2) of the Act as extending to distance of 12 nautical miles from the baselines drawn along the coastline of India. Section 4 of the Act provides for the right of innocent passage of foreign ships through the territorial waters of India provided that such passage is not prejudicial to the peace, good order or security of India. The said provision does not bear upon the present proceedings as the impugned acts, even on pleaded case of the State of Kerala, took place beyond the Territorial Waters, at a distance of no less than 20.5 nautical miles from the Indian coast.

(vi) Accepting for present purposes the factual position asserted by the State of Kerala, the impugned acts may be regarded as having taken place in the contiguous

zone as defined in Section 5 of the Act. This provision recognises the exercise of limited sovereign rights over this zone by Parliament acting through the Central Government. In this respect, Section 5(4) provides that the Central Government may exercise such powers and take such measures in relation to the Contiguous Zone as are considered necessary with respect to the security of India and for immigration, sanitation, customs and other fiscal matters. It may be noted that the enactment nowhere vests any jurisdiction in the state government in respect of conduct within the contiguous zone absent specific conferral of such jurisdiction on the state by the Central Government vide a notification to this effect. No Notification has also been issued by the Central Government under Section 5(5) conferring such powers on the State of Kerala. Accordingly the State of Kerala cannot assume jurisdiction and exercise powers or take measures in respect of matters relating to the Contiguous Zone.

(vii) Section 7 of the Act provides for the creation of the Exclusive Economic Zone extending to 200 nautical miles from the baseline. Sub-sections (4) and (6) of Section 7 provide for exercise by the Union of sovereign rights in respect of the said zone. The jurisdiction granted to the Union in respect of this zone

is only to the extent necessary to enforce its sovereign rights. The concept of sovereign rights is clearly distinct from an assertion of sovereignty over the same in the sense of Section 3 of the Act. The nature of the rights enjoyed by the Union under these provisions therefore extends only to those necessary to ensure optimal exploration and exploitation of the natural resources of the zone and to this extent the Union enjoys exclusive jurisdiction to impose and enforce such measures. This provision is effectively mirrored in Article 55 and 56 of UNCLOS, which provide for a distinct legal regime for the EEZ and identifies specific economic rights relating to this zone as well as ancillary powers necessary to enforce the same.

(viii) The above understanding has been affirmed by the Hon'ble Supreme Court of India in *AbanLoyd Chiles Offshore Ltd v. Union of India*(2008) 11 SCC 439, the following observations of the Court having a direct bearing on the construction of the above Notification:

> *"73. A combined reading of Sections 3, 6 and 7 of the Maritime Zones Act, 1976 shows that territorial waters, the seabed and subsoil underlying therein and the air space over such territorial waters form part of the territory of*

India. Sovereignty of India extends over the territorial waters but the position is different in the case of continental shelf and exclusive economic zone of India...

The aforesaid decision of the Hon'ble Supreme Court of India clearly shows that India has no sovereignty over the Contiguous Zone and the Exclusive Economic Zone but only limited sovereign rights minus the sovereignty. Therefore any Notification issued under the Territorial Waters Act extending any enactment can only be done in respect of the limited and stated sovereign rights enjoyed by India under the Territorial Waters Act and by UNCLOS.

(ix) From the reading of Sections 6 and 7 of the Maritime Zones Act, 1976, it is clear that in respect of the continental shelf and exclusive economic zone, India has been given only certain limited sovereign rights and such limited sovereign rights conferred on India in respect of continental and exclusive economic zone cannot be equated to extending the territorial sovereignty of India over the continental shelf and exclusive economic zone as in the case of territorial waters.

(x) While Parliament has the power to make laws having extra-territorial application in certain instances, it is evident from the above observations of the Hon'ble Supreme Court in *Aban Loyd Chiles* that such power has not been exercised in respect of the EEZ under the Territorial Waters Act. The assertion of extra-territorial jurisdiction over subject matter must necessarily flow from the assertion of sovereignty in respect of that same subject matter, which is conspicuous by its absence in the said Act. On the contrary, the Act draws a clear distinction between sovereignty and sovereign rights in respect of the Contiguous Zone and the EEZ and claims diminished rights over these in contrast to those claimed in respect of the Territorial Waters. Any interpretation of Section 7 or Notifications issued pursuant to the same that blurs this distinction would do violence to the scheme of the Act.

(xi) The Learned Single Judge erroneously interpreted the said Notification as providing the basis for extra-territorial application of the provisions of the IPC and that the said statute is therefore applicable to conduct of foreign nationals carried out beyond the territorial waters of India. This interpretation of Section 7 is predicated on an assertion of jurisdiction over a maritime zone over which the Territorial Waters Act

does not, in the first place, recognize Indian sovereignty. Section 7(4) of the 1976 Act provides that India enjoys no more than sovereign rights in respect of this zone and limited jurisdiction necessary to regulate installations and artificial islands within the zone. The extension of domestic statutes under Section 7(7) to this zone is to be read in this context. A notification under this provision cannot therefore have the effect of converting the exercise of limited sovereign rights into a full blown assertion of sovereignty over the zone, as manifested in the extension of domestic criminal law to cover the extra-territorial conduct of foreign nationals.

That the extension of sovereignty over maritime zones beyond the territorial waters would is altogether alien to the very articulation of the rights enjoyed by the Coastal State in the EEZ in Part V of the UNCLOS and can only be supported by taking the position that the 1976 Act departs from the legal position established by the UNCLOS. Such a position would not be tenable in light of the observation of the Hon'ble Apex Court in *Aban Offshore* that the "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."

(xii) That the Constitution of India mandates that domestic statutes have to be interpreted in accordance with the International obligations of India reflected in International Conventions and Treaties of India. Since UNCLOS clearly limits the Territorial Sovereignty of a Coastal State to 12 Nautical Miles/ Territorial Sea, the interpretation of the Notification has to be in keeping with the provisions of UNCLOS which gives only certain rights to Coastal States over the Contiguous Zone and Exclusive Economic Zone.

(xiii) That the interpretation of the Notification of 27th August 1981 by the Learned Single Judge would render the same *ultra vires* the Act and should accordingly be avoided. Rather, the plain text of the Notification affords an interpretation in consonance with the scope of the Territorial Waters Act. The impugned Notification incorporates, with necessary modifications, the provisions of the Indian Penal Code. Far from conferring extra-territorial effect upon the provisions of this statute, such incorporation in fact clarifies the

scope of applicability of the penal law of India. The same is apparent upon a reading of Section 4 of the IPC, which clarifies that the extension of the Code to extra-territorial offences is in specific circumstances consistent with the principle of Personality jurisdiction, i.e., where jurisdiction is asserted by a country over its citizens or vessels flying its flag (also known as flag state jurisdiction), regardless of where such person or vessel is in fact found. It does not in itself sanctify an extension of India's penal law to cover foreign nationals or over physical areas in respect of which India does not claim sovereignty. Thus, the Notification cannot go beyond the scope of the Territorial Waters Act, namely, when the Act gives only certain limited sovereign rights to India over the Exclusive Economic Zone, as opposed to territorial sovereignty over Exclusive Economic Zone, the Notification cannot exceed the limits and scope of the provisions of the Act. If the interpretation of the Learned Single Judge as regards the scope and applicability of the Notification is held to be correct then the Notification is to be declared unconstitutional and ultra-vires the provisions of the Constitution of India and provisions of the Territorial Waters Act itself.

(xiv) The Learned Single Judge failed to appreciate that the State of Kerala has wrongly relied upon Section 3 to

argue that it supports extra-territorial application of the IPC. This contention is misplaced, as is evident from a plain reading of the provision itself. Section 3 provides only that when *any other Indian Law* provides for extra-territorial operation, an offence committed under such statute would, by deeming fiction, be dealt with under the Code as if it was committed within India. It is apparent therefore that the liability to be tried for the offence committed outside India arises under a distinct law that has expressly been given extra-territorial effect and not under the IPC, which only applies as a supplement to such *lex specialis*. As is evident from the observations of the Hon'ble Supreme Court in *Aban Offshore*, there is clear evidence of Parliament's intention to *refrain* from giving extra-territorial operation to Section 7 of the Territorial Waters Act as a whole. Section 3 of the IPC cannot be read as overriding such Parliamentary intent.

(xv) That the fact that Section 188A was not added to the Cr. PC further demonstrates that the said Notification had to be restrictively construed as provided in the clarificatory memorandum of the Respondent No. 1.

(xvi) The Learned Single Judge failed to appreciate that the Continental Shelf, Exclusive Economic Zone or other

Maritime Zones specified in Article 297 of the Constitution are merely zones and not the territory of India or of the State of Kerala. As such, construing them, i.e. the said zones as part of the territory of India under Sections 7 (7) and 5 (5) of the Territorial Waters Act by creating a statutory legal fiction is ultra vires Article 297 and 1 (3) of the Constitution and would tantamount to colorable exercise of power and contrary to the scheme of the Constitution and is invalid and void. In view thereof, the zones or any parts thereof do not comprise the territory of the State of Kerala. The High Court as such fell in grave error by treating the territorial waters, the Contiguous Zone of India, the Continental shelf and the exclusive economic zone as the territory of Respondent No. 3.

(xvii) That the Learned Single Judge failed to appreciate that neither the Union of India nor the State of Kerala had in their Counter Affidavit/Statement/Reply filed before the High Court of Kerala dealt with SUA or the Notification No. S.O. 671 (E) dated August 27, 1981. The Union of India had filed the Statement of the Coast Guard along with the purported Report which was otherwise specifically incorrect. The Union of India suppressed from the High Court of Kerala concerning the clarification on Notification No. S.O. 671 (E) dated

August 27, 1981 issued by the Ministry of Home and the Ministry of External Affairs after the signing of the UNCLOS by India. The said clarification clearly runs counter to the interpretation of Notification given by the Learned Single Judge and on this ground alone the said Interpretation is said to be rejected.

F. That the assertion of jurisdiction on the basis of the Passive Nationality, Objective Territorial or 'Effective' principles must necessarily defer to the primacy of flag state jurisdiction as is well established in customary international law and under the UNCLOS.

G. That the impugned order erroneously fails to consider the import of Article 27 of the UNCLOS inasmuch as this provision demonstrates that even in respect of the territorial waters, a zone in respect of which it enjoys sovereignty, the exercise of criminal jurisdiction of the coastal state ordinarily defers to the primacy of jurisdiction of the flag state, which principle therefore applies with greater force to the other maritime zones, in respect of which the coastal state only exercises limited sovereign rights.

H. That the Learned Single Judge erroneously placed emphasis on the *Lotus* decision to find jurisdiction on the basis of the 'Effective' principle despite acknowledging that the same was no longer good law in light of the provisions of the UNCLOS.

I. That the impugned judgment errs in reliance on Section 179 of the Criminal Procedure Code and the 'effective principle' of jurisdiction inasmuch as both the impugned act and the consequence ensuing from the same have both admittedly taken place beyond the jurisdiction of the Court that is now trying the alleged offences

J. That the impugned judgment errs in giving extra-territorial effect to the provisions of the IPC despite the concession of counsel appearing on behalf of the State of Kerala that Section 4 of the IPC dealing with the extension of the Code to extra-territorial offences has no application to the case at hand.

K. That the provisions of Section 3 of Indian Penal Code cannot be invoked in relation to the alleged incident of protective action for sustaining the present prosecution in the Court in Kerala and the registration of F.I.R and proceeding thereunder by the Kerala State Police since the said provision does not in itself grant extraterritorial application to the provisions of the code but only gives effect to provisions for extra-territorial application contained in another Indian Law.

L. That, without prejudice to the above, even if the provisions of Section 3 of IPC can be held to apply to the CZ/EEZ this

provision can have no application to the conduct of a foreign national on board a ship flying a foreign flag and taking place beyond the territorial waters of India.

M. That Section 2 of the IPC dealing with punishment of offences committed within India cannot have any application to the present case, wherein the alleged offences admittedly took place beyond the territorial waters of India. Accordingly, the provisions of Section 179 CrPC will also not be applicable to the present case.

N. Because the executive power of the State of Kerala (Respondent No. 2) is vested within its territory in terms of Articles 153 and 154 of the Constitution. Since the territorial waters, Contiguous Zone of India, Continental shelf, exclusive economic zone or other maritime zones within the ambit of Article 297 of the Constitution do not comprise the territory of Respondent No. 3. The Kerala State, the prosecution and arrest of Petitioners No. 1 and 2 by the Kerala State Police within any of the said zones is without the authority of law and without their jurisdiction, a nullity and non est and in grave violation of Articles 21 and 14 of the Constitution.

The Learned Single Judge however failed to consider any of the above submissions raised in the Writ Petition and the judgment suffers from non consideration of the pleas of the

Petitioners and an erroneous approach adopted by the Leaned Single Judge.

Wrongful Interpretation Application of SUA

O. That the reasoning adopted by the Learned Single Judge for justifying the assumption of jurisdiction of the Respondent over the incident and the Prosecution of Petitioner No. 1 & 2, namely, the applicability of SUA is also clearly erroneous and untenable for the following reasons:

(i) SUA had not been invoked by the Petitioners during the pendency of the Petition nor was it pleaded in the two Written Replies filed by the State of Kerala.

(ii) Importantly, the Learned Single Judge has misconstrued and misinterpreted the provisions of SUA and has failed to deal with the submission of the Petitioners in this regard. It is clear from the reading of Section 4 and 12 of SUA that any arrest, investigation and prosecution under SUA can only be done with the previous sanction of the Central Government by gazetted officer of the Coast Guard or any gazetted officer of the Central Government, notified by the Central Government in the official gazette. The Learned Single Judge has failed to deal with the provisions of Section 4 and 12 of the said Act thereby vitiating his

conclusions on the interpretation of the Act. Section 4 of SUA which mandates that any investigation under SUA can only be done by any gazetted officer of the Coast Guard or any gazetted officer of the Central Government clearly militates against the conclusion of the Learned Single Judge that there can be subsequent notification or sanction by the Central Government. Further the Learned Single Judge failed to deal with Section 12 of the said Act which requires previous sanction by the Central Government before initiation of prosecution. Admittedly, till today the Central Government has neither notified any officer of the State to investigate the alleged incident under SUA nor has given any sanction for prosecution under SUA. Therefore, the invocation of SUA to justify assumption of jurisdiction by the Respondents over the alleged incident is manifestly erroneous and the conclusion of the Learned Single Judge is erroneous in law.

(iii) That the Learned Single Judge completely failed to appreciate that SUA had been enacted by the Parliament to give effect to the International Maritime Organization Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the safety of fixed platforms located on the Continental

Shelf and for matters connected therewith (**"SUA Convention"**) with a view to prevent acts of terrorism at sea that threatens the security of passengers, the crew and the safety of the ships. In fact, the Petitioner No. 1 & 2 were part of a team of Military detachment who had been deputed by the Italian Defence Ministry and Italian Navy to be onboard Enrica Lexie to protect the vessel against piracy. In fact, as per the Law of Parliament of the Republic of Italy the said Petitioners and the other team members were designated as the Law Enforcement Officers while on duty.

(iv) The Learned Single Judge has also disregarded the provisions of Section 3(8) of SUA which make the alleged acts and prosecution of the Petitioners under SUA without jurisdiction.

(v) The assertion of jurisdiction under the SUA over the impugned conduct must necessarily be predicated on the conduct answering the description of terrorist activity. Conduct of foreign nationals forming part of the military forces of a foreign nation, or at the very least, adopted as its own by a friendly nation cannot on any legal standard be described by terrorist activity. The preliminary jurisdictional requirement for assertion of

jurisdiction under the SUA is therefore not satisfied in the present case.

Failure to Recognize and Apply Customary International Laws Including Principles of Sovereign and Functional Immunity.

P. That without prejudice to the foregoing, the Learned Single Judge has failed to deal with the submissions of the Petitioners with regard to the fact that even otherwise in view of the well settled principle of International law as recognized by India, the Petitioners had sovereign immunity and functional immunity from prosecution in India. The Learned Single Judge completely ignored the relevant documents in this regard as well as submissions of Petitioners, which are also being raised hereinafter.

Q. The learned Single Judge failed to acknowledge and appreciate that the principle of jurisdictional immunity of State organs for acts committed in the exercise of their functions is well rooted in international law, and is considered a fundamental principle of customary law. The learned Single Judge failed to appreciate that apart from the earliest formulation of this principle by the US Supreme Court in the case of *"The Schooner Exchange vs. Mcfaddon, 1821"*, a recent clear expression of this principle is manifested in the judgment of the Appeals Chamber of the International

Tribunal for the former Yugoslavia in the case of *Prosecutor Vs. Blaskic (October 29, 1997) IT-95-14,* which states that customary international law protects the internal organization of each sovereign state: it leaves to each sovereign state to determine its internal structure and in particular to designate individuals acting as state agents or organs. Each sovereign state has the right to issue instructions to its organ, both those operating at the internal level and those operating in the field of international relations and also to provide for sanction or other remedies in case of non compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions." This judgment manifests the well established general rule of international law with regard to the sovereign equality of states (par in parem non habet imperium).

R. The Learned Single Judge also failed to appreciate that the above principle has also been upheld by numerous prominent jurists (Bothe, Akerhurst, Cassese) and in the judgment of the International Court of Justice (ICJ) in the case related to *"Certain Questions of Mutual Assistance in Criminal Matters (Djibuoti vs. France)" of June 4, 2008.* The learned Single Judge also failed to appreciate the ICJ

judgment in *Germany vs. Italy of February 3, 2012* wherein the ICJ has reiterated the principle of state immunity from foreign jurisdiction based on established customary international law. While this later pronouncement relates to state jurisdictional immunity, it is based on the principle which also applies to State organs in their official capacity, that respect for state sovereignty is paramount in providing for exemption from foreign jurisdiction. The opinions of the House of Lords in the cases of *Holland vs. Lampen-Wolfe (2000) and Jones vs. Saudi Arabia and Colonel Abu Aziz (2006)* are further precedents of the existence of the principle of functional and sovereign immunity in current international laws.

The International Law Commission in its reports including on the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction" has also widely recognized the existence of the principle of functional immunity of state officials, at all levels, and not only officials that enjoy high positions in the State administration. Reasons for compliance with the sovereign equality of States and non interference in their domestic affairs, of stability in international relations and effective discharge by each state of its essential functions have been recognized in support of this principle.

S. The Learned Single Judge erroneously failed to deal with the issue of sovereign and functional immunity on untenable reasoning that this was a matter of evidence and that the Petitioners had placed on records only the Identity Cards in support of their contentions. The Learned Single Judge failed to deal with several documents filed on record by the Petitioners including the Act of Parliament of Italy - Law Decree No. 107 dated July 12, 2011 converted into Law No. 130 on August 2, 2011 pertaining to deployment of Military Officers on Commercial Vessels, the Military detachment Orders, Note Verbale, etc. in support of contentions of Sovereign Immunity and Functional Immunity. The learned Single Judge has completely erred in concluding in paragraph 48 of the impugned judgment that "*the extent of immunity depends upon the circumstances in which the forces are admitted by the territorial State, and in particular upon the absence or presence of any express agreement between the host and the sending State regulating the terms and conditions governing the entry of forces in the coastal territory*". The Learned Single Judge failed to appreciate that in accordance with well settled principles of customary international law, no agreement between states (such as Status of Forces Agreement) is required to apply the principles of functional and sovereign immunity of state

organs which principles are binding on all members of international community.

T. That the interpretation of functional immunity in effect deprives the privilege extended by one sovereign nation to another of all legal content inasmuch as it finds that such immunity is displaced simply by a characterization of the impugned conduct as prima facie criminal in nature

U. The Learned Single Judge has selectively relied on Paragraph 1 of the Protocol Agreement between the Ministry of Defence-Naval Staff and the Italian Shipowners' Confederation (Confitarma) while ignoring all other related provision of the agreement which establishes that the Agreement was not a private agreement and that the alleged action of the Petitioners while in discharge of their duties were Acts In Jure Imperii and not Acta Jure Gestionis. It is submitted that the actions of Petitioner No. 1 and 2 in the facts and circumstances are clearly pursuant to the laws of the Parliament of Italy and the Military Detachment Orders placed on record by the Petitioners. Such actions cannot be by any stretch of imagination referred to as either personal acts or acts of the Republic of Italy which are in the nature of Acta Gestionis or private commercial acts of the Republic of Italy. Such a proposition is patently untenable in view of the documents and law placed by the Petitioners on record. As

per Sub-Paragraph 2 of Article 5 of Government Law Decree 107/2011 (later converted by Law of Parliament of Italy No. 130 of August 2, 2011) "Military personnel which is part of the Military Protection Detachment referred under comma 1, operates in compliance to the directives and the rules of engagement issued by the Ministry of Defence. The Commandant of each team, which has the exclusive responsibility for the military response to piracy, and the subordinate personnel are designated respectively as Law Enforcement Officers and Law Enforcement Auxiliaries in respect of the crimes listed in articles 1135 and 1136 of the Navigation Code and all those crimes linked to the former ones under the provision of Article 12 of the Criminal Procedure Code".

In view of the above mentioned norms, it is evident that:

a. The Petitioner No. 1 and Petitioner No. 2 were acting in accordance with the guidance provided by the Rules of Engagement, issued by the Ministry of Defence. The Rules of Engagement are governmental directives which delineate the circumstances and the limitations within which the use of military force is authorized. The same provision established the exclusive responsibility of the Team Leader for the "military response to piracy" whereas "military" is to be construed in a very narrow

sense of use of military means by personnel belonging to "regular armed forces". Therefore, the ship-owner and the commander of the ship, as private parties, did not have any possibility to interfere on the rules of engagement and on their concrete application;

b. The Petitioner No. 1 and Petitioner No. 2 were discharging their official duties which are directly attributable to the State of Italy. Accordingly, from the subjective qualification of Military Protection Detachment components as governmental official agents it derives the exemption of the jurisdiction or the exemption from the penal procedures and from the exercise of trial coercive powers by Indian Courts.

c. The mere fact that the ship owners were refunding incremental costs to the Republic of Italy for the deployment of its naval officials on commercial vessels does not in any manner render the nature of duties of the Italian military officials on board Italian Ships a commercial transaction. The functions being discharged were, notwithstanding the partial refund of costs, sovereign functions. Further, the Military Protection Detachment while embarked on board of a merchant vessel is always subject to and under the uninterrupted military chain of command.

d. In any event, the characterization of these actions has be on the basis of Italian law, and not on general notions of what may or may not be a commercial transaction. The Italian law provides for the deployment of military personnel, and also provides for the reimbursement of costs. The characterization of these as a commercial transaction is a veiled criticism of the military personnel in that they have been equated with mercenaries for hire. This is it submitted, constitutes disregarding the legal system of a friendly Republic and is contrary to the principles of pubic International law.

V. The Learned Single Judge also failed to deal with the documents on records which establish the claim of the Petitioner No. 1 and 2 of the Sovereign Immunity and Functional Immunity. The conclusion in paragraph 48 of the Judgment is clearly unfounded. The entire approach of the Learned Single Judge is erroneous and the impugned judgment is erroneous in law.

W. Learned Single Judge also failed to deal with the Judgment of the House of Lords in the Jones Case as well as the case of Germany vs. Italy decided by the International Court of Justice on February 3, 2012 cited before the Learned Single Judge as well as the provisions of draft Articles on State

Responsibility and the United Nations Convention on Jurisdictional Immunities of States and Their Property.

X. That the Learned Single Judge has wrongly referred to the "Effects Principle" by relying on the Judgment of (1973(1) AER 940) "Dooth Case". In the said Judgment, the House of Lords did not really invoke the "Effects Principle" as there was no such physical effect. The offence in that case being inchoate and no overt act was affected in England. The said case really dealt with the issue of conspiracy and is clearly not relevant to the issues raised herein. The Judgment of the Learned Single Judge is contradictory and erroneous. The Learned Single Judge in earlier portion of his Judgment holds that Section 4 of IPC is inapplicable and at the same time purports to apply Objective Territoriality Principle by referring to generic, indirect, unsubstantiated social consequences of the offence.

Y. The Learned Single Judge has erred in relying on purported state practices for asserting jurisdiction over the Contiguous Zone. The reliance of the Effects Principle and the purported State Practice for assuming jurisdiction in Contiguous Zone is contrary to law both domestic and International. Reference to the United States as a reflection of state practice is erroneous as the US is one of the few remaining nations yet to ratify the UNCLOS. Further, reliance by the Learned Single

Judge on the decision of the US Court in Manchester v Massachusetts (1891) 139 U.S. 240 is erroneous as the case is no way relevant to the issues raised in the present case. The US Maritime Drug Enforcement Act is not at all relevant to the instant case and infact the said statute will not be applicable to Vessels in expeditious lateral transit. Similarly, the reliance on Article 13 of Law of Sea enacted by the People's Republic of China's Law on Territorial Sea and the Contiguous Zone is wholly erroneous and inapplicable. In fact Article 5 of the said Act reads as under

> *"The People's Republic of China has the right to exercise control in the contiguous zone to prevent and impose penalties for activities infringing the laws or regulations concerning security, the customs, finance, sanitation or entry and exit control within its land territory, internal waters or territorial seas."*

The conclusion of the Learned Single Judge that the Petitioner No. 1 and 2 were under the command of the Captain of the vessel is wholly erroneous, fallacious and contrary to law. It was an undisputed position that the Military Protection Detachment Unit was not under the command of the Captain. The conclusion based on this erroneous assumption is also untenable. The Judgment is based on speculation and conjectures and is contrary to facts and law. Infact, the Order of the Supreme Court in SLP 11942 of 2012

it was noted that the Master of the Ship had no command or control over the Military Detachment Unit. The conclusions and findings of the Learned Single Judge are outside the record.

Z. The said provision is clearly distinct from the provisions of the Territorial Waters Act or UNCLOS and the Learned Single Judge has completely ignored the said provisions. The Security of India referred to in the Territorial Waters Act can only be in reference to Section 121 to130 of the IPC.

AA. The Learned Single Judge failed to appreciate that the Republic of Italy has taken responsibility for the alleged incident and for any alleged acts done by its officials during discharge of their official duties. The Courts in India could not then try the Petitioner No. 1 and Petitioner No. 2 for such alleged acts which are attributable to the State of Italy and for which the Republic of Italy has claimed sovereign and functional immunity and bringing the Petitioners No. 1 and 2 to trial for official acts of Petitioner No. 3 tantamounts to bringing a foreign sovereign state to trial in violation of sovereign equality of states.

BB. The Learned Single Judge failed to appreciate the correct legal regime applicable to such alleged incidents, and by an illegal application of India's domestic penal laws to what is at best an incident between two sovereign states, i.e., the

Republic of India and the Republic of Italy. It is submitted that to the extent a legal dispute can be said to exist in the present circumstances, it is clearly one that is between two nation states and accordingly is to be resolved exclusively with reference to applicable principles of Public International Law.

CC. The Learned Single Judge failed to appreciate the following admitted facts:

(i) The Vessel in which the Petitioners No. 1 and 2 were present was admittedly an Italian vessel flying the Italian flag;

(ii) The Petitioner No. 1 and 2 are members of the armed forces of Italy and are serving on the Vessel pursuant to a law of the Republic of Italy, and were acting in discharge of their duties as such members of the Italian armed forces.

(iii) The Italian Government is taking full responsibility for the alleged incident, has asserted that Petitioner 1 and 2 were acting as members of the Italian armed force, and

(iv) The Italian Government has asserted that if as alleged the Petitioner Nos. 1 and 2 acted in a manner contrary

to the rules or used excess force or used force unnecessarily, their conduct is to be judged in accordance with Italian law, and thus any trial for any alleged violation can only be in accordance with Italian law, and in Municipal courts of Italy.

In view thereof, the Petitioners enjoy functional and sovereign immunity according to well settled and recognized principles of International law from being prosecuted in any other State except the State of Italy where the necessary proceedings against Petitioner No. 1 and 2 have already been initiated.

DD. The Learned Single Judge has failed to appreciate that the present dispute properly cast, relates to determination of the international legal responsibility (if any) of the Republic of Italy for the acts of a member of its armed forces, which acts are in public international law regarded as sovereign acts attributable to Italy. Further, the said acts have in any event been adopted by the Republic of Italy through the stand taken by it in the Writ Petition, as having been undertaken in the course of discharge of public functions. It is submitted that in light of the same, the inescapable conclusion as a matter of Public International Law is that the conduct in question is viewed not as that involving state, rather than individual action. The criminal proceedings against Petitioner Nos. 1 and 2 therefore amount effectively to subjecting the

Republic of Italy to the domestic criminal law of India, which exercise is contrary to well established canons of international law as well as being contrary to the constitutional mandate enshrined in Article 51(c) of the Constitution of India to "foster respect for international law and treaty obligations".

EE. The Learned Single Judge has failed to appreciate that (a) Petitioners 1 and 2 were members of the armed forces of Italy; (b) the Republic of Italy, represented in the present proceedings through its Consul General has acknowledged that the alleged conduct in question was undertaken in discharge of sovereign public functions; (c) the alleged conduct of Petitioners is therefore, under international law, directly attributable to the Republic of Italy and is regarded as being an act of the state itself and therefore (d) the present dispute would necessarily have to be brought by the Republic of India represented by the Union Government against the Republic of Italy before the appropriate forum and relates to international legal responsibility of the latter rather than violation of the domestic laws of either country.

FF. The Learned Single Judge has failed to appreciate that as far as the individual criminal responsibility of Petitioners 1 and 2 is concerned, the same is to be determined exclusively with reference to the domestic criminal law of Italy. The Learned

Single Judge failed to appreciate that Petitioner No. 3 had reiterated its commitment to ensure that the conduct of Petitioners 1 and 2 is subject to the full rigour of the criminal justice system of the Republic of Italy.

GG. The Learned Single Judge erred in not appreciating that the characterization of an act as sovereign in nature in the first instance requires that no proceedings be initiated before a domestic court of another country calling into question the legality of the same under the domestic legal system of the other nation. However, upon such proceedings being initiated in violation of this well-settled position, the foreign sovereign is entitled as a matter of international law to appear in the said proceedings for the limited purpose of claiming functional immunity in respect of the said conduct.

HH. That the Learned Single Judge completely ignored and failed to appreciate the submissions and issues before it relating to sovereign immunity and functional immunity of the Petitioner No. 1 and 2 from domestic Court in India. The Learned Single Judge failed to appreciate that the issue is no longer *res integra* in light of the recent decision of the International Court of Justice in *Germany v. Italy* (Judgment of 3rd February 2012), where the ICJ observed that the rule of state immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of

states". This conclusion was arrived at by the Court following extensive analysis of the United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted by the United Nations General Assembly on 2 December 2004).

II. The Learned Single Judge failed to appreciate that the Petitioners No. 1 and 2 being serving members of Italian Military Navy were invited vide e-mail dated February 15, 2012 to Cochin Port to assist and identify suspected pirates who had been apprehended. Therefore, on a well settled principles of customary International law, a Sovereign's army having being invited on its territory, the inviting State waives all its jurisdiction over the Army and cannot be subject to prosecute in its Municipal Courts under Municipal Laws. Further, this principle would apply with greater force in view of the Petitioners and other Italian Navy contingent members being asked to come to Cochin Port after the alleged incident. The Learned Single Judge also failed to appreciate that the Respondents did not follow due process to inquire into the alleged incident occurring in International waters – by approaching Italian authorities – and by admittedly tricking and luring the Vessel and Petitioners 1 and 2 to come into Indian territorial waters, Respondents 1 and 2 abused due process of law and accordingly prosecution of Petitioner No.

1 and 2 based on such acts of bad faith and allurement can not be allowed to continue.

JJ. The Learned Single Judge failed to appreciate the provisions of United Nations Convention on Jurisdictional Immunities of States and Their Property. The following provisions of the said Convention are now an accepted part of customary international law and have an immediate bearing on the proceedings:

Article 2

Use of terms

....

(b) "State" means:

(i) the State and its various organs of government;

(ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;

(iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;

(iv) representatives of the State acting in that capacity;

Article 5

State Immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention

Article 6

Modalities for giving effect to state immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(a) is named as a party to that proceeding; or

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

KK. That the Learned Single Judge completely ignored the fact that upon the Republic of Italy appearing in the impugned proceedings and claiming functional immunity of Petitioner No. 1 and 2 from domestic criminal proceedings in respect of sovereign acts committed by members of its armed forces, the Hon'ble Court was obligated as a matter of Indian Law to give effect to the immunity enjoyed under international law by the Republic of Italy. Criminal proceedings against Petitioners 1 and 2, even to the extent they can be regarded as having been initiated in accordance with law (contrary to the established position of law stated above), could not have be prosecuted any further upon Petitioner 3 appearing before the Court and asserting its functional immunity in respect of the impugned conduct. The continued detention of Petitioners 1 and 2 is therefore without authority of law. That the entire investigation and arrest of the Petitioners was without authority of law and in any event could not have been sustained in law.

LL. That the Learned Single Judge failed to appreciate and did not consider the fact that the Republic of Italy has specifically enacted a law (Official Bulletin No. 181 of 5th August 2011 to the Writ Petition filed by the Petitioners) pursuant to which its military personnel are placed on commercial vessels in exercise of the sovereign functions of the Republic of Italy. The fact that some part of the monetary burden is shared by

the private operators does not detract from the express acknowledgement in Article 5(2) of the abovementioned law that the military personnel in question function under the authority of Italian Law and retain their status as members of the Military Protection Detachment of the regular armed forces of the Republic of Italy. It is clear upon a perusal of the said law that Petitioners 1 and 2 at the relevant time functioned as 'organs' of the Republic of Italy, or at the very least, exercised elements of governmental authority on behalf of the same. It is therefore undeniable that the conduct in question, is, in law, not that of an individual, but that of a foreign nation. The detachment officers were to be treated as Law enforcement officers while on board Italian vessels as per the law of Parliament of Italy.

MM. That the Learned Single Judge failed to appreciate and note the provisions of United Nations Convention on the Responsibility of States for Internationally Wrongful Acts (adopted by the General Assembly of the United Nations in Resolution 56/83 of 12 December 2001). The International Legal Responsibility of a state under international law is determined in accordance with the said Articles which are acknowledged to be principles of customary international law, which, as has been held by the Hon'ble Supreme Court of India in the cases of PUCL v. Union of India (1997) 3 SCC 433 and Vellore Citizens Welfare Forum v. Union of India

(1996) 5 SCC 647, are deemed to be part of the domestic law absent any indication to the contrary in any statute. It is submitted that no domestic law detracts from the clear delineation of disputes involving a determination of international legal responsibility from those to which India may rightfully exercise her domestic jurisdiction. The Articles on State Responsibility are therefore, to be given full effect in determining whether the alleged acts in question are attributable to the Republic of Italy.

NN. That the Learned Single Judge failed to appreciate that it common ground between the Parties that Petitioners 1 and 2 were present on board the vessel M.V. 'Enrica Lexie' as part of the Military Protection Detachment (Nucleo Military di Protezione) of the Italian Military Navy. The stationing of the Petitioners on board the Vessel was in pursuance of a domestic law enacted Italy's international obligations under Resolutions 1970 (2011) and 1973 (2011) of the Security Council of the United Nations and were aimed at combating the scourge of piracy in a shipping channel that is particularly vulnerable to this menace. The Petitioner Nos. 1 and 2 are highly decorated officials with extensive maritime experience and were officially regarded as being on active duty during the impugned acts. It is therefore submitted that all conduct of Petitioners 1 and 2 is, ipso facto, regarded as a sovereign act of a foreign nation for the purposes of both domestic and

international law and accordingly cannot be made subject to the domestic law regime of India. The Learned Single Judge failed to appreciate the qualifications, training, experience decorations, honours and awards and the mandate of Petitioners 1 and 2 and made unwarranted findings with regard to their culpability which while being outside the scope of the Writ Petition also attempts to equate them with common criminals.

OO. That the Learned Single Judge completely failed to appreciate that the interpretation of the provisions of the IPC which, it is submitted, are really irrelevant for the reason that as a matter of public international law, Indian domestic law cannot apply to the acts of a foreign sovereign. By the theory of attribution, the acts of Petitioners 1 and 2 are acts of the Republic of Italy, and clearly no Indian domestic law applies to the Republic of Italy. This is so afortiori when the acts have been allegedly committed in international waters beyond India's acknowledged sovereignty.

PP. The Hon'ble High Court failed to appreciate that the Division Bench of Calcutta High Court has observed while applying International Law Principles that any foreign state cannot be prosecuted for criminal offence without its consent and enjoys immunity in respect thereof. Foreign States under

customary international law has held to include agents and representatives acting on its behalf.

QQ. That the Learned Single Judge in any event failed to appreciate that in view of the fact that the alleged incident fell in the domain of the Public International Law, Indian Laws could not be made applicable to the foreign Acts of Republic of Italy.

RR. That the Learned Single Judge failed to appreciate and consider that the documents on record which clearly establish that the State of Italy had claimed sovereign and functional immunity in respect of alleged act of Petitioner No. 1 and 2 and therefore the State of Italy has taken responsibility for the alleged acts of its Marines on official duty. The Learned Single Judge ought to have quashed all the proceedings thereunder. The Learned Single Judge has completely erred in not appreciating and considering the documents on record and submissions in relation to sovereign immunity of Petitioner No. 1 and Petitioner No. 2.

SS. Because the Petitioners' grounds of functional immunity and sovereign immunity were wrongly and arbitrarily rejected by Learned Single Judge after he wrongly disregarded the submissions of the Petitioners which were not only pleaded in the Writ Petition but were also argued in the hearing that the Petitioner No. 1 and 2 were acting in their official capacity

and were in transit from Galle to Djibouti as Italian Military in transit and therefore under the provisions of UNCLOS as well as the principles recognized by international laws were subject to the jurisdiction of the flag state of the vessel or the jurisdiction of the State of which the relevant person is subject of i.e. Italian jurisdiction and that since the Petitioner No. 1 and 2 are Italian Navy military personnel and were on official duty as Naval Officials as part of the Italian Military Navy detachment which had been directed by the Ministry of Defense to board the Vessel which was flying an Italian Flag for the protection of the Vessel, they also enjoyed functional immunity on principles of international law from being tried for any offence related to their official duties and alleged to be committed during the performance of official duties by the state of any other jurisdiction except the courts or military tribunal of Italy.

Factual Findings, Observations and Conclusions By The Learned Single Judge beyond the scope of the Petition.

TT. That considerations of international comity and sovereign equality constrain a domestic court from entering adverse findings as to the bona fides of a responsible foreign sovereign appearing before it and also restrain observations on the conduct of official investigations or proceedings taking place in foreign nations. Observations in the impugned

judgment as to the bona fides of the Republic of Italy and the conduct of the ongoing criminal investigation relating to the facts in issue are mere conjecture and the casting of unreasonable and unsupported aspersions on a friendly co-equal sovereign. That such observations have influenced the substantive decision on the merits of the case renders the same liable to be set aside.

UU. That the observations of the Learned Single Judge, notwithstanding caveats, come close to being findings of facts and determinations in law that bear directly upon the ongoing criminal trial before the Sessions Judge and as such adversely affect the right of Petitioners 1 and 2 to a fair trial before a court properly seized of the merits of the dispute

VV. That the Learned Single Judge misdirected himself in giving factual conclusions relating to the alleged incident when the same were beyond the scope of the Writ Petition no. 4542 of 2012 which challenged only the Jurisdiction of the Respondents to initiate the criminal proceedings and prosecution and alternately raised the issue of sovereign immunity and functional immunity of the Petitioner No. 1 and 2 from prosecution in India for the alleged incident. This being the scope of the Writ Petition, the Learned Single Judge was only required to determine whether in view of the facts and circumstances of the case, the Petitioners were

entitled to the sovereign immunity under International laws as recognized by India and whether even under the provisions of the IPC and other relevant statutes, Indian authorities or Indian Courts had jurisdiction over the alleged crime, when the same took place outside the territory and the territorial waters of India. The Learned Single Judge while dealing with these issues has recorded findings and has come to a conclusion regarding alleged guilt of the Petitioner No.1 and 2 even when the same was beyond the scope of the Writ Petition, was never argued by the Parties and in any event could not have been made when the investigation at that stage was still at its infancy. The factual conclusions of the Learned Single Judge and the alleged acts ascribed to the Petitioner No. 1 and 2 are erroneous and in any event, beyond the scope of the Writ Petition.

WW. Without prejudice to the fact that the above findings were outside the scope of the Writ Petition, the Learned Single Judge failed to take judicial notice of the scourge of piracy infesting international waters and severely affecting sovereign nations including India and Italy and the fact that Petitioners 1 and 2 acted bonafide in accordance with internationally accepted best practices to avert a perceived pirate attack to defend the Vessel, its crew and the maritime interest of the Republic of Italy and while doing so were acting in their capacity of law enforcement officers of the

Republic of Italy. The Learned Single Judge did not appreciate that even otherwise the alleged acts of the Petitioners 1 and 2 would not lead to their conviction for the alleged offences and in view of the law settled by this Hon'ble Court no purpose would have been served in continuing the criminal proceedings.

XX. The Learned Single Judge also failed to appreciate that the alleged acts of Petitioners 1 and 2 were Acts of State having complete legislative sanction of Petitioner No. 3 that were performed to defend and protect the maritime interests of Petitioner No. 3.

YY. The Learned Single Judge erroneously relied on a Statement filed by the Coast Guard not accompanied by an Affidavit to come to factual conclusions virtually prejudging the Petitioner No. 1 and 2 as guilty of the brutal act of murder. The entire approach of the Learned Single Judge in this regard is erroneous. The Learned Single Judge in the Judgment holds and concludes that the Petitioner No. 1 and 2 have mercilessly and without any provocation brutally killed the two persons. As mentioned above, such finding is not only outside the scope but is contrary to the records and without any concrete evidence in this behalf. These findings are also contrary to the Notification MS Notice No. 7 of 2012 of the Ministry of Shipping dated March 7, 2012 and to the e-mail of

MRCC which were placed on record. It is also strange that such findings are given when the Chargesheet notes that all the persons onboard, besides the two persons killed, were all sleeping at the time of the incident and admittedly there were no 'eye witnesses to the alleged incident. Therefore the Judgment is erroneous as it is based on unsubstantiated replies filed by the Respondent.

ZZ. That the conclusion of the Learned Single Judge that the shooting was not done to avert an attempted piracy attack and the plea was raised as a defence against the offence of murder is erroneous and untenable.

AAA. That the conclusions of the Learned Single Judge are legally and factually untenable. As stated hereinabove, the conclusion made by the Learned Single Judge were beyond the scope of the Petition, based on incorrect facts and contrary to records. That the Indian Coast is free from piracy is contrary to the Notification MS Notice No. 7 of 2012 issued by the Ministry of Shipping which itself refers to all areas outside the territorial waters ending at 12 nautical miles as High Risk Area's, in the context of piracy threats. The conclusion that the persons were mercilessly attacked in broad daylight without any prior warning or adherence to any prescribed procedure is without any basis and based on incorrect purported report of the Coast Guard. In the admitted

absence of eye witnesses, such conclusions are without any factual basis. The conclusion that there was no attempted piracy attack on the Italian ship is contrary to the e-mail dated February 15, 2012 of the Respondent No.1 and the Notification MS Notice No. 7 of 2012 of Ministry of Shipping dated March 7, 2012. All the factual conclusions are clearly untenable and contrary to record apart from being unwarranted in view of the scope of the Petition filed by the Petitioners.

BBB. That the observations and conclusions of the Learned Single Judge that the pleadings are not sufficient enough in the Petition to come to a conclusion that shooting down the persons on board the fishing boat was done in order to avert an attempted piracy attack is misconceived. Firstly, the Petition only raised legal issues as regards Jurisdiction which have been erroneously repelled on specious reasoning by the Learned Single Judge. Secondly, the findings are contrary to the documents on record. In this regard, the Learned Single Judge has completely ignored the email dated February 15, 2012 wherein the Respondents themselves treated this incident as an attempted piracy incident. The Learned Single Judge has also ignored the statutory Notification MS Notice No. 7 of 2012 issued by the Ministry of Shipping dated March 7, 2012 which had been brought to the attention of the Learned Single Judge wherein

the Director General of Shipping has also concluded that the Navy Personnel on board the Vessel mistook the persons as pirates. The Learned Single Judge on the basis of unsubstantiated allegations of the Respondents has concluded that the Petitioners had fired unprovoked at the fishing boat which was alleged to be 200 meters away from the vessel and that any piracy attack could have been avoided without any force. Such conclusions are totally unwarranted. The issues in the Petition were relating to Jurisdiction and not whether the Petitioners No. 1 and 2 had prima facie committed the alleged acts attributed to them.

CCC. That the Learned Single Judge has erred in relying on the IMO Guidelines MSC .1/Circ.1405/Rev.1 which only relates to guidelines for private armed guards on commercial vessels. The Learned Single Judge has not dealt with the IMO Best Management Practices for Protection against Somalia Based Piracy MSC.1/Circ. 1339 dated September 14, 2011, which is also mentioned in the footnote relied upon by the IMO Guidelines which at Clause 8.15 states as under:

> *"Subject to risk analysis, careful planning and agreements the provision of Military Vessel Protection Detachments (VPDs) deployed to protect vulnerable shipping is the recommended option when considering armed guards."*

The MSC (Maritime Security Committee) of IMO had previously expressed its position as to the possibility to embark military personnel or law enforcement officers in resolution MSC 86, and IMO has recommended deployment of Military Detachment by States to protect vulnerable shipping. The detachments of Military Personnel on board merchant vessels are not covered by guidelines issued by the IMO. This is due to the fact that Military Personnel are placed under an uninterrupted military chain of command and are not answerable to the Master of a Merchant Vessels. This is true also under the Italian Constitution where the Supreme Command is vested in the President of the Italian Republic and the highest disciplinary authority is the Minister of Defense and military personnel are answerable only to a military Command.

Therefore clearly the said Guidelines are not applicable to Military Detachment of States on Commercial Vessels where such conduct is attributable to the Republic of Italy or the Military Navy concerned. The Learned Single Judge has completely ignored the submissions made regarding inapplicability of such guidelines which are only for Private guards contracted by private ships. The factual conclusions based on such Guidelines are therefore clearly erroneous and beyond the scope of the Petition.

DDD. That the Learned Single Judge's finding based on the PMSC guidelines that the Italian Marines could have monitored the activities of the persons through their telescope and the firing by them was unprovoked or that the firing is nothing but a brutal killing of two defenceless persons onboard the boat and that the piracy attempt could have been averted without having to resort to force are patently erroneous. In any event, the question was not the legality in Italian law of the actions of the military personnel of the Italian Republic, but the jurisdiction to hold them to account for their actions.

EEE. That the observations of the Learned Single Judge on the purported conduct of the Consul General of the Petitioner No. 3 and the Republic of Italy are wholly unwarranted and uncalled for. The Learned Single Judge has overlooked most of the documents filed by the Republic Italy on record which clearly militate against the unwarranted conclusions of the Learned Single Judge. The Learned Single Judge has fallen into error while interpreting the relevant provisions of UNCLOS and his conclusions based thereon are fallacious and untenable. The provisions of the Notification of 1981 are clearly incompatible with the provisions of UNCLOS and the interpretation given by the Learned Single Judge. Infact for this reason, the Respondents after execution of UNCLOS in 1982, which was subsequent to the passing of the Notification have categorically stated that the same has to be

given the restricted meaning and only provisions of IPC would apply to the artificial islands and the installations or area upto 500 meters breadth around such artificial islands and the installations. These clarifications have been given under Clause 2 of the Notification and therefore binding on the Respondent and the Learned Single Judge.

FFF. Because the Learned Single Judge while observing, inter alia, "*.....as a consequence of this and also to counter the menace of piracy on its vassals worldwide, the Petitioner No. 3 has been deploying its trained military navy personnel to protect and safeguard maritime interests.*" and "*Petitioners 1 and 2 were on active functional duty having been deployed by the Defense Ministry of the Petitioner No. 3 from piracy in order to fight international menace of piracy*", wrongly neglected to take note that the said actions of Petitioner No. 3 were to protect the *Italian flagged vessels* and to safeguard *its* maritime interests against international menace of piracy.

It is stated that the Learned Single Judge after erroneously disregarding the admitted facts which were not only pleaded in Paragraph 4 of the Writ Petition but was also orally urged during the course of hearing that the Petitioners 1 and 2 were on active functional duty having been deployed by the Defense Ministry of the Petitioner No. 3 for the purpose of protection of Italian vessels from piracy.

GGG. Because the Learned Single Judge while taking judicial note of the submissions as pleaded in Paragraph 1 of the Writ Petition relating to the steps taken by the Master during the suspected piracy attack, wrongly disregarded the submissions of the Petitioners that at the time of said suspected piracy attack on the Italian Vessel, the Master of the Vessel immediately set into motion 'the established international procedures to be undertaken by vessels during attempted piracy attacks' and also, thereafter, 'made "military report" at 1730 hours IST, a copy of which report was also sent to MSCHOA at UK.

HHH. That the observations and conclusions of the Learned Single Judge that there is not even a whisper regarding any attempt to commit any of the acts listed out in Article 101 of UNCLOS is totally misconceived and are factually and legally untenable.

Untenable Interpretation of Provisions of UNCLOS

III. That the Learned Single Judge has erred in relying on Lotus case:

(i) Firstly, Lotus case and the principle laid down by the International Court of Justice (ICJ) in 1927 has since been reconsidered and foregone in the subsequent historical development in various subsequent

Conventions of the United Nations on the Law of the Sea.

(ii) The recognition of the exclusive jurisdiction of the flag State or the State of nationality of the master and/or crew reflects an approach that has been consolidated in the international practice since 1952, with the International Convention for the Unification of certain rules on criminal jurisdiction in the case of collision or other accidents of navigation. In 1956 the International Law Commission (ILC) followed completely the same approach of the 1952 Convention, in the draft articles concerning the law of the sea, in particular Article 35, prepared for the work of the Geneva Conference on the Law of the Sea of 1958. The reading of the commentary to this draft articles is particularly useful for understanding the rationale of the rule and the objective assigned to it by the ILC that was inspired by the judgment of the Permanent Court of International Justice in 1927 in the controversial case of steam "Lotus", taking in account the relevant criticisms of the judgment (approved with 6 votes in favor and 6 against, with the determining vote of the President) as well as the concerns on the effects of the judgment expressed by lawyers and the international maritime stakeholders.

(iii) On this basis, the ILC expressed its full support to the contents of the 1952 Convention and declared that it was inspired by the desire to protect ships and their crews from the risk of criminal trials before foreign courts that can unacceptably impede international navigation. The wording used by the Commission in the said draft Article 35 was accepted by the participants in the Geneva Conference on the Law of the Sea and it was included, without modification, in Article 11 of the 1958 Geneva Convention on the High Seas.

(iv) On the occasion of the Third United Nations Conference on International Law of the Sea, which has developed the UNCLOS, the debates registered a general consensus on the maintenance of the rule contained in Article 11 of the Geneva Convention on the High Seas. The same rule was fully incorporated in Article 97 of UNCLOS

(v) The Learned Single Judge wrongly invoked the purported principles of objective territoriality and passive personality to assume jurisdiction over the alleged incident. The objective territoriality and passive personality principles applied by the International Court of Justice in the Case of S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) were specifically

derogated from by incorporating Article 97 of UNCLOS which restricted penal jurisdiction to the Flag State and applied the Active Nationality Principle to ensure avoidance of multiple jurisdictions. Further, the Learned Single Judge has ignored the true purport of Article 58(2) of UNCLOS which specifically incorporates and extends Article 97 and other Articles in that Chapter to the EEZ.

(vi) The Learned Single Judge also erred in concluding that Territoriality Principle is applicable in the present case. The reliance on the Lotus case is therefore totally misplaced. It may be pertinent to noted that in the Lotus case, the Turkish law specifically by Article 6 of its Penal Code permitted prosecution of a foreigner committing an offence abroad against Turkish subject in Turkey unlike the present case under IPC.

(vii) The Learned Single Judge also failed to appreciate the evolution of international law after the Lotus case and failed to take note of Article 92 (1) of UNCLOS which mandates that Ships shall sail under the flag of one State and, save in exceptional cases expressly provided for in international treaties or in this convention, shall be subject to its exclusive jurisdiction on the high seas. Thus it is clear from the reading of

Article 92, 97 and other relevant Articles of UNCLOS that they derogated from the principles laid down in Lotus case and give exclusive jurisdiction to the flag state.

JJJ. The Learned Single Judge has erred in misinterpreting Article 97 read with Article 58(2) of UNCLOS. In this regard the Learned Single Judge has completely ignored Article 94 (7) of UNCLOS which clearly establishes that the incident of navigation under Article 97 is very broad and include incident such as the present one, the subject matter of this Petition. The Learned Single Judge has completely misread and ignored specific provisions of UNCLOS particularly Clause 94 (7) describing incidents of navigations such as the alleged incident and has recorded a completely erroneous finding that 'Incident of navigation' is not defined anywhere in the UNCLOS or in any of the maritime laws or treaties and has wrongly held that the alleged incident does not attract Article 97 read with Article 58 (2) of the UNCLOS.

KKK. That the Learned Single Judge failed to appreciate that the Republic of Italy has already initiated investigations against the Petitioners No. 1 and 2 which is reflected by Communication from the Prosecution Office within the Tribunal of Rome and the Prosecution office within the Military Tribunal in Rome concerning proceedings initiated

against the Petitioner Nos. 1 and 2. Therefore in view of the fact that beyond 12 nautical miles, Article 97 read with Article 58(2) of UNCLOS will be applicable, the Petitioners will have to be tried only in the Republic of Italy. In this regard, the Petitioners reply upon the decision of the Hon'ble Supreme Court of India reported in (2008) 11 Supreme Court Cases 439. In the decision even the Hon'ble Supreme Court of India recognizes that in the Exclusive Economic Zone the status of waters is a part of high seas which is specifically recognized and detailed in UNCLOS and gives the coastal state restricted sovereign rights with respect to acts of exploitation, exploration and management of natural resources etc. and does not give it sovereignty in the sense of territoriality or dominium.

LLL. That the Learned Single Judge failed to appreciate the Affidavit of Consul General for and on behalf of Republic of Italy and the documents filed and relied upon by the Petitioners and therefore the impugned Judgment is contrary to law and all documents on record.

MMM. Because the alleged incident admittedly occurred in International Waters and the Petitioners No. 1 and 2 were acting under Italian laws, Indian laws including IPC and CrPC were not applicable at the place of occurrence and on

the Petitioners at the time of the alleged incident. Accordingly, subsequent application of Indian laws and proceedings against Petitioners 1 and 2 are in stark violation of Article 20 (1) of the Constitution of India as well as Article 21 of the Constitution of India. The reference to "violation of law in force at the time of commission of the act" cannot be restricted to mean Indian laws applicable to offences within India and ought to be given an interpretation which restricts proceedings against Petitioners 1 and 2 for alleged offences in international waters where Indian laws do not apply.

NNN. That the Learned Single Judge completely erred in failing to exercise jurisdiction under Constitution of India and more particularly in view of the fact that Respondents have no jurisdiction to proceed with the investigation or carry out any impugned investigations thereunder. The Respondents could have refused to assert jurisdiction particularly when the actions of the Respondents were without jurisdiction and the arrest and detention of Petitioner No. 1 and 2 were illegal and in violation of rights under Article 21 of the Constitution of India.

OOO. That the Learned Single Judge failed to appreciate that the impugned actions of the Respondents infringe the rights of Petitioner No. 1 and Petitioner No.2 under Article 21 of the Constitution of India and the registration of FIR, their arrest

and continued detention is illegal and without jurisdiction. The impugned order is contrary to law and the documents on record.

PPP. That the Learned Single Judge has completely erred in imposing cost on the Petitioner No. 3. That the directions in this regard are arbitrary and untenable in the present facts and circumstances of the case. As has been held in a catena of decisions of this Hon'ble Court, Courts can impose costs if it is satisfied that the litigation was inspired by vexatious motives and altogether groundless. By inexplicably imposing cost on Petitioner No. 3 on specious grounds, the Learned Single has equated the Writ Petition of the Petitioners which raises substantial questions of domestic and international laws to a frivolous and vexatious litigation. The direction of the Learned Single Judge imposing costs on Petitioner No. 3 is manifestly arbitrary and unwarranted and therefore such direction is liable to be set aside.

QQQ. The Learned Single Judge has also erred in relying on Section 179 of CrPC or provisions of CrPC which is only a procedural law and applicable to territorial offences within India. As is evident from Section 2 of CrPC, the provision of IPC would be applicable only if provisions of IPC apply to the said incident. Since the conclusions of the Learned Single Judge on the applicability of the Notification as well as SUA

are erroneous, the provisions of Section 179 of CrPC would not come into play. The provisions of CrPC would come into play only if it is established that the provisions of IPC apply to the alleged incident. In view of the grounds raised herein, since provisions of IPC are not applicable, the reliance on Section 179 CrPC is misplaced and fallacious.

RRR. Because the impugned order is contrary to the terms of Article 1 (2) and Serial No. 5 of the First Schedule of the Constitution and Section 5 (1) of the States Reorganization Act, 1956 and Article 214 of the Constitution.

SSS. Because the territory of Respondent No. 1 specified in terms of Article 1 (2) of the Constitution cannot be extended *suo motu* by the Kerala State or the High Court of Kerala.

6. **GROUNDS OF INTERIM RELIEF.**

The grounds raised in the present Petition are relied upon for seeking interim relief. The Respondents have filed the Chargesheet against the Petitioner No. 1 and 2 charging the Petitioners with offences under Sections 302, 307, 427, 34 of the Indian Penal Code and Section 3 of the SUA Act and the matter have been committed to the Sessions Court and the trial has proceeded. Since the Petitioners are challenging the jurisdiction of the Court to prosecute the Petitioners No. 1 and 2 on various grounds, it is imperative that pending

hearing and disposal of the present Petition, the proceedings in the trial pending in Crime Case No. 2 of 2012 of Neendakara Coastal Police Station, Kollam District, Kerala pending before Sessions Court, Kollam are stayed as otherwise the entire Petition will become infructuous.

By inexplicably imposing costs on Petitioner No. 3, the Learned Single has equated the Writ Petition of the Petitioners which raises substantial questions of domestic and international laws to a frivolous and vexatious litigation. The direction of the Learned Single Judge imposing costs on Petitioner No. 3 is manifestly arbitrary and unwarranted and therefore such direction is liable to be stayed.

That the balance of convenience lies in favour of the Petitioners and against the Respondents.

The Petitioners prima facie have a good case and there is likelihood of the Special Leave Petition to succeed and be allowed.

7. **MAIN PRAYER**

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:

a) grant Special Leave to appeal against the final Judgment and Order dated 29.05.2012 passed by the Hon'ble High Court of Kerala at Ernakulam in W.P. (C) No. 4542 of 2012; and

b) Pass such other and further orders as may be deemed fit and proper in the interest of justice.

8. **PRAYER FOR THE INTERIM RELIEF**

It is, therefore, most respectfully that your Lordship may be pleased to:-

a) stay further proceedings in criminal case registered as crime case No. 2 of 2012 of Neendakara Coastal Police Station, Kollam District, Kerala pending before the Sessions Court, Kollam under Sections 302, 307, 427, 34 of the Indian Penal Code and Section 3 of the SUA Act pending hearing and disposal of the present Special Leave Petition; and

b) Pass appropriate interim order staying the operation and effect of the Impugned Final Judgment and Order dated May 29, 2012 passed by the Learned Single Judge of the Hon'ble High Court of Kerala in Writ Petition no. 4542 of 2012 including directions to the Petitioner No. 3 to pay cost of Rs. 100,000 each to Respondent No. 1 and 2.

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c) Pass any such other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

FILED BY:

JAGJIT SINGH CHHABRA
ADVOCATE FOR THE PETITIONERS

DRAWN ON: 08.07.2012
FILED ON: 11.07.2012

DRAWN BY: DILJEET TITUS, ADVOCATE
ABHIXIT SINGH, ADVOCATE
ACHINT SINGH GYANI, ADVOCATE

SETTLED BY: MR. HARISH SALVE, SENIOR ADVOCATE

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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2012

IN THE MATTER OF

Massimilano Latorre & Ors. ...Petitioners

Versus

Union of India & Ors. ...Respondents

CERTIFICATE

Certified that the Special Leave Petition is confined only to pleadings before the Court whose Order is challenged and the other documents relied upon in those proceedings. No additional facts, documents or grounds have been taken therein or relied upon in the Special Leave Petition. It is further certified that the copies of the documents attached to the Special Leave Petition are necessary to answer the question of law raised in the petition to make out grounds urged in the Special Leave Petition for consideration of this Hon'ble Court. This Certificate is given on the basis of the instructions given by the petitioner/person authorized by the petitioner whose affidavit is filed in support of the Special Leave Petition.

FILED BY

(JAGJIT SINGH CHHABRA)
FILED ON: 11.07.2012 ADVOCATE FOR THE PETITIONERS

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION 148

SPECIAL LEAVE PETITION (CIVIL) NO. _____ OF 2012

IN THE MATTER OF:

Massimilano Latorre & Ors. ...Petitioners

Versus

Union of India & Ors. ...Respondents

AFFIDAVIT

I, Ugo Astuto, Chargé d'affaires, Embassy of Italy, 50E, Chandragupta Marg, Chankyapuri, New Delhi, do hereby solemnly affirm and state on oath as under:-

1. That I am the Chargé d'affaires, Embassy of Italy in India in my aforesaid capacity. I am duly authorized to represent the Republic of Italy in the above noted Special Leave Petition. I further state that I am also, in my aforesaid capacity, well conversant with the facts of the case, and thereby, am competent to swear the contents of the present affidavit.

2. That I have read the contents of the accompanying Special Leave Petition which has been prepared on my instructions and the contents of which are not being repeated herein for the sake of brevity, however, the same may be read as part of my this affidavit which I am filing in support thereto.

3. That I have read and understood the accompanying Special Leave Petition comprising para 1 to at pages Nos. to and

the List of Dates and Events at Page 'B' to and I say that the facts stated therein are true and correct to best of my knowledge and belief.

4. That I have also read and understood the accompanying Applications, which are prepared under my instructions and that the contents of which are not being repeated herein for the sake of brevity, however, the same be also be read as per of this affidavit. I further say that that the contents of the said accompanying Applications are also true and correct to my information and belief.

5. That all the annexures that are annexed to the accompanying above noted Special Leave Petition are true copies of their respective originals.

6. That the contents of paragraphs 1 to 5 above and the contents of this Paragraph are true and correct.

DEPONENT

VERIFICATION

I, the above named, deponent do hereby verify that the contents of paragraphs 1 to 6 of this affidavit are true and correct to my personal knowledge and belief. No part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this day of July, 2012

DEPONENT