

IT-56

WRIT PETITION NO. 236 OF 2014 UNDER ARTICLE 32 OF THE
CONSTITUTION OF INDIA, 6 MARCH 2014 (**“ARTICLE 32 WRIT
PETITION”**)

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
(Under Article 32 of the Constitution of India)

Writ Petition (Civil) No. 236 of 2014

IN THE MATTER OF:

Chief Master Seargeant Massimiliano Latorre
& Another

... Petitioners

Versus

Union of India & Ors..

... Respondents

WITH

I.A. NO. OF 2014
(Application for interim reliefs/stay)

VOL - I

PAPER BOOK
(FOR INDEX, PLEASE SEE INSIDE)

ADVOCATE FOR THE PETITIONERS: JAGJIT SINGH CHHABR

RECORD OF PROCEEDINGS
Date of Record of Proceedings

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.
- 11.
- 12.
- 13.
- 14.
- 15.

INDEX

S. NO.	PARTICULARS	PAGES
1.	Listing Proforma	A - A1
2.	Check List	A2 - A3
3.	Synopsis & List of Dates	B - L
4.	Writ Petition under Article 32 of the Constitution of India along with supporting Affidavit.	1 - 39
5.	<u>ANNEXURE-P-1:</u> Copy of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976.	40 - 58
6.	<u>ANNEXURE-P-2:</u> Copy of the Notification S.O. 671(E) dated August 27, 1981 issued by the Ministry of Home Affairs.	59 - 61
7.	<u>ANNEXURE-P-3 (COLLY):</u>	
(i)	Copy of Ministry of External Affairs dated March 25, 1983.	62 - 66
(ii)	Copy of Ministry of Home Affairs Clarifications dated April 14, 1983.	67 - 68
(iii)	Copy of Ministry of Home Affairs Clarifications dated May 14, 1983.	69
(iv)	Copy of Office Memorandums dated June 20, 1983.	70 - 71
8.	<u>ANNEXURE-P-4 (COLLY):</u>	
(i)	Copy of International Covenant for Civil and Political Rights, 1966 (ICCPR).	72 - 107
(ii)	Copy of CCPR/C/GC/32 dated August 23, 2007.	108 - 155

9. **ANNEXURE-P-5:**
Copy of the Order dated January 13, 2011 of the Home Department, Government of Kerala, limiting the area of jurisdiction upto 12 Nautical Miles (Territorial Waters of India) of the Coastal Police Station, Neendakara, Kollam District. 156 – 158
10. **ANNEXURE-P-6:**
Copy of Law of Parliament of Italy No. 130 dated 02.08.2011. 159 - 192
11. **ANNEXURE-P-7:**
Copy of the FIR No. 2 of 2012, dated 15.02.2012, lodged at Coastal Police Station, Neendakara, Kollam, Kerala U/s 302 IPC. 193 - 196
12. **ANNEXURE-P-8:**
Copy of the communication dated February 17, 2012 from prosecution office within the Military Tribunal of Rome. 197 - 198
13. **ANNEXURE-P-9:**
Copy of the Note Verbale sent by the Embassy of Italy to the Ministry of External Affairs-Government of India. 199 - 201
14. **ANNEXURE-P-10:**
Copy of the Ministry of Shipping Notification MS Notice No. 7 of 2012 dated March 7, 2012. 202 - 205
15. **ANNEXURE-P-11:**
Copy of Report dated 31.05.2012 filed by the Kerala State Police before the Hon'ble Sessions Judge, Kollam, Kerala in SC No. 515 of 2012. 206

(Annexure-P-12 to P-21 and application for interim reliefs/stay kindly see Vol-II)

A

PROFORMA FOR FIRST LISTING**SECTION: X****The case pertains to (Please tick/check the correct box):**

- ☐ Central Act: (Title) N/A
- ☐ Section: N/A
- ☐ Central Rule: (Title) N/A
- ☐ Rule No(s): N/A
- ☐ State Act: (Title) N/A
- ☐ Section: N/A
- ☐ State Rule: (Title) N/A
- ☐ Rule No(s): N/A
- ☐ Impugned Interim Order: (Date) N/A
- ☐ Impugned Final Order/Decree: (Date) N/A
- ☐ High Court: (Name) N/A
- ☐ Names of Judges: N/A
- ☐ Tribunal/Authority: (Name) N/A

1. Nature of matter: ☒ Civil ☐ Criminal

2. (a) Petitioner/appellant No.1: Chief Master Sargeant Massimiliano Latorre
& Another

(b) e-mail ID: N/A

(c) Mobile Phone number: N/A

3. (a) Respondent No.1: Union of India & Ors.

(b) e-mail ID: N/A

(c) Mobile Phone number: N/A

4. (a) Main category classification: 08

(b) Sub classification: 0801

5. Not to be listed before: N/A

6. Similar/Pending matter: N/A

A-1

7. Criminal Matters:(a) Whether accused/convict has surrendered: ☐ Yes ☐ No

(b) FIR No. N/A

Date: N/A

(c) Police Station: N/A

(d) Sentence Awarded: N/A

(e) Sentence Undergone: N/A

Land Acquisition Matters:

(a) Date of Section 4 notification: N/A

(b) Date of Section 6 notification: N/A

(c) Date of Section 17 notification: N/A

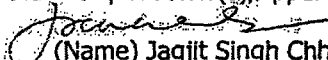
Tax Matters: State the tax effect: N/A**Special Category (first petitioner/appellant only):**☐ Senior Citizen > 65 years ☐ SC/ST ☐ Woman/child ☐ Disabled☐ Legal Aid case ☐ In custody

Vehicle Number (in case of Motor Accident Claim matters):

12. Decided case with citation: N/A

Date: 6.03.2014

AOR for petitioner(s)/appellant(s)


(Name) Jagjit Singh Chhabra
Registration No. 1302

A2

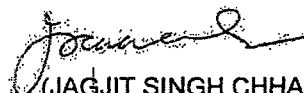
MODIFIED CHECK LIST

1.	(i) Whether SLP (Civil) has been filed in Form No. 28 with certificate as per notification dated 17.06.1997? (ii) Whether the prescribed Court fee has been paid?	Yes/No Yes/No
2.	(i) Whether proper and required number of paper-books (1+3) have been filed? (ii) Whether brief list of dates/events has been filed? (iii) Whether paragraphs and pages of paper books have been numbered consecutively and correctly noted in index?	Yes/No Yes/No Yes/No
3.	Whether the contents of the petition/appeal, application and accompanying documents are clear, legible and typed in double space on one side of the paper?	Yes/No
4.	Whether the petition and applications bear the signature of the counsel/in-person?	Yes/No
5.	Whether the affidavit of the petitioner in support of the petition/appeal and applications has been filed, properly attested and identified?	Yes/No
6.	If there are any vernacular documents/portion/lines, whether the application for exemption from filing official English translation, with affidavit in Court fee has been filed?	Yes/No
7.	If a party in the Court below has died, whether application for bringing the LRs on record, indicating the date of death, relationship, age and addresses along with affidavit and Court fee has been filed?	Yes/No
8.	(i) Whether the Vakalatnama has been properly executed by the petitioners/appellants and accepted by the Advocate and memo of appearance has been filed? (ii) If a petitioner is represented through power of attorney, whether the original power of attorney in English/translated copy has been filed and whether application for permission to appear before the Court has also been filed? (iii) (a) Whether the petition is filed by a body registered, under any Act or Rules? (b) If yes, is copy of the Registration filed? (iv) (a) Whether the person filing petition for such incorporated body has authority to file the petition? (b) If yes, is proof of such authority filed.	Yes/No Yes/No Yes/No Yes/No Yes/No Yes/No
9.	Whether the petition/appeal contains a statement in terms of order XVI/XXI of the Supreme Court Rules as to whether the petitioner has filed any petition against the impugned order/judgment earlier, and if so, the result thereof stated in the petition?	Yes/No
10.	Whether the certified copy of impugned judgment has been filed and if certified copy is not available, whether an application for exemption from filing certified copy has been filed?	Yes/No
11.	Whether the particulars of the impugned order and the orders passed by the Court(s) below are uniformly written in all the documents?	Yes/No

A-3

12.	(i) Whether the addresses of the parties and their representation are complete and set out properly and whether detailed cause title has been mentioned in the impugned judgment and if not whether the memo of parties has been filed, if required? (ii) Whether the cause title of the petition/appeal corresponds to that of the impugned judgment and if not whether separate memo of parties has been filed?	Yes/No Yes/No
13.	Whether in case of appeal by certificate the appeal is accompanied by judgment and decree from and order granting certificate?	Yes/No/NA
14.	If the petition/appeal is time barred, whether application for condonation of delay mentioning the No. of delay, with affidavit and Court fee has been filed?	Yes/No/NA
15.	Whether the annexures referred to in the petition/list of dates are true copies of the documents before the Court below and are filed in chronological order as per list of dates?	Yes/No
16.	Whether the petition/appeal is confined only to the pleadings in the Court/Tribunal below and If not, whether application for taking additional grounds/documents with affidavit and Court fee, has been filed?	Yes/No Yes/No
17.	(i) If SLP/Appeal is against the order passed in second appeal, whether copies of orders of trial Court and the first appellate Court have been filed? (ii) If required copy of the judgment/order/notification/award etc. is not filed, whether letter of undertaking has been filed in civil matters?	Yes/No/NA Yes/No/NA
18.	In matters involving conviction, whether separate proof of surrender in respect of all convicts or application for exemption from surrendering has been filed? (Copy of surrender proof to be included in the paper books) Whether in case where proof of surrender/separate certificate from the Jail Authority has not been filed, an application for exemption from filing separate proof of surrender has been filed?	Yes/No/NA Yes/No/NA
19.	In case of Quashing of F.I.R. whether a copy of the petition filed before the High Court under Section 482 of Cr.P.C. has been filed?	Yes/No/NA
20.	In case of anticipatory bail, whether a copy of F.I.R. or translated copy has been filed?	Yes/No/NA
21.	(i) Whether the complete listing Proforma has been filed in, signed and included in paper books? (ii) If any identical matter is pending in/disposed of by the Supreme Court, whether complete particulars of such matters have been given?	Yes/No Yes/No/NA

FILED BY:



(JAGJIT SINGH CHHABRA)

ADVOCATE FOR THE PETITIONER(S)

DATED: 06.03.2014

SYNOPSIS

B

The present Writ Petition is filed by the Petitioners herein *inter-alia* challenging the legality and validity of the investigation as well as prosecution by the National Investigation Agency ("NIA") under FIR No. 2 of 2012 registered with the Coastal Police Station, Neendakara, Kollam/re-registered FIR No RC-04/2013/NIA/DLI dated April 4, 2013, which is contrary to law and particularly in contravention of the National Investigation Agency Act, 2008 ("NIA Act") and the clear mandate contained in Sections 3(1), 6 and 8 of the NIA Act whereby the jurisdiction of the NIA has been restricted to offences specified in the Schedule to the NIA Act. In the instant case, admittedly there is no Scheduled Offence involved. Consequently, the entire investigation and prosecution by the NIA in the present case is violative of the fundamental rights guaranteed to the Petitioners under Articles 14 and 21 of the Constitution of India and being contrary to law and illegal, is liable to be quashed.

Following the alleged incident of 15.2.2012 involving the death of two Indian fishermen, the two Petitioners herein were arrested and taken into custody and have since been detained for investigation and prosecution in India. Although more than 2 years have elapsed, no charges have been presented against the Petitioners. As a result of conflicting positions being taken by the Union of India and its various Ministries, an impasse has been created where

instead of the neutral investigating agency intended to be appointed by this Hon'ble Court vide its Judgment dated 18.1.2013 and subsequent Orders, the Union of India while invoking the provisions of an anti-terrorism law – the SUA Act appointed the NIA as the purported neutral investigation Agency. The Union of India having accepted that the SUA Act is inapplicable to the present case, as recorded in this Hon'ble Court's Order dated 24.02.2014, the very foundation or basis for the NIA to have jurisdiction disappears apropos Sections 3(1), 6 and 8 of the NIA Act, as the NIA has jurisdiction only over the 'Scheduled Offences' as stated in the NIA Act, 2008. Besides, the Special Court has also not been set-up by the Central Government as was envisaged by this Hon'ble Court vide its Judgment of 18.01.2013.

The Petitioners also seek to challenge the legality and validity of Notification No. S.O. 671 dated August 27, 1981 issued under Section 7(7) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 ("MZA") as being ultra vires the said Act and particularly Section 5(4) and 7(5) of the said Act. The said Notification of 1981 has the effect of extending the applicability of the entire IPC and CrPC beyond the territorial limits of India without complying with the prescribed procedure under the law. The Notification has been passed without the approval of both Houses of the Parliament. The Notification of 1981 thus militates against the provisions of the MZA. Without prejudice to the foregoing, the Petitioners crave leave of this

D
Hon'ble Court to demonstrate during the hearing that the prerequisite and essential ingredients, facts and circumstances as required for extending the applicability of IPC and CrPC to the Exclusive Economic Zone (including the Contiguous Zone) are altogether missing/non-existent. The investigation and prosecution of the two Petitioners based on an illegal and ultra vires Notification, which is also in conflict with the provisions of UNCLOS, 1982 (to which India is a party and has signed and ratified) and contrary to the Ministry of External Affairs and the Ministry of Home Affairs Clarifications/Office Memorandums dated March 25, 1983, April 14, 1983, May 3, 1983 and June 20, 1983, violates the fundamental rights of the Petitioners under the Constitution of India and as further defined under the 1966 International Covenant on Civil and Political Rights ("ICCPR") to which India is a Party, to include the right to freedom and security, the right to a due process and the principle of legality and which the Union of India is obliged to respect as per the mandate of Article 51 of the Constitution of India.

That the Prosecution of the two Petitioners, who are Italian Military and Judicial Officials, by the NIA and/or any other Indian agency is also contrary to the well settled principles of International law of Functional and Sovereign Immunity, which are part of Indian law. The two Italian Military and Judicial Officials being organs of the sovereign State of the Republic of Italy and on active military duty at the time of the alleged incident and acting as such, have

E
immunity from prosecution in Indian Courts and are subject only to proceedings initiated in the Republic of Italy. The principle of Functional Immunity is also a part of customary international law which the Union of India is obliged to respect under the mandate of Article 51 of the Constitution of India.

Hence the instant Petition under Article 32 of the Constitution of India.

LIST OF DATES AND EVENTS

F

February 15, 2012 The Petitioners face investigation and prosecution in respect of an alleged incident of February 15, 2012 while on board an Italian flagged merchant shipping vessel, Enrica Lexie, wherein the Petitioners under the Law of Parliament of the Republic of Italy had been posted as Military and Judicial Officials to protect the said Italian vessel from piracy in International Waters. It is alleged against the Petitioners pursuant to FIR No. 2 of 2012 registered by the Kerala State Police that in the incident that occurred outside Indian territorial waters and in International Waters at 20.5 Nautical Miles (an area duly notified as 'High Risk Area' by the Union of India) off the coast of Kerala, the Petitioners had fired which resulted in the deaths of two Indian fishermen who were on board a fishing skiff which was not carrying any flag.

May 29, 2012 The Petitioners challenged the jurisdiction of the State of Kerala to register the aforesaid FIR No. 2 of 2012 and investigate

G
and prosecute the two Petitioners before the Kerala High Court, which Petition was rejected by the Hon'ble High Court of Kerala vide Judgment dated May 29, 2012.

May 31, 2012

That though the FIR No. 2 of 2012 of the State of Kerala did not invoke provisions of SUA, the same was included in the Chargesheet. However, on May 31, 2012 pursuant to the stand of the Union of India that SUA was not legally or factually attracted to the case, the Kerala Police dropped SUA from the Chargesheet.

January 18, 2013

The Petitioners had challenged the Judgment and Order of the Hon'ble Kerala High Court vide SLP (Civil) No. 20370 of 2012, and had also filed a Writ Petition (Civil) No. 135 of 2012. This Hon'ble Court disposed of the aforesaid two Petitions by a common Judgment and Order dated January 18, 2013 holding that the State of Kerala had no jurisdiction to investigate or prosecute the Petitioners herein. The Hon'ble Court held that the entire case has to be conducted only at the level of the

H
Central Government and cannot be the subject matter of a proceeding initiated by a State Government. This Hon'ble Court therefore directed the Union of India to set-up a Special Court in consultation with the Hon'ble Chief Justice of India, to try the case of the Petitioners under four specific laws, i.e. MZA, IPC, CrPC and UNCLOS 1982. This Hon'ble Court had specifically kept the question of jurisdiction open, i.e. whether the Union of India has jurisdiction to investigate and the Courts in India the jurisdiction to try the case or whether the Courts in Italy have jurisdiction.

April 1, 2013

Notwithstanding the above directions of this Hon'ble Court, the Union of India failed to take steps in accordance with the January 18, 2013 Judgment. Vide Order dated April 1, 2013, the Union of India appointed the NIA, an agency constituted under the NIA Act 2008 to investigate and prosecute only Scheduled Offences dealing with large scale terrorism sponsored from across the borders of India and other similar activities, to investigate the alleged incident of

I
February 15, 2012, in clear violation of the directions of this Hon'ble Court vide its Judgment of January 18, 2013. By the said Order of April 1, 2013, the Central Government acting under Section 6(5) of the NIA Act also opined that an offence had been committed under the anti-terrorism act – the SUA Act so as to appoint the NIA to investigate the present case.

April 4, 2013

Acting under the MHA Order of April 1, 2013, the NIA re-registered an FIR No. RC-04/2013/NIA/DLI dated April 4, 2013 invoking the provisions of the SUA Act against the Petitioners herein.

April 15, 2013

That upon the Petitioners bringing the above illegal actions of the Union of India to the attention of this Hon'ble Court, the Union of India vide MHA Order dated April 15, 2013 superseded its earlier Order of April 1, 2013. Thus, both the opinion regarding commission of offence under the SUA Act and the re-registered FIR No. RC-04/2013/NIA/DLI were superseded and

thereafter all investigation of the NIA is without jurisdiction.

April 16, 2013

The Union of India, in purported compliance with the January 18, 2013 Judgment of this Hon'ble Court, presented before this Hon'ble Court a Notification S.O. 964 (E) dated April 15, 2013 wherein it appointed and designated two Provincial Courts, i.e. the Chief Metropolitan Magistrate, Patiala House Courts and the Court of Additional Sessions Judge-01, Patiala House Courts, as the Special Designated Courts to try the case of the Petitioners under the four specific laws, i.e. MZA, IPC, CrPC and UNCLOS 1982.

April 26, 2013

Consequent to the Union of India informing this Hon'ble Court that it had rectified the illegal invocation of the SUA Act, this Hon'ble Court vide its Order dated April 26, 2013 took note of the steps taken by the Union of India and noted that if there is any jurisdictional error on the part of the Union of India, the same may be challenged by the Petitioners.

April 27, 2013

K
The Union of India vide Ministry of External Affairs' e-mail dated April 27, 2013 informed the Petitioners that the investigation would be conducted only under FIR No. 2 of 2012 which admittedly did not have the provisions of the anti-terrorism law – the SUA Act.

January 13, 2014

In view of the inordinate delay in the investigation and the reports appearing in the press that NIA was seeking sanction for the prosecution of the Petitioners under the SUA Act, the Petitioners filed I.A. No. 5 of 2014 in SLP (C) No. 20370 of 2012 in view of the illegal actions of the Union of India including re-invocation of the SUA Act.

February 24, 2014

In the ensuing proceedings before this Hon'ble Court pursuant to filing of I.A. No. 5 of 2014, the Union of India filed an Affidavit bringing on record the stand of the Law Ministry that the provisions of the SUA Act were not attracted to the present case. The said Affidavit was duly taken on record by this Hon'ble Court and vide its Order dated February 24, 2014, this Hon'ble Court

recorded that the Union of India has accepted the stand of the Law Ministry and that appropriate steps will be taken to ensure that the Chargesheet reflect the stand to the decision taken by the Union of India.

This Hon'ble Court vide its aforesaid Order of February 24, 2014 also granted liberty to the Petitioners herein to agitate the issue of jurisdictional capability of the NIA to investigate and prosecute this case pursuant to the acceptance of the Union of India regarding non-applicability of the SUA Act to the present case. This liberty is also available to the Petitioners vide Order dated April 26, 2013 of this Hon'ble Court.

March 6, 2014

Hence, the present Writ Petition.

IN THE SUPREME COURT OF INDIA**1****(CIVIL ORIGINAL JURISDICTION)****WRIT PETITION (CIVIL) NO. _____ OF 2014
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)****IN THE MATTER OF:**

1. Chief Master Sargeant Massimiliano Latorre,
Holder of Italian Passport
No. AA 1465972
(San Marco Regiment, Italy)
Presently at the Embassy of Italy,
50 – E Chandragupta Marg, Chanakyapuri,
New Delhi -110021
Petitioner No. 1

2. Sargeant Major Salvatore Girone
Holder of Italian Passport
No. S 111982
(San Marco Regiment, Italy).
Presently at the Embassy of Italy,
50 – E Chandragupta Marg, Chanakyapuri,
New Delhi -110021
Petitioner No. 2

Versus

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

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

3. Union of India,
Through Secretary,
Ministry of Law and Justice,
4th Floor, A- Wing, Shastri Bhawan, New
Delhi – 110001
Respondent No. 3

2

4. National Investigation Agency,
6th/7th Floor, NDCC-II Building,
Jai Singh Road,
New Delhi- 110001

Respondent No. 4

**WRIT PETITION UNDER ARTICLE 32 OF THE
CONSTITUTION OF INDIA**

To

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

The Humble Petition of the
Petitioners abovenamed;

MOST RESPECTFULLY SHOWETH:

1. The present Writ Petition is being filed by the Petitioners herein *inter-alia* challenging the legality and validity of the investigation as well as prosecution by the National Investigating Agency ("NIA") under FIR No. 2 of 2012 registered with the Coastal Police Station, Neendakara, Kollam/re-registered FIR No RC-04/2013/NIA/DLI dated April 4, 2013. The present Petition is being filed strictly without prejudice to the rights and contentions of the Petitioner Nos. 1 and 2, two Italian Military and Judicial Officials, Chief Master Sargeant Massimiliano Latorre and Sargeant Major Salvatore Girone, both permanently posted with the San Marco Regiment, Italy, that no Court in India has the

3

jurisdiction to try them in respect of the alleged incident of February 15, 2012 which occurred outside Indian territorial waters and in international waters at 20.5 nautical miles (an area duly notified as 'High Risk Area' by the Union of India) and more particularly in view of the fact that the issue of jurisdiction of India to investigate and try the present case has been specifically kept open by the Hon'ble Supreme Court by its Judgment of January 18, 2013. Further, the present Petition is without prejudice to the fact that the Petitioners being Italian Military and Judicial Officials have Sovereign and Functional Immunity from prosecution in the Courts of India in respect of their alleged actions concerning the incident of February 15, 2012.

The Republic of Italy is not a party since this Petition is founded on the rights of the Petitioners primarily under Article 21 of the Constitution of India and this is without prejudice to the rights of the Republic of Italy to take such further steps, in regard to this episode, as they may be advised.

2. The present Petition is being filed consequent upon the directions given by this Hon'ble Court in its Order dated February 24, 2014 in I.A. No. 5 of 2014 in Special Leave Petition No. 20370 of 2012 and also in view of the liberty granted by this Hon'ble Court's Order dated April 26, 2013 in Special Leave Petition No. 20370 of 2012; and moreso since

4
the fundamental rights of the Petitioner Nos. 1 and 2 are involved.

3. The prosecution of the Petitioners is sought to be done on the basis of investigations carried out by and under the supervision of NIA. This investigation has been continued notwithstanding there being no Scheduled Offence of which the Petitioners are accused. By way of abundant caution and for a complete and effectual adjudication of the matter, the NIA has also been impleaded as a party.

BRIEF FACTS

4. The brief facts which necessitated the filing of the present Writ Petition are as under:
- (a) The Petitioners face investigation and prosecution in respect of an alleged incident of February 15, 2012 while on board an Italian flagged merchant shipping vessel, Enrica Lexie, wherein the Petitioners under the Law of Parliament of the Republic of Italy had been posted as Military and Judicial Officials to protect the said Italian vessel from piracy in International Waters.
- (b) It is alleged against the Petitioners vide FIR No. 2 of 2012 registered by the Kerala State Police that at 20.5 Nautical Miles in international waters (an area duly notified as 'High Risk Area' by the Union of India) off the coast of Kerala, the

Petitioners fired which resulted in the death of two Indian fishermen who were on board a fishing skiff which was not carrying any flag. The FIR was registered at a Police Station which did not have territorial jurisdiction over the admitted place of occurrence of the alleged incident in International waters.

- (c) The Petitioners challenged the jurisdiction of the State of Kerala to register the aforesaid FIR No. 2 of 2012 and investigate and prosecute the two Petitioners before the Kerala High Court, which Petition was rejected by the Hon'ble High Court of Kerala vide Judgment dated May 29, 2012.
- (d) That the FIR No. 2 of 2012 registered by the Kerala Police was under the provisions of the IPC. Subsequently in the Chargesheet the Kerala Police included the provisions of Section 3 of the SUA Act. However on May 31, 2012 based upon the opinion received from the Union of India, the Kerala Police dropped SUA from the Chargesheet on the basis that both legally and factually no case under the SUA Act was made out against the Petitioners.
- (e) The Petitioners being aggrieved by the said Judgment of the Hon'ble Kerala High Court filed SLP (Civil) No. 20370 of 2012 before this Hon'ble Court. The Petitioners also filed a Writ Petition (Civil) No. 135 of 2012 before this Hon'ble Court in respect of the said incident of February 15, 2012.

6

- (f) Vide common Judgment and Order dated January 18, 2013, this Hon'ble Court held that the State of Kerala had no jurisdiction to investigate or prosecute the Petitioners herein. The Hon'ble Court held that the entire case has to be conducted only at the level of the Central Government and cannot be the subject matter of a proceeding initiated by a State Government. This Hon'ble Court therefore directed the Union of India to set-up a Special Court in consultation with the Hon'ble Chief Justice of India, to try the case of the Petitioners under four specific laws, i.e. Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 ("MZA"), IPC, CrPC and UNCLOS 1982. This Hon'ble Court had specifically kept the question of jurisdiction open, i.e. whether the Union of India has jurisdiction to investigate and the Courts in India the jurisdiction to try the case or whether the Courts in Italy have jurisdiction.
- (g) Notwithstanding the above directions of this Hon'ble Court, the Union of India failed to take steps in accordance with the January 18, 2013 Judgment. Vide Order dated April 1, 2013, the Union of India appointed the NIA, an agency constituted under the NIA Act 2008 to investigate and prosecute only Scheduled Offences dealing with large scale terrorism sponsored from across the borders of India and other similar

activities, to investigate the alleged incident of February 15, 2012, in clear violation of the directions of this Hon'ble Court vide its Judgment of January 18, 2013 and knowing fully well that provisions of the SUA Act had been specifically dropped even in Kerala on the ground that the said Act was wholly inapplicable.

- (h) That by the said Order of April 1, 2013, the Central Government acting under Section 6(5) of the NIA Act opined that an offence had been committed under the anti-terrorism act – the SUA Act, so as to appoint the NIA to investigate the present case. Subsequent thereto and basis the said Order of April 1, 2013, the NIA re-registered an FIR No. RC-04/2013/NIA/DLI dated April 4, 2013 invoking the provisions of the SUA Act against the Petitioners herein.
- (i) That upon the Petitioners bringing the above illegal actions of the Union of India to the attention of this Hon'ble Court, the Union of India vide MHA Order dated April 15, 2013 superseded its earlier Order of April 1, 2013. Thus, both the opinion regarding commission of offence under the SUA Act and the re-registered FIR No. RC-04/2013/NIA/DLI were superseded and thereafter all subsequent investigation of the NIA is without jurisdiction.

8

(j) Consequent to the Union of India rectifying the illegal invocation of the SUA Act, this Hon'ble Court vide its Order dated April 26, 2013 took note of the steps taken by the Union of India and noted that if there is any jurisdictional error on the part of the Union of India, the same may be challenged by the Petitioners.

(k) That the Petitioners were constrained to approach this Hon'ble Court again vide its I.A. No. 5 of 2014 in SLP (C) No. 20370 of 2012 in view of the illegal actions of the Union of India including by re-invocation of the SUA Act; and in the ensuing proceedings before this Hon'ble Court, the Union of India filed an Affidavit bringing on record the stand of the Law Ministry that the provisions of the SUA Act were not attracted to the present case. The said Affidavit was duly taken on record by this Hon'ble Court and vide its Order dated February 24, 2014, this Hon'ble Court recorded that the Union of India has accepted the stand of the Law Ministry and that appropriate steps will be taken to ensure that the Chargesheet reflect the stand to the decision taken by the Union of India that the provisions of SUA Act were not attracted in the facts and circumstances of this case.

This Hon'ble Court vide its aforesaid Order of February 24, 2014 also granted liberty to the Petitioners herein to agitate the issue of jurisdictional capability of the NIA to investigate

9
and prosecute this case pursuant to the acceptance of the Union of India regarding non-applicability of the SUA Act to the present case. This liberty is also available to the Petitioners vide Order dated April 26, 2013 of this Hon'ble Court.

- (I) That the prosecution of the Petitioners by the Union of India also violates the fundamental rights of the Petitioners guaranteed under Article 14 and 21 of the Constitution of India in view of the fact that (a) the investigation and prosecution of the Petitioners is based on the illegal and ultra vires Notification (namely Notification No. S.O. 671 dated August 27, 1981 issued under Section 7(7) of the MZA), which is patently ultra vires the MZA Act and which is also in conflict with the provisions of UNCLOS, 1982 to which India is a party and is contrary to the Ministry of External Affairs and the Ministry of Home Affairs Clarifications/Office Memorandums dated March 25, 1983, April 14, 1983, May 3, 1983 and June 20, 1983, and thus violates the fundamental rights of the Petitioners; and (b) the prosecution of the two Petitioners, who are Italian Military and Judicial Officials, by the NIA and/or any other Indian agency is contrary to the well settled principles of International law of Functional and Sovereign Immunity, which are a part of Indian law.

10

It is stated that without prejudice to the grounds of challenging the vires of the said Notification of 1981 as set out below, the said Notification of 1981 will, if need be, and/or if occasion so arises, further, be assailed by additionally and/or alternatively challenging the vires, of the provision of Section 7(7)/the MZA as being ultra vires the Constitution of India.

- (m) For purposes of adjudication of the present Writ Petition and for the grounds raised herein, the Petitioners are relying on the following documents which are annexed herewith:
- (i) Copy of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 is annexed hereto as ANNEXURE-P-1. (Page No. 40-58)
 - (ii) Copy of the Notification S.O. 671(E) dated August 27, 1981 issued by the Ministry of Home Affairs is annexed hereto as ANNEXURE-P-2. (Page No. 59-61)
 - (iii) Copies of Ministry of External Affairs and the Ministry of Home Affairs Clarifications/Office Memorandums dated March 25, 1983, April 14, 1983, May 3, 1983 and June 20, 1983 are annexed hereto and marked as ANNEXURE-P-3 (COLLY). (Page No. 62-71)

- (iv) Copies of International Covenant for Civil and Political Rights, 1966 (ICCPR) and CCPR/C/GC/32 dated August 23, 2007 is annexed hereto collectively as ANNEXURE-P-4 (COLLY). (Page No. 72-155)
- (v) Copy of the Order dated January 13, 2011 of the Home Department, Government of Kerala, limiting the area of jurisdiction upto 12 Nautical Miles (Territorial Waters of India) of the Coastal Police Station, Neendakara, Kollam District is annexed hereto as ANNEXURE-P-5. (Page No. 156-158)
- (vi) Copy of Law of Parliament of Italy No. 130 dated 02.08.2011 is annexed hereto as ANNEXURE-P-6. (Page No. 159-191)
- (vii) Copy of the FIR No. 2 of 2012, dated 15.02.2012, lodged at Coastal Police Station, Neendakara, Kollam, Kerala U/s 302 IPC is annexed hereto as ANNEXURE-P-7. (Page No. 193-196)
- (viii) Copy of the communication dated February 17, 2012 from prosecution office within the Military Tribunal of Rome is annexed hereto as ANNEXURE-P-8. (Page No. 197-198)

12

- (ix) Copy of the Note Verbale sent by the Embassy of Italy to the Ministry of External Affairs-Government of India is annexed hereto as ANNEXURE-P-9. (Page No. 199-201)
- (x) Copy of the Ministry of Shipping Notification MS Notice No. 7 of 2012 dated March 7, 2012 is annexed hereto as ANNEXURE-P-10. (Page No. 202-205)
- (xi) Copy of Report dated 31.05.2012 filed by the Kerala State Police before the Hon'ble Sessions Judge, Kollam, Kerala in SC No. 515 of 2012 is annexed hereto as ANNEXURE-P-11. (Page No. 206)
- (xii) Copy of Judgment dated 18.01.2013 passed by the Hon'ble Supreme Court in Writ Petition (Civil) No. 135 of 2012 and the Special Leave Petition (Civil) No. 20370 of 2012 is annexed hereto as ANNEXURE-P-12. (Page No. 207-306)
- (xiii) Copy of the Order dated April 1, 2013 passed by the Ministry of Home Affairs, New Delhi is annexed hereto as ANNEXURE-P-13. (Page No. 307-308)
- (xiv) Copy of re-registered FIR No. RC-04/2013/NIA/DLI dated April 4, 2013 Police Station National Investigation Agency, New Delhi under Section 302, 307, 427 r/w 34 IPC is annexed hereto as ANNEXURE-P-14. (Page No. 309-315)

- (xv) Copy of the Order dated April 15, 2013 passed by the Ministry of Home Affairs, New Delhi is annexed hereto as ANNEXURE-P-15. (Page No. 316-317)
- (xvi) Copy of Notification dated April 15, 2013 issued by the Ministry of Home Affairs, New Delhi is annexed hereto as ANNEXURE-P-16. (Page No. 318-320)
- (xvii) Copy of Order dated April 26, 2013 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 135 of 2012 is annexed hereto as ANNEXURE-P-17. (Page No. 321-328)
- (xviii) Copy of Ministry of External Affairs' e-mail dated April 27, 2013 is annexed hereto as ANNEXURE-P-18. (Page No. 329)
- (xix) Copy of the extract from the website of NIA showing the Court of District Additional Session Judge 01, New Delhi, Patiala House Courts as a NIA Special Court is annexed hereto as ANNEXURE-P-19. (Page No. 330-332)
- (xx) Copy of the Order dated February 6, 2014 sanctioning prosecution under SUA passed by the Ministry of Home Affairs, New Delhi is annexed hereto and marked as ANNEXURE-P-20. (Page No. 333-338)

14

(xxi) Copy of the Affidavit filed by the Union of India with this Hon'ble Court on February 24, 2014 is annexed hereto as ANNEXURE-P-21. (Page No. 339-340)

5. This Petition raises the following questions of law of far reaching public importance:

(a) Whether the NIA which is a creature of a statute, namely the NIA Act 2008, can investigate offences not within the Schedule of the NIA Act notwithstanding the clear mandate of Sections 3(1), 6 and 8 of the NIA Act limiting the jurisdiction of the NIA only to offences specified in the Schedule to the NIA Act 2008 or connected therewith?

(b) Whether the NIA which is an investigating agency created under a statute, namely the NIA Act and therefore its jurisdiction and power to investigate and prosecute being fully limited by its creating statute under Section 3(1), 6 and 8 thereof, can investigate and prosecute offences in the absence of any Scheduled Offence, as accepted by the Union of India in view of its stand that a Scheduled Offence is not attracted in the present case and whether the investigation and prosecution by NIA are in compliance with the internationally recognized principle of the rule of law?

(c) Whether the wrongful and illegal application of the NIA Act, which provide for only prosecution by the NIA Special Court

is in direct conflict with the directions and Judgment of this Hon'ble Court for setting-up of a Special Court by the Union of India to try the case of the Petitioner Nos. 1 and 2 under four specified laws, i.e. Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 ("MZA"), IPC, CrPC and UNCLOS?

- (d) Whether the NIA or any other investigative agency of the Union of India has the jurisdiction to investigate an offence allegedly committed in the Contiguous Zone on the basis of Notification No. S.O. 671 dated August 27, 1981 when the said Notification is ex-facie an excessive piece of delegated legislation being in contravention of the provisions of the Section 7(7) of the MZA as it goes beyond the scope of the parent Statute and therefore ultra vires the MZA; and in any case has been interpreted by the Ministry of External Affairs and the Ministry of Home Affairs vide Clarifications/Office Memorandums dated March 25, 1983, April 14, 1983, May 3, 1983 and June 20, 1983 as clearly not applying to the Contiguous Zone but applying only to safety zones upto 500 meters breadth around the artificial islands and the installations in the Exclusive Economic Zone of India?
- (e) Whether the NIA or any other investigative agency of the Union of India has the jurisdiction to investigate and prosecute the two Italian Military and Judicial Officials under

16

Indian laws in view of well settled customary international law principles of Sovereign and Functional Immunity, which the Union of India is obliged to respect in view of the mandate of Article 51 of the Constitution of India?

GROUND

6. The Petitioners are filing the present Writ Petition on the following grounds which are taken without prejudice to each other:

NO JURISDICTION OF NIA TO INVESTIGATE AND PROSECUTE THE PETITIONERS BEFORE THE SPECIAL COURT AS CONSTITUTED.

A. Under Section 3(1), 6 and 8 of the NIA Act, 2008, the NIA can only investigate Scheduled Offences. In the present case, there is no Scheduled Offence as the offence under the SUA Act, 2002 has gone. Therefore, the investigation by the NIA was entirely misconceived, premature, wholly without jurisdiction and ultra vires the NIA Act, 2008 and is now admittedly rendered infructuous.

B. As narrated in the facts, the position of the Union of India and its Home and Law Ministries on the question of applicability of the SUA Act, has been a conflicting and contradictory one. It is indicative of the same emanating from a desire to somehow create and foist jurisdiction when it is non-existent,

17

by the invocation of the SUA Act. This is manifested further by the Affidavit filed by the Union of India on February 24, 2014 wherein it is admitted that the provisions of the SUA Act are not attracted to the present case.

As the Union of India had vide MHA Order of April 15, 2013 superseded the MHA Order of April 1, 2013 and subsequently has stated before this Hon'ble Court through its affidavit of February 24, 2014 that the provisions of the SUA Act are not attracted to the present case, the provisions of Section 6(4) and 6(5) of the NIA Act are not satisfied to enable or empower the NIA to investigate and/or prosecute the present case where there is no Scheduled Offence and thus any investigation done in violation of the said mandatory provisions of the NIA Act and is wholly illegal and without jurisdiction.

- C. Similarly, the Special Court under the NIA Act (hereinafter called the 'NIA Special Court') is to only try offences listed in the Schedule to the NIA Act where the NIA is to be the Investigating and Prosecuting Agency. The said Special Court now has nothing to decide since there is no Scheduled Offence to decide upon in the present case and therefore the Special Court has no jurisdiction and authority to try this case. The said NIA Special Court strips the Petitioners from ordinary rights under established criminal procedure in

18

contravention to established interpretation of Article 14(1) of the ICCPR 1966 and CCPR/C/GC/32 dated August 23, 2007.

D. Thus not only the NIA but also the Special Court set up under the MHA Notification dated April 15, 2013 has no jurisdiction in the matter. Thus, the investigation and the purported prosecution by the NIA in the Special Court is ultra vires the law.

E. The NIA in any case had no right to investigate the instant matter in view of the January 18, 2013 Judgment of this Hon'ble Court asking for investigation and prosecution only under the four laws, i.e. MZA, Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and the United Nations Convention on the Law of the Sea, 1982.

F. That in view of the supersession of the Order of April 1, 2013 by the Union of India, the entire investigation by NIA is vitiated and is without jurisdiction. Article 21 of the Constitution of India encompasses both procedural and substantive rights in matters of personal liberty of any person.

NOTIFICATION NO. S.O. 671 DATED AUGUST 27, 1981 ULTRA VIRES THE MZA.

G. Though the January 18, 2013 Judgment of this Hon'ble Court clearly held that the State of Kerala had no jurisdiction, it

directed the Union of India to constitute a Special Court in consultation with the Hon'ble Chief Justice of India and further directed the case of the Petitioners be determined under the four specific laws, i.e. MZA, IPC, CrPC and UNCLOS. The Petitioners humbly submit that in view of the following legal issues arising, appropriate declarations and directions from this Hon'ble Court are necessary to safeguard the fundamental rights of the Petitioners..

It is submitted that the Notification No. S.O. 671 dated August 27, 1981 purports to extend the provisions of the entire IPC and CrPC to the entire Exclusive Economic Zone (i.e. upto 200 Nautical Miles) which is wholly ultra vires the MZA.

It transpires that under Section 5(4) of the MZA, Indian laws may apply to the Contiguous Zone only limited to the following:

- (i) the security of India; and
- (ii) immigration, sanitation, customs and other fiscal matters.

It is humbly submitted that it is nobody's case that the present case related to any of the above.

20

Similarly, the jurisdiction of the Union of India upto 200 Nautical Miles in the area called the Exclusive Economic Zone ("EEZ") is limited under Section 7 of the MZA. The jurisdiction under Section 7(7) read with Section 7(6) of the said Act applies only to the following:

- (i) the exploration, exploitation and protection of the resources of such designated areas; or
- (ii) other activities for the economic exploitation and exploration of such designated area such as the production of energy from tides, winds and currents; or
- (iii) the safety and protection of artificial island, off-shore terminals, installations and other structures and devices in such designated area; or
- (iv) the protection of marine environment of such designated area; or
- (v) Customs and other fiscal matters in relation to such designated area.

The situations and contingencies contemplated in (i) to (v) do not arise in this case, moreso in view of the Notification No. S.O. 671 dated August 27, 1981 under Section 7(7) of the MZA read with Ministry of External Affairs and the Ministry of

Home Affairs Clarifications/Office Memorandums dated March 25, 1983, April 14, 1983, May 3, 1983 and June 20, 1983 which clarifies that criminal laws of India cannot extend to the entire Exclusive Economic Zone.

The application of the entire Indian Penal Code, 1860 to the Exclusive Economic Zone including the Contiguous Zone is therefore ultra vires the MZA and so also the Notification No. S.O. 671 dated August 27, 1981.

The said Notification of 1981 has the effect of extending the applicability of the entire IPC and CrPC beyond the territorial limits of India without complying with the prescribed procedure under the law. The Notification has been passed without the approval of both Houses of the Parliament. The Notification of 1981 thus militates against the provisions of the MZA. Without prejudice to the foregoing, the Petitioners crave leave of this Hon'ble Court to demonstrate during the hearing that the prerequisite and essential ingredients, facts and circumstances as required for extending the applicability of IPC and CrPC to the Exclusive Economic Zone (including the Contiguous Zone) are altogether missing/non-existent.

The invocation of the Notification No. S.O. 671 dated August 27, 1981 further violates the Petitioners fundamental rights under Article 15(1) of the ICCPR as the alleged extension of

the IPC and CrPC derives from an obscure and since the forgotten piece of delegated legislation which does not fulfill the international law requirement of accessibility and was not implemented. The extension of the IPC was accordingly not foreseeable and predictable to all laymen, even seeking legal advice, as it took almost one month to the Investigating authorities to uncover the Notification. The Notification is also bad in law and void as no adoption of Section 188A in CrPC ever took place. That the clarity requirements of the Notification are not fulfilled emerges from the fact that this Hon'ble Court noticed the partial applicability of the Notification to the Exclusive Economic Zone as far as the artificial islands and installations in the said Zone are concerned. The Petitioners crave leave to demonstrate during the hearing the different connotations and consequences that can flow in the application of the said Notification to the respective Zones.

H. Neither the NIA nor any agency of the Union of India has the jurisdiction to investigate an offence allegedly committed in the Contiguous Zone on the basis of Notification No. S.O. 671 dated August 27, 1981 when the said Notification is ex-facie an excessive piece of delegated legislation being in contravention of the provisions of the Section 7(7) of the MZA as it goes beyond the scope of the parent Statute and thus ultra vires the MZA including Section 7(7) thereof. The said

Notification in any case has been interpreted by the Ministry of External Affairs and the Ministry of Home Affairs Clarifications/Office Memorandums dated March 25, 1983, April 14, 1983, May 3, 1983 and June 20, 1983 as clearly not applying to the Contiguous Zone but applying only to safety zones upto 500 meters breadth around the artificial islands and the installations in the Exclusive Economic Zone of India.

I. Also, after the signing and ratification of UNCLOS by India, Section 7(7) of the MZA should have been brought in line with the UNCLOS. It is also submitted that in any event the Notification No. S.O. 671 dated August 27, 1981 stood modified/revoked and/or superseded upon India signing and ratifying the provisions of UNCLOS 1982 and issuing the clarifications.

J. As is evident from the foregoing, the extra territorial application of a domestic law is especially subject to the provisions of the MZA and the restrictions contained therein.

In this view of the matter, the Union of India has no jurisdiction to try the Petitioners herein.

K. Furthermore, the Judgment dated January 18, 2013 has not noticed these aspect in its true perspective and the Judgment dated January 18, 2013 needs to be recalled as it infringes

24

the fundamental rights of the Petitioners under Article 21 of the Constitution of India.

- L. The case is fortified by the fact that under international law, an incident of such nature can only be tried by the Flag State, i.e. the Republic of Italy since the ship on which the Petitioners were present carried the Italian Flag while the suspected pirate Skiff carried no flag.

PETITIONERS ENTITLED TO SOVEREIGN AND FUNCTIONAL IMMUNITY UNDER WELL SETTLED PRINCIPLES OF PUBLIC INTERNATIONAL LAW.

- M. That without prejudice to the foregoing, it is submitted that in any case the Petitioner Nos. 1 and 2 have immunity from prosecution in India as being organs of a sovereign state carrying out their official functions they are entitled to Sovereign and Functional Immunity from being prosecuted/tried in India under well established principles of customary international law, which as has been held by the Hon'ble Supreme Court of India in the cases of *Research Foundation for Science Technology and Natural Resource Policy v. Union of India and Others* (2007) 15 SCC 193, *Transmission Corporation of A.P. v. Ch Prabhakar and Others* (2004) 5 SCC 551, *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, and consequently that any investigation or trial of the Petitioner Nos. 1 and 2 is violative of their rights guaranteed under Article 21 and 14 of the Constitution of India.

- N. The Military Protection Detachments (NMPs) of which the two Petitioners are members, was created to prevent and counter piracy in keeping with the International mandate on all nations to assist and cooperate in repressing the menace of piracy and to which both India and Italy are bound under International Conventions, relevant UN Security Council Resolutions on the Piracy off the Horn of Africa.
- O. That the principles and rules of Sovereign and Functional Immunity are well established in State practice and legal doctrine. Sovereign and Functional Immunity is derived from International custom which is the basic source of International Law (Article 38 of the Statute of the International Court of Justice). In this sphere and it is well settled that in the absence of any general convention, in relation to immunities, rules are provided by customary international law. State immunity is not a self imposed jurisdiction of its courts which the Court can, as a matter of discretion, relax or abandon, but it is imposed by international law without any discrimination between one state and the other.

26

P. That the Petitioners had agitated the issue of Petitioner Nos. 1 and 2 being entitled to Sovereign and Functional Immunity from prosecution in India in SLP (Civil) No. 20370 of 2012 as well as in Writ Petition No. 135 of 2012 filed with this Hon'ble Court, however, this Hon'ble Court had not given an finding with respect to this issue in its Judgment of January 18, 2013 while disposing off the aforesaid SLP and Writ Petition.

The Petitioners accordingly request this Hon'ble Court to adjudicate on this issue which goes into the root of the matter and in absence of a conclusive finding on this issue, the fundamental rights of the Petitioner Nos. 1 and 2 are being violated due to their continued illegal detention in India.

The alleged actions of the two Italian Military and Judicial Officials (acting as an organ of the Italian state exercising military and law enforcement duties on board *M.V. Enrica Lexie*) are directly attributable to the Italian Republic, since the two officials were on active military duty.

Under well-established principles of international law they therefore have Sovereign and Functional Immunity from being tried in Indian national courts for the alleged incident.

That even assuming without admitting that the Union of India has jurisdiction in relation to the incident of February 15, 2012, the Petitioner Nos. 1 and 2 being Italian Military and

27

Judicial Officials and on active duty at the relevant time under direct command of the Republic of Italy enjoy complete Sovereign and Functional Immunity from any investigation process and/or prosecution in respect the alleged incident in any Court except the Courts in Italy.

Q. Since the actions of the two Italian Military and Judicial Officials are sovereign acts (*acta jure imperii* as opposed to commercial or private acts - *acta jure gestionis*) attributable to the Italian Republic, continuance of proceedings against them in India would be tantamount to the Italian Republic being brought to trial in India contrary to the well settled international public law principles of sovereign equality of States and international comity of nations.

R. Because the Union of India is obliged to respect customary international law in view of the mandate of Art. 51 of the Constitution of India and must respect the Functional Immunity of the Petitioners in the instant case.

S. That the principle of Sovereign immunity applies equally and with full force to official acts of officials and agents of the foreign State whose conduct and actions in discharge of the Sovereign right and functions of a State also enjoy immunity which is known as Functional Immunity. By prosecuting an official or agent of a foreign state in respect of any action taken by him while discharging official or public functions or

in respect of acts which have the color of authority of State, it is actually the foreign State itself which is being prosecuted as these are acts of the State and thus not justiciable in another State. In other words, State officials may not be tried by States other than their Sending State for the consequences of wrongful acts which may have been committed in the exercise of their official function. In *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* 2006 the House of Lords held: "state immunity is not 'self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt' and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another". And the cases and other materials on state liability make it clear that the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law. Further, Immunity is derived from the character of the actor and the public nature of the function –not the consequence. The following cases are also relied upon - *The Schooner Exchange vs. Mcfaddon*, 1821; *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Harbhajan Singh Dhalla Vs. Union of India (UOI)*(1986) 4 SCC 678; *Transaero, Inc. v. La Fuerza Aerea Boliviana*, the United States Court of Appeals, District of

Columbia Circuit 308 U.S. App. D.C. 86; Lozano v Italy, Appeal Judgment, Case No 31171/2008; ILDC 1085 (IT 2008), 24 July 2008, Italy, Court of Cassation, First Criminal Division); Germany v. Italy: Greece intervening), ICJ Judgment, 3 February 2012; General Officer Commanding Vs. CBI and Anr. 2012 (5) SCALE 58, Propend Finance Pty v. Sing, 1997(1997) 111 ILR 611; Ex parte Pinochet Ugarte (No. 3) 1999 Vol. 2 All ER 97; Prosecutor v. Tihomir Blaskic, Judgment of 29 October 1997- The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia-; Certain Questions of Mutual Assistance In Criminal Matters (DJIBOUTI v. FRANCE) of June 4, 2008; Decision of the Swiss Federal Criminal Court dated 25 July 2012; Decision (January 14, 2014) of the European Court of Human Rights (ECtHR) in Jones v. United Kingdom; The 2004 United Nations Convention on Jurisdictional Immunities of States and The Reports of the United Nations General Assembly International Law Commission on the immunity of State officials from foreign criminal jurisdiction.

PROSECUTION OF PETITIONERS IN VIOLATION OF
FUNDAMENTAL AND BASIC HUMAN RIGHTS OF THE
PETITIONERS GUARANTEED UNDER THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966.

30

- T. That India acceded to the International Covenant on Civil and Political Rights, 1966 ("ICCPR") on April 10, 1979. It has been held by this Hon'ble Court in numerous cases that the provisions of the ICCPR and the rights guaranteed to every human being thereunder are a part of Indian law. Violation of human rights and rights under ICCPR have been held by this Hon'ble court as being violative of Article 21 of the Constitution of India. The rights granted to an accused are basic human rights in any civilized jurisprudence and are recognized as facets of Articles 14 and 21 of the Constitution of India by this Hon'ble court. In any event, the Union of India is obliged to respect its treaty obligations in view of the express constitutional mandate of Article 51(c) of the Constitution of India.
- U. The appointment of NIA as an investigating agency in this case and the consequent investigation and prosecution of the Petitioners would infringe the basic fundamental rights granted to the Petitioners under Article 14 and 21 of the Constitution of India. Equally the application of the Notification of 1981 would be in conflict of the *Nulla poena sine lege* principle which is reflected in Article 15 of ICCPR.
- V. Article 14 of ICCPR guarantees the right that all persons shall be entitled to a fair hearing by a competent tribunal established by law. In the facts and submissions as made

31

hereinabove the prosecution of the two Petitioners by the NIA before a Special Court under the MHA Notification of April 15, 2013 would violate the fundamental human right of internationally accepted fair trial standards.

W. That the prolonged detention of the Petitioners in India without any case being presented against them for over two years now amounts to an arbitrary detention under Article 9(1) of the ICCPR and deprivation of liberty in the absence of a law justifying the exercise of jurisdiction by India.

CONTINUING NON COMPLIANCE AND DEFIANCE BY THE RESPONDENTS OF THE JANUARY 18, 2013 JUDGMENT OF THIS HON'BLE COURT; AND CONSEQUENT INFRINGEMENT OF FUNDAMENTAL RIGHTS OF THE PETITIONER NOS. 1 AND 2.

X. That it has now been over one (1) year since the January 18, 2013 Judgment and the investigating agency appointed by the Union of India been unable to submitted its Report before any Court in relation to the incident of February 15, 2012 which has essentially resulted in Petitioners who are Italian Military and Judicial Officials being detained in India without any case being presented against them. It is also emphasized that in addition to this period, the Petitioners had earlier been detained in India for almost 1 year on account of the State of Kerala wrongfully and illegally asserting

32

jurisdiction over the alleged incident of February 15, 2012 and seeking to illegally prosecute the Petitioner Nos. 1 and 2.

Thus, the Petitioners have been illegally and unjustifiably detained in India for a period of over two (2) years without any lawful case being presented against them.

Y. That the Petitioners have been constrained to approach this Hon'ble Court by way of this Petition in view of the illegal and without jurisdiction actions of the Union of India and their failure to themselves comply with the January 18, 2013 Judgment of this Hon'ble Court; and therefore the Petitioners, are constrained to make a substantive challenge to the various actions of the Respondents which violate the fundamental rights guaranteed to the Petitioners under the Constitution of India and the rights available to the Petitioners under the ICCPR.

Z. That owing to the Union of India miserably failing to do justice in the matter at the cost of violating the fundamental rights of Petitioner Nos. 1 and 2 who are serving Italian Military and Judicial Officials by illegally detaining them in India for a period of close to two (2) years without any lawful case being presented against them or even a lawful investigation being conducted, the Petitioners deserve to be discharged.

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

- AA. Such other grounds as may be urged by the Petitioners during the course of arguments before this Hon'ble Court.
7. That the petitioners have not filed any petition before this Hon'ble Court/High Courts or any other Court praying for similar reliefs.

PRAYER

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

- (a) Declare that the investigation and prosecution by the NIA of the Petitioners under FIR no. 2 of 2012/ re-registered FIR No. RC-04/2013/NIA/DLI dated April 4, 2013 and all actions taken and investigation done by the NIA including the re-registered FIR are without jurisdiction, illegal, invalid, null and void and bad in law and consequently quash the same by issuing an appropriate writ order and/or directions in the nature of certiorari or like order/ direction.

34

- (b) Declare that the MHA Notification S.O. 964 (E) dated April 15, 2013 appointing and designating the purported Special Court is illegal, unconstitutional, without jurisdiction, and in conflict with the Judgment dated January 18, 2013 and therefore be pleased to quash the same by issuing an appropriate writ order and/ or directions in the nature of *certiorari* or like order/ direction.
- (c) Declare that the Notification No. S.O. 671 dated August 27, 1981 issued under Section 7(7) of the MZA, is non-est, illegal, unconstitutional and ultra-vires the MZA and consequently be pleased to quash the same by issuance of an appropriate writ order and/ or directions in the nature of *certiorari* or like order/ direction.
- (d) Declare that the Petitioners being Italian Military and Judicial Officials, have Functional and Sovereign Immunity from being prosecuted in India and accordingly direct immediate discharge of the Petitioners in the facts and circumstances of this case;
- (e) Declare the MHA Order dated February 6, 2014 ceased to have any effect in view of the revocation by the Union of India of the applicability of the SUA Act to this case and the acceptance of the same by this Hon'ble Court vide Order dated February 24, 2014.

35

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

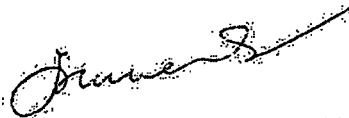
DRAWN BY:

MR. DILJEET TITUS
ADVOCATE

SETTLED BY:

MR. MUKUL ROHATGI,
SENIOR ADVOCATE

FILED BY:



(JAGJIT SINGH CHHABRA)
ADVOCATE FOR PETITIONERS

DRAWN ON: 05.03.2014
FILED ON: 06.03.2014

36

IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) NO. _____ OF 2014
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Chief Master Seargeant Massimiliano Latorre & Another
...Petitioners

Versus

Union of India & Others
...Respondents

AFFIDAVIT

I, Massimiliano Latorre, Holder of Italian Passport Number AA 1465972 (Chief Master Sargeant San Marco Regiment, Italy), Aged 46 years S/o. Tommaso Latorre, presently residing at the Embassy of Italy, 50E, Chandragupta Marg, Chanakyapuri, New Delhi, do hereby solemnly affirm and state on oath as under:-

1. That I am the Petitioner No. 1 in the above mentioned Writ Petition and the accompanying Application(s). I further state that I am also well conversant with the facts of the case, and thereby, am competent to swear the contents of the present Affidavit.
2. I further state that I am aware of the facts and circumstances of the Writ Petition and have also read and understood the contents of the Synopsis and List of Dates at Pages B to L and the contents of accompanying Writ Petition in

37

paragraphs 1 to 7 at pages 1 to 37 and state that the contents are true and correct to the best of my knowledge and belief. I have also read the contents of the accompanying application(s) and state that the contents thereof are true and correct to the best of my knowledge and belief.

3. I further state that the annexures annexed with the petition are true and correct copies of their respective originals.

DEPONENT

VERIFICATION:-

Verified at New Delhi on 6th day of March, 2014, that the contents of paragraphs 1 to 3 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.

DEPONENT

38

IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) NO. _____ OF 2014
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Chief Master Sargeant Massimiliano Latorre & Another
...Petitioners

Versus

Union of India & Others
...Respondents

AFFIDAVIT

I, Salvatore Girone, Holder of Italian Passport Number S111982 (Sargeant Major, San Marco Regiment, Italy) Aged 35 years S/o. Michele Girone, presently residing at the Embassy of Italy, 50E, Chandragupta Marg, Chanakyapuri, New Delhi, do hereby solemnly affirm and state on oath as under:-

1. That I am the Petitioner No. 2 in the above mentioned Writ Petition and the accompanying Application(s). I further state that I am also well conversant with the facts of the case, and thereby, am competent to swear the contents of the present Affidavit.
2. I further state that I am aware of the facts and circumstances of the Writ Petition and have also read and understood the contents of the Synopsis and List of Dates at Pages 8 to 1 and contents of accompanying Writ Petition in paragraphs 1 to 7 at pages 1 to 39 and state that the contents are true

39

and correct to the best of my knowledge and belief. I have also read the contents of the accompanying application(s) and state that the contents thereof are true and correct to the best of my knowledge and belief.

3. I further state that the annexures annexed with the petition are true and correct copies of their respective originals.

DEPONENT

VERIFICATION:-

Verified at New Delhi on 6th day of March, 2014, that the contents of paragraphs 1 to 3 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.

DEPONENT

40

ANNEXURE-P-1**TERRITORIAL WATERS, CONTINENTAL SHELF, EXCLUSIVE
ECONOMIC ZONE AND OTHER MARITIME ZONES ACT, 1976**

Preamble 1 - TERRITORIAL WATERS, CONTINENTAL SHELF,
EXCLUSIVE ECONOMIC ZONE AND OTHER MARITIME ZONES
ACT, 1976

**THE TERRITORIAL WATERS, CONTINENTAL SHELF,
EXCLUSIVE ECONOMIC ZONE AND OTHER MARITIME ZONES
ACT, 1976**

[Act, No. 80 of 1976]

[25th August, 1976]

PREAMBLE

*An Act to provide for certain matters relating to the territorial
waters continental shelf, exclusive economic zone and other
maritime zones of India.*

BE it enacted by Parliament in the Twenty-seventh Year of
the Republic of India as follows:-

Section 1 - Short title and commencement

- (1) This Act may be called the Territorial Waters, Continental
Shelf, Exclusive Economic Zone and Other Maritime Zones
Act, 1976.

41

- (2) Sections 5 and 7 shall come into force on such date or on such different dates as the Central Government may, by notification in the Official Gazette, appoint; and the remaining provisions of this Act shall come into force at once.

Section 2 - Definition

In this Act, "limit", in relation to the territorial waters, the continental shelf, the exclusive economic zone or any other maritime zone of India, means the limit of such waters, shelf or zone with reference to the mainland of India as well as the individual or composite group or groups of islands constituting part of the territory of India.

Section 3 - Sovereignty over, and limits of, territorial waters

- (1) The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the air space over, such waters.
- (2) The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.
- (3) Notwithstanding anything contained in sub-section (2), the Central Government may, whenever it considers necessary so to do having regard to International Law and State

42

practice, alter, by notification in the Official Gazette, the limit of the territorial waters.

- (4) No notification shall be issued under sub-section (3) unless resolutions approving the issue of such notification are passed by both Houses of Parliament.

Section 4 - Use of territorial waters by foreign ships

- (1) Without prejudice to the provisions of any other law for the time being in force, all foreign ships (other than warships including sub-marines and other underwater vehicles) shall enjoy the right of innocent passage through the territorial waters.

Explanation.—For the purposes of this section, passage is innocent so long as it is not prejudicial to the peace, good order or security of India.

- (2) Foreign warships including submarines and other underwater vehicles may enter or pass through the territorial waters after giving prior to notice to the Central Government:

Provided that submarines and other underwater vehicles shall navigate on the surface and show their flag while passing through such waters.

- (3) The Central Government may, if satisfied that it is necessary so to do in the interests of the peace, good order or security

of India or any part thereof, suspend, by notification in the Official Gazette, whether absolutely or subject to such exceptions and qualifications as may be specified in the notification, the entry of all or any class of foreign ships into such area of the territorial waters as may be specified in the notification.

Section 5 - Contiguous zone of India

- (1) The contiguous zone of India (hereinafter referred to as the contiguous zone) is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (20 of section 3.
- (2) Notwithstanding anything contained in sub-section (1), the Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the contiguous zone.
- (3) No notification shall be issued under sub-section (2) unless resolutions approving the issue of such notification are passed by both Houses of Parliament.

44

(4) The Central Government may exercise such powers and take such measures in or in relation to the contiguous zone as it may consider necessary with respect to,-

- (a) the security of India, and
- (b) immigration, sanitation, customs and other fiscal matters.

(5) The Central Government may, by notification in the Official Gazette,

(a) extend with such restrictions and modifications as it thinks fit, any enactment, relating to any matter referred to in clause (a) or clause (b) of sub-section (4), for the time being in force in India or any part thereof, to the contiguous zone, and

(b) make such provisions as it may consider necessary in such notification for facilitating the enforcement of such enactment.

and any enactment so extended shall have effect as if the contiguous zone is a part of the territory of India.

Section 6 - Continental shelf

(1) The continental shelf of India (hereinafter referred to as the continental shelf) comprises the seabed and subsoil of the

submarine areas that extend beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baseline referred to in sub-section (2) of section 3 where the outer edge of the continental margin does not extend up to that distance.

(2) India has, and always had, full and exclusive sovereign rights in respect of its continental shelf.

(3) Without prejudice to the generality of the provisions of sub-section (2), the Union has in the continental shelf,-

(a) sovereign rights for the purposes of exploration, exploitation, conservation and management of all resources;

(b) exclusive rights and jurisdiction for the construction, maintenance or operation of artificial islands, off-shore terminals, installations and other structure and devices necessary for the exploration and exploitation of the resources of the continental shelf or for the convenience of shipping or for any other purpose;

(c) exclusive jurisdiction to authorise, regulate and control scientific research; and

(d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution.

46

(4) No person (including a foreign Government) shall, except under, and in accordance with, the terms of a licence or a letter of authority granted by the Central Government, explore the continental shelf or exploit its resources or carry out any search or excavation or conduct any research within the continental shelf or drill therein or construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device therein for any purpose whatsoever.

(5) The Central Government may, by notification in the Official Gazette,-

(a) declare any area of the continental shelf and its superjacent waters to be a designated area; and

(b) make such provisions as it may deem necessary with respect to,-

(i) the exploration, exploitation and protection of the resources of the continental shelf within such designated area; or

(ii) the safety and protection of artificial islands, off-shore terminals, installations and other structures and devices in such designated area; or

(iii) the protection of marine environment of such designated area; or

- (iv) customs and other fiscal matters in relation to such designated area.

Explanation.-A notification issued under this sub-section may provide for the regulation of entry into and passage through the designated area of foreign ships by the establishment of fairways, seaplanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India.

- (6) The Central Government may, by notification in the Official Gazette,-

(a) extend with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof to the continental shelf or any part [including any designated area under sub-section (5)] thereof; and

(b) make such provisions as it may consider necessary for facilitating the enforcement of such enactment, and any enactment so extended shall have effect as if the continental shelf or the part [including, as the case may be, any designated area under sub-section (5)] thereof to which it has been extended is a part of the territory of India.

- (7) Without prejudice to the provisions of sub-section (2) and subject to any measures that may be necessary for protecting the interests of India, the Central Government may

48

not impede the laying or maintenance of submarine cables or pipelines on the continental shelf by foreign States:

Provided that the consent of the Central Government shall be necessary for the delineation of the course for the laying of such cables or pipelines.

Section 7 - Exclusive economics zone

- (1) The exclusive economic zone of India (hereinafter referred to as the exclusive economic zone) is an area beyond and adjacent to the territorial waters, and the limit of such zone is two hundred nautical miles from the baseline referred to in sub-section (2) of section 3.
- (2) Notwithstanding anything contained in sub-section (1), the Central Government may, whenever it considers
- (3) No notification shall be issued under sub-section (2) unless resolutions approving the issue of such notification are passed by both Houses of Parliament.
- (4) In the exclusive economic zone, the Union has,-
 - (a) sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents;
 - (b) exclusive rights and jurisdiction for the construction,

49

maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the exploration and exploitation of the resources of the zone or for the convenience of shipping or for any other purpose;

(c) exclusive jurisdiction to authorise, regulate and control scientific research;

(d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution; and

(e) such other rights as are recognised by International Law.

- (5) No person (including a foreign Government) shall, except under, and in accordance with, the terms of any agreement with the Central Government or of a licence or a letter of authority granted by the Central Government, explore or exploit any resources of the exclusive economic zone or carry out any search or excavation or conduct any research within the exclusive economic zone or drill therein or construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device therein for any purpose whatsoever:

Provided that nothing in this sub-section shall apply in relation to fishing by a citizen of India.

50

(6) The Central Government may, by notification in the Official Gazette,

(a) Declare any area of the exclusive economic zone to be a designated area; and

(b) make such provisions as it may deem necessary with respect to,-

(i) the exploration, exploitation and protection of the resources of such designated area; or

(ii) other activities for the economic exploitation and exploration of such designated area such as the production of energy from tides, winds and currents; or

(iii) the safety and protection of artificial islands, off-shore terminals, installations and other structures and devices in such designated area; or

(iv) the protection of marine environment of such designated area; or

(v) customs and other fiscal matters in relation to such designated area.

Explanation.—A notification issued under this sub-section may provide for the regulation of entry into and passage through the designated area of foreign ships by the establishment of fairways, seaplanes, traffic separation

schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India.

- (7) The Central Government may, by notification in the official Gazette,-

(a) extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof to the exclusive economic zone or any part thereof; and

(b) make such provisions as it may consider necessary for facilitating the enforcement of such enactment, and any enactment so extended shall have effect as if the exclusive economic zone or the part thereof to which it has been extended is a part of the territory of India.

- (8) The provisions of sub-section (7) of section 6 shall apply in relation to the laying or maintenance of submarine cables or pipelines on the seabed of the exclusive economic zone as they apply in relation to the laying or maintenance of submarine cables or pipelines on the seabed of the continental shelf.

- (9) In the exclusive economic zone and the air space over the zone, ships and aircraft of all States shall, subject to the exercise by India of its rights within the zone, enjoy freedom of navigation and overflight.

Section 8 - Historic waters

- (1) The Central Government may, by notification in the Official Gazette, specify the limits of such waters adjacent to its land territory as are the historic waters of India.
- (2) The sovereignty of India extends, and has always extended, to the historic waters of India and to the seabed and subsoil underlying, and the air space over, such waters.

Section 9 - Maritime boundaries between India and states having coasts opposite or adjacent to those of India

- (1) The maritime boundaries between India and any State whose coast is opposite or adjacent to that of India in regard to their respective territorial waters, contiguous zones, continental shelves, exclusive economic zone and other maritime zones shall be as determined by agreement (whether entered into before or after the commencement of this section) between India and such State, and pending such agreement between India and any such State, and unless any other provisional arrangements are agreed to between them, the maritime boundaries between India and such State shall not extend beyond the line every point of which is equidistant from the nearest point from which the breadth of the territorial waters of India and of such State are measured.

- (2) Every agreement referred to in sub-section (1) shall, as soon as may be after it is entered into, be published in the Official Gazette.
- (3) The provisions of sub-section (1) shall have effect notwithstanding anything contained in any other provision of this Act.

Section 10 - Section 10

The Central Government may cause the baseline referred to in sub-section (2) of section 3, the limits of the territorial waters, the contiguous zone, the continental shelf, the exclusive economic zone and the historic waters of India and the maritime boundaries as settled by agreements referred to in section 9 to be published in charts.

Section 11 - Offences

Whoever contravenes any provision of this Act or of any notification thereunder shall (without prejudice to any other action which may be taken against such person under any other provision of this or of any other enactment) be punishable with imprisonment which may extend to three years, or with fine, or with both.

Section 12 - Offences by companies

- (1) Where an offence under this Act or the rules made

54

thereunder has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

- (2) Notwithstanding anything contained in sub-section (1) where an offence under this Act or the rules made thereunder has been committed by a company and it is proved that the offence has been committed with the consent or the connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,-

- (a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

Section 13 - Place of trial

Any person committing an offence under this Act or any rules made thereunder or under any of the enactments extended under this Act or under the rules made thereunder may be tried for the offence in any place in which he may be found or in such other place as the Central Government may, by general or special order, published in the Official Gazette, direct in this behalf.

Section 14 - Previous sanction of the Central Government for prosecution

No prosecution shall be instituted against any person in respect of any offence under this Act or the rules made thereunder without the previous sanction of the Central Government or such officer or authority as may be authorised by that Government by order in writing in this behalf.

Section 15 - Power to make rules

- (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.
- (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the

56

following matters, namely:-

- (a) regulation of the conduct of any person in the territorial waters, the contiguous zone, the continental shelf, the exclusive economic zone or any other maritime zone of India;
- (b) regulation of the exploration and exploitation, conservation and management of the resources of the continental shelf;
- (c) regulation of the exploration, exploitation, conservation and management of the resources of the exclusive economic zone;
- (d) regulation of the construction, maintenance and operation of artificial islands, off-shore terminals, installations and other structures and devices referred to in sections 6 and 7;
- (e) preservation and protection of the marine environment and prevention and control of marine pollution for the purposes of this Act;
- (f) authorisation, regulation and control of the conduct of scientific research for the purposes of this Act;
- (g) fees in relation to licences and letters of authority referred to in sub-section (4) of section 6 and sub-section (5) of section 7 or for any other purpose; or

57

(h) any matter incidental to any of the matters specified in clauses (a) to (g).

(3) In making any rule under this section, the Central Government may provide that a contravention thereof shall be punishable with imprisonment which may extend to three years, or with fine which may extend to any amount, or with both.

(4) Every rule made under this Act and every notification issued under sub-section (5) of section 6 or sub-section (6) of section 7 shall be laid, as soon as may be after it is made or issued, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if, before the expiry of the session immediately following the session or the successive sessions aforesaid both Houses agree in making any modification in the rule or the notification or both Houses agree that the rule or notification should not be issued, the rule or notification shall, thereafter, have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification.

58

Section 16 - Removal of difficulties

- (1) If any difficulty arises in giving effect to the provisions of this Act or of any of the enactments extended under this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act or, as the case may be, of such enactment, as may appear to it to be necessary or expedient for removing the difficulty:

Provided that no order shall be made under this section—

- (a) in the case of any difficulty arising in giving effect to any provision of this Act, after the expiry of three years from the commencement of such provision;
- (b) in the case of any difficulty arising in giving effect to the provisions of any enactment extended under this Act, after the expiry of three years from the extension of such enactment.
- (2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

TRUE COPY

59
ANNEXURE-P-2

MINISTRY OF HOME AFFAIRS

NOTIFICATION

New Delhi, the 27th August, 1981

S.O. 671 (E).--In exercise of the powers conferred by sub section (7) of Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976), the Central Government hereby extends to the exclusive economic zone, referred to therein, the Acts specified in the Schedule hereto annexed subject to the modifications (if any) and the provisions for facilitating the enforcement of such Acts specified in the said schedule.

SCHEDULE
Part I--List of Acts

Year	No.	Short title	Modifications
1	2	3	4
1860	45	The Indian Penal Code, 1860	
1974	2	The Code of Criminal Procedure, 1973	After Section 188 of the Code of Criminal Procedure, 1973 the following section shall be inserted; namely :-- "188A. Offence committed in exclusive economic Zone: When an offence is committed by any

60

person in the exclusive economic zone described in sub-section (1) of section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976) or as altered by notification, if any, issued under sub-section (2) thereof, such person may be dealt with in respect of such offence as if it had been committed in anyplace in which he may be found or in such other place as the Central Government may direct under Section 13 of the Said Act."

Part II -Provisions for facilitating the enforcement of the Acts

1. For the purpose of facilitating the application of relation to the aforementioned exclusive economic zone, of any Act mentioned in Part I, any court or other authority, may construe it in such manner, not affecting the substance, as may be necessary or proper to adapt it to the matter before the court or other authority.

2. (1) If any difficulty arises in giving effect, in relation to the aforementioned exclusive economic zone; to the provisions of any Act specified in Part I, the Central Government may, by

61

order published in the Official Gazette, make such provisions or give such directions as appear to it to be necessary for the removal of the difficulty.

(2) In particular and without prejudice to the generality of the provisions of sub-paragraph (1) of this paragraph, any order made under sub-paragraph (1) may make provisions with regard to construction of references to any functionary specified in such Act.

[No.2/2/81-Judl.Cell]
S.V. SHARAN, Jt. Secy.

TRUE COPY

62

ANNEXURE-P-3 (COLLY)Ministry of External Affairs
(Legal & Treaties Division)

In their note dated 18/1/1983, page 1 and 2, the Ministry of Home Affairs have raised two questions, namely, (i) whether in the light of the signing by India of the UN Convention on the Law of the Sea 1982, it is necessary to amend the notification issued in August 1981 extending the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973 to the exclusive economic zone of India and (ii) whether the Department of Revenue could go ahead with the issue of notification under Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone, and other Maritime Zone Act, 1976, to extend indirect tax enactments to the exclusive economic zone or some areas thereof, or the areas have first to be notified as "designated areas".

2. There is also the general question of scrutinizing the provisions of the Law of the Seas Convention 1982 to examine whether it is necessary to amend the already existing legislations and subordinate legislations in order to implement the Convention and whether new legislation needs to be enacted for the purpose of such implementation. This general question will be examined in depth separately.

3. With regard to the points raised by the Ministry of Home Affairs our views are as follows:-

- (a) We have gone through the provisions of the UN Convention on the Law of the Sea relating to a coastal State's rights and jurisdiction in the exclusive economic zone. In the exclusive economic zone the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living. It also has the same rights with regard to other activities such as the production of energy from the water, currents and winds. Further, it has jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.
- (b) Thus, it may be seen that the coastal State may enact legislation and take other measures in and with regard to the EEZ, to the extent that they are necessary for the exercise of its sovereign rights and jurisdiction. These would include Legislation on mining of the non-living resources, on conservation, exploitation and regulation of fishing and fisheries. To the extent that they are related to the coastal States sovereign rights, other rights and jurisdictions and for the purpose of exercising these rights and jurisdictions coastal State may also extend its customs, income-tax and

64

other fiscal laws as well as enact safety regulations in the EEZ and parts thereof. The coastal State may also enact Legislation for the control and prevention of pollution and conservation of the marine environment of its exclusive economic zone.

- (c) The application of Criminal law, in general, its territorially limited. However, since the artificial islands and installations in the EEZ are under the jurisdiction of the coastal State, penal and criminal laws could also be extended to such structures etc., as if these were the part of the Indian territory. The Convention does not provide for the extension of the criminal laws of a coastal State to the whole of the exclusive economic zone or the Continental shelf, since India does not have sovereignty over them unlike the territorial sea. However, criminal laws may be extended to the EEZ/Continental Shelf for the purpose of exercising India's sovereign rights, other rights and jurisdictions in these maritime zones. Thus, although, the notification issued in 1981 extending the IPC and the Cr.P.C. to the EEZ, needs in principle to be modified, we may not amend it at present but may instead interpret it restrictively in its application to concrete cases.
- (d) Similarly, regarding the second question, we are of the view that the Revenue Department may extend the Customs Act,

the Central Exercise Act or other relevant enactments to the whole of the exclusive economic zone/continental shelf. However, extension of these enactments has to be for the purpose of exercising India's sovereign rights, other rights and jurisdiction in these maritime zones.

- (e) With regard to the question of "designated areas" India had proposed at the conference that a Coastal State should be permitted to designate certain areas in the exclusive economic zone and the continental shelf as "special areas" in respect of which it could enact legislation and take other measures. However, this proposal of India was not acceptable to the Conference in this form. The Convention, however, contains a provision in Article 211 (6) which envisages adoption of special measures for the prevention of pollution as well as protection of resources etc. in respect of clearly defined areas of the exclusive economic zone. This could be done with the previous approval of the competent international organization. The procedure for obtaining this approval is rather long drawnout. The coastal State however, can establish a safety zone up to 500 metres breadth around its artificial islands.
- (f) Although it is not directly provided in the Convention it may be possible to establish certain 'cautionary zones' outside the safety zones of 500 meters if it is absolutely necessary for

66

safety of installations, structures etc. In respect of these 'cautionary zones' Notices to Mariners (Notams) warning them of the hazards could be issued and ships could be advised to avoid the 'cautionary zone'. In these 'cautionary' zones the coastal State may not be able to extend its laws except those measures which are directly related to safety of installations, structures and/or human life.

A.S. - (L&T) has seen.

Sd/-
(Sushma Malik)
Assistant Legal Adviser
25-3-1983

JS (J), Ministry of Home Affairs

TRUE COPY

67

ANNEXURE-P-3 (COLLY)

Subject:- Convention on the Law of the Sea. Question whether the notification dated 27.8.1981 issued to extend Cr.P.C. & IPC to EEZ be amended-Consideration of-

Will the Ministry of External Affairs India refer to their U.O. No. 810/L&T/83 dated 27th March 1981 and furnish clarification on the following points:-

- (1) Whether any offence under the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 can be investigated and inquired- under the provisions of the Cr.P.C. if occurred in any part of the Exclusive Economic Zone;
- (2) Whether any offence under the IPC, (if committed within any part of the Exclusive Economic Zone connected with the exploration and exploitation, conservation and management of the natural resources, living or non-living can be investigated or inquired into without any restriction;
- (3) Whether investigation and inquiry into an IPC offence other than the offence other than the offence connected with the natural resources committed within the EEZ have to be restricted only to the safety zone upto 500 mtr. breadth around the artificial islands and the installations in the EEZ; and

68

- (4) Whether instructions are required to be given to the field agencies namely the Coast Guard who are meant for ensuring security in the EEZ and the police authorities that, in respect of offences under the IPC other than those connected with the natural resources committed within the territory should restrict their operations to the safety zone upto 500 mtr. breadth around the artificial islands and installations there.

Sd/-
(O.P. Gupta)
Desk Officer
Tel: 371011/88

Ministry of External Affairs (Smt. Sushma Malik, Assistant Legal
Adviser, L&T Division,
MHA U.O. No. 2/2/83-Judl. Cell, dated the 14th April, 1983

TRUE COPY

69

ANNEXURE-P-3 (COLLY)

MINISTRY OF EXTERNAL AFFAIRS
(Legal & Treaties Division)

Subject:- Convention of the Law of the Sea-whether the
notification dated 27.8.1981 issued to extend Cr.P.C. &
IPC to EEZ be amended- Consideration of-

Reference your U.O. No. 2/2/83-Judl. Cell, dated the 14th
April, 1983. The answers to all the four question raised in your
above note are in the affirmative.

Sd/-
(Sushma Malik)
Assistant Legal Adviser

Ministry of Home Affairs (Shri O. P. Gupta, Desk Officer)
MEA U.O. No. 1019/L&T/83

TRUE COPY

70
ANNEXURE-P-3 (COLLY)**IMMEDIATE**

No. 2/2/83-Judl. Cell
Government of India
Ministry of Home Affairs

New Delhi, the 20 June, 1983

OFFICE MEMORANDUM

Subject: Convention on the Law of the Sea-Question whether the notification dated 27.8.1981 issued to extend Cr.P.C. and IPC to EEZ be amended-Consideration of -

xxxx

The undersigned is directed to say that the question whether the Notification issued by this Ministry to extend the IPC and Cr.P.C. to the Exclusive Economic Zone on 27th August, 1981 would require to be amended consequent on the Government signing the Convention on the Law of the Sea was examined in consultation with the Ministry of External Affairs. A copy of their note dated 25th March, 1983 is enclosed.

2. On the basis of the advice given by the Ministry of External Affairs, certain clarifications were sought. A copy of our U.O. of even number dated 14th April, 1983 seeking clarifications

71
alongwith a copy of the Ministry of External Affairs. U.O. No.
1019/L&T/83, dated 3rd May, 1983 giving reply to the queries
raised therein is also enclosed.

Sd/-
(O. P. Gupta)
Desk Officer
Tel. No. 371011/22

Ministry of Defence
(Shri Bhaskar Ghosh, JS, Navy)
New Delhi.

TRUE COPY

72
ANNEXURE-P-4 (COLLY)

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by
General Assembly resolution 2200A (XXI) of 16 December 1966,
entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in
the Charter of the United Nations, recognition of the inherent
dignity and of the equal and inalienable rights of all members of the
human family is the foundation of freedom, justice and peace in the
world,

Recognizing that these rights derive from the inherent dignity of the
human person,

Recognizing that, in accordance with the Universal Declaration of
Human Rights, the ideal of free human beings enjoying civil and
political freedom and freedom from fear and want can only be
achieved if conditions are created whereby everyone may enjoy his
civil and political rights, as well as his economic, social and cultural
rights,

73

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of

74

self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or

75

legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties

76

to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

77

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

78

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

79

- (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
- (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

80

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

81

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before,

82

the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

84

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

86

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

87

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national

88

security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

89

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 26

90

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights,

91

consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

92

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated.

93

However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4. 2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the

94

States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

95

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

- (a) Twelve members shall constitute a quorum;
- (b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give

96

effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests;

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

97

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

98

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being

99

considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the

100

notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

101

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

102

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the

Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

104

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

105

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United

106

Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

107

- (a) Signatures, ratifications and accessions under article 48;
- (b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

TRUE COPY

108

ANNEXURE-P-4 (COLLY)**UNITED
NATIONS****CCPR****International covenant on civil
and political rights****Distr.
GENERAL****CCPR/C/GC/32
23 August 2007****Original: ENGLISH****HUMAN RIGHTS COMMITTEE
Ninetieth session
Geneva, 9 to 27 July 2007****General Comment No. 32**

**Article 14: Right to equality before courts and tribunals and to
a fair trial**

I. GENERAL REMARKS

1. This general comment replaces general comment No. 13
(twenty-first session).

2. The right to equality before the courts and tribunals and
to a fair trial is a key element of human rights protection and
serves as a procedural means to safeguard the rule of law.
Article 14 of the Covenant aims at ensuring the proper
administration of justice, and to this end guarantees a series of
specific rights.

109

3. Article 14 is of a particularly complex nature, combining various guarantees with different scopes of application. The first sentence of paragraph 1 sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The second sentence of the same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are determined in a suit at law. In such proceedings the media and the public may be excluded from the hearing only in the cases specified in the third sentence of paragraph 1. Paragraphs 2 – 5 of the article contain procedural guarantees available to persons charged with a criminal offence. Paragraph 6 secures a substantive right to compensation in cases of miscarriage of justice in criminal cases. Paragraph 7 prohibits double jeopardy and thus guarantees a substantive freedom, namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted. States parties to the Covenant, in their reports, should clearly distinguish between these different aspects of the right to a fair trial.

110

4. Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are GE interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees.

5. While reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.¹

6. While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of nonderogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of

111

emergency must conform to the provisions of the Covenant, including all the requirements of article 14.2 Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency,³ except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.⁴ Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.⁵

II. EQUALITY BEFORE COURTS AND TRIBUNALS

7. The first sentence of article 14, paragraph 1 guarantees in general terms the right to equality before courts and tribunals. This guarantee not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14, but must also be respected whenever domestic law entrusts a judicial body with a judicial task.⁶

8. The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that

112

the parties to the proceedings in question are treated without any discrimination.

9. Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in

¹ General comment, No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, para. 8.

² General comment No. 29 (2001) on article 4: Derogations during a state of emergency, para. 15.

³ *Ibid*, paras. 7 and 15.

⁴ Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 15.

⁵ General comment No. 29 (2001) on article 4: Derogations during a state of emergency, para. 11.

⁶ Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2 (disciplinary proceedings against a civil servant); Communication No. 961/2000, *Everett v. Spain*, para. 6.4 (extradition), procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to the guarantee of article 14, paragraph 1, first sentence.⁷ This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁸

113

10. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant.⁹

11. Similarly, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1.¹⁰ In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them.¹¹

114

12. The right of equal access to a court, embodied in article 14, paragraph 1, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.¹²

13. The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.¹³ There is no equality of arms if, for instance,

7 Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

8 Communication No. 202/1986, *Ato del Avellanal v. Peru*, para. 10.2 (limitation of the right to represent matrimonial property before courts to the husband, thus excluding married women from suing in court). See also general comment No. 18 (1989) on non-discrimination, para. 7.

9 Communications No. 377/1989, *Currie v. Jamaica*, para. 13.4; No. 704/1996, *Shaw v. Jamaica*, para. 7.6; No. 707/1996, *Taylor v. Jamaica*, para. 8.2; No. 752/1997, *Henry v. Trinidad and Tobago*, para. 7.6; No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.10.

10 Communication No. 646/1995, *Lindon v. Australia*, para. 6.4.

11 Communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.2.

12 Communication No. 450/1991, *I.P. v. Finland*, para. 6.2.

13 Communication No. 1347/2005, *Dudko v. Australia*, para. 7.4. only the prosecutor, but not the defendant, is allowed to appeal a certain decision.

14 The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.

15 In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.

14. Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases,¹⁶ objective and reasonable grounds must be provided to justify the distinction.

III. FAIR AND PUBLIC HEARING BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

15. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, according to the second sentence of article 14, paragraph 1, in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.¹⁷

116

16. The concept of determination of rights and obligations "in a suit at law" (*de caractère civil/de carácter civil*) is more complex. It is formulated differently in the various languages of the Covenant that, according to article 53 of the Covenant, are equally authentic, and the *travaux préparatoires* do not resolve the discrepancies in the various language texts. The Committee notes that the concept of a "suit at law" or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.¹⁸ The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons,¹⁹ the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking

¹⁴ Communication No. 1086/2002, *Weiss v. Austria*, para. 9.6. For another example of a violation of the principle of equality of arms see Communication No. 223/1987, *Robinson v. Jamaica*, para. 10.4 (adjournment of hearing).

¹⁵ Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.

117

16 E.g. if jury trials are excluded for certain categories of offenders (see concluding observations, *United Kingdom of Great Britain and Northern Ireland*, CCPR/CO/73/UK (2001), para. 18) or offences.

17 Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2.

18 Communication No. 112/1981, *Y.L. v. Canada*, paras. 9.1 and 9.2.

19 Communication No. 441/1990, *Casanovas v. France*, para. 5.2.

20 Communication No. 454/1991, *Garcia Pons v. Spain*, para. 9.3

21 Communication No. 112/1981, *Y.L. v. Canada*, para. 9.3.

22 Communication No. 779/1997, *Äärelä and Näkkäläjätvi v. Finland*, paras. 7.2 – 7.4. of private property. In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.

17. On the other hand, the right to access a court or tribunal as provided for by article 14, paragraph 1, second sentence, does not apply where domestic law does not grant any entitlement to the person concerned. For this reason, the Committee held this provision to be inapplicable in cases where domestic law did not confer any right to be promoted to a higher position in the civil service, ²³ to be appointed as a judge ²⁴ or to have a death sentence commuted by an executive body.²⁵ Furthermore, there is no determination of rights and obligations in a suit at law where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative control; such as disciplinary measures not

118

amounting to penal sanctions being taken against a civil servant, ²⁶ a member of the armed forces; or a prisoner. This guarantee furthermore does not apply to extradition, expulsion and deportation procedures.²⁷ Although there is no right of access to a court or tribunal as provided for by article 14, paragraph 1, second sentence, in these and similar cases, other procedural guarantees may still apply.²⁸

18. The notion of a "tribunal" in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision. Similarly, whenever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence. The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of

article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.

19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.²³ The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from

²³ Communication No. 837/1998, *Kolanowski v. Poland*, para. 6.4.

²⁴ Communications No. 972/2001, *Kazantzis v. Cyprus*, para. 6.5; No. 943/2000, *Jacobs v. Belgium*, para. 8.7, and No. 1396/2005, *Rivera Fernández v. Spain*, para. 6.3.

120

25 Communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.4.

26 Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2 (disciplinary dismissal).

27 Communications No. 1341/2005, *Zundel v. Canada*, para. 6.8, No. 1359/2005, *Esposito v. Spain*, para. 7.6.

28 See para. 62 below.

29 Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.

any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.³⁰ A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.³¹ It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the

constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.³² The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.³³

21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.³⁴ Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.³⁵

22. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the

122

trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional,³⁶ i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where

³⁰ Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.

³¹ Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

³² Communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.

³³ Communication No. 933/2000, *Mundyo Busyo et al v. Democratic Republic of Congo*, para. 5.2.

³⁴ Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2.

³⁵ *Idem*.

³⁶ Also see Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, art. 64 and general comment No. 31 (2004) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 11.

with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.³⁷

23. Some countries have resorted to special tribunals of "faceless judges" composed of anonymous judges, e.g. within measures taken to fight terrorist activities. Such courts, even if the identity and status of such judges has been verified by an independent authority, often suffer not only from the fact that the identity and status of the judges is not made known to the accused persons but also from irregularities such as exclusion of the public or even the accused or their representatives³⁸ from the proceedings;³⁹ restrictions of the right to a lawyer of their own choice;⁴⁰ severe restrictions or denial of the right to communicate with their lawyers, particularly when held incommunicado;⁴¹ threats to the lawyers;⁴² inadequate time for preparation of the case;⁴³ or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the defendant.⁴⁴ Tribunals with or without faceless judges, in circumstances such as these, do not satisfy basic standards of fair trial and, in particular, the

124

requirement that the tribunal must be independent and impartial.⁴⁵

24. Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.

25. The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in

criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence,⁴⁶ or is exposed to other manifestations of hostility with similar effects.

37 See communication No. 1172/2003, *Madani v. Algeria*, para. 8.7.

38 Communication No. 1298/2004, *Becerra Barney v. Colombia*, para.7.2.

39 Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; No. 1126/2002, *Carranza Alegre v. Peru*, para. 7.5.

40 Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.

41 Communication No.577/1994, *Polay Campos v. Peru*, para. 8.8; Communication No. 1126/2002, *Carranza Alegre v. Peru*, para.7.5.

42 Communication No. 1058/2002, *Vargas Mas v. Peru*, para. 6.4.

43 Communication No. 1125/2002, *Quispe Roque v. Peru*, para. 7.3.

44 Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; Communication No. 1126/2002, *Carranza Alegre v. Peru*, para.7.5; Communication No. 1125/2002, *Quispe Roque v. Peru*, para. 7.3; Communication No. 1058/2002, *Vargas Mas v. Peru*, para. 6.4.

45 Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8 ; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.

46 Communication No. 770/1997, *Gridin v. Russian Federation*, para. 8.2.

Expressions of racist attitudes by a jury ⁴⁷ that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure.

26. Article 14 guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal.⁴⁸ It is generally for the courts of States parties to the Covenant to review facts

126

and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.⁴⁹ The same standard applies to specific instructions to the jury by the judge in a trial by jury.⁵⁰

27. An important aspect of the fairness of a hearing is its expeditiousness. While the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3 (c) of article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behavior of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision.⁵¹ Where such delays are caused by a lack of resources and chronic under-funding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.⁵²

28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make

127

information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.⁵³ The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations,⁵⁴ or to pre-trial decisions made by prosecutors and other public authorities.⁵⁵

29. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for 47 See Committee on the Elimination of Racial Discrimination, communication No. 3/1991, *Narainen v. Norway*, para. 9.3.

⁴⁸ Communications No. 273/1988, *B.d.B. v. The Netherlands*, para. 6.3; No. 1097/2002, *Martínez Mercader et al v. Spain*, para. 6.3.

128

49 Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision, para. 8.6.

50 Communication No. 253/1987, *Kelly v. Jamaica*, para. 5.13; No. 349/1989, *Wright v. Jamaica*, para. 8.3.

51 Communication No. 203/1986, *Múnoz Hermoza v. Peru*, para. 11.3; No. 514/1992, *Fei v. Colombia*, para. 8.4.

52 See e.g. Concluding observations, *Democratic Republic of Congo*, CCPR/C/COD/CO/3 (2006), para. 21, *Central African Republic*, CCPR/C/CAF/CO/2 (2006), para. 16.

53 Communication No. 215/1986, *Van Meurs v. The Netherlands*, para. 6.2.

54 Communication No. 301/1988, *R.M. v. Finland*, para. 6.4.

55 Communication No. 819/1998, *Kavanagh v. Ireland*, para. 10.4. instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

IV. PRESUMPTION OF INNOCENCE

30. According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.⁵⁶ Defendants should normally not be

shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree.⁵⁷ The denial of bail⁵⁸ or findings of liability in civil proceedings⁵⁹ do not affect the presumption of innocence.

V. RIGHTS OF PERSONS CHARGED WITH A CRIMINAL OFFENCE

31. The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. This guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges.⁶⁰ Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant.⁶¹ The right to be informed of the charge "promptly" requires that information be given as soon as the person concerned is formally charged with a criminal

130

offence under domestic law,⁶² or the individual is publicly named as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based. In the case of trials in absentia, article 14, paragraph 3 (a) requires that, notwithstanding the absence of the accused, all due steps have been taken to inform accused persons of the charges and to notify them of the proceedings.⁶³

⁵⁶ Communication No. 770/1997, *Gridin v. Russian Federation*, paras. 3.5 and 8.3.

⁵⁷ On the relationship between article 14, paragraph 2 and article 9 of the Covenant (pre-trial detention) see, e.g. concluding observations, Italy, CCPR/C/ITA/CO/5 (2006), para. 14 and Argentina, CCPR/CO/10/ARG (2000), para. 10.

⁵⁸ Communication No. 788/1997, *Cagas, Butin and Astillero v. Philippines*, para. 7.3.

⁵⁹ Communication No. 207/1986, *Moraël v. France*, para. 9.5; No. 408/1990, *W.J.H. v. The Netherlands*, para. 6.2; No. 432/1990, *W.B.E. v. The Netherlands*, para. 6.6.

⁶⁰ Communication No. 1056/2002, *Khachatryan v. Armenia*, para. 6.4.

⁶¹ Communication No. 253/1987, *Kelly v. Jamaica*, para. 5.8.

⁶² Communications No. 1128/2002, *Márques de Morais v. Angola*, para. 5.4 and 253/1987, *Kelly v. Jamaica*, para. 5.8.

⁶³ Communication No. 16/1977, *Mbenge v. Zaire*, para. 14.1.

32. Subparagraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.⁶⁴ In cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase.⁶⁵ What counts as "adequate time" depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial.⁶⁶ A State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.⁶⁷ There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed.⁶⁸

33. "Adequate facilities" must include access to documents and other evidence; this access must include all materials ⁶⁹ that the prosecution plans to offer in court against the accused

132

or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim. If the accused does not speak the language in which the proceedings are held, but is represented by counsel who is familiar with the language, it may be sufficient that the relevant documents in the case file are made available to counsel ⁷⁰

34. The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.⁷¹ Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.

35. The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the

⁶⁴ Communications No. 282/1988, *Smith v. Jamaica*, para. 10.4; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.

⁶⁵ See communication No. 451/1991, *Harward v. Norway*, para. 9.5.

⁶⁶ Communication No. 1128/2002, *Morais v. Angola*, para. 5.6. Similarly Communications No. 349/1989, *Wright v. Jamaica*, para. 8.4; No. 272/1988, *Thomas v. Jamaica*, para. 11.4; No. 230/87, *Henry v. Jamaica*, para. 8.2; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.

⁶⁷ Communication No. 1128/2002, *Márques de Morais v. Angola*, para. 5.4.

⁶⁸ Communications No. 913/2000, *Chan v. Guyana*, para. 6.3; No. 594/1992, *Phillip v. Trinidad and Tobago*, para. 7.2.

⁶⁹ See concluding observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13.

⁷⁰ Communication No. 451/1991, *Harward v. Norway*, para. 9.5.

⁷¹ Communications No. 1117/2002, *Khomidova v. Tajikistan*, para. 6.4; No. 907/2000, *Siragev v. Uzbekistan*, para. 6.3; No. 770/1997, *Gridin v. Russian Federation*, para. 8.5.

circumstances of each case,⁷² taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the

134

administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.⁷³ This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.⁷⁴ All stages, whether in first instance or on appeal must take place "without undue delay."

36. Article 14, paragraph 3 (d) contains three distinct guarantees. First, the provision requires that accused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.⁷⁵

37. Second, the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right, as provided for

by article 14, paragraph 3 (d), refers to two types of defence which are not mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf. At the same time, the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person "or" with legal assistance of one's own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. This right to defend oneself without a lawyer is, however not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right

136

to defend oneself in criminal proceedings without the assistance of counsel.⁷⁶

72. See e.g. communication No. 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.2 regarding a delay of 22 months between the charging of the accused with a crime carrying the death penalty and the beginning of the trial without specific circumstances justifying the delay; in communication No. 537/1993, *Kelly v. Jamaica*, para. 5.11, an 18 months delay between charges and beginning of the trial did not violate art. 14, para. 3 (c). See also communication No. 676/1996, *Yasseen and Thomas v. Guyana*, para. 7.11 (delay of two years between a decision by the Court of Appeal and the beginning of a retrial) and communication No. 938/2000, *Siewpersaud, Sukhran, and Persaud v. Trinidad v Tobago*, para. 6.2 (total duration of criminal proceedings of almost five years in the absence of any explanation from the State party justifying the delay).

73 Communication No. 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.2.

74 Communications No. 1089/2002, *Rouse v. Philippines*, para.7.4; No. 1085/2002, *Taright, Touadi, Remli and Yousfi v. Algeria*, para. 8.5.

75 Communications No. 16/1977, *Mbenge v. Zaire*, para. 14.1; No. 699/1996, *Maleki v. Italy*, para. 9.3.

76 Communication No. 1123/2002, *Correia de Matos v. Portugal*, paras. 7.4 and 7.5.

38. Third, article 14, paragraph 3 (d) guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. The gravity of the offence is important in deciding whether counsel should be assigned "in the interest of justice"⁷⁷ as is the existence of some objective chance of success at the appeals stage.⁷⁸ In cases involving capital punishment, it is axiomatic that the accused must be

effectively assisted by a lawyer at all stages of the proceedings.⁷⁹ Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused. Unlike in the case of privately retained lawyers,⁸⁰ blatant misbehaviour or incompetence, for example the withdrawal of an appeal without consultation in a death penalty case,⁸¹ or absence during the hearing of a witness in such cases ⁸² may entail the responsibility of the State concerned for a violation of article 14, paragraph 3 (d), provided that it was manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.⁸³ There is also a violation of this provision if the court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.⁸⁴

39. Paragraph 3 (e) of article 14 guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal

138

powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7, ⁸⁵ it is primarily for the domestic legislatures of States parties to determine the admissibility of evidence and how their courts assess it.

40. The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings.⁸⁶ This right arises at all stages of the oral proceedings. It applies to aliens as well as to nationals. However, accused persons whose mother tongue differs from the official court language are, in

⁷⁷ Communication No. 646/1995, *Lindon v. Australia*, para. 6.5.

78 Communication No. 341/1988, Z.P. v. Canada, para. 5.4.

79 Communications No. 985/2001, Aliboeva v. Tajikistan, para. 6.4; No. 964/2001, Saidova v. Tajikistan, para. 6.8; No. 781/1997, Aliev v. Ukraine, para. 7.3; No. 554/1993, LaVende v. Trinidad and Tobago, para. 58.

80 Communication No. 383/1989, H.C. v. Jamaica, para. 6.3.

81 Communication No. 253/1987, Kelly v. Jamaica, para. 9.5.

82 Communication No. 838/1998, Hendricks v. Guyana, para. 6.4.

For the case of an absence of an author's legal representative during the hearing of a witness in a preliminary hearing see Communication No. 775/1997, *Brown v. Jamaica*, para. 6.6.

83 Communications No. 705/1996, Taylor v. Jamaica, para. 6.2; No. 913/2000, Chan v. Guyana, para. 6.2; No. 980/2001, Hussain v. Mauritius, para. 6.3.

84 Communication No. 917/2000, Arutyunyan v. Uzbekistan, para. 6.3.

85 See para. 6 above.

86 Communication No. 219/1986, Guesdon v. France, para. 10.2.

principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.⁸⁷

140

41. Finally, article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.⁸⁸ Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred,⁸⁹ and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.⁹⁰

VI. JUVENILE PERSONS

42. Article 14, paragraph 4, provides that in the case of juvenile persons, procedures should take account of their age and the desirability of promoting their rehabilitation. Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14 of the Covenant. In addition, juveniles need special protection. In criminal

141

proceedings they should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation. Detention before and during the trial should be avoided to the extent possible.⁹¹

43. States should take measures to establish an appropriate juvenile criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age. It is important to establish a minimum age below which children and juveniles shall not be put on trial for criminal offences; that age should take into account their physical and mental immaturity.

44. Whenever appropriate, in particular where the rehabilitation of juveniles alleged to have committed acts prohibited under penal law would be fostered, measures other than criminal proceedings, such as mediation between the perpetrator and the victim, conferences with the family of the

142

perpetrator, counselling or community service or educational programmes, should be considered, provided they are compatible with the requirements of this Covenant and other relevant human rights standards.

87 *Idem.*

88 Communications No. 1208/2003, *Kurbanov v. Tajikistan*, paras. 6.2 – 6.4; No. 1044/2002, *Shukurova v. Tajikistan*, paras. 8.2 – 8.3; No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; No. 912/2000, *Deolall v. Guyana*, para. 5.1; No. 253/1987, *Kelly v. Jamaica*, para. 5.5.

89 Cf. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 15. On the use of other evidence obtained in violation of article 7 of the Covenant, see paragraph 6 above.

90 Communications No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; No. 253/1987, *Kelly v. Jamaica*, para. 7.4.

91 See general comment No. 17 (1989) on article 24 (*Rights of the child*), para. 4.

VII. REVIEW BY A HIGHER TRIBUNAL

45. Article 14, paragraph 5 of the Covenant provides that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. As the different language versions (crime, *infraction*, *delito*) show, the guarantee is not confined to the most serious offences. The expression "according to law" in this provision is not intended to leave the very existence of the right of review to the discretion of the States parties, since this

right is recognised by the Covenant, and not merely by domestic law. The term according to law rather relates to the determination of the modalities by which the review by a higher tribunal is to be carried out,⁹² as well as which court is responsible for carrying out a review in accordance with the Covenant. Article 14, paragraph 5 does not require States parties to provide for several instances of appeal.⁹³ However, the reference to domestic law in this provision is to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.⁹⁴

46. Article 14, paragraph 5 does not apply to procedures determining rights and obligations in a suit at law⁹⁵ or any other procedure not being part of a criminal appeal process, such as constitutional motions.⁹⁶

47. Article 14, paragraph 5 is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court ⁹⁷ or a court of final instance, ⁹⁸ following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not

144

offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect.⁹⁹

48. The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.¹⁰⁰ A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.¹⁰¹ However, article 14, paragraph 5

⁹² *Communications No. 1095/2002, Gomariz Valera v. Spain, para. 7.1; No. 64/1979, Salgar de Montejo v. Colombia, para. 10.4.*

⁹³ *Communication No. 1089/2002, Rouse v. Philippines, para. 7.6.*

⁹⁴ *Communication No. 230/1987, Henry v. Jamaica, para. 8.4.*

⁹⁵ *Communication No. 450/1991, I.P. v. Finland, para. 6.2.*

⁹⁶ *Communication No. 352/1989, Douglas, Gentles, Kerr v. Jamaica, para. 11.2.*

⁹⁷ *Communication No. 1095/2002, Gomariz Valera v. Spain, para. 7.1.*

145

98 *Communication No. 1073/2002, Terrón v Spain, para. 7.4.*

99 *Idem.*

100 *Communications No. 1100/2002, Bandajevsky v. Belarus, para. 10.13; No. 985/2001, Aliboeva v. Tajikistan, para. 6.5; No. 973/2001, Khallova v. Tajikistan, para. 7.5; No. 623-627/1995, Domukovsky et al. v. Georgia, para. 18.11; No. 964/2001, Saidova v. Tajikistan, para. 6.5; No. 802/1998, Rogerson v. Australia, para. 7.5; No. 662/1995, Lumley v. Jamaica, para. 7.3.*

101 *Communication No. 701/1996, Gómez Vázquez v. Spain, para. 11.1.*

does not require a full retrial or a "hearing",¹⁰² as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated.¹⁰³

49. The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal,¹⁰⁴ also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal.¹⁰⁵ The effectiveness of this right is also impaired, and article 14, paragraph 5 violated,

146

if the review by the higher instance court is unduly delayed in violation of paragraph 3 (c) of the same provision.¹⁰⁶

50. A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor.¹⁰⁷

51. The right of appeal is of particular importance in death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14, paragraph 3 (d), but at the same time also of article 14, paragraph 5, as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court.¹⁰⁸ The right to have one's conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation, in order that their concerns may be ventilated at the appeal level.¹⁰⁹

147

102 Communication No. 1110/2002, *Rolando v. Philippines*, para. 4.5; No. 984/2001, *Juma v. Australia*, para. 7.5; No. 536/1993, *Perera v. Australia*, para. 6.4.

103 E.g. communications No. 1156/2003, *Pérez Escolar v. Spain*, para. 3; No. 1389/2005, *Bertelli Gálvez v. Spain*, para. 4.5.

104 Communications No. 903/1999, *Van Hulst v. Netherlands*, para. 6.4; No. 709/1996, *Bailey v. Jamaica*, para. 7.2; No. 663/1995, *Morrison v. Jamaica*, para. 8.5.

105 Communication No. 662/1995, *Lumley v. Jamaica*, para. 7.5.

106 Communications No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.5; No. 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.3; No. 750/1997, *Daley v. Jamaica*, para. 7.4; No. 665/1995, *Brown and Parish v. Jamaica*, para. 9.5; No. 614/1995, *Thomas v. Jamaica*, para. 9.5; No. 590/1994, *Bennet v. Jamaica*, para. 10.5.

107 Communications No. 1100/2002, *Bandajevsky v. Belarus*, para. 10.13; No. 836/1998, *Gelazauskas v. Lithuania*, para. 7.2.

108 Communication No. 554/1993, *LaVende v. Trinidad and Tobago*, para. 5.8.

109 See communications No. 750/1997, *Daley v. Jamaica*, para. 7.5; No. 680/1996, *Galimore v. Jamaica*, para. 7.4; No. 668/1995, *Smith and Stewart v. Jamaica*, para. 7.3. See also Communication No. 928/2000, *Sooklal v. Trinidad and Tobago*, para. 4.10.

VIII. COMPENSATION IN CASES OF MISCARRIAGE OF JUSTICE

52. According to paragraph 6 of article 14 of the Covenant, compensation according to the law shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of such conviction, if their conviction has been reversed or they

148

have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.¹¹⁰ It is necessary that States parties enact legislation ensuring that compensation as required by this provision can in fact be paid and that the payment is made within a reasonable period of time.

53. This guarantee does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused; in such cases, the burden of proof rests on the State. Furthermore, no compensation is due if the conviction is set aside upon appeal, i.e. before the judgement becomes final,¹¹¹ or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice.¹¹²

IX. NE BIS IN IDEM

54. Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or

149

acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted in absentia who requests it, but applies to the second conviction.

55. Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience.¹¹³

56. The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial.¹¹⁴ Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.

57. This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the

150

110 *Communications No. 963/2001, Uebergang v. Australia, para. 4.2; No. 880/1999, Irving v. Australia, para. 8.3; No. 408/1990, W.J.H. v. Netherlands, para. 6.3.*

111 *Communications No. 880/1999; Irving v. Australia, para. 8.4; No. 868/1999, Wilson v. Philippines, para. 6.6.*

112 *Communication No. 89/1981, Muhonen v. Finland, para. 11.2.*

113 *See United Nations Working Group on Arbitrary Detention, Opinion No. 36/1999 (Turkey), E/CN.4/2001/14/Add. 1, para. 9 and Opinion No. 24/2003 (Israel), E/CN.4/2005/6/Add. 1, para. 30.*

114 *Communication No. 277/1988, Terán Jijón v. Ecuador, para. 5.4. Covenant.* 115 *Furthermore, it does not guarantee ne bis in idem with respect to the national jurisdictions of two or more States.* 116 *This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions.* 117

X. RELATIONSHIP OF ARTICLE 14 WITH OTHER PROVISIONS OF THE COVENANT

58. As a set of procedural guarantees, article 14 of the Covenant often plays an important role in the implementation of the more substantive guarantees of the Covenant that must

151

be taken into account in the context of determining criminal charges and rights and obligations of a person in a suit at law. In procedural terms, the relationship with the right to an effective remedy provided for by article 2, paragraph 3 of the Covenant is relevant. In general, this provision needs to be respected whenever any guarantee of article 14 has been violated.¹¹⁸ However, as regards the right to have one's conviction and sentence reviewed by a higher tribunal, article 14, paragraph 5 of the Covenant is a *lex specialis* in relation to article 2, paragraph 3 when invoking the right to access a tribunal at the appeals level.¹¹⁹

59. In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant).¹²⁰

60. To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both article 7 of the Covenant prohibiting torture and inhuman, cruel or degrading

152

treatment and article 14, paragraph 3 (g) prohibiting compulsion to testify against oneself or confess guilt.¹²¹

61. If someone suspected of a crime and detained on the basis of article 9 of the Covenant is charged with an offence but not brought to trial, the prohibitions of unduly delaying trials as provided for by articles 9, paragraph 3, and 14, paragraph 3 (c) of the Covenant may be violated at the same time.¹²²

¹¹⁵ *Communication No. 1001/2001, Gerardus Strik v. The Netherlands, para. 7.3.*

¹¹⁶ *Communications No. 692/1996, A.R.J. v. Australia, para. 6.4; No. 204/1986, A.P. v. Italy, para. 7.3.*

¹¹⁷ *See, e.g. Rome Statute of the International Criminal Court, article 20, para. 3.*

¹¹⁸ *E.g. Communications No. 1033/2001, Singarasa v. Sri Lanka, para. 7.4; No. 823/1998, Czernin v. Czech Republic, para. 7.5.*

¹¹⁹ *Communication No. 1073/2002, Terrón v. Spain, para. 6.6.*

¹²⁰ *E.g. communications No. 1044/2002, Shakurova v. Tajikistan, para. 8.5 (violation of art. 14 para. 1 and 3 (b), (d) and (g)); No. 915/2000, Ruzmetov v. Uzbekistan, para. 7.6 (violation of art. 14, para. 1, 2 and 3 (b), (d), (e) and (g)); No. 913/2000, Chan v. Guyana, para. 5.4 (violation of art. 14 para. 3 (b) and (d)); No. 1167/2003, Rayos v. Philippines, para. 7.3 (violation of art. 14 para. 3(b)).*

¹²¹ *Communications No. 1044/2002, Shakurova v. Tajikistan, para. 8.2; No. 915/2000, Ruzmetov v. Uzbekistan, paras. 7.2 and 7.3; No. 1042/2001, Boimurodov v. Tajikistan, para. 7.2, and many others. On the prohibition to admit evidence in violation of article 7, see paragraphs 6 and 41 above.*

122 Communications No. 908/2000, Evans v. Trinidad and Tobago, para. 6.2; No. 838/1998, Hendricks v. Guayana, para. 6.3, and many more.

62. The procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14¹²³ and thus should be interpreted in the light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable.¹²⁴ All relevant guarantees of article 14, however, apply where expulsion takes the form of a penal sanction or where violations of expulsion orders are punished under criminal law.

63. The way criminal proceedings are handled may affect the exercise and enjoyment of rights and guarantees of the Covenant unrelated to article 14. Thus, for instance, to keep pending, for several years, indictments for the criminal offence of defamation brought against a journalist for having published certain articles, in violation of article 14, paragraph 3 (c), may leave the accused in a situation of uncertainty and intimidation and thus have a chilling effect which unduly restricts the

154

exercise of his right to freedom of expression (article 19 of the Covenant).¹²⁵ Similarly, delays of criminal proceedings for several years in contravention of article 14, paragraph 3 (c), may violate the right of a person to leave one's own country as guaranteed in article 12, paragraph 2 of the Covenant, if the accused has to remain in that country as long as proceedings are pending.¹²⁶

64. As regards the right to have access to public service on general terms of equality as provided for in article 25 (c) of the Covenant, a dismissal of judges in violation of this provision may amount to a violation of this guarantee, read in conjunction with article 14, paragraph 1 providing for the independence of the judiciary.¹²⁷

65. Procedural laws or their application that make distinctions based on any of the criteria listed in article 2, paragraph 1 or article 26, or disregard the equal right of men and women, in accordance with article 3, to the enjoyment of the guarantees set forth in article 14 of the Covenant, not only violate the requirement of paragraph 1 of this provision that "all persons shall be equal before the courts and tribunals," but may also amount to discrimination.¹²⁸

155

123 Communication No. 1051/2002 *Ahani v. Canada*, para. 10.9. See also communication No. 961/2000, *Everett v. Spain*, para. 6.4 (extradition), 1438/2005, *Taghi Khadje v. Netherlands*, para. 6.3.

124 See communication No. 961/2000, *Everett v. Spain*, para. 6.4.

125 Communication No. 909/2000, *Mujuwana Kankanamge v. Sri Lanka*, para. 9.4.

126 Communication No. 263/1987, *Gonzales del Rio v. Peru*, paras. 5.2 and 5.3.

127 Communications No. 933/2000, *Mundyo Busyo et al. v. Democratic Republic of Congo*, para. 5.2.; No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.

128 Communication No. 202/1986, *Ato del Avellanal v. Peru*, paras. 10.1 and 10.2.

TRUE COPY

156
ANNEXURE-P-5**GOVERNMENT OF KERALA****Abstract**

Home Department – Coastal Security Scheme – Setting up of 8 Coastal Police Stations in Kerala in Phase I – Expost facto Administrative Sanction and Approval of Jurisdiction – Accorded – Orders issued.

HOME (E) DEPARTMENT

G.O. (Ms) No. 11/2011/Home Dated, Thiruvananthapuram
13/1/2011

Read: -1.D.O. No. 5/1/2005 – dated 15-2-2005 from the Secretary, Border Management, Ministry of Home Affairs, Government of India.

2. Letter No: S1/43728/2003 dated 14-8-2006 from Director General of Police, Thiruvananthapuram

ORDER

The revised Marine Policing/Coastal Security Scheme was launched by the Government of India in February – 2005 with project duration of 5 years, where opening of 24 Coastal Police Stations in the State of Kerala was proposed. In the phase I of the Scheme, Ministry of Home Affairs have approved setting up of 8 Coastal Police Stations in Kerala viz Vizhinjam, Neendakara, Thottappally, Fort Kochi, Azhikode, Beypore, Azhikkal and Bekal.

157

Eventhough formal Administrative Sanction was not issued for setting up the above Coastal Police Stations, six of them have already been opened.

The Director General of Police has also proposed to approve the area of jurisdiction of each Coastal Police Stations except Azhikode Coastal Police Station as 12 Nautical Mile (Territorial Waters) off the coast of the Revenue District in which they are situated and that of Azhikode Coastal Police Station as 12 Nautical Mile (Territorial Waters) off the coast of Thrissur & Malappuram Revenue District.

In the circumstances, Government are pleased to accord expost facto Administrative Sanction for the setting up of the following 8 Coastal Police Stations with area of jurisdiction extending upto 12 Nautical Mile (Territorial Waters) off the Coast of Revenue Districts noted against them.

- | | |
|-----------------|--------------------------------|
| 1. Vizhinajm | Thiruvananthapuram District |
| 2. Neendakara | Kollam District |
| 3. Thottappally | Alappzuha District |
| 4. Fort Kochi | Ernakulam District |
| 5. Azhikode | Thrissur & Malappuram District |
| 6. Beypore | Kozhikode District |
| 7. Azhikkal | Kannur District |
| 8. Bekal | Kasaragod District |

By order of the Governor,

K.JAYAKUMAR
Additional Chief Secretary to Government

158

To

The Director General of Police, Thiruvananthapuram,

The Principal Accountant General (Audit) Kerala,
Thiruvananthapuram,The Accountant General (A&E) Kerala, Thiruvananthapuram,
(This issue with the concurrence of Finance Department)The Finance Department
(Vide UO No. 87785/Exp. A3/2010/Fin dated 8-12-2010)The Law Department
(Vide U.O. No. 17059/Leg.B1/2008/Law dated 16-9-2008)The General Administration (SC) Department,
(Vide item No 5605 dated 12.1.2011)

Stock File/Office Copy.

Forwarded/By order
Section Officer

TRUE COPY

Official Bulletin N. 181 of the 5th August 2011

COORDINATED TEXT OF THE LAW DECREE 12 JULY 2011, n.
107

Text of the law – decree 12 July 2011, n. 107 (in Official Bulletin-
General Serie - n. 160 of the 12th of July 2011, coordinated with the
conversion law 2 August 2011, n. 130, containing: "Prorogation of
the International missions of military and police forces and
provisions for the implementation of resolutions 1970 (2011) and
1973 (2011) adopted by the United Nations Security Council, and
cooperation measures for the development and support to peace
and stability processes and urgent measures against piracy.

Section

INTERVENTIONS FOR THE COOPERATION FOR THE
DEVELOPMENT AND SUSTAINING PEACE AND
STABILIZATION PROCESSES

Art. 1

1. Initiatives in favour of Afghanistan. For cooperation initiatives
in favour of Afghanistan departing from the 1st of July 2011
and until the 31st of December 2011, the expense of euro
10.800.000 is authorized and integrates the expenses
budgeted in accordance with the Table C attached to the law
26 February 1987, n. 49, as re-determined in Table C
attached to the law 13 December 2010, n. 220, and euro

160

1.000.000 for the Italian participation at the NATO Trust Fund for the support of the Afghan National Army and at the NATO - Russia Council Trust Fund for Afghanistan.

2. Departing from the 1st of July 2011 and until the 31st of December 2011, the participation of Italy to an economic, social and humanitarian mission in Afghanistan and Pakistan in order to provide support to the Afghan and Pakistan Government in their prioritized activities within the development and consolidation of local institutions and assistance to population. For the organization of the mission the expenses will last on the cooperation initiatives listed in paragraph 1.
3. In the context of the objectives and the finalities of international talks and specifically the donors Conference in the area, the operational activities of the mission are aimed at the realization of agreed initiatives between the Pakistan and Afghan Government, among others:
 - a) sustanment of sanitary and educational sector;
 - b) Institutional and technical support;
 - c) support to the small and average enterprises, with particular reference to the border region between Pakistan and Afghanistan;
 - d) support to local means of communication.

161

4. The Ministry of Foreign Affairs identifies the measures for the support of the intervention by non governmental organizations willing to operate in Pakistan and Afghanistan for humanitarian purposes. Such interventions includes also the realization of a "Home of the civil society" at Kabul, as a cultural centre for development of relationships between Italy and Afghanistan, also in order to develop the results of the regional conference mentioned in article 1, comma 4, of the law decree 1st of January 2010, n. 1, converted with modifications into the law of the 5th of March, n. 130.
5. With imputation to the expenditure of the euro 10.800.000 mentioned in paragraph 1, the Ministry of Foreign Affairs may send or engage on site personnel for the Italian cooperation in Heart, under the coordination of the local technical unit mentioned in article 13 of the law of the 26th of February, 1987, n. 49, established under the Italian Embassy in Kabul.
6. Within the international crises management organization, for the operations and the functioning of the office of the NATO Civilian Representative at Heart departing from the 1st of July 2011 and until the 31st of December 2011, the expense of euro 24.000 is authorized.

Art. 2

162

INTERVENTIONS FOR THE COOPERATION FOR
DEVELOPMENT AND SUPPORTING PEACE AND
STABILIZATION PROCESSES

1. For cooperation initiatives in favour of Iraq, Lebanon, Myanmar, Pakistan, Somalia, Sudan, aimed at the amelioration of the living conditions of the population and refugees in bordering Countries and also for the support to the civil reconstruction departing from the 1st of July 2011 and until the 31st of December 2011, the expense of euro 8.600.000, integrating the expenses budgeted in accordance with the Table C attached to the law 26 February 1987, n. 49, as re-determined in Table C attached to the law 13 December 2010, n. 220, also the expenditure of euro 350.000 for the interventions foreseen by the law of the 7th of March 2001, n. 58, and also in other areas. Within the budget of euro 8.600.000 the Ministry of Foreign Affairs may be decree, allocate resources up to a maximum of 15%, for cooperation initiatives in other crisis areas where there is an urgent necessity within the time limits of the present decree
2. Taking into consideration what has been established under article 8-bis of the EU Regulation n. 204/2011, of the Council, of the 2 March, 2011, as modified by the EU Regulation n. 572/2011, of the Council, of the 16th of June 2011 and taking into consideration the decisions taken by the Contact Group

163

on Libya which meet at Abu Dhabi the 9th of June 2011 and at Istambul the 15th of July 2011, on the establishment of a mechanism allowing for the de-freezing of the Libyan funds and the economic resources, and their utilizations as a security for the financing of the obligations of the Transitional National Council, as an idoneous instrument responding to the humanitarian needs of the Libyan population, the Libyan public goods frozen in Italy may be used as a guarantee compensating the political and commercial risks and as a guarantee for the operational security of legal persons willing to start initiatives in favour of the Libyan population, and for the opening of credit for the above mentioned finalities, in favour of the Transitional National Council, recognized by Italy as a Government.

1. Departing from the 1st of July 2011 and until the 31st of December 2011, the expense of euro expenses euro 5.150.751 for the furthering of operational emergency interventions for the security and the protection of Italian citizens and Italian interests in war-zones and territories at high risk.
4. Departing from the 1st of July 2011 and until the 31st of December 2011, the expenditure of euro 2.295.223 for interventions supporting stabilization processes in Iraq and Libya. Within the mentioned ceiling, the Ministry of Foreign

164

Affairs may employ resources, for initiatives in other crisis areas, in which there is the necessity for urgent responses in the said period.

5. Departing from the 1st of July 2011 and until the 31st of December, 2011, the expenditure of euro 4.162.000 for the reinforcement of active, passive and information security measures of diplomatic and consular offices.
6. Departing from the 1st of July 2011 and until 31st of December 2011, the expenditure of euro 430.000 for the participation in the NATO Trust Fund for the training of the Iraqi police, at the Fund of the Contact Group established within the United Nations Office on Drug and Crime (UNODC) for the contrast of the piracy in the area of the Gulf of Aden and the Indian Ocean and for the Italian participation in the STANDEX project in the framework of the NATO Russia Council.
7. Departing from the 1st of July 2011 and until 31st of December 2011, the expenditure of euro 200.000 for the payment of the Italian contribution to the United Nations Special Tribunal for Lebanon.
- 7-bis. Departing from the 1st of July 2011 and until 31st of December 2011, the expenditure, for a voluntary contribution of euro 250.000 for the year 2011 in favour of the Staff College, in Turin, established as an international body by

165

Resolution n. 55/278 of the 12th of July 2001 of the United Nations General Assembly and aimed at sustaining activities in the field of the formation of the personnel serving at international organizations of the United Nations (ONU).

8. Departing from the 1st of July 2011 and until 31st of December 2011, the expenditure of euro 399.983 in order to ensure the Italian participation to civilian peace operations and preventive diplomacy, and also the participation to cooperation projects of the Organization for Cooperation and Security in Europe (OSCE).
9. Departing from the 1st of July 2011 and until 31st of December 2011, the expenditure of euro 994.938 in order to ensure the Italian participation to PESC-PSDC initiatives and to initiatives of other international organizations.
10. For the realization of interventions and initiatives sustaining the peace processes and reinforcing security in the sub-Saharan region of Africa, Departing from the 1st of July 2011 and until 31st of December 2011, the expenditure of euro 1.000.000, integrating the allocations already established for fiscal year 2011 for the implementation of the law of the 6th of February 2011 n. 180.
11. Departing from the 1st of July 2011 and until 31st of December 2011, the expenditure of euro 437.250 is authorized for the

166

diplomatic personnel belonging to the Ministry for Foreign Affairs to the diplomatic seats in Afghanistan, Iraq, Libya, Pakistan e Yemen. The above mentioned personnel will perceive an allowance of 80% of that determined under article 171 of the Presidential Decree of the 5th of January 1967, n. 18 and subsequent modifications. It is also authorized, departing from the 1st of July 2011 and until the 31st of December, 2011, to expend euro 61.971 for the partial payment of the leave expenses for the personnel on duty in the seats in Afghanistan, Iraq e Pakistan and their relatives.

12. Departing from the 1st of July 2011 and until 31st of December 2011, the expenditure of euro 403.200 is authorized for the participation of personnel of the Ministry of Foreign Affairs to international crisis management operations, to include PESD missions and offices of the Special representatives of the European Union. The said personnel will perceive an indemnity, deducted the indemnity eventually provided by the international organization and without representation allowances, which is determined in 80% of those established under article 171 of the Presidential Decree of the 5th of January 1967, n. 18 and subsequent modifications.
14. Departing from the 1st of July 2011 and until 31st of December 2011, the expenditure of euro 300.000 is authorized in order to ensure the Italian participation at the

167

Fondazione Iniziativa adriatico-ionica, in order to implement the coordination of the policies of the Countries participating for the reinforcement of the regional cooperation in the area.

Capo I

Art. 3

REGIME OF INTERVENTIONS

1. In order to ensure the necessary coordination of the interventions and initiatives mentioned within this Section the Ministry of Foreign Affairs, with own degree with non regulatory nature may establish structures for temporary operations within the ceiling referred to in articles 1 and 2.
2. For the purposes and within the temporary limits mentioned under articles 1 and 2, the Ministry for Foreign Affairs is authorized, in situations of necessity and urgency, to proceed to the purchase of goods and services in economy, also derogating to general rules for public accounting, relying if possible on local resources either human or material
3. Within the budget ceilings referred to in articles 1 and 2, the personnel in temporary duty for the initiatives mentioned in articles 1 and 2, to include those personnel under article 16 of the law of the 26th of February 1987, n. 49, and subsequent modifications will perceive the per diem established under the royal decree of the 3 June 1926, n. 941, increased by 30% and determined having as a

168

reference the per diem calculated established for Saudi Arabia, United Arab Emirates and Oman.

4. The Ministry of Foreign Affairs, within the budget ceiling for the functioning of the technical unites referred to in article 13 of the law of the 26th of February 1987, n. 49, and of the detached Sections referred to in article 4, comma 2, of the Presidential Decree 12th April 1988, n. 177, is authorized to sustain the expenses for meals and lodging strictly necessary for the personnel sent in temporary duty in the Countries listed in articles 1, comma 1 and 2, comma 1 and 2, when for reasons of security, the said personnel has to be lodged in rooms at the disposition of Ministry. The expenses of the structures located in the Countries listed in articles 1, comma 1 and 2, comma 1 and 2 of this decree, are not affected by the provisions of article 9, comma 28, law decree 31 May 2010, n. 78, converted with modifications by the law 30 July 2010, n. 122. The effect deriving on the balances in public finance on the authorizations to expend under article 1 comma 1, e 2, comma 1, of the present decree.
5. When not otherwise established, the activities and initiatives provided for in the present Section are not affected by the provisions under article 57, comma 6 and 7, of the law decree 12 April 2006, n. 163, and subsequent modifications, as well as article 3, comma 1 e 5, and article 4, comma 2, of

169

the law decree 10 July 2003, n. 165, converted, with modifications by the law 10 August 2003, n. 219.

6. The expenditure authorized under article 1 e 2 are not affected by the provisions of article 60, comma 15, of the law decree 25 June 2008, n. 112, converted with modifications by the law 6 August 2008, n. 133, and by the provisions of article 6, comma 14, of the law decree 31 May 2010, n. 78, converted with modifications by the law 30 July 2010, n. 122.
7. For the aims, and within the temporary budget ceilings referred to in article 1 and 2, the Ministry of Foreign Affairs may rely on temporary consultancies provided by entities and specialized bodies, as well as from personnel not belonging to the public administration possessing specific professional requirements, and conclude agreements for coordinated and continuous collaboration, in derogation of the provision of article 6, comma 7, and article 9, comma 28, of the law decree 31 May 2010, n. 78, converted with modifications, by the law 30 July 2010, n. 122, article 1, comma 56, of the law 23 December 2005, n. 266, article 61, comma 2 and 3, of the law decree 25 June 2008, n. 112, converted with modifications by the law 6 August 2008, n. 133, and also in derogation of the provisions of article 7 and 36 of the law decree 39 March 2001, n. 165, and subsequent modifications. The contracts for consultancies are awarded in

170

the respect of the principle of equal opportunities between man and women, to local nationals or Italians or even citizens of other Countries as the condition that they fulfill the professional requirements.

8. Within the limits of the resources allocated by articles 1 and 2, the within the allocations established by articles 1 and 2 of the law decree 1st January 2010, n. 1, converted with modifications by the law 5 March 2010, n. 30, such allocations are validated, the activities carried out and the services procured from the 1st of January 2010 until the entry into force of the present decree, which are in compliance with the provisions of the present article, are validated.
9. Le sums mentioned in articles 1 and 2 of the present decree, if not committed in the fiscal year may be transferred in the budget of year 2011 and the following fiscal year.
10. The active balances of the allocations under articles 1 and 2 of the law decree 1st January 2010, n. 1, converted with modifications by the law 5 March 2010, n. 30, and articles 1 and 2 of the law decree 6 July, 2010, n. 102, converted with modifications by the law 3 August 2010, n. 126, articles 1 and 2 of the law decree 29 December 2010, n. 228, converted within the fiscal year 2011.

171

11. The Ministry of Foreign Affairs is authorized to continue the actions under article 2, comma 6, of the law decree 6 July 2010, n. 102, converted, with modifications by the law 3 August 2010, n. 126, as well those mentioned under the last part of article 2, comma, 1 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9, within the budget ceilings, without any mayor or new commitment for the public budget, also through idoneous governmental organizations or public and private entities.
12. Without prejudice of the prohibition to artificially frame the expenditure, in the presence of objective difficulties related to the use of the banking system, the established limit for payments not superior to 10.000 euro, done by diplomatic seats and pertaining to the funds mentioned under article 1, comma 1, and article 2, comma 1, transferred to them does not apply.
13. The organization of the activities for the interventions under article 1, comma 2 and 3, is defined with one or more decree of the Ministry of foreign Affairs with non regulatory nature, establishing:
 - a) the organization and the way the intervention is carried out, to include the links with authorities and local administrative and government structures activity

172

- b) the establishment within the Ministry of Foreign Affairs of a structure (<<Task Force>>), with the task to determine, manage and coordinate the interventions
- c) the establishment of a board in charge of the control of the interventions.

14. (suppressed).

15. (suppressed).

16. Within article 21, comma 1, of the law decree 3 February 2011, n. 71, the words; <<the head of the consular office>> are replaced by the following: <<the consular office>>.

17. The expiration term for the Commissary general for the Universal exposition of Shanghai is prolonged at the 31st October 2011. For the purposes of the present comma, the expenditure of the sum of 200.000 euro for the year 2011 is authorized.

18. The contribution provided for in article 1, comma 1, of the law 23 April 2002, n. 78, is incremented, from year 2011, by euro 60.000. The costs deriving from the implementation of the present comma will be covered by a corresponding reduction of the authorization established under article 3 of the law 4 June 1997, n. 170.

Section II

173

INTERNATIONAL MISSIONS OF THE ARMED FORCES AND
THE POLICE

Art. 4

International missions of the armed forces and the police.

1. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 399.704.836 is authorized for the prolongation of the participation in military personnel to the mission denominated International Security Assistance Force (ISAF) and EUPOL AFGHANISTAN, as previously authorized under article 4, comma 1 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
2. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 92.021.055 is authorized for the prolongation of the participation in military personnel to the mission denominated United Nations Interim Force in Lebanon (UNIFIL), to include the Maritime Task Force, as previously authorized under article 4, comma 2 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
3. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 33.234.000 is authorized for

174

the prolongation of the participation in military personnel to the missions in the Balkans listed below, as previously authorized under article 4, comma 2 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9:

a) Multinational Specialized Unit (MSU), European Union Rule of Law Mission in Kosovo (EULEX Kosovo), Security Force Training Plan in Kosovo;

b) Joint Enterprises.

4. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 150.248 is authorized for the prolongation of the participation in military personnel to the EU mission in Bosnia Herzegovina denominated ALTHEA, in whose ambit, the Integrated Police Unit (IPU) is established, as previously authorized under article 4, comma 4 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.

5. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 7.308.028 is authorized for the prolongation of the participation in military personnel to the mission denominated Active Endeavour, as previously authorized under article 4, comma 5 of the law decree 29

175

December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.

6. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 603.986 is authorized for the prolongation of the participation in military personnel to the mission Temporary International Presence in Hebron (TIPH2), as previously authorized under article 4, comma 6 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
7. Departing from the 1st of July and the until 31st of December 2011, the expenditure of euro 61.345 is authorized for the prolongation of the participation in military personnel to the EU border assistance mission for the assistance at the Rafah pass denominated European Union Border Assistance Mission in Rafah (EUBAM Rafah), as previously authorized under article 4, comma 7 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
8. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 128.507 is authorized for the prolongation of the participation in military personnel to the United Nations/African Union in Sudan denominated United Nations/African Union Mission in Darfur (UNAMID), as previously authorized under article 4, comma 8 of the law

176

decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.

9. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 104.721 is authorized for the prolongation of the participation in military personnel to the European Union mission in the Democratic Republic of Congo denominated EUPOL RD CONGO, as previously authorized under article 4, comma 9 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
10. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 134.228 is authorized for the prolongation of the participation in military personnel to the United nations mission denominated United Nations Peacekeeping force in Cyprus (UNFICYP), as previously authorized under article 4, comma 10 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
11. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 158.749 is authorized for the prolongation of the assistance activities to the Albanese Armed Forces, as previously authorized under article 4, comma 11 of the law decree 29 December 2010, n. 228,

177

converted with modifications by the law 22 February 2011, n.

9.

12. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 353.164 is authorized for the prolongation of the participation in military personnel to the European Union Vigilance mission in Georgia, denominated EUMM Georgia, as previously authorized under article 4, comma 12 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n.

9.

13. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 20.873.434 is authorized for the prolongation of the participation in military personnel to the European Union mission denominated Atalanta and to the NATO mission for the contrasts to piracy, as previously authorized under article 4, comma 13 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.

14. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 4.240.689 is authorized for the prolongation of the participation of military personnel in Iraq in activities of consultancy, training and education in favour of Iraqi armed forces and police, as previously authorized under article 4, comma 14 of the law decree 29 December 2010, n.

178

228, converted with modifications by the law 22 February 2011, n. 9.

15. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 10.483.835 is authorized for the prolongation of the employment of military personnel in the United Arab Emirates, in Bahrein and at Tampa for needs related to the mission in Afghanistan and Iraq, as previously authorized under article 4, comma 15 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
16. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 508.319 is authorized for the prolongation of the participation of military personnel in the European Union mission denominated BUTM Somalia, as previously authorized under article 4, comma 16 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February, 2011, n. 9.
17. Departing from the 1st of July and until the 31st of December 2011, the further expenditure of euro 64.255.200 is authorized for the signature of insurance and transportation contracts with an annual duration as well as for the realization of infrastructures for the missions listed in the present decree.

179

18. In order to provide to the first necessities of the local population and the re-establishment of essential services, the expenditure of euro 1.600.000 is authorized for urgent interventions and/or acquisition of services even in derogation to public accounting rules, decided by the Commandant of the Italian contingent participating to the mission ISAF in Afghanistan.
19. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 58.075.560 is authorized for the military mission implementing the intervention for the protection of civilians and civilian occupied areas in the Jamahiriya Araba Libya under threat of an attack, for the respect of the ban on over flights of the Libyan airspace and for the embargo on arms under Resolutions 1970 (2011) e 1973 (2011), adopted by the United Nations Security Council
20. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 3.382.400 is authorized for the prolongation of the cooperation programmes of the Italian police forces in Albania and in the Countries of the Balcan Regions, as previously authorized under article 4, comma 19 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
21. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 867.940 is authorized for the

180

prolongation of the participation of personnel of the Italian State police to the European Union Rule of Law Operation in Kosovo (EULEX Kosovo) and euro 31.480 for the prorogation of the participation of police personnel to the mission denominated United Nations Mission in Kosovo (UNMIK), as previously authorized under article 4, comma 20 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February, 2011, n. 9.

22. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 63.730 is authorized for the prolongation of the cooperation programmes of the Italian State police personnel to the mission in Palestine, denominated European Union Police Mission for the Palestinian Territories (EUPOL COPPS), as previously authorized under article 4, comma 21 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
23. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 270.851 is authorized for the prolongation of the cooperation programmes of the Italian personnel belonging to the carabinieri and the State police to the mission Bosnia Herzegovina denominated European Police Mission (EUPM), as previously authorized under article 4, comma 22, of the law decree 29 December 2010, n.

228, converted with modifications by the law 22 February, 2011, n. 9.

24. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 1.600.179 is authorized for the prolongation of the participation of personnel belonging to Guardia di Finanza to the mission in Afghanistan denominated International Security Assistance Force (ISAF), as previously authorized under article 4, comma 24 of the law decree 29 December, 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
25. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 342.220 is authorized for the prolongation of the participation of personnel belonging to Guardia di Finanza to the European Union Rule of Law mission (EULEX KOSOVO), as previously authorized under article 4, comma 25 of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
26. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 227.628 is authorized for the prolongation of the participation of personnel belonging to Guardia di Finanza to the Joint Coordination Unit (JMOUs) established in Afghanistan, United Arab Emirates and Kosovo, as previously authorized under Article 4, comma 26,

182

of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.

27. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 342. 220 is authorized for the prolongation of the participation of magistrates placed out of the roles and personnel belonging to the penitentiary police and administrative personnel of the Ministry of Justice to the European Union Rule of law mission (EULEX KOSOVO), as previously authorized under Article 4, comma 27, of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
28. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 19.254 is authorized for the prolongation of the participation of magistrates placed out of the roles to the European Police Mission for the Palestine territories (EUPOL COOPS), as previously authorized under Article 4, comma 28, of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.
29. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 96.971 is authorized for the participation of two magistrates placed out of the roles to the mission in Bosnia Herzegovina denominated European Police (EUPM), as previously authorized under Article 4,

183

comma 29, of the law decree 29 December 2010, n. 228, converted with modifications by the law 22 February 2011, n. 9.

30. Departing from the 1st of July and until the 31st of December 2011, the expenditure of euro 5.000.000 is authorized for the maintainment of the info-operational detachments of the Agency for external information and security (AISE) for the protection of armed forces deployed in international mission, in accordance with tasks of the AISE under article 6, comma 2, of the law 3 August 2007, n. 124.
31. For the completion of the activities for the implementation of the memorandum for the technical cooperation in security matter between the government of the Republic of Italy and the Government of the Republic of Panama, with the contemporaneous cancellation from the inventory and the special list of the naval units CP902 <Diciotti> and CP 903 <Dattilo> actually used by the Coast Guard. For the purpose of the present comma, the authorization to expend under article 3-bis, comma 3, of the law decree 25 September 2009, n. 135, converted with modifications by the law 20 November 2009 n. 166 with the sole reference to the purpose of article 3-bis, comma 2, is incremented by euro 17.400.000, in order to provide financial coverage for the failed buy back

184

of the said naval units due to concurrence procedures started against the corporation to which the contract was awarded.

31-bis. In order to A1 fine to allow an adequate operational effectiveness of the detachments listed under comma 31, with effect departing from the conversion of the present law decree, the table D attached to the law decree 31 July 1954, n. 533, converted with modifications by the law 26 September 1954, n. 869, is replaced by the Annex. A to the present decree. Any mayor income deriving from the present comma will be used for purposes related to the functioning of the Coast Guard.

SECTION II

MISSONI INTERNAZIONALI DELLE FORZE ARMATE E DI POLIZIA

Art. 4 bis

Measures for the support to sector of local economy afflicted by limitations imposed by the UN Resolution 1973.

1. The allocation in the fund established by article 2, comma 616, of the law 24 December 2007, n. 244, for the quote to be framed in fiscal year 2011 is incremented by the additional incomes under article 2, comma 11, letter a), of the law 24 December 2003, n. 350, and subsequent modifications, and in any case within the limit of 10 millions is allocated for the support of those sector of the local economy damaged by the

limitations deriving from operational limitations deriving from the United Nations Resolution 1973, which impacted on the operations of civilians airports.

2. By a decree of the President of Ministers Council, adopted upon proposal by the Ministries of Economy Finance, Interior, defence and infrastructure, heard the concerned provinces, to be adopted within 60 days from the date of the entry into force of the law converting this decree, the interventions needed will be determined.
3. The Ministry of Economy and Finance is authorized to determine, with own decree the necessary budgetary variations.

Capo II

INTERNATIONAL MISSIONS OF ARMED FORCES AND POLICE

Art. 5

Further measures for the contrast of piracy

1. The Ministry of Defence, as a part of international counter-piracy efforts and in order to ensure the freedom of navigation of national merchant shipping, may sign with the Italian private owners associations and with other subjects with specific powers of representation of that category framework agreements for the protection of vessels flying the Italian flag in transit in international sea areas at risk of piracy

186

designated by the Ministry of Defence upon consultations with the Ministry of Foreign Affairs and the Ministry of Infrastructures and Transportations, taking into consideration periodic reports by the International Maritime Organization- by embarking, at the request and with burden on the owners. Military Protection Detachments (Nuclei Militari di Protezione- NMP-) of the Italian Navy which may avail itself of personnel from other armed forces in order to fulfil the task.

2. Military personnel which is part of the Military Protection Detachment referred under comma 1, operates in compliance to the directives and rules of engagement issued by the Ministry of Defence. The commandant of each team, which has the exclusive responsibility for the military contrast to piracy, and the subordinate personnel are designated respectively as law enforcement officer and law enforcement auxiliaries in respect of the crimes listed in articles 1135₁ and 1136₂ of the Navigation Code and all those crimes linked to the former ones under the provision of article 12 of the Criminal Procedure Code. The above personnel is entitled to receive, upon reallocation of the resources from the pertinent income chapter, the comprehensive allowances for operational employment and those established for the personnel embarked on Units of the Italian Navy in international maritime spaces. The provisions contained in

187

article 5, comma 1, of the law decree 30 December 2008, n. 209, with modifications

1. *"Art. 1135. Piracy – The Master or officer of a national or foreign ship who has committed acts of depredation against a national or foreign ship, or his cargo or with intent to depredate commits acts of violence against a person embarked on a national or foreign ship is punished with imprisonment from 10 to 20 years. For other component of the crew the punishment is reduced in a way not exceeding one third; for extraneous persons the punishment is reduced up to the half".*
2. *Art. 1136. Ship suspected of piracy. The master or officer of a national or foreign ship which is abusively equipped with arms and is sailing without documents, is punished with imprisonment from 5 to 10 years. The second comma of previous article applies".*
3. *"Art. 12. Cases in which there is connection- 1. There is connection between proceedings when:*
 - a) *when the crime for which there is proceeding has been committed by more persons acting under concurrence or cooperation between them or when two or more persons has caused with independent conduct, the event;*
 - b) *if a person has been charged for more crimes committed with a unique action or omission or in furtherance of the same criminal plot;*
 - c) *if some of the crimes for which there is a proceeding some have been committed in order to commit or hide others".*

by the law 24 February 2009, n. 124, and in the article 4, comma 1-sexies and 1-septies, of the law decree 4 November 2009, n. 152, converted with modifications by the law 29 December 2009, n. 197, considering the "necessities

188

of military operations" replaced by the "need to protect the vessels referred to in comma 1".

3. The owner of the vessel under protection referred to in comma 1, shall refund the costs, including the cost for the personnel and the cost of operations as defined in the agreement referred to in comma 1, by the income chapter of the State budget in order to be reallocated to the estimates of expenditure of the Ministry of Defence, in derogation of the provisions of article 2, comma 615, and 617 of the law of the 24th of December 2007, n. 244, limiting reallocation of funds.
4. In the context of international efforts for counter-piracy and the participation of military personnel at the operations referred to in article 4, comma 13 of this decree, and also in conjunction with the European Union Joint Action 2008/851/PESC of the Council, of the 10th of November 2008, and awaiting the approval of the guidelines of the Maritime Safety Committee >> (MSC) of the United Nations within the <<International Maritime Organization>> (IMO) of the United Nations within the detachments referred to in comma 1, are not established – and in any case within the limits established in comma 5, 5-bis, 5-ter, the employment of "sworn guards", authorized under articles 133 and 134 of the Unified law text on Public Security, approved with Royal Decree 18 of the June 1931, n. 773, on board merchant ships

flagged in Italy transiting in international waters referred to in comma 1, for the protection of the said ships.

5. The employment referred to under comma 4 is allowed exclusively on board the ship predisposed for the defence from act of piracy, through the implementation of at least one of the means mentioned in the <<best management practices>> for the self-protection of shipping developed by IMO, and authorized to detain arms under comma 5-bis, through sworn guards to be recruited preferably among those having military experience, eventually as voluntaries, and have attended one of the theory and practical courses mentioned in the implementing of the Ministry of Interior 15 September 2009, n. 154, adopted in order to implement article 18 of the law decree 27 July 2005, n. 144, converted with modifications by the law 31 July 2005, n. 155.

5-bis. The personnel referred to in comma 4 while fulfilling their service in accordance with comma 5 and within the limits of international waters may use the weapons which are part of the equipment of the ship, upon prior authorization by the Ministry of Interior to the ship owner under article 28 of the unified text for public security approved with Royal decree 18 June 1931, n. 773. Authorization is granted by the Ministry of Interior heard the Ministry of Defence and the Ministry of Infrastructure

190

4 "1. The personnel participating to the international missions falls under the military penal code for peace time

and Transportation, for the purchase of arms, transportation and cession of arms in fiduciary trust to the personnel mentioned under comma 4.

5-ter. A decree of the Ministry of Interiors agreed with the Ministry of Defence and the Ministry of Infrastructures and Transportations, within 60 days from the entry into force of the law converting this decree, will detail the measures for the implementation of comma 5, 5-bis and 5-ter to include the purchase, transport and fiduciary cession of the arms detained on board, their ammunition, the quantity as well as the relationship between the personnel mentioned in comma 4 and the Maters.

6. On board the ships and within the areas in which the services mentioned in comma 1 and 4, the provisions of article 5 comma 2 to 6 of the urgent decree 209 of 2008 converted with modifications by the law n. 12 of 2009 and subsequent modifications.

6-bis. Under article 111, comma 1 (Competencies of the Navy), of the Code of the military organization approved with delegated decree 15 March 2010, n. 66, letter a) is replaced by the following:-

191

5. 2. Crimes committed by the foreigner in the territories or on the high seas where the intervention and international missions listed in these decrees take place, against the State or Italian citizens participating to the said interventions or missions, are punished upon sanction by the Minister of justice heard, for crimes against personnel belonging to the armed forces, the Minister of defence.

3. Crimes listed in comma 2 are subject, when committed in the territories and in the timeframe of the interventions and military missions, to the jurisdiction of the ordinary tribunal in Rome.

4. Crimes dealt with in articles 1135 and 1136 of the navigation code and those connected to them under article 12 of the code for criminal procedure, if committed against the State, Italian citizens or goods in the areas in which the interventions or military missions mentioned under article 3 comma 14, take place, are punished under article 7 of the penal code and the competence belongs to the Tribunal of Rome.

5. When a person has been arrested or when there is the necessity to interview a person in custody on remand for one of the crimes listed under comma 4, when imperative reasons impedes the transfer of the person in a jail at the disposal of judicial authorities article 9, comma 5 and 6, of the law decree 10 December 2001, n. 421 converted with modifications by the law 31 January 2002, n. 6. In the same situations, the arrested person will remain restricted under military custody on board the ship.

6. Upon seizure, the judicial authority may appoint the owner as a judicial custodian of captured aircraft captured with acts of piracy."

<<"a) the vigilance and the protection of national interests and sea lines of communication beyond the external limit of territorial sea, to include counter-piracy also with the means mentioned under article 5, comma 1, of the law decree 12 July 2011, n. 107>>.

192
6-ter. From the implementation of this article no new or
mayor expenditure shall derive for the public budget.

CONSULATE GENERAL OF ITALY, MUMBAI

TRUE COPY

193
ANNEXURE-P-7

KERALA POLICE
FIRST INFORMATION REPORT
(Under Section 154 Cr.P.C)

1. District: KOLLAM P.S. Coastal PS Year: 2012 FIR No.
2/2012 Date: 15-02-2012
2. Act: IPC Section(s): 302
3. Date of Occurrence
 - (a) Day: Wednesday Date from: 15-02-2012 Time period:
16.30 Time from: 21.15 hrs Time to 21.15 hrs
 - (b) Information received at PS. Date: 15-02-2012 Time: 23.15 hrs
 - (c) General Diary Reference: Entry No. Time:
4. Type of information -
5. Place of occurrence - 33 nautical mile north west from
Neendakara port at Arabian sea
 - (a) Direction and distance from P.S.: Beat No.
6. Complainant/Informant
 - (a) Name: Fredy
 - (b) Father's/Husband's Name: John Pesco
 - (c) Date/Year of birth: 30/2012
 - (d) Nationality: Indian
 - (e) Passport No. Date of issue Place of issue
 - (f) Occupation: Fishing

193

(g) Address: House No. 11/174, Poonthura Christu Nagar,
Ezhudesam Village, Vilavankode Taluk, Kanyakumari
District

7. Details of known/suspect/unknown accused: An employee of the ship painted black on top and red at bottom who had caused the crime at the time of committing the same.

12. FIR Contents

That the complainant and others were fishing at deep seas on 15-02-2012 at around 4.30 pm off about 33 nautical miles north-west from Neendakara harbour using St. Antony boat belonging to the complainant along with his ten workers including Jelastin and Pinky and while they were moving in the boat for fishing an officer who was in a ship having black paint on its top and red paint on its bottom fired continuously at the boat with the intention of killing the employees of the boat and with the knowledge that even death can occur because of his action, because of his objection for their fishing at the deep sea or some other reasons, and Jelastin aged 48, a worker of the boat was hit by bullet just below his right ear and Pinky aged 20 another worker of the boat was hit on the right side of his chest and both of them died. The accused has killed them intentionally.

14. Signature of the Complainant sd/- (Fredy)

194

Sd/-

Signature of the Officer-in-charge of

Police Station

Name: R Jayaraj

Rank: C I of Police, Costal PS, Neendakara

15.2.2012

FIRST INFORMATION

District: Kollam

Police Station: Coastal Police
Station, Neendakara

Statement given orally by Fredy (Mob. 07736593262) aged 30 years s/o John Pesco, r/o House No. 11/174, Poonthura Christu Nagar, Ezhudesan Village, Vilavankode Taluk, Kanyakumari District to R. Jayaraj, Circle Inspector, Neendakara Coastal Police Station.

My occupation is fishing. I have studied up to class 10th. For the last six years I am working as Syrang of my own fishing boat named St. Antony and am engaged in fishing. We do fishing in the Neendakara area permanently. There are 10 other employees namely Killari, Francis, Johnson, Kinserivan, Clements, Muthappan, Martin, Michel, Jelastin and Pinky apart from me in the boat. All the other nine except Jelastin are natives of my own place. Jelastin's house is at Muthakkara. On last Tuesday (7.2.2012) by 12.00 noon I and workers set out for fishing. Normally we go up to 60 nm and do fishing for up to 10 days and then return. We catch fish both during day and night. We were catching fish during the past eight days. Normally it is me who

195

drives the boat and others catch fish. The result of the job was not so good during the last night.

After reaching about to 40 nautical mile, we were returning and when we reached about 24 nm from the shore it was about 4.30 pm. At that time except Jelastin and Pinky all others were asleep. Jelastin was driving the boat. Pinky was sitting at the stern of the boat. When I woke up hearing sound, it was found that blood was coming out from the ears. He was sitting in the driver's seat but did not say anything. I cried. Hearing my cry, the others woke up. At that time firing from the ship towards our boat was continuing. Then I told other in Tamil that the people from the ship is firing and asked them to lie down. All of us lay on the deck of the boat. At that time there was a cry for help from the stern of the boat. I ran towards there and found he breathed twice heavily and lay still. I checked his pulse and I could understand that he was dead. Blood was coming from the right side of his chest. I did not examined because I was afraid. The firing was from a ship which went north west to us on our right side. The ship is having black paint on its top and red paint on its bottom. There was no load in the ship. It was standing high on the sea. There was firing for about 2 minutes from the ship. The ship was about 200 meters away from our boat.

The bullets hit the top of the boat and the gas cylinder kept inside the Wheel house and is hose was broken and gas came out

196

from it. The bullets were literally showering. I took the boat away at high speed. Jelastin's body was taken from the Wheel House and placed near that of Pinky's and covered. Jelastin is about 48 years. Pinky is about 20 years. I called the owner of the boat St Antony, Prabhu from the wireless set of my boat and told him what happened. Those in the ship gunned down two among us with no provocation at all. Before firing from the ship no alarm was raised, no mike announcement made nor was there any firing in the air as a warning to us. The spot of incident is about 31 nm northwest from here. We reached Neendakara harbour by 11.00 pm. The dead bodies are kept at the mortuary of District Hospital, Kollam.

The statement was read out to me and found correct.

Sd/- (FREDY)

The statement read out and he agreed that the same is correct.

Sd/-
Police Circle Inspector
Coastal PS
Neendakara.
Kollam, 15.2.2012

TRUE COPY

197
ANNEXURE P-8

PROSECUTION OFFICE WITHIN THE MILITARY TRIBUNAL OF
ROME

Viale delle Milizie n.5/c-00192 Rome n.47/2012/DP/R.mod 45

TO: Commanding Officer of the Military Protection Detachment
LATORRE embarked on board the MV Enrica LEXIE
By Command in Chief of the Italian Fleet.

Rome

OBJECT: Proceeding n. 47/2012/DP/R.mod 45. Preliminary investigations regarding the "event occurred the 15th of February 2012 in international waters, in the Indian Ocean, when a military security detachment of the Navy embarked on board the MV Enrica LEXIE has made use of their arms".

In reference to the information report dated 17 February 2012 filed by those Commanding Officer, I'm delegating you, in your quality of Law Enforcement Officer, to conduct the following investigations in order to provide this Office with elements of information.

Specifically, beyond what above requested, you are directed to ascertain and communicate with the maximum urgency:

- Specific duties carried out by the detachment in the area (detachment, post and other elements).
- What duties were currently carried and which soldiers were on duty, specifically listed by name, rank and charge;

198

- What instructions were in force at the moment the event occurred and if such instructions have been concretely respected, in respect to the activities carried out as well as with respect to the arms and equipment.

Rome, the 17th of February, 2012

The Military Prosecutor
Dr. Marco DE PAOLIS

TRUE COPY

199
ANNEXURE-P-9**EMBASSY OF ITALY
NEW DELHI****NOTE VERBALE**

95/553

The Embassy of Italy presents its compliments to the Ministry of External Affairs, Government of India and has the honour to refer to the case of the ship Enrica Lexie as per Note Verbale n. 71 dated February 18th 2012.

The Embassy of Italy would like to recall that according to principles of customary international law, recognized by several decisions of International Courts. State organs enjoy jurisdictional immunity for acts committed in the exercise of their official functions. The Italian Navy Military Detachment that operated in international waters on board of the ship Enrica Lexie must be considered as an organ of the Italian State.

Their conduct has been carried out in the fulfillment of their official duties in accordance with national regulations (Italian Act nr. 107/2011), directives, instructions and orders, as well as the pertinent rules on piracy contained in the 1982 UN Convention on the Law of the Sea and in the relevant UN Security Council Resolutions on the Piracy off the Horn of Africa.

The Embassy of Italy welcomes the steps taken by the Chief Judicial Magistrate in Kollam in order to protect the life and honour

200

of the Italian Military Navy Personnel currently held in judicial custody on remand. The Embassy of Italy also welcomes the cooperative approach on the issue of the examination of the weapons taken by the Magistrate.

The Embassy of Italy nevertheless reasserts the Italian exclusive jurisdiction in respect of the said military personnel. It wishes to inform that investigations by both the Italian ordinary and military judicial authorities have already been initiated. Therefore, it urges for the release of the Italian Navy Military Personnel and the unimpeded departure from the Indian Territory. They have entered Indian territorial waters and harbor simply as a Military Force Detachment officially embarked on the Italian vessel Enrica Lexie in order to cooperate with Indian authorities in the investigation in an alleged piracy episode. The entry in Indian territorial waters was upon initial invitation and then under direction of Indian Authorities.

The Embassy of Italy, while reiterating the sovereign right of a State to employ its military personnel in ongoing antipiracy military protection of national flagged merchant ship in international waters, underlines that the same right is not impaired by the ongoing national investigations involving Italian Navy Military Personnel.

The Italian Navy Military Personnel, currently held in judicial custody on remand, was carrying out official functions for the protection of the vessel from piracy and armed robbery in the

201

extraterritorial maritime zones which at the relevant time were considered as "risk area", taking also in consideration information provided by IMO and other relevant multinational organization. Thus, while acknowledging the obligations of Italy under international law, including the obligation to cooperate with Indian authorities for the most comprehensive and mutually satisfactory investigation of the event, the Embassy of Italy recalls that the conduct of Italian Navy Military Personnel officially acting in the performance of their duties should not be open to judgment scrutiny in front of any court other than the Italian ones.

The Embassy of Italy, New Delhi avails relief of this opportunity to renew to the Ministry of External Affairs, Government of India, the assurances of its highest consideration.

New Delhi, 29th February, 2012

Consulate General of Italy, Mumbai

Ministry of External Affairs
Government of India
Europe West Division
New Delhi.

TRUE COPY

202

ANNEXURE-P-10

GOVERNMENT OF INDIA
MINISTRY OF SHIPPING,
DIRECTORATE GENERAL OF SHIPPING
"JAHAZ BHAVAN"
W. H. MARG,
MUMBAI-400001

Tele: 22613651-54
Fax: 91-22-22613655
Web: www.dgshipping.com

File No. 35-NT(4)/2012

Dated: 7th March 2012

MS Notice No. 7 of 2012

Sub: Navigation off the Indian coast- transgressing of fishing nets – mistaking fishing boats with pirate skiffs.

1. Shipping traffic closer to western Indian coast has been observed to be steadily increasing during recent times as merchant ships appear to prefer planning their passage closer to Indian coast as against the straight courses across the Arabian seas.
2. There are over 300,000 fishing boats in operations off the Indian coast. Fishing off the coast of state of Kerala and Karnataka is particularly intense during post South West monsoon and extends up to 50 NM from the coastline. Generally in these waters, FRP Fishing boats with 04-05 crew with outboard motors operate and engage in fishing activity with long lines and purseine gear.

203

3. Increasing shipping traffic closer to the Indian coast causes the merchant ships to, at times, transgress the fishing nets. On observing the approaching merchant vessel onto their fishing nets/gear, it is common for the fishing boats to raise alarm and to 'sail towards' the merchant ship to attract attention so as to avoid damage to their nets.
4. Reports are being received where merchant ships have mistaken the fishing boats to be 'pirate skiffs' In one such recent incident off the coast of West coast of India, Kerala, a merchant ship fired on the fishermen, killing two of the fishermen. The ship's security guards had assumed the innocent fishermen to be the pirates. In addition, there has been report of another report of firing of warning shots on Indian fishermen.
5. In another case, a merchant ship collided with a fishing boat. This resulted in sinking of the boat and loss of life of three fishermen while two of the fishermen are still missing. These unfortunate accidents have resulted in the detention of the suspected vessels and their crew members/security guards involved. In addition to these two instances, there have been numerous reporting of near miss collisions of fishing vessels with merchant ships off the west coast of India.
6. It has been reported that merchant ships are transiting very close to the coast to avoid the High Risk Area (HRA) which

204

starts at 12 NM from the Indian coast. When the merchant ships navigate close to the coast, they do have close encounters with the fishermen. This interface may result in either a collision with the fishing vessels or at times merchant ships mistaking the fishermen to be pirates, fire upon the innocent fishermen. Such close encounters may result in the adverse consequences for the fishing vessels as well as the merchant ships.

7. While the ships are advised to maintain best management practices as per the advice of IMO, while navigating in the high risk area, it is clarified that continuing heightened vigil of Indian Navy and Indian Coast Guard has ensured that no cases of incidents of piracy have occurred in the Indian EEZ (up to 200 NM from the Indian coast) since June 2011.

8. Therefore, all merchant vessels are advised;

a) to take note of dense fishing traffic on Indian coast, the possibility that they may be approached by these boats for safeguarding their nets/ lines and should not mistake these fishing boats for 'pirate skiffs' or PAGs and navigate with extreme caution when approaching upto 50 NM from the Indian coast, and,

b) to take cognizance of IMO Circular MSC.1/1334 dated 23 Jun 2009 with regard to appreciating sufficient grounds for

205

suspecting the fishing vessel to be a Pirate Action Group (PAG).

- c) to report sightings of any suspicious craft within Indian EEZ to Indian Coast Guard on contact details mentioned under para 7 below.

9. All merchants ships are further advised to report the presence of armed Guards on board to Indian Navy (email: wncmocmb-navy@nic.in; fax: +91 22 22661702)/ Indian Coast Guard (email: mrcc-west@indiancoastguard.nic.in or indsar@vsnl.net, or icgmrce_mumbai@mtnl.net; Telephone: +91 22 24388065, 24316558, Fax: +91 22 24316558, +91 22 24333727) in compliance to para 3.8 of IMO circular MSC.1/Circ 1405/Rev.1 dated 16 Sept. 2011 and para 7.6 of Ministry of Shipping, Govt. of India Circular F. No. SR-13020/6/2009-MG (pt) dated 29 Aug 2011.

10. This is issued with approval of Director General of Shipping.

Sd/-
(Capt. Harish Khatri)
(Dy. Director General of Shipping (Tech))

TRUE COPY

206

ANNEXURE-P-11

BEFORE THE HON'BLE SESSIONS COURT KOLLAM

SC NO.515 OF 2012

Report most respectfully submitted by the investigating officer R.
Jayaraj Circle Inspector of Police Coastal Police Station,
Neendakara in the above case

The above case stands charge sheeted under section 302, 307, 427 r/w 34 of the Indian Penal Code and under section 3 SUA Act 2002.

Section 3 of SUA Act 2002 was incorporated in the case on 26.03.2012 pursuant to the opinion of Ministry of Shipping in that regard.

Now legal opinion has been received that from the fact and circumstance sec 3 of SUA Act 2002 is not maintainable in this case factually or legally. Hence it is submitted that cognizance may not be taken for the said offence.

This report is submitted for further action in this case.

Submitted

R. Jayaraj
CI of Police Coastal
Neendkara, Kollam
31.05.2012

TRUE COPY

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
(Under Article 32 of the Constitution of India)

Writ Petition (Civil) No. 236 of 2014

IN THE MATTER OF:

Chief Master Seargeant Massimiliano Latorre
& Another

... Petitioners

Versus

Union of India & Ors.

... Respondents

VOL-II

(Annexure-P-12 to P-21 and Application for interim reliefs/stay)

PAPER BOOK
(FOR INDEX, PLEASE SEE INSIDE)

ADVOCATE FOR THE PETITIONERS: JAGJIT SINGH CHHABRA

RECORD OF PROCEEDINGS
Date of Record of Proceedings

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.
- 11.
- 12.
- 13.
- 14.
- 15.

INDEX

S. NO.	PARTICULARS	PAGES
16.	<u>ANNEXURE-P-12:</u> Copy of Judgment dated 18.01.2013 passed by the Hon'ble Supreme Court in Writ Petition (Civil) No. 135 of 2012 and the Special Leave Petition (Civil) No. 20370 of 2012.	207 - 306
17.	<u>ANNEXURE-P-13:</u> Copy of the Order dated April 1, 2013 passed by the Ministry of Home Affairs, New Delhi.	307 - 308
18.	<u>ANNEXURE-P-14:</u> Copy of re-registered FIR No. RC-04/2013/NIA/DLI dated April 4, 2013 Police Station National Investigation Agency, New Delhi under Section 302, 307, 427 r/w 34 IPC.	309 - 315
19.	<u>ANNEXURE-P-15:</u> Copy of the Order dated April 15, 2013 passed by the Ministry of Home Affairs, New Delhi.	316 - 317
20.	<u>ANNEXURE-P-16:</u> Copy of Notification dated April 15, 2013 issued by the Ministry of Home Affairs, New Delhi.	318 - 320
21.	<u>ANNEXURE-P-17:</u> Copy of Order dated April 26, 2013 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 135 of 2012.	321 - 328
22.	<u>ANNEXURE-P-18:</u> Copy of Ministry of External Affairs' e-mail dated April 27, 2013.	329

23. **ANNEXURE-P-19:**
Copy of the extract from the website of
NIA showing the Court of District
Additional Session Judge 01, New Delhi,
Patiala House Courts as a NIA Special
Court. 330 - 332
24. **ANNEXURE-P-20:**
Copy of the Order dated February 6,
2014 sanctioning prosecution under SUA
passed by the Ministry of Home Affairs,
New Delhi. 333 - 338
25. **ANNEXURE-P-21:**
Copy of the Affidavit filed by the Union of
India with this Hon'ble Court on February
24, 2014. 339 - 340
26. Application for interim reliefs/stay. 341 - 344

207
ANNEXURE-P-12

ITEM NO.1A "OUT TODAY"
COURT NO.1 SECTION X
[FOR JUDGMENT]

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS
WRIT PETITION (CIVIL) NO(s). 135 OF 2012

REPUBLIC OF ITALY THR. AMBASSADOR & ORS. Petitioner(s)

VERSUS

UNION OF INDIA & ORS. Respondent(s)

WITH

SLP(C) NO. 20370 of 2012

Date: 18/01/2013 These Petitions were called on for JUDGMENT
today.

For Petitioner(s) Mr. Harish N.Salve, Sr. Adv.
Mr. Sphail Dutt, Sr. Adv.
Mr. Diljit Titus, Adv.
Mr. Jagjit Singh Chhabra, AOR
Mr. Jayesh Gaurav, Adv.
Mr. Vibhav Sharma, Adv.

For Respondent(s) Ms. Indira Jai Sing, ASG.
Mr. D.S. Mahra, AOR
Mr. B. Krishna Prasad, AOR
Mr. V.Giri, Sr. Adv.
Mr. Ramesh Babu M.R., AOR

Hon'ble the Chief Justice and Hon'ble Mr. Justice J.
Chelameswar pronounced their separate but concurring judgments
of the Bench comprised of Their Lordships.

Pursuant to the decision rendered by us in Writ Petition(C)No.135 of 2012 and SLP(C) NO. 20370 of 2012, certain consequential directions are required to be made, since the petitioner Nos.2 and 3 had been granted bail by the Kerala High Court.

Since we have held that the State of Kerala as a Unit of the Federal Union does not have jurisdiction to try the matter, we are of the view that till such time as the Special Court is constituted in terms of our judgments, the said petitioners should be removed to Delhi and be kept on the same terms and conditions of bail, as was granted by the High Court, except for the following changes:-

1. The orders passed by the Kerala High Court restricting the movement of the said petitioners is lifted, but the same conditions will stand reinstated, as and when the said petitioners come to Delhi and they shall not leave the precincts of Delhi without the leave of the Court.
2. Instead of reporting to the Police Station at City Commissioner at Kochi, they will now report to the Station House Officer of the Chanakaya Puri Police Station, New Delhi, once a week, subject to further relaxation, as may be granted.
3. Once the said petitioners have moved to Delhi, they shall upon the request of Italian Embassy in Delhi, remain under their control. The Italian Embassy, in Delhi, also agrees to be responsible for the movements of the petitioners and to ensure

209

that they report to the trial court, as and when called upon to do so.

4. Since their passports had been surrendered to the trial court in Kollam, the same is to be transferred by the said court to the Home Ministry, immediately upon receipt of a copy of this judgment".

Let copies of these judgments/Orders be made available to the learned advocates of the respective parties and also to a representative of the petitioner No.1. In addition, let copies of these Judgments be also sent to the High Court of Kerala, as also the trial court at Kollam, who are to act on the basis thereof immediately on receipt of the same.

Till such time as the Special Court is set up, the petitioner Nos. 2 and 3 will be under the custody of this Court.

Let copies of these Judgments/Orders be communicated to the Kerala High Court and the court of the Magistrate at Kollam and also to the City Police Commissioner, Kochi and D.C.P. Kochi Airport, by E-mail, at the cost of the petitioners.

The Writ Petition and the Special Leave Petition, along with all connected applications, are disposed of in terms of the signed judgments.

(Sheetal Dhingra)
Court Master

(Juginder Kaur)
Assistant Registrar

[Signed Reportable Judgments are placed on the file]

210
REPORTABLEIN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.135 OF 2012

1 Republic of Italy & Ors. ... Petitioners

Vs.

2 Union of India & Ors. ... Respondents

WITH

SPECIAL LEAVE PETITION (CIVIL) NO.20370 OF 2012

2 Massimiliano Latorre & Ors. ... Petitioners

Vs.

3 Union of India & Ors. ... Respondents

J U D G M E N TALTAMAS KABIR, CJI.

1. The past decade has witnessed a sharp increase in acts of piracy on the high seas off the Coast of Somalia and even in the vicinity of the Minicoy islands forming part of the Lakshadweep archipelago. In an effort to counter piracy and to ensure freedom of navigation of merchant shipping and for the protection of vessels flying the Italian flag in transit in International seas, the Republic of Italy enacted Government Decree 107 of 2011, converted into Law of Parliament of Italy No.130 of 2nd August, 2011, to protect Italian ships from piracy in International seas. Article 5 of the said legislation provides for deployment of Italian Military Navy Contingents on Italian vessels flying the

211

Italian flag, to counter the growing menace of piracy on the seas. Pursuant to the said law of Parliament of Italy No.130 of 2nd August, 2011, a Protocol of Agreement was purportedly entered into on 11th October, 2011, between the Ministry of Defence - Naval Staff and Italian Shipowners' Confederation (Confitarma), pursuant to which the Petitioner Nos.2 and 3 in the writ Petition, who are also the Petitioner Nos.1 and 2 in the Special Leave Petition, were deployed along with four others, as "Team Latorre", on board the "M.V. Enrica Lexie" on 6th February, 2012, to protect the said vessel and to embark thereon on 11th February, 2011, from Galle in Sri Lanka. The said Military Deployment Order was sent by the Italian Navy General Staff to the concerned Military Attaches in New Delhi, India and Muscat, Oman. A change in the disembarkation plans, whereby the planned port of disembarkation was shifted from Muscat to Djibouti, was also intimated to the concerned Attaches.

2. While the aforesaid vessel, with the Military Protection Detachment on board, was heading for Djibouti on 15th February, 2012, it came across an Indian fishing vessel, St. Antony, which it allegedly mistook to be a pirate vessel, at a distance of about 20.5 nautical miles from the Indian sea coast off the State of Kerala, and on account of firing from the Italian vessel, two persons in the Indian fishing vessel were killed. After the said incident, the Italian vessel continued on its scheduled course to

212

Djibouti. When the vessel had proceeded about 38 nautical miles on the High Seas towards Djibouti, it received a telephone message, as well as an e-mail, from the Maritime Rescue Co-ordination Centre, Mumbai, asking it to return to Cochin Port to assist with the enquiry into the incident. Responding to the message, the M.V. Enrica Lexie altered its course and came to Cochin Port on 16th February, 2012. Upon docking in Cochin, the Master of the vessel was informed that First Information Report (F.I.R.) No.2 of 2012 had been lodged with the Circle Inspector, Neendakara, Kollam, Kerala, under Section 302 read with Section 34 of the Indian Penal Code (I.P.C.) in respect of the firing incident leading to the death of the two Indian fishermen. On 19th February, 2012, Massimiliano Latorre and Salvatore Girone, the Petitioner Nos.2 and 3 in Writ Petition No.135 of 2012, were arrested by the Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, from Willington Island and have been in judicial custody ever since.

3. On 20th February, 2012, the petitioner Nos.2 and 3 were produced before the Chief Judicial Magistrate (C.J.M.), Kollam, by the Circle Inspector of Police, Coastal Police Station, Neendakara, who prayed for remand of the accused to judicial custody.

4. The petitioners thereupon filed Writ Petition No.4542 of 2012 before the Kerala High Court, under Article 226 of the

213

Constitution, challenging the jurisdiction of the State of Kerala and the Circle Inspector of Police, Kollam District, Kerala, to register the F.I.R. and to conduct investigation on the basis thereof or to arrest the petitioner Nos.2 and 3 and to produce them before the Magistrate. The Writ Petitioners prayed for quashing of F.I.R. No.2 of 2012 on the file of the Circle Inspector of Police, Neendakara, Kollam District, as the same was purportedly without jurisdiction, contrary to law and null and void. The Writ Petitioners also prayed for a declaration that their arrest and detention and all proceedings taken against them were without jurisdiction, contrary to law and, therefore, void. A further prayer was made for the release of the Petitioner Nos.2 and 3 from the case.

5. Between 22nd and 26th February, 2012, several relatives of the deceased sought impleadment in the Writ Petition and were impleaded as Additional Respondents Nos.4, 5 and 6.

6. During the pendency of the Writ Petition, the Presenting Officer within the Tribunal of Rome, Republic of Italy, intimated the Ministry of Defence of Italy on 24th February, 2012, that Criminal Proceedings No.9463 of 2012 had been initiated against the Petitioner Nos.2 and 3 in Italy. It was indicated that punishment for the crime of murder under Section 575 of the Italian Penal Code is imprisonment of at least 21 years.

214

7. After entering appearance in the writ petition, the Union of India and its Investigating Agency filed joint statements therein on 28th February, 2012, on behalf of the Union of India and the Coast Guard, with the Kerala High Court, along with the Boarding Officers Report dated 16th- 17th February, 2012, as an annexure. On 5th March, 2012, the Consul General filed a further affidavit on behalf of the Republic of Italy, annexing additional documents in support of its claim that the accused had acted in an official capacity. In the affidavit, the Consul General reasserted that Italy had exclusive jurisdiction over the writ petitioners and invoked sovereign and functional immunity.

8. The Kerala High Court heard the matter and directed the Petitioners to file their additional written submissions, which were duly filed on 2nd April, 2012, whereupon the High Court reserved its judgment. However, in the meantime, since the judgment in the Writ Petition was not forthcoming, the Petitioners filed the present Writ Petition under Article 32 of the Constitution of India on 19th April, 2012, inter alia, for the following reliefs:-

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

(ii) Declare that the continued detention of Petitioners 2 and 3 by the State of Kerala is illegal and ultra vires being

215

violative of the principles of sovereign immunity and also violative of Art. 14 and 21 of the Constitution of India; and

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

9. During the pendency of the said Writ Petition in this Court, the Kerala State Police filed charge sheet against the Petitioner Nos.2 and 3 herein on 18th May, 2012 under Sections 302, 307, 427 read with Section 34 Indian Penal Code and Section 3 of the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, hereinafter referred to as 'the SUA Act'. On 29th May, 2012, the learned Single Judge of the Kerala High Court dismissed Writ Petition (Civil) No.4542 of 2012 on two grounds. The learned Single Judge held that under the Notification No. SO 67/E dated 27th August, 1981, the entire Indian Penal Code had been extended to the Exclusive Economic Zone and the territorial jurisdiction of the State of Kerala was not limited to 12 nautical miles only. The learned Single Judge also held that under the provisions of the SUA Act, the State of Kerala has jurisdiction upto 200 nautical miles from the Indian coast, falling within the Exclusive Economic Zone of India.

216

10. Aggrieved by the aforesaid judgment of the Kerala High Court, the Petitioners filed Special Leave Petition (Civil) No.20370 of 2012, challenging the order of dismissal of their Writ Petition by the Kerala High Court.

11. As will be evident from what has been narrated hereinabove, the subject matter and the reliefs prayed for in Writ Petition (Civil) No.4542 of 2012 before the Kerala High Court and S.L.P.(C) No.20370 of 2012 are the same as those sought in Writ Petition (Civil) No.135 of 2012.

12. Accordingly, the Special Leave Petition and the Writ Petition have been heard together.

13. Simply stated, the case of the Petitioners is, that the Petitioner Nos.2 and 3, had been discharging their duties as members of the Italian Armed Forces, in accordance with the principles of Public International Law and an Italian National Law requiring the presence of armed personnel on board commercial vessels to protect them from attacks of piracy. It is also the Petitioners' case that the determination of international disputes and responsibilities as well as proceedings connected therewith, must necessarily be between the Sovereign Governments of the two countries and not constituent elements of a Federal Structure. In other words, in cases of international disputes, the State units/governments within a federal structure, could not be

217

regarded as entities entitled to maintain or participate in proceedings relating to the sovereign acts of one nation against another, nor could such status be conferred upon them by the Federal/Central Government. It is also the case of the writ petitioners that the proceedings, if any, in such cases, could only be initiated by the Union at its discretion. Consequently, the arrest and continued detention of the Petitioner Nos.2 and 3 by the State of Kerala is unlawful and based on a misconception of the law relating to disputes between two sovereign nations.

14. Appearing for the writ petitioners, Mr. Harish N. Salve, learned Senior Advocate, contended that the acquiescence of the Union of India to the unlawful arrest and detention of the Petitioner Nos.2 and 3 by the State of Kerala was in violation of the long standing Customary International Law, Principles of International Comity and Sovereign Equality Amongst States, as contained in the United Nations General Assembly Resolution titled "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation between States in accordance with the Charter of the United Nations". Mr. Salve contended that these aforesaid principles require that any proceeding, whether diplomatic or judicial, where the conduct of a foreign nation in the exercise of its sovereign functions is questioned, has to be conducted only at the level of the Federal or Central Government and could not be the subject matter of a proceeding initiated by a Provincial/State Government.

218

15. Mr. Salve submitted that the incident which occurred on 15th February, 2012, was an incident between two nation States and any dispute arising therefrom would be governed by the principles of International Legal Responsibility under which the rights and obligations of the parties will be those existing between the Republic of India and the Republic of Italy. Mr. Salve submitted that no legal relationship exists between the Republic of Italy and the State of Kerala and by continued detention of the members of the Armed Forces of the Republic of Italy, acting in discharge of their official duties, the State of Kerala had acted in a manner contrary to Public International Law, as well as the provisions of the Constitution of India.

16. Learned counsel submitted that the Scheme of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, hereinafter referred to as "the Maritime Zones Act, 1976", contemplates limited jurisdiction of the Central Government over each of the Maritime Zones divided into the "Territorial Waters", the "Contiguous Zones" and the "Exclusive Economic Zones". Learned counsel also submitted that Sections 3, 5, 7 and 15 of the Act contemplate the existence of such division of zones as a direct consequence of rights guaranteed under Public International Law, including the United Nations Convention on the Law of the Sea, hereinafter referred to as, "the UNCLOS".

219

17. Mr. Salve submitted that the extent of jurisdiction of a State beyond its coastline is provided in Section 3 of the Maritime Zones Act, 1976. Sub-section (2) of Section 3 indicates that the limit of the Territorial Waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline. Section 5 of the aforesaid Act provides that the Contiguous Zone of India is an area beyond and adjacent to the Territorial Waters and the limit of the Contiguous Zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in Sub-section (2) of Section 3. Section 7 of the Act defines Exclusive Economic Zone as an area beyond and adjacent to the Territorial Waters, and the limit of such zone is two hundred nautical miles from the baseline referred to in sub-section (2) of Section 3. In respect of each of the three above-mentioned zones, the Central Government has been empowered whenever it considers necessary so to do, having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the said zones.

18. Mr. Salve pointed out that Section 4 of the Maritime Zones Act, 1976, specially provides for use of Territorial Waters by foreign ships and in terms of Sub-section (1), all foreign ships (other than warships including sub-marines and other underwater vehicles) are entitled to a right of innocent passage through the

Territorial Waters, so long as such passage was innocent and not prejudicial to the peace, good order or security of India.

19. Apart from the above, Mr. Salve also pointed out that Section 6 of the aforesaid Act provides that the Continental Shelf of India comprises the seabed and subsoil of the submarine areas that extend beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baseline referred to in Sub-section (2) of Section 3, where the outer edge of the continental margin does not extend up to that distance. Sub-section (2) provides that India has and always had full and exclusive sovereign rights in respect of its Continental Shelf.

20. According to Mr. Salve, the incident having occurred at a place which was 20.5 nautical miles from the coast of India, it was outside the territorial waters though within the Contiguous Zone and the Exclusive Economic Zone, as indicated hereinabove. Accordingly, by no means could it be said that the incident occurred within the jurisdiction of one of the federal units of the Union of India. Mr. Salve urged that the incident, therefore, occurred in a zone in which the Central Government is entitled under the Maritime Zones Act, 1976, as well as UNCLOS, to exercise sovereign rights, not amounting to sovereignty. Mr. Salve submitted that the Act nowhere contemplates conferral of jurisdiction on any coastal unit forming part of any Maritime Zone

221

adjacent to its coast. Accordingly, the arrest and detention of the Petitioner Nos.2 and 3 by the police authorities in the State of Kerala was unlawful and was liable to be quashed. Mr. Salve also went on to urge that notwithstanding the provisions of the Maritime Zones Act, 1976, India, as a signatory of the UNCLOS, is also bound by the provisions thereof. Submitting that since the provisions of the 1976 Act and also UNCLOS recognise the primacy of Flag State jurisdiction, the Petitioner No.1 i.e. the Republic of Italy, has the preemptive right to try the Petitioner Nos.2 and 3 under its local laws.

21. Mr. Salve submitted that provisions, similar to those in the Maritime Zones Act, 1976, relating to the extent of territorial waters and internal waters and the right of "innocent passage", are provided in Articles 8, 17 and 18 of the Convention. Mr. Salve submitted that Article 17 sets down in clear terms that subject to the Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. "Innocent passage" has been defined in Article 18 to mean navigation through the territorial sea for the purpose of:

- (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
- (b) proceeding to or from internal waters or a call at such roadstead or port facility.

22. The said definition has been qualified to indicate that such passage would be continuous and expeditious, but would include stopping and anchoring, only in so far as the same are incidental to ordinary navigation or are rendered necessary for force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. Mr. Salve pointed out that Article 19 describes innocent passage to be such so long as it is not prejudicial to the peace, good order or security of the coastal State and takes place in conformity with the Convention and other rules of International law.

Learned counsel pointed out that Article 24 of the Convention contained an assurance that the coastal States would not hamper the innocent passage of foreign ships through the territorial sea, except in accordance with the Convention.

23. As to criminal jurisdiction on board a foreign ship, Mr. Salve referred to Article 27 of UNCLOS, which provides that the criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in cases where the consequences of the crime extend to the coastal State; if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; if the assistance of the local authorities has been requested by the Master of the ship

223

or by a diplomatic agent or consular officer of the flag State, or if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. Mr. Salve, however, urged that none of the aforesaid conditions were attracted in the facts of this case so as to attract the criminal jurisdiction of a State within the federal structure of the Union of India.

24. Another Article of some significance is Article 33 of the Convention under Section 4, which deals with Contiguous Zones. Mr. Salve submitted that Article 33 provides that in a zone contiguous to its territorial sea, a coastal State may exercise the control necessary to:

- (i) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (ii) punish infringement of the above laws and regulations committed within its territory or territorial sea.

However, the Contiguous Zone may not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured. Accordingly, since the incident occurred outside the territorial waters, the State of Kerala exceeded its jurisdiction and authority in acting on the basis of the FIR lodged against the Petitioner Nos.2 and 3 at Neendakara, Kollam, and in keeping them in continued detention.

25. Referring to Part V of the Convention, which deals with Exclusive Economic Zones, Mr. Salve pointed out that Article 56 under the said Part indicates the rights, jurisdiction and duties of the coastal State in the Exclusive Economic Zone so as to include the State's sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. The said Article also indicates that the State has jurisdiction in regard to:

- (i) the establishment and use of artificial islands, installations and structures;
- (ii) marine scientific research;
- (iii) the protection and preservation of the marine environment;

and other rights and duties provided for in the Convention. In regard to artificial islands, Mr. Salve pointed out that under Clause 8 of Article 59, artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea, the Exclusive Economic Zone or the Continental Shelf.

225

26. Dealing with the concept of High Seas, contained in Part VII of the Convention, Mr. Salve submitted that Articles 88 and 89 of the Convention provide that the High Seas have to be reserved for peaceful purposes and that no State may validly purport to subject any part of the same to its sovereignty. Mr. Salve submitted that under Articles 91, 92 and 94 of the Convention, every State was entitled to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Article 91 provides that ships have the nationality of the State whose flag they are entitled to fly and there must exist a genuine link between the State and the ship. Mr. Salve pointed out that Article 94 casts several duties on the flag State and one of the most significant clauses of Article 94 is clause 7 which provides that each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation (emphasis supplied) on the High Seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by the concerned State into any such marine casualty or incident of navigation. The same provisions are also reflected in Article 97 of the Convention, in which it has been indicated that in the event of a collision or any other incident of navigation concerning a ship on the High Seas,

involving the penal or disciplinary responsibility of the Master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

27. Lastly, Mr. Salve referred to Article 100, which may be of relevance to the facts of this case, as it requires all States to cooperate to the fullest extent in the repression of piracy on the High Seas or in any other place outside the jurisdiction of any State.

28. Mr. Salve submitted that the publication of a Notification by the Ministry of Home Affairs on 27th August, 1981, under Sub-section (7) of Section 7 of the Maritime Zones Act, 1976, extending the application of Section 188 of the Code of Criminal Procedure, 1973, to the Exclusive Economic Zone, created various difficulties, since the said Notification was a departure from the provisions of Part V of UNCLOS which provides that a coastal State enjoys only sovereign rights and not sovereignty over the Exclusive Economic Zone.

29. Referring to the interim report of the Ministry of Shipping, Government of India, in respect of the incident, Mr. Salve pointed out that the fishing boat, MFB St. Antony, about 12 meters long, was owned by one Mr. Freidy, who was also working as the Sarang of the boat, which is registered at Colachel,

227

Kanyakumari District, Tamil Nadu, by the Assistant Director of Fisheries. The crew of the boat were issued Identity Cards by the Trivandrum Matsyathozhilali Forum, but the fishing boat is not registered under the Indian Merchant Shipping Act, 1958, and was not flying the Indian Flag at the time of the incident. Furthermore, at the time of the incident, the ship was at a minimum distance of about 20 nautical miles from the Indian coast. The ship was coasting in Indian territorial waters in order to avoid any encounter with pirate boats as the area was declared to be a High Risk Area of Piracy. Mr. Salve urged that in the report it was also indicated that the area comes under the high alert zone for piracy attacks, as declared by the UKMTO, and the Watch Officers were maintaining their normal pirate watch. Apart from the normal navigational Watch Keepers, the ship also had NMP Marines on the bridge on anti-pirate watch as stated by the Second Mate and Master. The NMP Marines were keeping their own watch as per their schedule and it was not the responsibility of the Master to keep track of their regimen. The NMP Marines were supposed to take independent decisions as per Article 5 of the agreement between the Italian Defence Ministry and the Italian ship Owners Association. The report also indicated that the fishing boat came within a distance of 100 meters of the Italian Ship, causing the crew of the ship to believe that they were under pirate attack and in the circumstances of the moment the marines,

228

who are independent of the orders of the Master, opened fire, killing the two Indian fishermen.

Subsequently, while the Ship was moving away, it received a phone call from the MRCC, Mumbai Duty Controller, instructing the ship to proceed towards Kochi Anchorage to give a statement and witness with regard to the incident. Mr. Salve submitted that pursuant thereto the Italian vessel, instead of proceeding further into the high seas, returned to Cochin Port and was, thereafter, detained by the Kerala police authorities.

Mr. Salve submitted that it was necessary to construe the provisions of the Maritime Zones Act, 1976, in the light of the UNCLOS, which gives rise to the question as to which of the provisions would have primacy in case of conflict.

30. Referring to the decision of this Court in *Aban Loyd Chiles Offshore Limited Vs. Union of India & Anr.* [(2008) 11 SCC 439], Mr. Salve submitted that in the said decision, this Court had held that from a reading of Sections 6 and 7 of the Maritime Zones Act, 1976, it is clear that India has been given only certain limited sovereign rights in respect of its Continental Shelf and Exclusive Economic Zone, which cannot be equated to extending the sovereignty of India over its Continental Shelf and Exclusive Economic Zone, as in the case of Territorial Waters. However, Sections 6(6) and 7(7) of the Maritime Zones Act, 1976, empower the Central Government, by notification, to extend the enactment in

229

force in India, with such restrictions and modifications which it thinks fit, to its Continental Shelf and Exclusive Economic Zone and also provides that an enactment so extended shall have effect as if the Continental Shelf or the Exclusive Economic Zone, to which the Act has been extended, is a part of the territory of India. Sections 6(6) and 7(7) create a fiction by which the Continental Shelf and the Exclusive Economic Zone are deemed to be a part of India for the purposes of such enactments which are extended to those areas by the Central Government by issuing a notification.

31. Mr. Salve submitted that it was also held that the coastal State has no sovereignty in the territorial sense of dominion over Contiguous Zones, but it exercises sovereign rights for the purpose of exploring the Continental Shelf and exploiting its natural resources. It has jurisdiction to enforce its fiscal, revenue and penal laws by intercepting vessels engaged in suspected smuggling or other illegal activities attributable to a violation of the existing laws. The waters which extend beyond the Contiguous Zone are traditionally the domain of high seas or open sea which juristically speaking, enjoy the status of International waters where all States enjoy traditional high seas freedoms, including freedom of navigation. The coastal States can exercise their right of search, seizure or confiscation of vessels for violation of its customs or fiscal or penal laws in the Contiguous Zone, but it cannot exercise these rights once the vessel in question enters the high seas,

230

since it has no right of hot pursuit, except where the vessel is engaged in piratical acts, which make it liable for arrest and condemnation within the seas. Accordingly, although, the coastal States do not exercise sovereignty over the Contiguous Zone, they are entitled to exercise sovereign rights and take appropriate steps to protect its revenues and like matters.

32. Relying on the aforesaid observations made by this Court in the aforesaid case, Mr. Salve submitted that the provisions of the Maritime Zones Act, 1976, would have to be read in harmony with the provisions of UNCLOS. Mr. Salve submitted that the reference made in paragraphs 77 and 99 of the judgment dealt with policing powers in the designated areas of the Contiguous Zone for the application of the Customs Act and not as a reference to general policing powers exercised by the State police within the Union of India. Mr. Salve submitted that it would thus be clear, that if an offence was committed beyond the Contiguous Zone, the State concerned could not proceed beyond 24 nautical miles from the baseline in pursuit of the vessel alleged to have committed the offence. Mr. Salve submitted that it was not contemplated under the Maritime Zones Act, 1976, that the policing powers of a coastal State would proceed beyond the Contiguous Zone and into the Exclusive Economic Zone or High Seas, though certain provisions of the Customs Act and the

231

Customs Tariff Act had been extended to areas declared as "designated areas" under the said Act.

33. Mr. Salve contended that the stand of the Union of India has been that the provisions of UNCLOS cannot be applied in the facts of the case, since the Maritime Zones Act, 1976, which is a domestic Act, is a departure from UNCLOS, and Article 27 of UNCLOS was not a part of the Indian domestic law. Further, in anticipation of the submissions on behalf of the Respondents, Mr. Salve urged that the judgment of the Permanent Court of International Justice in the Case of S.S. Lotus (Fr. v. Turk.) [(1927) P.C.I.J.] which involved claims between France and Turkey continued to be good law, save and except to the extent it had been overridden, but only in relation to collisions under Article 97 of the UNCLOS.

34. Mr. Salve submitted that the aforesaid contentions made on behalf of the Union of India were misconceived, because they were not taken earlier and were not to be found in the affidavit affirmed by the Union of India. Mr. Salve submitted that the Maritime Zones Act, 1976, far from being a departure, is in complete conformity with the principles of UNCLOS. The Act is limited to spelling out the geographical boundaries of the various zones, namely, the Territorial Waters, the Contiguous Zone, the Exclusive Economic Zone, and the Continental Shelf, etc. and the nature of rights available to India in respect of each of

the zones is spelled out in the Act in a manner which is in complete conformity with the UNCLOS. Mr. Salve urged that India was not only a signatory to but had also ratified the Convention. The learned counsel submitted that the Maritime Zones Act, 1976, was based, to a large extent, on the draft of UNCLOS which had been prepared before 1976, but it is settled law in India that once a Convention of this kind is ratified, the municipal law on similar issues should be construed in harmony with the Convention, unless there were express provisions to the contrary.

35. Simply stated, Mr. Salve's submissions boil down to the question as to whether the sovereignty of India would extend to the Exclusive Economic Zone, which extends to 200 nautical miles from the baseline of the coast of the State of Kerala.

36. Mr. Salve then urged that if Sub-section (2) of Section 4 I.P.C. was to be invoked by the Union of India for exercising jurisdiction over a person present on a vessel flying the Indian flag, it must respect a similar right asserted by other jurisdictions indicating that Article 21 of the Convention recognises the right of innocent passage which is to be respected by all nations, who are signatories to UNCLOS. As a result, if a vessel is in innocent passage and an incident occurs between two foreign citizens which has no consequences upon the coastal State, it is obvious that no jurisdiction could be asserted over such an act on the

233

ground that it amounts to violation of the Indian Penal Code or that the Indian Courts would have jurisdiction to try such criminal offences. Mr. Salve submitted that the acceptance of such an assertion would negate the rights of innocent passage.

37. Mr. Salve submitted that once it is accepted that it must be Parliament's intention to recognise the Exclusive Economic Zone and to create a legal regime for exercise of the sovereign rights in respect of the said zone, then, it must necessarily follow that a Parliamentary intent has to be read in conjunction with Article 55 of the UNCLOS. It must then follow that the sovereign rights in the said zone must be read subject to the specific legal regime established in Part V of UNCLOS.

38. As far as the Lotus decision is concerned, Mr. Salve contended that such decision had been rendered in the facts involving the collision of a French vessel with a Turkish vessel, which ultimately led to the 1952 Geneva Convention for the unification of certain rules relating to penal jurisdiction in matters of collisions, which overruled the application of the principles of concurrent jurisdiction over marine collisions. Mr. Salve urged that a reading of Articles 91, 92, 94 and 97 of UNCLOS clearly establishes that any principle of concurrent jurisdiction that may have been recognised as a principle of Public International Law stands displaced by the express provisions of UNCLOS. Learned counsel pointed out that it was not in dispute that the St. Antony,

234

the Indian vessel involved in the incident, was registered under the Tamil Nadu Fishing laws and not under the Indian Merchant Shipping Act, 1958, which would allow it to travel beyond the territorial waters of the respective State of the Indian Union, where the vessel was registered.

39. Mr. Salve lastly contended that the stand of the Union of India that since no specific law had been enacted in India in terms of UNCLOS, the said Convention was not binding on India, was wholly misconceived. Mr. Salve urged that in earlier matters, this Court had ruled that although Conventions, such as these, have not been adopted by legislation, the principles incorporated therein, are themselves derived from the common law of nations as embodying the felt necessities of international trade and are, therefore, a part of the common law of India and applicable for the enforcement of maritime claims against foreign ships.

40. Mr. Salve also relied on the Constitution Bench decision of this Court in *Maganbhai Ishwarbhai Patel vs. Union of India* and another [(1970) 3 SCC 400], in which this Court had inter alia held that unless there be a law in conflict with the Treaty, the Treaty must stand. Also citing the decision of this Court in *Vishaka and Others vs. State of Rajasthan and Others* [(1997) 6 SCC 241], this Court held that international conventions and norms are to be read into constitutional rights which are absent in domestic law, so long as there is no inconsistency with such domestic law.

235

41. Mr. Salve urged that Section 3 of the Maritime Zones Act, 1976, recognises the notion of sovereignty, but, limits it to 12 nautical miles from the nearest point of the appropriate baseline.

42. The essence of Mr. Salve's submissions is focussed on the question as to whether the sovereignty of India and consequently the penal jurisdiction of Indian Courts, extends to the Exclusive Economic Zone or whether India has only sovereign rights over the Continental Shelf and the area covered by the Exclusive Economic Zone. A reading of Sections 6 and 7 of the Maritime Zones Act, 1976, makes it clear that India's sovereignty extends over its territorial waters, but the position is different in the case of the Continental Shelf and Exclusive Economic Zone of the country.

The Continental Shelf of India comprises the seabed beyond the territorial waters to a distance of 200 nautical miles. The Exclusive Economic Zone represents the sea or waters over the Continental Shelf. Mr. Salve submitted that the language of the various enactments and the manner in which the same have been interpreted, has given rise to the larger question of sovereign immunity.

Mr. Salve submitted that while Italy signed the UNCLOS in 1973 and ratified it in January, 1995, India signed the Convention in 1982 and ratified the same on 29th June, 1995.

236

Referring to Sections 2 and 4 of the Indian Penal Code read with Section 179 of the Code of Criminal Procedure, Mr. Salve urged that the same would stand excluded in their operation to the domestic Courts on the ground of sovereign immunity.

43. Mr. Salve lastly urged that in order to understand the presence of the Italian marines on board the M.V. Enrica Lexie, it would be necessary to refer to the Protocol Agreement entered into between the Ministry of Defence - Naval Staff and Italian Shipowners' Confederation (Confitarma) on 11th October, 2011. Mr. Salve pointed out that the said Agreement was entered into pursuant to various legislative and presidential decrees which were issued on the premise that piracy and armed plundering were serious threats to safety in navigation for crew and carried merchandise, with significant after-effects on freights and marine insurance, the commercial costs of which may affect the national community. Accordingly, it was decided to sign the Protocol Agreement, in order that the parties may look for and find all or any measure suitable to facilitate that the embarkation and disembarkation of Military Protection Squads, hereinafter referred to as "NMPs", on to and from ships in the traffic areas within the area defined by the Ministry of Defence by Ministerial Decree of 1st September, 2011. Mr. Salve pointed out that the said Agreement provides for the presence of Italian marines, belonging to the Italian Navy, to provide protection to private

237

commercial ships against the surge of piracy. Mr. Salve submitted that, in fact, the navy was of the view that the activity covered by the Agreement/Protocol could also be offered to national shipowners other than Confitarma and other class associations, following acceptance of the Convention.

44. Mr. Salve pointed out that Article 3 of the Convention provided for the supply of the protection service, in which on an application for embarkation of the military protection squads, the Ministry of Defence would consider several aspects, including the stipulation that the ship's Master would remain responsible only for choices concerning safety of navigation and manoeuvre, including escape manoeuvres, but would not be responsible for the choices relating to operations involved in countering a piracy attack. Mr. Salve submitted that, in other words, in case of piracy attacks, the Master of the ship would have no control over the actions of the NMPs provided by the Italian Government. Mr. Salve submitted that the deployment order of the team of marines, including the Writ Petitioner Nos.2 and 3, is contained in OP 06145Z FEB 12 ZDS from the Italian Navy General Staff to the Italian Defence Attache in New Delhi, India, and several other Italian Defence Attaches in different countries, which has been made Annexure P-3 to the Special Leave Petition. In this regard, Mr. Salve referred to a Note Verbale No.95/553 issued by the Embassy of Italy in New Delhi to the Ministry of External Affairs, Government of India, referring to the case involving the

238

vessel in question. Since the same encapsulates in a short compass the case of the Petitioners, the same in its entirety is extracted hereinbelow:

"EMBASSY OF ITALY
NEW DELHI

NOTE VERBALE

95/553

The Embassy of Italy presents its compliments to the Ministry of External Affairs, Government of India and has the honour to refer to the case of the ship Enrica Lexie as per Note Verbale n.71 dated February 18th 2012.

The Embassy of Italy would like to recall that according to principles of customary international law, recognized by several decisions of International Courts. State organs enjoy jurisdictional immunity for acts committed in the exercise of their official functions. The Italian Navy Military Department that operated in international waters on board of the ship Enrica Lexie must be considered as an organ of the Italian State.

Their conduct has been carried out in the fulfillment of their official duties in accordance with national regulations (Italian Act nr.107/2011), directives, instructions and orders, as well as the pertinent rules on piracy contained in the 1982 UN Convention on

239

the Law of the Sea and in the relevant UN Security Council Resolutions on the Piracy off the Horn of Africa.

The Embassy of Italy welcomes the steps taken by the Chief Judicial Magistrate in Kollam in order to protect the life and honour of the Italian Military Navy Personnel currently held in judicial custody on remand. The Embassy of Italy also welcomes the cooperative approach on the issue of the examination of the weapons taken by the Magistrate.

The Embassy of Italy nevertheless reasserts the Italian exclusive jurisdiction in respect of the said military personnel. It wishes to inform that investigations by both the Italian ordinary and military judicial authorities have already been initiated. Therefore, it urges for the release of the Italian Navy Military Personnel and the unimpeded departure from the Indian Territory. They have entered Indian territorial waters and harbor simply as a Military Force Detachment officially embarked on the Italian vessel Enrica Lexie in order to cooperate with Indian authorities in the investigation of an alleged piracy episode. The entry in Indian territorial waters was upon initial invitation and then under direction of Indian Authorities.

The Embassy of Italy, while reiterating the sovereign right of a State to employ its military personnel in ongoing antipiracy military protection of national flagged merchant ship in international

240

waters, underlines that the same right is not impaired by the ongoing national investigations involving Italian Navy Military Personnel.

The Italian Navy Military Personnel, currently held in judicial custody on remand, was carrying out official functions for the protection of the vessel from piracy and armed robbery in the extraterritorial maritime zones which at the relevant time were considered as "risk area", taking also in consideration information provided by IMO and other relevant multinational organization. Thus, while acknowledging the obligations of Italy under international law, including the obligation to cooperate with Indian authorities for the most comprehensive and mutually satisfactory investigation of the event, the Embassy of Italy recalls that the conduct of Italian Navy Military Personnel officially acting in the performance of their duties should not be open to judgment scrutiny in front of any court other than the Italian ones.

The Embassy of Italy, New Delhi, avails itself of this opportunity to renew to the Ministry of External Affairs, Government of India, the assurances of its highest consideration.

New Delhi, 29th February, 2012.

Consulate General of Italy, Mumbai."

45. In fact, shorn of all legalese, the aforesaid note emphasises the stand of the Italian Government that the conduct of the Petitioner Nos.2 and 3 was in fulfilment of their official duties in

241

accordance with national regulations, directives, instructions and orders, as well as the rules of piracy contained in UNCLOS and the relevant UN Security Council Resolutions on Piracy off the Horn of Africa.

46. Mr. Salve submitted that in the special facts of the case, the Petitioners were entitled to the reliefs prayed for in the Writ Petition and the Special Leave Petition.

47. Mr. Gourab Banerji, Additional Solicitor General, who appeared for the Union of India, focussed his submissions on two issues raised by the Petitioners, namely, :-

- (i) Whether Indian Courts have territorial jurisdiction to try Petitioner Nos.2 and 3 under the provisions of the Indian Penal Code, 1860?
- (ii) If so, whether the Writ Petitioners are entitled to claim sovereign immunity?

48. Mr. Banerji submitted that stripped of all embellishments, the bare facts of the incident reveal that on 15th February, 2012, FIR No.2 of 2012 was registered with the Coastal Police Station, Neendakara, Kollam, under Section 302 read with Section 34 I.P.C. alleging that a fishing vessel, "St. Antony", was fired at by persons on board a passing ship, as a result of which, out of the 11 fishermen on board, two were killed instantaneously. It was alleged that the ship in question was M.V.

242

Enrica Lexie. The detailed facts pertaining to the incident could be found in the statement dated 28th February, 2012, filed by the Coast Guard before the Kerala High Court and the Charge-sheet filed on 18th May, 2012.

49. The defence of the Petitioners is that the Petitioner Nos.2 and 3 were members of the Military Protection Detachment deployed on the Italian vessel and had taken action to protect the vessel against a pirate attack.

50. Mr. Banerji submitted that it had been urged on behalf of the Petitioners that the Union of India had departed from its pleadings in urging that the Maritime Zones Act, 1976, was a departure from and inconsistent with UNCLOS. Mr. Banerji submitted that the legal position in this regard had already been clarified in paragraphs 100 to 102 of the decision in *Aban Loyd's case* (supra) wherein this Court had re-emphasised the position that the Court could look into the provisions of international treaties, and that such an issue is no longer *res integra*. In *Gramophone Co. of India vs. Birendra Bahadur Pandey*[(1984) 2 SCC 534], this Court had held that even in the absence of municipal law, the treaties/conventions could not only be looked into, but could also be used to interpret municipal laws so as to bring them in consonance with international law.

243

51. Mr. Banerji urged that as far as the Union of India was concerned, an attempt must necessarily be made in the first instance, to harmonise the Maritime Zones Act, 1976 with the UNCLOS. If this was not possible and there was no alternative but a conflict between municipal law and the international convention, then the provisions of the 1976 Act would prevail. Mr. Banerji urged that primacy in interpretation by a domestic Court, must, in the first instance, be given to the Maritime Zones Act, 1976 rather than the UNCLOS. Questioning the approach of the Petitioners in relying firstly on the UNCLOS and only, thereafter, on the provisions of the Maritime Zones Act, 1976, Mr. Banerji submitted that such approach was misconceived and was contrary to the precepts of Public International Law.

52. Mr. Banerji submitted that the case of the Petitioners that the Indian Courts had no jurisdiction to take cognizance of the offence which is alleged to have taken place in the Contiguous Zone, which was beyond the territorial waters of India, as far as India was concerned, was misconceived. The Contiguous Zone would also be deemed to be a part of the territory of India, inasmuch as, the Indian Penal Code and the Code of Criminal Procedure had been extended to the Contiguous Zone/Exclusive Economic Zone by virtue of the Notification dated 27th August, 1981, issued under Section 7(7) of the Maritime Zones Act, 1976. Mr. Banerji submitted that according to the Union of India, the domestic law is not inconsistent with the

244

International law and in fact even as a matter of international law, the Indian Courts have jurisdiction to try the present offence. The learned Additional Solicitor General submitted that in order to determine the issue of territorial jurisdiction, it would be necessary to conjointly read the provisions of Section 2 I.P.C., the Maritime Zones Act, 1976 and the 27th August, 1981 Notification and all attempts had to be made to harmonise the said provisions with the UNCLOS. However, if a conflict was inevitable, the domestic laws must prevail over the International Conventions and Agreements.

53. In this regard, Mr. Banerji first referred to the provisions of Section 2 of the Indian Penal Code which deals with punishment of offences committed within India. In this context, Mr. Banerji also referred to the Maritime Zones Act, 1976, and more particularly, Section 7(7) thereof, under which the notification dated 27th August, 1981, had been published by the Ministry of Home Affairs, extending the provisions of Section 188-A of the Code of Criminal Procedure, 1973, to the Exclusive Economic Zone.

54. Mr. Banerji urged that it appears to have slipped the notice of all concerned that the Notifications which had been applied in the Aban Loyd's case (supra) were under Section 7(6) of the 1976 Act and there appeared to be some confusion on the part of the Petitioners in regard to the scope of Sub-sections (6) and (7) of

245

Section 7 thereof. Mr. Banerji urged that the judgment in *Aban Loyd's case* (supra) has to be understood in the light of the facts of that case where the issue was whether oil rigs situated in the Exclusive Economic Zone were foreign going vessels and, therefore, entitled to consume imported stores without payment of customs duty. In the said set of facts it was held by this Court that the territory of India for the purpose of customs duty was not confined to the land and territorial waters alone, but also notionally extended to the "designated areas" outside the territorial waters. Mr. Banerji urged that the notification dated 27th August, 1981, issued by the Ministry of Home Affairs which had been relied upon by the Union of India, has not been issued for designated areas alone, but for the entire Exclusive Economic Zone to enable it to exercise and protect Indian sovereign rights of exploitation of living natural resources, and more specifically its fishing rights, therein.

55. Mr. Banerji submitted that the Notification of 27th August, 1981, had been promulgated in exercise of powers conferred by Section 7(7) of the Maritime Zones Act, 1976. Mr. Banerji also submitted that the Indian Penal Code and the Code of Criminal Procedure had been extended by the Central Government to the Exclusive Economic Zone. The Schedule to the Notification is in two parts. Part I provides the list of enactments extended, whereas Part II provides the provision for facilitating the enforcement of the said Acts. Accordingly, while Part I of the

246

Schedule to the Notification is relatable to Section 7(7)(a) of the Act, Part II of the Schedule is relatable to Section 7(7)(b) thereof.

56. The learned Additional Solicitor General submitted that the case of the Union of India rests on two alternative planks. According to one interpretation, the bare reading of Section 7(7) and the Notification suggests that once the I.P.C. has been extended to the Exclusive Economic Zone, which includes the Contiguous Zone, the Indian Courts have territorial jurisdiction to try offences committed within the Contiguous Zone. Another plank of the case of the Union of India, involves a contextual interpretation of Section 7(7) and the 1981 Notification. Mr. Banerji submitted that presuming that the Notification provides for the extension of Indian law relating to only those matters specified in Section 7(4) of the Act, the Indian Courts would also have territorial jurisdiction in respect of the present case. Mr. Banerji submitted that notwithstanding the submission made on behalf of the Petitioners that such an interpretation would be contrary to the provisions of UNCLOS, particularly, Article 56 thereof, the same failed to notice Article 59 which permits States to assert rights or jurisdiction beyond those specifically provided in the Convention. Alternatively, even in terms of the contextual interpretation of Section 7(7) of the Act, the same would also establish the territorial jurisdiction of the Indian Courts. Mr. Banerji submitted that even on a reading of Section 7(4) of the

247

Maritime Zones Act, 1976, the Petitioners had laid emphasis on Sub-Clause (b), although, various other rights and privileges had also been reserved to the Indian Union. It was urged that the importance of the other Sub-Clauses, and, in particular, (a) and (e) would fully establish the territorial jurisdiction of the Indian Courts to try the offence involving the unlawful killing of two Indian citizens on board an Indian vessel. Mr. Banerji also urged that reading Section 7(4) of the Act, in harmony with Section 7(7) thereof, would include within its ambit the power to extend enactments for the purposes of protecting exploration, exploitation, conservation and management of natural resources which include fishing rights. Accordingly, if the provisions of I.P.C. and the Cr.P.C. have been extended throughout the Exclusive Economic Zone, inter alia, for the purpose of protecting fishing rights under Section 7(4)(a), the same would include extending legislation for the safety and security of the Indian fishermen. By opening fire on the Indian fishing vessel and killing two of the fishermen on board the said vessel within the Contiguous Zone, the Petitioner Nos.2 and 3 made themselves liable to be tried by the Indian Courts under the domestic laws.

57. On the question as to whether the State of Kerala had jurisdiction to try the offence, since the incident had taken place in the zone contiguous to the territorial waters off the coast of Kerala, Mr. Banerji submitted that the Kerala Courts derived jurisdiction in

248

the matter from Section 183 of the Code of Criminal Procedure, which has also been extended to the Exclusive Economic Zone by the 1981 Notification and relates to offences committed on journeys or voyages. Mr. Banerji submitted that when such an offence is committed, it could be inquired into or tried by a court through or into whose local jurisdiction the person or thing passed in the course of that journey or voyage. Mr. Banerji submitted that the voyage contemplated under the said provision is not the voyage of the Enrica Lexie, but the voyage of St. Antony.

58. Apart from the above, the main case of the Union of India is that on a plain reading of the language of Section 7(7) or on a contextual interpretation thereof, the Republic of India has jurisdiction to try the Petitioner Nos.2 and 3 in its domestic courts. Even the 1981 Notification could be read down and related to Section 5 of the 1976 Act. Referring to the decision of this court in *Hukumchand Mills Vs. State of Madhya Pradesh* [AIR 1964 SC 1329] and *N. Mani Vs. Sangeetha Theatre & Ors.* [(2004) 12 SCC 278], Mr. Banerji urged that if the executive authority had the requisite power under the law, and if the action taken by the executive could be justified under some other power, mere reference to a wrong provision of law would not vitiate the exercise of power by the executive, so long as the said power exists.

249

59. Regarding the applicability of Section 4 of the Indian Penal Code to the facts of the case, Mr. Banerji urged that the provisions of the I.P.C. would, in any event, apply to any citizen of India in any place without and beyond India or to any person on any ship or aircraft registered in India, wherever it may be. Mr. Banerji submitted that the Explanation to the Section makes it clear that the word "offence" includes every act committed outside India which, if committed in India, would be punishable under the said Code.

60. Mr. Banerji submitted that although the learned Advocate General of the State of Kerala had conceded before the learned Single Judge of the Kerala High Court that Section 4 of the I.P.C. would not apply to the facts of the case, the Union of India was not a party to such concession, which, in any event, amounted to a concession in law. Mr. Banerji urged that the words "aboard" or "on board" are not used in Section 4(2) I.P.C. and an unduly restrictive interpretation of the said Section would require both the victim and the perpetrator to be aboard the same ship or aircraft, which could lead to consequences where pirate, hijacker or terrorist, who fires upon an innocent Indian citizen within an Indian ship or aircraft, would escape prosecution in India. Mr. Banerji contended that the provisions of Section 4(2) I.P.C. has to be read with Section 188 Cr.P.C., which subsequently stipulates that where an offence is committed outside India by a citizen of India, whether on the high seas or elsewhere, or by a person not

250

being such citizen, on any ship or aircraft registered in India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found. Mr. Banerji submitted that in view of the concession made on behalf of the State of Kerala, the question of the scope of Section 4 I.P.C. could be left open to be decided in an appropriate case.

61. Mr. Banerji submitted that, although a good deal of emphasis had been laid by the Petitioners on the observation contained in the Shipping Ministry's Interim Report that the fishing vessel was not registered under the Merchant Shipping Act, 1958, but under a local law pertaining to the State of Tamil Nadu, the same was only a red herring, as the Kerala State Fishing Laws do not permit fishing vessels to sail beyond the territorial waters of their respective States.

Mr. Banerji urged that such a submission may have been relevant in the context of Section 4(2) I.P.C., wherein the expression "registered in India" had been used, but the same would have no significance to the facts of this case, since the said provisions were not being invoked for the purposes of this case. The learned ASG contended that even if the fishing vessel had sailed beyond its permitted area of fishing, the same was a matter of evidence, which stage had yet to arrive. Mr. Banerji contended that, on the other hand, what was more important were the provisions of the Maritime Zones of India (Regulation of Fishing

251

by Foreign Vessels) Act, 1981, wherein in the Statement of Objects and Reasons of the Act it has been indicated that the Act was in the nature of umbrella legislation and it was envisaged that separate legislation for dealing in greater detail with the regulation, exploration and exploitation of particular resources in the country's Maritime Zones and to prevent poaching activities of foreign fishing vessel to protect the fishermen who were citizens of India, should be undertaken in due course. In this context, Mr. Banerji further urged that the provisions of the Merchant Shipping Act dealing with the registration of Indian ships, do not include fishing vessels, which are treated as an entirely distinct and separate category in Chapter XV-A of the said Act.

62. Mr. Banerji urged that the right of passage through territorial waters is not the subject matter of dispute involved in the facts of this case. On the other hand, Article 56 of UNCLOS, which has been relied upon by the Petitioners indicate that the rights given to the coastal States are exhaustive. However, while the Petitioners have laid emphasis on Article 56(1)(b), the Union of India has laid emphasis on Article 56(1)(a) read with Article 73 of UNCLOS to justify the action taken against the accused. Mr. Banerji urged that even if Article 16 of UNCLOS is given a restrictive meaning, the action of the Indian Courts would be justified, inasmuch as, and action seeks to protect the country's fishermen.

63. Mr. Banerji contended that Article 59 of the UNCLOS, which deals with the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the Exclusive Economic Zone, contemplates rights beyond those which are attributable under the Convention. However, even if it could be assumed that the rights asserted by India are beyond those indicated in Article 56 of UNCLOS, such conflict would have to be resolved on the basis of equity and in the light of all circumstances. Accordingly, even if both the Republic of Italy and India had the power to prosecute the accused, it would be much more convenient and appropriate for the trial to be conducted in India, having regard to the location of the incident and the nature of the evidence and witnesses to be used against the accused.

64. Responding to the invocation of Article 97 of UNCLOS by the Petitioners, Mr. Banerji urged that whether under International law Italy has exclusive jurisdiction to prosecute the Petitioner Nos.2 and 3 is a question which would be relevant in the event the Court found it necessary to invoke Section 7(4)(e) of the Maritime Zones Act, 1976. Mr. Banerji urged that in order to claim exclusive jurisdiction, the Republic of Italy had relied upon Article 97 of UNCLOS which, however, dealt with the collision of shipping vessels and was unconnected with any crime involving homicide. The learned Additional Solicitor General pointed out that the title of Article 97 reads that it provides for Penal jurisdiction in matters of collision or any other incident of

253

navigation and that, as had been pointed out by Mr. Harish Salve, appearing for the Petitioners, Article 97(1), inter alia, provides that in the event of collision or any other incident of navigation concerning the ship on the high seas, involving the penal or disciplinary responsibility of the Master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national. Mr. Banerji urged that the expression "incident of navigation" used in Article 97, did not contemplate a situation where a homicide takes place and, accordingly, the provisions of Article 97 of the UNCLOS would not have any application to the facts of the present case.

65. On Article 11 of the Geneva Convention on the Law of the Seas, 1958, Mr. Banerji submitted that the killing of an Indian national on board an Indian vessel could not be said to be an incident of navigation, as understood under the said Article which deals mainly with collision on the high seas. Referring to Oppenheim on International Law [9th Edn. Vol.1], Mr. Banerji submitted that the phrase "accident of navigation" has been used synonymously with "incident of navigation". Consequently, the meaning of the expression "accident of navigation" provided in the dictionary defines the same to mean mishaps that are peculiar to travel by sea or to normal navigation; accidents caused at sea

by the action of the elements, rather than by a failure to exercise good handling, working or navigation of a ship. Furthermore, if Article 97 of UNCLOS is to include a homicide incident, Article 92 thereof would be rendered otiose. Mr. Banerji submitted that the decision in the Lotus case (supra) continued to be good law in cases such as the present one. It was urged that under the Passive Personality principle, States may claim jurisdiction to try an individual where actions might have affected nationals of the State. Mr. Banerji submitted that various Articles of UNCLOS do not support the case attempted to be made out by the Republic of Italy, either on merits, or on the question of exclusive jurisdiction.

66. On the claim of sovereign immunity from criminal prosecution, Mr. Banerji submitted that the Petitioner Nos.2 and 3 were not entitled to the same. Mr. Banerji submitted that while the International law was quite clear on the doctrine of sovereign immunity, the important question to be considered in this case is the extent of such sovereign immunity which could be applied to the facts of this case. In support of his submissions, Mr. Banerji referred to certain observations made by Lord Denning M.R. in *Trendtex Trading Corporation vs. Bank of Nigeria* [(1997) 1 Q.B. 529], wherein it was observed as follows:-

"The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign state should not be impleaded in the courts of another

255

sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilized nations of the world. All nations agree upon it. So it is part of the law of nations."

Lord Denning, however, went on to observe that notion of a consensus was merely fictional and there was no agreed doctrine of sovereign immunity. However, this did not mean that there was no rule of international law on the subject. It only meant that there is difference of opinion as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it.

67. In this line of reasoning, Mr. Banerji submitted that the provisions of Section 2 I.P.C. and its impact would have to be considered before the impact of Customary International Law could be considered. Mr. Banerji pointed out that Section 2 I.P.C. begins with the words - "every person" which makes all offenders, irrespective of nationality, punishable under the Code and not otherwise, for every act or omission contrary to the provisions thereof, of which he is found to be guilty within India. Reference was made by Mr. Banerji to the decision of this Court in *Mobarik Ali Ahmad Vs. State of Bombay* [AIR 1957 SC 857], wherein this Court had held that the exercise of criminal jurisdiction depends on the location of the offence, and not on the nationality of the alleged offender or his corporeal presence in

India. This Court pointed out that the plain meaning of the phrase "every person" is that it embraces all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed, except such as may be specially exempted from criminal proceedings or punishment by virtue of specific provisions of the Constitution or any statutory provisions or some well-recognised principle of international law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.

68. Going a step further, Mr. Banerji also referred to the United Nations Privileges and Immunities Act, 1947, and the Diplomatic Relations (Vienna Convention) Act, 1972, which gave certain diplomats, missions and their members diplomatic immunity even from criminal jurisdiction. Mr. Banerji submitted that the 1972 Act had been enacted to give effect to the Vienna Convention on Diplomatic Relations, 1961. The effect of Section 2 of the Act is to give the force of law in India to certain provisions set out in the Schedule to the Act. Mr. Banerji specifically referred to Article 31 of the Convention, which is extracted hereinbelow :-

"ARTICLE 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy

257

immunity from its civil and administrative jurisdiction,
except in the case of :

- (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
 - (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
 - (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
2. A diplomatic agent is not obliged to give evidence as a witness.
3. No measure of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State."

69. Mr. Banerji urged that as per the Policy of the Government of India, no foreign arms or foreign private armed guards or foreign armed forces personnel, accompanying merchant vessels, are allowed diplomatic clearance. Nor is it the policy of the Government of India to enter into any Status of Forces Agreement (SOFA) by which foreign armed forces are given immunity from criminal prosecution. Mr. Banerji sought to emphasise the fact that the United Convention on Jurisdictional Immunities of States and their Property, 2004, had not come into force. Accordingly, the Petitioners' case that the said Convention reflects the Customary International Law, cannot be accepted.

70. Also referring to the decision in Pinochet's case No.3 [(2000) 1 AC 147], Mr. Banerji submitted that the said case concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages. The learned ASG submitted that even though the Republic of Italy may claim sovereign immunity when sued in an Indian Court for damages for the unlawful acts of its citizens, it was clear that even if it is assumed that the Petitioner Nos.2 and 3 were acting

259

under orders of the Italian Navy, there is no basis for any claim of immunity from criminal jurisdiction in the face of Section 2 I.P.C. Mr. Banerji submitted that the action of the Petitioner Nos.2 and 3 was not *acta jure imperii* but *acta res gestionis* and hence the scope of the various Italian laws would have to be established by way of evidence. Mr. Banerji submitted that since the claim of functional immunity from criminal jurisdiction was not maintainable, the Special Leave Petition was liable to be dismissed.

71. On the filing of the Writ Petition before this Court, being Writ Petition (Civil) No.135 of 2012, Mr. Banerji urged that Writ Petition (Civil) No.4542 of 2012, for the self-same reliefs had been filed by the same Petitioners before the Kerala High Court and the same being dismissed, was now pending consideration in the Special Leave Petition. Mr. Banerji submitted that the Writ Petition was wholly misconceived since the Petitioners were not entitled to pursue two parallel proceedings for the self-same reliefs. It was submitted that the Writ Petition under Article 32 was, therefore, liable to be rejected.

72. Appearing for the State of Kerala and the Investigating Officer of the case, Mr. V. Giri, learned Senior Advocate, submitted that on account of the death of Valentine alias Jelastine and Ajeesh Pink, two of the crew members on board the Indian fishing vessel, St. Antony, Crime No.2 of 2012, was registered by

260

the Neendakara Coastal Police Station for offences alleged to have been committed under Sections 302, 307 and 427 read with Section 34 I.P.C. and Section 3 of the Suppression of Unlawful Activities Act (SUA Act). On the return of the Italian vessel to Kochi, the Petitioner Nos.2 and 3 were placed under arrest by the Kerala Police on 19th February, 2012, in connection with the said incident and are now in judicial custody.

73. Mr. Giri submitted that the Maritime Zones Act, 1976, was enacted by Parliament after the amendment of Article 297 of the Constitution by the 40th Constitution (Amendment) Act of 1976, which provides for the vesting in the Union of all things of value within territorial waters or the Continental Shelf and resources of the Exclusive Economic Zone. Mr. Giri urged that the concept of territorial waters or Continental Shelf and Exclusive Economic Zone originated in Article 297 and the 1976 Act in relation to the municipal laws of India.

74. Mr. Giri submitted that the Maritime Zones Act, 1976, and the Notification dated 27th August, 1981, extending the provisions of Section 188-A Cr.P.C. to the Exclusive Economic Zone, were prior in point of time to UNCLOS 1982 and the date on which India ratified the said convention. Mr. Giri submitted that despite the legislative competence of Parliament under Article 253, read with Entry 14 of List I of the Seventh Schedule, conferring on Parliament the power to enact laws to give effect to the

provisions of a Treaty, Agreement or Convention, to which India is a party, the provisions of UNCLOS have not as yet been made part of the Municipal Law of India. Mr. Giri urged that several International Conventions have been ratified by the Indian Republic to give effect to provisions of Conventions to which India is a signatory, such as the Diplomatic Relations (Vienna Convention) Act, 1972, to give effect to the provisions of the Vienna Convention on Diplomatic Relations, as also the Carriage by Air Act, 1972, to give effect to the provisions of the Warsaw Convention. In the instant case, however, the Indian Parliament has not enacted any law to give effect to the provisions of UNCLOS 1982.

75. Mr. Giri, however, conceded that International Conventions could not be ignored while enforcing the municipal law dealing with the same subject matter and in any given case, attempts were required to be made to harmonise the provisions of the international law with the municipal law. However, in the case of conflict between the two, it is the municipal law which would prevail. In this regard, reference was made to the decision of this Court in what is commonly referred to as the "Berubari case" [AIR 1960 SC 845], which was, in fact, a Presidential Reference under Article 143(1) of the Constitution of India on the implementation of the India-Pakistan Agreement relating to Berubari Union and Exchange of Enclaves. In the said Reference, the issue involved was with regard to an Agreement entered into between India and

Pakistan on 10th September, 1958, to remove certain border disputes which included the division of Berubari Union No.12 and another. In the said Reference, this Court was, inter alia, called upon to consider the question as to how a foreign Treaty and Agreement could be given effect to. The said Reference was answered by this Court by indicating that foreign Agreements and Conventions could be made applicable to the municipal laws in India, upon suitable legislation by Parliament in this regard.

76. Reference was also made to the decision of this Court in *Maganbhai Ishwarbhai Patel Vs. Union of India* [(1970) 3 SCC 400], where the subject matter was the claim to a disputed territory in the Rann of Kutch, which the Petitioners claimed was a part of India. It was noted that the Petitioners' claim had originated from the very creation of the two dominions. It was also the Petitioners' claim that India had all along exercised effective administrative control over the territory and that giving up a claim to it involved cession of Indian Territory which could only be effected by a constitutional amendment and not by an executive order.

77. Other judgments were also referred to, to which we may refer if the need arises. Mr. Giri submitted that if a Treaty or an Agreement or even a Convention does not infringe the rights of the citizens or does not in the wake of its implementation modify any

263

law, then it is open to the Executive to come to such Treaty or Agreement and the Executive was quite competent to issue orders, but if in consequence of the exercise of the executive power, rights of the citizens or others are restricted or infringed or laws are modified, the exercise of power must be supported by legislation.

78. It was also submitted that in the event the provisions of UNCLOS were implemented without the sanction of Parliament, it would amount to modification of a municipal law covered by the Maritime Zones Act, 1976. Mr. Giri contended that the 1976 Act, which was enacted under Article 297 of the Constitution, is a law which applies to the Territorial Waters, Contiguous Zone, Continental Shelf and the Exclusive Economic Zone over the seas in which the incident had taken place. If, therefore, the provisions of the Convention were to be accepted as having conferred jurisdiction on the Indian judiciary, such a situation would be contrary to the provisions of the Maritime Zones Act, 1976, which contemplates the extension of domestic penal laws to the Exclusive Economic Zone in such a manner that once extended, it would, for all applicable purposes, include such zone to be a part of the territory of India. Mr. Giri submitted that adoption or implementation of the provisions of UNCLOS would not only affect the rights of the citizens of this country, but also give rise to a legal regime, which would be inconsistent with the working of the

Maritime Zones Act, 1976, read with the notifications issued thereunder. Consequently, neither the Indian Penal Code nor the Code of Criminal Procedure or the notifications issued, making them applicable to the Exclusive Economic Zone, as if they were part of the territory of India, could be kept inoperative by UNCLOS, 1982.

79. On the question of conflict between the provisions of the Maritime Zones Act and UNCLOS, Mr. Giri reiterated the submissions made by Mr. Gaurav Banerji, on behalf of the Union of India, and contended that even if there are similarities between some of the clauses of the 1976 Act and of the UNCLOS, Article 97 of UNCLOS restricts the operation, otherwise contemplated under the Territorial Waters Act, 1976. Mr. Giri also reiterated that in case of conflict between a Treaty or a Convention and a municipal law, the latter shall always prevail, except in certain given circumstances.

80. Regarding the jurisdiction of the State of Kerala to prosecute the accused, Mr. Giri submitted that the State of Kerala and its officers were exercising jurisdiction as provided in the Indian Penal Code and the Code of Criminal Procedure. Mr. Giri submitted that the jurisdiction of the Neendakara Police Station, situated in the District of Kollam in the State of Kerala, and the concerned courts, is reserved under Sections 179 and 183 Cr.P.C. It was urged that at this stage the jurisdiction of the Indian Courts would

265

have to be ascertained on the premise that the version pleaded by the prosecution is correct and that the fishing boat, St. Antony, which was berthed at Neendakara, had commenced its voyage from within the jurisdiction of Neendakara Police Station and had come back and berthed at the same place after the incident of 15th February, 2012, and that the said facts brought the entire matter within the jurisdiction of the Neendakara Police Station and, in consequence, the Kerala State Police.

81. Mr. Giri lastly contended that the fact that "St. Antony" is not registered under the Merchant Shipping Act, 1958, and is only a fishing boat, is of little consequence, since a fishing boat is separately registered under Section 435C, Part XV-A of the aforesaid Act. In this case, the fishing boat was registered at Colachel in the State of Tamil Nadu under Registration No. TN/15/MFB/2008. According to Mr. Giri, the question as to whether the fishing vessel was registered under the Merchant Shipping Act or not was irrelevant for the purpose of this case and, since the incident had taken place within 20.5 nautical miles from the Indian coastline, falling within the Contiguous Zone/Exclusive Economic Zone of India, it must be deemed to be a part of the Indian territory for the purpose of application of the Indian Penal Code and the Cr.P.C. by virtue of Section 7(7) of the Maritime Zones Act read with Notification S.O.671(E) dated 27th August, 1981. Mr. Giri submitted that the case made out in the Special Leave Petition did not merit any interference with the judgment of

266

the learned Single Judge of the Kerala High Court, nor was any interference called for in the Writ Petition filed by the Petitioners in this Court. Learned counsel submitted that both the petitions were liable to be dismissed with appropriate cost.

82. Two issues, both relating to jurisdiction, fall for determination in this case. While the first issue concerns the jurisdiction of the Kerala State Police to investigate the incident of shooting of the two Indian fishermen on board their fishing vessel, the second issue, which is wider in its import, in view of the Public International Law, involves the question as to whether the Courts of the Republic of Italy or the Indian Courts have jurisdiction to try the accused.

83. We propose to deal with the jurisdiction of the Kerala State Police to investigate the matter before dealing with the second and larger issue, the decision whereof depends on various factors. One such factor is the location of the incident.

84. Admittedly, the incident took place at a distance of about 20.5 nautical miles from the coastline of the State of Kerala, a unit within the Indian Union. The incident, therefore, occurred not within the territorial waters of the coastline of the State of Kerala, but within the Contiguous Zone, over which the State Police of the State of Kerala ordinarily has no jurisdiction. The submission made on behalf of the Union of India and the State of Kerala to the effect that with the extension of Section 188A of the Indian

267

Penal Code to the Exclusive Economic Zone, the provisions of the said Code, as also the Code of Criminal Procedure, stood extended to the Contiguous Zone also, thereby vesting the Kerala Police with the jurisdiction to investigate into the incident under the provisions thereof, is not tenable. The State of Kerala had no jurisdiction over the Contiguous Zone and even if the provisions of the Indian Penal Code and the Code of Criminal Procedure Code were extended to the Contiguous Zone, it did not vest the State of Kerala with the powers to investigate and, thereafter, to try the offence. What, in effect, is the result of such extension is that the Union of India extended the application of the Indian Penal Code and the Code of Criminal Procedure to the Contiguous Zone, which entitled the Union of India to take cognizance of, investigate and prosecute persons who commit any infraction of the domestic laws within the Contiguous Zone. However, such a power is not vested with the State of Kerala.

85. The submissions advanced on behalf of the Union of India as well as the State of Kerala that since the Indian fishing vessel, the St. Antony, had proceeded on its fishing expedition from Neendakara in Kollam District and had returned thereto after the incident of firing, the State of Kerala was entitled to inquire into the incident, is equally untenable, since the cause of action for the filing of the F.I.R. occurred outside the jurisdiction of the Kerala Police under Section 154 of the Cr.P.C. The F.I.R. could have been lodged at Neendakara Police station, but that did not vest

the Kerala Police with jurisdiction to investigate into the complaint. It is the Union of India which was entitled in law to take up the investigation and to take further steps in the matter.

86. Furthermore, in this case, one has to take into account another angle which is an adjunct of Public International Law, since the two accused in the case are marines belonging to the Royal Italian Navy, who had been deputed on M.V. Enrica Lexie, purportedly in pursuance of an Italian Decree of Parliament, pursuant to which an Agreement was entered into between the Republic of Italy on the one hand and the Italian Shipowners' Confederation (Confitarma) on the other. This takes the dispute to a different level where the Governments of the two countries become involved. The Republic of Italy has, in fact, from the very beginning, asserted its right to try the two marines and has already commenced proceedings against them in Italy under penal provisions which could result in a sentence of 21 years of imprisonment if the said accused are convicted. In such a scenario, the State of Kerala, as one of the units of a federal unit, would not have any authority to try the accused who were outside the jurisdiction of the State unit. As mentioned hereinbefore, the extension of Section 188A I.P.C. to the Exclusive Maritime Zone, of which the Contiguous Zone is also a part, did not also extend the authority of the Kerala State Police beyond the territorial waters, which is the limit of its area of operations.

269

87. What then makes this case different from any other case that may involve similar facts, so as to merit exclusion from the operation of Section 2 of the Indian Penal Code, as urged by Mr. Salve? For the sake of reference, Section 2 of Indian Penal Code, is extracted hereinbelow :-

"2. Punishment of offences committed within India - Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India."

88. The answer to the said question is the intervention of the UNCLOS 1982, which sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities. The said Convention which was signed by India in 1982 and ratified on 29th June, 1995, encapsulates the law of the sea and is supplemented by several subsequent resolutions adopted by the Security Council of the United Nations.

89. Before UNCLOS came into existence, the law relating to the seas which was in operation in India, was the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, which spelt out the jurisdiction of the Central Government over the Territorial Waters, the Contiguous Zones and the Exclusive Economic Zone.

270

90. In addition to the above was the presence of Article 11 of the Geneva Convention on the Law of the Seas, 1958, and the interpretation of the expression "incident of navigation" used therein, in its application to the firing resorted to by the Petitioner Nos.2 and 3 from on board the M.V. Enrica Lexie.

91. What is also of some relevance in the facts of this case is Resolution 1897 of 2009, adopted by the Security Council of the United Nations on 30th November, 2009, wherein while recognizing the menace of piracy, particularly off the coast of Somalia, the United Nations renewed its call upon States and regional organizations that had the capacity to do so, to take part in the fight against piracy and armed robbery off the Sea of Somalia in particular.

92. The provisions of the Maritime Zones Act, 1976, take note of the Territorial Waters, the Contiguous Zone, the Continental Shelf and the Exclusive Economic Zone. Section 7 of the said enactment deals with the Exclusive Economic Zone of India and stipulates the same to be an area beyond and adjacent to the Territorial Waters extending upto 200 nautical miles from the nearest point of the baseline of the Kerala coast. It is quite clear that the Contiguous Zone is, therefore, within the Exclusive Economic Zone of India and the laws governing the Exclusive Economic Zone would also govern the incident which occurred

271

within the Contiguous Zone, as defined under Section 5 of the aforesaid Act. The provisions of the UNCLOS is in harmony with and not in conflict with the provisions of the Maritime Zones Act, 1976, in this regard. Article 33 of the Convention recognises and describes the Contiguous Zone of a nation to extend to 24 nautical miles from the baseline from which the breadth of the territorial sea is measured. This is in complete harmony with the provisions of the 1976 Act. Similarly, Articles 56 and 57 describe the rights, jurisdiction and duties of the coastal State in the Exclusive Economic Zone and the breadth thereof extending to 20 nautical miles from the baseline from which the breadth of the territorial sea is measured. This provision is also in consonance with the provisions of the 1976 Act. The area of difference between the provisions of the Maritime Zones Act, 1976, and the Convention occurs in Article 97 of the Convention which relates to the penal jurisdiction in matters of collision or any other incident of navigation (emphasis added).

93. The present case does not involve any collision between the Italian Vessel and the Indian Fishing Vessel. However, it has to be seen whether the firing incident could be said to be covered by the expression "incident of navigation". Furthermore, in the facts of the case, as asserted on behalf of the Petitioners, the incident also comes within Article 100 of the Convention which provides that all States shall cooperate to the fullest possible extent in

272

the repression of piracy on the high seas or in any other place outside the jurisdiction of any State. If Article 97 of the Convention applies to the facts of this case, then in such case, no penal or disciplinary proceeding can be instituted against the Master or any other person in service of the ship, except before the judicial or administrative authorities either of the Flag State or of the State of which such person is a national. Article 97(3) stipulates in clear terms that no arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the Flag State. In this case, the Italian Vessel, M.V. Enrica Lexie, was flying the Italian flag. It may be recalled that the St. Antony was not flying an Indian flag at the time when the incident took place. In my view, the above fact is not very relevant at this stage, and may be of some consequence if the provisions of Article 100 of UNCLOS, 1982, are invoked.

94. The next question which arises is whether the incident of firing could be said to be an incident of navigation. The context in which the expression has been used in Article 97 of the Convention seems to indicate that the same refers to an accident occurring in the course of navigation, of which collision between two vessels is the principal incident. An incident of navigation as intended in the aforesaid Article, cannot, in my view, involve a criminal act in whatever circumstances. In what circumstances the incident occurred may be set up as a

273

defence in a criminal action that may be taken, which legal position is accepted by both the countries which have initiated criminal proceedings against the two marines. Even the provisions of Article 100 of UNCLOS may be used for the same purpose. Whether the accused acted on the misunderstanding that the Indian fishing vessel was a pirate vessel which caused the accused to fire, is a matter of evidence which can only be established during a trial. If the defence advanced on behalf of the Petitioner Nos. 2 and 3 is accepted, then only will the provisions of Article 100 of the Convention become applicable to the facts of the case.

95. The decision in the Lotus Case (supra) relied upon by the learned Additional Solicitor General would accordingly be dependent on whether the provisions of Article 97 of the Convention are attracted in the facts of this case. As already indicated hereinbefore, the expression "incident of navigation" in Article 97 cannot be extended to a criminal act, involving the killing of two Indian fishermen on board an Indian fishing vessel, although, the same was not flying the Indian flag. If at all, Article 100 of the Convention may stand attracted if and when the defence version of apprehension of a pirate attack is accepted by the Trial Court. In the Lotus case, the question relating to the extent of the criminal jurisdiction of a State was brought to the Permanent Court of International Justice in 1927. The said case related to a collision between the French Steamship 'Lotus' and

274

the Turkish Steamship 'Boz-Kourt', which resulted in the sinking of the latter ship and the death of eight Turkish subjects. Once the Lotus arrived at Constantinople, the Turkish Government commenced criminal proceedings both against the Captain of the Turkish vessel and the French Officer of the Watch on board the Lotus. On both being sentenced to imprisonment, the French Government questioned the judgment on the ground that Turkey had no jurisdiction over an act committed on the open seas by a foreigner on board a foreign vessel, whose flag gave it exclusive jurisdiction in the matter. On being referred to the Permanent Court of International Justice, it was decided that Turkey had not acted in a manner which was contrary to International Law since the act committed on board the Lotus had effect on the Boz-Kourt flying the Turkish flag. In the ninth edition of Oppenheim's International Law, which has been referred to in the judgment under consideration, the nationality of ships in the high seas has been referred to in paragraph 287, wherein it has been observed by the learned author that the legal order on the high seas is based primarily on the rule of International Law which requires every vessel sailing the high seas to possess the nationality of, and to fly the flag of, one State, whereby a vessel and persons on board the vessel are subjected to the law of the State of the flag and in general subject to its exclusive jurisdiction. In paragraph 291 of the aforesaid discourse, the learned author has defined the scope of flag jurisdiction to mean

275

that jurisdiction in the high seas is dependent upon the Maritime Flag under which vessels sail, because, no State can extend its territorial jurisdiction to the high seas. Of course, the aforesaid principle is subject to the right of "hot pursuit", which is an exception to the exclusiveness of the flag jurisdiction over ships on the high seas in certain special cases.

96. This takes us to another dimension involving the concept of sovereignty of a nation in the realm of Public International Law. The exercise of sovereignty amounts to the exercise of all rights that a sovereign exercises over its subjects and territories, of which the exercise of penal jurisdiction under the criminal law is an important part. In an area in which a country exercises sovereignty, its laws will prevail over other laws in case of a conflict between the two. On the other hand, a State may have sovereign rights over an area, which stops short of complete sovereignty as in the instant case where in view of the provisions both of the Maritime Zones Act, 1976, and UNCLOS 1982, the Exclusive Economic Zone is extended to 200 nautical miles from the baseline for measurement of Territorial Waters. Although, the provisions of Section 188A I.P.C. have been extended to the Exclusive Economic Zone, the same are extended to areas declared as "designated areas" under the Act which are confined to installations and artificial islands, created for the purpose of exploring and exploiting the natural resources in and under the sea to the extent of 200 nautical miles, which also

includes the area comprising the Continental Shelf of a country.

However, the Exclusive Economic Zone continues to be part of the High Seas over which sovereignty cannot be exercised by any nation.

97. In my view, since India is a signatory, she is obligated to respect the provisions of UNCLOS 1982, and to apply the same if there is no conflict with the domestic law. In this context, both the countries may have to subject themselves to the provisions of Article 94 of the Convention which deals with the duties of the Flag State and, in particular, sub-Article (7) which provides that each State shall cause an inquiry to be held into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State. It is also stipulated that the Flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

98. The principles enunciated in the Lotus case (supra) have, to some extent, been watered down by Article 97 of UNCLOS 1982. Moreover, as observed in Starke's International Law, referred to by Mr. Salve, the territorial criminal jurisdiction is founded on various principles which provide that, as a matter of convenience, crimes should be dealt with by the States whose social order is most closely affected. However, it has also been

277

observed that some public ships and armed forces of foreign States may enjoy a degree of immunity from the territorial jurisdiction of a nation.

99. This brings me to the question of applicability of the provisions of the Indian Penal Code to the case in hand, in view of Sections 2 and 4 thereof. Of course, the applicability of Section 4 is no longer in question in this case on account of the concession made on behalf of the State of Kerala in the writ proceedings before the Kerala High Court. However, Section 2 of the Indian Penal Code as extracted hereinbefore provides otherwise. Undoubtedly, the incident took place within the Contiguous Zone over which, both under the provisions of the Maritime Zones Act, 1976, and UNCLOS 1982, India is entitled to exercise rights of sovereignty. However, as decided by this Court in the *Aban Loyd Chiles Offshore Ltd. case* (supra), referred to by Mr. Salve, Sub-section (4) of Section 7 only provides for the Union of India to have sovereign rights limited to exploration, exploitation, conservation and management of the natural resources, both living and non-living, as well as for producing energy from tides, winds and currents, which cannot be equated with rights of sovereignty over the said areas, in the Exclusive Economic Zone. It also provides for the Union of India to exercise other ancillary rights which only clothes the Union of India with sovereign rights and not rights of sovereignty in the

278

Exclusive Economic Zone. The said position is reinforced under Sections 6 and 7 of the Maritime Zones Act, 1976, which also provides that India's sovereignty extends over its Territorial Waters while, the position is different in respect of the Exclusive Economic Zone. I am unable to accept Mr. Banerji's submissions to the contrary to the effect that Article 59 of the Convention permits States to assert rights or jurisdiction beyond those specifically provided in the Convention.

100. What, therefore, transpires from the aforesaid discussion is that while India is entitled both under its Domestic Law and the Public International Law to exercise rights of sovereignty upto 24 nautical miles from the baseline on the basis of which the width of Territorial Waters is measured, it can exercise only sovereign rights within the Exclusive Economic Zone for certain purposes. The incident of firing from the Italian vessel on the Indian shipping vessel having occurred within the Contiguous Zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in the country. However, the same is subject to the provisions of Article 100 of UNCLOS 1982. I agree with Mr. Salve that the "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation between States in accordance with the Charter of the United Nations" has to be conducted only at the level of the Federal or

279

Central Government and cannot be the subject matter of a proceeding initiated by a Provincial/State Government.

101. While, therefore, holding that the State of Kerala has no jurisdiction to investigate into the incident, I am also of the view that till such time as it is proved that the provisions of Article 100 of the UNCLOS 1982 apply to the facts of this case, it is the Union of India which has jurisdiction to proceed with the investigation and trial of the Petitioner Nos.2 and 3 in the Writ Petition. The Union of India is, therefore, directed, in consultation with the Chief Justice of India, to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and most importantly, the provisions of UNCLOS 1982, where there is no conflict between the domestic law and UNCLOS 1982. The pending proceedings before the Chief Judicial Magistrate, Kollam, shall stand transferred to the Special Court to be constituted in terms of this judgment and it is expected that the same shall be disposed of expeditiously. This will not prevent the Petitioners herein in the two matters from invoking the provisions of Article 100 of UNCLOS 1982, upon adducing evidence in support thereof, whereupon the question of jurisdiction of the Union of India to investigate into the incident and for the Courts in India to try the accused may be reconsidered. If it is found that both the Republic of Italy and

280

the Republic of India have concurrent jurisdiction over the matter,
then these directions will continue to hold good.

102. It is made clear that the observations made in this judgment relate only to the question of jurisdiction prior to the adducing of evidence and once the evidence has been recorded, it will be open to the Petitioners to re-agitate the question of jurisdiction before the Trial Court which will be at liberty to reconsider the matter in the light of the evidence which may be adduced by the parties and in accordance with law. It is also made clear that nothing in this judgment should come in the way of such reconsideration, if such an application is made.

103. The Special Leave Petition and the Writ Petition, along with all connected applications, are disposed of in the aforesaid terms.

CJI.
(ALTAMAS
KABIR)

New Delhi

Dated: January 18, 2013.

281

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 135 OF 2012

Republic of Italy thro' Ambassador & Ors.

.... Petitioners

Versus

Union of India & Ors.

.... Respondents

WITH

SPECIAL LEAVE PETITION (C) No. 20370/2012

Massimiliano Latorre & Ors.

..... Petitioners

Versus

Union of India & Ors.

..... Respondents

J U D G M E N T

Chelameswar, J.

1. I agree with the conclusions recorded in the Judgment of the Hon'ble Chief Justice. But, I wish to supplement the following.

2. The substance of the submission made by Shri Harish Salve, learned senior counsel for the petitioners is;

(1) The incident in question occurred beyond the territory of India to which location the sovereignty of the country does not extend; and Parliament cannot extend the application of the laws made by it beyond the territory of India. Consequentially, the two marines are not amenable to the jurisdiction of India;

Alternatively it is argued; (2) that the incident, which resulted in the death of two Indians is an "incident of navigation" within the meaning of Article 97

1. Article 97. Penal jurisdiction in matters of collision or any other incident of navigation

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.
2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.
3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

of the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) and therefore, no penal proceedings may be instituted against the two marines except before the Judicial authorities of the 'Flag State' or the State of which the marines are nationals.

3. The authority of the Sovereign to make laws and enforce them against its subjects is undoubted in constitutional theory. Though

283

written Constitutions prescribe limitations, either express or implied on such authority, under our Constitution, such limitations are with respect to territory [Article 245(1)] or subject matter [Article 246] or time span of the operation of the laws [Articles 249 & 250] or the inviolable rights of the subjects [fundamental rights] etc. For the purpose of the present case, we are concerned only with the limitation based on territory.

4. That leads me to the question as to what is the territory of the Sovereign Democratic Republic of India ?

5. The territory of India is defined under Article 1;

"1. Name and territory of the Union.-

- 1) India, that is Bharat, shall be a Union of States.
- 2) The States and the territories thereof shall be as specified in the First Schedule.
- 3) The territory of India shall comprise—
 - (a) The territories of the States;
 - (b) The Union territories specified in the First Schedule; and
 - (c) such other territories as may be acquired."

But that deals only with geographical territory. Article 297 deals with 'maritime territory' 2.

2. As early as 1927, Philip C. Jessup, who subsequently became a judge of the International Court of Justice, stated that the territorial waters are "as much a part of the territory of a nation as is the land

itself'. Hans Kelsen declared that "the territorial waters form part of the territory of the littoral State". In the *Grisbadama Case* (1909), between Norway and Sweden, the Permanent Court of Arbitration referred to the territorial waters as "the maritime territory" which is an essential appurtenance of the adjacent land territory. In the *Corfu Channel (Merits) case* (1949), the International Court of Justice clearly recognised that, under international law, the territorial sea was the "territory" of the coastal state over which it enjoyed "exclusive territorial control" and "sovereignty". Lord McNair, who subscribed to the majority view of the Court in the above case, observed in the *Anglo-Norwegian Fisheries case*:

To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory..... International law does not say to a State: "You are entitled to claim territorial waters if you want them". No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.

Sir Gerald Fitzmaurice, writing before he became a judge of the International Court of Justice, quoted McNair's observation with approval, and considered that it was also implicit in the decision of the World Court in the *Anglo-Norwegian Fisheries case*. It follows, therefore, that the territorial waters are not only "territory" but also a compulsory appurtenance to the coastal state. Hence the observation by L.F.E. Goldie that "it has long been accepted that territorial waters, their superambient air, their sea-bed and subsoil, vest in the coastal State ipso jure (i.e., without any proclamation or effective occupation being necessary)": —from *The New Law of Maritime Zones* by P.C.Rao (Page 22)

6. Article 297(3) authorises the Parliament to specify from time to time the limits of various maritime zones such as, territorial waters, continental shelf, etc. Clauses (1) and (2) of the

285

said article make a declaration that all lands, minerals and other things of value and all other resources shall vest in the Union of India.

"Article 297: Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union.-

- 1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.
- 2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.
- 3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.

7. Two things follow from the above declaration under Article 297. Firstly, India asserts its authority not only on the land mass of the territory of India specified under Article 1, but also over the areas specified under Article 297. It authorises the Parliament

to specify the limits of such areas (maritime zones). The nature of the said authority may not be the same for the various maritime zones indicated in Article 297. However, the preponderance of judicial authority appears to be that the sovereignty of the coastal state extends to the territorial waters 3.

3. The territorial sea appertains to the territorial sovereignty of the coastal state and thus belongs to it automatically. For example, all newly independent states (with a coast) come to independence with an entitlement to a territorial sea. There have been a number of theories as to the precise legal character of the territorial sea of the coastal state, ranging from treating the territorial sea as part of the *res communis*, but subject to certain rights exercisable by the coastal state, to regarding the territorial sea as part of the coastal state's territorial domain subject to a right of innocent passage by foreign vessels.....

Articles 1 and 2 of the Convention on the Territorial Sea, 1958 provide that the coastal state's sovereignty extends over its territorial sea and to the airspace and seabed and the subsoil thereof, subject to the provisions of the Convention and of international law..... — from International Law by Malcolm N. Shaw [sixth edition](page 569 - 570)

8. The sovereignty of a Nation / State over the landmass comprised within the territorial boundaries of the State, is an established principle of both constitutional theory and International Law. The authority of the Sovereign to make and enforce laws within the territory over which the sovereignty extends is unquestionable in constitutional theory. That the sovereignty of a 'coastal State' extends to its territorial waters, is also a well accepted principle of International Law 4

287

4. It is well established that the coastal state has sovereignty over its territorial waters, the sea-bed and subsoil underlying such waters, and the air space above them, subject to the obligations imposed by international law. Recently, in the North Sea Continental Shelf cases, the International Court of Justice declared that a coastal state has "full sovereignty" over its territorial sea. This principle of customary international law has also been enshrined in article 1 of the Geneva Convention, and remains unaffected in the draft convention. —from The New Law of Maritime Zones by P.C.Rao (Page 22)

though there is no uniformly shared legal norm establishing the limit of the territorial waters - "maritime territory". Whether the maritime territory is also a part of the national territory of the State is a question on which difference of opinion exists. Insofar as this Court is concerned, a Constitution Bench in *B.K.Wadeyar v. M/s. Daulatram Rameshwarlal* (AIR 1961 SC 311) held at para 8 as follows:

"These territorial limits would include the territorial waters of India....."

9. Insofar the Republic of India is concerned, the limit of the territorial waters was initially understood to be three nautical miles. It had been extended subsequently, up to six nautical miles by a Presidential proclamation dated 22.3.52 and to twelve nautical miles by another proclamation dated 30.9.67. By Act 80 of 1976 of the Parliament, it was statutorily fixed at 12 nautical miles. The Act also authorizes the Parliament to alter such limit of the territorial waters.

10. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 80 of 1976 (hereinafter referred to as 'the Maritime Zones Act'), was made by the Parliament in exercise of the authority conferred under Article 297. Except Sections 5 and 7, rest of the Sections of the Act, came into force on 26-08-1976. Sections 5 and 7 came into force, subsequently, on 15-01-1977, by virtue of a notification contemplated under Section 1(2). Section 3(1) declares that the sovereignty of India extends, and has always extended, to the territorial waters of India:

"The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the air space over, such waters."

Under sub-section (2), the limit of the territorial waters is specified to be twelve nautical miles from the nearest point of the appropriate baseline:

"The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline."

289

Sub-section (3) authorises the Government of India to alter the limit of the territorial waters by a notification approved by both the Houses of Parliament, with due regard to the International Law and State practice:

"Notwithstanding anything contained in sub-section (2), the Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the territorial waters."

11. Section 5 defines contiguous zone to be an area beyond and adjacent to the territorial waters extending up to twenty-four nautical miles from the nearest point of the appropriate baseline:

"Section 5(1): The contiguous zone of India (hereinafter referred to as the contiguous zone) is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of section 3."

This limit also can be altered by the Government of India, in the same manner as the limit of the territorial waters. Section 6 describes the continental shelf, whereas Section 7 defines the

exclusive economic zone. While the Parliament authorizes the Government of India

5. Central Government may whenever it considers necessary so to do having regard to the International Law and State practice alter by notification in the Official Gazette the limit of"

under Sections 3(3), 5(2) and 7(2) respectively to alter the limits of territorial waters, contiguous zone and exclusive economic zone with the approval of both the Houses of the Parliament, the law does not authorise the alteration of the limit of the continental shelf.

12. While Section 3 declares that "the sovereignty of India extends, and has always extended, to the territorial waters", no such declaration is to be found in the context of contiguous zone. On the other hand, with reference to continental shelf, it is declared under Section 6(2) that "India has, and always had, full and exclusive sovereign rights in respect of its continental shelf". With reference to exclusive economic zone, Section 7(4)(a) declares that "in the exclusive economic zone, the Union has sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents."

13. Whatever may be the implications flowing from the language of the Maritime Zones Act and the meaning of the expression

291

"sovereign rights" employed in Sections 6(2), 6(3)(a) 6 and 7(4)(a), (Whether or not the sovereignty of India extends beyond its territorial waters and to the contiguous zone or not) 7, in view of the scheme of the Act, as apparent from Section 5(5)(a) 8 and Section 7(7)(a) 9,

6. Section 6(3)(a) : sovereign rights for the purpose of exploration, exploitation, conservation and management of all resources.

7. the jurisdiction of the coastal state has been extended into areas of high seas contiguous to the territorial sea, albeit for defined purposes only. Such restricted jurisdiction zones have been established or asserted for a number of reasons.....

.....without having to extend the boundaries of its territorial sea further into the high seas.....

.....such contiguous zones were clearly differentiated from claims to full sovereignty as parts of the territorial sea, by being referred to as part of the high seas over which the coastal state may exercise particular rights. Unlike the territorial sea, which is automatically attached to the land territory of the state..... — from International Law by Malcolm N. Shaw [sixth edition](page 578 - 579)

8.

Section 5(5)(a) : extend with such restrictions and modifications as it thinks fit, any enactment, relating to any matter referred to in clause (a) or clause (b) of sub-section (4), for the time being in force in India or any part thereof to the contiguous zone.

9. Section 7(7)(a) : extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof in the exclusive economic zone or any part thereof.

the application of "any enactment for the time being in force in India" (like the Indian Penal Code and the Code of Criminal

292

Procedure), is not automatic either to the contiguous zone or exclusive economic zone. It requires a notification in the official gazette of India to extend the application of such enactments to such maritime zone. The Maritime Zones Act further declares that once such a notification is issued, the enactment whose application is so extended "shall have effect as if" the contiguous zone or exclusive economic zone, as the case may be, "is part of the territory of India". Creation of such a legal fiction is certainly within the authority of the Sovereign Legislative Body.

14. In exercise of the power conferred by Section 7(7) of the Maritime Zones Act, the Government of India extended the application of both the Indian Penal Code and the Code of Criminal Procedure to the exclusive economic zone by a notification dated 27-08-1981. By the said notification, the Code of Criminal Procedure also stood modified. A new provision - Section 188A - came to be inserted in the Code of Criminal Procedure, which reads as follows:

"188A. Offence committed in exclusive economic zone:

When an offence is committed by any person in the exclusive economic zone described in sub-section(1) of Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976) or as altered by

293

notification, if any, issued under sub-section (2) thereof, such person may be dealt with in respect of such offence as if it had been committed in any place in which he may be found or in such other place as the Central Government may direct under Section 13 of the Said Act."

15. Under the Constitution, the legislative authority is distributed between the Parliament and the State Legislatures. While the State legislature's authority to make laws is limited to the territory of the State, Parliament's authority has no such limitation.

16. Though Article 245 10

10. Article 245 : Extent of laws made by Parliament and by the Legislatures of State.-

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

speaks of the authority of the Parliament to make laws for the territory of India, Article 245(2) expressly declares - "No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation". In my view the declaration is a fetter on the jurisdiction of the Municipal Courts

294

including Constitutional Courts to either declare a law to be unconstitutional or decline to give effect to such a law on the ground of extra territoriality. The first submission of Shri Salve must, therefore, fail.

17. Even otherwise, territorial sovereignty and the ability of the sovereign to make, apply and enforce its laws to persons (even if not citizens), who are not corporeally present within the sovereign's territory, are not necessarily co-extensive.

18. No doubt that with respect to Criminal Law, it is the principle of 19th century English jurisprudence that;

"all crime is local. The jurisdiction over the crime belongs to the country where the crime is committed"

11.

[12] See: *Macleod v. Attorney General of New South Wales* (1891) AC 455, 451-58 and *Huntington v. Attrill* (1893) AC 150.

But that principle is not accepted as an absolute principle any more. The increased complexity of modern life emanating from the advanced technology and travel facilities and the large cross border commerce made it possible to commit crimes whose effects are felt in territories beyond the residential borders of the offenders. Therefore, States claim jurisdiction over; (1) offenders who are not physically present within; and (2) offences committed beyond-the-territory of the State whose "legitimate

295

interests" are affected. This is done on the basis of various principles known to international law, such as, "the objective territorial claim, the nationality claim, the passive personality claim, the security claim, the universality claim and the like" 12.

19. The protection of Articles 14 and 21 of the Constitution is available even to an alien when sought to be subjected to the legal process of this country. This court on more than one occasion held so on the ground that the rights emanating from those two Articles are not confined only to or dependent upon the citizenship of this country 13.

12. P C Rao - "Indian Constitution and International Law", page 42

13. See AIR 1955 SC 367 = Hans Muller of Nuremberg v. Superintendent, Presidency Jail Calcutta para 34.

also (2002) 2 SCC 465 = Chairman, Railway Board & Others - vs- Mrs. Chandrima Das and Others paras 28 to 32

As a necessary concomitant, this country ought to have the authority to apply and enforce the laws of this country against the persons and things beyond its territory when its legitimate interests are affected. In assertion of such a principle, various laws of this country are made applicable beyond its territory.

20. Section 2 read with 4 of the Indian Penal Code 14 makes the provisions of the Code applicable to the offences committed "in any place without and beyond" the territory of India; (1) by a

296

citizen of India or (2) on any ship or aircraft registered in India, irrespective of its location, by any person not necessarily a citizen

15.

14. Section.2: Punishment of offences committed within India.- Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.

Section.4: Extension of Code to extra-territorial offences.- The provisions of this Code apply also to any offence committed by –

- (1) any citizen of India in any place without and beyond India;
- (2) any person on any ship or aircraft registered in India wherever it may be;
- (3) any person in any place without and beyond India committing offence targeting a computer resource located in India.

15. Mobarik Ali Ahmed v. State of Bombay (AIR 1957 SC 857, 870) "on a plain reading of section 2 of the Penal Code, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside".

Such a declaration was made as long back as in 1898. By an amendment in 2009 to the said Section, the Code is extended to any person in any place "without and beyond the territory of India", committing an offence targeting a computer resource located in India.

21. Similarly, Parliament enacted the Suppression of Unlawful Acts Against Safety of Maritime Navigation And Fixed Platforms on Continental Shelf Act, 2002 (Act No.69 of 2002), under Section 1(2), it is declared as follows:

297

"It extends to the whole of India including the limit of the territorial waters, the continental shelf, the exclusive economic zone or any other maritime zone of India within the meaning of section 2 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976)."

(emphasis supplied)

Thereby expressly extending the application of the said Act beyond the limits of the territorial waters of India.

22. Section 3 of the said Act, insofar it is relevant for our purpose is as follows:

"(1) Whoever unlawfully and intentionally-

(a) commits an act of violence against a person on board a fixed platform or a ship which is likely to endanger the safety of the fixed platform or, as the case may be, safe navigation of the ship shall be punished with imprisonment for a term which may extend to ten year and shall also be liable to fine;"

(emphasis supplied)

23. The expression "ship" for the purpose of the said Act is defined under Section 2(h):

298

"(h) "ship" means a vessel of any type whatsoever not permanently attached to the seabed and includes dynamically supported craft submersibles, or any other floating craft."

24. Parliament asserted its authority to apply the penal provisions against persons, who "hijack" (described under Section

3 16

16. 3. Hijacking.- (1) whoever on board an aircraft in flight, unlawfully, by force or threat of force or by an other form of intimidation, seizes or exercises control of that aircraft, commits the offence of hijacking of such aircraft.

(2) Whoever attempts to commit any of the acts referred to in sub-section(1) in relation to any aircraft, or abets the commission of any such act, shall also be deemed to have committed the offence of hijacking of such aircraft.

(3) For the purposes of this section, an aircraft shall be deemed to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, and in the case of a forced landing, the flight shall be deemed to continue until the competent authorities of the country in which such forced landing takes place take over the responsibility for the aircraft and for persons and property on board.

of the Anti-Hijacking Act, 1982) an aircraft. The Act does not take into account the nationality of the hijacker. The Act expressly recognises the possibility of the commission of the act of hijacking outside India and provides under Section 6 that the person committing such offence may be dealt with in respect thereof

299

as if such offence had been committed in any place within India at which he may be found. Similarly, Section 3 of the Geneva Conventions Act, 1960, provides that "any person commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions", either "within or without India", shall be punished.

25. Thus, it is amply clear that Parliament always asserted its authority to make laws, which are applicable to persons, who are not corporeally present within the territory of India (whether are not they are citizens) when such persons commit acts which affect the legitimate interests of this country.

26. In furtherance of such assertion and in order to facilitate the prosecution of the offenders contemplated under Section 4(1) & (2) of the Indian Penal Code, Section 188 of the Code of Criminal Procedure 17

[18] Section 188. Offence committed outside India.

When an offence is committed outside India-

(a) By a citizen of India, whether on the high seas or elsewhere; or

(b) By a person, not being such citizen, on any ship or aircraft registered in India.

He may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.

300

prescribes the jurisdiction to deal with such offences. Each one of the above referred enactments also contains a provision parallel to Section 188.

27. Such assertion is not peculiar to India, but is also made by various other countries. For example, the issue arose in a case reported in R v. Baster [1971] 2 All ER 359 (C.A.). The accused posted letters in Northern Ireland to football pool promoters in England falsely claiming that he had correctly forecast the results of football matches and was entitled to winnings. He was charged with attempting to obtain property by deception contrary to Section 15 of the Theft Act 1968. The accused contended that when the letters were posted in Northern Ireland the attempt was complete and as he had never left Northern Ireland during the relevant period, the attempt had not been committed within the jurisdiction of the English Courts. It was held:

"The attempt was committed within the jurisdiction because an offence could be said to be committing an attempt at every moment of the period between the commission of the proximate act necessary to constitute the attempt and the moment when the attempt failed; accordingly the accused was attempting to commit the offence of obtaining by deception when the letter reached its destination within England and thus the offence was committed within the

301

jurisdiction of the English courts; alternatively it could be said that the accused made arrangements for the transport and delivery of the letter, essential parts of the attempt, within the jurisdiction; the presence of the accused within the jurisdiction was not an essential element of offences committed in England."

(emphasis supplied)

28. The United States of America made such assertions:

"..... the provision extending the special maritime and territorial jurisdiction of the US to include any place outside the jurisdiction of any nation with respect to an offence by or against a national of the United States. In 1986, following the Achille Lauro incident, the US adopted the Omnibus Diplomatic Security and Anti-Terrorism Act, inserting into the criminal code a new section which provided for US jurisdiction over homicide and physical violence outside the US where a national of the US is the victim."

(International Law by Malcolm N. Shaw page 665 [sixth Edition])

29. Therefore, I am of the opinion that the Parliament, undoubtedly, has the power to make and apply the law to persons, who are not citizens of India, committing acts, which constitute

302

offences prescribed by the law of this country, irrespective of the fact whether such acts are committed within the territory of India or irrespective of the fact that the offender is corporeally present or not within the Indian territory at the time of the commission of the offence. At any rate, it is not open for any Municipal Court including this Court to decline to apply the law on the ground that the law is extra-territorial in operation when the language of the enactment clearly extends the application of the law.

30. Before parting with the topic, one submission of Shri Salve is required to be dealt with:

Shri Salve relied heavily upon the decision reported in *Aban Loyd Chilies Offshore Ltd. v. Union of India and ors.* [(2008) 11 SCC 439], for the purpose of establishing that the sovereignty of this country does not extend beyond the territorial waters of India and therefore, the extension of the Indian Penal Code beyond the territorial waters of India is impermissible.

31. No doubt, this Court did make certain observations to the effect that under the Maritime Zones Act;

"....., India has been given only certain limited sovereign rights and such limited sovereign rights conferred on India in respect of continental shelf and exclusive economic zone cannot be equated to extending the sovereignty of India over the

303

continental shelf and exclusive economic zone as in the case of territorial waters....."

32. With great respect to the learned Judges, I am of the opinion that sovereignty is not "given", but it is only asserted. No doubt, under the Maritime Zones Act, the Parliament expressly asserted sovereignty of this country over the territorial waters but, simultaneously, asserted its authority to determine / alter the limit of the territorial waters.

33. At any rate, the issue is not whether India can and, in fact, has asserted its sovereignty over areas beyond the territorial waters. The issue in the instant case is the authority of the Parliament to extend the laws beyond its territorial waters and the jurisdiction of this Court to examine the legality of such exercise. Even on the facts of Aban Loyd case, it can be noticed that the operation of the Customs Act was extended beyond the territorial waters of India and this Court found it clearly permissible although on the authority conferred by the Maritime Zones Act. The implications of Article 245(2) did not fall for consideration of this Court in that Judgment.

34. Coming to the second issue; whether the incident in issue is an "incident of navigation" in order to exclude the jurisdiction of India on the ground that with respect to an "incident of navigation", penal proceedings could be instituted only before the

Judicial Authorities of the "Flag State" or of the State of which the accused is a national.

35. The expression "incident of navigation" occurring under Article 97 of the UNCLOS is not a defined expression. Therefore, necessarily the meaning of the expression must be ascertained from the context and scheme of the relevant provisions of the UNCLOS. Article 97 occurs in Part-VII of the UNCLOS, which deals with "HIGH SEAS". Article 86 stipulates the application of Part-VII. It reads as follows:

"The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58."

Further, Article 89 makes an express declaration that:

No State may validly purport to subject any part of the high seas to its sovereignty."

36. From the language of Article 86 it is made very clear that Part-VII applies only to that part of the sea which is not included in

305

the exclusive economic zone, territorial waters, etc. Exclusive economic zone is defined under Article 55 as follows:

"Article 55: Specific legal regime of the exclusive economic zone: The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

That being the case, I am of the opinion that irrespective of the meaning of the expression "incident of navigation", Article 97 has no application to the exclusive economic zone. Even under UNCLOS, Article 57 stipulates that "the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured". It follows from a combined reading of Articles 55 and 57 that within the limit of 200 nautical miles, measured as indicated under Article 57, the authority of each coastal State to prescribe the limits of exclusive economic zone is internationally recognised. The declaration under Section 7(1) of the Maritime Zones Act, which stipulates the limit of the exclusive economic zone, is perfectly in tune with the terms of UNCLOS. Therefore, Article 97 of UNCLOS has no application to the exclusive economic zone, of which the

306

contiguous zone is a part and that is the area relevant, in the context of the incident in question. For that reason, the second submission of Shri Salve should also fail.

J.
(J. CHELAMESWAR)

New Delhi;
January 18, 2013.

TRUE COPY

307
ANNEXURE-P-13

F. No. 11011/19/2013-IS.IV
Government of India
Ministry of home Affairs
Internal Security – I Division

North Block, New Delhi
Dated, the 1.04.2013

ORDER

Whereas the Central Government has received information that a FIR No. 02/2012 was registered at Coastal Police Station Neendakara, Kollam District, Kerala in respect of the alleged firing of incident leading to the death of the two Indian fishermen on 15.02.2012. The said case was chargesheeted by the Kerala State Police against the two Italian Marines, named (i) Mr. Latorre and (ii) Mr. Salvato jerone under section 302, 307, 427 r/w section 34 of Indian Penal Code and Section 3 of the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (69 of 2002).

2. And whereas the Central Government having regard to the gravity of the issue involved is of the opinion that the offence has been committed under the provisions of Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (69 of 2002) which is a Scheduled Offence of the National Investigation Agency Act, 2008.

308

3. Now, therefore, in exercise of the powers conferred by section 6(5) read with section 8 of the National Investigation Agency Act, 2008, the Central Government hereby directs the National Investigation Agency to take up the investigation of the aforementioned case and such other offences as may come to light during the said investigation. NIA may also associate Kerala Police and the State Police of other concerned States during the investigation.

(Rakesh Singh)
Joint Secretary to the Government of India

To:-

- 1) The Director General, National Investigation Agency,
Splendor Forum, Jasola, New Delhi
- 2) The Chief Secretary, Government of Kerala
- 3) The DGP, Kerala
- 4) PS to HM/PPS to HS/SS(IS)

TRUE COPY

309
ANNEXURE-P-14

NATIONAL INVESTIGATION AGENCY

FIRST INFORMATION REPORT

(Under Section 154 Cr. P.C)

Book No.001

Serial No.43

1. District: New Delhi PS: National Investigation Agency,
New Delhi

Year: 2013

FIR No.4

Date: 04.04.2013

2. (1) Act: Indian Penal Code Section(s) 302, 307, 427 read
with 34

(2) Act: Suppression of unlawful Act: Section(s) 3
AGAINST SAFETY OF MARITIME
NAVIGATION AND FIXED PLATFORMS
ON CONTINENTAL SHELF ACT, 2002

3(a) Suspected Offence: murder by firing of two fisherman namely
Jelastin and Pinku by two Italian Mariness aboard "Enrica Lexie" an
Italian ship 31 N M from north-west of Neendakara Costal Police
Station, In Arabian Sea on 15.02.2012 at 4:30 pm.

4.(c) Information received at PS, NIA New Delhi through
Government of India Ministry of Home Affairs, New Delhi vide
Order No.11011/19/2013-IS.IV dated: 01.04.2013.

(d) G.D. No.35 Dated: 04.04.2013 Time: 17: 45 hrs

4. Type of information: Oral reduced to writing.

5. Place of Occurrence:

310

(a) Direction and Distance from PS Beat No.: 31. Nautical miles
off Neendakara Coastal Police Station

(b) Address: 31 NM from Neendakara Coastal Police Station,
Koltam, in Arabian Sea

(c) In case, outside the limit of this Police Station, then: N/A

Name of PS: Coastal PS, Neendakara District: Kollam State: Kerala.

Complainant/informant:

- (a) Name : Freddy
- (b) Father's Name : Bosco
- (c) Date/year of Birth :
- (d) Passport No :
- (e) Place of issue :
- (f) Profession : Fisherman
- (g) Address : House No.1174, Poothura
Christ Nagar, Ezhudesom Village, Vilavinkodu,
Kanyakumari Dist. T. Nadu.

7. Details of known/suspected/unknown accused with full
particulars (attach separate sheet, if necessary)

1) Mr. Latorre Massimillano, aged 45 years, Italian, holder of
Italian passport No. AA1465972 (Chief Master Sergeant, San
Marco Regiment, Italy)

2) Mr. Salvatore Girone aged 34 years, Italian, holder of Italian
Passport No. S111982 (Sergeant, San Marco Regiment, Italy).

8. Reasons for delay in reporting by the
complainant/information:-

No delay

311

9. Particulars of properties stolen
(Attach separate sheet, if necessary):- N/A
10. Total Value of property lost:- Not available
11. Inquest report / U.D. Case No. If any:- 2 reports of deceased Jelastin & Pnku.
12. First Information contents (Attach separate sheet, if required)
As per MHC Order No.11011/19/2013-IS.IV dated 01.04.2013 issued under Section 6(5) read with Section 8 of NIA Act, the FIR No.2/2012 of Coastal PS, Neendakara, Kollam, reproduced below in full (along with English Translation), is taken over for investigation. (Copy of MHA order enclosed)
13. Action taken:- Re-registered the case as RC-04/2013/NIA/DLI and directed Shri P. Vikraman, DSP, NIA, Kochi, Branch, Kerala to take up the investigation as the Chief Investigating Officer (CIO).
14. Signatures /Thumb Impression of the Complainant/Informant:

Signature of officer In-Charge
Name: ANUP KURUVILLA JOHN, IPC
Rank: Supdt. of Police, NIA, New Delhi
Name of PS: National Investigation Agency
New Delhi

15. Date and time of dispatch to the court: 8324-36/04/2013,
HRS

Document Enclosed:

1. Order No.11011/19/2013-IS.IV dated 01.04.2013 of Government of India, ministry of Home Affairs, New Delhi

312

2. Photo copy of FIR in Crime No.2/2012 dated 15.02.2012 of Coastal PS, Neendakara Kollam District.

Copy to

1. Chief Metropolitan Magistrate, Patiala House Courts, New Delhi .
2. NIA Special Court, Patiala House Courts, New Delhi
3. JS (IS-I), MHA New Delhi for information
4. DIG, NIA Hyderabad (A.P.)
5. Superintendent of Police, NIA, Kochi, Kerala
6. CIO
7. Crime Section

313

Translated Version of the FIS In Cr. 02/2012 of Coastal Police
Station, Neendakara.

FIRST INFORMATION

An oral statement furnished before R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, by the complainant Freedy, age 30 s/o Bosco residing at House No.1174, Poothura Christ Nagar, Ezhudesom village, Vilavinkodu Taluk of Kanyakumari District dated on 15.02.2012.

"I have been working as a fisherman and have studied up to the tenth standard. I have been doing fishing work as syrang in my own boat St. Antony, for the last six years. It is at Neendakara that we usually do the fishing work. In addition to me, there are 10 other persons as crew onboard my boat. They are Killary Francis, Johson, Kinseriyan, Clemence, Muthappan, Martin, Michael, Jelastin and Pnku. All other barring Jelastin, belong to my native place. Jelastin is hailing from Moothakara. I along with the 10 men went out fishing to the sea last Friday (on 07.02.2012) by 12'o close. Usually we return ashore after fishing for six days having reached up to 60 Nautical miles. We do fishing round the clock. We fished for the last eight days. Usually, it is me who steers the helm while the others do the fishing. During the last night, as we did some angle work, it proved to be so poor. Hence, we switched over to the southern direction and while we were proceeding on a distance of 40 Nautical miles, the time was 04:30 PM when we

314

reached west of Kayamkulam. All others barring Jelastin and Pinku were asleep at that time. It was Jelastim who took the helm. Pinku was at the bow. I was suddenly aroused from by a sound to see that Jelastin was bleeding from his nose and ear. He was sitting on his driving seat. He spoke nothing. I howled, and others who were asleep were aroused, by my howling. Bullets were being shot into the boat at that time. Then, I warned the others that "Kappalukar Chudinan, ellam keele kida". Every body lay down onboard the boat. At that time Pinku, who was onboard the stem, was heard howling "amme". We dashed to him to find that he breathed his last two breaths and turned out to be motionless. I examined his pulse. He was dead. Blood was oozing out from the right side of his chest. I feared to examine his body out of fear. There was a little inflammation on the right side of the lower limb of Jelastin. I did not examine how deep Jelastin's wounds were, out of fear and apprehension. The firing was done from the ship, which passed us by the right side, heading to the north-west. The ship was painted in black atop and red at the bottom. It was evident that the ship carried no cargo/load/freight as it was well afloat. The firing had continued approximately for two minutes. The ship lay approximately about 200 meter away from the boat. On firing, gas leaked out from the cylinders, which were kept atop the boat and in the wheel house, as the firing broke the hose of the same. The bullets came in falling like torrential rain. I abruptly helmed the boat away. Jelastin's body was laid aside to that of Pinku's and covered

315

with a blanket after having the body being taken out from the wheel house. Jelastin was aged 48 and Pink was 20 years old. I called Prabhu, owner of St. Antony's Boat from the wireless set in my boat and apprised him of the information. I informed that it was out of no provocation that the shipmen had killed two men by firing. No alarm sounded or mike announcement made or a warning shot fired, nothing of the sort was done before firing bullets. The place of occurrence is 31 Nautical mile distant north-west from Neendakara. We reached Neendakara by about 11.00 o' clock night. The dead bodies are kept in the mortuary of District Hospital, Kollam.

Agreed ok to the oral statement heard recited

Fredy
Agreed ok to the recitation of the oral being made.

Sd/-
Circle Inspector of Police
Coastal Police Station,
Neendakara, Kollam

TRUE COPY

316

ANNEXURE-P-15

F. No. 17011/27/2012-IS.VI (IV)

Government of India
Ministry of Home Affairs
Internal Security – I Division

North block, New Delhi

Dated, the 15/04/2013

ORDER

Pursuant to the judgment of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 135/2012 and Special Leave Petition (Civil) No. 20370/2012, and the directions contained therein for setting up of a Special Court to try the case of Mr. Massimilano Latorre and Mr. Salvatore Girone, Petitioner Nos. 2 and 3 in the Writ Petition and in relation to the proceedings before the Special Court established under notification of the Government of India dated 15.04.2013 in terms of the order of Hon'ble Supreme Court dated 18.01.2013, the Central Government, hereby designates and authorizes the National Investigation Agency to take up the investigation and prosecution of the case FIR No. 02/2012 which was registered at Coastal Police Station Neendakara, Kollam District, Kerala on 15.02.2012.

This issues in supersession of this Ministry's Order No. 11011/19/2013- IS.IV dated 01.04.2013

(Rakesh Singh)

Joint Secretary to the Government of India

317

To:-

- 1) The Director General, National Investigation Agency,
Splendor Forum, Jasola, New Delhi
- 2) The Chief Secretary, Government of Kerala
- 3) The Chief Secretary, Government of NCT Delhi
- 4) Commissioner of Police, Delhi
- 5) PS to HM/PPS to HS/SS(IS)

TRUE COPY

318
ANNEXURE-P-16

[TO BE PUBLISHED IN THE GAZETTE OF INDIA,
EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION-(ii)]

Government of India
Ministry of Home Affairs

NOTIFICATION

New Delhi, the 15th April, 2013

S.064.....(E).- In pursuance of the judgment dated the 18th January, 2013 of the Hon'ble Supreme Court of India in Writ Petition (Civil) 135/2012 and Special Leave Petition (Civil) No. 20370/2012, and the directions contained therein for setting up of a Special Court to try the case of Mr. Massimilano Latorre and Mr. Salvatore Girone, Petitioner Nos. 2 and 3 and dispose of the same in accordance with the provisions of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976), the Indian Penal Code (45 of 1860), the Code of Criminal Procedure, 1973 (2 of 1974) and the provisions of the United Nations Convention on Law of Seas, 1982, the Central Government, after consultation with the Chief Justice of India and the Chief Justice and other Judges of the High Court of Delhi, and after taking into account the communications dated the

319

3rd April, 2013 and 11th April, 2013, both received from the Registrar General of the High Court of Delhi in this regard, hereby appoints the Chief Metropolitan Magistrate, Patiala House, New Delhi to deal with the case pertaining to the trial of Mr. Massimilano Latorre and Mr. Salvatore Girone, and further appoints and designate the Court of Additional Sessions Judge-01, Patiala House, New Delhi as Special Designated Court to try and dispose of the case and proceedings pending before the Chief Judicial Magistrate, Kollam which stand transferred to the Chief Metropolitan Magistrate, and the Court of Additional Sessions Judge-01, the Special Designated Court in terms of the judgment dated the 18th January, 2013 of the Supreme Court of India.

In exercise of the powers conferred by sub-section (8) of section 24 of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby appoints Shri Sidharth Luthra, Additional Solicitor General and Shri Satish L. Maneshinde, Advocate as Special Public Prosecutors on behalf of the Union of India, for conducting the cases in relation to the proceedings pertaining to the trial of Mr. Massimilano Latorre and Mr. Salvatore Girone, before the Chief Metropolitan Magistrate, Patiala House, New Delhi and the Court of Additional Sessions Judge-01, Patiala House, New Delhi, the Special Designated Court, to try and dispose of the case and proceedings transferred from the Chief

320

Judicial Magistrate, Kollam in terms of the said judgment dated the
18th January, 2013 of the Supreme Court of India.

[F. No. 17011/27/2012-IS-VI (IS-IV)]

Sd/- 15.04.2011
(Rakesh Singh)

Joint Secretary to the Government of India

The Manager,
Government of India Press,
Mayapuri, Ring Road,
New Delhi

TRUE COPY

321

ANNEXURE-P-17

ITEM NO.301

COURT NO.1

SECTION X

SUPREME COURT OF INDIA

RECORD OF PROCEEDINGS

WRIT PETITION (CIVIL) NO.135 OF 2012

REPUBLIC OF ITALY THR. AMBASSADOR
& ORS.

...Petitioner(s)

VERSUS

UNION OF INDIA & ORS.

...Respondent(s)

(With office report)

With S.L.P. (C) No.20370 of 2012

(With office report)

[For Orders]

Date: 26/04/2013 These Matters were called on for Orders today.

CORAM: HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE ANIL R. DAVE
HON'BLE MR. JUSTICE VIKRAMAJIT SEN

For Petitioner(s) Mr. Mukul Rohatgi, Sr. Adv.
Mr. Suhail Dutt, Sr. Adv.
Mr. Diljeet Titus, Adv.
Mr. Viplov Sharma, Adv.
Mr. Jagjit Singh Chhabra, Adv.
Mr. Ujjwal Sharma, Adv.
Mr. Ninad Laud, Adv.
Mr. Achint Singh Gyani, Adv.
Mr. Sulabh Sharma, Adv.

322

For Respondent(s)/ Union of India: Mr. Goolam E. Vahanvati, AG.
Mr. S.A. Haseeb, Adv.
Mr. Anoopam Prasad, Adv.
Mr. B. Krishna Prasad, Adv.

For Respondent No.4: Mr. Siddharth Luthra, ASG.
Ms. Rekha Pandey, Adv.
Mr. S.S. Rawat, Adv.
Ms. Supriya Juneja, Adv.
Mr. Arjun Diwan, Adv.
Mr. D.S. Mahra, Adv.

For State of Kerala: Mr. Ramesh Babu M.R., Adv.
Mr. Sushrut Jindal, Adv.

UPON hearing counsel the Court made the following

ORDER

The Hon'ble Court gave directions in terms of the signed order, which is placed on the file.

Sd/-
[T.I. Rajput]
Deputy Registrar

Sd/-
[Juginder Kaur]
Assistant Registrar

[Signed reportable order is placed on the file]

323

REPORTABLE

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

1 Republic of Italy & Ors. ... Petitioners

Vs.

2 Union of India & Ors. ... Respondents

WITH

SPECIAL LEAVE PETITION (CIVIL) NO. 20370 OF 2012

1 Massimiliano Latorre & Ors. ... Petitioners

Vs.

2 Union of India & Ors. ... Respondents

ORDER

ALTAMAS KABIR, CJI.

1. These proceedings are an offshoot of the judgment delivered by this Court on 18th January, 2013, disposing of Writ Petition (Civil) No. 135 of 2012 filed by the Republic of Italy through its Ambassador in India and the two marines who had been arrested by the Kerala Police in connection with the killing of two Indian fishermen on board an Indian fishing vessel at a distance

324

of 20.5 nautical miles from the Indian sea-coast off the coastline of the State of Kerala. While the Special Leave Petition was filed by the two marines challenging the dismissal of their Writ Petition No.4542 of 2012 by the Kerala High Court rejecting their prayer for quashing of FIR No.2 of 2012 on the file of the Circle Inspector of Police, Neendakara, Kollam District, Kerala, as being without jurisdiction, the Writ Petition (Civil) No.135 of 2012 was also filed for much the same reliefs. Both the matters were, therefore, taken up together for hearing and were disposed of together on 18th January, 2013.

2. While disposing of the two matters, this Court held that the State of Kerala had no jurisdiction to investigate into the incident and that till such time it is proved that the provisions of Article 100 of UNCLOS, 1982, applied to the facts of this case, it is the Union of India which alone has the jurisdiction to proceed with the investigation and trial of the Petitioner Nos.2 and 3 in the Writ Petition. We, accordingly, directed the Union of India, in consultation with the Chief Justice of India, to set-up a special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and the provisions of UNCLOS 1982. It was further directed that the proceedings before the Chief Judicial Magistrate, Kollam, would stand transferred to the Special Court to be constituted in terms of the judgment, upon the expectation that the trial would be

325

conducted expeditiously. Liberty was given to the Petitioners to re-agitate the question of jurisdiction once the evidence was adduced on behalf of the parties.

3. On 14th March, 2013, the matter was mentioned by the learned Attorney General, on basis of Note Verbale No.89/635 dated 11th March, 2013, received by the Ministry of External Affairs, Government of India, from the Embassy of Italy in New Delhi, whereby it was indicated that the Government of Italy had decided not to return the accused marines to India to stand trial for the offences alleged to have been committed by them. Pursuant to the directions given on that date, the matter was again listed on 2nd April, 2013, and the learned Attorney General was requested by the Court to indicate what steps had been taken for constitution of a separate Court to try the two Italian marines separately on a fast track basis, in order to dispose of the matter as quickly as possible. The matter was then listed again on 22nd April, 2013, when the learned Attorney General informed the Court that pursuant to the directions of this Court in its judgment dated 18th January, 2013, the Government of India, in the Ministry of Home Affairs, had appointed the National Investigation Agency created under the National Investigation Agency Act, 2008, to take over the investigation on the basis of FIR No.2 of 2012 dated 29th August, 2012, Coastal PS Neendakara, Kollam. The case was re-registered at PS NIA, New Delhi as Case No.RC-04/2013/NIA/DLI under Sections 302, 307, 427 read with Section

326

34 of the Indian Penal Code and Section 3 of The Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002. The learned Attorney General submitted that the case is under investigation by the National Investigation Agency, and such investigation would be completed shortly.

4. The submissions made by the learned Attorney General were vehemently opposed by Shri Mukul Rohatgi, learned Senior Advocate, on behalf of the accused mainly on the ground that by handing over the investigation to the National Investigation Agency, the Government was also altering the forum before which the matter could be heard. Furthermore, by entrusting the investigation to the National Investigation Agency, the investigating authorities were being permitted to invoke the provisions of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, which provides for death penalty in regard to cognizance being taken on any of the scheduled offences. Mr. Mukul Rohtagi, learned Senior Advocate, who appeared for the Petitioners, urged that since the provisions of the aforesaid Act had not been included in the original charge-sheet, the investigating authorities could not be permitted to take recourse to the same, especially when directions had been given by this Court in the judgment dated 18th January, 2013, that the case was to be tried under the provisions of the Maritime Zones Act, 1976,

327

the Indian Penal Code, the Code of Criminal Procedure and the provisions of UNCLOS 1982.

5. Mr. Rohtagi submitted that since the National Investigation Agency could only try the Scheduled Offences, referred to in the Act, the investigation could not, in any event, be taken up under the National Investigation Agency Act, 2008.

6. Having heard the learned Attorney General for India and Mr. Mukul Rohtagi for the Petitioners, we do not see why this Court should be called upon to decide as to the agency that is to conduct the investigation. The direction which we had given in our judgment dated 18th January, 2013, was in the context of whether the Kerala Courts or the Indian Courts or even the Italian Courts would have the jurisdiction to try the two Italian marines. It was not our desire that any particular Agency was to be entrusted with the investigation and to take further steps in connection therewith. Our intention in giving the direction for formation of a special Court was for the Central Government to first of all entrust the investigation to a neutral agency, and, thereafter, to have a dedicated Court having jurisdiction to conduct the trial. Since steps have been duly taken for the appointment of a Court of competent jurisdiction to try the case, the Central Government appears to have taken steps in terms of the directions given in our judgment dated 18th January, 2013. It is for the Central Government to take a decision in the matter.

328

7. If there is any jurisdictional error on the part of the Central Government in this regard, it will always be open to the accused to question the same before the appropriate forum.

8. We, therefore, take note of the steps taken by the Central Government pursuant to the directions given in our judgment dated 18th January, 2013, and leave it to the Central Government to take further steps in the matter.

9. In addition to the above, we sincerely hope that the investigation will be completed at an early date and the trial will also be conducted on a day-to-day basis and be completed expeditiously as well.

10. The terms and conditions regarding bail, as were indicated in our Order dated 18th January, 2013, will continue to remain operative in the meantime.

Sd/-
CJI.
(ALTAMAS KABIR)

Sd/-
JUDGE
(ANIL R. DAVE)

Sd/-
JUDGE
(VIKRAMAJIT SEN)

New Delhi
Dated: April 26, 2013.

TRUE COPY

329

ANNEXURE-P-18

Da: Syed Akbaruddin [mailto:jsxpindia@gmail.com]

Inviato: Saturday, April 27, 2013 9:50 PM

A: Mancini Daniele

Oggetto: Re. No death penalty likely in Marines Case as SUA Act not invoked

On 27 Apr 2013 21:17, "Syed Akbaruddin" jsxpindia@gmail.com wrote:

The latest Supreme Court order in the matter of the Italian marines has been read out of context leading to misleading reports.

It is clear from the Order that the judgment of 18 January, 2013 remains in operation and that the NIA has been designated by the Central Government to investigate the matter pursuant to the 18 January 2013 judgment rather than the NIA Act.

Furthermore, the FIR No 2 of 2012 dated 29 August 2012, Coastal PS Neendakara, Kollam will be the basis for the investigation. It follows that the later FIR re-registered by the NIA under the NIA Act is redundant and for the present the Suppression of Unlawful Acts Against Safety of Maritime Navigation Act 2002 has not been invoked.

In any case no question arises of death penalty being imposed in the circumstances of the case if the Court was to return a verdict of 'guilty'.

TRUE COPY

CONTACT US

Various Special Courts have been notified by the Govt. of India for trial of the cases registered at various police stations of NIA.

States

Sl. No.	State Name	Court Name	View
1.	Andhra Pradesh	Court of Additional Metropolitan Sessions Judge-cum-XVIII Additional Chief Judge, City Civil Court, Hyderabad	View
2.	Arunachal Pradesh	Court of District & Sessions Judge, Yupia, Itanagar	View
3.	Assam	Special Court of the Special Judge, Central Bureau of Investigation, Assam at Guwahati	View
4.	Bihar	Court of Additional District & Sessions Judge-I, Patna	View
5.	Chhattisgarh	District & Sessions Judge, Bilaspur	View
6.	Delhi	Court of District Judge-IV-cum-Additional Sessions Judge incharge, New Delhi Police District, Patiala House Courts, New Delhi	View
7.		Court of District Additional Sessions Judge-01, New Delhi Patiala House Courts, New Delhi	
8.	Goa	The Court of the Sessions Judge, North Goa	View
9.	Gujrat	Principal Judge, City Civil and Sessions Courts, Ahmedabad	View
10.	Haryana	Court of Senior Most Additional Sessions Judge, Panchkula	View
11.	Himachal Pradesh	Court of District & Session Judge, Shimla	View
12.	Jammu and Kashmir	Designated Court TADA/POTA at Jammu &	View

331

		Srinagar	
13.	Jharkhand	Court of Judicial Commissioner, Ranchi	View
14.	Kerala	Special Court - II of the Special Judge, Central Bureau of Investigation, Kerala at Kochi	View
15.		Court of SPE/ CBI-I/ Additional District Court-III, Ernakulam	View
16.	Madhya Pradesh	Court of Special Judge, (NDPS Act), Bhopal	View
17.	Maharashtra	The City Civil and Sessions Courts, Mumbai	View
18.	Manipur	Court of District & Sessions Judge, Manipur East, Imphal	View
19.	Meghalaya	Court of District & Sessions Judge, Shillong	View
20.	Mizoram	Court of District & Sessions Judge, Aizwal	View
21.	Nagaland	Court of District & Sessions Judge, Dimapur	View
22.	Orissa	Court of District and Sessions Judge, Khurda at Bhubaneswar	View
23.	Punjab	Court of Senior Most Additional Sessions Judge, Mohali	View
24.	Rajasthan	Sp. Court CBI Cases, Jaipur	View
25.	Sikkim	District & Sessions Judge (Special Division-I) at Gangtok	View
26.	Tamil Nadu	Bomb Blast Court, Chennai	View
27.	Tripura	Court of District & Sessions Judge, West Tripura, Agartala	View
28.	Uttar Pradesh	The 3rd Senior Most Court of Additional District & Sessions Judge, Lucknow	View
29.	Uttarakhand	District & Sessions Judge, Dehradun	View
30.	West Bengal	Court of the Senior Most Additional District and Sessions Judge, Siliguri	View
31.		Court of the Chief Judge, City Sessions Court, Calcutta	View

Union Territories

332

Sl. No.	UT Name	Court Name	View
1.	Andaman and Nicobar Islands	Court of the District and Sessions Judge, Port Blair	View
2.	Chandigarh	Court of Senior Most Additional Sessions Judge, Chandigarh	View
3.	Dadra and Nagar Haveli	Court of the Sessions Judge, Dadara and Nagar Haveli at Silvassa	View
4.	Daman	Court of the Sessions Judge at Daman	View
5.	Diu	The Court of Sessions Judge at Diu	
6.	Lakshadweep	District Court, Kavaratti	View
7.	Puducherry	Principal District and Sessions Court, Puducherry	View

TRUE COPY

333
ANNEXURE-P-20

No. 17011/27/2012-IS-VI(IV)
GOVERNMENT OF INDIA
MINISTRY OF HOME AFFAIRS
INTERNAL SECURITY – I DIVISION

North Block, New Delhi
Dated the 6th February 2014

"ORDER"

WHEREAS on the basis of the complaint of Mr. Freddy son of Shri John Bosco, a Criminal Case No. 02/2012 relating to killing of two fishermen viz. Shri Valentine @Jelastine son of Shri Yesu Adima, Derik Villa, Moothakara, Kollam and Shri Ajeesh Pink son of Shri Antony Xavier, Ealdesom Village, Thuthoor Panchayat, Kanyakumari District, off the coast of Kerala by two Italian Marines viz. Massimilliano Latorre, Chief Master Sergeant, San Marco Regiment, Italy and Salvatore Girone, Sergeant, San Marco Regiment, Italy from the Italian Ship called ENRICA LEXIE was registered at Neendakara Coastal Police Station, Kollam District, Kerala on 15th February, 2012 under section 302 of the Indian Penal Code;

AND WHEREAS offences under Section 307, 427 of Indian Penal Code and Section 3 of Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (69 of 2002) (hereinafter mentioned as SUA Act, 2002) were subsequently included on 6th March 2012

334

and Kerala Police filed charged sheet before the learned Chief Judicial Magistrate Court, Kollam on 18th May 2012 under sections 302, 307, 427 read with section 34 and section 3 of SUA Act, 2002;

AND WHEREAS, after the judgment dated 18th January 2013 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 135/2012 and Special Leave Petition (Civil) No. 20370/2012, the Central Government, in exercise of the powers conferred by sub-section (5) of section 6 read with section 8 of the National Investigation Agency Act, 2008 (34 of 2008), vide order No. 11011/19/2013-IS. IV dated 1st April, 2013, directed the National Investigation Agency (NIA) to take up the investigation of the aforementioned case no. 02/2012 registered at Neendkara Coastal Police Station, Kollam District, Kerala on 15th February, 2012;

AND WHEREAS pursuant to the said Judgment dated 18th January, 2013 of the Hon'ble Supreme Court, revised order (in supersession of the abovesaid order dated 1st April, 2013) was issued by the Central Government on 15th April, 2013, authorizing NIA to take up the investigation of the case;

AND WHEREAS in compliance to the said order dated 1st April, 2013, NIA re-registered the case vide Crime No. RC-04/2013/NIA/DLI on 4th April, 2013 under sections 302, 307, 427 read with 34 of the Indian Penal Code and sections 3 of the SUA Act, 2002 and investigated the case;

335

AND WHEREAS the Central Government, in exercise of the powers conferred under sub-section (1) of Section 4 of the SUA Act, 2002, conferred the powers of arrest, investigation and prosecution on Shri P. Vikraman and Shri V. K. Abdul Kader, Deputy Superintendents of Police, National Investigation Agency vide notification number S01530(E).dated 15th June, 2013;

AND WHEREAS the National Investigation Agency after investigation had sought sanction of the Central Government for filing the charge sheet in the said case under the following provisions against the accused persons as detailed below:-

1. Massimiliano Latorre, Age 46, Italian Passport No, AA1465972, Chief Master Sergeant, San Marco Regiment, Italy: A-1: Under sections 302, 307, 427 & 201 of Indian Penal Code read with section 34 of the Indian Penal Code and Clause (a) read with sub-section (i) of Clause (g) of section 3 (1) of the SUA Act, 2002.
2. Salvatore Girone, Age 35, Italian Passport No. S111962, Sergeant, San Marco Regiment, Italy: A-2: Under sections 302, 307, 427 & 201 of Indian. Penal Code read with section 34 of the Indian Penal Code and Clause (a) read with sub-section (i) of Clause (g) of section 3 (1) of the SUA Act, 2002.

336

AND WHEREAS, the Central Government had by an order dated 17th January, 2014 granted sanction for prosecution against the following accused persons as under:

Sr. No	Accused Number	Name of the accused	Sections of Jaw under which sanction for prosecution is accorded
1.	A-1	Massimiliano Latorre, Age 46, Italian. Passport No. AA1465972, Chief Master Sergeant, San Marco Regiment, Italy	Under Section 3(1) (a) read with section 3(1)(g)(i) of the SUA Act, 2002.
2.	A -2	Salvatore Girone, Age 35, Italian Passport No. S111982, Sergeant, San Marco Regiment, Italy	Under Section 3(1) (a) read with section 3(1)(g)(i) of the SUA Act, 2002.

AND WHEREAS, subsequently, the matter has been reconsidered at length and the Central Government has reconsidered the aspect of invocation of section 3(1)(g)(i) of the SUA Act, 2002.

337

AND WHEREAS* the Central Government is satisfied that it becomes necessary to supersede the said order of sanction dated 17th January, 2014 and replace the same by a fresh order of sanction deleting the reference to section 3(1)(g)(i) of the SUA Act, 2002.

NOW, THEREFORE, in exercise of powers conferred by section 12 of the SUA Act, 2002, -the' Central Government hereby accord sanction for prosecuting the following accused persons under the corresponding sections of Law as noted against each in the Crime No.04/2013/NIA/DLI of NIA for taking cognizance of the said offences by a Court of competent jurisdiction:-

Sr. No.	Accused Number	Name of the accused	Sections of law under which sanction for prosecution is accorded
1.	A-1	Massimiliano Latorre, Age 46, Italian Passport No. AA1465972, Chief Master Sergeant, San Marco Regiment, Italy	Under Section 3(1) (a) of the SUA Act, 2002.
2.	A-2	Salvatore Girone, Age 35, Italian Passport No, S111982, Sergeant, San Marco Regiment, Italy	Under Section 3(1) (a) of the SUA Act, 2002.

338

AND, FURTHER, pursuant to the provisions of clause (d) of sub-section (1) of section 6 of the SUA Act, 2002, the Central Government hereby authorizes Shri P. Vikraman, Deputy Superintendent of Police, National Investigation Agency for filing the complaint before the Special Courts for taking cognizance of the said offence.

BY ORDER AND IN THE
NAME OF THE
PRESIDENT OF INDIA
(Ramesh Kumar
Suman)
Director (IS-II)

TRUE COPY

339
ANNEXURE-P-21

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NO. 5 OF 2014

IN

SPECIAL LEAVE PETITION (C) NO. 20370 OF 2012

IN THE MATTER OF:

Massimilano Latorre and Ors.

... Petitioner(s)

Versus

Union of India and Ors.

... Respondent(s)

AFFIDAVIT ON BEHALF OF UNION OF INDIA

I, N.S. Bisht Aged 48 years S/o P.S. Bisht, Under Secretary,
Ministry of Home Affairs, Govt. of India, North Block, New Delhi do
hereby solemnly affirm and state as follows:-

1. That I am currently working as Under Secretary in the
Ministry of Home Affairs, Govt. of India, New Delhi and am
cognizant of the facts of the case and am therefore
competent to swear the present affidavit on behalf of the
Ministry.
2. Pursuant to the order of this Hon'ble Court dated 18 February
2014, I am making this short affidavit for the purposes of
placing on record the opinion given by the Law Ministry.
Pursuant to a meeting of the Hon'ble Ministers, the matter

340

had been referred to the Law Ministry for its opinion and on 21 February 2014, the Hon'ble Law Minister has recorded his opinion that the provisions of the SAU Act are not attracted to this case.

3. In the circumstances, appropriate steps will be taken to ensure that the chargesheet reflects this opinion.
4. I am placing this affidavit for the limited purposes of producing the opinion before the court. I am not dealing with any other aspect including with regard to the alleged delay in the trial and the other prayers made by the petitioners.
5. I crave leave to file a further affidavit, if required.

DEPONENT

Verification

Verified at New Delhi on this the day of February, 2014 that the contents of the paragraphs 1 to 5 of my above affidavit are true and correct to my knowledge and believe, that no part of it is false and nothing material has been concealed therefrom.

DEPONENT

TRUE COPY

341

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A. NO. _____ OF 2014

IN
WRIT PETITION (CIVIL) NO. _____ OF 2014
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Chief Master Sargeant Massimiliano Latorre & Another
...Petitioners

Versus

Union of India & Others
...Respondents

APPLICATION FOR INTERIM RELIEFS/STAY

To

The Hon'ble Chief Justice of India and
his companion Justices of the Hon'ble
Supreme Court of India

The above named Petitioners

MOST RESPECTFULLY SHOWETH:

1. That Present Writ Petition has been filed under Article 32 of the Constitution of India *inter-alia* challenging the legality and validity of the investigation as well as prosecution by the NIA which is contrary to law, in contravention of the National Investigation Agency Act, 2008 and contrary to the January 18, 2013 Judgment of this Hon'ble Court and is violative of the fundamental rights guaranteed to the Petitioners under Articles 14 and 21 of the Constitution of India; and that the Union of India does not have jurisdiction to try the present

342

case; and to declare that the Petitioner Nos. 1 and 2 have immunity from prosecution in India as being organs of a sovereign State carrying out their official functions they are entitled to Sovereign and Functional Immunity from being prosecuted/tried in India under well established principles of public international laws and consequently that any investigation or trial of the Petitioner nos. 1 and 2 is violative of their rights guaranteed under Article 21 and 14 of the Constitution of India.

2. That the facts of the case have been set out in extenso in the accompanying Writ Petition and same are not being repeated herein for the sake of brevity and same may be read as part and parcel of the present Application. The Petitioners crave leave of this Hon'ble Court to refer and rely upon the same at the time of hearing of the present Application.
3. That it has been over one year since the January 18, 2013 Judgment of this Hon'ble Court and the investigating agency appointed by the Union of India has not submitted its Report before any Court in relation to the alleged incident of February 15, 2012 which has essentially resulted in Petitioner Nos. 1 and 2 who are Italian Military and Judicial Officials being detained in India without any case being presented against them for close to two years now, thereby infringing the fundamental rights of the said Petitioners. The continued

343

detention of the Petitioner Nos. 1 and 2 is also patently illegal and a gross violation of their rights as the said Petitioners enjoy Sovereign and Functional Immunity from prosecution in India by virtue of being organs of another sovereign State – the Republic of Italy as also the official functions being discharged by them.

4. That the accompanying Writ Petition raises substantial questions of law, the determination of which would go to the root of the purported case against the Petitioner Nos. 1 and 2 and accordingly the initiation and/or continuation of any proceedings against the said Petitioners before the Courts of Chief Metropolitan Magistrate, Patiala House Courts and the Court of Additional Sessions Judge-01, Patiala House Courts pending adjudication of the accompanying Writ Petition would be in gross violation of the rights of the Petitioner Nos. 1 and 2. The Petitioner Nos. 1 and 2 be also permitted to return to Italy until disposal of the present Petition on such terms and conditions as may be deemed fit and proper by this Hon'ble Court.
5. The Petitioners prima facie have good case on merits. The balance of convenience is in favour of the Petitioners. If the relief prayed herein is not granted it shall cause serious prejudice to the Petitioners.

PRAYER

344

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

- a. Stay any and all further proceedings by the NIA against the Petitioners under FIR no. 2 of 2012/re-registered FIR No. RC-04/2013/NIA/DLI dated April 4, 2013 and any further proceedings before the Court of Chief Metropolitan Magistrate and the Additional Sessions Judge-01, Patiala House Courts; and
- b. Relax the bail conditions restricting the travel of the Petitioners and permit the Petitioners to travel to Italy and await in Italy until adjudication of the accompanying Writ Petition, on such conditions as may be deemed fit and proper by this Hon'ble Court in the facts and circumstances of the case;
- c. Pass ex-parte ad interim orders in terms of prayers (a) and (b) above pending final disposal of the above noted writ petition.
- d. Pass any such other further order(s) as this Hon'ble Court may deem fit in the interest of justice.

FILED BY

(JAGJIT SINGH CHHABRA)
ADVOCATE FOR THE PETITIONERS

FILED ON: 6 .03.2014