

IT-51

APPLICATION FOR DIRECTIONS, 13 JANUARY 2014

SECTION: XI-A

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NO. OF 2014

IN

SPECIAL LEAVE PETITION (CIVIL) NO. 20370 OF 2012

IN THE MATTER OF:

Massimiliano Latorre & Others

Applicants

Versus

Union of India & Others

Respondent

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CC: B.K. Prasad, Adv. →

← Ramesh Babu, MR. Adv.



Total Rs.44/-

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

I.A. NO. OF 2014

IN

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IN THE MATTER OF:

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Respondent

WITH

I.A. NO. OF 2014
(Application for Directions)

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ADVOCATE FOR THE APPLICANTS JAGJIT SINGH CHHABRA

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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

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SPECIAL LEAVE PETITION (CIVIL) NO. 20370 OF 2012

IN THE MATTER OF:

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Applicants

Versus

Union of India & Others

Respondent

APPLICATION FOR DIRECTIONS

TO

THE HON'BLE THE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUSTICES OF THE
SUPREME COURT OF INDIA AT NEW DELHI

THE HUMBLE PETITION OF THE
APPLICANT ABOVE-NAMED

MOST RESPECTFULLY SHOWETH:

1. The Petitioners abovenamed are filing the present Application for directions consequent upon the complete failure on the part of the Union of India to comply with the Order/Judgment of this Hon'ble Court dated January 18, 2013 in Special Leave Petition (C) No. 20370 of 2012 and

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Writ Petition (C) No. 135 of 2012, as well as the directions reiterated in its Orders dated February 22, 2013, April 2, 2013 and April 26, 2013, to try the case of Petitioner Nos. 1 and 2 herein (Petitioner Nos. 2 and 3 in the above referred Writ Petition) under the four specified laws, i.e. the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 ("MZA"), the Indian Penal Code, 1860 ("IPC"), the Code of Criminal Procedure, 1973 ("Cr PC") and UNCLOS 1982, while giving liberty to the Petitioners to re-agitate the issue of jurisdiction of the Union of India to investigate and try the case of Petitioner Nos. 1 and 2 in respect of the alleged incident of February 15, 2012.

Copy of the Order/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 herewith as ANNEXURE-A-1. (Page No. 24-136)

2. That the Petitioner Nos. 1 and 2 have been detained in India for the last two years without any criminal case against them being started and the Union of India has in fact failed to present any Final Report/case against the Petitioner Nos. 1 and 2, Italian Military and Judicial Officials, for almost 1 year despite the directions of the Hon'ble Supreme Court vide its Judgment dated January 18, 2013 to try and dispose of the case on a fast-track basis.

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3. That it is emphasized at the very outset that the Petitioner Nos. 1 and 2 are Italian Military and Judicial Officials acting at all times as an organ of the Italian state exercising military and law enforcement duties, powers and obligations and as officials of the Judicial Police have the power and obligation to identify acts of Piracy and take necessary action for arrest and detention of pirates so as to prevent, counter and repress piracy. Thus, the Petitioner Nos. 1 and 2 exercise Military and Judicial duties in discharge of sovereign functions of the Republic of Italy.

That at the highest the case against the Petitioner Nos. 1 and 2, who are Italian Military and Judicial Officials, is that while performing sovereign functions to act in repression of piracy, as mandated by International obligations, the Petitioner Nos. 1 and 2 took protective action against a suspected pirate boat in an admitted High Risk Area in international waters.

4. That after a lapse of almost 3 months from the date of Judgment of this Hon'ble Court, the Union of India passed a Notification dated April 15, 2013 (which was also placed before the Supreme Court by the Attorney General of India) 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

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case of the Petitioners under the four specific laws, i.e. MZA, IPC, Cr. PC and UNCLOS, in compliance of the Judgment dated January 18, 2013.

However, despite the unequivocal directions of the Hon'ble Supreme Court of India contained in the Judgment dated January 18, 2013 and Orders dated February 22, 2013, April 2, 2013 and April 26, 2013, requiring the Union of India to try the case of the Petitioners under the four specified laws, on a fast track basis, the Union of India has been unable to present any case before the designated Special Courts appointed by the Union of India vide its Notification dated April 15, 2013. Copy of MHA Notification dated April 15, 2013 issued by the Government of India, Ministry of Home Affairs, is annexed herewith as ANNEXURE-A-2. (Page No. 137-138)

Such gross non-compliance and the inordinate delay of one year by the Union of India in complying with the Judgment and Directions of this Hon'ble Court warrants appropriate directions by this Hon'ble Court to close the right of the Union of India to investigate and prosecute the case any further as it has seriously jeopardized the liberty and freedom of two Italian Military and Judicial Officials (Petitioner Nos. 1 and 2 herein) who have now been detained in India for almost two years without any case being instituted against them in

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accordance with the directions contained in the Judgment of January 18, 2013.

5. The Petitioners crave leave to refer to and rely on the below extracted directions of this Hon'ble Court contained in its Judgment dated January 18, 2013 and, subsequently reiterated in its Orders dated February 22, 2013, April 2, 2013 and April 26, 2013:

Judgment dated January 18, 2013:

"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

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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 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."

Since over a month had passed and the Union of India had not taken any steps to set-up the Special Court, the Hon'ble Supreme Court in its Order dated February 22, 2013 passed the following directions:

"15. The learned ASG is unable to tell us today as to whether the procedure for constitution of the Special Court directed to be set up by the Central Government, in consultation with the Chief Justice of India, has been initiated or not. In the event steps have not been taken to constitute the Special Court, as directed, the Central Government is directed to do so, without any further delay."

Since more than two months had now passed without the Union of India taking any steps whatsoever, the Hon'ble

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Supreme Court again passed the following directions in its Order dated April 2, 2013:

"Let this matter stand adjourned till 16th April, 2013, at the top, to enable the learned Attorney General for India, to inform us of the steps taken for constitution of a separate Court, which we had intended to be constituted for trial of the petitioners Nos. 2 and 3 on a Fast Track basis, in terms of the judgment delivered by this Court on 18th January, 2013."

Since no progress had been made by the Union of India concerning investigation of the case, the Hon'ble Supreme Court passed the following directions in its Order dated April 26, 2013:

"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."

Copies of Orders dated February 22, 2013, April 2, 2013 and April 26, 2013 are collectively annexed herewith as ANNEXURE-A-3(COLLY): (Page No. 139-162)

6. It is submitted that despite the Union of India coming out with the Notification dated April 15, 2013 wherein the Union of India designated two Special Designated Courts to try the case of the Petitioners under the four specific laws i.e. the MZA, IPC, Cr. PC and UNCLOS, the Union of India, is purportedly seeking to invoke the provisions of an anti-

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terrorism law against the two Italian Military and Judicial Officials of the Republic of Italy i.e. the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 ("SUA Act").

The anti-terrorism SUA Act was legislated to give effect to the SUA Conventions (Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf) which in turn was brought to existence to deal with the worldwide escalating acts of terrorism endangering life at sea. In fact, the draft Protocol of 2005 to the SUA Convention expressly excludes the applicability of the SUA Convention to activities undertaken by military forces of a State in the exercise of their official duties. Invoking the anti-terrorism SUA Act would tantamount to the Republic of Italy being termed a terrorist State and acts of its organs, which were in repression of piracy, as being deemed as acts of terrorism, which is wholly untenable and unacceptable in the facts and circumstances of this case and in keeping with the comity of nations and international cooperation.

The purported attempt by the Union of India to unilaterally invoke the provisions of the anti-terrorism SUA Act is contrary to and in willful disregard of the directions of this Hon'ble

Court, has come to the knowledge of the Petitioners on the basis of an Application recently filed by the National Investigation Agency (NIA) (the investigating agency appointed by the Union of India) with the Court of the Additional Sessions Judge-01, Patiala House Courts, as detailed hereinafter as well as some recent newspaper reports appearing in National dailies.

That such action on the part of the Union of India to invoke an anti-terrorism law is wholly contrary to the unequivocal and specific directions of the January 18, 2013 Judgment of this Hon'ble Court, in willful disobedience and disregard thereof and amounts to a unilateral review by the Union of India of the Judgment of this Hon'ble Court for the reasons detailed hereinafter.

7. That the NIA has recently filed an Application with the Court of the Additional Sessions Judge-01, Patiala House Courts, seeking transfer of custody of the Petitioner Nos. 1 and 2 from the Hon'ble Supreme Court to the Court of Additional Sessions Judge-01 by invoking Section 3 of the anti-terrorism law – the SUA Act against the Petitioner Nos. 1 and 2.

Copy of Application dated 27.11.2013 before the 'Ld. Additional Sessions Judge, Patiala House Courts filed by the NIA is annexed herewith as ANNEXURE-A-4 (Page No. 163-164)

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8. The Petitioners seek to draw the attention of this Hon'ble Court to Paragraph 3 of the Application filed by the NIA, wherein the NIA is relying on the purported re-registered FIR No. RC-04/2013/NIA/DLI dated April 4, 2013, registered pursuant to MHA Order dated April 1, 2013, which invokes the provisions of the anti-terrorism SUA Act against two Italian Military and Judicial Officials who were admittedly engaged in an anti-piracy mission. Copy of FIR No. RC-04/2013/NIA/DLI dated 04.04.2013 lodged at Police Station NIA, New Delhi, U/S 302, 307, 427 read with 34 IPC; and Section 3 SUA Act is annexed herewith as ANNEXURE-A-5. (Page No. 165-173)

9. It is submitted that the above action of the Union of India is completely contrary to the January 18, 2013 Judgment of this Hon'ble Court and even the own position of the Union of India who being conscious that the case was to be tried only under the four specified laws, vide MHA Order dated April 15, 2013, superseded its earlier Order of April 1, 2013, which had purportedly invoked the provisions of the anti-terrorism law – the SUA Act in the re-registered NIA FIR No. RC-04/2013/NIA/DLI dated April 4, 2013.

Copy of order dated 15.04.2013 issued by the Ministry of Home Affairs is annexed herewith as ANNEXURE-A-6. (Page No. 174-175)

Copy of the superseded Order dated 01.04.2013 issued by the Ministry of Home Affairs is annexed herewith as ANNEXURE-A-7. (Page No. 176 - 177)

10. The Union of India's acknowledgement of the clear directions of the Hon'ble Supreme Court for the trial of the case of the Petitioners under the specified four laws was also endorsed in the clear wordings of the MHA Notification of April 15, 2013. That any investigation and trial of this case has been circumscribed by the Hon'ble Supreme Court only to the four specified enactments. Any attempt by the NIA to depart from the Judgment of the Hon'ble Supreme Court and the MHA Notification consequent thereto cannot be countenanced.
11. However, it appears that in total non-compliance of the directions of this Hon'ble Court, and in a complete turn-around, the NIA, is purporting to investigate the case under the superseded FIR no. RC-04/2013/NIA/DLI dated April 4, 2013 which includes the provisions of the anti-terrorism law — the SUA Act.
12. The invocation of provisions of the anti-terrorism law, the SUA Act to the present case had been consciously and unambiguously given up and recorded both in the Kerala proceedings and the proceedings before this Hon'ble Court which had in its explicit directions contained in its Judgment

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of January 18, 2013 directed the Union of India to set-up a Special Court to try the case of the Petitioners under the four specified laws only.

13. That this Hon'ble Court has clearly directed in its Judgment of January 18, 2013 that the '*pending proceedings*' before the Chief Judicial Magistrate, Kollam, shall stand transferred to the Special Court to be constituted in terms of the Judgment of this Hon'ble Court. The anti-terrorism law – the SUA Act was not a part of the FIR No. 2 of 2012 registered with Coastal Police Station, Neendakara, Kollam on February 15, 2012 which only included Section 302 IPC read with Section 34 IPC. Copy of the FIR No. 2 of 2012, dated 15.02.2012, lodged at Coastal Police Station, Neendakara, Kollam U/s 302 IPC is annexed herewith as ANNEXURE-A-8. (Page No.178-183).
14. That it is pertinent to state that the anti-terrorism SUA Act had been specifically dropped from the Charge-sheet by the State of Kerala at the Sessions Court, Kollam vide Application of the Kerala State Police dated May 31, 2012, wherein it was specifically stated that "*legal opinion has been received that from the fact and circumstances sec 3 of SUA Act 2002 is not maintainable in the case factually or legally. Hence, it is submitted that cognizance may not be taken for the said offence*".

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 herewith as ANNEXURE-A-9.
(Page No. 184)

Thus, it would appear that the Union of India had itself previously specifically refused sanction for prosecution under the provisions of the anti-terrorism SUA Act during the Kerala proceedings, as the facts of this case clearly could not justify invocation of an anti-terrorism law against Military and Judicial Officials of a friendly foreign nation. It is therefore surprising that after a year, and without any change in the facts of the case, the Union of India appears to believe that an anti-terrorism law can be invoked in the present case.

15. That even in the Counter Affidavit dated August 10, 2012, filed by the State of Kerala in the Special Leave Petition (Civil) No. 20370 of 2012 before this Hon'ble Court, the fact of dropping of the anti-terrorism SUA Act on May 31, 2012 was specifically stated on the record of this Hon'ble Court. Therefore, as on the date when this Hon'ble Court directed that the '*pending proceedings*' before the Chief Judicial Magistrate, Kollam, shall stand transferred to the Special Court, the '*pending proceedings*' to be transferred did not include the provisions of the anti-terrorism SUA Act. The provisions of the anti-terrorism SUA Act thus cannot be now

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included by the Union of India in the re-registered FIR of April 4, 2013 and any consequent Charge-sheet that may be filed in the matter. Copy of the Counter Affidavit 10.08.2012 before the Hon'ble Supreme Court of India in SLP (C) No.20370 of 2012 is annexed herewith as ANNEXURE-A-10. (Page No. 185-209)

16. In view of the foregoing, it is submitted that the Union of India should not be permitted to proceed on the basis of the re-registered FIR no. RC-04/2013/NIA/DLI dated April 4, 2013 (invoking the provisions of the anti-terrorism SUA Act) as the same was specifically superseded by the MHA Order of April 15, 2013 and the present case was to proceed under FIR No. 2 of 2012 in terms of MHA Order of April 15, 2012.

In fact, being concisions of the above, the Ministry of External Affairs had vide its e-mail dated April 27, 2013 communicated to the Petitioners that the investigation would be conducted under FIR No. 2 of 2012 which admittedly did not have the provisions of the anti-terrorism SUA Act. Copy of Ministry of External Affairs' E-mail dated 27.04.2013 is annexed herewith as ANNEXURE A-11. (Page No. 210)

17. In addition to the foregoing, the illegal invocation of the anti-terrorism SUA Act is unsustainable and completely contrary to the January 18, 2013 Judgement of this Hon'ble Court for the following reasons, which if permitted would essentially

override the entire Judgement and the directions contained therein would be defeated and set at naught by the Union of India:

(a) That this Hon'ble Court in its directions in Paragraph 101 and 102 of the January 18, 2013 Judgment had held that the Union of India shall have the jurisdiction to proceed with the investigation and trial of the Petitioner Nos. 1 and 2 subject to provisions of Article 100 of UNCLOS and till such time Article 100 of UNCLOS is invoked and established by the Petitioners before the Special Court. Therefore, the Republic of Italy upon proving that Article 100 of UNCLOS applies fully to this case would be able to agitate the issue of jurisdiction which has been specifically kept open by this Hon'ble Court.

(b) That under Section 1(2) of the anti-terrorism SUA Act, the SUA Act extends to the entire Exclusive Economic Zone (i.e. the Union of India may assert jurisdiction upto 200 Nautical Miles), which if asserted would make the issue of Article 100 of UNCLOS on the issue of jurisdiction redundant, thereby negating the very basis of the Judgment of this Hon'ble Court. Such action by the Union of India would actually defeat the entire basis, letter and spirit of the January 18, 2013

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Judgment which cannot be permitted. The Applicants submit that allowing this would essentially amount to an act of the executive unilaterally reviewing and overruling the Judgment of the Hon'ble Supreme Court.

- (c) That this Hon'ble Court in Paragraph 93 of the January 18, 2013 Judgment has held that the fishing boat St. Antony was not flying an Indian Flag at the time when the alleged incident took place. Again in Paragraph 95 of the Judgment, this Hon'ble Court has held that the defence version of apprehension of a pirate attack, if accepted by the Trial Court, would attract the provisions of Article 100 of UNCLOS which if established by the Petitioners, upon leading evidence before the Special Court, would go to the root of jurisdiction of the Union of India to investigate and try the case in India.

The Applicants submit that if the provisions of the anti-terrorism SUA Act are allowed to be invoked by the Union of India, such observations of the Judgment would be given a go-by and the specific direction in Paragraph 101 and 102 of the Judgment would be rendered otiose and overridden as the Union of India may claim jurisdiction till 200 nautical miles.

- (d) That this Hon'ble Court in Paragraph 97, 99 and 100 of the January 18, 2013 Judgment had concluded that as

per UNCLOS, the provisions of which are in conformity with the domestic Law, in the Exclusive Economic Zone, the Union of India has only sovereign rights as opposed to sovereignty. By invoking the provisions of the anti-terrorism SUA Act and the consequent assertion of complete jurisdiction till 200 nautical miles, the conclusion and findings of the Hon'ble Supreme Court in its Judgment would stand reviewed and negated by the unilateral act of the Union of India to invoke the provisions of the anti-terrorism SUA Act.

- (e) That it is clear from the January 18, 2013 Judgment of this Hon'ble Court that the Union of India cannot re-agitate the issues covered by the Hon'ble Supreme Court Judgment and only the Petitioners herein can do so. It is thus clear that in response to this Application, the Union of India cannot bring in any fresh arguments to claim a different basis for jurisdiction or to invoke the provisions of the anti-terrorism SUA Act in respect of the alleged incident of February 15, 2012.
- (f) Without prejudice to the foregoing, even otherwise the January 18, 2013 Judgment of the Supreme Court while disposing the SLP (Civil) No. 20370 of 2012 against the Judgment of the Kerala High Court of May 29, 2013, has expressly as well as impliedly set aside

the conclusion and finding of the Kerala High Court that the provisions of the anti-terrorism SUA Act applied to the facts of this case.

- (g) The Hon'ble Supreme Court after hearing the matter at length directed that a Special Court be set up and the two Italian Military and Judicial Officials be tried only under the four specific Acts (MZA, IPC, Cr. PC and UNCLOS). This direction and judgment of the Hon'ble Supreme Court has been accepted by the Union of India and no review has been filed. This direction was reiterated by the Hon'ble Supreme Court in paragraph 2 of its Order dated April 26, 2013. Hence, the Judgment of the Hon'ble Supreme Court becoming final operates as final and binding on the Union of India and binds any agency of the Union of India in respect of trial of the two Italian Military and Judicial Officials only under the four specific Acts.

The matter having thus become final and conclusive cannot be re-opened in fact or in law.

18. Without prejudice to the foregoing, the Petitioners reserve their right to make a substantial challenge to the constitutional validity and applicability of the anti-terrorism SUA Act if and when the need so arises.

19. That the Petitioner Nos. 1 and 2 alleged to be involved in the incident of February 15, 2012, were on active military duty at the time of the alleged incident and were onboard the shipping vessel M.V. Enrica Lexie to defend and protect the vessel from Piracy in international waters pursuant to provisions of Italian law intended to fulfill its international obligations to repress piracy. Petitioner Nos. 1 and 2 continue to be serving Italian Military & Judicial Officials who have been away from Italy and active service for almost two years awaiting initiation of proceedings in India.
20. It is humbly submitted that in view of the gross delays, defaults and failure of the Union of India to strictly comply with the directions of the Hon'ble Supreme Court and to even present or start any case against Petitioner Nos. 1 and 2, the two Petitioners ought to be discharged or in the alternative be permitted to travel to Italy till such time that their presence is not required by a competent Court in India or the Trial commences.

PRAYER

In view of the foregoing, it is most humbly prayed that this Hon'ble Court may be pleased to:

- (a) Close the right of the Union of India and the NIA to present any Final Report/criminal case against the Petitioner Nos. 1 and 2 on account of the complete failure of the Union of India

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to file any Final Report/case for almost one (1) year in violation of the directions of this Hon'ble Court dated January 18, 2013, and further discharge Petitioner Nos. 1 and 2 for the said continuing inordinate delay and substantial non-compliance with the directions of this Hon'ble Court; and

(b) In the alternative, direct the Union of India to file the Final Report/case against the Petitioner Nos. 1 and 2 strictly in accordance with the directions of the Hon'ble Supreme Court vide Judgement dated January 18, 2013 in terms of which the Petitioner Nos. 1 and 2 were to be tried only under four specific laws, i.e. MZA, IPC, CrPC and UNCLOS, and not under the anti-terrorism law – the SUA Act, within a period of two weeks from the date of this Application failing which the right of the Union of India to initiate any prosecution against Petitioner Nos. 1 and 2 be closed and further to conclude the trial within a period of three months thereafter, in a strict time-bound manner; and

(c) Pending the hearing and disposal of the present Application, permit Petitioner Nos. 1 and 2 to return to Italy and await in Italy till such time that the trial against the said two Petitioners commences on such conditions as deemed fit and proper in the facts and circumstances of the case; and

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

DRAWN BY:

FILED BY:

(Mr. DILJEET TITUS)
ADVOCATE

(JAGJIT SINGH CHHABRA)
ADVOCATE FOR THE APPLICANTS

SETTLED BY:

(Mr. MUKUL ROHATGI)
SR. ADVOCATE

NEW DELHI
FILED ON: 13.01.2014

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

I.A. NO. OF 2014

IN

SPECIAL LEAVE PETITION (CIVIL) NO. 20370 OF 2012

IN THE MATTER OF:

Massimiliano Latorre & Others

Applicants

Versus

Union of India & Others

Respondent

AFFIDAVIT

I, Daniele Mancini, aged 60 years, residing at the Embassy of Italy, 50E, Chandragupta Marg, Chankyapuri, New Delhi, do hereby solemnly affirm and state on oath as under:-

1. That I am the Ambassador of Italy in India and in my aforesaid capacity, I am duly authorized to represent the Applicant No. 3 in the accompanying Application for Directions. I further state that I am also, in my aforesaid capacity, well conversant with the facts of the case, and thereby, am competent to swear the contents of the present affidavit.
2. That I am aware of the facts and circumstances of the present Application and have also read and understood the contents of the accompanying Application for Directions

which are true and correct to the best of my knowledge and belief.

3. That the annexures annexed to the accompanying Application for Directions are true copies of their respective originals.
4. That this Affidavit is duly authorized by the Republic of Italy and is executed for and on behalf of the Republic of Italy.

Daniela Mancini
DEPONENT

VERIFICATION:-

Verified at New Delhi on 13th day of January, 2014, that the contents of paragraphs 1 to 4 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.



Daniela Mancini
DEPONENT

ANNEXURE-A-1

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843544

ITEM NO. IA
[FOR JUDGMENT]"OUT TODAY"
COURT NO. 1

SECTION X

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS
WRIT PETITION (CIVIL) NO(s). 135 OF 2012

REPUBLIC OF ITALY THR. AMBASSADOR & ORS.

Petitioner(s)

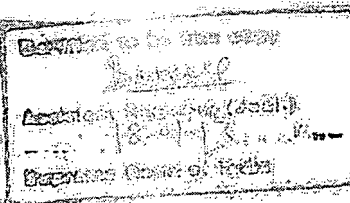
VERSUS

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. Sohail 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.

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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 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.

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(Sheetal Dhingra)
Court Master

(Juginder Kaur)
Assistant Registrar

[Signed Reportable Judgments are placed on the file]

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 135 OF 2012

Republic of Italy & Ors. ... Petitioners

Vs.

Union of India & Ors. ... Respondents

WITH

SPECIAL LEAVE PETITION (CIVIL) NO. 20370 OF 2012

Massimiliano Latorre & Ors. ... Petitioners

Vs.

Union of India & Ors. ... Respondents

J U D G M E N T

ALTAMAS 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 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 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 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.

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 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.

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 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.

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".

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 submarines 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 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 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.

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, 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, 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 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, 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 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 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, 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.

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. 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 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 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 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 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 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, :-

(1) 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. 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 Banadur 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.

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 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 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 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 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 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 Rukumchand 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.

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 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) T.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 AGC 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 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 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 or 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 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 Moharik 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 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 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 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.

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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 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 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 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 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.

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.

90. In addition to the above was the presence of Article 11 of the Geneva Convention or 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 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 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 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 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 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 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 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 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 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

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Dated: January 18, 2013.

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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

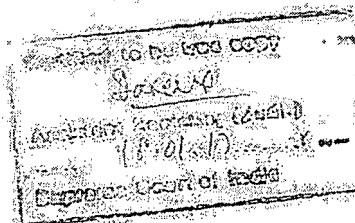
WITH

SPECIAL LEAVE PETITION (C) No. 20370/2012

Massimiliano Latorre & Ors.
Petitioners

Versus

Union of India & Ors.
Respondents

J U D G M E N TChelameswar, 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 Sri Harish

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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 97¹ 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

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.

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 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;

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(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 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 *Grisbadarna 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 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

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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 waters³.

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

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)

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State' extends to its territorial waters, is also a well accepted principle of International Law 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 Rameshwari Lal* (AIR 1961 SC 911) 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

4. It is well established that the coastal state has sovereignty over its territorial waters, the seabed 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)

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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."

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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."

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:

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"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 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 authorize 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

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.....

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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 "sovereign rights" employed in Sections 6(2), 6(3)(a) and 7(4)(a), (Whether or not the sovereignty of India extends beyond its territorial waters and to the contiguous zone or not), in view of the scheme of the Act,

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.....

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as apparent from Section 5(5) (a)⁸ and Section 7(7) (a)⁹, the application of "any enactment for the time being in force in India" (like the Indian Penal Code and the Code of Criminal 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.

..... 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.

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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 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

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make laws is limited to the territory of the State, Parliament's authority has no such limitation.

16. Though Article 245³⁰ 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 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.

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.

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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.

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 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

¹¹ See: *Macleod v. Attorney General of New South Wales* (1891) AC 455, 451-58 and *Huntington v. Attrill* (1893) AC 150.

¹² P C Rao - "Indian Constitution and International Law", page 42

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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 country¹³. 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 Code¹⁴ makes the provisions of the Code applicable to the offences

13 See AIR 1955 SC 367 = Hans Müller 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

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.

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committed "in any place without and beyond" the territory of India; (1) by a citizen of India or (2) on any ship or aircraft registered in India, irrespective of its location, by any person not necessarily a citizen". 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:

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".

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"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):

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"(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 3¹⁶ 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 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

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.

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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 or 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 Procedure¹⁷ prescribes the

17 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.

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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

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letter reached its destination within England and thus the offence was committed within the 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 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

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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 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

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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

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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 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

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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 contiguous zone is a part and that is the area relevant, in the

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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.

(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. 264.....(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. Massimiliano 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 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. Massimiliano 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. Massimiliano 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

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Chief Judicial Magistrate, Kollam in terms of the said judgment dated the 18th January, 2013 of the Supreme Court of India.

[E.No.17011/27/2012-IS-VI (IS-IV)]

(Rakesh Singh)

Joint Secretary to the Government of India

The Manager,
Government of India Press,
Mayapuri, Ring Road,
New Delhi

(True Copy)

IA 4/2013 IN WP(C) NO. 20370/2012

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ITEM NO.42

COURT NO.1

SECTION XIA

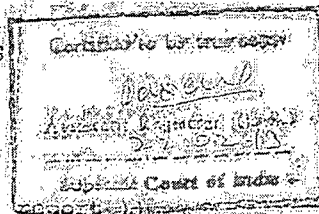
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGSIA 4/2013 in
Petition(s) for Special Leave to Appeal (Civil) No(s).20370/2012(From the judgement and order dated 29/05/2012 in WPC No.4542/2012
of The HIGH COURT OF KERALA AT ERNAKULAM)

MASSIMILANO LATORRE AND ORS

VERSUS

UNION OF INDIA AND ORS.

for directions and office report



Petitioner(s)

Respondent(s)

Date: 22/02/2013 This Petition was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE ANIL R. DAVE
HON'BLE MR. JUSTICE VIKRAMAJIT SEN

For Petitioner(s)

Mr. Harish N.Salve, Sr. Adv.
Mr. Suhail Dutt, Sr. Adv.
Mr. Diljeet Titus, Adv.
Mr. Viplov Sharma, Adv.
Mr. Jagjit Singh Chhabra, AOR
Mr. Achint Singh Gyani, Adv.

For Respondent(s)

Mr. P.F. Malhotra, ASG.
Mr. S.A. Haseeb, Adv.
Mr. B. Krishna Prasad, AOR

R.2

Mr. V.Giri, Sr. Adv.
Mr. Ramesh Babu M.R., AOR
Mr. Sushruj Jindal, Adv.

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YA 4 OF 2013 IN SLP(C) NO. 20370 OF 2012

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UPON hearing counsel the Court made the following
O R D E R

In terms of the signed order, the I.A.4 is disposed of.

Let the original additional affidavit dated 19/02/2013 filed in Court today be taken on record.

The learned ASG is unable to tell us today as to whether the procedure for constitution of the Special Court directed to be set up by the Central Government, in consultation with the Chief Justice of India, has been initiated or not. In the event steps have not been taken to constitute the Special Court, as directed, the Central Government is directed to do so, without any further delay.

(Sheetal Dhingra)
Court Master

(Juginder Kaur)
Assistant Registrar

[Signed order is placed on the file]

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IA 4 OF 2013 IN SLP (C) NO. 20370 OF 2012

1

859351

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

IA 4 OF 2013

IN

SPECIAL LEAVE PETITION (C) NO. 20370 OF 2012

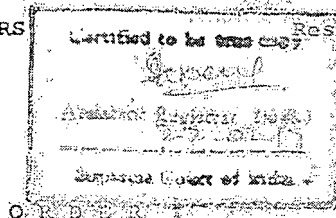
MASSIMILANO LATORRE AND ORS.

Petitioner(s)

VERSUS

UNION OF INDIA AND ORS.

Respondent(s)



1. IA No.4 of 2013 has been filed in SLP(C) No.20370 of 2012, wherein we had passed certain Orders on 18th January, 2013, permitting the applicants/petitioner Nos. 1 and 2, Mr. Massimilano Latorre and Salvatore Gironi, to travel to Italy for a period of four weeks under the supervision, custody and control of the petitioner No.3, the Ambassador of Italy to India, and thereafter to return to India within the said period.

2. Pursuant to the said Order, the applicants/

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IA 4 OF 2013 IN SLP(C) NO. 20370 OF 2012

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petitioners travelled to Italy and returned within the period specified in the Order.

3. This application has now been made for further permission to the petitioners/applicants Nos.1 and 2, to travel to Italy for the purpose of casting their votes in the election scheduled on 24th and 25th February, 2013. In fact, the prayers in the interlocutory application No.4 are as follows:-

"(a) In relaxation of the conditions imposed by this Hon'ble Court vide its order dated 18.01.2013, permit the Applicant No.1 and 2 to travel to the Republic of Italy under round the clock care/custody, control and supervision of the Applicant No. 3 for a period of four weeks and thereafter return to India within said time or such time as permitted by this Hon'ble Court;

(b) direct the Respondents and their concerned departments/authorities to facilitate the international passage of the Applicant No.1 and 2 from New Delhi, India to Italy and thereafter,

IN 4 OF 2013 IN SLP (CINO) 20376 OF 2012

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their travel back to New Delhi, India within four weeks and in that behalf direct the Union of India to release of their passports forthwith and direction for grant of exit visa by Foreigners Regional Registration Office and/or other authorities."

4. Having heard learned counsel for the applicants/petitioners, as well as learned ASG, Mr. Malhotra and Mr. Giri, senior counsel, appearing for the State of Kerala, we are inclined to allow the prayers, as made.

5. It may be noted that an additional affidavit has been filed by Daniele Mancini, Ambassador of Italy in India, representing the applicant No.3, indicating that under the Italian laws, the petitioners 1 and 2 are not entitled to cast their votes in their present circumstances, and that they have to travel to Italy for the said purpose. The said respondent has also affirmed an Affidavit of Undertaking on 9th February, 2013, whereby he has taken full responsibility for the petitioner Nos. 1 and 2 to proceed to

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IN 4 OF 2013 IN SLP (C) NO. 20370 OF 2012

4

Italy in the custody and control of the Government of Italy and to ensure their return to India in terms of this Order.

6. On behalf of the petitioner Nos.1 and 2, it has been submitted by Mr. Harish Salve, learned senior counsel, that an additional affidavit will also be filed on their behalf giving the same undertaking for their travel to Italy and their return.

7. In that view of the matter and having regard to the fact that once before the petitioner Nos. 1 and 2 had been permitted to travel to Italy and they had returned within the stipulated period, we allow the application and permit the petitioners/applicants Nos.1 and 2, to leave India and to remain in the Republic of Italy for a period of four weeks from the date of departure from India. They shall travel to Italy, remain in Italy and return to India under the care, supervision and control of the Italian Republic and shall also report to Chankyapuri Police Station, New Delhi, both at the time of their departure and on their return.

8. The Republic of Italy will provide the address and contact details of the

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IN 4 OF 2013 IN SUP (C) NO. 20976 OF 2012

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petitioners/applicants Nos.1 and 2 and also provide further information about their movements in Italy to the Chankyapuri Police Station, New Delhi, during their stay in Italy. The petitioners shall also not leave the Republic of Italy, except for return to India. On their return, the applicants/petitioners Nos.1 and 2, shall once again be bound by the conditions contained in the Order passed by this Court on 18th January, 2013.

9. By the aforesaid Order/judgment, this Court had also directed that since the passports of the petitioners/applicants Nos.1 and 2 had been surrendered to the trial court in Kollam, the same were to be transferred by the said Court to the Home Ministry, immediately upon receipt of a copy of the judgment. It is submitted by Mr. Salve, on instructions, that the said passports have been sent by mail by the Court concerned and is yet to reach the Home Ministry. In such circumstances, the applicants/petitioners Nos.1 and 2 will be entitled to travel to Italy and to return to India on the basis of temporary passports/travel documents and the Ministry of Home Affairs shall direct the Foreigners

IA 4 OF 2012 IN SLP(C) NO. 20370 OF 2012

6

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Regional Registration Office, to provide the said petitioners/applicants with the necessary exit and re-entry visas on the said temporary travel documents. The Ministry of Home Affairs, Government of India, shall also inform the authorities of the Indira Gandhi International Airport, including the Bureau of Immigration and the C.I.S.F. concerned, of this Order.

10. The condition Nos.1 to 4 of the directions contained in respect of the judgment/Order of 18th January, 2013, are relaxed to the extent indicated in this Order. On their return to India at the end of the period hereby granted, the said petitioners/applicants Nos.1 and 2 would once again be bound by the said conditions in their full force.

11. Let the undertaking by the petitioner Nos.1 and 2, be filed in Court today within 2.00 p.m.

12. Let copies of this order be made available to the learned advocates of the respective parties. In addition, let copies of the same be also sent to the Home Secretary, Foreigners Regional Registration Office, Bureau of Immigration, CISF, Indira Gandhi International

YA 1 OF 2012 IN SLP(CIND) 20070 OF 2012

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Airport and to the D.C.P. IGI Airport, which will act on the basis thereof, immediately on receipt of the same.

13. I.A.4 is disposed of with the aforesaid directions.

14. Let the original additional affidavit dated 19/02/2013 filed in Court today be taken on record.

15. The learned ASG is unable to tell us today as to whether the procedure for constitution of the Special Court directed to be set up by the Central Government, in consultation with the Chief Justice of India, has been initiated or not. In the event steps have not been taken to constitute the Special Court, as directed, the Central Government is directed to do so, without any further delay.

.....CJI.
(ALTAMAS KABIR)

.....J
(ANIL R. DAVE)

.....J
(VIKRAMAJIT SEN)

NEW DELHI;
February 22, 2013.

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ANNEXURE-A-3 (copy)

874835

WP(C)135/12

1

ITEM NO.1

COURT NO.1

SECTION X

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGSWRIT PETITION (CIVIL) NO.135 OF 2012

REPUBLIC OF ITALY THR. AMBASSADOR & ORS.

Petitioner(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

(With appln(s) for exemption from filing O.T., directions and intervention and with office report)

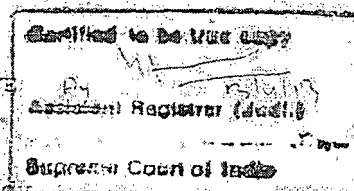
WITH

S.L.P. (C) NO.20370 of 2012

(With appln. (s) for permission to file lengthy list of dates and placing addl. facts and documents on record and permission to place addl. documents on record and directions and office report)

Date: 02/04/2013 These Petitions were called on for hearing today.

CORAM

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE ANIL R. DAVE
HON'BLE MR. VIKRAMAJIT SEN

For Petitioner(s)

Mr. Mukul Rohatgi, Sr. Adv.
Mr. Suhail Dutt, Sr. Adv.
Mr. Diljeet Titus, Adv.
Mr. Viplav Sharma, Adv.
Mr. Jagjit Singh Chhabra, AOR
Mr. Ujjwal Sharma, Adv.
Mr. Achint Singh Gyani, Adv.
Mr. Ninad, Adv.
Mr. Sulabh Sharma Adv.For Respondent(s) /
U.O.I.Mr. Goolam E. Vahanvati, A.G.
Mr. Harris Beeran, Adv.
Mr. Anoopam Prasad, Adv.
Mr. S.A. Haseeb, Adv.
Mr. B. Krishna Prasad, AOR

For R-4

Ms. Rekha Pandey, Adv.
Ms. Rashmi Malhotra, Adv.
Mr. D.S. Mahra, AOR

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WP(C)135/12

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For State of
Kerala

Mr. V.Giri, Sr. Adv.
Mr. Ramesh Babu M.R., AOR

UPON hearing counsel the Court made the following
O R D E R

1. This matter has been listed today on the basis of the directions issued on 18th March, 2013. On that date, the matter had been mentioned by the learned Attorney General who had produced a copy of Note Verbale No.100/685 dated 15th March, 2013, addressed to the Ministry of External Affairs, Europe West Division, South Block, New Delhi, by the Embassy of Italy, New Delhi. On 14th March, 2013, this matter had been mentioned on the basis of Note Verbale No.89/635 dated 11th March, 2013, received by the Ministry of External Affairs from the Italian Embassy in New Delhi, conveying the decision of the Italian Government not to send back the petitioner Nos.2 and 3 to stand trial in India. Since the time for the petitioner Nos.2 and 3 to return to India had not expired, we had directed the matter to be listed today. We had also extended the interim directions given on 14th March, 2013, directing Mr. Daniele Mancini, the Ambassador of Italy in India, not to leave India, without the permission of this Court, until further orders.

2. Since the petitioner Nos.2 and 3 have returned to India within the stipulated time, the undertaking

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WP(C)135/12

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given by the Ambassador of Italy in India, has been satisfied and he is discharged therefrom.

3. As far as this case is concerned, we need not take any further note of either Note Verbale No.89/635 dated 11th March, 2013, or Note Verbale No.100/685. The interim order passed on 14th March, 2013, directing Mr. Daniele Mancini, the Ambassador of Italy in India, not to leave India without the permission of this Court, is vacated.

4. Let this matter stand adjourned till 16th April, 2013, at the top, to enable the learned Attorney General for India, to inform us of the steps taken for constitution of a separate Court, which we had intended to be constituted for trial of the petitioners Nos. 2 and 3 on a Fast Track basis, in terms of the judgment delivered by this Court on 18th January, 2013.

(Sheetal Dhingra)
AR-cum-PS

(Juginder Kaur)
Assistant Registrar

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]

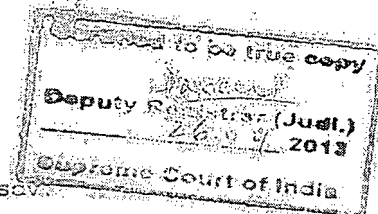
Date: 26/04/2013 These Matters were called on for Orders today.

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.

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.

...2/-

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- 2 -

For State of Kerala: Mr. Ramesh Babu M.R., Adv.
Mr. Sushrut Jindal, Adv.

UPON hearing counsel the Court made the following
O R D E R

The Hon'ble Court gave directions in terms
of the signed order, which is placed on the file.

[T.I. Rajput]
Deputy Registrar

[Juginder Kaur]
Assistant Registrar

[Signed order is placed on the file]

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 135 OF 2012

Copies: 100 to be true copy

2/10/2013

Supreme Court of India

Republic of Italy & Ors.

... Petitioners

Vs.

Union of India & Ors.

... Respondents

WITHSPECIAL LEAVE PETITION (CIVIL) NO. 20370 OF 2012

Massimiliano Latorre & Ors.

... Petitioners

Vs.

Union of India & Ors.

... Respondents

O R D E R

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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 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

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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 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

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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

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Delhi as Case No.RC-04/2013/NIA/DLI under Sections 302, 307, 427 read with Section 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, the Indian Penal Code, the Code of Criminal Procedure and the provisions of UNCLOS 1982.

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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.

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

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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/ CJJ
(ALTAMAS KABIR)

sd/ J
(ANIL R. DAVE)

sd/ J
(VIKRAMAJIT SEN)

New Delhi
Dated: April 26, 2013.

IN THE COURT OF SH. DHARMESH SHARMA ASJ-1, SPECIAL JUDGE,
PATIALA HOUSE COURTS, NEW DELHI

STATE (NIA) V/S Massimiliano Latorre and Salvatore Girone

NIA Case number RC-04/2013/NIA/DLI, u/s 302,
307, 427 IPC and Sec 3 of SUA Act 2002.

SUB:- APPLICATION ON BEHALF OF CHIEF INVESTIGATION
OFFICER FOR TAKING APPROPRIATE M/S FOR TRANSFER
OF CUSTODY OF ACCUSED MASSIMILIANO LATORRE AND
SALVATORE GIRONE IN COMPLIANCE OF HON'BLE
SUPREME COURTS ORDER.

MOST RESPECTFULLY SHOWETH :

1. That the Hon'ble Supreme Court in the order dated 18.01.2013 in Writ Petition No. 135/2012 (Civil) and Special Leave Petition 20370/2012 had directed the Central Govt. to constitute a Special Court to try the case against the Italian marines Massimiliano Latorre and Salvatore Girone the copy of the order dated 18.01.2013 of Hon'ble Supreme Court is attached herewith as Annexure-A.
2. That in obedience of the above order of the Hon'ble Supreme Court the Central Govt. Ministry of Home Affairs after consultation with Hon'ble Chief justice of India and Hon'ble Chief Justice of Delhi High Court appointed and designated this Hon'ble Court, the court of Additional Session Judge -01, Patiala House, New Delhi as special designated court to try and dispose the case. Copy of the order dated 15.04.2013 of Central Govt. bearing no. 17011/27/2012- 15-IV is attached herewith as Annexure-B.
3. That in obedience of the same order of the Hon'ble Supreme Court the Central Govt Ministry of Home Affairs entrusted the investigation of the

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case to National Investigation Agency vide order dated 01.04.2013 No. F11011/19/2013-IS-IV. Accordingly, the National Investigation Agency has re-registered the case as RC-4/2013/NIA/DLI dated 04.04.2013 and the FIR has been submitted before the Hon'ble Chief Metropolitan Magistrate Court, Patiala House Courts, New Delhi. The case is under Investigation and I.P. Vikraman Deputy Superintendent of Police, National Investigation Agency is the CIO of the case copy of the FIR is attached as Annexure-C.

4. That in the aforesaid order of the Hon'ble Supreme Court, the Hon'ble Supreme Court has observed that "Till such time as the special court is set up the petitioners 2 and 3 will be under the custody of this court". The petitioners are Massimiliano Latorre and Salvatore Girone and as per the information available with the National Investigation Agency they are at the Italian Embassy, New Delhi. They are marking their presence in Chanakya Puri Police Station, New Delhi in every week. All the documents and the material objects which were in the custody of Chief, Judicial Magistrate, Kollam have since been transferred in the sealed condition to the Hon'ble Chief Metropolitan Magistrate, Patiala House, New Delhi and the Hon'ble Chief Metropolitan Magistrate, Patiala House, New Delhi entrusted the same in my safe custody.

PRAYER

It is submitted before this Hon'ble Court that the Hon'ble Court may take appropriate steps for transfer of custody of the accused Massimiliano Latorre and Salvatore Girone to this Hon'ble Court as per the direction of the Supreme Court Judgment dated 18.01.2013.

New Delhi
Dated: 27.11.2013

P. Vikraman, DSP
NIA

TRUE COPY

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ANNEXURE-A-5

NATIONAL INVESTIGATION AGENCY
FIRST INFORMATION REPORT
 (Under Section, 154 Cr. PC)

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 ACTS : 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 fishermen namely Jelastin and Pinku
 by two Italian Marines aboard "Enrica Lexie" an Italian ship 31 N M from north-west of
 Neendakara Coastal Police Station, in Arabian Sea on 15-2-2012 at 4.30 pm

(b) **Day:** Wednesday **Date:** 15/02/2012 **Time:** 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 **Date:** 04/04/2013 **Time:** 17:45hrs

4. **Type of Information:** Oral reduced to writing5. **Place of Occurrence:**

(a) **Direction and Distance from PS** Beat No. 31 Nautical miles off
 Neendakara Coastal Police Station

(b) **Address:** 31 N.M from Neendakara Coastal Police Station, Kollam, 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

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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 Massimiliano, 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/informant:-
No delay**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 & Pinku

12. First information contents (Attach separate sheet, if required)

As per MHA 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)

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13. Action taken:- Re-registered the case as RC-04/2013/NIA/DU and directed Shri. P. Vikraman, DSP, NIA, Kochi Branch, Kerala to take up the investigation as the Chief Investigating Officer (CIO).

14. Signature / Thumb Impression
of the Complainant / informant:



Signature of Officer In-Charge

Name : ANUP KURUVILLA JOHN, IPS

Rank : Supdt of Police, NIA, New Delhi

Name of P.S : National Investigation Agency
New Delhi

15. Date and time of dispatch to the court : 04/04/2013, ____HRS
8324-36

Documents Enclosed :

1. Order No. 11011/19/2013-IS.IV dated 01/04/2013 of Government of India, Ministry of Home Affairs, New Delhi.
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
- one closed envelope 05/04/2013

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[illegible]

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 Freddy, 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, Johnson, Kinseriyan, Clemence, Muthappan, Martin, Michael, Jelastin and Pinku. All others 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 clock. 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 reached west of Kayamkulam. All others barring Jelastin and Pinku were asleep at that time. It was Jelastin 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 stern, was heard howling 'amme.' we dashed to him to find that he

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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 with a blanket after having the body being taken out from the wheel house. Jelastin was aged 48 and Pinku 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.

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ANNEXURE-A-6

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 15/04/2013ORDER

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 Gironi, 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

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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

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ANNEXURE-A-7

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.

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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

ANNEXURE - A-8

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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

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(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

(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

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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)

Sd/-
Signature of the Officer-in-charge of
Police Station
Name: R Jayaraj
Rank: C I of Police, Coastal 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 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

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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 its hose was broken and gas came out 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

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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)

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ANNEXURE - A-9BEFORE THE HON'BLE SESSIONS COURT KOLLAMSC No. 515 of 2012

Report most respectfully submitted by the Investigating Officer R. Jayara
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
circumstances 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. Jayara
CI of Police, Coastal
Neendakara, Kollam
31-05-2012

" True Copy "

IN THE SUPREME COURT OF INDIA

CIVIL-APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) No. 20370 OF 2012

IN THE MATTER OF:

MASSIMILANO LATORRE & OTHERS PETITIONERS

Versus.

UNION OF INDIA & OTHERS RESPONDENTS

COUNTER AFFIDAVIT FILED ON BEHALF OF THE SECOND
RESPONDENT

I, M R Ajith Kumar, aged 44 years, son of, R. Muthukrishnan, Commissioner of Police, Cochin City, Kerala, residing at Ernakulam, Kerala, presently at Cochin, do hereby solemnly affirm and stated on oath as under:-

1. I am the Commissioner of Police, Ernakulam, Kerala and I was supervising the investigation arising out of the death of two Indian fishermen on 15th February 2012 while they were onboard an Indian shipping vessel. I am aware of the facts of the present case. I am further authorized to affirm the present affidavit on behalf of the State of Kerala and am filing this Counter Affidavit on behalf of the third respondent also.

2. I have perused a copy of the Special Leave Petition No. 20370 of 2012 filed by the Petitioners. At the very outset, I deny the correctness of the averments contained in the Special Leave Petition except those which are specifically admitted hereunder. I understand that the Special Leave Petition was challenging the judgment dated 29.05.2012 in W.P.(C) No. 4542/2012 of the files of the Honourable High Court of Kerala.

3. I notice from the array of parties that one Massimiliano Latorre who is one of the Italian marines and arrayed as the 1st accused who have shot at the Indian fishermen is Petitioner No. 1 and Salvatore Girone, the other Italian marine who also shot at Indian fishermen, is Petitioner No. 2 and that the Republic of Italy is Petitioner

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No. 3. It is pointed out that during the pendency of the W.P.(C) No. 4542/12, the same petitioners filed W.P.(C) No. 135/12 before this Honourable Court for more or less similar reliefs.

4. I further notice that Union of India through the Secretary, Ministry of Home Affairs has been impleaded as Respondent No. 1, the State of Kerala has been impleaded as Respondent No. 2 and the Circle Inspector of Police was impleaded as respondents No.3.

PRELIMINARY SUBMISSIONS AND BRIEF STATEMENT OF FACTS:

5. The present SLP is filed by the Petitioners seeking Special Leave to appeal against the final judgment dated 29.05.2012 in W.P.(C) No. 4542/12. Petitioner also seeks stay of further proceedings in Crime No. 2/12 of Neendakara Coastal Police Station.

6. At the outset itself, it is submitted that in W.P.(C) 4542/12, the prayer itself was to quash FIR in Crime No.2/12 on the files of Coastal Police Station, Neendakara. The challenge was repelled by the Hon'ble High Court by virtue of the impugned judgment and dismissed the Writ Petition. Be that as it may, investigation was completed and Final report was filed on 18.05.2012 before the Chief Judicial Court, Kollam which is the Court having competent jurisdiction. The case was committed to Sessions Court, and numbered as SC No. 515/2012, on files of Principal Sessions Court, Kollam. SC No. 515/12, was the posted for preliminary hearing on charge. Therefore, since the information about the offence in the FIR was investigated and final report has been submitted finding the guilt of the accused, petitioner's contention against FIR, cease to exist and the. Special Leave Petition itself is practically infructuous.

7. The very same petitioners have filed a writ petition, W.P.No. 135 of 2012 seeking termination of all proceedings taken against the petitioners on the same set of grounds. W.P.(C) No.135/12 was filed when W.P.(C) No.4542/12 was posted for

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judgment. While the said writ petition was pending before the High Court, the same petitioners filed W.P.(C) No. 135/2012 before this Honourable Court which is liable to be dismissed as not maintainable.

8. It is also submitted that the Writ Petition as well as the present Special Leave Petition is not maintainable at the behest of Republic of Italy. The third petitioner being a Sovereign State is not supposed to invoke the writ jurisdiction of the High Court or this Hon'ble Court challenging the Constitutional Authority of the Government of India. The answering respondent, State of Kerala while exercising its jurisdiction under the criminal law, is only exercising the sovereign power of the Union and the attempt of the petitioners to differentiate between the Union and the State Government is probably ill-advised and Highly deplorable. Secondly, the conduct of the Petitioners as would be evident from the facts which are mentioned hereinafter do suggest absence of bonafides and Petitioners are attempting to subvert Indian constitutional processes and the Rule of Law.

9. That, in response to the questions of law raised in the Special Leave Petition it is most respectfully submitted that none of those questions of law would arise on the facts of this case. The petitioners 1 and 2 have committed a crime by shooting and killing two Indian Citizens while they were fishing within the territory of India. Indian fishermen are permitted to do fishing within the Exclusive Economic Zone of India which extend upto 200 nautical miles from the base line. Indian Exclusive Economic Zone is considered as an extension of Indian territory and India has exclusive right and jurisdiction within that area where foreign ships only have a right of innocent passage. No foreign ship or its crew are permitted to do any activity except a right of innocent passage in the Exclusive Economic Zone of India. In any case no foreigner is permitted to use weapons in that area. The Indian waters extending upto the Exclusive Economic Zone is under the surveillance of Indian Coast Guard and Indian Navy. Even if the Italian Ship M.V. Enrica Lexie feared any kind of suspicious

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movement as alleged, within the exclusive economic zone of India, they ought to have informed the Indian Coast Guard and Indian Navy and certainly cannot shoot and kill Indian Citizens legitimately fishing in that area. Petitioners 1 and 2 by resorting to such an inhuman and illegal act, have committed a grave crime of murder which is punishable under the Indian Penal Code. When such crime is reported, the police has rightly registered an FIR and initiated the investigation. The state police to whom the commission of a crime within their jurisdiction is reported has all the powers to proceed with the investigation and prosecution.

10. That the incident happened in this case is not an act of another sovereign state. It is a cold blooded murder committed by two individuals, petitioners 1 and 2. It does not involve any sovereign conduct and therefore the initiation of legal proceedings will not constitute violation of principle of sovereign immunity.

11. That it is respectfully submitted that initiation of legal proceedings in this case is not contrary to the principles of International Law nor in violation of United Nations Convention on the law of the Sea. The act in question is a crime of cold blooded murder by two individuals who were deployed for the private security of a Merchant Ship. It is not an act of a sovereign State and cannot by any stretch of imagination be considered as an act of a sovereign State entitled to immunity under the United Nations Convention on the law of the Sea. Article 97 of the United Nations Convention on the law of the Sea extends only in high seas. Admittedly, offence is committed within the area where the sovereignty of India extends and not in high seas as defined in article 97 of the United Nations Convention on the law of the Sea. Art. 97 and 58 which are relied on by the petitioners are not applicable in the present case. In UNCLOS, Art. 27 and 28 speaks about Rules applicable regarding criminal jurisdiction and civil jurisdiction onboard a foreign ship. Art. 27 specifically states that the criminal

jurisdiction of the coastal state should not be exercised onboard a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed onboard, the ship during its passage, except in some special cases. Art.27 (1) (a) states the first exception that if the consequence of the crime extends to the coastal State, criminal jurisdiction of that State would be applicable onboard a foreign ship. The exception provided under this Article is on the basis of the effect principle. 'Article 97 speaks about collision' and incidents of navigation in high seas whereas Art. 27 specifically deals with exercise of Criminal Jurisdiction. When there is a specific clause dealing with the subject matter, reliance on a clause which is not applicable to the present case is misconceived. That the vessel in question is a merchant vessel and the marines deployed on the ship were in private duty on guard of the private ship. The marines who were posted on private security duty cannot be treated as in sovereign duty and they were not exercising any sovereign power. Petitioners 1 and 2 therefore do not enjoy any sovereign immunity. Since they have committed a crime, there is no need of any formal consent to set the law on motion.

12. That it is respectfully submitted that the shooting and killing of two innocent fishermen by petitioners 1 and 2 is a cold blooded murder in violation of all the principles of the law of the sea or international laws. There was no provocation from the fishermen. No warning shots were fired. The coast guard or Navy was not alerted by the ship of any apprehension. The act in question is nothing but a criminal act of murder which needs to be investigated and prosecuted under the criminal law of the Indian Union. The petitioner's attempt to describe it as an excessive use of force is misleading and unsustainable. In the contiguous Zone of the coastal State, Foreign Merchant vessels only have a right of innocent passage. It does not have any right, to use weapons against legitimate fisher men of the coastal State. Even if they apprehend any suspicious activity, they can only alert the Coast Guard

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13. It is denied that petitioners 1 and 2 were acting under authority of Italian Law. The petitioners may be Italian Military personnel. But they were not in furtherance of their military duty when they fired and killed two innocent fishermen without any provocation. When the Police set the criminal law in motion against such aggressors on the basis of the information received by them, it will not tantamount to initiation of proceedings against a sovereign nation. The accused persons being members of armed forces does not mean that every illegal act committed by them will be considered as act done in exercise of their official functions and attributable to petitioner No. 3. Petitioners 1 and 2 unnecessarily dragging petitioner No. 3 in to the case for the purpose of claiming sovereign immunity to escape from their criminal culpability to which the sovereign state is acceding for reasons best known to them. The dispute in issue is not between two sovereign states, but an individual offence pure and simple. Hence principle of sovereign immunity is not applicable in this case.

14. That it is respectfully submitted that the incident happened within the contiguous zone of India. Two Indian nationals were shot dead within the contiguous zone of India. The deceased were engaged in their legal activity of fishing. It is a crime committed may be by foreigners but within the Indian waters. The crime was committed on an Indian vessel. Here in this case, the effect of the illegal act extended to the coastal state of Indian Union and therefore the police is duty bound to exercise its criminal jurisdiction to investigate and prosecute the accused.

15. That, it is submitted that by no stretch of imagination it can be alleged that a private mercantile vessel flying the flag of a State will get the sovereign immunity of the state. The very same merchant ship can be visited, searched and penalized for the lapses by the customs and other enforcement officers. It is therefore clear that private vessels are not having the immunity granted to warships as contended in the petition. Hence there is no embargo for Indian law enforcers for visiting or diverting a mercantile ship involved in a crime.

16. It is interesting to note that the present Special Leave Petition does not make an adequate disclosure of material facts which lie within the domain and knowledge of the Petitioners. It is respectfully submitted that this Hon'ble Court may decline to entertain such a petition on the ground of suppression and concealment of relevant and material facts. Before adverting to the grounds raised in the Special Leave Petition, it is worthwhile to narrate the chronology of events in the above case.

Date	Events
15.5.12	SHO, Coastal Police station, Kollam registered FIR as per the complaint of Freddy, the owner of the fishing boat St. Antony
16.2.12	CI held the inquest report of the deceased Ajeesh Pink and Valentine @ Jelestine. Ballistic expert examined the body of the deceased and the fishing boat and collected the evidences.
16.2.12	Coast Guard and Police Officers of Kochi City boarded the ship around 11 am
17.2.12	The Ship ENRICA LEXIE was brought to Cochin Oil Terminal
17.2.12	The investigation team boarded the ship
19.2.12	The crew members and the captain were questioned. Two navy guards Massimiliano Lattore and Salvatore Girone were arrested

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20.2.12 :	The accused were produced before the court and got them in police custody upto 23.2.12
21.2.12	Order No. T3-16/673/12 by Director General of Police, Kerala constituting Special Investigation Team.
23.2.12	The accused were produced before the Court and got them in Police custody upto 1.3.12
25.2.12	Investigation Team conducted search in the vessel by obtaining warrant from court and seized 8 suspected weapons and ammunitions. Arms and ammunitions were produced before the court for FSL examination
1.3.12	The accused were produced before the court on 1.3.12 and got them in police custody upto 5.3.12
22.02.2012	W.P.(C) No.4542/12 filed before the Honourable High Court of Kerala for quashing FIR.
5.3.12	The accused were produced before the court and they were remanded
28.3.12	The FSL examination was completed and results awaited
29.3.12	Learned Single Judge of the Hon'ble High Court disposed Writ Petition 6083/12 to release the ship with conditions
2.4.12	The legal heirs of deceased filed appeal before the Division Bench against the judgment to release the

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	ship and the court stayed the order till 2.4.12
4.4.12	The Hon'ble High court directed the ship owners to approach the learned Magistrate.
4.4.12	FSL report of ballistic examination was received
10.4.12	The shipping company filed Special Leave Petition 11942/2012 before Supreme Court.
30.4.12	Freddy filed a petition as CMP 2201/12 before the CJM Court to release the fishing boat.
2.5.12	The SLP was disposed. The Supreme Court directed to release the ship
7.5.12	The ship was released
9.5.12	W.P(C) 135/12 was considered and posted to 26 th July.
	The Supreme Court ordered the ADGP Prisons and DGP to consider the request of Italian authorities for shifting the accused marines to Borstal School Ernakulam. ADGP informed that the marines can stay at central Prison Thiruvananthapuram until the repair work of Borstal school is over. The Hon'ble Court ordered that the pendency of this matter before Supreme Court will not prevent the trial from being proceeded with.:
10.5.12	CJM Court Kollam ordered to release the fishing boat on conditions. But the owner of the boat Mr. Freddy had not executed the conditions before the

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	Court and it is still in safe custody of police
15.5.12	The request was sent to ADGP (South Zone, for getting the Prosecution sanction as per Section 9(12) of SUA Act for incorporating Section 3 of SUA Act in this case
15.5.12	Accused filed Bail application before Sessions Court Kollam (Crl. M.P 1340/12).
18.5.12	Final Report of the case was submitted under section 302, 307, 427 and 34 IPC and Section 3 of suppression of Unlawful Acts Against Safety of
	Maritime Navigation and Fixed Platform on Continental Shelf Act 2002' before the Chief Judicial Magistrate's; Court, Kollam and the case was numbered as CP 1/12.
19.5.12	The Bail Application was dismissed
22.5.12	Accused filed Bail Application No.3517/12 before Hon'ble High Court of Kerala and bail was granted on 30.5.12
25.5.12	The case was committed to the Sessions Court for trial.
29.5.12	W.P(C) 4542/12 was dismissed by Hon'ble High Court of Kerala
31.5.12	Report filed not to take cognizance under the relevant sections of SUA before the Sessions Court Kollam based on legal opinion

2.6.12	The accused were produced before the Hon'ble Sessions Court as a first step to commence the trial. Case is number as SC.515/2012. The Counsel for the accused requested the Hon'ble Court that the charge should be translated to Italian and a panel should be made available who is conversant with Italian, English and Malayalam.
2.6.12	The accused were enlarged on bail after complying the conditions imposed by the Hon'ble High Court
15.6.12	A panel of names conversant with Malayalam, English and Italian was submitted by the prosecution. 1. Fr. Rolden Jose Jacob, 2. Fr.. Paul antonym Mullasser and 3. Fr. Joseph Sugun Leon and all of them belongs to Kollam District
16.6.12	The counsel for the accused filed CrI. M.P 1637/12 before the Hon'ble sessions court Kollam that the charge should be translated to Italian and a panel should be made available who is conversant with Italian, English and Malayalam
23.6.12	State Police Chief requested to the Principal Secretary, Home(G) Department to take action for obtaining prosecution sanction from the Central government and also to designate the District sessions Court-1 Kollam to try the accused under the provisions of SUA
10.7.12	The accused were present in the Court. The counsel for the accused argued to get the entire

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	documents to be translated to Italian. The prosecution opposed their demand.
17.7.12	The Sessions Court Kollam dismissed the CrI. M.P 1637/12 filed by the accused
18.7.12	The Hon'ble Supreme Court of India dismissed the petition filed by the Dolphin Tankers for getting back the demand Draft they submitted before the Hon'ble High Court of Kerala for releasing the ship Enrica Lexie. Sri, M.T. George appeared for the State
24.7.12	The accused filed CrI.M.P No.1648/12 before the Hon'ble High Court for getting the translated version of charge and to stay the trial till it is obtained. The Court issued an interim stay till 30 th July 2012
18.7.12	Accused persons approached the Hon'ble supreme court for staying the trial procedures of Kollam court. The Court rejected their plea and posted the same to 6 th August 2012 of hearing.

17. **Jurisdiction:** That, as per section 1 of the Indian Penal Code it applies to the whole of India including land and the sea. There is no provision which excludes Contiguous Zone or the Exclusive Economic Zone of India as defined in the Maritime Zone of India Act from, the regime of Indian laws. The Exclusive Economic Zone of India extends upto 200 Nautical Miles where India has exclusive right to economic activities. Only Indian fisher men and fishing boats registered in India has the right to fish within the exclusive economic zone of India. All laws of India will extend upto

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Exclusive Economic Zone subject to limited exclusions with regard to the right of innocent passage to foreign vessels. As Indian laws extend upto the Exclusive Economic Zone of India, it is fallacious to allege that Indian Municipal Court has no jurisdiction or authority over an offence committed within the Contiguous Zone. Moreover, exercising powers conferred by Sub section (7) of Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, the Central Government has extended the operation of Indian Penal Code and Criminal Procedure Code to the Exclusive Economic Zones. Copy of the Notification No. S.O.671(E) dated 27.08.1981 is produced herewith and marked as **Annexure R/1**. In view of this notification extending the operation of Indian Penal Code and Criminal Procedure Code to the Exclusive Economic Zones, there is no ambiguity regarding the jurisdiction of Kerala Police to take cognizance of the crime reported to it and to proceed in accordance with law.

18. **Section 2 of IPC read with Section 7(7) of Act 80 of 1976.**

It is the submission of the respondent state of Kerala that police has jurisdiction to prosecute the offenders in this case who have committed a crime of murder within the Contiguous Zone. India has exclusive jurisdiction to investigate and try the offence in view of Sections 2, 3 and 4 of the Indian Penal Code.

Section 2 says '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 2 takes into its sweep an act or omission contrary to the provisions of the Code any act or omission by 'any person' by virtue of the fact that it has committed 'in India'.

Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976(Act 80 of 1976) is an Act promulgated by virtue of the

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powers under Article 297 of the Constitution of India, as a comprehensive legislation on the Law of the Sea. This Act limits the extent of Maritime zones and waters.

However, by virtue of Section 7(7) of the Act, the Central Government may by notification extend any enactment to the exclusive economic zone or any part thereof 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.

In exercise of the powers under Section 7(7) of the Act 80 of 1976, Ministry of Home Affairs, New Delhi had issued a notification as S.O. 671(E) dtd. 27.08.1980, extending the application of Indian Penal Code to the Exclusive Economic Zone. By virtue of this; even if a criminal Act has been Committed outside 12 nautical miles, if it has been committed within the limits of Exclusive Economic Zone (200 nm), it would be treated as a Crime Committed within India.

Without prejudice to the above contention, it is also the case of the state that India has jurisdiction to investigate and prosecute the offence in this case because of Section 4 of the IPC.

Section 4 of IPC

"Section (4) - Extension of code to extra-territorial offences:- the provisions of this code apply also to any offence committed by -

- (i) any citizen of India in any place without and beyond India.
- (ii) any person on any ship or air craft registered in India wherever it may be.
- (iii) Any person on any place without and beyond India committing offence targeting a computer resource located in India.

Explanation:- In this Section -

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- (a) the word 'offence' includes every act committed outside India which, if committed in India, would be punishable under this code.
- (b) The expression 'computer resource' shall have the meaning assigned to it in clause (k) of Section (1) of Section (2) of the Information Technology Act 2000."

Section 188 and 189 of Cr.P.C provides for trial of offenders in such case.

Section 4 of IPC deals with extra territorial operation of Indian Penal Code when an offence is committed by any citizen of India or by any person on a ship or aircraft registered in India. Two vessels are involved in the present incident. Italian Ship and Indian Boat. The crime has been committed, culminated and had its ultimate effect on the citizens of India travelling in the Indian boat. According to Section 4, a vessel registered in India, wherever it may be, would be treated as Indian Territory.

19. That as per Section 3 IPC any person liable by any Indian law for an offence committed beyond India shall be dealt with according to the provisions of Indian Penal Code for such act as if that act had been committed within India. The terms 'any person', 'any Indian law' etc. assumes significance under this Section. The term 'any person' would take in petitioners 2 and 3, though they are Italians. The term 'any Indian law' would mean that petitioners 2 and 3 would be liable not only by IPC but by any Indian law.

20. It is submitted that there is no manifest error in interpreting the Territorial Water's Act and Notification No. S.O 671(E) dated 27.08.1981. The allegation in the Special Leave Petition that the said Government Order and Territorial Water's Act

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were interpreted erroneously is absolutely incorrect and hence denied. The impugned act took place within the jurisdiction of India wherein the provisions of Indian Penal Code can be extended successfully. The allegation that under Territorial Water's Act, the exercise of jurisdiction in respect of maritime law can only be undertaken by the Central Government is totally incorrect and hence denied. By virtue of the proviso of Section 7 of the Territorial Waters Act, State of Kerala has empowered to exercise its jurisdiction over those areas upto 200 nautical miles. The contentions to the contrary are false and hence denied. The allegation that the said notification does not form part of the pleading before the High Court cannot be accepted at all.

21. The allegation that as per the office memorandum dated 22.02.1983, the said notification has only restricted interpretation is stoutly denied. Petitioner are estopped from taking such a contention since it is taken up for the first time in the above Special Leave Petition. It is worthwhile to mention that Notification No. SO 671(E) dated 27.08.1981 was issued by the Central Government in accordance with the proviso to Section 7(7) of the Territorial Water's Act. By virtue of this notification, the application of Indian Penal Code and Code of Criminal Procedure was extended upto 200 nautical miles. It is trite law that whenever the Government is amending, modifying, deleting certain conditions, or altering the existing law, the amended law has to be published. It is humbly submitted that there is nothing on record to suggest that S.O. No. 671(E) dated 27.08.1981 was subsequently modified, cancelled or amended. Therefore, petitioner's contention that State of Kerala has no jurisdiction is devoid of merits and liable to be rejected. In so far as S.O.671E is not modified, amended or cancelled, the State is perfectly justified in exercising its jurisdiction over petitioners 1 and 2 who committed the offence of murder of two persons which, is punishable under Section 302 of Indian Penal Code.

22. It is respectfully submitted that International Convention has no application in facts of this case. Even the UNCLOS recognizes Coastal State's authority

to invoke its Penal jurisdiction when the consequence of the criminal Act ensued to the territory of the Coastal State. Art. 97 and 58 of the UN Convention on the Law of the Sea, 1982 (UNCLOS) which are relied on by the petitioners are not applicable in the present case. In UNCLOS, Art. 27 and 28 speaks about Rules applicable regarding criminal jurisdiction and civil jurisdiction onboard a foreign ship. Art. 27 specifically states that the criminal jurisdiction of the coastal State should not be exercised onboard a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed onboard, the ship during its passage, except in some special cases. Art. 27 (1) (a) states the first exception that if the consequence of the crime extends to the coastal State, criminal jurisdiction of that State would be applicable onboard a foreign ship. The exception provided under this Article is on the basis of the effect principle. Article 97 speaks about collision and incidents of navigation in high seas whereas Art. 27 specifically deals with exercise of Criminal Jurisdiction. When there is a specific clause dealing with the subject matter, reliance on a clause which is not applicable to the present case is misconceived.

23. Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 provides for limits of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones of India. The 1981 Act defines the term 'maritime zones of India' as Territorial waters of India or the exclusive economic zone of India under section 2 (g). This Act contemplates regulation of fishing by foreign vessels and even powers of search and seizure and also offences and penalties as regards the exploration and fishing rights. Under 1976 Act the sovereignty of India extends up to territorial water (12 nm). As defined u/s 5, contiguous zone which extends up to 24 nm from the base line and the Govt. exercises powers with respect to matters such as security of India, immigration, sanitation, customs and other fiscal matters. Exclusive economic zone defined under section 7 extends upto 200 nm from

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the base line deals with sovereign rights for exploration, exploitation and conservation and management of natural resources and exclusive right and jurisdiction for scientific research; installation of structures, preservation and protection of marine environment and such other rights recognized by the International Law. Thus, when Sovereign India exercise its rights even over exclusive economic zone (fishing, marine, exploration rights etc.), it cannot be argued that State is powerless to take action if a crime has been committed on its citizens that too when the said crime is squarely covered under Art. 27 of the UNCLOS.

24. It is respectfully submitted that the police has acted with jurisdiction in this case. Since petitioners 1 and 2 has committed murder which was reported to the police, they rightly initiated action under Criminal Procedure Code. The arrest and detention of petitioners 2 and 3 is with authority of law. Even according, to the petitioners, the authorities in Italy considers that the act of petitioners 1 and 2 amount to murder. As the crime was committed within the contiguous zone, Criminal Law of India extends to those area and the police have the jurisdiction to take action against the petitioners 1 and 2.

25. It is submitted that this case does not involve any formation, enforcement or adjudication of international legal obligations. It is a pure and simple criminal case of murder to be investigated, tried and punished under the criminal law of India. Since the petitioners are accused arrested and detained for commission of a crime punishable under Section 302 of the Indian Penal Code, Geneva Conventions 1949 has no application in this case.

26. The petitioners are stretching the facts of this case a bit too far to suggest that it is a dispute between two sovereign states. It surprising that petitioner No.3 is taking upon it the responsibility of a cold blooded murder committed by petitioners 1 and 2. State of Kerala is not subjecting petitioner No.3 to its jurisdiction.

On the contrary, it is petitioner No.3 submitting itself to the jurisdiction of Indian Courts by intervening in this case and by filing the writ petition before the High Court and before this Hon'ble Court.

27. It is respectfully submitted that Union of India by notification No.S.O.671(E) dated 27.08.1981 has extended the operation of IPC and Cr.P.C to the Exclusive Economic Zone of India. As the operation of IPC and Cr.P.C has since been extended to the Exclusive Economic Zone, the investigation initiated by Kerala Police is perfectly legal and valid.

28. It is respectfully submitted that Article 94 and 97 of UNCLOS is applicable only if the offence is committed onboard of a foreign ship but if the offence is committed in the economic zone of India and the effect of the offence extends to the coastal state, then the criminal jurisdiction of the coastal state extends to such criminal acts.

29. The crime committed by petitioners 1 and 2 in this case is not an act of a sovereign state. They do not enjoy any sovereign immunity. The crime was committed within the Contiguous Zone of India. The criminal law of India extends to those areas and therefore the police is perfectly within its jurisdiction to arrest and detain the accused persons. The accused persons, petitioners 1 and 2 are liable to face criminal prosecution under Indian Law in as much as they committed murder of two Indian citizens within the territory of India. It is not a sovereign act and they are not entitled to any immunity. Unprovoked shooting of innocent Indian fishermen while fishing within the Contiguous Zone if to be treated as a sovereign act, it will lead to serious consequences. Indian fishermen will then be vulnerable to attack any time by guards of foreign merchant ships. The allegation that the accused persons were abducted and kept in illegal custody will amount to contempt of court and is highly objectionable. They were in judicial custody till 02.06.2012 and there is no question of

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any violation Article 21 of the Constitution of India. Accused were on a private arrangement between the Republic of Italy and the Ship owner's Association. They were not discharging any Sovereign Functions. Moreover, they cannot claim any immunity after committing a crime in India. Arguments based on United Nations convention on Jurisdictional Immunity of States and Their Property, 2004 is rebuttable since this convention has not been ratified even now. Italy has not signed it. Moreover, Article 12 of, the Convention states that a State cannot invoke Immunity in case of personal injuries and damage to property done on another State. Article 5 specifically states that a State enjoys immunity subject to the provisions of present convention. Part-III of the Convention (Art. 10 to Art. 17) deals with proceedings in which State Immunity cannot be invoked. Article 12 is such an exception.

30. That the concept of sovereignty as understood in public international law contemplates sovereignty to be an attribute of competence - both executive and legislative. Therefore, a provincial unit shall be sovereign, and not subject to the authority of the Central/federal Government, insofar as matters completely within its competence are concerned. Under the Constitution of India, in matters concerning public order and police, States have exclusive competence by virtue of Article 246 read with Entries 1 and 2, List II of the Seventh Schedule to the Constitution. It is thus submitted that in matters concerning public order and police, States have powers. Further, the mere factor of interpretation of international obligations of the Union by judicial authorities would not operate to limit or exclude such competence of the States to prosecute offences committed within their jurisdiction. In fact, it is settled practice in foreign jurisdictions for provincial units to prosecute criminal, offences committed within their jurisdiction. This principle is founded on the Doctrine of territoriality.

31. That it is further pertinent to point out that Petitioners No. 1 and 2 are in fact not entitled to any form of sovereign immunity. It is submitted that Petitioners No.

1 and 2 are in fact 'contracted agents' employed by private marine vessels for their security and protection, and such private agents do not ipso facto acquire the status of law-enforcement officials. Petitioners No. 1 and 2 thus cannot be said to be carrying out functions of a governmental nature, so as to possess sovereign immunity.

32. That even if it is assumed that Petitioners No. 1 and 2 are in fact discharging law-enforcement functions, it is submitted that the acts of Petitioners No. 1 and 2 being completely outside the scope of their function or employment, sovereign immunity cannot apply for such acts. It is a settled principle of international law that all privileges and immunities attached with acts on behalf sovereign nations are limited to the extent of functional necessity i.e. for actions beyond the scope of functional necessity, the immunity shall not apply. Regarding the limits of immunity, the rule is that immunity will govern and cover all acts and relationships entered into in the exercise of the essential functions of the nation. Thus, unlawful activities such as espionage, accepting a bribe, committing fraudulent acts within the headquarters district, assault & resistance with arrest, are not deemed to be official acts which attract immunity. In the present matter, the acts of the Petitioners No. 1 and 2 are completely beyond the purview of their official functions, and thus no sovereign immunity is attracted for the same.

33. The Petitioners have relied upon Articles 94 and 97 of UNCLOS to emphasize upon the primacy of the flag state jurisdiction and that the Petitioner No. 3 has the pre-emptive right to try Petitioner No. 1 & 2 in accordance with its local laws. It is respectfully submitted that Article 94 of UNCLOS talks about effective exercise of jurisdiction and control by a state over ships flying its flag, only in administrative, technical and social matters. It does not confer penal jurisdiction upon the flag state for trying a criminal act. It is pertinent to note that clause 7 of Article 94 says that in the eventuality of a marine casualty or incident of navigation on the high seas involving a ship flying

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its flag and causing loss of life and serious injury to nationals of another state, the flag state and the other state shall co-operate in the conduct of any inquiry held by that other state (in this case Union of India) into any such marine casualty, etc.

34. Article 97 of UNCLOS does confer penal jurisdiction upon the flag state but only with regard to matters of collision or any other incident of navigation concerning a ship on the High Seas. It nowhere contemplates conferring jurisdiction in a case of unprovoked killing of innocent nationals of the coastal state.

35. The law of the seas was codified by the First United Nations Conference on the Laws of the Seas at Geneva in 1958. However, the 1958 conference failed to reach agreement on a number of questions. Thereafter, a second Conference was held in 1960 which also failed to reach consensus. The third conference was convened in 1973, to draw up a new comprehensive convention on the law of the sea. The conference finally adopted the text of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982.

36. India being a signatory to the UNCLOS, already had a legislation, the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, (hereinafter referred to as 'the Territorial Waters Act of 1976'), which governed the field of Maritime Zones and reflects the principle norms laid down in UNCLOS.

37. Under the Territorial Waters Act of 1976, sub-section (2) of section 3 defines the limit of the territorial waters as the line every point of which is at a distance of 12 nautical miles from the nearest point of the appropriate baseline. Section 4(1) recognizes the right of a foreign ship to an innocent passage through the territorial waters. Explanation to sub-section (1) of section 4 referred above states, 'For the

purpose of this section, passage is innocent so long as it is not prejudicial to the peace, good order or security of India'. Section 5 defines the contiguous zone of India as an area beyond and adjacent to territorial waters but within 24 nautical miles from the nearest point of the baseline. The Exclusive Economic Zone of India has been defined under sub-section (1) of section 7 as an area beyond and adjacent to the territorial waters but within 200 nautical miles from the baseline.

38. Under sub-section (7) of section 7, the Central Government may, by notification in the official gazette extend any enactment to the Exclusive Economic Zone. In exercise of the aforementioned power, the Central Government has extended the applicability of the Indian Penal Code as well as Code of Criminal Procedure in the Exclusive Economic Zone of India. Hence, for any act, committed within the Exclusive Economic Zone, which amounts to commission of an offence under IPC, action can be taken by the state authorities as per the provisions of Cr.P.C.

39. It is submitted that on a fair construction of the provisions of sub-section (4) of Section 7 of the Act, territorial sovereignty, does exist with India in respect of both the mineral wealth as well as the power to regulate in respect of certain matters. It may also be pointed out that obviously if sovereign rights can be exercised in the Exclusive Economic Zone, it would be open to the Central Government to apply such laws as are necessary and consistent with the purposes of sub-section (4). It is submitted, therefore, that in the light of the above, there can be no doubt that the said incident did not take place in the high seas i.e. beyond 200 nautical miles and therefore the Indian State of Kerala did not lack any jurisdiction. It is respectfully assured that the trial of the accused will take place in accordance with due process of law which is guaranteed under the Indian Constitution. Final Report was already submitted before the Court having competent jurisdiction. However, it is expected that the Republic of Italy will respect Indian law and permit the law to take its own course.

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40. The answering respondent submits that death of two Indian citizen, if the same is occasioned by unnatural means i.e. caused by an offence, is a non-compoundable matter and must be tried in accordance with law. It is submitted that the attempts on the part of Republic of Italy to seek various disclaimers and even to compel the boat owner to enable an acquittal constitute direct interference in the administration of the criminal justice system. The Republic of Italy, during the hearing of the SLP (C) No. 11942 of 2012, has fairly stated before this Hon'ble Court that the settlements may be set aside which statement has been taken on record. Although the said statement is accepted by the State of Kerala, the Petitioner continues to question the jurisdiction of the Indian Courts as well as the State of Kerala.

41. The State of Kerala submits that death of an Indian citizen, if the same is occasioned by unnatural means i.e. caused by an offence, is a non-compoundable matter and must be tried in accordance with law. It is submitted that the attempts on the part of Republic of Italy to seek various disclaimers and even to compel the boat owner to enable an acquittal constitute direct interference in the administration of the criminal justice system.

42. I crave leave and liberty to file a fuller and more detailed reply if called upon to do so.

43. In the judgment *Aban Loyd Chiles offshore Ltd vs. Union of India*, this Hon'ble Court has held that "The police and revenue jurisdiction of the coastal state is extended to the contiguous zone as well". Therefore, the special, leave petition filed by the petitioners herein is devoid of merits and is liable to be dismissed. It is prayed accordingly.

DEPONENT**VERIFICATION**

I, the above deponent presently at Ernakulam do hereby verify that the contents of my above affidavit are true and correct to my knowledge and belief based on the records available in my office. Not part of it is false and nothing material has been concealed there from. Verified at Ernakulam on this the 10 day of August, 2012.

DEPONENT

Solemnly affirmed and signed before me by the Deponent whom I know on this the 10th day of August, 2012 at the office of the Advocate General, Ernakulam.

" True Copy "

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ANNEXURE-A-11Da: 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'.

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