Republic Of Italy Thr. Ambassador

v.

Union Of India

(Supreme Court Of India)

HON'BLE CHIEF JUSTICE MR. ALTMAS KABIR HON'BLE MR. JUSTICE CHELAMESWAR

Writ Petition (Civil) No. 135 Of 2012 With Special Leave Petition (C) No. 20370 Of 2012 | 18-01-2013

Altmas 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, Massimilano 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 sub-marines and other underwater vehicles) are entitled to a right of innocent passage through the Territorial Waters, so long as such passage was innocent and not prejudicial to the peace, good order or security of India.

19. Apart from the above, Mr. Salve also pointed out that Section 6 of the aforesaid Act provides that the Continental Shelf of India comprises the seabed and subsoil of the submarine areas that extend beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baseline referred to in Sub-section (2) of Section 3, where the outer edge of the continental margin does not extend up to that distance. Sub-

section (2) provides that India has and always had full and exclusive sovereign rights in respect of its Continental Shelf.

20. According to Mr. Salve, the incident having occurred at a place which was 20.5 nautical miles from the coast of India, it was outside the territorial waters though within the Contiguous Zone and the Exclusive Economic Zone, as indicated hereinabove. Accordingly, by no means could it be said that the incident occurred within the jurisdiction of one of the federal units of the Union of India. Mr. Salve urged that the incident, therefore, occurred in a zone in which the Central Government is entitled under the Maritime Zones Act, 1976, as well as UNCLOS, to exercise sovereign rights, not amounting to sovereignty. Mr. Salve submitted that the Act nowhere contemplates conferral of jurisdiction on any coastal unit forming part of any Maritime Zone 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 part facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or part 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] : (AIR 2008 SC (Supp) 1066), 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 SCC) : (paras 70 and 86 of AIR 2008 SC (Supp) 1066) 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] : (AIR 1969 SC 783), 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] : (AIR 1997 SC 3011 : 1997 AIR SCW 3043), 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, :-

(i) Whether Indian Courts have territorial jurisdiction to try Petitioner Nos.2 and 3 under the provisions of the Indian Penal Code, 1860?

(ii) If so, whether the Writ Petitioners are entitled to claim sovereign immunity?

48. Mr. Banerji submitted that stripped of all embellishments, the bare facts of the incident reveal that on 15th February, 2012, FIR No.2 of 2012 was registered with the Coastal Police Station, Neendakara, Kollam, under Section 302 read with Section 34 I.P.C. alleging that a fishing vessel, "St. Antony", was fired at by persons on board a passing ship, as a result of which, out of the 11 fishermen on board, two were killed instantaneously. It was alleged that the ship in question was M.V. 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 SCC) : (paras 87 to 89 off AIR (supp)) of the decision in Aban Loyd's case (AIR 2008 SC (Supp) 1066) (supra) wherein this Court had re-emphasised the position that the Court could look into the provisions of international treaties, and that such an issue is no longer res integra. In Gramophone Co. of India vs. Birendra Bahadur Pandey [(1984) 2 SCC 534] : (AIR 1984 SC 667), 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 (AIR 2008 SC (Supp) 1066) (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 Hukumchand Mills Vs. State of Madhya Pradesh [AIR 1964 SC 1329] and N. Mani Vs. Sangeetha Theatre & Ors. [(2004) 12 SCC 278], Mr. Banerji urged that if the executive authority had the requisite power under the law, and if the action taken by the executive could be justified under some other power, mere reference to a wrong provision of law would not vitiate the exercise of power by the executive, so long as the said power exists.

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) I.P.C., wherein the expression "registered in India" had been used, but the same would have no significance to the facts of this case, since the said provisions were not being invoked for the purposes of this case. The learned ASG contended that even if the fishing vessel had sailed beyond its permitted area of fishing, the same was a matter of evidence, which stage had yet to arrive. Mr. Banerji contended that, on the other hand, what was more important were the provisions of the Maritime Zones of India (Regulation of Fishing 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 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. Benerji 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 Mobarik Ali Ahmad Vs. State of Bombay [AIR 1957 SC 857], wherein this Court had held that the exercise of criminal jurisdiction depends on the location of the offence, and not on the nationality of the alleged offender or his corporeal presence in India. This Court pointed out that the plain meaning of the phrase "every person" is that it embraces all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed, except such as may be specially exempted from criminal proceedings or punishment by virtue of specific provisions of the Constitution or any statutory provisions or some well-recognised principle of international law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.

68. Going a step further, Mr. Banerji also referred to the United Nations Privileges and Immunities Act, 1947, and the Diplomatic Relations (Vienna Convention) Act, 1972, which

gave certain diplomats, missions and their members diplomatic immunity even from criminal jurisdiction. Mr. Banerji submitted that the 1972 Act had been enacted to give effect to the Vienna Convention on Diplomatic Relations, 1961. The effect of Section 2 of the Act is to give the force of law in India to certain provisions set out in the Schedule to the Act. Mr. Banerji specifically referred to Article 31 of the Convention, which is extracted hereinbelow :-

"ARTICLE 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy 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 or 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.

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. (AIR 2008 SC (Supp) 1066) 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 Family 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.

CHELAMESWAR, J: -

104. I agree with the conclusions recorded in the Judgment of the Hon’ble Chief Justice. But, I wish to supplement the following.

105. The substance of the submission made by Shri Harish Salve, learned senior counsel for the petitioners is;

(1) The incident in question occurred beyond the territory of India to which location the sovereignty of the country does not extend; and Parliament cannot extend the application of the laws made by it beyond the territory of India. Consequentially, the two marines are not amenable to the jurisdiction of India;

Alternatively it is argued; (2) that the incident, which resulted in the death of two Indians is an "incident of navigation" within the meaning of Article 97 [Article 97, Penal jurisdiction in matters of collision or any other incident of navigation 1. In the event of a collision or any other incident of navigation concerning a ship on the high Seas, involving the penal or disciplinary responsibility of the Master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national. 2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them. 3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.] of the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) and therefore, no penal proceedings may be instituted against the two marines except before the Judicial authorities of the 'Flag State' or the State of which the marines are nationals.

106. 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.

107. That leads me to the question as to what is the territory of the Sovereign Democratic Republic of India?

108. The territory of India is defined under Article 1;

"1. Name and territory of the Union.-

1) India, that is Bharat, shall be a Union of States.

2) The States and the territories thereof shall be as specified in the First Schedule.

3) The territory of India shall comprise—

(a) The territories of the States;

(b) The Union territories specified in the First Schedule; and

(c) such other territories as may be acquired."

But that deals only with geographical territory. Article 297 deals with 'maritime territory'. [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 Word 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 super ambient 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)]

109. 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.

110. Two things follow from the above declaration under Article 297. Firstly, India asserts its authority not only on the land mass of the territory of India specified under Article 1, but also over the areas specified under Article 297. It authorises the Parliament to specify the limits of such areas (maritime zones). The nature of the said authority may not be the same for the various maritime zones indicated in Article 297. However, the preponderance of judicial authority appears to be that the sovereignty of the coastal state extends to the territorial waters. [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)]

111. The sovereignty of a Nation/State over the landmass comprised within the territorial boundaries of the State, is an established principle of both constitutional theory and International Law. The authority of the Sovereign to make and enforce laws within the territory over which the sovereignty extends is unquestionable in constitutional theory. That the sovereignty of a 'coastal State' extends to its territorial waters, is also a well accepted

principle of International Law [It is well established that the coastal state has sovereignty over its territorial waters, the sea-bed and subsoil underlying such waters, and the air space above them, subject to the obligations imposed by international law. Recently, in the North Sea Continental Shelf cases, the International Court of Justice declared that a coastal state has "full sovereignty" over its territorial sea. This principle of customary international law has also been enshrined in article 1 of the Geneva Convention, and remains unaffected in the draft convention. ----from The New Law of Maritime Zones by P.C.Rao (Page 22)] though there is no uniformly shared legal norm establishing the limit of the territorial waters - "maritime territory". Whether the maritime territory is also a part of the national territory of the State is a question on which difference of opinion exists. Insofar as this Court is concerned, a Constitution Bench in B.K.Wadeyar v. M/s. Daulatram Rameshwarlal (AIR 1961 SC 311) held at para 8 as follows:

"..... These territorial limits would include the territorial waters of India....."

112. Insofar the Republic of India is concerned, the limit of the territorial waters was initially understood to be three nautical miles. It had been extended subsequently, up to six nautical miles by a Presidential proclamation dated 22.3.52 and to twelve nautical miles by another proclamation dated 30.9.67. By Act 80 of 1976 of the Parliament, it was statutorily fixed at 12 nautical miles. The Act also authorizes the Parliament to alter such limit of the territorial waters.

113. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 80 of 1976 (hereinafter referred to as 'the Maritime Zones Act'), was made by the Parliament in exercise of the authority conferred under Article 297. Except Sections 5 and 7, rest of the Sections of the Act, came into force on 26-08-1976. Sections 5 and 7 came into force, subsequently, on 15-01-1977, by virtue of a notification contemplated under Section 1(2). Section 3(1) declares that the sovereignty of India extends, and has always extended, to the territorial waters of India:

"The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the air space over, such waters."

Under sub-section (2), the limit of the territorial waters is specified to be twelve nautical miles from the nearest point of the appropriate baseline:

"The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline."

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."

114. Section 5 defines contiguous zone to be an area beyond and adjacent to the territorial waters extending up to twenty-four nautical miles from the nearest point of the appropriate baseline:

"Section 5(1): The contiguous zone of India (hereinafter referred to as the contiguous zone) is and 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 [..... Central Government may whenever it considers necessary so to do having regard to the International Law and State practice alter by notification in the Official Gazette the limit of .....] under Sections 3(3), 5(2) and 7(2) respectively to alter the limits of territorial waters, contiguous zone and exclusive economic zone with the approval of both the Houses of the Parliament, the law does not authorise the alteration of the limit of the continental shelf.

115. While Section 3 declares that "the sovereignty of India extends, and has always extended, to the territorial waters", no such declaration is to be found in the context of contiguous zone. On the other hand, with reference to continental shelf, it is declared under Section 6(2) that "India has, and always had, full and exclusive sovereign rights in respect of its continental shelf". With reference to exclusive economic zone, Section 7(4)(a) declares that "in the exclusive economic zone, the Union has sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents."

116. 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) [Section 6(3)(a) : sovereign rights for the purpose of exploration, exploitation, conservation

and management of all resources.] and 7(4)(a), (Whether or not the sovereignty of India extends beyond its territorial waters and to the contiguous zone or not) [..... the jurisdiction of the coastal state has been extended into areas of high seas contiguous to the territorial sea, albeit for defined purposes only. Such restricted jurisdiction zones have been established or asserted for a number of reasons.....

without having to extend the boundaries of its territorial sea further into the high seas.....

such contiguous zones were clearly differentiated from claims to full sovereignty as parts of the territorial sea, by being referred to as part of the high seas over which the coastal state may exercise particular rights. Unlike the territorial sea, which is automatically attached to the land territory of the state..... — from International Law by Malcolm N. Shaw [sixth edition](page 578 - 579)], in view of the scheme of the Act, as apparent from Section 5(5)(a) [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.] and Section 7(7)(a) [Section 7(7)(a) : extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof in the exclusive economic zone or any part thereof.], the application of "any enactment for the time being in force in India" (like the Indian Penal Code and the Code of Criminal 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.

117. 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."

117A. Under the Constitution, the legislative authority is distributed between the Parliament and the State Legislatures. While the State legislature's authority to make laws is limited to the territory of the State, Parliament's authority has no such limitation.

118. Though Article 245 [Article 245 : Extent of laws made by Parliament and by the Legislatures of State.—

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.] speaks of the authority of the Parliament to make laws for the territory of India, Article 245(2) expressly declares - "No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation". In my view the declaration is a fetter on the jurisdiction of the Municipal Courts 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.

119. 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.

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

But that principle is not accepted as an absolute principle any more. The increased complexity of modern life emanating from the advanced technology and travel facilities and the large cross border commerce made it possible to commit crimes whose effects are felt in territories beyond the residential borders of the offenders. Therefore, States claim jurisdiction over; (1) offenders who are not physically present within; and (2) offences committed beyond-the-territory of the State whose "legitimate 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" [P C Rao-"Indian Constitution and International Law", page 42.12].

121. The protection of Articles 14 and 21 of the Constitution is available even to an alien when sought to be subjected to the legal process of this country. This court on more than one occasion held so on the ground that the rights emanating from those two Articles are not confined only to or dependent upon the citizenship of this country [See AIR 1955 SC 367 = Hans Muller of Nuremberg v. Superintendent, Presidency Jail Calcutta para 34.

also (2002) 2 SCC 465 : (AIR 2000 SC 988 : 2000 AI SCW 649) = Chairman, Railway Board & Others -vs- Mrs. Chandrima Das and Others paras 28 to 32 : (of SCC) : (Paras 29 to 33 of AIR, AIR SCW)]. 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.

122. Section 2 read with 4 of the Indian Penal Code [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 therefore, 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.] makes the provisions of the Code applicable to the offences 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 [Mobarik Ali Ahmed v. State of Bombay (AIR 1957 SC 857, 870) "on a plain reading of section 2 of the Penal Code, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside".]. Such a declaration was made as long back as in 1898. By an amendment in 2009 to the said Section, the Code is extended to any person in any place "without and beyond the territory of India", committing an offence targeting a computer resource located in India.

123. 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:

"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.

124. 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)

125. The expression "ship" for the purpose of the said Act is defined under Section 2(h):

"(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."

126. Parliament asserted its authority to apply the penal provisions against persons, who "hijack" (described under Section 3 [3. Hijacking.- (1) whoever on board an aircraft in flight, unlawfully, by force or threat of force or by an other form of intimidation, seizes or exercises control of that aircraft, commits the offence of hijacking of such aircraft.

(2) Whoever attempts to commit any of the acts referred to in sub-section(1) in relation to any aircraft, or abets the commission of any such act, shall also be deemed to have committed the offence of hijacking of such aircraft.

(3) For the purposes of this section, an aircraft shall be deemed to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, and in the case of a forced landing, the flight shall be deemed to continue until the competent authorities of the country in which such forced landing takes place take over the responsibility for the aircraft and for persons and property on board.] of the Anti-Hijacking Act, 1982) an aircraft. The Act does not take into account the nationality of the hijacker. The Act expressly recognises the possibility of the commission of the act of hijacking outside India and provides under Section 6 that the person committing such offence may be dealt with in respect thereof as if such offence had been committed in any place within India at which he may be found. Similarly, Section 3 of the Geneva Conventions Act, 1960, provides that "any person commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions", either "within or without India", shall be punished.

127. Thus, it is amply clear that Parliament always asserted its authority to make laws, which are applicable to persons, who are not corporeally present within the territory of India (whether are not they are citizens) when such persons commit acts which affect the legitimate interests of this country.

128. In furtherance of such assertion and in order to facilitate the prosecution of the offenders contemplated under Section 4(1) & (2) of the Indian Penal Code, Section 188 of the Code of Criminal Procedure [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.] prescribes the jurisdiction to deal with such offences. Each one of the above referred enactments also contains a provision parallel to Section 188.

129. Such assertion is not peculiar to India, but is also made by various other countries. For example, the issue arose in a case reported in R v. Baster [1971] 2 All ER 359 (C.A.). The accused posted letters in Northern Ireland to football pool promoters in England falsely claiming that he had correctly forecast the results of football matches and was entitled to winnings. He was charged with attempting to obtain property by deception contrary to Section 15 of the Theft Act 1968. The accused contended that when the letters were posted in Northern Ireland the attempt was complete and as he had never left Northern Ireland during the relevant period, the attempt had not been committed within the jurisdiction of the English Courts. It was held:

"The attempt was committed within the jurisdiction because an offence could be said to be committing an attempt at every moment of the period between the commission of the proximate act necessary to constitute the attempt and the moment when the attempt failed; accordingly the accused was attempting to commit the offence of obtaining by deception when the letter reached its destination within England and thus the offence was committed within the 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)

130. 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])

131. 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.

132. 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] : (AIR 2008 SC (supp) 1066), 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.

133. No doubt, this Court did make certain observations to the effect that under the Maritime Zones Act;

"..... India has been given only certain limited sovereign rights and such limited sovereign rights conferred on India in respect of continental shelf and exclusive economic zone cannot be equated to extending the sovereignty of India over the continental shelf and exclusive economic zone as in the case of territorial waters....."

134. 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.

135. At any rate, the issue is not whether India can and, in fact, has asserted its sovereignty over areas beyond the territorial waters. The issue in the instant case is the authority of the Parliament to extend the laws beyond its territorial waters and the jurisdiction of this Court to examine the legality of such exercise. Even on the facts of Aban Loyd case, it can be noticed that the operation of the Customs Act was extended beyond the territorial waters of India and this Court found it clearly permissible although on the authority conferred by the Maritime Zones Act. The implications of Article 245(2) did not fall for consideration of this Court in that Judgment.

136. 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.

137. The expression "incident of navigation" occurring under Article 97 of the UNCLOS is not a defined expression. Therefore, necessarily the meaning of the expression must be ascertained from the context and scheme of the relevant provisions of the UNCLOS. Article 97 occurs in Part-VII of the UNCLOS, which deals with "HIGH SEAS". Article 86 stipulates the application of Part-VII. It reads as follows:

"The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58."

Further, Article 89 makes an express declaration that:

"No State may validly purport to subject any part of the high seas to its sovereignty."

138. 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 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 context of the incident in question. For that reason, the second submission of Shri Salve should also fail.