Finally, in admitting the claimants' denial-of-justice claim, the tribunal applied the customary international law notion of futility of exhaustion of local remedies, which was developed in the context of diplomatic protection. Here the tribunal cut short the allowance of eighteen months for recourse to local courts under Article 10 of the BIT because in the circumstances such recourse would have been "useless, time consuming and costly" (para. 234). Since the BIT itself contained no such futility exception, this holding, as discussed above, can be seen as the tribunal's use of Article 31(3)(c) of the Vienna Convention to look to broader relevant rules of international law so as to apply the provisions of the pertinent treaty.

Now that the proceedings will progress to the merits phase, all eyes remain focused on how the tribunal will ultimately decide the case.

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*Law of the sea—sovereign immunity—waiver of immunity—binding effect of ITLOS decisions—domestic incorporation of international law*

REPUBLIC v. HIGH COURT ACCRA, *EX PARTE* ATTORNEY GENERAL. Civil Motion No. J5/10/2013. *At* http://pca-cpa.org.
Supreme Court of Ghana, June 2, 2013.

In a ruling on Ghana's attachment of an Argentine warship, the Supreme Court of Ghana, on June 2, 2013, held that the warship was immune from enforcement of a foreign judgment, not as a matter of international law but as a matter of Ghanaian public policy.[1] While Argentina had validly waived the immunity of the warship by contract, the courts of Ghana would decline to enforce the waiver to preserve the state's peace and security. The Supreme Court's decision makes important contributions to three areas of law: the domestic incorporation of international law and the effects of international judicial decisions on domestic courts, the construction of advance sovereign immunity waivers, and the authority of states to deny recognition to international law rights on the basis of domestic public policy.

NML Capital, a holder of Argentine sovereign bonds, had sought enforcement in Ghana of a judgment it had won against Argentina in the United States District Court for the Southern District of New York arising from that state's default. NML Capital filed for a temporary injunction attaching the frigate *Libertad*, a three-masted Argentine ship used for naval exercises, which was docked in Accra (pp. 10–11).[2] Relying on a broad waiver provision in both the Argentine bonds and the agreement under which they were issued, the Fiscal Agency Agreement (FAA), the Commercial Division of the High Court of Accra granted the interlocutory injunctions on the basis that Argentina had waived any sovereign immunity from jurisdiction and enforcement that would otherwise protect the *Libertad*.[3] The High Court did not question

[1] Republic v. High Court Accra, *ex parte* Attorney General, Civ. Motion No. J5/10/2013 (Sup. Ct. June 2, 2013) (Ghana), *at* http://pca-cpa.org.

[2] For an account of NML Capital's attempts at enforcement of the New York judgment in France, see Alexander Blumrosen & Fleur Malet-Deraedt, Case Report: NML Capital Ltd. v. Republic of Argentina, 107 AJIL 638 (2013).

[3] Fiscal Agency Agreement Between the Republic of Argentina and Bankers Trust Company, Fiscal Agent (Oct. 19, 1994), *at* http://www.shearman.com/files/upload/Fiscal-Agency-Agreement.pdf.

that in general Argentina and its property were entitled to sovereign immunity. But it relied on "the universally recognized" right of sovereign states to waive their immunity by contract (p. 13)[4] and interpreted the waiver to mean that "other courts" to which Argentina had agreed to submit for enforcement of a final New York judgment included the Ghanaian courts (p. 12). The High Court observed that the United Kingdom (UK) Supreme Court had concluded, in a proceeding brought in England to enforce the same judgment, that Argentina had waived its relevant immunities through the broad provision in the FAA and the bonds (pp. 14–15).[5] The Ghanaian court thus determined that the matter was *res judicata*, as a decision between the same parties on the same issue rendered by a court of competent jurisdiction (p. 15).

In response, Argentina filed for international adjudication before the International Tribunal for the Law of the Sea (ITLOS), which issued a decision on provisional measures on December 15, 2012, ordering Ghana to release the ship (pp. 15–16).[6] Shortly thereafter, the attorney general of Ghana filed the present motion with the Supreme Court seeking its cooperation in enabling compliance with the ITLOS order. He requested an order of certiorari to quash the temporary injunctions arresting the ship and an order prohibiting all lower courts from hearing any other actions in the suit in which the injunctions had been issued (p. 9).

In its ruling, the Supreme Court first explained that Ghana's approach to incorporating international law into Ghanaian municipal law is typical of common law jurisdictions: customary international law is "part of Ghanaian law," incorporated into domestic common law through judicial decisions to the extent that it does not conflict with domestic statutory or case law (p. 2). Treaties, by contrast, are treated according to the dualist approach: they do not change municipal law, and thus may not be applied by domestic courts unless incorporated by appropriate legislation (pp. 2, 5). The Court accordingly held that orders of a treaty-based international tribunal do not bind Ghanaian courts absent implementing legislation (p. 3). Moreover, rectification of a lower court decision with a *subsequent* conflicting order of an international tribunal is not a basis for granting certiorari, a remedy reserved for fundamental errors of the lower courts (*id.*).

The Court also rejected the government's arguments that several provisions of the Ghanaian Constitution incorporated the UN Convention on the Law of the Sea into Ghanaian law. Article 75 of the Constitution provides that treaties must be ratified by Parliament and sets out the methods of ratification (pp. 3–4). The Court reasoned, however, that mere ratification does not equal incorporation into domestic law and found that Parliament had not incorporated the relevant provisions of the Law of the Sea Convention (pp. 4–5). It further considered the effect of constitutional provisions requiring the government to "promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means" and "to conduct its international affairs in consonance with the accepted principles of public international law" (pp. 6–7). Nothing in those provisions permitted the courts to enforce a treaty without legislative implementation; rather, such an interpretation would "give the Executive an opportunity to bypass Parliament in changing the rights and obligations of citizens and residents of Ghana" (p. 7). The Court thus elaborated the principle that a breach of the state's

[4] Quoting NML Capital Ltd. v. Republic of Arg., No. RPC/343/12, at 12 (High Ct. Accra Oct. 11, 2012), *at* http://www.itlos.org/index.php?id=222#c1081.

[5] NML Capital Ltd. v. Republic of Arg., [2011] UKSC 31, [2011] 2 A.C. 495 (on appeal from Eng.).

[6] *See* "ARA Libertad" (Arg. v. Ghana), Case No. 20, Provisional Measures (ITLOS Dec. 15, 2012) (reported by James Kraska at 107 AJIL 404 (2013)).

international obligations does not require any alteration of the usual functioning of the domestic constitutional structure, even where the Constitution expressly imposes obligations on the government concerning its conduct in the international realm.

The Court went on to invoke the decision of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State* (*Germany v. Italy)* to support its dualist view. The ICJ had required Italy to remedy its violation of Germany's sovereign immunity, effected through Italian court decisions, "by enacting appropriate legislation, or by resorting to other methods of its choosing," to nullify the offending decisions (p. 8).[7] The Supreme Court observed that the Italian legislature had subsequently enacted responsive legislation, and it urged the government of Ghana to do the same (*id.*). The Court thus concluded that, in the absence of appropriate legislation, it lacked jurisdiction for the purpose of bringing Ghana into compliance with the ITLOS decision.

It next turned to a possible alternative basis for jurisdiction: the commission by the High Court of a fundamental error of law by incorrectly interpreting Argentina's waiver of sovereign immunity (p. 9). It agreed with the High Court's conclusion that whether Argentina had waived its sovereign immunity concerning a proceeding to enforce the New York judgment was *res judicata* through issue estoppel by virtue of the UK Supreme Court decision mentioned above (pp. 15–22). But a determinative issue remained: whether, as a matter of public policy, Ghanaian courts should give effect to the waiver of immunity over a military asset.

The Court recalled the conflict-of-laws doctrine that permits the courts of a jurisdiction to decline to enforce a right arising under the law of a foreign country if enforcement of that right would be inconsistent with the fundamental public policy of the forum state (p. 22). It determined that the military nature of the asset against which execution was sought gave rise to a public policy issue because "it imperils, to a degree, the peace and security of Ghana" (p. 23). In reaching that conclusion, the Court cited statutes of both the United States and Canada that forbid the attachment of military assets of a foreign state (pp. 23–24). While Ghana has not enacted a parallel statute, the Court found that it could recognize such a rule judicially because the law "ought to allow the exclusion of foreign law, on public policy grounds, where the enforcement of a right under that foreign law contributes to [a] risk of military conflict or insecurity" (p. 24). The Court recognized that this was a "novel perspective" on the scope of the conflict-of-laws public policy doctrine but reasoned that "[t]he fundamental public policy of the State should surely include the need to preserve its security" *(id.)*. It thus concluded that the ship was not subject to attachment in Ghana.

* * * *

On the incorporation of international judicial decisions into domestic law, the Ghanaian Court's approach hews more closely in principle to that of the U.S. Supreme Court after *Avena (Mexico v. United States)*[8] than to that of the Italian Court of Cassation after the ICJ's decision in *Germany v. Italy*. Like the Italian Court, however, the Ghanaian Court—while denying it was bound to do so—ultimately issued a decision enabling compliance with the international judicial decision.

[7] Quoting Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), para. 139(4) (Int'l Ct. Justice Feb. 3, 2012) [hereinafter *Germany v. Italy*].

[8] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ REP. 12 (Mar. 31).

https://doi.org/10.5305/amerjintelaw.108.1.0073 Published online by Cambridge University Press

In *Avena*, the ICJ held the United States to be in breach of its obligations under the Vienna Convention on Consular Relations for failing to inform Mexican nationals of their right to consular representation during the criminal process.[9] The ICJ ordered the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals."[10] Nonetheless, the U.S. Supreme Court refused to order Texas courts to abide by the *Avena* judgment despite official requests for review and reconsideration by Presidents Bush and Obama.[11] The U.S. Supreme Court rested its conclusion on the dualist view that the ICJ's decision was not directly enforceable before state courts because the treaties granting ICJ jurisdiction were not self-executing and Congress had failed to enact implementing legislation.[12] Constitutionally, only congressional action, and not the successive presidents' memorandums, could override state law.[13] The Ghanaian Supreme Court similarly emphasized the sanctity of the domestic constitution even in the face of an admitted violation of international law. Any action taken to remedy the international breach must be carried out in accordance with the Constitution, which limited the Court's power. But in *Marbury*-like fashion, that acknowledgment of self-limitation served to affirm the Court's supreme authority to interpret and apply the Constitution.

In *Albers*, the Italian Court of Cassation gave effect to the ICJ's order in *Germany v. Italy* that Italy restore the status quo ante.[14] The Italian Court overturned the decision of a lower court and its own precedent on the basis of the ICJ decision. The Court affirmed the "total autonomy of the jurisdictional function" of Italian courts under domestic law and asserted that it was not bound by the ICJ decision.[15] It explained, however, that, despite its autonomy, it would use its discretion to implement the decision in recognition of the ICJ's authority to discern principles of international law.[16] Whereas the Supreme Court of Ghana held that it lacked the constitutional authority to implement the ITLOS decision under Ghana's dualist system, the Italian Court apparently saw itself as neither bound by the international decision nor precluded constitutionally from adopting the decision as it deemed appropriate. It is thus difficult to place Italy's approach within the monist/dualist framework. Nevertheless, like the Italian Court, the Ghanaian Court denied the existence of any obligation to comply with the international decision but ultimately did comply. In that respect, both decisions can be viewed as face-saving: the courts reasserted their authority while avoiding further legal conflict.

The most important contribution of the Ghanaian Supreme Court's decision concerns which source of law governs the construction of advance waivers of sovereign immunity. The French Court of Cassation had previously considered the question in *NML Capital v. Argentina*, an action brought to enforce the same New York judgment at issue before the Supreme

[9] *Id.*, para. 153(4).

[10] *Id.*, para. 153(9).

[11] *See* Garcia v. Texas, 131 S.Ct. 2866 (2011); Medellín v. Texas, 554 U.S. 759 (2008); Medellín v. Texas, 552 U.S. 491 (2008) [hereinafter *Medellín I*].

[12] *See Medellín I*, *supra* note 11, at 504–14.

[13] *See id.* at 523–27.

[14] *See supra* text at and note 7.

[15] Criminal Proceedings Against Albers, Cass., sez. un. pen., 9 agosto 2012, n. 32139, 95 RIVISTA DI DIRITTO INTERNAZIONALE 1196, 1205 (2012), *quoted in* Filippo Fontanelli, Case Report: Criminal Proceedings Against Albers, 107 AJIL 632, 635 (2013).

[16] *Id.*, 95 RIVISTA DI DIRITTO INTERNAZIONALE at 1205.

Court of Ghana.[17] The primary distinction between the two Courts' approaches is that the French Court interpreted Argentina's waiver in light of what it said was customary international law as reflected in the 2004 UN Convention on Jurisdictional Immunities.[18] Alexander Blumrosen and Fleur Malet-Deraedt have rightly pointed out the weaknesses of the French Court's analysis.[19] In particular, its conclusion that *as a matter of customary international law* waivers of immunity from enforcement, to be effective regarding categories of assets listed in Article 21 of the UN Convention, must specifically name those categories is dually flawed.

First, the French Court's interpretation of the Convention is questionable. Article 21 lists categories of property, including military property, that "shall not be considered as property specifically in use or intended for use by the State for other than governmental non-commercial purposes." The article therefore concerns the restrictive theory of immunity, an issue distinct from explicit advance waivers of immunity. It expressly states that it is without prejudice to the provision permitting advance waiver by written contract. The Court presumably relied on the International Law Commission's commentaries to the 1991 draft articles on jurisdictional immunities, which state that waivers concerning assets within the listed categories must specifically identify the category. Second, besides the 1991 draft commentaries' disputable value as an interpretive aid to the final 2004 Convention,[20] the commentaries do not themselves offer any basis to conclude that this statement reflects the content of customary international law.[21] The French Court adduced no subsequent practice or *opinio juris* supporting such a finding.

To the contrary, the state practice that exists is found in sovereign immunity statutes, which vary concerning whether and in what circumstances to give effect to immunity waivers vis-à-vis various categories of assets, including military property. The Ghanaian Court relied on the statutory law of the United States and Canada, which absolutely prohibits execution against or attachment of foreign military assets.[22] In contrast, Australia's Foreign Sovereign Immunities Act will recognize a waiver of immunity from enforcement concerning military property, but only if the waiver "expressly designates the property as property to which the waiver applies."[23] The immunity statutes of other states do not explicitly prohibit enforcement of waivers with

[17] NML Capital Ltd. v. Republic of Arg., Cour de cassation [supreme court for judicial matters] 1e civ., Mar. 28, 2013, JOURNAL DU DROIT INTERNATIONAL 2013, 899, note Cuniberti, *available at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/ (Nos. 11-10.450, 11-13.323, 10-25.938).

[18] UN Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38, annex (Dec. 2, 2004) [hereinafter 2004 Convention] (not yet in force).

[19] Blumrosen & Malet-Deraedt, *supra* note 2, at 641–44.

[20] The commentaries were not adopted with the 2004 Convention, and the final convention differs from the earlier draft articles. *See* Draft Articles on Jurisdictional Immunities of States and Their Property and Commentaries Thereto, *in* Report of the International Law Commission on the Work of Its Forty-Third Session, [1991] 2 Y.B. Int'l L. Comm'n, pt. 2, at 13, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), UN Sales No. E.93.V.9 (Part 2) [hereinafter commentaries]; 2004 Convention, *supra* note 18. The commentaries' preference for specific waivers contravenes the express language of the 2004 Convention under Article 21(2) that Article 21 is without prejudice to Article 19's waiver provisions. Furthermore, the legislative history indicates that the drafters of the 2004 Convention considered and rejected the requirement of a specific waiver for Article 21 categories. *See General Introduction* to THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY at xxxvii, xxxix–xl (Roger O'Keefe & Christian J. Tams eds., 2013); Chester Brown & Roger O'Keefe, *Article 21*, *in id.* at 334, 346; Cuniberti, *supra* note 17, paras. 18–20.

[21] *See* commentaries, *supra* note 20, Art. 19, para. 2, at 58–59.

[22] *See* U.S. Foreign Sovereign Immunities Act, 28 U.S.C. §1611(b) (2012); Canada State Immunity Act, R.S.C. 1985, c. S-18, Art. 12.

[23] *Foreign Sovereign Immunities Act 1985* (Cth) Art. 31(4).

respect to military assets.[24] Nor do the states that restrict enforcement against military property necessarily do so out of a sense of legal obligation. The legislative history of the U.S. Foreign Sovereign Immunities Act, for example, states that the carve-out for military property is intended "to avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments" and to "avoid the possibility that a foreign state might permit execution on military property of the United States abroad."[25] In short, while it might be sensible policy for a state to avoid attaching foreign military vessels (just as the Supreme Court of Ghana concluded), no rule of customary international law prevents states from waiving their immunity over such vessels through broad contractual clauses.

More generally, while it is beyond question that customary international law recognizes the general rule of state immunity and the right of states to waive their immunity,[26] more specific rules on waiver have not attracted sufficiently uniform practice to establish customary norms.[27] The ICJ has acknowledged the limited boundaries of clear agreement that can be taken to demonstrate customary international law in this domain.[28]

Argentina had urged the Supreme Court of Ghana to follow the French Court of Cassation's reasoning and determine that customary international law governed the construction of the waiver (pp. 27–28). Declining to do so, the Supreme Court instead concluded that where no domestic statute applies, domestic common law governs the interpretation of waivers of sovereign immunity (pp. 31–32). In so holding, the Court stood on firmer ground than the French Court of Cassation as being faithful to the current state of international law on waivers of immunity.

The Court had some difficulty connecting the conflict-of-laws public policy doctrine to its power to decline to give effect to the exercise by Argentina of its sovereign right to waive immunity. According to the Court, it was entitled as a matter of private international law to invoke its public policy to refuse to enforce a foreign-law right (the New York judgment). But it jumped from that premise to its authority to refuse to recognize Argentina's international-law right to waive sovereign immunity, which, as noted above, the Court had earlier declared to be a "universally recognized right of sovereign States" (p. 13). It could have simply relied on the language of the Fiscal Agency Agreement, which expressly envisaged that the forum state's law might supersede the waiver: "[T]he Republic has irrevocably agreed not to claim and has irrevocably waived such immunity *to the fullest extent permitted by the laws of such jurisdiction*"

[24] Courts in other jurisdictions might achieve the same result by broadly interpreting statutory exclusions of proceedings relating to visiting armed forces. *See, e.g.*, State Immunity Act, 1978, c. 33, Art. 16(2) (UK).

[25] *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. REP. NO. 94-1487, at 31, 32 (Sept. 9, 1976), *reprinted in* 15 ILM 1398, 1414, 1415 (1976). The early U.S. Supreme Court case *The Schooner Exchange v. McFaddon*, which addressed immunity from enforcement of warships under customary international law, did not consider waivers of immunity. 11 U.S. (7 Cranch) 116 (1812).

[26] Germany v. Italy, *supra* note 7, paras. 56–57, 118.

[27] *See* Case C-154/11, Mahamdia v. People's Democratic Republic of Alg., Opinion of Advocate General Mengozzi, para. 23 (Eur. Ct. Justice May 24, 2012), *at* http://curia.europa.eu (observing the variety of national approaches to how a state may waive its sovereign immunity). In its judgment, the Grand Chamber of the Court of Justice of the European Union agreed with the advocate general's point that at present customary international law recognizes only limited immunity and preserves space for national jurisdictions to apply their own law to determine the precise scope of immunity. *Id.*, Judgment, paras. 53–56 (July 19, 2012).

[28] Germany v. Italy, *supra* note 7, para. 117.

(p. 12, emphasis added). Besides, even absent that express language, no principle of international law requires states to give effect to other states' waivers of immunity. As the Court reasons later in its decision, customary international law permits a state to grant wider immunities than those recognized by international law (p. 25). That a state has the power to decline to give effect to another state's waiver is apparent from the diversity of national practice on the scope of waivers, discussed above.

This decision thus highlights the unusual posture of sovereign immunity waivers, straddling public and private international law, and the resulting uncertainty surrounding the scope of broad waivers. As has been observed, the rules of state immunity have developed "*within* the States, not *between* them," and in that sense resemble conflict-of-laws rules in private international law.[29] The diversity of practice concerning waivers leaves open the possibility of finding a jurisdiction willing to enforce a judgment against a sovereign, but that possibility has so far remained hypothetical for NML Capital. The practical import of this decision for states that waive their immunity to attract investors, and for potential investors considering contracting with sovereigns, is threefold. While a state cannot rely on customary international law to protect its military assets, even a very broad waiver will not yield certainty of enforcement against all of a state's assets. One should therefore expect future contractual waivers to be more specific about the categories of assets they include and exclude, so as to address both of those sources of uncertainty. Additionally, in light of the prospect that courts may decline to enforce even an express and specific waiver against sensitive categories of assets, contracting parties and investment markets will probably take that uncertainty into account when pricing investments in sovereign debt and state contracts.

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*European Convention on Human Rights—Article 2—right to life—extraterritorial jurisdiction—combat immunity*

SMITH V. MINISTRY OF DEFENCE, ELLIS V. MINISTRY OF DEFENCE & ALLBUTT V. MINISTRY OF DEFENCE. [2013] W.L.R. 239.
Supreme Court of the United Kingdom, June 19, 2013.

In a judgment rendered on June 19, 2013,[1] the Supreme Court (Court) of the United Kingdom (UK) held that UK courts have jurisdiction for the purposes of Article 2 of the European Convention on Human Rights (Convention) over claims arising from certain injuries to and deaths of British soldiers while serving abroad.[2] Furthermore, the Court held that the United Kingdom had owed a "positive obligation" under Article 2(1) of the Convention to take

[29] XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 26 (2012).

[1] Smith v. Ministry of Defence, Ellis v. Ministry of Defence & Allbutt v. Ministry of Defence, [2013] UKSC 41, [2013] W.L.R. 239, *available at* http://www.supremecourt.gov. uk. Decisions of British courts cited herein are available at http://www.bailii.org/databases.html.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 221. Article 1 of the Convention provides that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

https://doi.org/10.5305/amerjintelaw.108.1.0073 Published online by Cambridge University Press