Convention on the Law of the Sea—warship immunity—scope of applicability of Convention—provisional measures—definition of warship—arbitral jurisdiction

THE "ARA LIBERTAD" (Argentina v. Ghana). ITLOS Case No. 20. Provisional Measures. *At* http://www.itlos.org.
International Tribunal for the Law of the Sea, December 15, 2012.

On December 15, 2012, the International Tribunal for the Law of the Sea (Tribunal or ITLOS) ordered Ghana to resupply and, upon payment of security, to refuel and release the Argentine naval frigate *ARA Libertad*, which was being held by authorities in the Ghanaian port of Tema.[1] The Tribunal ordered release of the vessel in response to Argentina's request for provisional measures under Article 290(5) of the United Nations Convention on the Law of the Sea (Convention or UNCLOS).[2] The Tribunal accepted Argentina's prima facie showing that the *Libertad*, a tall, three-masted sailing ship commissioned in the Argentine Navy being used as a training vessel for officer cadets, qualifies as a "warship" under Article 29 of UNCLOS, and was therefore entitled to immunity and release to avoid irreparable harm to Argentina pending the final outcome of the case (paras. 93–95).

The voyage of the *Libertad* to the west coast of Africa had been planned at a meeting between Argentina and the countries of sub-Saharan Africa in Buenos Aires in April 2011. Diplomats from Ghana were present at the meeting and agreed that the ship would visit that country as part of a thirteen-nation goodwill cruise and official engagement visit to West Africa. The vessel was on its forty-third training mission when it arrived in Tema, near Accra, on October 1, 2012. It carried a crew of 220, including 69 members of the Argentine Navy and 110 naval officer cadets.

The day after the *Libertad* arrived in port, a U.S. judgment creditor, NML Capital, filed a Statement of Claim before the High Court of Ghana (Commercial Division) of the Superior Courts of Judicature[3] seeking an order of *in rem* attachment of the *Libertad* to satisfy a judgment against Argentina that had earlier been granted in the United States. The judgment was awarded in favor of NML Capital by the United States District Court for the Southern District of New York in a case involving Argentina's default in payment obligations under sovereign bonds.[4]

NML Capital held $370 million worth of distressed debt obligations arising from $95 billion in bonds issued by the Argentine government in 2001. Argentina's subsequent default on those bonds led to dozens of complex litigation cases in federal court by the Cayman Islands–based fund NML Capital, which is owned by the investment firm Elliott Management Corp. and other creditors. The bonds in question contained an explicit waiver of sovereign immunity from suit by Argentina:

[1] "ARA Libertad" (Arg. v. Ghana), Case. No. 20, Request for the Prescription of Provisional Measures, para. 108 (ITLOS Dec. 15, 2012) [hereinafter Libertad]. The order and other documents of the International Tribunal for the Law of the Sea cited herein are available online at its website, http://www.itlos.org.

[2] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, *available at* http://www.un.org/depts/los/ [hereinafter UNCLOS].

[3] The Superior Courts of Judicature of Ghana are composed of the Supreme Court, the Court of Appeal, and the High Court.

[4] NML Capital, Ltd. v. Republic of Arg., 2009 U.S. Dist. LEXIS 19046 (S.D.N.Y. Mar. 3, 2009), *aff'd*, 699 F.3d 246 (2d Cir. 2012).

> The [Argentine] republic has hereby irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction . . . provided further that such agreement and waiver, in so far as it relates to any jurisdiction . . . is given solely for the purpose of enabling the fiscal agent or a holder of securities of this series to enforce or execute a related judgment.[5]

On the basis of that waiver, the High Court granted NML Capital's request for an order attaching the vessel.

The order ignited a two-month standoff between port authorities and the Argentine government. The ship had originally been scheduled to leave Tema on October 4, 2012. At 8:00 p.m. on October 2, however, an official of the Judicial Service of the Superior Courts of Judicature, on behalf of the High Court, arrived at the *Libertad* to deliver the court's order that the ship be held in port. In the ensuing days, Susana Pataro, Argentina's ambassador to Ghana, and Ebenezer Appreku, director of the Legal and Consular Bureau of Ghana's Ministry of Foreign Affairs and Regional Integration, both advised the High Court that the vessel was immune from the court's jurisdiction and inviolable as a matter of international law. A high-level diplomatic delegation from Argentina visited Accra from October 16 to 19, to meet with the minister of defense, the minister of the interior, and advisers to the president of Ghana to try to find a solution to the impasse. The interventions failed to resolve the dispute.

On November 5, 2012, High Court judge Richard Adjei-Frimpong granted Tema port officials authority to move the ship from its original position to a new anchorage because of congestion at the pier. Two days later, in an effort to move the ship to a different berth, port officials attempted to board the ship forcibly but were prevented from doing so by armed Argentine watchstanders. By then, Argentina had removed everyone from the ship except a skeleton crew of forty-five naval personnel. When the *Libertad* refused to comply with the order, port authorities cut off water and electricity to the ship, which forced the vessel to resort to onboard power. Without fresh water and ample fuel to power the engines, conditions on the ship deteriorated.

Argentina then sought arbitration under UNCLOS to resolve the crisis. Both Argentina and Ghana are parties to the Convention. Compulsory jurisdiction under Article 287 is limited to disputes regarding "the interpretation and application" of the treaty, and the article offers various choices for the proceedings, including ITLOS, the International Court of Justice, and two types of arbitral tribunals (arbitration or special arbitration). On November 14, Argentina submitted a request to ITLOS for the prescription of provisional measures in accordance with UNCLOS Article 290(5)[6] pending constitution of the arbitral tribunal it was requesting under Annex VII to the Convention. Argentina sought the following provisional measure: "that Ghana unconditionally enables the Argentine warship Frigate ARA Libertad to leave the Tema port and the jurisdictional waters of Ghana, and be resupplied to that end."[7]

The gravamen of Argentina's complaint was that Ghana had violated its international obligation to respect the immunity of the ship from jurisdiction and execution, which is enjoyed

[5] Libertad, Written Statement of the Republic of Ghana, app. 3, at 61–62 (Nov. 28, 2012).

[6] Libertad, Republic of Argentina Request for the Prescription of Provisional Measures, para. 1 (Nov. 14, 2012) [hereinafter Argentina Request].

[7] *Id.*, para. 28.

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by warships pursuant to Article 32 of UNCLOS, Article 3 of the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Vessels, and customary international law.[8] Article 32 of UNCLOS is derived from Article 22 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.[9]

The ITLOS hearing opened on November 29. On the first morning, the government of Argentina presented the rationale and evidence for its request for provisional measures so that the *Libertad* could leave Tema port and Ghana's jurisdictional waters and be resupplied to that end.[10] Argentina claimed that its rights were suffering "irreparable damage," with dire consequences to the sovereignty and dignity of the state.[11] Under Article 290(5), provisional measures also require an element of urgency. In the *MOX Plant* case, for example, ITLOS stated that Article 290(5) may be applied pending the constitution of an Annex VII arbitral tribunal if the tribunal considers that "the urgency of the situation so requires in the sense that action prejudicial to the rights of either party . . . is likely to be taken before constitution of the Annex VII arbitral tribunal."[12] The Annex VII tribunal upheld this formula two years later.[13]

Ghana submitted that the request for provisional measures should be rejected and that Argentina be required to pay all costs incurred in connection with the case.

Even though the Tribunal found prima facie jurisdiction, it was not required to prescribe provisional measures. ITLOS balanced the risk of inaction—injury to state sovereignty and the national dignity of Argentina—against the risk borne by Ghana that releasing the vessel would make enforcement proceedings impossible. As a provisional order, the ITLOS decision postponed judgment on the merits of Argentina's claim and considered only whether the request for relief constituted a prima facie basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded (para. 60). Under UNCLOS Article 290(1) and (5), such a prima facie finding of jurisdiction is required to hear cases of provisional measures, and ITLOS applied the same standard as the one articulated in the International Court of Justice's *Iceland Fisheries* case for finding a colorable basis for jurisdiction.[14]

Argentina argued that the *Libertad* met the definition of a warship in UNCLOS Article 29[15] and accordingly was immune from the jurisdiction of any state under UNCLOS Article 32. Article 32 states that "nothing in this Convention affects the immunities of warships." Ghana countered that Article 32 applied only to the territorial sea, whereas the ship lay in Ghana's

[8] *Id.*, para. 31. *See* International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Vessels, Art. 3, Apr. 10, 1926, 176 LNTS 199, *reprinted in* 26 AJIL Supp. 527, 566 (1932) (in French); *see also* Convention Relating to the Regulation of Aerial Navigation, Art. 32, Oct. 13, 1919, 11 LNTS 173; Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295.

[9] Geneva Convention on the Territorial Sea and the Contiguous Zone, Art. 22, Apr. 29, 1958, 15 UST 1606, 516 UNTS 205. The relevant provision of the 1958 Convention states that "nothing in these articles affects" the immunities of government ships operated for noncommercial purposes.

[10] Libertad, Public sitting, Doc. ITLOS/PV.12/C20/1, at 1 (Nov. 29, 2012) [hereinafter Public sitting].

[11] *Id.* at 25.

[12] MOX Plant (Ir. v. UK), Case No. 10, Provisional Measures, para. 64 (ITLOS Dec. 3, 2001).

[13] MOX Plant (Ir. v. UK), Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, paras. 35, 38, 58 (UNCLOS Ann. VII Arb. Trib. June 24, 2003), 42 ILM 1187 (2003), *available at* http://www.pca-cpa.org.

[14] Fisheries Jurisdiction (UK v. Ice.), Provisional Measures, 1972 ICJ REP. 12, paras. 15, 20–21 (Aug. 17).

[15] The definition in Article 29 is drawn almost verbatim from Article 8(2) of the Geneva Convention on the High Seas, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82.

internal waters. The Tribunal noted, however, that the immunity of warships applies in internal waters as well under general international law. Although "most of the provisions" in Part II relate to the territorial sea, some provisions, such as the definition of warships in Article 29, "may be applicable to all maritime areas" (para. 64). ITLOS therefore affirmed that a dispute existed between the parties over the applicability of Article 32 that "affords a basis on which *prima facie* jurisdiction of the Annex VII arbitral tribunal might be founded" (para. 66).

Argentina also claimed that Ghana was precluding the *Libertad* from exercising its right to enjoy innocent passage in the territorial sea according to Articles 17 and 18(1)(b) of UNCLOS; freedom of navigation and related internationally lawful uses of the sea reflected in Articles 56(2) and 58 of UNCLOS; and the right to exercise high seas freedoms set forth in Articles 87 and 90 of the Convention, by preventing the vessel from getting under way.[16] Professor Gerhard Hafner, co-agent for Argentina, argued that the exercise of navigational rights directly depends upon the ability to make departure from port. He referred to the International Court of Justice's declaration on the merits in *Military and Paramilitary Activities in and Against Nicaragua*:

> [I]n order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; article 18, paragraph 1(*b*), of [UNCLOS] does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters . . . , it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for maritime navigation.[17]

Ghana countered that the dispute between the two parties was one of general international law, rather than the interpretation or application of specific provisions of UNCLOS, and was therefore not justiciable under the Convention. Argentina suggested that the relationship between general international law and UNCLOS involved much more cross-pollination. Article 300 of the Convention, for example, stipulates that the obligations are incumbent on the parties under international law, and not only the law of the sea: "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right." Article 301 continues by linking the exercise by states of their rights and performance of their duties under the Convention to observance of "the principles of international law embodied in the Charter of the United Nations."

Provisional measures were granted to defuse the tense standoff (para. 97). The Tribunal's order states, "[A]ny act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States" (para. 97). Interlocutory relief was awarded to Argentina to avoid an urgent risk of irreparable harm, since the *Libertad* was deemed a tangible expression of the flag state's sovereignty (paras. 94, 100). The unanimous decision was joined by Judge *ad hoc* Thomas Mensah, who served as the first president of ITLOS and in this case was appointed by Ghana.

[16] Public sitting, *supra* note 10, at 8.

[17] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 214 (June 27), *quoted in id.* at 9.

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The Tribunal ordered Ghana to release the frigate, its commander, and its crew by December 22, and to ensure that the vessel was "resupplied toward that end" (para. 108). Ghana complied with the provisional order. The vessel departed from Ghana on December 19 and was welcomed back in Argentina on January 9, 2013.

* * * *

ARA Libertad marks the twentieth case to be heard by ITLOS. The provisional order merely concluded the first stage in the litigation between Argentina and Ghana over the detention of the tall sailing ship. ITLOS acted with dispatch and played a constructive role in a dispute that appears almost to have spiraled out of control. Argentina submitted a note to the Tribunal on October 29 and a detailed request for provisional measures on November 14, 2012. The Tribunal began deliberations within two weeks[18] and issued the order for provisional measures on December 15.

The order is important for upholding the immunity of a warship broadly and inclusively defined—as a tall sailing ship used for training by the Argentine Navy. ITLOS found that "in accordance with general international law, a warship enjoys immunity" (para. 95). Perhaps even more important, the order applied sovereign immunity as a general principle of international law to the internal waters (port) of Ghana, even though Article 32 on sovereign immunity is contained in Part II of UNCLOS on the territorial sea. This finding raises interesting questions about the scope of ITLOS's jurisdiction beyond the specific provisions of the text of the Convention.

The Tribunal viewed Article 32 as an effective restatement of customary international law. The inclusive definition of sovereign immunity and the applicability to port facilities and internal waters should provide a level of comfort for conventional naval forces concerned about attempts by coastal states and port states to exercise jurisdiction over warships (and by extension, military aircraft). In this regard, ITLOS has left another compelling reason for the United States to accede to UNCLOS: to take advantage of the dispute settlement provisions of the Convention.

The interlocutory order also raises questions about how national courts treat waivers of sovereign immunity by foreign governments. Judge Frimpong's interpretation of the waiver clause means that Argentina would be virtually devoid of sovereignty. Argentina argued that military property is absolutely excluded from any kind of execution measure by a foreign state; or (in the alternative) even if a state can waive immunity from execution, the waiver must be explicit and specific to the related military asset at stake. As a rule, a general waiver cannot be applied to military or diplomatic assets.[19] The waiver of immunity typically involves jurisdiction to adjudicate, but not enforcement against any state asset whatsoever its nature.

Ghana never contested the immunity of the warship under customary international law—sidestepping the core equity at stake by relying on a bare textual argument grounded in

[18] The Tribunal conducted oral proceedings on November 29 and 30, 2012. *See* Public sitting, *supra* note 10, at 9; Libertad, Docs. ITLOS/PV.12/C20/2 (Nov. 29, 2012); ITLOS/PV.12/C20/3–4 (Nov. 30, 2012).

[19] Argentina Request, *supra* note 6, paras. 40, 41; *see also* XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 404 (2002) ("Certain categories of property are regarded as so sensitive that they are under special protection and absolutely immune from execution . . . ."), *quoted in id.*, para. 47.

UNCLOS. Under such circumstances, whatever the relative strength of the arguments surrounding Article 32 for jurisdictional purposes, Ghana did not assert (and was denied) a legal right to hold the ship under international law more generally.

On the broad question of immunity, the ITLOS order bears a striking resemblance to the U.S. Supreme Court's holding in the famous 1812 case of *The Schooner Exchange*.[20] There, a schooner owned by John McFaddon and William Greetham had been seized by order of Napoleon Bonaparte on December 30, 1810. The ship was armed and converted into a public vessel and renamed *Balou*. During a deployment to the West Indies in the summer of 1811, the *Balou* pulled into port in Philadelphia, and McFaddon and Greetham sought to recover their vessel. The district court dismissed their action in libel on the ground that a public armed vessel of a foreign power at peace with the United States was not subject to the jurisdiction of U.S. courts. The circuit court reversed; on appeal to the Supreme Court, Chief Justice Marshall upheld the district court's order, stating that the "whole civilized world" concurred in the construction that

> [a warship] constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.[21]

Notably, the Tribunal found that Article 32 may apply to Ghana's internal waters. It is uncertain whether the Annex VII arbitral tribunal will apply the text of Article 32 to internal waters during the merits phase. A strong case can be made that Article 32 affirmatively preserves warship immunity under customary international law, rather than that the issue lies entirely outside the Convention and is therefore dependent on customary law. In the choice between reading Article 32 to exclude immunity under the Convention and reading the article to incorporate immunity under international law by reference, the text and negotiations suggest that the latter analysis is stronger. The final decision, however, awaits an order on the merits.

In the United States, the case once again raised the issue of ratification of UNCLOS. An editorial in the *Wall Street Journal* on December 24, 2012, called the order more evidence of the treaty's assault on national (this time Ghana's) sovereignty.[22] ITLOS, the editorial argued, had overlooked that Argentina had waived immunity and made the error of treating the vessel "as if this is an actual warship." Ghana was "bullied by a global tribunal." American courts, Congress, and the president, however, have always protected the sovereign immunity of warships, even of such unconventional vessels as the three-masted frigate *Libertad*. The order will be particularly valuable for the protection of U.S. Navy warships that are not conventional fighting vessels, such as the naval auxiliary special mission ships USNS *Impeccable*, USNS *Victorious*,

[20] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

[21] *Id*. at 144.

[22] Editorial, *Lawless at Sea*, WALL ST. J., Dec. 24, 2012, at A12. The incident provides "[a] case study in the dangers of the Law of the Sea Treaty." *Id*., text box.

USNS *Sumner*, and USNS *Bowditch*, which may not be painted warship gray or carry armament. The United States recognizes sovereign immunity for American warships even after they have sunk, which underscores the great weight placed on the preservation of immunity to foreign states' legal process.[23] Consequently, the preservation of sovereign immunity for warships in this order, even for an unconventional training ship and even only as a prima facie showing during an interlocutory appeal, is an encouraging precedent for stability of expectations and the rule of law at sea and in port.

JAMES KRASKA
United States Naval War College

Treaty on the Functioning of the European Union—amendment—simplified revision procedure—economic and monetary policy—validity of stability mechanism for euro area member states

PRINGLE v. IRELAND. Case C-370/12. *At* http://curia.europa.eu.
Court of Justice of the European Union, November 27, 2012.

In the judgment *Pringle v. Ireland*,[1] the full Court of Justice of the European Union (Court or ECJ) upheld the validity of the decision of the European Council enabling the simplified amendment of the Treaty on the Functioning of the European Union (TFEU).[2] In its Decision 2011/199/EU, the Council had provided for the establishment of a permanent European Stability Mechanism (ESM) by those member states of the European Union (Union or EU) that had adopted the euro as their common currency and legal tender. The Court also found in this judgment that those member states had not violated EU law by negotiating and concluding the Treaty Establishing the European Stability Mechanism (ESM Treaty).[3] The Court based the latter finding on the long-awaited clarification of the scope and content of the TFEU's "no-bailout clause" (Art. 125(1)), which had been the subject of intense controversies among legal scholars, in particular in Germany.

The European sovereign debt crisis started when the newly elected Greek government announced in late 2009 that the real Greek budget deficit was much higher than the one previously notified to the European Commission. In the spring of 2010, it became obvious that Greece was going to lose access to market financing for its enormous budget deficit. The European institutions and the member states of the euro area repeatedly stressed their willingness to "take determined and coordinated action, if needed, to safeguard financial stability in the

[23] President William J. Clinton issued the following statement during the last hours of his presidency: "Pursuant to the property clause of Article IV of the Constitution, the United States retains title indefinitely to its sunken State craft unless title has been abandoned or transferred . . . ." Statement on United States Policy for the Protection of Sunken Warships, 37 WEEKLY COMP. PRES. DOC. 195, 195 (Jan. 22, 2001), 2001 WLNR 4638318; *see also* David J. Bederman, *Congress Enacts Increased Protections for Sunken Military Craft*, 100 AJIL 649 (2006); Jason R. Harris, *Protecting Sunken Warships as Objects Entitled to Sovereign Immunity*, 33 U. MIAMI INTER-AM. L. REV. 101 (2002); J. Ashley Roach, *France Concedes United States Has Title to CSS* Alabama, 85 AJIL 381 (1991).

[1] Pringle v. Ireland, Case C-370/12 (Eur. Ct. Justice Nov. 27, 2012), *at* http://curia.europa.eu.

[2] Consolidated Version of the Treaty on the Functioning of the European Union, Sept. 5, 2008, 2008 O.J. (C 115) 47, *available at* http://eur-lex.europa.eu. This is the version of the TFEU referred to by the Court in this case.

[3] Treaty Establishing the European Stability Mechanism, Feb. 2, 2012, *at* http://www.esm.europa.eu/pdf/esm_treaty_en.pdf.