THE DOCTRINE OF SOVEREIGN IMMUNITY IN INTERNATIONAL LAW: THE CASE OF THE LIBERTAD*

BACKGROUND

The case of NML Capital Limited vs. The Republic of Argentina[1] must be of interest to not only judges and legal practitioners but the diplomatic community at large as it raises interesting issues in sovereign immunity in contemporary international law and relations. Indeed, for many a Ghanaian jurist, the case presents a rare opportunity for the application of rules of public international law in Ghanaian jurisprudence. There is even an important aspect of the case that is yet to be discussed; that is, the question of reconciling International and Domestic National Laws.

The facts of the case are not in dispute.[2] Sometime in October 1994, the Defendant entered into a Fiscal Agency Agreement (FAA) with the Bankers Trust Company of New York Banking Corporation under which agreement the Defendant issued securities and bonds for purchase by the public. When the Defendant defaulted on the bonds the Plaintiff subsequently sued and obtained Judgment in the United States District Court for the Southern District of New York against the Defendant to recover the sums due. The Defendant did not settle the debt.

On the 15th of May, 2005, the Plaintiff commenced an action in the English High Court suing on the simple debt obligation imposed on the Defendant/Applicant by the New York Judgment. The Defendant raised an objection to the suit in the U. K. High Court on the ground that it enjoyed state immunity under English law and that the English Court had no jurisdiction to entertain the matter. The matter went before the Supreme Court of the United Kingdom which held that the

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* By George A. Sarpong, Legal Practitioner and Consultant, immediate Past Director, Ghana School of Law and E. Yaw Benneh, Senior Lecturer, Faculty of Law, University of Ghana,, Legon.[1] Suit No. RPC/343/12, High Court of Justice, Commercial Division, Accra, Coram Justice Richard Adjei-Frimpong dated 11th October, 2012.

[2] See, Judgment, ibid, pp. 1-5.

Defendant did not enjoy state immunity and that the English Court had jurisdiction to entertain the suit.

In the subsequent proceedings in the English High Court, the Defendant submitted to Judgment and the Court made a consent Order against the Defendant and in favour of the Plaintiff for the payment of the principal sum of US$284,184,632.30 and interest of US$48,095,940.91. The Defendant did not pay any part of the sum awarded.

On or about 1st October, 2012, the vessel "ARA Libertad" a warship belonging to the Defendant entered Ghana's territorial waters and docked at the Port of Tema. The Plaintiff with the leave of the Court commenced the instant suit claiming:

a. The sum of US$284,184,632 being the amount of the Judgment awarded by the United States District Court for the Southern District of New York.
b. Interest on the sum of US$284,184,632.30 at the rate of 4.95% per annum amounting to US$91,784,681.30 as at October 1st, 2012.
c. Continuing interest at the rate of 4.9% per annum (compounded annually) currently amounting to US$49,071.03 per day from 1st October, 2012 until Judgment **on sooner** payment or
d. Alternatively, interest on the amount at the prevailing Commercial Bank rate from 18th December, 2006 to date of final payment.

Having filed the claim, the Plaintiff obtained in the High Court an Ex-Parte Limited Order of Interlocutory Injunction in effect restraining the movement from the port of Tema, the vessel and the interim preservation of same. It is this order the Defendant sought to set aside. The Plaintiff opposed the Application.

Essentially then, the Plaintiff sought to enforce against the State of Argentina, Judgment obtained from an American Court that had received an endorsement from the Highest Court in the United Kingdom. Two issues of jurisdictional nature were raised in the determination of the Application, namely:

a. That the Court could not enforce a Judgment obtained from a United States Court on grounds that under the applicable law[3] on the matter, the United

[3] S.81 of the Courts Act, 1993 (Act 459); Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument, 1993 (LI 1575).

States is not listed as one of the states recognized by Ghana for purpose of reciprocal enforcement of Judgments; and further

b. That the Defendant is a sovereign state entitled to immunity from the Court's processes.

THE HIGH COURT DECISION

The Court correctly judged issue (a) above. As his Lordship rightly pointed out, *"I am of the view that the common law regime which permits the filing of a fresh action founded on a foreign judgment for purposes of enforcement is still applicable in Ghana. Under English law where specific statutory provisions are available for registration of foreign judgments for reciprocal enforcement, there is still the avenue outside the statutes to maintain a cause of action to enforce foreign judgments. The rationale behind that avenue is that the foreign Judgment creates an enforceable contract between the parties which can found an action at common law."*

This holding by the High Court is unassailable. Indeed the Common law is part of the laws of Ghana and recognized as such under the 1992 Constitution.[4]

The other, and more problematic, is the Court's decision on the issue of immunity in (b) above. It was argued on behalf of the Defendant that being a sovereign state, it was immune from the Court's processes. Reliance was placed on the United Nations Convention on Jurisdictional Immunities of States and their Property, 2004; and the United Nations Convention on the Law of the Sea (UNCLOS)[5].

In reaction, Plaintiff contended that the immunities the State of Argentina and the vessel enjoyed were waived by the State of Argentina under and by virtue of the Fiscal Agency Agreement (FAA) that governed the bond transaction.[6]

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[4] See Article 11 of the 1992 Constitution on the Sources of Law in Ghana.

[5] See: www.un.org/depts/los/LEGISLATIONANDTREATIES/status.htm

[6] The term in contention reads as follows: "The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York State or Federal Court sitting in the borough of Manhattan, the City of New York and the Courts of the Republic of Argentine ("the specified Courts") over any suit, action or proceeding against it or its properties assets or revenues with respect to the securities of this series or the fiscal Agency Agreement (a "Related Proceeding") except with respect to any actions brought under the United States Federal security laws. The Republic has in the fiscal Agency Agreement waived any objection to the related proceedings in

His Lordship Adjei-Frimpong, on the basis of the FAA and the decision of the English Supreme Court,[7] held that the Defendant had, in clear terms, waived the immunity attributed to the Argentina War Vessel Libertad through the mode of contract which mode is recognized by the rules of international law. With the greatest respect, His Lordship erred in arriving at this conclusion. A contrary view point is thus presented in this paper.

As would be appreciated from the last sentence of the FAA namely: ***The Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction,*** Argentina waived its immunity to the fullest extent permitted by the laws of Ghana. Being a party to UNCLOS, Ghana is enjoined under and by virtue of UNCLOS to accord absolute immunity to warships, including the Libertad as we endeavour to establish below:

THE DOCTRINE OF SOVERIEGN IMMUNITY IN INTERNATIONAL LAW

Traditionally, international law has accepted the doctrine of the immunity of the foreign sovereign. This immunity, described as an immunity *ratione personae* pertained to the particular status of the sovereign to whom all allegiance was due. If the sovereign was the personification of the State, then sovereignty attaches to his person as well, a perspective summarized in the famous quip of King Louis XIV of France: "*L'etat, c'est moi*". Today, of course, continuation of the identification of a monarch or other head of State with the State itself is no longer a meaningful proposition. Modern State constitutions have made it clear that

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such courts whether on the grounds of venue, residence or domicile or on the ground that the related proceedings have been brought in an inconvenient forum. The Republic agrees that a final non-appealable Judgment in any such Related proceeding (i.e. "Related Judgment") shall be conclusive and binding upon it and may be enforced in any specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the other courts") by a suit upon such a judgment ……

To the extent that the Republic or any of its revenues, assets or properties shall be entitled, in any jurisdiction in which any specified court is located, in which any related proceeding may at any time be brought against it or any of its revenues, assets or properties or in any jurisdiction in which any specified court or other court is located in which any suit, action or proceedings may at any time be brought solely for the purpose of enforcing or executing any Related Judgment, to any immunity from suit from the jurisdiction of any such court, from set off from attachment prior to judgment, from attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy and to the extent that in any such jurisdiction there shall be attributed such an immunity**, the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction''.**

[7] See the Judgment of the U.K Supreme Court, discussed at pp. 14-16 of the Judgment.

sovereignty does not reside with the Head of State. Yet, the doctrine of sovereign immunity, or the so-called State immunity doctrine has not been laid to rest. It is supported by the suggestion that the doctrine is rooted in the notions of the sovereign equality of Statesc comity and mutual respect arising among nations, which would be violated if the courts of one sovereign State were to exercise jurisdiction over another State—*par in parem non habet imperium*--.[8] The classic case illustrating this doctrine of sovereign immunity is *The Schooner Exchange* v *McFadden & Others* [9] in 1812. where the United States Supreme Court, through Chief Justice Marshall declared:

> .this perfect quality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation…One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory…..[10]

However, it is worth considering that in the past few decades States have generally moved away from the concept of absolute immunity whereby the sovereign was completely immune from foreign jurisdiction in all cases regardless of circumstances, to one of restrictive immunity by which States are only granted immunity in respect of their governmental acts (acts *jure imperii)*, but not their commercial or other private law transactions (acts *jure gestionis)*.

STATUS OF WARSHIPS IN INTERNATIONAL LAW

1. Under Customary International Law

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[8]Literally, an equal has no authority over an equal.

[9] 7 Cranch 116, 11 U.S 116(U.S. Pa), 1812 WL 1310 (U.S.Pa).

[10] See also the statement by Lord Slynn of Hadley in *Ex Parte Pinochet 1*: 'the original concept of the immunity of a Head of State in customary international law in part arose from the fact that he or she was a Monarch who by reason of personal dignity and respect ought not to be impleaded in a foreign State; it was linked no less to the idea that the Head of State was, or represented, the State and that to sue him was tantamount to suing an independent State extra-territorially, something which the comity of nations did not allow…."

Customary international law grants absolute immunity to warships from other states' jurisdiction in the pursuit of their maritime intercourse. In *The Schooner Exchange* v *McFadden & Others* [11] Chief Justice Marshall pertinently noted that a warship:

> *constitutes a part of the military force of her nation; acts under the immediate and direct commence 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* ***ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality*** *seems to the Court."*

Today, state practice does not only affirm this immunity of warships from foreign jurisdiction, but also considers warships immune from enforcement measures. Thus, the United States Foreign Sovereign Immunities Act (1976) stipulates that "property of a military character" comprising weapons, ammunition, communications equipment, warships, tanks and military transport, if its present or future use is military, is exempt from enforcement measures.[12]

2. Under Treaty Law: UNCLOS 111

Warships have immunity also under treaty law. Though, the issue of immunity for warships and other government vessels was not much discussed at the Third

[11] 7 Cranch 116, 11 U.S 116(U.S. Pa), 1812 WL 1310 (U.S.Pa).

[12] See Section 1611 (b) (2), United States Foreign Sovereign Immunities Act 1976, reprinted in 15 ILM 1388 (1076),. See also the Legislative History of the Foreign Sovereign Immunities Act 1976, House Report No. 74-1487, 94th Congress, 2nd Sess. 12, 15 ILM 1398, paras. 30-31. For other national immunity statutes, see Section 32 (3) (a), Australia Foreign States Immunities Act, in 25 ILM 715 (1986); Article 12 (3), Canada State Immunity Act 1982. In 21 ILM 798 (1982).

United Nations Conference on the Law of the Sea that gave birth to UNCLOS[13]. The Convention's provisions follow other pre-existing conventions by granting absolute immunity to Warships[14], in spite of the sovereignty of coastal states in the territorial seas.

i. Warship Defined

Article 29 of UNCLOS 111 defines a warship as "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer dully commissioned by the Government of the State and whose name appears in the appropriate service list or its equivalent and manned by a crew which is under regular armed forces discipline". Coast guard vessels designated as such and under the command of a commissioned officer, are also considered to be "warships". However, by Article 102 of UNCLOS 111, a vessel ceases being a "warship" if "acts of piracy" are committed by a mutinous crew and would thus be treated as acts committed by private ship.

ii. Immunity of Warships

Unlike other issues at the Third United Nations Conference on the Law of the Sea , the issue of immunity of warships did not engender any controversy and finds expression in various provisions of the convention; despite the acknowledgment of coastal states' sovereignty in their territorial seas.

Article 3 of UNCLOS provides for 12-mile territorial sea for each coastal state and grants these states absolute sovereignty subject only to the right of innocent

[13] This part of the paper draws on my earlier work, "The Impact of the Law of the Sea Convention on Vessel-Source Pollution Enforcement in the Exclusive Economic Zone", (LL.M Thesis, University of British Columbia; 1984).
[14] See for example, art. VII (4) of LDC 72; art. 3 (3) of MARPOL 73/78. See also: T. K. Thommen, *Legal Status of Government Merchant Ships* (The Hague, 1962); Lauterpacht, "The problem of jurisdictional immunities of foreign States," 28 B. Y. B. I.220 (1951); HI. Mollot and M. L. Jewett, "The State immunity Act of Canada", 20 Can. Yr. Bk. Int'L 79 (1982); Ingrid Delupis, "Foreign Warships and Immunity from Espionage," 78 American Journal of International Law 53 (1984); I Congreso del Partido, (1981) 2 ALL E.R. 1064.

passage under article 17[15].The sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil (article 2).

As regards what constitutes innocent passage, the convention goes beyond merely specifying that it is passage that is not prejudicial to the security, peace and good order of the coastal state by specifying activities which when engaged in will be deemed to be non-innocent[16], and endows the coastal states with the

[15] Meaning of passage: 1. Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress: article 18.

[16] Passage of a foreign ship shall be considered non-innocent or to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;(b) any exercise or practice with weapons of any kind;(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;(d) any act of propaganda aimed at affecting the defence or security of the coastal State;(e) the launching, landing or taking on board of any aircraft; (f) the launching, landing or taking on board of any military device;(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;(h) any act of willful and serious pollution contrary to this Convention;(i) any fishing activities; (j) the carrying out of research or survey activities;(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;(l) any other activity not having a direct bearing on passage: article 19.

power to enact appropriate legislation governing passage in the territorial sea.[17] UNCLOS also confers civil[18] and criminal[19] jurisdiction on the coastal state.

Article 21 of UNCLOS enjoins foreign ships navigating the waters of a coastal state to comply with all the rules and regulations of the coastal state and the relevant rules of international law.

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[17]Article 21: Laws and regulations of the coastal State relating to innocent passage: 1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:(a) the safety of navigation and the regulation of maritime traffic; (b) the protection of navigational aids and facilities and other facilities or installations; (c) the protection of cables and pipelines;(d) the conservation of the living resources of the sea;(e) the prevention of infringement of the fisheries laws and regulations of the coastal State;(f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;(g) marine scientific research and hydrographic surveys;(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastalState.2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards. 3. The coastal State shall give due publicity to all such laws and regulations.

[18] Article 28: Civil jurisdiction in relation to foreign ships.1. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship. 2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State. 3. Paragraph 2 is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal water.

[19] Article 27: Criminal jurisdiction on board a foreign ship: 1. 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 the following cases: (a) if the consequences of the crime extend to the coastal State; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) 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 (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. 2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

However, **it exempts warships and other state vessels operated for non-commercial purposes from the jurisdiction of the coastal state** in articles 30, 31 and 32 of the convention, inter alia:

"Article30

Non-compliance by warships with the laws and regulations of the coastal State

If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.

Article31

Responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes

The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.

Article32

Immunities of warships and other government ships operated for non-commercial purposes

With such exceptions as are contained in subsection A[20] and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."

It follows from these provisions that he doctrine of immunity of government ships is derived from the wider principle of jurisdictional immunity of sovereign states under traditional international law. It is the immunity of a foreign state from jurisdiction or execution in respect of its maritime property that entitles a state's vessel to immunities while outside its waters. The basis of the rule, as has been

[20] These are the rules applicable to all ships in innocent passage referred to above.

said earlier, is the independence, equality, and dignity of states expressed in the maxim *par in parem non habet imperium.*

As stated by Lord Atkin in the Cristina:[21]

"The Courts of a country will not implead a ……sovereign; that is they will not by their process make him, against his will, a party to legal proceedings…. The second is that they will not by their process…. seize property which is his or of which he is in possession or control."[22]

Hence, from these specific provisions of the Convention, warships and other government ships navigating our maritime zones are immune from our enforcement regimes by virtue of UNCLOS. Indeed, as noted, under Article 30 of UNCLOS,[23] warships enjoy absolute immunity from the jurisdiction of a coastal state; and where a warship flouts the laws and regulations of a Coastal State like Ghana, it cannot be arrested. The Convention only requires the offended state to require such an offending vessel to leave the territorial sea immediately. Whatever harm or damage caused a coastal state may be pursued through diplomatic channels or international proceedings.

If an offending warship cannot be arrested for violations in the territorial sea, then a fortiori, it cannot be arrested whilst docking at a port for a "violation" that occurred outside its maritime zone. There is no doubt at all that the vessel in question is a warship.[24] Accordingly, the Court erred in ordering its arrest and detention. This view is consistent with the FAA Agreement which makes the waiver of immunity subject to such immunity as is to the fullest extent permitted by the laws of such jurisdiction.

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[21] (1938) A.C 485.

[22] Ibid, 490.

[23] This, as noted, is binding on Ghana under and by virtue of S2 of PNDCL 159. S.2 provides that the Republic of Ghana exercises it sovereignty over the territorial sea subject to the provisions of UNCLOS and any other rules of international law.

[24] Article 29 of UNCLOS provides: For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Once established that such vessels are naval vessels of a state, absolute immunity prevails; no question of waiver arises. In the words of Delupis:

> *It is indeed a well established rule of international law that warships are immune from legal process, execution or other jurisdictional measures of foreign authorities. This immunity applies to the commander and the crew as well as to the ship itself. Thus as the Institute of International Law phrased in its "Stockholm Rules," "warships cannot form the subject of seizure, arrest or detention by any legal means whatsoever or by any jurisdictional process." These rules codify relevant norms with regard to immunity of warships as accepted in State practice*…[25]

STATUS OF WARSHIPS IN GHANAIAN (NATIONAL) LAW

It is under the dictates of the 1992 Constitution of the Republic of Ghana, in Article 75, that treaties, conventions, protocols and other international agreements become part of Ghanaian (national) law when they are ratified by Parliament in the form either of an Act of Parliament or by *resolution.* Regarding UNCLOS, Ghana enacted the Maritime Zones (Delimitation) Act, 1986 (PNDCL Law 159)[26] to give effect to the provisions of the Convention

PNDC Law 159

This piece of legislation which was passed on 2nd August, 1986 and gazetted on 22nd August, 1986 has in its preamble provided:

"WHEREAS the United Nations Convention on the Law of the Sea referred to in this Act as "the Convention" was signed by the Government of Ghana on the 10th day of December, 1982 at Montego Bay in Jamaica;
AND WHEREAS it is necessary to give effect to the provisions of the Convention relating to the delimitation of the territorial sea, contiguous zone, exclusive

[25] Ingrid Delupis, "Foreign Warships and Immunity from Espionage", supra n.7.
[26] PNDCL 159.

economic zone and the continental shelf in order that these provisions of the Convention shall have the force of the law in Ghana."

In other words, the intention of the law maker was to domesticate the said provisions of UNCLOS in Ghanaian domestic jurisprudence. Accordingly, the Law makes provisions for these maritime zones and their limits in accordance with the provisions of the convention[27]:

Section 2 of PNDC Law 159 on the jurisdictional scope of the internal waters and the territorial sea, in consonance with UNCLOS, is quite germane to the present

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[27] See the ff. sections of PNDCL 159 which mirror UNCLOS:
1. Breadth of the territorial sea (1) it is hereby declared that the breadth of the territorial sea of the Republic shall not exceed twelve nautical miles measured from the low waterline along the coast of the Re-public as marked on large-scale official charts. (2) The outer limit of the territorial sea shall be the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea. **2. Extent of sovereignty** (1) The Republic exercises **sovereignty over the territorial sea subject to the provisions of the Convention and any other rules of international law**.
(2) The sovereignty of the Republic extends beyond its land territory and internal waters and to the airspace over the territorial sea as well as to its bed and subsoil. **3. Internal waters.** The waters on the landward side of the baseline of the territorial sea form part of the internal waters of the Republic. **4. Contiguous zone** (1) The contiguous zone of the Republic is that zone contiguous to the territorial sea which may not extend beyond twenty-four nautical miles from the baselines from which the breadth of the territorial sea is measured. (2) In the contiguous zone the Government may exercise the control necessary to, and, *(a)* prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations, *(b)* punish infringement of those laws and regulations if the infringement is committed within the territories of the Republic or the territorial sea.
5. Exclusive economic zone (1) The exclusive economic zone of the Republic is that area beyond and adjacent to the territorial sea which does not extend beyond two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured. (2) In the exclusive economic zone the Republic has, to the extent permitted by inter-national law,

(a) 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 sea-bed and of the sea-bed and its subsoil, and with regard to any other activities for the economic exploration and exploitation of the zone, such as the production of energy from the water, currents and winds;
(b) jurisdiction in accordance with the Convention3 with regard to

(i) the establishment and use of artificial islands, installations and structures,
(ii) marine scientific research, and
(iii) the protection and preservation of the marine environment; and
(c) any other rights and duties that are provided for in the Convention.

(3) The lines delimiting the outer limits of the exclusive economic zone shall be
shown on official charts of a scale adequate for ascertaining their position. **6. Continental shelf** (1) The continental shelf of the Republic comprises the sea-bed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of its land territory to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured.

discussion: It provides: *"(1) The Republic exercises sovereignty over the territorial sea subject to the provisions of the* ***Convention and any other rules of international law.***
(2) The sovereignty of the Republic extends beyond its land territory and internal waters and to the airspace over the territorial sea as well as to its bed and subsoil."

In essence therefore, even though PNDCL 159 is bereft of specific regulatory and/or conservatory competences to be exercised within these various Ghanaian maritime zones, it mandates that the rules of UNCLOS apply to these zones. The provisions of UNCLOS are thus binding on Ghana and constitute the norms or benchmarks against which the propriety or otherwise of Ghanaian maritime activities and judicial decisions may be assessed.

Therefore, the Supreme Court's assertion that "in relation to UNCLOS there has been no incorporation of its provisions into Ghanaian municipal law, except to a limited extent in the Maritime Zones (Delimitation) Act, 1986"[28] is inaccurate. In any event, as regards the Libertad, PNDC Law 159 provides a jurisdictional basis for the determination of the suit.

THE LIBERTAD AND ITLOS[29]

On 30 October 2012, Argentina, pursuant to the decision of the Ghana High Court, instituted dispute settlement proceedings against Ghana under UNCLOS for the release of the Argentine vessel. Accordingly, acting under Article 287 of the Convention,, Argentina resorted to the International Tribunal for the Law of the Sea (ITLOS), the appropriate international forum for redress, for the Tribunal to constitute an Arbitral Tribunal to declare that the seizure of the warship violated "the international obligation of respecting the immunities from jurisdiction and execution enjoyed by such vessel pursuant to Article 32 of UNCLOS and Article 3 of the 1926 Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels as well as pursuant to well-established general or customary international law rules in this regard". Subsequently,

[28] Per Date-Bah JSC at p.5 of the judgment. See FN 29 below.
[29] See: www.itlos.org/.

on 14 November 2012, Argentina submitted a request for the prescription of provisional measures under article 290, paragraph 5, of UNCLOS to the Tribunal.[30]

In its Order of 15 December 2012, the Tribunal held that it had jurisdiction to make interim orders, and held that "*in accordance with general international law, a warship enjoys immunity*" and that "*any 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"*.

The Tribunal opined that *"under the circumstances of the present case, pursuant to article 290, paragraph 5, of the Convention, the urgency of the situation requires the prescription by the Tribunal of provisional measures that will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the Parties".*

Pending the decision of the Arbitral Tribunal[31]; ITLOS directed Ghana forthwith, and unconditionally, to release the Libertad, to ensure that it's Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and also to ensure that it is resupplied to that end. [32]

Interestingly, before the Tribunal, Ghana had pleaded that as a matter of its constitutional law and practice, the executive arm of Government fully respected

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[30] The Convention provides for compulsory third-party disputes settlement mechanism for disputes concerning the interpretation or application of the Convention. To this purpose, the parties to a dispute may choose from different procedures that the Convention makes available to them (International Tribunal for the Law of the Sea, International Court of Justice or arbitration).Both Ghana and Argentina are States Parties to the Convention. They have however not accepted the same procedure for the settlement of disputes. The Convention provides that, in such cases, the parties to a dispute are deemed to have accepted arbitration in accordance with Annex VII to the Convention. The setting up of an arbitral tribunal may take some time and pending the constitution of such arbitral tribunal, any party to the dispute may, under the conditions set by the Convention, request ITLOS to prescribe provisional measures according to article 290, paragraph 5, of the Convention. The Tribunal may prescribe provisional measures if it considers that prima facie the arbitral tribunal to be constituted prima facie would have jurisdiction and that the urgency of the situation so requires.

[31] Argentina and Ghana, on Friday 27 September 2013 signed a settlement agreement at the Permanent Court of Arbitration, in The Hague, The Netherlands, bringing an end to the dispute between the two countries. Under the settlement, Argentina agreed to discontinue the arbitration it initiated and dropped all financial claims against Ghana. See: Ministry of Information, "Ghana, Argentina end dispute over sized Ship";www.ghanaweb.com/Ghanahomepage/articel.php .

[32] See ITLOS/Press 188 of 15 December, 2012.

the independence of the Ghanaian Judiciary and as such was "unable to interfere with the work of the Ghanaian Courts" nor was it "within the powers of the Government to compel the Ghanaian courts to do anything"[33]. This plea was rejected by the Tribunal which held that a "State cannot take shelter behind a decision of any of its organs as an excuse for not implementing its international legal obligations".[34] As was forcefully put by Judge Lucky, in his Separate Opinion:

> The Government of Ghana's defence based on the rule of law and the separation of powers, enshrined in its Constitution, does not legally absolve it from its State responsibility in international law. General international law specifies that a State may not use its internal laws, including its Constitution, as a shield to circumvent its international obligations".[35]

The ITLOS decision did not come as a surprise to many a student of public international law. Indeed, it is trite learning that a country cannot use and/or deploy its domestic legal regime as an excuse for non- compliance with International Law.[36]

THE LIBERTAD IN THE SUPREME COURT[37]

Subsequent to the decision of ITLOS, the Honourable Attorney General in an effort to ensure Ghana's compliance with International Law, sought to have the High Court decision quashed before the Supreme Court by an Order of Certiorari. He argued, inter alia, that UNCLOS is incorporated into Ghanaian law by article 75 of the 1992 Constitution.

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[33] Request for the Prescription of Provisional Measures Under Article 290,paragraph 5, of the United Nations Convention on the Law of the Sea, Written Statement of the Republic of Ghana , 28 November,2012,paragraphs 15.Available on https://www.itlos.org/cases/list_of_case _no_20/C20_ord_15_12_2012_SepOp_Ch_Rao_E_pdf

[34] https://itlos.org/fileadmin/itlos,document/cases/case_no.20/C20_Ord_15_12_2012_SepOp_Ch_Rao_E_pdf

[35] https://itlos.org/fileadmin/itlos,document/cases/case_no.20/C20_Ord_15_12_2012_SepOp_Lucky

[36] In respect of this, Article 27 of the Vienna Convention on the Law of Treaties provides: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

[37] See Civil Motion No. JS/10/2013: In the Matter of An Application to Invoke the Supervisory Jurisdiction of the Supreme Court. Articles 88(6) and 132 of the 1992 Constitution, Rule 61 of the Supreme Court Rules 1996 (C.I. 16); The Republic vs. High Court, Commercial Division, Accra, Ex Parte; Attorney General (Applicant); NML Capital Ltd (1st Interested Party); The Republic of Argentina (2nd Interested Party), 20th June, 2013. Coram: Date-Bah, Dotse, Yeboah, Gbadegbe, Akamba JJSCs.

While characterizing that argument as "a spectacularly erroneous proposition of law", the Supreme Court then proceeded with an analysis of Article 75. In his Judgement, Justice Dr. Date- Bah (Presiding) held"

> The mere fact that a treaty has been ratified by Parliament through one of the two modes indicated (in Article 75) …. does not, of itself, mean that it is incorporated into Ghanaian law. A treaty may come into force and regulate the rights and obligations of the State on the international plane, without changing rights and obligations under municipal law. Where the mode of ratification adopted is through an Act of Parliament, that Act may incorporate the treaty, by appropriate language into the municipal law of Ghana.[38]

Obviously, the Attorney-General was in error. Article 75 provides a constitutional basis for the invocation of the rules of Public International Law in Ghanaian jurisprudence. It does not provide the substantive basis for dealing with the subject of immunity of warships. Curiously, the Honourable Attorney General did not canvass before the Court the relevant provisions of UNCLOS; and the Maritime Zone (Delimitation) Act, 1986 (PNDCL 159) which sought to implement UNCLOS in Ghanaian domestic jurisprudence. The Supreme Court rightfully debunked the AG's submissions and decided the matter on grounds of public policy.[39] In the words of Date-Bah JSC:

> *In sum, what has been said is that although the 2nd Interested Party waived its immunity through the contractual waiver clause, that waiver of immunity is not binding on the Ghanaian Courts, in so far as it relates to a military asset. Customary international law permits sovereign states to decide whether to accord a wider immunity in their municipal law than required under international law. There is thus no obligation in municipal*

[38] Civil Motion No. JS/10/2013, supra, n37,at p.4.

[39] Public Policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good which may be termed the policy of the law or public policy in relation to the law: Egerton vs. Brownlow (Eml) (1853) G H.L Cas 1, at p.196.

law to recognize waivers of sovereign State immunity in all circumstances, except those required by public international law.

The learned trial Judge, who was not bound by any previous decided Ghanaian case on this issue, made a fundamentally and patently wrong decision by holding that the 2nd interested Party's contractual waiver of immunity, in so far it related to the seizure of a military asset, should be given effect to. The Courts of Ghana ought not to promote conditions leading to possible military conflict, when they have the judicial discretion to follow an alternative path. This public policy consideration persuades us that waiver of sovereign State immunity over military assets should not be recognized under Ghanaian common law. Thus though we accept the issue of estoppel raised by NML Capital Ltd v Republic of Argentina (supra) to the effect that Argentina has effectively waived its immunity by contract before Courts such as this Court in relation to the enforcement of the Judgment debt in issue in this case, we are saying that this waiver of immunity has no effect in relation to military assets in Ghana, for the public policy reasons canvassed above.

With this clarification of the law by this Court, there should be no need for any order of prohibition to be issued. All lower Courts are obliged to follow and apply the law as clarified in this case. There should accordingly be no further seizures of military assets of sovereign states by Ghanaian Courts in execution of foreign Judgments, even if the sovereign concerned has waived its immunity.[40]

The decision of the Supreme Court, in upholding the immunity of the Argentine war vessel is perfectly in accord with International Law. However, the public policy option adopted in arriving at the decision could be problematic.[41] As has been observed, public policy is an unruly horse which may carry its rider he knows not where.[42] In other words, public policy is fraught with uncertainty and/or unpredictability as to its scope, nature and/or extent.

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[40] See Civil Motion No. JS/10/2013, supra, n. 19, at p.4.

[41] Public Policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good which may be termed the policy of the law or public policy in relation to the law: Egerton vs. Brownlow (Eml) (1853) G H.L Cas 1, at p.196.

[42] Richardson vs. Mellish (1824), 2 Bing. 229 at p.252. On these, see Cheshire & Fifoot, The Law of Contract, 5th Ed (Butterworth & Co., 1960) at pp. 278.

The merits or otherwise of the doctrine should not, however, detain us. The matter, with respect, could have been resolved on the basis of conventional norms and national obligations assumed by Ghana as a party to UNCLOS,[43] contrary to the Supreme Court's position.

CONCLUSION

The Libertad presented a rare opportunity for the application of Public International law in Ghanaian Jurisprudence. The decision has obvious diplomatic and financial implications. Indeed the Ghanaian government has been embarrassed by this singular action which has been construed as an act of hostility against Argentina. It should, of course be remembered that the Libertad's port call to Tema was an official diplomatic, goodwill visit to Ghana. The detension of the warship had nothing to do with a maritime dispute between Ghana and Argentina; rather the dispute arose between the private entity, NML Capital, and Agentina over the default of the latter of its public debt to the former. Fortunately for Ghana, Argentina has discontinued the arbitral proceedings and dropped all financial claims against her.

The High Court, in arriving at its decision, was influenced by the United Kingdom Supreme Court decision on the matter. The United Kingdom has not ratified UNCLOS. Ghana, however, is bound by the Convention whose provisions constitute the norms and benchmarks for our maritime jurisprudence.

The Supreme Court's decision in upholding the immunity of the Argentine war vessel is perfectly in accord with International Law. However, the public policy option adopted in arriving at the decision could be problematic. UNCLOS and PNDC Law 159 provide a more viable and certain alternative for upholding the doctrine of immunity of warships in Ghanaian jurisprudence.

Yet, even more embarrassing for Ghana was her oscillation between the two contrasting positions she took in this case It would be remembered that before

[43] On this subject, see: G.A Sarpong, "Conventional Norms and National Obligations: Ghana and the Exclusive Economic Zone", (1991-92) 18 Review of Ghana Law, pp.220-243.

the Supreme Court, Ghana had argued that the Libertad enjoyed sovereign immunity in both international law and domestic law. However, before the ITLOS, Ghana sought to resile from her international obligations ny pleading the provisions of her internal law. This, of course, raises the question of how to reconcile International and Domestic Law. The Libertad case does not answer that question. Indeed, as has been observed: "Since each State has its own legal system, the problem becomes complex. If a universally acceptable solution to this problem is to be evolved under international law, each State will have to make a provision for it in its legal system".[44]

To conclude, we may well be advised to pay attention to the words of Chief Justice Stone who in the United States Supreme Court decision in *Republic of Mexico v. Hoffman*[45], had this to say:

> It is….not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. The judicils seizure of property of a friendly State may be regarded as such an affront to it dignity and so may affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the Executive determination that the vessel shall be treated as immune. But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our international interests and for recognition by other nations.[46]

[44] B. M. Dimri, "The Arrest of Argentine Warship 'ARA Libertad'—Revisiting International Law Governing Warships, Sovereign Immunity, and Naval Diplomatic Roles", Journal of Defence Studies, Vol. 7, No. 3, July-September 2013, pp. 97-124.
[45] 324 U.S. 30, 65 S. Ct. 530, 89 L.Ed. 729 (1945).
[46] Ibid. 35-36, 65 S.Ct. at 532-533.