INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 2012

15 December 2012

List of Cases:
No. 20

THE "ARA LIBERTAD" CASE

(ARGENTINA *v.* GHANA)

Request for the prescription of provisional measures

ORDER

Present: *President* YANAI; *Vice-President* HOFFMANN; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge* ad hoc MENSAH; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and articles 21, 25 and 27 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the fact that the Argentine Republic (hereinafter "Argentina") and the Republic of Ghana (hereinafter "Ghana") are States Parties to the Convention,

Having regard to the fact that Argentina and Ghana have not accepted the same procedure for the settlement of disputes in accordance with article 287 of the Convention and are therefore deemed to have accepted arbitration in accordance with Annex VII to the Convention,

Having regard to the Notification and Statement of Claims dated 29 October 2012 and submitted by Argentina to Ghana on 30 October 2012 instituting arbitral proceedings under Annex VII to the Convention in a dispute concerning the "detention by Ghana […] of the warship 'ARA Fragata Libertad'" of Argentina,

Having regard to the request for provisional measures contained in the Statement of Claims submitted by Argentina to Ghana pending the constitution of an arbitral tribunal under Annex VII to the Convention,

Makes the following Order:

1. *Whereas*, on 14 November 2012, Argentina filed with the Tribunal a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in a dispute concerning the "detention by Ghana […] of the warship 'ARA Fragata Libertad'";

2. *Whereas*, in a letter dated 9 November 2012 addressed to the Registrar and received in the Registry on 14 November 2012, the Minister of Foreign Affairs and Worship of the Argentine Republic notified the Tribunal of the appointment of Ms Susana Ruiz Cerutti, Legal Adviser of the Ministry of

Foreign Affairs and Worship, as Agent for Argentina, and Mr Horacio A. Basabe, Head of the Direction of International Legal Assistance of the Ministry of Foreign Affairs and Worship, as Co-Agent for Argentina;

3. *Whereas*, on 14 November 2012, a certified copy of the Request was transmitted by the Registrar to the Minister for Foreign Affairs and Regional Integration of Ghana, and a further certified copy was transmitted to the Ambassador of Ghana to Germany;

4. *Whereas*, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified of the Request by a letter from the Registrar dated 14 November 2012;

5. *Whereas*, on 16 November 2012, the President, by telephone conference with the Agent of Argentina and the Minister-Counselor of the Embassy of Ghana in Germany, ascertained the views of the Parties regarding the procedure for the hearing in accordance with article 73 of the Rules;

6. *Whereas*, pursuant to article 90, paragraph 2, of the Rules, the President, by Order dated 20 November 2012, fixed 29 November 2012 as the date for the opening of the hearing, notice of which was communicated to the Parties on 20 November 2012;

7. *Whereas* States Parties to the Convention were notified of the Request, in accordance with article 24, paragraph 3, of the Statute, by a note verbale from the Registrar dated 20 November 2012;

8. *Whereas*, in the Request for the prescription of provisional measures, Argentina requested the President to “urgently call upon the Parties to act in such a way as will enable any order the Tribunal may make on the request for

the provisional measure to have its appropriate effects, as established by Article 90 of the Rules of the Tribunal";

9. *Whereas*, on 20 November 2012, the President addressed a letter to both Parties calling upon them, in conformity with article 90, paragraph 4, of the Rules, "to avoid taking any measures which might hinder any order the Tribunal may make on the Request for provisional measures to have its appropriate effects";

10. *Whereas*, by letter dated 22 November 2012, the Deputy Minister for Foreign Affairs and Regional Integration of Ghana notified the Registrar of the appointment of Mr Anthony Gyambiby, Deputy Attorney-General and Deputy Minister for Justice, as Agent for Ghana, and of Mr Ebenezer Appreku, Director/Legal and Consular Bureau, Ministry of Foreign Affairs and Regional Integration, and Ms Amma Gaisie, Solicitor-General, as Co-Agents for Ghana;

11. *Whereas*, since the Tribunal did not include upon the bench a judge of the nationality of Ghana, the Deputy Minister for Foreign Affairs and Regional Integration of Ghana, pursuant to article 17, paragraph 3, of the Statute, informed the Registrar by letter dated 22 November 2012 that Ghana had chosen Mr Thomas A. Mensah to sit as judge *ad hoc* in this case, a copy of which was transmitted to Argentina on 23 November 2012;

12. *Whereas,* since no objection to the choice of Mr Mensah as judge *ad hoc* was raised by Argentina, and no objection appeared to the Tribunal itself, Mr Mensah was admitted to participate in the proceedings as judge *ad hoc* after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 28 November 2012;

13. *Whereas*, on 27 November 2012, Argentina submitted to the Tribunal an additional document containing the "Motion on Notice for an Order for Committal for Contempt Order 50, Rule 1", issued by the Superior Court of Judicature in the High Court of Justice (Commercial Division), Accra, against

the Commander of the *ARA Libertad*, a copy of which was transmitted to Ghana on the same day;

14. *Whereas*, on 28 November 2012, Ghana filed with the Tribunal its Response, a certified copy of which was transmitted by bearer and electronically to the Agent of Argentina on the same day;

15. *Whereas*, pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, materials were submitted to the Tribunal by Argentina on 27 and 28 November 2012 and by Ghana on 28 November 2012;

16. *Whereas,* in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 28 November 2012 concerning the written pleadings and the conduct of the case;

17. *Whereas*, on 28 November 2012, in accordance with article 45 of the Rules, the President held consultations with the Agent of Argentina and the Co-Agent of Ghana with regard to questions of procedure and transmitted to them a request of the Tribunal pursuant to article 76, paragraph 1, of the Rules, to "receive from both parties precise information on the current situation of the vessel and its crew, including the type of assistance (e.g. water, fuel, food) provided to the vessel";

18. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and the Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

19. *Whereas* oral statements were presented at four public sittings held on 29 and 30 November 2012 by the following:

On behalf of Argentina: Ms Susana Ruiz Cerutti, Legal Adviser, Ministry of Foreign Affairs and Worship,

as Agent,

Mr Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Associate Member of the Institut de droit international,

Mr Gerhard Hafner, Professor of International Law, Member of the Institut de droit international,

as Counsel and Advocates;

On behalf of Ghana: Mr Ebenezer Appreku, Director/Legal & Consular Bureau, Legal Adviser, Ministry of Foreign Affairs and Regional Integration of the Republic of Ghana, Accra,

as Co-Agent and Counsel,

Mr Philippe Sands QC, Member of the Bar of England and Wales, Professor of International Law, University College of London, London, United Kingdom,

Ms Anjolie Singh, Member of the Indian Bar,

Ms Michelle Butler, Member of the Bar of England and Wales,

as Counsel and Advocates;

20. *Whereas*, in the course of the oral proceedings, a number of exhibits, including photographs and extracts from documents, were displayed by the Parties on video monitors;

21. *Whereas,* during the oral proceedings, on 29 November 2012, Ghana submitted additional documents to the Tribunal, consisting of a letter dated 27 November 2012 from the Ghana Ports and Harbours Authority addressed to Counsel of Ghana, a letter dated 19 November 2012 from the Financial Manager of Tema Port addressed to the Port Director, two affidavits of the Acting Director of Tema Port and a plan of Tema Port, copies of which were transmitted to Argentina on the same day;

22. *Whereas,* during the oral proceedings, on 30 November 2012, Argentina submitted additional documents to the Tribunal, consisting of an affidavit of the Commander of the *ARA Libertad* and an affidavit of the Ambassador of the Argentine Republic to Nigeria, concurrently accredited to Ghana, copies of which were transmitted to Ghana on the same day;

23. *Whereas*, after the closure of the oral proceedings, on 30 November 2012, Ghana submitted to the Tribunal an additional document to which it had referred during the oral proceedings on the same day;

24. *Whereas* a copy of the additional document submitted by Ghana was transmitted to Argentina on the same day and Argentina, by letter dated 3 December 2012, referring to article 90, paragraph 3, of the Rules, requested the Tribunal to determine that "the document produced by Ghana subsequently to the close of the hearing shall not be considered to form part of the case file";

25. *Whereas* the Tribunal, on 3 December 2012, decided pursuant to article 90, paragraph 3, of the Rules that the document submitted by Ghana on 30 November 2012 after the closure of the hearing would not be considered part of the pleadings in the case and notice of this decision was communicated to both Parties on the same day;

* * *

26. *Whereas*, in the Notification and Statement of Claims dated 29 October 2012, Argentina requested the arbitral tribunal to be constituted under Annex VII (hereinafter "the Annex VII arbitral tribunal"):

> to declare that the Republic of Ghana, by detaining the warship "ARA Fragata Libertad", keeping it detained, not allowing it to refuel and adopting several judicial measures against it:
>
> > (1) Violates 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;
>
> (2) Prevents the exercise of the right to sail out of the waters subject to the jurisdiction of the coastal State and the right of freedom of navigation enjoyed by the said vessel and its crew, pursuant to Articles 18, paragraph 1(b), 87, paragraph 1(a), and 90 of UNCLOS;
>
> […]
>
> to assert the international responsibility of Ghana, whereby such State must:
>
> (1) immediately cease the violation of its international obligations as described in the preceding paragraph;
>
> (2) pay to the Argentine Republic adequate compensation for all material losses caused;
>
> (3) offer a solemn salute to the Argentine flag as satisfaction for the moral damage caused by the unlawful detention of the flagship of the Argentine Navy, ARA Fragata Libertad, preventing it from accomplishing its planned activities and ordering it to hand over the documentation and the flag locker to the Port Authority of Tema, Republic of Ghana,
>
> (4) impose disciplinary sanctions on the officials of the Republic of Ghana directly responsible for the decisions by which such State has engaged in the violations of its aforesaid international obligations;

27. *Whereas,* the provisional measure requested by Argentina in the Request to the Tribunal filed on 14 November 2012 is as follows:

> that Ghana unconditionally enables the Argentine warship Frigate ARA Libertad to leave the Tema port and the jurisdictional waters of Ghana and to be resupplied to that end;

28. *Whereas,* at the public sitting held on 30 November 2012, the Agent of Argentina made the following final submissions:

> For the reasons expressed by Argentina before the Tribunal, pending the constitution of the arbitral tribunal under Annex VII of UNCLOS, Argentina requests that the Tribunal prescribes 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 to be resupplied to that end.
>
> Equally Argentina requests that the Tribunal rejects all the submissions made by Ghana;

29. *Whereas* the submissions presented by Ghana in its Response, and maintained in the final submissions read by the Co-Agent of Ghana at the public sitting held on 30 November 2012, are as follows:

> [T]he Republic of Ghana requests the Tribunal:
>
> (1) to reject the request for provisional measures filed by Argentina on 14 November 2012; and
>
> (2) to order Argentina to pay all costs incurred by the Republic of Ghana in connection with this request;

* * *

30. *Considering* that, in accordance with article 287 of the Convention, Argentina, on 30 October 2012, instituted proceedings under Annex VII to the Convention against Ghana in the dispute concerning the frigate *ARA Libertad*;

31. *Considering* that Argentina notified Ghana on 30 October 2012 of the institution of proceedings under Annex VII to the Convention which included a request for provisional measures;

32. *Considering* that, on 14 November 2012, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Argentina submitted to the Tribunal a Request for the prescription of provisional measures;

33. *Considering* that Argentina, in its instrument of ratification of 1 December 1995, made the following declaration under article 298 of the Convention:

> The Argentine Government also declares that it does not accept the procedures provided for in Part XV, section 2, with respect to the disputes specified in article 298, paragraph 1(a), (b) and (c);

34. *Considering* that, on 26 October 2012, Argentina made a declaration by which it amended its declaration of 1995 under article 298 of the Convention:

> […] in accordance with article 298 of [the] Convention, the Argentine Republic withdraws with immediate effect the optional exceptions to the applicability of section 2 of part XV of the Convention provided for in that article and set forth in its declaration dated 18 October 1995 (deposited on 1 December 1995) to "military activities by government vessels and aircraft engaged in non-commercial service";

35. *Considering* that, on 15 December 2009, Ghana deposited the following declaration made under article 298 of the Convention:

> In accordance with paragraph 1 of Article 298 of the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"), the Republic of Ghana hereby declares that it does not accept any of the procedures provided for in section 2 of Part XV of the Convention with respect to the categories of disputes referred to in paragraph 1(a) of article 298 of the Convention;

36. *Considering* that article 290, paragraph 5, of the Convention provides that

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4;

37. *Considering* that therefore the Tribunal, before prescribing provisional measures under article 290, paragraph 5, of the Convention, must satisfy itself that *prima facie* the Annex VII arbitral tribunal would have jurisdiction;

38. *Considering* that the visit of the frigate *ARA Libertad* to the port of Tema, a port near Accra, Ghana, from 1 to 4 October 2012 was the subject of an exchange of diplomatic notes between the Parties and that, in response to a note verbale of 21 May 2012 from the Embassy of Argentina in Abuja, Nigeria, concerning the organization of the visit of the *ARA Libertad* to the port of Tema from 1 to 4 October 2012, the High Commission of Ghana in Abuja, by a note verbale of 4 June 2012, informed the Embassy that "the Ghanaian Authorities have granted the request";

39. *Considering* that Argentina contends that the detention of the *ARA Libertad* violates the rights recognized by the Convention and argues that the dispute between Argentina and Ghana relates to the interpretation and application of the Convention, in particular articles 18, paragraph 1 (b), 32, 87, paragraph 1 (a), and 90;

40. *Considering* that Argentina further contends that

> [t]he fact that the *ARA Libertad* is currently in forced detention prevents Argentina from exercising its right to [have it] leave the port of Tema and Ghana's jurisdictional waters, in accordance with the right of innocent passage […]
>
> The forcible detention of the frigate prevents Argentina from using this emblematic vessel to exercise its navigational rights, as guaranteed by the Convention, in the different maritime areas. It prevents the *ARA Libertad* from completing its itinerary, established in agreement with third countries, from ensuring it carries out its regular maintenance programme, and from being used as a training vessel indeed from being used full-stop. Its detention is also in direct violation of Argentina's right to benefit from the immunity attaching to its warship;

41. *Considering* that Argentina states that, as set out in article 18, paragraph 1(b), of the Convention, "the definition of innocent passage includes not only the right to proceed to the internal waters, but also the right to proceed from the internal waters; and it is particularly this latter right that has been denied to Argentina with respect to the frigate *ARA Libertad*";

42. *Considering* that Argentina further states that "[t]he frigate *ARA Libertad* was anchored at Tema […] on the basis of consent by Ghana" and "[a]ccordingly, the frigate was lawfully in the Tema port" and "[i]t was fully entitled to leave the

port, as agreed, on 4 October 2012 and to make use of the right of innocent passage as guaranteed by article 17 of the Convention";

43. *Considering* that Argentina argues that a "right in relation to which Argentina seeks protection is the freedom of the high seas regarding navigation […] as guaranteed by article 87 of the Convention", and that the detention of the frigate *ARA Libertad* by Ghana "prevents it from exercising also this fundamental freedom";

44. *Considering* that Argentina states that article 32 of the Convention confirms a well-established rule of general international law, and that, "under customary international law, as it is recognized and enshrined in the Convention, the immunity of warships is a special and autonomous type of immunity which provides for the complete immunity of these ships";

45. *Considering* that Argentina further states that article 32 of the Convention "uses the formulation 'nothing in this Convention' instead of 'nothing in this part'", which "clearly proves that its application extends beyond the part regarding the territorial sea";

46. *Considering* that Argentina argues that article 32 of the Convention determines the immunity of warships "with respect to the entire geographical scope of the Convention" and that the "immunity accorded to warships is identical in internal waters as it is in the territorial sea";

47. *Considering* that, contrary to Ghana's position that article 32 of the Convention does not set forth an obligation, establishing a rule of immunity, and is a mere "saver clause", Argentina argues that, "article 32 explicitly refers to such immunity so that warship immunity is incorporated into the Convention";

48. *Considering* that Argentina argues that article 8 of the Convention concerning the definition of internal waters also comes under the provisions of Part II of the Convention entitled "Territorial Sea and Contiguous Zone";

49. *Considering* that Argentina refers to article 236 of the Convention which states that

> [t]he provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service;

50. *Considering* that Argentina contends that the immunity of warships relates to the whole maritime area, and points in particular to the provisions of the Convention regarding the protection and preservation of the marine environment, such as article 211, paragraph 3, concerning the entry of foreign vessels into ports or internal waters and article 218 concerning enforcement by port States, which according to Argentina, shows clearly that article 236 applies to the regime of ports;

51. *Considering* that Ghana maintains that there is no dispute between Ghana and Argentina on the interpretation or application of the Convention and that consequently the Tribunal does not have jurisdiction to order the provisional measures requested by Argentina;

52. *Considering* that Ghana contends that the Annex VII arbitral tribunal has no *prima facie* jurisdiction concerning the dispute presented by Argentina since "[o]n their face […] none of those provisions [articles 18, paragraph 1 (b), 32, 87, paragraph 1 (a), and 90] is applicable to acts occurring in internal waters";

53. *Considering* that Ghana is of the view that article 18, paragraph 1, of the Convention, which defines "passage" as navigation through the territorial sea without entering the internal waters of the coastal State or for the purpose of entering or leaving the internal waters, is of no relevance for the present case as the ship "is not in Ghana's territorial sea";

54. *Considering* that Ghana contends that articles 87 and 90 of the Convention relate to freedom of the high seas and the right of navigation on the

high seas, respectively, and that they are not directly relevant to the immunity of a warship in internal waters;

55. *Considering* that Ghana argues that article 32 of the Convention refers to the immunity of warships in the territorial sea and does not refer to any such immunity when in internal waters and that "it was understood that the regime of ports and internal waters was excluded […] from the 1982 Convention";

56. *Considering* that Ghana maintains that the coastal State enjoys full territorial sovereignty over internal waters, and that any foreign vessel located in internal waters is subject to the legislative, administrative, judicial and jurisdictional powers of the coastal State;

57. *Considering* that Ghana contends that the immunity of a warship in internal waters does not involve the interpretation and application of the Convention and that, to the extent that such rules might exist, they could only be found outside the Convention, whether under other rules of customary or conventional international law;

58. *Considering* that Ghana maintains that "[a]rticle 288(1) of UNCLOS provides that an Annex VII tribunal will have jurisdiction over 'any dispute concerning the interpretation or application of the Convention', not the interpretation or application of general international law";

59. *Considering* that Ghana states that article 236 of the Convention "is limited to the protection and preservation of the marine environment, which is not in issue in this case";

* * *

60. *Considering* that at this stage of the proceedings, the Tribunal does not need to establish definitively the existence of the rights claimed by Argentina and yet, before prescribing provisional measures, the Tribunal must satisfy itself that the provisions invoked by the Applicant appear *prima facie* to afford

a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded;

61. *Considering* that article 18, paragraph 1(b), of the Convention on the meaning of passage in the territorial sea and articles 87 and 90 concerning the right and freedom of navigation on the high seas do not relate to the immunity of warships in internal waters and therefore do not seem to provide a basis for *prima facie* jurisdiction of the Annex VII arbitral tribunal;

62. *Considering* that article 32 of the Convention reads:

> *Immunities of warships and other government ships operated for non-commercial purposes*
>
> With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes;

63. *Considering* that article 32 of the Convention states that "nothing in this Convention affects the immunities of warships" without specifying the geographical scope of its application;

64. *Considering* that, although article 32 is included in Part II of the Convention entitled "Territorial Sea and Contiguous Zone", and most of the provisions in this Part relate to the territorial sea, some of the provisions in this Part may be applicable to all maritime areas, as in the case of the definition of warships provided for in article 29 of the Convention;

65. *Considering* that, in the light of the positions of the Parties, a difference of opinions exists between them as to the applicability of article 32 and thus the Tribunal is of the view that a dispute appears to exist between the Parties concerning the interpretation or application of the Convention;

66. *Considering* that, having regard to the submissions of the Parties and the arguments presented in support of these submissions, the Tribunal is of

the view that article 32 affords a basis on which *prima facie* jurisdiction of the Annex VII arbitral tribunal might be founded;

67. *Considering* that, for the above reasons, the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute;

* * *

68. *Considerin*g that article 283, paragraph 1, of the Convention reads as follows:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means;

69. *Considering* that Argentina contends that the requirements of article 283 of the Convention have been satisfied in light of its efforts to exchange views and resolve the dispute and that it refers in this respect to the letter dated 4 October 2012 sent by the Minister of Foreign Affairs of Argentina to his Ghanaian counterpart, to requests made by the Argentine Ambassador accredited to Ghana as well as to the fact that it sent to Accra a high-level delegation which met with high officials of Ghana from 16 to 19 October 2012, and *considering* that these facts are not disputed by Ghana;

70. *Considering* that Argentina maintains that such exchanges of views and negotiations have failed to resolve the dispute;

71. *Considering* that the Tribunal has held that “a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted” (*MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 107, para. 60);

72. *Considering* that, in the circumstances of the present case, the Tribunal is of the view that the requirements of article 283 are satisfied;

* * *

73. *Considering* that, pursuant to article 290, paragraph 5, of the Convention, the Tribunal may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the Annex VII arbitral tribunal would have jurisdiction and that the urgency of the situation so requires;

74. *Considering* that, in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision;

75. *Considering* that, with reference to the preservation of the rights of the parties, Argentina states that

> Ghana's action is producing an irreparable damage to the Argentine rights in question, namely the immunity that the Frigate ARA Libertad enjoys, the exercise of its right to leave the territorial waters of Ghana, and its freedom of navigation more generally;

76. *Considering* that Argentina states that "[o]n 7 November the Port Authority agents forcibly attempted to board and move the Frigate ARA Libertad" and contends that

> [t]he attempt by the government and judiciary system of Ghana to exercise jurisdiction over the warship, the application of measures of constraint and the threat of further measures of attachment against the Frigate ARA Libertad, not only preclude Argentina from exercising its rights for a prolonged period, but also entail a risk that these rights will be irreparably lost;

77. *Considering* that Argentina further states that

> [t]he detention of the warship is […] a measure that disrupts the organisation of the armed forces of a sovereign State and an offence to one of the symbols of the Argentine Nation that hurts the feelings of the Argentine people, the effects of which are only compounded by the passage of time;

78. *Considering* that Ghana maintains that it "does not accept that Argentina has suffered irreparable harm due to the temporary holding of the ARA Libertad at the Tema Port pursuant to an order of the Ghanaian High Court";

79. *Considering* that Ghana further maintains that "there is no real or imminent risk of irreparable prejudice to Argentina's rights caused by the ongoing docking of the vessel" at the port of Tema;

80. *Considering* that Ghana contends that

> Argentina has not established that the provisional measures it has requested are necessary or appropriate because it has not demonstrated that it will suffer a real and imminent risk of irreparable prejudice to its rights such as to warrant the imposition of the measures;

81. *Considering* that, with reference to the urgency of the situation, Argentina states that

> [i]f the provisional measure requested is not ordered, the involuntary presence of Frigate ARA Libertad and its crew in the Tema port will be left at the mercy of the will of the Ghanaian State, which continues to detain the warship contrary to international law;

82. *Considering* that Argentina states that "[f]urther attempts to forcibly board and move the Frigate without the consent of Argentina would lead to the escalation of the conflict and to serious incidents in which human lives would be at risk";

83. *Considering* that Argentina contends that the risk of disregard of the warship's immunity is real and serious because "the Ghanaian judicial authorities have stated their intention to rule on the merits [of the case] and,

notwithstanding the immunities enjoyed by the *ARA Libertad*, on the application for execution of the judgment concerning the warship";

84. *Considering* that Argentina states that the threat to prosecute the Commander of the *ARA Libertad* "for being in contempt of court as a result of the events of 7 November adds a new and flagrant denial to the immunities of Argentina, the ARA Libertad and its military staff";

85. *Considering* that Argentina maintains that "the degradation of the general conditions of the warship due to the impossibility to carry out the scheduled maintenance of its systems, [is] compromising the vessel's safety for prolonged navigation";

86. *Considering* that Argentina states that

> the time required for the constitution of the arbitral tribunal, for the conduct of the relevant procedure and for the award to be rendered makes it impossible for Argentina to wait for the completion of the procedure without seriously impairing the exercise of its rights, or their very existence;

87. *Considering* that Argentina further states that

> any measure which would imply a condition for the release of the *ARA Libertad*, whether it be financial or otherwise, would mean a denial of the immunity enjoyed by warships under the Convention and international law;

88. *Considering* that Ghana contends that "there is no urgency such as to justify the imposition of the measures requested, in the period pending the constitution of the Annex VII arbitral tribunal";

89. *Considering* that Ghana states that, "[c]ontrary to the Argentina's submission, there is no real or imminent risk of prejudice to Argentina's rights caused by the ongoing docking of the ARA Libertad at Port Tema";

90. *Considering* that Ghana argues that "[t]he events of 7 November 2012 in no way demonstrate that there is a risk of irreparable prejudice to Argentina's rights prior to the imminent formation of the Annex VII Tribunal";

91. *Considering* that Ghana states that "the Port Authority has been very careful to ensure that the ship and its remaining crew have been and will continue to be provided with all requirements to ensure their full liberty, safety and security" and that

> in exercising their duty to enforce the order of the Ghanaian High Court, the Port Authority has acted reasonably in avoiding the use of excessive force and has taken into account the historical and cultural value of the vessel in trying to protect it from all possible risks – including risks to navigational safety and risks of clinker and cement contamination;

92. *Considering* that Ghana claims that "Argentina has the ability to ensure the immediate release of the ARA Libertad by the payment of security to the Ghanaian courts" and that "[a]ccordingly, while the dispute remains pending before the Ghanaian courts, there is no need for any additional remedy by this Tribunal in order to prevent any prejudice being caused to the rights of Argentina";

* * *

93. *Considering* that in accordance with article 29 of the 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 and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline;

94. *Considering* that a warship is an expression of the sovereignty of the State whose flag it flies;

95. *Considering* that, in accordance with general international law, a warship enjoys immunity, including in internal waters, and that this is not disputed by Ghana;

96. *Considering* that, in accordance with article 279 of the Convention, "States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations";

97. *Considering* 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;

98. *Considering* that actions taken by the Ghanaian authorities that prevent the *ARA Libertad*, a warship belonging to the Argentine Navy, from discharging its mission and duties affect the immunity enjoyed by this warship under general international law;

99. *Considering* that attempts by the Ghanaian authorities on 7 November 2012 to board the warship *ARA Libertad* and to move it by force to another berth without authorization by its Commander and the possibility that such actions may be repeated, demonstrate the gravity of the situation and underline the urgent need for measures pending the constitution of the Annex VII arbitral tribunal;

100. *Considering* 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;

101. *Considering* that Argentina and Ghana shall each ensure that no action is taken which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal;

102. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

103. *Considering* that, pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

104. *Considering* that, in the view of the Tribunal, it is consistent with the purpose of proceedings under article 290, paragraph 5, of the Convention that parties also submit reports to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise;

105. *Considering* that it may be necessary for the Tribunal to request further information from the Parties on the implementation of provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

106. *Considering* that the present Order in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the merits themselves, and leaves unaffected the rights of Argentina and Ghana to submit arguments in respect of those questions (see *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010*, *ITLOS Reports 2008-2010*, p. 58, at p. 70, para. 80);

107. *Considering* that, in the present case, the Tribunal sees no reason to depart from the general rule, as set out in article 34 of its Statute, that each party shall bear its own costs;

108. *For these reasons,*

THE TRIBUNAL,

(1) Unanimously,

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:

Ghana shall forthwith and unconditionally release the frigate *ARA Libertad*, shall ensure that the frigate *ARA Libertad*, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and shall ensure that the frigate *ARA Libertad* is resupplied to that end.

(2) Unanimously,

Decides that Argentina and Ghana shall each submit the initial report referred to in paragraph 103 not later than 22 December 2012 to the Tribunal, and authorizes the President to request such information as he may consider appropriate after that date.

(3) Unanimously,

Decides that each Party shall bear its own costs.

Done in English and in French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this fifteenth day of December, two thousand and twelve, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Argentine Republic and the Government of the Republic of Ghana, respectively.

(signed)

Shunji YANAI

President

(signed)

Philippe GAUTIER

Registrar

Judge Paik appends a declaration to the Order of the Tribunal.

Judge Chandrasekhara Rao appends a separate opinion to the Order of the Tribunal.

Judges Wolfrum and Cot append a joint separate opinion to the Order of the Tribunal.

Judge Lucky appends a separate opinion to the Order of the Tribunal.

DECLARATION OF JUDGE PAIK

1. In provisional measures proceedings, a rather low threshold of *prima facie* jurisdiction is balanced by more stringent requirements for the prescription of such measures, such as those of urgency and irreparability. In my view, the Order should be clearer in terms of how Argentina's request meets those requirements. Hence I append this brief observation.

2. In measuring the "urgency of the situation" under article 290, paragraph 5, of the Convention, the Tribunal needs to consider the following factors. First, of particular relevance is the nature of the rights or legal interests in respect of which the request for provisional measures is made. In this case, among the rights at issue is that of Argentina to enjoy the immunity of a warship in the port of a foreign State. This right is clearly established in international law, and, in fact, constitutes one of the most important pillars of the *ordre public* of the oceans. In addition, as the Order of the Tribunal indicates in paragraph 94, a warship, the subject-matter of the right claimed by Argentina, is an expression of the sovereignty of the State and an instrument of war. As such, any dispute involving a warship has the potential to disrupt peace and security and should thus be dealt with with utmost caution. The fact that the frigate *ARA Libertad* is an unarmed training vessel does not mitigate the gravity of the situation. This nature of the right and of its subject-matter suggests an element of urgency in the present case.

3. The second factor to be considered is a temporal element. Under article 290, paragraph 5, of the Convention, the Tribunal may not prescribe provisional measures unless it is satisfied that prejudice to the rights of the parties is likely to occur before an arbitral tribunal has been constituted and become functional. The time frame envisaged under article 290, paragraph 5, is thus much tighter than that under article 290, paragraph 1, which provides for the prescription of provisional measures *pendent lite*. While the requirement of urgency under article 290, paragraph 5, is accordingly more stringent than that under article 290, paragraph 1, whether such a requirement is met depends on the circumstances of the particular case. In the present case, the Tribunal was informed that several legal proceedings related to the frigate *ARA Libertad*, including those on the application for execution of the judgment

against the warship and on the appeal against its forced relocation, are now under way in the domestic courts of Ghana. The information available to the Tribunal also indicates that the plaintiff, which filed a motion for interlocutory injunction and interim preservation of the *ARA Libertad* and thus triggered the events leading to the present proceedings, is apparently a quite active litigant. While the outcome of the litigation and the dates of the decisions are unknown, the fact that they are pending and have the potential further to aggravate the situation cannot be taken lightly.

4. The third factor to be considered is the existence or otherwise of commitments or assurances given by the parties that an action prejudicial to the rights of the parties will not be taken. In determining the urgency of the situation, the Tribunal has attached importance to such commitments or assurances. However, Ghana in this case is unable to give such assurance because it is beyond the competence of the government (executive branch) of Ghana. The measures of constraint against the *ARA Libertad* were ordered by the High Court of Ghana. As the Co-Agent of Ghana acknowledged, the government of Ghana cannot interfere with those judicial acts due to the strict separation of powers and the independence of the judiciary. Although the affidavit submitted by the Ghana Port and Harbour Authority confirms, among other things, that the warship has access to water and electricity and that the crew is not subject to any harassment or psychological aggression, such confirmation by no means assures that the *ARA Libertad* is now safe from further measures of constraint that might be ordered by the courts of Ghana. On the contrary, the warship and its crew remain as vulnerable to them as before, if not more so. The lack of assurance on the part of Ghana thus does not help mitigate the urgency of the situation.

5. The next requirement for the prescription of provisional measures is that such measures should aim to preserve the respective rights of the parties to the dispute. In order to preserve the respective rights of the parties, irreparable prejudice or harm to the rights must be prevented. Thus the test of “irreparable prejudice” has been developed mostly by the International Court of Justice (*Fisheries Jurisdiction* case *(United Kingdom of Great Britain and Northern Ireland* v. *Iceland), Order of 17 August 1972, I.C.J. Reports, 1972*, p. 16, para. 21), though it should be pointed out that its application by the Court has not always been consistent and that such a

test is not the only applicable standard to justify provisional measures. Under this test, if prejudice or harm that cannot be repaired simply by "the payment of an indemnity or by compensation or restitution in some other material form" is likely to occur, provisional measures may be considered (*Denunciation of the Treaty of 2 November 1865 between China and Belgium, Order of 8 January 1927, P.C.I.J. Series A, No. 8,* p. 7). The purpose of provisional measures is thus to prevent a risk of irreparable prejudice or harm from occurring.

6. In the present case, the alleged violation of Argentina's rights has already occurred and the state of infraction continues. Moreover, further violations are likely to occur, not least depending on the progress and outcome of the litigation pending in the Ghanaian courts. Moreover, the rights allegedly violated are of such nature that compensation or any material reparation may fall short of repairing harm caused to them. According to Argentina, prejudice or harm to its rights includes not only a serious risk to the very existence of its rights but consequential damages such as the prevention of the warship from fulfilling its missions and duties, a serious risk to the safety of the warship and its crew and injuries to the dignity of the State and the feelings of its people. What is important in this case is that the continuation of situation is likely to increase a serious risk of irreparable prejudice or harm to those rights.

7. Considering the nature of the right at issue and its subject-matter, pending litigation in the courts of Ghana with its potential to aggravate the situation, the lack of assurance on the part of Ghana, and the nature and gravity of harm that has occurred and is likely to occur, I believe that the requirements for the prescription of provisional measures, in particular those of urgency and irreparability, have been met in this case.

8. Now that the need for provisional measures is established, the question is what should be the content of such measures. As provisional measures are prescribed without there being any need to prove the conclusive existence of jurisdiction or the validity of claims, a request for measures that would result in virtually resolving the dispute should not be accepted. The Permanent Court of International Justice emphasized this point when it stated that any request "designed

to obtain an interim judgment in favour of a part of the claim formulated in the Application" should be dismissed (*Case concerning the Factory at Chorzów (Indemnities), Order of 21 November 1927, P.C.I.J. Series A, No. 12,* p. 10). However, this does not necessarily mean that a party cannot seek relief through a request for provisional measures which is in substance identical with the principal relief sought on the merits of the claim. Much depends on the circumstances of the particular case. In the present case, the relief sought by Argentina in the request, which is the unconditional release of the warship *ARA Libertad*, comes close, in substance, to the principal relief sought in the claims submitted in its Application. However, this fact alone should not preclude the Tribunal from considering the measures sought by Argentina. In addition, the various forms of relief sought by Argentina in its Application instituting the Annex VII arbitration are obviously broader than those sought in the request for provisional measures.

9. In prescribing provisional measures, what the Tribunal should consider is the preservation of the "respective" rights of the parties to the dispute. In other words, the Tribunal should have due regard for and do justice to the respective rights of both parties. Provisional measures that preserve the rights of one party but prejudice those of the other party cannot be considered appropriate. In the present case, while Argentina clearly demonstrates its rights to be preserved, Ghana fails to do so as regards its own rights. Furthermore, Ghana did not differ from Argentina on the point that the *ARA Libertad*, as a warship, is entitled to immunity under general international law and thus must be released. The Co-Agent of Ghana stated before the High Court of Justice in Accra: "[I]t became the court's duty in conformity to established principles to release the vessel and to proceed no further in the course". (Proceedings in the Superior Court of Judicature in the Commercial Division of the High Court of Justice Accra held on Tuesday, 9 October 2012 before his Lordship Justice Richard Adjei-Frimpong. Statement by Mr. Ebenezer Appreku, Director of the Legal and Consular Bureau of the Ministry of Foreign Affairs and Regional Integration of Ghana). He stated further in the public hearing before the Tribunal that

> [I] appeared before the High Court not, I underscore with the greatest respect, in my personal capacity but in my official capacity as a legal adviser to the Ministry of Foreign Affairs, and the views that I expressed reflected what I was authorized to say by the Foreign Minister. ... Despite our best efforts, the High Court's decision did not go Argentina's way, and

> the views expressed by the executive arm of government of Ghana, which it continues to hold, were not accepted (ITLOS/PV.12/C20/4, p. 12, lines 8-15).

In my view, this understanding between the parties on the need for the release of the ARA Libertad is of particular relevance to the Tribunal in granting the relief sought by Argentina. The unconditional release of the *ARA Libertad* preserves the rights of Argentina while it does not affect or prejudice those of Ghana.

10. There is clearly an important role to be played by the discretion and appreciation of the Tribunal when it considers and prescribes provisional measures under article 290 of the Convention. However, the application of this provision to the facts should not vary with the length of the “Chancellor’s foot”. A little more clarity in the reasoning of the Tribunal could be helpful in this regard.

(signed)

J.-H. Paik

SEPARATE OPINION OF JUDGE CHANDRASEKHARA RAO

1. I have voted in favour of the Order. Nevertheless, the Order remains conspicuously silent on certain aspects of the case which deserve to be noted in this Separate Opinion.

2. The central issue in this case concerns the detention of the Argentine warship *ARA Libertad* by Ghana at its port of Tema. Though its entry into this port was authorized by Ghana, Ghana argues that the ship was detained pursuant to an order of the Ghanaian High Court sitting in Accra, notwithstanding the clear submission made before the Court by the Director of the Legal and Consular Bureau of the Ministry of Foreign Affairs of Ghana to the effect that the warship enjoyed immunity and that it was the duty of the Judge to release the vessel forthwith. His statement deserves to be quoted in full:

> First of all there are two levels in this matter one has to do with the jurisdiction of the court for the Republic of Argentina subject to the jurisdiction of the courts of Ghana. The second has to do with the status of the warship and on both count as the department responsible for the conduct of our relations we want to ride on the established principles that we need the express waiver of a foreign government to subject that government to your foreign jurisdiction, not even the American courts will entertain an exercise of jurisdiction over the Republic of Argentina in breach of the principle of the sovereign immunity of a foreign state in a foreign court. The second part is the vessel, the warship. As has been deposed by counsel for Argentina, the foreign ministry advised the Attorney Generals Department that the vessel is a warship and on that point I want to refer to a ruling by a U.S. Court in the case of Ex-parte Republic of Peru in which Chief Justice Stone in ruling upon Peru's claim of sovereign immunities stated that the department of state has allowed the claim of immunity and caused it actions to be certified to the District Court through the appropriate channels. The certification and the request that the vessel the warship be declared immuned must be accepted by a court as a conclusive determination by the political arm of government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this certification to the court (in this case our letter which is attached to the affidavit filed by counsel). Upon certification to the court (in this case this honourable court), it became the court's duty in conformity to established principles to release the vessel and to proceed no further in the case. I recognize that this is of persuasive authority.

3. In spite of this clear and unambiguous certification by the executive wing of the Government, the Court took measures of constraint against the warship.

4. During the course of the oral proceedings, Ghana did not take the legal position that it expressed before its own court. Ghana explained its inability to help in the matter of release of the warship. Ghana stated:

> However, by reason of my Government's strong and unwavering commitment to the rule of law and the separation of powers – encompassing a completely independent judiciary – the situation is not one which can be resolved instantaneously by an act of the executive branch of the Ghanaian Republic. In Ghana the independence of the Ghanaian Judiciary is fully respected. (ITLOS/PV.12/C20/2, p. 3)
>
> The executive arm of government is therefore unable to interfere with the work of the Ghanaian courts; it is not within the powers of the Government to compel the Ghanaian courts to do anything. It is not for the executive branch to meddle with the judicial function of the Ghanaian High Court, just as no political body and no organ of the United Nations can in any way interfere with the judicial functions of this illustrious Tribunal. (ITLOS/PV.12/C20/2, p. 3)

5. In response to the Ghanaian argument, Argentina points out that a State is required to abide by its obligations under international law, that a State is responsible for the acts of all its organs, whether they exercise judicial or other functions, and that Ghana has not taken any kind of measure aimed at putting an end to the unlawful act generated by the decision of its judiciary.

6. It is well established that a State cannot take shelter behind a decision of any of its organs as an excuse for not implementing its international legal obligations. The Permanent Court of International Justice stated:

> From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.
> (*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7,* p. 19. See the Judgment of this Tribunal in the *M/V "SAIGA" (No 2)* Case, *Judgment, ITLOS Reports 1999*, p. 10 at p. 52, citing with approval the above quoted Judgment)

7. The International Court of Justice held:

> According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:
>
> > The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State. (*Yearbook of the International Law Commission*, 1973, Vol. II, p. 193)
>
> ...
>
> As indicated above, the conduct of an organ of a State – even an organ independent of the executive power – must be regarded as an act of that State.
>
> (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I. C. J. Reports 1999,* p. 62 at pp. 87-88, paras. 62-63*)*

8. More recently, the International Court of Justice stated:

> The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity.
> ...
>
> The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law. (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* p. 3 at p. 29)

9. The question whether the doctrine of estoppel could also be invoked as a ground for opposing the judicial proceedings has not been mentioned in the Judgment. It has been discussed in the Separate Opinion of Judges Wolfrum and Cot. There is no doubt that, as noted in the Judgment, the visit of the warship *ARA Libertad* to the port of Tema was the subject of an exchange of diplomatic notes between Argentina and Ghana, whereby the visit of the warship had been authorized by Ghana by a note verbale of 4 June 2012. What is the legal significance of this

authorization? The position that obtains under general international law is well established.

10. As early as 1812, the United States Supreme Court, in the *Schooner Exchange* case, held:

> If the preceding reasoning be correct, the *Exchange*, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. (*The Schooner Exchange v. McFaddon*, 11 U.S. 116, para. 20 (1812))

11. To the same effect are the following observations by C. John Colombos:

> When the entry of foreign warships has been either expressly or impliedly allowed by the territorial State, its jurisdiction is waived, and no form of public or private process lies against the foreign warships. They cannot be seized or interfered with in any manner by judicial proceeding [...]. (C. John Colombos, *The International Law of the Sea (*6th revised edition 1967), pages 264-265)

12. Since in this case the entry of the warship into the internal waters had been expressly authorized by Ghana, the warship should be considered as exempted from Ghana's jurisdiction by its consent. The coastal State with whose permission a warship enters its internal waters can be said to have waived its jurisdiction over the warship. It does not appear that such waiver in and by itself affords a basis on which prima facie jurisdiction of the Annex VII arbitral tribunal might be founded.

13. Even if the doctrine of estoppel can be relied upon on the facts of this case, it may not have a bearing on the prima facie jurisdiction of the Annex VII arbitral tribunal. Judges Wolfrum and Cot disagree with the holding of the Tribunal that the Annex VII arbitral tribunal would prima facie have jurisdiction over the dispute. Nevertheless, they are of the opinion that the Tribunal can prescribe appropriate provisional measures, since Ghana is estopped from presenting any objection for such

prescription in the particular circumstances of this case. The Convention does not appear to support this view. How can the Tribunal prescribe provisional measures if it has no jurisdiction?

14. The argument based on waiver or, as the case may be, estoppel may become relevant at the merits stage of this case.

15. Paragraph 97 of the Judgment deals with the consequences of a warship being prevented by force from discharging its mission.

16. I would have preferred to see in this paragraph a clear statement to the effect that even an attempt to threaten or use of force against a warship would be a matter impinging on the maintenance of international peace and security. In a comprehensive article on warships, Bernard Oxman stated:

> An attempt to exercise law enforcement jurisdiction against a foreign warship is in fact an attempt to threaten or use force against a sovereign instrumentality of a foreign State. That is primarily the subject matter of the law regarding the maintenance of international peace and security, not the law of the sea as such – with a notable qualification in the case of innocent passage in the territorial sea... (Bernard H. Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea", *24 Va. J. Int'l L.,* pp. 809 at 815 (1983-1984))

(signed)

P. Chandrasekhara Rao

JOINT SEPARATE OPINION OF JUDGE WOLFRUM AND JUDGE COT

1. We have voted in favour of the measures as prescribed in the Order, however, we cannot join in a significant part of the reasoning. In particular, we disagree with the reasoning of the Tribunal as to whether the arbitral tribunal to be established under article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (the Convention) *prima facie* has jurisdiction to decide on the merits of the case.

2. Article 290, paragraph 5, of the Convention entrusts the Tribunal with the task of establishing whether *prima facie* an arbitral tribunal to be established has jurisdiction according to article 288 of the Convention. In our view the Tribunal does not construct its reasoning on this central issue as predetermined by the jurisprudence of the International Court of Justice and of this Tribunal.

3. Before delving into the question of the *prima facie* jurisdiction, several general considerations concerning the object and purpose of provisional measures, the scope of the settlement-of-disputes system under Part XV of the Convention, the relationship between jurisdiction and the question which law may be applied and the relationship between this case before the Tribunal and cases pending before national courts of several countries are called for.

Object and purpose of provisional measures

4. Provisional measures may only be requested and decided in the context of a case submitted on the merits. Provisional measures are meant to protect the object of the litigation in question and, thereby, the integrity of the decision as to the merits. Neither party to the conflict shall change the relevant situation that prevailed on the initiation of the proceedings on the merits and thus render the proceedings meaningless by frustrating their potential result. This equally embraces the objective of ensuring the proper conduct of the proceedings or the possibility of the execution of whatever judgment may finally be rendered. This objective is reflected, although in abbreviated form, in article 290, paragraph 1, of the Convention which states that

provisional measures are meant “to preserve the respective rights of the parties to the dispute … pending the final decision”.

5. In this context it seems appropriate to refer to an important consideration concerning provisional measures under article 290 of the Convention. One has to distinguish between provisional measures taken under article 290, paragraph 1, of the Convention and those under article 290, paragraph 5, of the Convention. Whereas under article 290, paragraph 1, of the Convention, the Tribunal is called upon to decide *prima facie* on its own jurisdiction, under article 290, paragraph 5, of the Convention, it must decide on the *prima facie* jurisdiction of another court or tribunal. Out of respect for the other court or tribunal the Tribunal has to exercise some restraint in questioning *prima facie* jurisdiction of such other court or tribunal. This has to be taken into account in the context of this case. The Tribunal still has to develop a jurisprudence to specify the applicable threshold more clearly. What counts, among other possible considerations, is the urgency and which rights or interests are at stake. It is equally unsatisfactory if the arbitral tribunal under Annex VII denies its jurisdiction which the Tribunal has established *prima facie* as it is for the settlement of the said dispute if the Tribunal denies *prima facie* jurisdiction in a situation where the arbitral tribunal would have voted otherwise.

6. A further consideration is called for since it has to be taken into account when establishing jurisdiction and, in particular, *prima facie* jurisdiction under article 290 of the Convention. The competences of the Tribunal under Part XV, Section 2, of the Convention have to be seen against the background of the dispute settlement system under the Convention. Whereas the International Court of Justice enjoys a general competence as far as are concerned disputes it may decide upon, the competences of the Tribunal under article 288 of the Convention are limited to disputes concerning the interpretation and application of the Convention. Such limitation is the counterpart of and in fact balances the obligatory character of the dispute settlement system under Part XV of the Convention. Any attempt to broaden the jurisdictional power of the Tribunal and that of arbitral tribunals under Annex VII going beyond what is prescribed in article 288 of the Convention is not in keeping with the basic philosophy governing the dispute settlement system of the

Convention. It undermines the understanding reached at the Third UN Conference on the Law of the Sea, namely that the dispute settlement system under the Convention will be mandatory but limited as far its scope is concerned. This limitation is not only reflected in the wording of article 288 of the Convention but equally in Section 3 of Part XV enumerating various limitations and exceptions. In our view this fundamental consideration has not been taken into account by the Order in interpreting article 32 of the Convention (see below).

7. We would like to emphasize a central point concerning the interpretation of article 288 of the Convention. According to that provision the Tribunal is mandated only to decide on disputes concerning the interpretation and application of the Convention. In that respect the mandate of the Tribunal is limited compared to the one of the International Court of Justice. Article 293 of the Convention provides that the Tribunal may have recourse to general international law not incompatible with the Convention. These two issues have to be separated clearly, which the Order does not do (compare paragraphs 62 *et seq.* with paragraph 100). A dispute concerning the interpretation and application of a rule of customary law therefore does not trigger the competence of the Tribunal unless such rule of customary international law has been incorporated in the Convention. In our view the question of the immunity of warships in foreign internal waters, including ports, is a rule of customary international law which is not being incorporated in the Convention. It is on this issue that we disagree with the reasoning of the Order; this issue will be elaborated further below.

8. We believe it necessary to underline a final general point. The Respondent emphasized that the case should be considered in its broader context, namely the cases pending before national courts dealing with bonds of the Argentine Republic. The Respondent indicated that the Tribunal should not interfere with the ongoing litigation against Argentina since it lacked judicial competence to deal with state bonds and waivers. We disagree with this approach. The case before the Tribunal is an independent albeit limited one. It only requires a decision on the jurisdiction *prima facie* of the arbitral tribunal under Annex VII and as to whether and which provisional measures may be prescribed. However, these are questions to be decided on the

basis of the Convention and have to be clearly distinguished from other issues to be considered before national fora. Also this issue will be elaborated further below. Anything that goes beyond the limited scope of the case before the Tribunal would exceed the jurisdiction the Tribunal has in this case so far.

9. We shall now turn to the issue of *prima facie* jurisdiction as indicated above.

Prima facie jurisdiction of the arbitral tribunal under Annex VII

10. According to article 290, paragraph 5, of the Convention the Tribunal may prescribe provisional measures if the case is duly submitted to it and if, pending the establishment of the arbitral tribunal, under the circumstances of the case a decision to preserve the rights of the parties is necessary before the arbitral tribunal may be established. The Tribunal does not have to establish that the arbitral tribunal has jurisdiction to entertain the case on the merits; it is sufficient but also necessary to establish that the arbitral tribunal has jurisdiction *prima facie* taking into consideration the caveat expressed in paragraph 5 above.

11. The decisive provision governing the jurisdiction of the courts and tribunals referred to in article 287 of the Convention is article 288 of the Convention, according to which these courts and tribunals have the jurisdiction to decide disputes concerning the interpretation and application of the Convention. But, as already stated in this case, the Tribunal has a more limited function; it is only mandated to establish whether the arbitral tribunal constituted under Annex VII *prima facie* has jurisdiction. To come to a conclusion three steps have to be taken, namely to establish which threshold has to be applied in deciding whether the arbitral tribunal *prima facie* has jurisdiction, whether a legal dispute exists between the parties and, finally, whether the Applicant in its discourse with the Respondent has presented facts and law which allow the Tribunal to conclude that the arbitral tribunal *prima facie* has jurisdiction.

12. Article 290 of the Convention does not provide much guidance concerning the threshold to be applied by the Tribunal when deciding on the question on *prima facie*

jurisdiction. However, the International Court of Justice has developed jurisprudence in this respect. This case law is of relevance beyond the Court for the jurisprudence of other international courts including the Tribunal. We see no reason to deviate from this jurisprudence as the Tribunal seems to do.

13. Since the Icelandic *Fisheries Jurisdiction* cases the International Court of Justice (*Interim protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 12 at p. 16 (para. 17)) uses a standard formula, namely that the instrument invoked by the parties as conferring jurisdiction "appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded". The International Court of Justice has further stated that, in taking such measures, it must remain within its jurisdiction both *ratione personae* and *ratione materiae* (Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993*, I.C.J. Reports 1993*, pp. 11-12 (para. 14)). The ICJ denied the indication of provisional measures in several cases for lack of jurisdiction on the merits. In this context, the decision to deny the indication of provisional measures in the case *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case (I.C.J. Reports 1995*, p. 288 *et seq*.) is enlightening. In this case, the applicant had invoked a paragraph ("Paragraph 63") of a previous judgment of the International Court of Justice as the basis of jurisdiction. The ICJ dismissed both the request for provisional measures and the application stating that this paragraph could only be invoked in respect of atmospheric nuclear tests but not in respect of underground nuclear tests. This means that the International Court of Justice did not simply follow the assertion of the applicant but found it necessary to compare the jurisdictional basis with the facts on which the claim of the applicant was based. In its Order of 15 October 2008 on *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, after having stated that both parties were parties to the said Convention and neither of them had entered any reservation, the International Court of Justice, in examining whether it had *prima facie* jurisdiction, scrutinized carefully whether the actions undertaken by the Russian Federation were covered by article 22 of the International Convention on the Elimination of all Forms

of Racial Discrimination (see paragraphs 104-117). The International Court of Justice correlated the alleged jurisdictional basis for entertaining the case on the merits with the claims advanced by the applicant and ascertained whether there was a link between the claims on the merits and the request for provisional measures.

14. It should always be borne in mind that the prescription of provisional measures constitutes an infringement of the sovereign rights of the responding State. This infringement is only legitimized if the State concerned has consented thereto by accepting the jurisdiction of the court or tribunal in question. This consideration is well reflected in the jurisprudence of the ICJ when the Court states that it gives jurisdiction over the merits "fullest consideration compatible with the requirement of urgency" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 169 at p. 179 (para. 25)).

15. In the present case, the principal measure prescribed by the Tribunal and in which we concur – i.e. the release of the *ARA Libertad* – is undoubtedly an infringement of the sovereign right of Ghana to apply its jurisdictional decisions within the port of Tema, due to the superior obligation imposed upon Ghana by customary international to respect immunity of warships within its internal waters.

16. On the basis of the jurisprudence of the International Court of Justice it may be summarized that – for an international court or tribunal to assume *prima facie* jurisdiction – it is not sufficient that an applicant merely invokes provisions which, read in an abstract way, may provide theoretically a basis for the jurisdiction of the court or tribunal in question. On the contrary, it is necessary for the adjudicative body to take into account the facts which are known to it at the moment of deciding on provisional measures and to consider whether on this basis, together with the legal basis invoked by the applicant, *prima facie* jurisdiction on the merits may be established. Such considerations cannot be left to the merits phase. This applies equally to the decisions under article 290, paragraphs 1 and 5, of the Convention. Whether the facts and the law presented and argued are sufficient is to be decided on a case-by-case basis, the dominant factor being urgency.

17. As indicated above it is necessary next to establish whether a legal dispute exists between the parties.

18. It is the particularity of this case that the Respondent emphasized that there was no legal dispute between Ghana and Argentina but rather a dispute between Argentina and MLN, an entity under private law. Such approach makes it necessary to deal with the meaning of the term “dispute” as referred to in article 288, paragraph 1, of the Convention and the relationship between this case before the Tribunal and the ones pending before various national courts touched upon in general terms above.

19. There is a certain confusion as to the nature of the dispute. In fact, there are two distinct disputes. The first is a dispute between NML, claimant, and the Argentine Republic, defendant. It is subject to private law and private international law. NML bought Argentine obligations and is asking for full repayment with interest. NML is asking the courts of Ghana to implement judicial decisions taken by courts in the United States and in the United Kingdom by way of seizure of the frigate *ARA Libertad* in the port of Tema. This first dispute is governed by the law of the State of New York, the law of England or the law of Ghana.

20. The second dispute, the only one concerning this Tribunal and the Annex VII tribunal, opposes the Argentine Republic, claimant, and the Republic of Ghana, defendant, on the issue of immunity from jurisdiction and enforcement of warships in ports. This dispute is governed by public international law, as stated *inter alia* by the 1982 Convention, but also by those other rules of international law referred to in article 293 of the Convention. The International Court of Justice has recently noted that “the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts” (*Jurisdictional immunities of the State (Germany* v*. Italy: Greece intervening), Judgment*, para. 113) . It is the existence of this second alleged dispute the Tribunal is to establish.

21. As far as the existence and scope of the alleged legal dispute is concerned, it is appropriate to refer to the established jurisprudence of the International Court of Justice according to which “it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it.” (*Fisheries Jurisdiction* case (*Spain* v. *Canada*), *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432 at p. 447). According to the International Court of Justice, those requirements are “essential from the point of view of legal security and the good administration of justice” (*Ibid*. 448). According to the well-established jurisprudence of the International Court of Justice, the jurisdiction of the Court regarding disputes between States is of an adversarial nature and extends only to the terms of the legal dispute submitted to it. In this regard it should be recalled that article 24, paragraph 1, of the Statute of the Tribunal and article 54, paragraph 1, of its Rules provide that the application shall indicate “the subject of the dispute”. Article 54, paragraph 2, of the Rules of the Tribunal further provides that the application shall also specify “the precise nature of the claim”. The principles underlying these provisions have been highlighted in the jurisprudence of the Permanent Court of International Justice as well as in that of the International Court of Justice. In an often quoted dictum of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case (Greece v. United Kingdom), the Court gave a definition of a dispute: “A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two parties.” This definition has been referred to by the International Court of Justice in a number of decisions (see, inter alia, *Certain Property (Liechtenstein/ Germany), Preliminary Objections*, para. 24). The Tribunal also quoted the PCIJ’s dictum in its Order in the *Southern Bluefin Tuna Cases* (*ITLOS Reports 1999*, at p. 293, para. 44) and added a reference to the jurisprudence of the International Court of Justice in the *South West Africa, Preliminary Objections,* case (*I.C.J. Reports 1962*, p. 328). Paragraph 44 of the Order of ITLOS reads:

> *Considering* that, in the view of the Tribunal, a dispute is a “disagreement on a point of law or fact, a conflict of legal views or of interests” (*Mavrommatis Palestine Concessions, Judgment No. 2, 1824, P.C.I.J, Series A, No. 2*, p. 11), and “[i]t must be shown that the claim of one party is positively opposed by the other” (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

22. The Respondent advances two arguments in support of its denial that there is a legal dispute, namely that the Convention does not cover the internal waters and that none of the provisions of the Convention provide for the immunity of warships in the internal waters of a foreign State.

23. As far as the first argument is concerned, we agree in principle with the Respondent. We note, though, that there are certain provisions in the Convention having a bearing on the legal regime governing internal waters; these are article 2, paragraph 1, article 7, paragraph 3, article 8, article 10, paragraph 4, article 18, paragraph 1, article 25, paragraph 2, article 27, paragraph 2, article 28, paragraph 3, article 35 (a), article 50, article 211, paragraph 3, and article 218 of the Convention.

24. But even a cursory assessment of these provisions clearly indicates their limited scope. They only deal with the status of internal waters, equating that area with the land territory, the access thereto, their delimitation *vis-à-vis* the territorial sea, the rights of coastal States exercising their jurisdiction *vis-à-vis* vessels having left internal waters and the rights of coastal States to prevent the entry of vessels into their internal waters. However, all these provisions taken together do not constitute a comprehensive legal regime comparable to the one on the territorial sea (see the different approach taken in the Order). In particular, an equivalent to article 21 of the Convention describing the laws and regulations of the coastal State relating to innocent passage in the territorial sea is missing. The principle governing internal waters is the sovereignty of the coastal State concerned. This is clearly expressed in article 2, paragraph 1, of the Convention, which reads:

> The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

25. The provision is quite telling. It equates internal waters and archipelagic waters with the land territory whereas it “extends the sovereignty to an adjacent belt of sea called the territorial sea”. This clearly establishes that internal waters originally belong to the land whereas the territorial sea so belongs but only on the basis of international treaty and customary international law. As a consequence thereof

limitations of the coastal States' sovereignty over internal waters cannot be assumed.

26. Our analysis that internal waters in principle are not covered by the Convention but by customary international law is largely confirmed by the travaux préparatoires of the Convention. It is telling that during the long years of the Third Conference on the Law of the Sea, not a word was said about including provisions on the legal regime of ports and inland waters in the Convention. No delegation at any moment suggested otherwise.

27. In 1928 at Stockholm, the Institut de droit international adopted a comprehensive resolution on the rules of customary international law governing the regime of ships and crews in foreign ports in peacetime (Gilbert Gidel, Rapporteur). It drafted a full 17 articles on the status of warships. The main provisions included article 15, stating that foreign warships must respect the local laws and regulations, in particular those concerning navigation, docking and sanitary police. In case of a serious violation, the commander, after having been duly notified, may be invited to leave the port. Article 16 provides that military vessels admitted in a foreign port are subject to the action of their State; the local authorities may not take acts of authority on these warships or exercise any act of jurisdiction over the persons on board the ship, except in the cases expressly provided for in the present rules.

28. It is noticeable that the Institut refrained from using the term "immunity". At no moment did the Institut suggest the item be addressed by the forthcoming 1930 Codification Conference of The Hague.

29. The Hague Codification Conference of 1930 addressed the issue of "Exercise of Jurisdiction over Foreign Vessels in Ports". The Second Committee of the Conference, on Territorial Waters (Rapporteur: Mr. François), decided not to include the subject for the following reasons:

> The Preparatory Committee, when drawing up its questionnaire, observed that this issue did not quite lie within the programme of questions with which the Conference would have to deal. The Committee found that the

> opinions of Governments were divided as to the desirability of embodying this point in the future Convention.
>
> The Committee agreed not to include any clause of this kind in the Convention It was pointed out that the subject was a very complex one, lying outside the scope of the Convention, and could not be treated in full in the two Bases of Discussion drawn up by the Preparatory Committee... (*Acts of the Conference for the Codification of International Law, vol. III (Minutes of the Second Committee, Territorial Waters, p. 209*.)

30. The Conference recommended "... that the Convention on the International Regime of Maritime Ports signed at Geneva on December 9th 1923 be supplemented by the adoption of provisions regulating the scope of the judicial powers of States with regard to vessels in their inland waters."

31. The Council of the League took note of the proposal and, on proposal of Mr. Grandi, transmitted the recommendation to the Organization for Communications and Transit (June 1930 *League of Nations - Official Journal,* p. 545). No further action was taken at the time.

32. The issue was re-examined and disposed of in the Geneva Conventions on the Law of the Sea and, more specifically, during the meetings of the International Law Commission on the subject. In 1954, Hersch Lauterpacht pointed out that "... nothing had been said of the obligations of States from the point of view of the regime of the ports". He added that "[t]he Commission was codifying and consolidating international law and should lay down in its draft the obligations of States on the basis of the 1923 Geneva Convention."

33. J.P.A. François, who was reappointed as Rapporteur in the International Law Commission, answered the following:

> Mr. François, Special Rapporteur, said he was opposed to the discussion of the regime of ports. The subject was outside the scope of the Commission's work which dealt exclusively with the regime of the territorial sea. He had already agreed to include in article 9 a stipulation originally contained in the comment to that article. However Mr. Lauterpacht wished the Commission to go still further and actually to determine the regime of the ports. That question had been entirely omitted from his report, and, if it was decided to introduce it, the Commission would have to take up the whole problem of inland waters, which would greatly complicate matters. He appealed to Mr. Lauterpacht

> not to press for a discussion on the regime of ports. (*Yearbook of the International Law Commission*, 1954, vol. I, p. 91).

G. Amado, J. Zourek and G. Scelle supported the views of the Special Rapporteur. H. Lauterpacht complied and the matter was settled.

34. The considerations set out above, namely the textual analysis of article 2, paragraph 1, of the Convention as well as the legislative history concerning the treatment of internal waters in the ILC, the Geneva Law of the Sea Conference of 1958 and the Third UN Conference on the Law of the Sea, have not been taken into account by the Order of the Tribunal. For that reason we cannot assume that all activities of the coastal State in its internal waters and its ports are governed by the Convention and accordingly come under the jurisdiction of the Tribunal.

35. To establish that there is a legal dispute between the Parties it is not sufficient that the Applicant takes a different view on the status of internal waters than the Respondent. It is for the Applicant, in accordance with the jurisprudence referred to above, to invoke and argue particular provisions of the Convention which plausibly support its claim and to show that the views on the interpretation of these provisions are positively opposed by the Respondent.

36. On this basis we will deal with the provisions invoked by the Applicant, arguing that the Tribunal has jurisdiction according to article 288, paragraph 1, of the Convention.

37. We agree with the Order as far as article 87 of the Convention is concerned. It has to be noted that this provision deals with the freedom of the high seas, in particular the freedom of navigation. Evidently, the Applicant takes the position that the arrest and detention of the *ARA Libertad* constitutes an infringement on the freedom of navigation. In our view this approach is not sustainable considering the situation of the vessel, which is detained in Tema, a port of the Respondent. It is hard to imagine how the detention of a vessel in port in the course of national civil proceedings can be construed as violating the freedom of navigation on the high seas. To take this argument to the extreme, it would, in fact, mean that the principle

of the freedom of navigation would render all vessels immune from civil proceedings and in consequence from the implementation of the national law of the port State in question. This leads us to the conclusion, and insofar we follow the reasoning of the Tribunal, that on the facts provided by the Applicant article 87 of the Convention does not form a plausible basis for a claim of the Applicant.

38. We disagree with the Order of the Tribunal in its interpretation of article 32 of the Convention. Article 32 reads:

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

39. The Order maintains that article 32 provides for the immunity of warships and that this rule applies to the internal waters. We disagree with both.

40. As far as the interpretation of article 32 of the Convention is concerned article 31 of the Vienna Convention on the Law of Treaties is to be applied; thus text, context, object and purpose as well as the legislative history of this provision are of relevance.

41. The wording of this provision makes it plain that this provision does not establish the immunity of warships. Instead the immunity of warships is taken for granted. Therefore article 32 constitutes a reference rather than a regulation in itself. In that respect article 32 of the Convention corresponds to the last preambular paragraph of the Convention, which states: "*Affirming* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

42. Further, the wording of article 32 of the Convention also clearly spells out that it addresses limitations and exceptions to immunity. This textual interpretation is reinforced by the wording of article 95 of the Convention, which reads: "Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."

43. Comparing the wording of these two provisions on the immunity of warships makes it very clear that only article 95 of the Convention contains a regulation on immunity whereas article 32 does not; any other interpretation disregards the difference in wording while making it obsolete. That having been said, this must not be misunderstood to mean that warships have no immunity in internal waters; they have but the basis thereof is in customary international law and not in the Convention.

44. It having been established on the basis of a textual analysis that article 32 of the Convention constitutes a reference to immunity and not a regulation as far as the establishment of immunity is concerned, it is easier to understand the reference to ”nothing in this Convention”. This reference does not apply to an establishment of immunity but rather to exceptions. It means that, apart from the exceptions specifically referred to articles 30 and 31 and in subsection A of Section 3 (Innocent Passage in the Territorial Sea), the Convention does not contain any further exceptions for the immunity of warships. Therefore it is unsustainable to conclude from this reference in article 32 of the Convention to the potential sources of exceptions that article 32 of the Convention is to be applied beyond the territorial sea.

45. This brings us to the second point, namely whether article 32 of the Convention on the immunity of warships if understood as in the Order may be considered to be a general clause governing the immunity of warships in all ocean spaces, including the internal waters (see paragraph 64 of the Order). It has to be acknowledged, though, that article 32 of the Convention is placed in the Section on innocent passage in the territorial sea. This means *prima facie* that this provision is meant to be applicable in the territorial sea only. One cannot disregard the location of a provision and the impact this location may have on the interpretation of the said regulation easily. It has already been pointed out above that the reference to the Convention refers to exceptions rather than to the establishment of immunity itself. Having said so, we are aware that the Convention is not always consistent in this respect. Article 29 of the Convention, providing the definition of the term “warship”, applies to the Convention as a whole. But it does so explicitly by saying: “For the

purposes of this Convention, ‘warship’ means ...”. Such an indication concerning the applicability is missing in article 32 of the Convention. It has already been pointed out that the reference to the Convention has a different meaning in the context of article 32 of the Convention. Finally the Order should have considered what it means to attribute a wider scope of application to article 32 of the Convention. The immunity of warships on the high seas is covered by article 95 of the Convention and this provision applies, according to article 58, paragraph 2, of the Convention, also to the exclusive economic zone. This means the Order only advocates the extension of article 32 of the Convention to the internal waters, although it refers to “all maritime areas” which is in contradiction to the wording of that rule, its placement and in particular the distinction being made between internal waters and the territorial sea in article 2, paragraph 1, of the Convention (see above, paragraphs 25 and 26).

46. Our reading of article 32 of the Convention is endorsed by the legislative history of this provision. This provision developed out of article 23 of the International Law Commission’s draft articles prepared in 1956. The main issue at that time was not warships but government ships operated for non-commercial purposes. The ILC draft was taken over and expanded by article 22 of the 1958 Convention on the Territorial Sea and the Contiguous Zone. What is of interest in this context is that its paragraph 2 emphasized that the rules regarding the enjoyment of the rights of innocent passage of government ships operated for non-commercial purposes were without prejudice to whatever immunities such ships might enjoy under the provisions of the 1958 Convention or other rules of international law. This, at least, provides for a clear indication that the issue of immunity had its basis outside treaty law in customary international law. This reference to customary international law was repeated for warships in article 31 ISNT/Part II. This reference was dropped in article 31 RSNT/Part II. The ultimate reason for that was the general reference to customary international law in the last preambular paragraph.

47. That warships in internal waters enjoy immunity from the exercise of coastal State jurisdiction, which includes immunity from judicial proceedings or any enforcement measure, is well established in customary international law and recognized in legal doctrine. This was affirmed *inter alia* by the International Law

Institute in its Resolution of 1897 and of 1928. The Institute's Stockholm Resolution, "Règlement sur le régime des navires de guerre et de leurs équipages dans les ports étrangers en temps de paix" of 1928, provided (articles 15 and 26) that warships cannot form the subject of seizure, arrest, or detention by any legal means whatsoever or by any judicial procedure (article 24). This customary international law is confirmed by a judgment of the US Supreme Court in the Case *Schooner Exchange v. McFaddon*. The relevant passage reads:

> The Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. (at 147).

48. There are several national court decisions which confirm and honour this legal principle of customary international law, such as that of the *Cour d'appel de Paris* on 10 August 2000 ordering the release of vessel Sedov, a training vessel of Russia. The question remains whether this customary international law has been incorporated (incorporation by reference) through article 32 into the Convention.

49. The mechanism to incorporate rules from one set of rules into another one is well established in many national legal systems. However, it always has to be established whether the norm in question incorporates another one by reference or whether that norm only refers to another norm without incorporating it, thus leaving the issue to be regulated by the other set of norms, in our case by customary international law.

50. Article 32 of the Convention does not indicate that through it the customary international law is being incorporated into the Convention. It simply takes the immunity of warships as a fact. It becomes evident upon scrutiny of the Convention that there are very few references to customary international law – except the already mentioned last preambular paragraph. This is due to the overall policy towards customary international law, whose universality was, at the time of the drafting of the Convention, put into question.

51. This leads us to the conclusion that there are valid considerations which would preclude the Tribunal from deciding that *prima facie* the arbitral tribunal under Annex VII would have jurisdiction.

Estoppel

52. Although we disagree with the finding of the Tribunal that the arbitral tribunal under Annex VII has jurisdiction in accordance with article 288, paragraph 1, of the Convention, in our view, Ghana is estopped from opposing the proceedings at this phase.

53. The position of Ghana is fraught with contradictions. On one hand, the Government of Ghana supports the position of Argentina. The Co-Agent for Ghana, Mr. Appreku, legal counsel, appeared as *amicus curiae* in the domestic courts of Ghana in support of the position of the Argentine Republic to the effect that the Libertad was entitled to full immunity in the port of Tema (Statement before the High Court of Accra, Request of the Republic of Argentine, 14 November 2012, Annex D). The Courts of Ghana had to respect the obligation imposed upon Ghana to allow the Libertad to leave Ghana's waters and continue its voyage, as formally agreed between the two countries.

54. Mr Appreku repeated this commitment of the Government of Ghana during the oral proceedings on provisional measures before this Tribunal (ITLOS/PV.12/C20/2, p. 2, lines 13-27). He announced that he would be personally appearing in his official capacity before the High Court of Accra to call for the release of the vessel in conformity with Ghana's international obligations (ITLOS/PV.12/C20/4, p. 11, lines 12-17). But, on the other hand, Ghana has asked the Tribunal to dismiss the Argentine request for provisional measures. The gist of the argument of Ghana is the independence of the Ghana judiciary, guaranteed by the Constitution of the country. The Government of Ghana had no other choice but to support the actions of the Ghana courts and enforce the decision of Justice Frimpong to seize the ship.

55. The argument of the Government of Ghana founded on the Constitution of Ghana does not hold water. International law considers that a State may not hide behind its Constitution to shed its international obligations. International courts have repeated this position time and again since the Permanent Court of International Justice. The ILC, more recently, has enshrined the rule in its draft articles on international responsibility. Article 4 of the draft clearly provides for the responsibility of States for all actions of their organs:

> *Conduct of organs of a State*
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central Government or of the territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

56. To sum up the situation, the Parties agree as to the substance of the case. The *ARA Libertad* is entitled to full immunity within the port of Tema and must be allowed to sail out of the port and continue its voyage. Mr. Appreku repeated in the oral proceedings that Ghana had no dispute with Argentina on the issue.

57. The role of the Tribunal is to help the Parties implement their understanding under international law and to insure the respect of a fundamental rule of international law, namely immunity of warships moored in a port in time of peace.

58. We consider that the notions of fairness and of good faith can be of some help in this situation and must prevail. Ghana, having given official assurances to Argentina as to the visit of the *ARA Libertad* in the port of Tema, cannot object today to a procedure ensuring implementation of the assurances.

59. More specifically, Ghana is estopped from objecting to the jurisdiction of the Annex VII tribunal and to the provisional measures this Tribunal is entitled to prescribe, pursuant to article 290 of the Convention.

60. Estoppel is an accepted principle in international law. It has two faces: a procedural one, with consequences as to the possibility for a party to object to proceedings before a Court or a Tribunal; a more substantive aspect, barring contradictory legal positions taken by a party to the dispute.

61. Estoppel by deed, to use the English vocabulary, finds its equivalent in international law in “estoppels by treaty, compromise, exchange of notes, or other undertaking in writing” (cf. Bowett, *BYB 1957*, vol. 33, p. 181). Such is the situation here, where Argentina and Ghana proceeded to an exchange of notes organizing the visit of the *ARA Libertad*. Bowett notes that the wording must be clear and unambiguous. Bowett quotes the *Eastern Greenland* case, the *Sharp* case, the *Canevaro* case and the *Salem* case. In the *Serbian Loans* case, the Permanent Court refused to apply estoppel because: “There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied.” (*Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, p. 39). By contrast, the exchange of notes on the *ARA Libertad* leaves no doubt as to the conditions of the visit of the ship.

62. In the present case, we are concerned with the procedural aspect of the rule of estoppel. The essence of the rule was stated by Judge Sir Percy Spender in the *Temple of Preah Vihear* case in 1962:

> The principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself. (*Temple of Preah Vihear (Cambodia* v*. Thailand) Merits, Dissenting Opinion of Sir Percy Spender, I.C.J. Reports 1962*, 143-44)

63. As Sir Gerald Fitzmaurice noted in the *Temple* case:

> Such a plea is essentially a means of excluding a denial that might be *correct*--irrespective of its correctness. It prevents the assertion of what might in fact be *true*. (*I.C.J. Reports 1962*, p. 63)

64. The Court spelled out its position in the *North Sea Continental Shelf* cases:

> It appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to … [the contention that the Federal Republic was bound by the Geneva Convention on the Continental Shelf]—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, para. 30).

65. More recently, the Court had this to say:

> ... the Court points out that a party relying on an estoppel must show, among other things, that it has taken distinct acts in reliance on the other party's statement (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 26, para. 30). The Court observes that Singapore did not point to any such acts. To the contrary, it acknowledges in its Reply that, after receiving the letter, it had no reason to change its behaviour; the actions after 1953 to which it refers were a continuation and development of the actions it had taken over the previous century. While some of the conduct in the 1970s, which the Court next reviews, has a different character, Singapore does not contend that those actions were taken in reliance on the Johor response given in its letter of 1953. The Court accordingly need not consider whether other requirements of estoppel are met. (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12 at p. 81)

66. In the *Bay of Bengal* case, this Tribunal summed up the situation:

> 124. The Tribunal observes that, in international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation. The Tribunal notes in this respect the observations in the *North Sea Continental Shelf* cases *(Judgment, I.C.J. Reports 1969*, p. 3, at p. 26, para. 30) and in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Judgment, I.C.J. Reports 1984*, p. 246, at p. 309, para. 145).
>
> 125. In the view of the Tribunal, the evidence submitted by Bangladesh to demonstrate that the Parties have administered their waters in accordance with the limits set forth in the 1974 Agreed Minutes is not conclusive. There is no indication that Myanmar's conduct caused Bangladesh to change its position to its detriment or suffer some prejudice in reliance on such conduct. For these reasons, the Tribunal finds that Bangladesh's claim of estoppel cannot be upheld.

(*Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, 14 March 2012*).

67. The conditions attached to procedural estoppel are strict. They are obviously present in this case. Argentina, when deciding to sail the *ARA Libertad* to the port of Tema, did rely on the official assurances of Ghana. The Embassy of the Argentine Republic sent notes to the High Commission of Ghana in Abuja on 21 May 2012, 24 May 2012, 19 June 2012, 21 June 2012, 28 June 2012, 28 August 2012 and 25 September 2012 with all the details of the proposed visit: dates, crew, welcoming ceremony, etc. On 4 June 2012, the Ghana High Commission in Abuja informed the Embassy of Argentina that the Ghanaian Authorities had granted the request "for its naval ship to dock at Tema harbour from 1st to 4th October 2012" (Request for Prescription of Provisional Measures, Annex 2). Ghana did at no moment question the specifics of the visit as provided for by Argentina in its further notes and thus tacitly assented to them.

68. Argentina relied on these assurances. It did so to its detriment, as the ship was and still is detained in the port, contrary to the assurances given. Ghana is thus in no position to oppose a judicial procedure whose object is to resolve the dispute that arose out of Argentina's reliance on the assumption that Ghana would extend to the ship all the privileges and immunities which Argentina could expect under customary international law for a military vessel on a visit of friendship.

69. The Tribunal cannot accept the submission of Ghana "to reject the provisional measures filed by Argentina on 14 November 2012". Ghana is estopped from presenting any objection on the matter, whatever the validity of the arguments presented to that effect.

70. Given the very particular circumstances of this case, the International Tribunal for the Law of the Sea can thus proceed to prescribe appropriate provisional measures pending the constitution of the Annex VII tribunal.

(signed)

R. Wolfrum

(signed)

J.-P. Cot

SEPARATE OPINION OF JUDGE LUCKY

1. I have voted in favour of the measures prescribed in the Order. However, I have the following additional views.

2. Briefly, the Request by Argentina for the prescription of provisional measures seeks the release of the *ARA Libertad*, an Argentine warship. The vessel was on a visit to the Ghanaian Port of Tema. While in the port, the ship was seized in accordance with an order of the Ghanaian High Court of Justice (Commercial Division), in which a foreign financial institution, NML Capital Limited, obtained judgment against Argentina for a debt which was owed to it. Argentina claims that a warship enjoys immunity and cannot be seized.

3. Argentina requests the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") prescribe 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 to be re-supplied to that end.

4. Applications or requests for Provisional Measures before international courts or tribunals are similar to applications for injunctive relief during interlocutory proceedings in the national courts. The circumstances must be compelling and urgent.

5. When a party to a dispute seeks the prescription of provisional measures, the Tribunal has to consider whether by granting the Request, it prevents the parties from taking any action that would render the final decision on the merits otiose. In other words, the Order should preserve the status quo and the inherent rights of the parties. Further, pursuant to article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), the Tribunal must ensure that *prima facie* the arbitral tribunal which is to be constituted under Annex VII would have jurisdiction over the dispute.

6. At this stage of the proceedings, the Tribunal has to identify a legal basis that gives rise to claims under the Convention. In other words, the Tribunal must be satisfied that the provisions upon which Argentina relies give rise to a dispute concerning the interpretation or application of the Convention, in accordance with article 288 of the Convention.

7. The Tribunal has to ensure that it does not encroach upon the jurisdiction of the Annex VII arbitral tribunal or arrive at any final determination of the major issues. In other words, the Tribunal has to be careful in ensuring that it does not determine any contentious issue on the merits of the case. The Tribunal's jurisprudence as set out in the Order in the *M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea)* is relevant:

> before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded.
> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea) Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998,* p. 24, para. 29.

8. Article 290, paragraph 5, of the Convention provides that pending the constitution of an arbitral tribunal to which the dispute is being submitted under Section 2, the Tribunal may prescribe provisional measures, if it considers that *prime facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.

9. In these circumstances, the Tribunal has to examine whether the respective rights of the parties are at imminent risk, in order to determine whether the conditions of necessity and urgency are fulfilled.

10. In examining requests for provisional measures, the degree or standards of proof need not be conclusive; that is a matter for the final arbiter, be it the Annex VII arbitral tribunal or the Tribunal if chosen to hear the case on the merits.

11. In such proceedings, the Tribunal does not have to apply the same standard of proof that will be required in the final decision on the matter in order to determine the existence of the rights claimed by Argentina. However, the Tribunal has to decide whether, *prima facie,* there is evidence of the existence of a dispute concerning those rights.

11. Argentina claims that the immunity of the *ARA Libertad* from the jurisdiction of the authorities of Ghana (this includes the judicial arm of the State) arises both in general international law and specifically under article 32, *inter alia,* of the Convention. Argentina contends that article 32 is not limited to the territorial sea, but rather also applies to the internal waters of Ghana.

12. Ghana contends that the immunity to which the *ARA Libertad* may be entitled does not arise from any provisions in the Convention and certainly not article 32, which does not provide for immunity in internal waters, including the port. Ghana is not challenging the contention of Argentina that under general international law, the *ARA Libertad* is exempt from the jurisdiction of the authorities of Ghana. As I alluded to above, Ghana contends that the provisions of article 32 of the Convention do not apply in the present circumstances.

13. In my opinion, the issues of the immunity of the *ARA Libertad* can only be determined after the contentions and arguments have been fully considered before the court or tribunal that has to determine the matter on the merits. This would involve the interpretation of article 32, and whether the rights and obligations set out therein are applicable. Suffice it to mention here that, bearing in mind that the request for provisional measures is similar to interlocutory proceedings in a domestic court and that the parties have presented differing arguments on the scope of the application of article 32 of the Convention, it is necessary to examine the relevant articles in the Convention to determine whether they are interrelated. There is a dispute over the interpretation or application of articles 18(1), 87(1) and 32 of the Convention. Therefore, in my view, *prima facie*, the Tribunal has jurisdiction to hear and determine the Request.

Urgency

14. Article 290 paragraph 5, provides *inter alia* that the Tribunal

> may prescribe ... provisional measures if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.

15. In these proceedings, Argentina and Ghana have annexed affidavits to their written pleadings.

16. Argentina provided affidavits to support its contention that the matter is urgent. Ghana submitted its affidavit and statements to demonstrate why the *ARA Libertad* has been detained.

17. I think it is necessary to devote a few comments to evidence on affidavit.

18. The Rules of the Tribunal do not address the issue of the admissibility of affidavits. While affidavits are treated as admissible evidence in some international courts and tribunals, their evidentiary value in those cases has been questioned. International Courts and distinguished jurists have opined that “witness statements produced in the form of affidavits should be treated with caution.” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), I.C.J. Reports 2007*, p. 659 at p. 731, para. 244).

19. Pablo Lucio Salonio, the captain of the *ARA Libertad*, deposes that the situation is “worrisome and uncertain”. He claims that he is unable to go on land because of the contempt of Court Order against him and that there is uneasiness among the crew because of tensions and fatigue as 43 men have to carry out the duties of 135 men.

20. In response, Ghana tendered another affidavit dealing with reasons why the *ARA Libertad* should not be freed or moved, claiming that it may flee from the jurisdiction of the High Court of Justice (Commercial Division). The deponent has neither confirmed nor refuted the allegations of captain Salonio. However, Counsel

submits that the current situation is not grave and in fact, he argues that there is not much difference between the two parties. The difference is that the affidavit on behalf of Ghana does not refute the evidence set out in Captain Salonio's affidavit.

21. In determining the value of affidavits, the Tribunal should take into account their credibility and the interests of those providing the information therein.

22. In the light of the foregoing, I have considered the affidavits specifically with regard to urgency and necessity. The affidavit of Pablo Lucio Salonio, in conjunction with other documentary evidence including the photographs, seems to provide an accurate account of his views, and, I think, in these circumstances has evidential value in assessing whether the matter is urgent and the provisional measures thus necessary. I have considered the fact that his testimony on affidavit has not been tested by cross-examination. Nevertheless, there seems to be considerable truth in what he has deposed in his affidavit.

23. It is also not disputed that the Port Authority of Ghana is losing and has lost considerable revenue by the presence of the ship in Port. However, this is a matter for the hearing on the merits with respect to, if the tribunal so finds, mitigation of damages.

Rights invoked under the Convention

24. It seems to me that final determinations in respect of the interpretation of article 32 of the Convention and its applicability cannot be made by the Tribunal in these proceedings. Such a matter ought to be determined by the Annex VII arbitral tribunal after the contentions of both parties have been fully argued.

25. The question for the arbitral tribunal or other tribunal hearing the case on the merits is: whether the rights enshrined in the articles of the Convention cited by Argentina have been infringed by Ghana.

26. Briefly, Argentina contends that, with regard to the *ARA Libertad*, rights enjoyed by Argentina both under the Convention and general international law have

been infringed by Ghana through the conduct of its State organ, the judiciary. These rights are set out in the following articles:

- Article 32 on the immunities of warships and other government ships operated for non-commercial purposes;
- Article 18 of the Convention on the right of innocent passage and the meaning of passage;
- Articles 56(2) and 58 on the right of innocent passage in archipelagic waters and in the exclusive economic zone;
- Article 87(a) on the freedom of navigation; and
- Article 90 on the right of navigation.

27. I begin with article 32. In these proceedings; I do not think that the Tribunal can arrive at a conclusion on the interpretation and application of this article without having heard full arguments by both sides. This is simply not possible until the issues surrounding immunity as set out in the said article have been ventilated at the hearing by the Annex VII tribunal.

28. I have a different view with respect to the application of articles 18(1), 87(1) and 90 of the Convention.

29. Based on the undisputed facts, the *ARA Libertad* was authorised to sail through the territorial sea and internal waters of Ghana and then into the Ghanaian Port of Tema. In doing so, it exercised its right of innocent passage through the territorial sea and continued into the internal waters to call at the said Port. After one day in Port, it was seized in accordance with a court order, issued by the High Court of Justice (Commercial Division) in Accra. Consequently, I am of the view that by preventing the vessel from leaving its berth to proceed as innocently as it came, Ghana appears to be depriving the *ARA LIbertad* of its rights under articles 18, 87(1) and 90 of the Convention. All these rights are recognised in the Convention and in general international law.

30. As I alluded to above, the *ARA Libertad* was invited and authorised to enter the internal waters of Ghana and the Port of Tema. Its visit was official. It is not

disputed that while on the high seas, and in the exclusive economic zone and the territorial sea of Ghana the vessel enjoyed immunity as set out in article 32 of the Convention. In my opinion this right continued when it entered the internal waters and the port, because the right of innocent passage is unaffected in the Port, and understandably so prior to the vessel's departure. Consequently, when the *ARA Libertad* is ready to leave, these rights continue to exist. It is logical in the circumstances.

31. The *ARA Libertad* is the subject matter of the seizure that Argentina submits is contrary to the provisions of article 32 of the Convention. Ghana argues that article 32 does not apply to internal waters and therefore the *ARA Libertad* does not enjoy immunity, and further that based on its Constitution, which guarantees the separation of powers and independence of the judiciary, the executive cannot interfere with the order of the Judge in the High Court of Justice (Commercial Division).

32. In my view, 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.

33. Article 4 of the draft articles of the International Law Commission on responsibility of States for internationally wrongful acts provides that:

> *Article 4. Conduct of organs of a State*
>
> *1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions ,whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
>
> *2. An organ includes any person or entity which has that status in accordance with the internal law of the State.*

Draft Article 4 reflects customary international law. (*Application of the Convention on the Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro, judgment, I.C.J. Reports 2007,* p. 43, para. 388)

34. Both Argentina and Ghana are parties to the Convention, article 293, paragraph 1, of which specifies that:

> *A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention*.

35. The judgments in the United States and United Kingdom Courts do not *de jure* or *de facto* relate to the *ARA Libertad*. The domestic proceedings are between NML Capital Limited and Argentina and not between Ghana and Argentina.

36. The enforcement of the judgment by ordering the seizure of the *ARA Libertad* and the validity of the Order of the Ghanaian High Court (Commercial Division) are not for this Tribunal to determine.

37. Argentina claims that articles 2(3), 18, 32 and 87 *et al* have been infringed by Ghana. Ghana argues that article 32 of the Convention refers to the immunity of warships in the territorial sea and does not refer to any such immunity when in internal waters and that "it was understood that the regime of ports and internal waters was excluded ... from the 1982 Convention". It maintains that the immunity of a warship in internal waters does not involve the interpretation and application of the Convention and that, to the extent that such rules might exist, they could only be found outside the Convention, whether under other rules of customary or conventional international law.

38. I think that international law and the relevant articles in the Convention should be considered as a whole and in these circumstances article 32 can be deemed to include internal waters; not only because it does not explicitly exclude the immunity of warships in internal waters, but because it should be read in congruence with other rules of international law which guarantee such immunity. Therefore, where the law is silent a tribunal ought to take a pragmatic approach and, bearing in mind the circumstances of the case, interpret and construe the law accordingly. I would hold that the *ARA Libertad* has the right of immunity in the internal waters of Ghana, and

that a wide interpretation of the article is suitable. These being provisional measures, my view is open to review if the case is heard and determined on the merits.

39. I agreed to and voted in favour of the prescription of provisional measures set out in the Order of the Tribunal.

(signed)

A. Lucky