INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2012

Public sitting

held on Thursday, 29 November 2012, at 9.30 a.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President Shunji Yanai presiding

THE "ARA LIBERTAD" CASE

(Argentina v. *Ghana)*

Verbatim Record

Uncorrected

Present:	President	Shunji Yanai
	Vice-President	Albert J. Hoffmann
	Judges	P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Helmut Tuerk
		James L. Kateka
		Zhiguo Gao
		Boualem Bouguetaia
		Vladimir Golitsyn
		Jin-Hyun Paik
		Elsa Kelly
		David Attard
		Markiyan Kulyk
	Judge ad hoc	Thomas A. Mensah
	Registrar	Philippe Gautier

Argentina is represented by:

Mrs Susana Ruiz Cerutti, Legal Adviser, Ministry of Foreign Affairs and Worship,

as Agent;

Mr Horacio Adolfo Basabe, Head, Direction of International Legal Assistance, Ministry of Foreign Affairs and Worship,

as Co-Agent;

and

Mr Marcelo Kohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Switzerland,
Mr Gerhard Hafner, Professor of International Law,
Mr Holger F. Martinsen, Deputy Legal Adviser, Ministry of Foreign Affairs and Worship,

as Counsel and Advocates;

Mr Mamadou Hebié, appointed lecturer, LLM in International Dispute Settlement (MIDS), Geneva, Switzerland,
Mr Gregor Novak, Mag. Iur., University of Vienna, Austria,
Mr Manuel Fernandez Salorio, Consul General of the Argentine Republic, Hamburg, Germany,
Ms Erica Lucero, Third Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs and Worship,

as Advisers.

Ghana is represented by:

Mrs Amma Gaisie, Solicitor-General, Attorney-General's Department, Headquarters,
Mr Ebenezer Appreku, Director/Legal and Consular Bureau, Legal Adviser, Ministry of Foreign Affairs,

as Co-Agents and Counsel;

and

Mr Raymond Atuguba, Senior Lecturer in Law, Faculty of Law, University of Ghana, Legon,

as 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, Matrix Chambers, London, United Kingdom,

Ms Michelle Butler, Member of the Bar of England and Wales, Matrix Chambers, London, United Kingdom,

as Counsel and Advocates;

Mr Remi Reichhold, Research Assistant, Matrix Chambers, London, United Kingdom,

as Adviser;

Mr Paul Aryene, Ambassador of the Republic of Ghana to Germany, Embassy of Ghana, Berlin, Germany,

Mr Peter Owusu Manu, Minister Counsellor, Embassy of Ghana, Berlin, Germany.

THE PRESIDENT: The Tribunal meets today pursuant to article 26 of its Statute to hear the Parties' arguments in the *ARA Libertad* case between the Argentine Republic and the Republic of Ghana.

At the outset, I would like to note that Judge Marotta Rangel and Judge Nelson are prevented by illness from sitting on the bench.

On 14 November 2012 Argentina submitted to the Tribunal a Request for the prescription of provisional measures pending the constitution of an arbitral tribunal in a dispute with Ghana concerning the detention of the frigate *ARA Libertad*. The Request was made pursuant to article 290, paragraph 5, of the United Nations Convention on the Law of the Sea. The case was named *The "ARA Libertad" Case* and entered in the List of Cases as case number 20.

I now call on the Registrar to summarize the procedure and to read out the submissions of the Parties.

THE REGISTRAR *(Interpretation from French)***:** Thank you, Mr President.

On 14 November 2012 a copy of the Request for the prescription of provisional measures was sent to the Government of Ghana. By order of 20 November 2012 the President of the Tribunal fixed 29 November 2012 as the date for opening the oral hearing. On the same day the President sent a letter to each of the Parties calling upon them to refrain from taking measures which might hamper the effects of any order the Tribunal might adopt. On 28 November 2012 Ghana submitted a statement in reply to the Argentine Request.

I shall now read the submissions of the Parties.

(Continued in English) The Tribunal prescribes the following provisional measures:

> "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."

The Respondent requests:

> "(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."

THE PRESIDENT: Thank you, Mr Registrar.

At today's hearing both Parties will present the first round of their respective oral arguments. Argentina will make its arguments this morning until approximately 1 p.m., with a break of 30 minutes at around 11.00 a.m. Ghana will speak this afternoon from 3 p.m. until approximately 6.30 p.m., with a break of 30 minutes at around 4.30 p.m.

Tomorrow will be the second round of oral arguments, with Argentina speaking from 9.30 to 11.00 a.m. and Ghana speaking from 12 noon to 1.30 p.m.

I note the presence at the hearing of Agent, Co-Agents, counsel and advocates of the Parties.

I now call on the Agent of Argentina, Ms Susana Ruiz Cerutti, to introduce the delegation of Argentina.

MS RUIZ CERUTTI *(Interpretation from French)***:** Mr President, Mr Vice President, honourable members of the Tribunal, it is indeed an honour for me to find myself once again before this Tribunal representing the Argentine Republic. Allow me at this stage to introduce the delegation from the Argentine Republic. We have Ambassador Horacio Basabe, Head of the Direction of International Legal Assistance, in the Ministry of Foreign Affairs and Worship of Argentina, as Co-Agent; Professor Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies in Geneva, an Associate Member of the Institute of International Law; Professor Gerhard Hafner, Professor of International Law, Member of the Institute of International Law; and Mr Holger F. Martinsen, Deputy Legal Adviser in the Ministry of Foreign Affairs and Worship as Counsel and Advocate; Mr Mamadou Hebié, lecturer appointed on the Masters programme in International Dispute Settlement in Geneva; Mr Gregor Novak, Mag. Iur. at the University of Vienna; Mr Manuel Fernandez Salorio, Consul General of the Argentine Republic in Hamburg; and Ms Erica Lucero, Third Secretary and member of the Office of the Legal Adviser of the Ministry of Foreign Affairs and Worship as counsel.

Thank you, Mr President.

THE PRESIDENT: We have been informed by the Co-Agent of Ghana, Mr Ebenezer Appreku, that the Agent of Ghana, Mr Anthony Gyambiby, will not be present at the hearing. I therefore call on the Co-Agent, Mr Appreku, to introduce the delegation of Ghana.

MR APPREKU: Good morning. Honourable President, honourable members of the Tribunal, it is my singular privilege to introduce the delegation of Ghana. The honourable Anthony Gyambiby, Agent, has indicated he is unable to join us for unavoidable reasons. We have Mrs Amma Gaisie as Co-Agent and Counsel, Solicitor-General of the Republic of Ghana, Attorney-General's Department. We have Dr Raymond Atuguba, Senior Lecturer in Law, Faculty of Law, University of Ghana, Legon, as Counsel. We also have Professor Martin Tsamenyi, Professor of Law, University of Wollongong, Australia, who is unable to join us for unavoidable reasons. We have his Excellency Mr Paul Aryene, Ambassador of the Republic of Ghana to Germany and to ITLOS, Mr Peter Owusu Manu, Minister Counsellor of the Embassy of Ghana in Berlin, and we have Professor Philippe Sands, QC, of Matrix Chambers, London, who is also a Professor at the University of London;
Ms Anjolie Singh, a member of the Indian Bar and also of Matrix Chambers, London;
Ms Michelle Butler, a member of the English Bar and also of Matrix Chambers;
Mr Remi Reichhold, Research Assistant, is a member of the delegation as well.

THE PRESIDENT: Thank you, Mr Appreku. I now request the Agent of Argentina, Ms Ruiz Cerutti, to begin her statement.

MS RUIZ CERUTTI *(Interpretation from French)***:** Thank you, Mr President.

Mr President, Mr Vice-President, Members of the Tribunal, I mentioned what an honour it is for me to find myself once again addressing this Tribunal on behalf of my country, although unfortunately this time I am doing so in the context of proceedings arising from measures adopted by a friendly country, Ghana, against an Argentine warship which has the highest possible symbolic value for all Argentines, the frigate *ARA Libertad*. Moreover, I have to do this in a year which is particularly symbolic for all those who were involved in the negotiations for the Third United Nations Conference on the Law of the Sea. In a few days' time the Convention will be celebrating its 30th anniversary, and it is also an honour to be able to mention this event here at the Hamburg Tribunal, in the company of colleagues, both from the Tribunal and among the counsel, with whom we shared some of that long and difficult road leading to the adoption of that instrument, whose interpretation and application are the reason for us being here today.

Mr President, there is no need for me to refer to the great importance this Tribunal represents for Argentina. We consider it to be one of the pillars of contemporary international law, and that is why our country is one of the 34 States which have chosen the Tribunal as their first option for settling disputes within the system of the Convention. It is also the reason why we have supported the Tribunal in all the relevant international fora. If we had tried to guess what might be the first dispute which would lead us to appear before this Tribunal, we would never have imagined that it would be a situation like the one that we are concerned with today, defending the immunities enjoyed by a warship and its right to navigate, moreover, in the face of measures taken by a friendly country, whose real interest in this case remains a mystery to us, even after the submission yesterday of the Written Statement by Ghana.

Indeed, until yesterday Ghana had not seen fit to reply to even a single one of the numerous communications which the Argentine authorities have sent it since this crisis began on 2 October. The Written Statement I have just referred to also does not clarify any of the rights which Ghana is claiming to protect in this case.

Mr President, I would like very briefly to explain why the frigate, *ARA Libertad*, found itself in the port of Tema, the principal port of Ghana. One of the key pillars of Argentina's current foreign policy consists in deepening south-south cooperation and among the key measures to achieve that objective is the development of political links between Argentina and the countries of sub-Saharan Africa, and it is within that framework that Argentina has pursued a policy under which measures include the promotion of cooperation programmes in fields where Argentina can make a contribution to the development of other countries. So, recently, Ghanaian diplomats were present at the first meeting between the Argentine Republic and the countries of sub-Saharan Africa, which took place in Buenos Aires from 4-7 April 2011, on the theme of "Innovation and Development in Agro-Farming Production".

In the context of such measures, which are far from being the only ones I could mention, it is hardly surprising that the port of Tema was chosen as a port of call in the itinerary for the 43rd training voyage for cadets from the Argentine Navy on board the warship *ARA Libertad*. The frigate *ARA Libertad* is known to all Argentines as our "Ambassador" on the world's seas. This title, which has a purely formal function, was conferred on it by presidential decree. Many countries have a tall ship as a training vessel which is emblematic of their national fleet, and all these countries know that the choice of a country as a port of call for training voyages for young officers clearly indicates the intention of expressing friendship and a desire for deeper relations between the countries.

Throughout its history, and indeed, since 1873, the Argentine Navy has always had training vessels which serve to train its future officers. Currently it is the frigate *ARA Libertad*, a masterpiece designed and constructed in Argentina, which fulfils this function and has done so since 1963, the year in which it began its life as a training vessel. Considered to be one of the greatest and most magnificent of tall ships, the *ARA Libertad* makes a voyage around the world every year to train cadets in the national navy. Last June it left Buenos Aires for a tour taking it to 13 different countries, and that voyage ended on 2 October in the port of Tema in Ghana in the most abrupt and unexpected manner. I would even use the word "brutal".

Mr President, warships are defined in part II of the Convention on the Law of the Sea in article 29. That article takes almost word for word the definition given by article 8, paragraph 2 of the 1958 Convention on the High Seas. According to this article, "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". It is clear from that extract that a warship is defined by external marks as defined by the State to which it belongs, military command and armed forces discipline.

We note that the definition does not include the presence or absence of weapons of any kind which are normally found on board any warship. The *ARA Libertad* is a training vessel. Its crew consists, for the most part, of military naval personnel in training. The officers and other members of the crew are all military personnel in the Argentine Navy under armed forces discipline. The commander of the vessel is an officer in the Argentine Navy and the vessel bears the external marks set by Argentina for its warships; "ARA" means "Navy of the Argentine Republic". In other words, the *ARA Libertad* is indeed a warship to which the Convention grants rights and specifies immunities which it enjoys because it has a public service mission and represents the sovereignty of a State.

Ghana received the *ARA Libertad* into the port of Tema as a warship, as is shown by the diplomatic correspondence exchanged between the two Parties prior to its visit. The status of the *ARA Libertad* as a warship is not a matter of dispute between the Parties, any more than the existence of an agreement between the two Parties under which the frigate was to arrive in the port of Tema on 1 October and to depart on 4 October, leaving the waters within Ghana's jurisdiction on 5 October. These three dates are all well established in the diplomatic correspondence exchanged.

Mr President, for almost two months, and, more precisely, since 2 October, when the commercial court of first instance in Ghana decided to seize one of our warships, Argentina has been wondering, without receiving an answer, what gave Ghana the right to embark upon such a venture. Up to this moment when I am speaking, no plausible explanation has been given as to the motivations underlying Ghana's conduct. Given the quality of bilateral relations between Argentina and Ghana and the conditions in which the visit by the *ARA Libertad* to the port of Tema was agreed, the reasons for the silence and lack of action on the part of the Ghanaian authorities in the face of all our notes and all the overtures we have made since the beginning of this crisis remain a mystery.

Only once has a Ghanaian authority expressed any concern about the respect of international law, and this was done by my colleague, who is here, the Legal Adviser of the Ghanaian Ministry of External Relations and Regional Integration, Mr Ebenezer Appreku, who quite rightly maintained before the court of first instance of his country that that court was entirely lacking in jurisdiction, both with regard to Argentina as a State and with regard to the *ARA Libertad*, because of its immunity as a warship.

Allow me, Mr President, to cite verbatim what Mr Appreku said before the Ghanaian court to conclude his statement:

> "It became the court's duty in conformity to established principles to release the vessel and to proceed no further in the course."

After hearing the statement made by the legal adviser on behalf of his government with regard to the illegal seizure of our frigate, what we have some difficulty in understanding is why Ghana, a country that has friendly relations with Argentina, cannot, in the space of sixty days, despite the enormous and intense political and diplomatic efforts made by Argentina, remedy such a manifest violation of its international obligations.

The nine pages that Ghana sent us only yesterday have proved insufficient to cast any light on Ghana's interests and motivations in this crisis.

Mr President, the facts that led Argentina to request a provisional measure before this Tribunal are described in paragraphs 3 to 18 of the Request for the prescription of provisional measures by Argentina.

It is really distressing, from a legal point of view, to have to ask: what is this behaviour, after agreeing and authorizing an official visit of an Argentine warship with all the protocol and solemnity that is usual on this kind of occasion, in particular an official reception attended by the civil and military authorities of the country and members of the diplomatic corps, when a court of first instance, which, incidentally, does not make the effort to quote and interpret correctly the texts on which it bases its decision, submits this ship, one day after its arrival, to an embargo in violation of all its immunities. Unfortunately no country is entirely free from the risk of such a decision being taken by an isolated member of its judiciary. On the other hand, what is so serious is that two months after this crisis began the Government of Ghana has

not yet found a way to return to the path of international legality and respect for its peers, nor has it adopted measures to avoid the dispute becoming aggravated. Article 300 of the Convention, which regulates situations of this kind, reminds us of the obligations incumbent on the Parties under international law, and not only the Law of the Sea, when it provides, under the heading 'Good faith and abuse of rights', that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right".

Ghana must have all the necessary internal resources and mechanisms to remedy the effects of a judicial decision that is in violation of the applicable international law and which, moreover, has led to a crisis situation. This is a requirement of general international law, as is clear from the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. The fact that Ghana claims that the vulture fund chose the frigate as "available to be the subject of enforcement proceedings" does not diminish or remove its international responsibility in this matter.

Mr President, the Tribunal might wonder why at several points in my statement I have referred to the situation arising from this embargo as a "crisis". The reason is very simple: from the first day to today, my government has been compelled to take crisis-management measures with regard to the *ARA Libertad*. Indeed, the succession of events we have had to face cannot be described in any other terms.

We had to evacuate 281 people, that is to say the majority of the crew, both Argentine cadets and many from third States who had been invited to take part in this training voyage, because of the risks to their safety and the lack of the resources needed to live decently on board the *ARA Libertad* as a result of the embargo and other measures taken by the Ghanaian port authorities.

We have had to revise the training plan for our cadets from the Argentine Navy. We have had to try and minimize the negative consequences that the interruption to the 43rd training voyage of the *ARA Libertad* caused to the foreign cadets who were taking part in the voyage. We have had to resist all imaginable attempts decided upon by a Ghanaian court to seize the ship's documents and its flag locker because of the humiliation that such an action would represent for the ship and for Argentina.

The crew on board has had to suffer the precarious situation caused by the local port authorities when for long periods they cut off the supply of water and power to the ship, placing the crew in a situation that can only be described as extreme.

We have had to resist attempts to board our warship by force, resulting from an irresponsible endeavour on behalf of the port authorities.

Just yesterday, in its Written Statement, Ghana recognized that it had used force against a warship, even if it tried to minimize that fact by referring to it as "avoiding the use of excessive force".

On a daily basis we had to support the 45 crew members remaining on board the *ARA Libertad*, who have been daily subjected to abusive treatment over the last sixty

days. The situation has become particularly grave since the attempt to forcibly board and move the vessel. Since that time the reduced crew on board the boat is practically living in a state of arrest, under the permanent threat of a fresh attempt to board.

One of the most recent expressions of this intolerable harassment against a warship that enjoys sovereign immunities was the proceedings for "contempt of court" which have just been initiated against its commander in the Ghanaian courts, a matter on which we provided updated documentation to the Tribunal two days ago.

We have not received any information that such senseless action has been rejected *in limine litis* by the Ghanaian courts or by the governmental authorities of Ghana.

As you will realize, this accusation of contempt of court is a new threat of a worsening of the violation of the immunities of the warship, which clearly and necessarily cover the vessel's commander and its crew.

To sum up, Mr President, Members of the Tribunal, these are only some of the facts that have led us to regard the situation caused by Ghana's conduct as a "serious crisis", which has already lasted more than sixty days.

In that context, Mr President, the Argentine Government greatly appreciates your decision calling upon both Parties, in accordance with article 90(4) of the Rules of the Tribunal, to act in such a way as will not aggravate the dispute so that any order the Tribunal may make on the request for the provisional measure can have its appropriate effects.

Mr President, Argentina has done everything in its power to try and resolve this dispute peacefully before bringing it before this international body. A high-level mission of Argentine officials met various Ghanaian authorities over a number of days. We have done everything we could to resolve this serious situation peacefully, including numerous requests made to the court concerned, while on each occasion denying the jurisdiction of that court with regard to Argentina and its warship. We have informed the court of the gravity of the situation that it has caused by this absurd embargo against the *ARA Libertad*.

We have taken all those steps even though Argentina did not and does not have any obligation to appear before local courts, even less to exhaust domestic remedies.

To conclude, Mr President, I would like to dwell for a moment on the nature and function of immunities of States and their property in international law. It is clear that the more closely an activity is linked to an inherent function of a State the greater the degree of specific protection that international law confers on the property allocated to the exercise of that activity.

It is difficult to conceive that a State could be deprived of any ability to entertain relations with other States or be deprived of the possibility of defending itself. On that basis, it is clear that property allocated to diplomatic action and to military activity enjoys particularly rigorous and specific protection, as has been recognized

repeatedly by various courts and tribunals throughout the world. Argentina hopes to see that strict and specific protection fully respected with regard to its warship.

Today we are principally concerned with the immunities for warships provided under the Convention. We hope to see an application of the spirit which, thirty years ago, inspired the first paragraph of the preamble to the Convention when it stated, and I quote: "Prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world".

Thank you, Members of the Tribunal, for your attention. I invite you now, Mr President, to give the floor to Professor Gerhard Hafner.

THE PRESIDENT *(Interpretation from French)***:** Thank you Mrs Ruiz Cerutti.

PROFESSOR HAFNER: Mr President, Mr Vice-President, Members of the Tribunal, it is a great pleasure and privilege for me to appear – for the first time – before this distinguished Tribunal. I have been entrusted with that part of Argentina's case dealing with the rights Argentina requests this Tribunal to protect through the prescription of a provisional measure. In the following, I shall refer to the United Nations Convention on the Law of the Sea as "the Convention".

Allow me to note, before outlining the structure of my submission, that this is the first case in which a State, Argentina, is seeking from this Tribunal to prescribe a provisional measure to protect the rights enjoyed by Argentina under the Convention relating to the freedom of navigation, innocent passage in the territorial sea and immunity in respect of a vessel of its armed forces, the *ARA Libertad*. This is necessary as a consequence of the threats to the rights enjoyed by Argentina.

I will show that Argentina has been precluded from exercising its rights under the Convention. With regard to the frigate *ARA Libertad*, Argentina enjoys the right of innocent passage according to articles 17 and 18, freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as set forth in articles 56(2) and 58 and related provisions of the Convention and freedom of navigation on the high seas according to article 87 and 90 of the Convention as well as immunity as recognized by article 32 of the Convention. As I will explain, Argentina enjoys, with respect to its warships, complete and autonomous immunity, both under the Convention and general international law. A further point I will make is that the waiver referred to by Ghana has no legal effect with regard to the frigate *ARA Libertad* so that Argentina by no means waived this immunity with regard to this vessel and is enjoying complete immunity concerning this vessel even in the ports of Ghana, as confirmed by the international law of the sea.

THE PRESIDENT: Mr Hafner, I am sorry to interrupt you, but could you please slow down for the sake of the interpretation?

PROFESSOR HAFNER: I apologize. Mr President, Mr Vice-President, Members of the Tribunal, the legal position I will present here has, by necessity, been elaborated rapidly and does not aim at preparing a decision on the merits of the case. As is

appropriate in these proceedings, my explanations should illustrate that the law as applied to the facts of this case unequivocally supports our submissions and request; they further prove that our *prima facie* rights under the Convention, which have been impaired and need protection by provisional measures, have the nature of *fumus boni iuri*.

Permit me, first, to explain which rights, enjoyed by Argentina both under the Convention as well as under general international law, need the protection by this Tribunal. Argentina, as well as Ghana, are parties to the Convention so that it has been applicable to them in their mutual relations since 31 December 1995. The frigate *ARA Libertad* was anchored at Tema, a port near Accra, Ghana, on the basis of consent by Ghana. Accordingly, the frigate was lawfully in the Tema port. It 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. There is absolutely no indication that it was engaged in any activity that would render its passage non-innocent. It hardly needs mentioning that the ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. This right is defined in article 18(1)(b) of the Convention and includes the

> "passage through the territorial sea for the purpose of proceeding to or from internal waters or a call at such roadstead or port facility."

Contrary to the Written Statement of the Respondent, 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 so that Argentina seeks its protection through this Tribunal.

All foreign vessels, including foreign warships, enjoy such a right of innocent passage. It allows them to proceed from ports in order to exercise also other rights under the Convention whose enjoyment directly depends on this right. As the International Court of Justice declared in the case concerning *Military and Paramilitary Activities in and against Nicaragua*

> "... in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; article 18, paragraph 1(b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for maritime navigation.

Argentina does not merely seek protection of the right to innocent passage it is entitled to under the Convention. Moreover, Ghana has also explicitly consented to the entrance, presence and timely departure of the frigate *ARA Libertad* in the waters under the jurisdiction of Ghana by letter dated 4 June 2012 (received 5 June 2012).

Preventing the frigate from leaving the port of Tema makes the exercise of the right of innocent passage impossible. The conditions that Ghana can impose on the course of the frigate relate exclusively to maritime safety such as the observance of maritime traffic, separation schemes or sea-lanes, certain national regulations as enumerated in article 21 of the Convention relating to protection of fishing stocks, the environment, the maritime safety or research. No such "laws and regulations" of Ghana are alleged to have been breached by the frigate. Even if a violation of such "laws and regulations" had occurred (*qua non*), Ghana's rights under the Convention are strictly limited to requiring the warship to leave the port. Any more far-reaching measure by Ghana would be impermissible.

Preventing the frigate from leaving the port of Tema makes the exercise of the right of innocent passage impossible. The conditions that Ghana can impose on the course of the frigate relate exclusively to maritime safety such as the observance of maritime traffic, separation schemes or sea-lanes, certain national regulations as enumerated in article 21 of the Convention relating to protection of fishing stocks, the environment, the maritime safety or research. No such "laws and regulations" of Ghana are alleged to have been breached by the Frigate. Even if a violation of such "laws and regulations" had occurred (*qua non*), Ghana's rights under the Convention are strictly limited to requiring the warship to leave the port. Any more far-reaching measure by Ghana would be impermissible.

We are informed by Ghana that it took forcible measures against the frigate *ARA Libertad*. But, as already mentioned, article 30 of the Convention clearly states that in the case of non-compliance by a foreign warship with the laws and regulations of the coastal State concerning passage through the territorial sea, the coastal State may ultimately require this ship to leave the waters immediately. This situation is also applicable to ports as can be derived from the immunity enjoyed by warships even in foreign ports.For instance, according to article 236 the measures a port State can take against any foreign ship for breach of regulations regarding the protection of the marine environment are not applicable to warships.

Mr President, Mr Vice-President, distinguished Members of the Tribunal. The second right in relation to which Argentina seeks protection is the freedom of the high seas regarding navigation and other internationally lawful uses of the sea as guaranteed by article 87 of the Convention. The attachment of the frigate *ARA Libertad* by Ghana prevents it from exercising also this fundamental freedom, so that it is immediately affected by this measure. There is no doubt that the frigate *ARA Libertad* is fully entitled under the Convention to make use of this freedom and corresponding rights. In paragraph 14 of its Written Statement, the Respondent clearly misinterprets this freedom.

As I have explained, Ghana is denying a number of rights under the Convention to Argentina. These are denied by reference to a waiver of immunity. Since the immunity of warships is incorporated in the Convention and the alleged waiver is the only justification proffered by Ghana, I will now turn to the question of immunity.

Thus I shall now explain 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. The frigate *ARA Libertad* enjoys this immunity as a warship under a foreign flag. The acts denying this immunity prevent the frigate from making use of the rights that it enjoys under the Convention, including innocent passage and freedom of navigation. Both States, Argentina and Ghana, are in agreement that the frigate *ARA Libertad* is a warship in the sense of article 29 of the Convention. It is one of the oldest rules under international law that warships, or in the former terminology men-of-war, enjoy full immunity in maritime areas under coastal State jurisdiction. This rule has already been reflected in the well-known US Supreme Court case *The Schooner Exchange v. McFaddon* of 1812. It is reproduced in the Request of Argentina so that there is no need to reiterate it here.

Throughout the subsequent periods until now, this rule has been maintained and scrupulously respected by all States. *Oppenheim's International Law*, in its fifth edition, makes it very clear that:

> "[…] [n]o legal proceedings can be taken against [a man-of-war] either for recovery of possession or for damages for collision, or for a salvage reward, or for any other cause."

The immunity enjoyed by warships applies also in the port of foreign States as confirmed by the Institut de Droit International. Article 26 of its Resolution adopted in 1928 unequivocally states that military vessels may neither be subject to any measures of attachment nor any legal procedure *in rem*. The resolution further states in article 16 that in foreign ports the local authorities are neither entitled to perform acts of authority on board that ship nor to exercise jurisdiction with regard of the persons on board nor visit the ship. One current scholar, who, I submit, has appropriately analyzed the issue in terms of customary international law, leaves no doubt regarding the existence of this rule and states that:

> "Warships as defined in UNCLOS and military aircraft have complete immunity in the territorial sea, in internal waters and in ports, which are usually located in internal waters."

Jurisprudence confirms this rule. Thus, for example, in the case *Allianz Via Insurance v. USA* the court of Appeal of Aix-en-Provence stated as follows:

> "Assigned to the public service of national defence, a warship is the very expression of the sovereignty of the State whose flag it flies, on the high seas or in foreign territorial waters, and whatever the mission assigned to it, whether an act of war or, as in this case, a simple stopover or courtesy visit in the port of a friendly country.
>
> In the event that the performance of this public service mission may give rise to the exercise of a judicial proceeding of any kind whatsoever, the State whose flag the foreign warship is flying should be recognized as enjoying absolute sovereign immunity before the courts of another State."

Article 32 of the Convention leaves no doubt on the existence of this immunity as its states:

> *"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."

This formulation reiterates article 22, paragraph 2, of the Convention on the Territorial Sea and the Contiguous Zone of 1958. According to the Virginia Commentary, this article emphasizes that warships and other government ships operated for non-commercial purposes have immunity, except as provided in articles 17 to 26, 30 and 31. These exceptions relate for instance to maritime security provisions such as sea lanes and traffic separation schemes or charges levied upon foreign ships.

The interpretation offered by the Virginia Commentary clearly indicates that it is article 32 which confirms the existence of immunity enjoyed by warships with effect and for the purposes of the Convention as a whole. The provision uses the formulation "nothing in this convention" instead of "nothing in this part". This clearly proves that its application extends beyond the part regarding the territorial sea, with the only exception being the rules concerning the High Seas and the Exclusive Economic Zone where a special provision, article 95, applies. The Convention also relates to ports, such as in article 25(2) or, more generally, in part XII on the protection and preservation of the marine environment. The contention of the Respondent in paragraph 11 of its Written Statement that the immunity provisions of the Convention do not relate to internal waters, or in paragraph 13 that internal waters are not the subject of detailed regulation of the Convention, can by no means be sustained.

The immunity to which article 32 refers is a necessary element of this provision since otherwise it would neither make any sense nor would its scope be ascertainable. According to the legal principle of effectiveness or *ut res magis valeat quam pereat*, any provision must be interpreted that it makes sense, a principle that not only the International Court of Justice in various judgments such as *Fisheries Jurisdiction* (Spain v. Canada) case, but also arbitral tribunals like the one in the case regarding the *Iron Rhine* considered as being of particular importance.

The immunity of warships relates to the whole maritime area. This is confirmed by article 236 of the Convention, entitled "Sovereign Immunity". It not only extends this immunity of warships and other government ships used for non-commercial purpose to the entire maritime area, including ports, but even establishes immunity from international rules and, as a consequence, from the rules enacted by States in conformity with the Convention.

There is no need to delve further into the question of the existence of such a rule since both Parties to this dispute, Argentina and Ghana, are in agreement that warships enjoy immunity under international law. This rule applies to the frigate *ARA Libertad* in the ports of Ghana. In his statement in the Superior Court of Judicature, Legal Adviser Mr Appreku stated that this warship enjoys immunity and that the courts must accept such a declaration by the Foreign Ministry as

> "a conclusive determination by the political arm of the government that the continued retention of the vessels interferes with the proper conduct of our foreign relations."

Mr President, Mr Vice-President, Members of the Tribunal, Argentina seeks protection of the right of innocent passage, freedom of navigation and the immunity of its warships, all rights embodied in the Convention. The denial of immunity is not only a denial of this right under the Convention but also of the other mentioned rights. For this reason is it important to shed light on the substance and character of the immunity of warships.

The immunity of warships is not only related to the general jurisdictional immunity that States enjoy under international law, but has also been established as a separate legal institute under customary international law, which does not share the development of the general State immunity. As such it is reflected in the Convention. The leading authorities on international law and the law of the sea treat the immunity of warships separate from State immunity. An unequivocal distinction between general State immunity and the immunity of warships is also emphasized in all newer works by scholars, such as for instance Pingel or Yang, who are quoted in Argentina's Request and have, I submit, appropriately analyzed the issue in terms of customary international law.

In particular, treaties confirm the autonomous nature of this legal institute and the particular status of warships under international law, to a large extent even disconnected from the immunity of other government ships: article 3 of the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships singles out warships as a separate category in addition to other ships owned or operated by a State. Other conventions on maritime law, which ensure the immunity of warships, include treaties such as the International Convention on Salvage of 1989, the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages of 1967, the International Convention on Maritime Liens and Mortgages 1993, the London Convention on Prevention of Martine Pollution by Dumping of Wastes of 1972, the 1973 MARPOL Convention, or the 2001 UNESCO Convention on the Protection of Underwater Cultural heritage.

An excellent example of the particular nature of this status of warships under international law is offered by the Geneva Convention on the High Seas and the Geneva Convention on the Territorial Sea and the Contiguous Zone. The latter clearly distinguishes between rules applicable to all ships, rules applicable to merchant ships, rules applicable to government ships other than warships and rules applicable to warships, thus distinguishing between the latter and other government ships. The rules applicable to warships clearly demonstrate that the coastal State has no right to interfere with the activities of such a ship. The only measure that a coastal State may take against a foreign warship that does not abide by certain rules of the coastal State consists, as already mentioned, in a request to leave the territorial waters of this State.

The distinction between warships and other government ships is maintained in the Convention. The fact that article 32 of the Convention addresses both categories of

ships, warships as well as government ships operated for non-commercial purposes, does not militate against this conclusion. As the Virginia Commentary explains, the various texts used for the Third UN Conference on the Law of the Sea still distinguished between these two categories and treated them as separate. They were later placed under the same heading merely for practical purposes.

At other places, the Convention explicitly upholds the differentiation between the different kinds of immunity enjoyed by these two categories of ships. Article 95 relates only to the immunity of warships whereas article 96 addresses the second category, namely ships used only on government non-commercial service. This different status of the immunity of warships compared to other governmental ships found its expression also in court judgments. On the one hand, according to the District Court of Amsterdam in the case *Wijsmuller Salvage BV v. ADM Naval Services*, a warship albeit not being on duty did not lose its immunity. In contrast, the Dutch Supreme Court held in 1993 that the exercise of jurisdiction such as by provisional seizure against a vessel belonging to the State and intended for commercial shipping was not contrary to international law.

The literature shares this view; Vitzthum, for instance, derives from the present law of the sea that warships enjoy a preferential treatment that is based on the sovereignty and the equality of States.

The reasons for this special treatment of warships are to be found in the different function of warships compared to other governmental ships. The commentary of the ILC explicitly connects the policing function of warships at sea with their immunity. Only warships are entitled to take such action. The ILC emphasized their particular status as follows:

> "Hence it is important that the right to take action should be confined to warships, since the use of other government ships does not provide the same safeguards against abuse."

These explanations by the International Law Commission are also to be applied to the corresponding articles of the Convention, namely article 107 regarding *Ships and aircraft which are entitled to seize on account of piracy,* according to which only warships and similar ships are entitled to seize vessels under a foreign flag. It is precisely for this reason that they enjoy complete immunity as established already by article 8 of the High Seas Convention and article 95 of the Convention.

A number of different authorities might be quoted in support of the autonomous character of warship immunity such as Colombos, O'Connell, Tanaka, Pingel, Espaliú Berdud, Zou Keyuan, Ivanashchenko, and very recently Yang, to name only few of them. For all these reasons, it must be acknowledged that the complete and autonomous immunity of warships is firmly rooted in present international law and recognized by the Convention.

Mr President, Mr Vice-President, distinguished Members of the Tribunal, that there exist different kinds of immunity in international law is confirmed in the 2008 memorandum of the Secretariat of the United Nations, stating that there are various kinds of immunities that arise under international law covering a range of aspects.

Several courts, such as the German Constitutional Court in 1997 and 2003, as well as other courts in the United Kingdom, in Austria, in the Netherlands, in the United States, in Italy and in Switzerland, have already delivered decisions according to which, for instance, diplomatic immunities were separate from State immunities.

Similarly, Head of State immunity is also a separate immunity category. This conclusion is reflected in the United Nations Convention on Jurisdictional Immunities of States and Their Property as its article 3, paragraph 2, explicitly refers to Head of State immunity as a separate kind of immunity. The ICJ in the recent *Jurisdictional Immunities* case, as well as several national courts in the United States, Belgium or France, confirmed the existence of a rule of customary international law concerning the separate nature of such immunity.

These examples convincingly prove that international law distinguishes among different kinds of immunity. In this respect, the autonomous regime of the immunity of warships is comparable to the immunities enjoyed by diplomatic missions, including bank accounts, as well as Head of State immunity. That diplomatic immunity is comparable to the immunity of warships is confirmed also by the French author Pingel according to whom:

(Interpretation from French)

> "Like the property of central banks and diplomatic premises, warships are one of the characteristic attributes of a sovereign State and must therefore enjoy exemption from the jurisdiction of foreign courts."

(Continued in English)

Permit me now to turn to the effect of a general waiver on the immunity of warships. Some authorities of Ghana base their forcible measures against the Frigate *ARA Libertad* on a general waiver included in the Fiscal Agency Agreement dated 19 October 1994 and concluded between Argentina and a Fiscal Agent. The full text of this waiver is reproduced in the attachment to Argentina's Request.

In contrast to the view of the Respondent, it is necessary to discuss here the non-existence of a waiver regarding this vessel since Ghana invokes an alleged waiver of Argentina in order to justify its denial of Argentina's rights under the Convention. It already follows from the autonomous nature of the immunity of warships that a general waiver relating to immunity from jurisdiction and immunity from enforcement is never able to remove the warship's immunity. It has already been demonstrated in the Request of Argentina that cases and doctrine convincingly establish that warships are under a special protection against the loss of their immunity. This conclusion can be corroborated by reference to several international conventions that explicitly exclude the exercise of jurisdiction against warships, such as the above-mentioned International Convention on Maritime Liens and Mortgages of 1989. Its article 13(2) stipulates that:

> "(n)othing in this Convention shall create any rights in, or enable any rights to be enforced against, any vessel owned or operated by a State and used only on Government non-commercial service."

This particular quality of the immunity enjoyed by warships signals, as Simonnet puts it:

(Interpretation from French)

> "The warship represents the State, its sovereignty, its power, and to claim to exercise authority over a ship so closely linked to the State would be for a foreign State to claim to exercise authority over the State itself and to encroach upon its sovereignty."

(Continued in English)

Similarly, Momtaz maintains that:

> "the immunity of a warship knows no limits."

It is for this reason already from the outset obvious that a general waiver does not apply to warships. This finding is confirmed in general terms by Lord Atkins in the Privy Council in the case *Chung Chi Cheung v. The King* where he stated:

> "The sovereign himself, his envoy and his property, including his public armed ships, are not to be subjected to legal process."

Even if the immunity of warships is considered as being possibly subject to a waiver, the autonomous nature of the immunity of warships requires a special and specified waiver. This requirement is generally recognized. In its decision of 2006, the German Constitutional Court acknowledged that the ILC confirmed the tendency of practice according to which a general waiver would not suffice to set aside the diplomatic immunity of property, which is particularly protected by international law. The German Constitutional Court held that such property comprises, beside premises and property used for diplomatic purposes, also governmental ships and vessels or materials of military forces.

National courts and tribunals in Germany as well as in other States followed this practice of the particular protection of such property, so, for instance, the English High Court in the case *A Company v. Republic of X*, or the decision of the Swedish Supreme Court in the case *Tekno-Pharma AB v. the State of Iran* or in the decision of the French Cour d'Appel in the *NOGA* case. In the latter case, as well as in the case before the English High Court, it was even held that a general waiver not only did not imply a waiver with respect to enforcement, but also with effect on adjudicatory jurisdiction so that the special status of the immunity of diplomatic assets protects such property against both kinds of jurisdiction, irrespective of the existence of a general waiver. For this reason, the Respondent wrongly quotes the judgment of the UK Supreme Court because this case in no way related to an immunity of special property.

This conclusion applies also to warships, which enjoy a similar status as diplomatic assets regarding immunity. The general waiver referred to above cannot have any effect on warships; only a special and specified waiver would release Ghana from its obligation to accord immunity to Argentina in respect of the warship *ARA Libertad*.

However, in the present case such a waiver does not exist.

The waiver referred to by Ghana is said to affect adjudicatory as well as enforcement jurisdiction.

It is generally acknowledged that measures of enforcement need a separate waiver only for this purpose. Article 20 of the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004 unequivocally reflects this rule. The exercise of enforcement jurisdiction is of particular relevance as the measures resulting therefrom have an immediate impact on the property of foreign States and, consequently, on States themselves. The ILC called the immunity against measures of enforcement "the last fortress, the last bastion of State immunity". That the exercise of enforcement jurisdiction is of particular sensitivity to States even of the same political setting is reflected in the European Convention on State Immunity, which does not address the issue of measures of constraint. Accordingly, this jurisdiction as applied to foreign States must be acceded with the greatest care.

Cases and doctrine convincingly establish that warships are under a special protection against the loss of their immunity from enforcement jurisdiction, as was already demonstrated in Argentina's Request. It was particularly emphasized in the above-mentioned decision of the German Constitutional Court in 2006.

The ILC did not leave any doubt regarding the conclusion that in relation to certain properties, including those of a military nature, a special and specified waiver is required:

> "A general waiver or a waiver in respect of all property in the territory of the State of the forum, without mention of any specific categories, would not be sufficient to allow measures of constraint against property listed in paragraph 1."

Paragraph 1 of the draft article 19 regarding State immunity, which became article 21 of the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004, includes among such property also "property of a military character or used or intended for use for military purposes".

This conclusion is also corroborated by the International Law Association, according to which a specified waiver is necessary for property that "is of a military character or is intended for use for military purposes".

Already in the case *Chung Chi Cheung v. The King* the Judicial Committee of the Privy Council quoted the *Schooner Exchange* case and confirmed that, in the area of immunity:

> "...in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation: acts under the immediate and direct command of the sovereign… The implied license therefore under which such vessel enters a friendly port may reasonably be construed and it seems to the court ought to be construed as containing an

> exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality."

In other words, international law does not extend the territoriality principle to permit the exercise of enforcement jurisdiction over warships and government ships operated for non-commercial purposes. As Commander John Astley III and Lieutenant Colonel Michel summarize the consensus on this issue:

> "Regardless of the legal regime in which it is operating, a warship or military aircraft may not, absent its consent, be arrested (seized), searched, inspected, or boarded by officials of another State. Instead, if the vessel or aircraft entered internal waters pursuant to host-nation consent, the host may simply withdraw that consent, thereby requiring the aircraft or vessel to depart. If the aircraft/vessel subsequently refuses to leave, minimal force may be used to compel it to do so."

The immunity of warships referred to in the Convention must be interpreted in this sense.

This is precisely one of the reasons why courts in various States felt obliged to abstain from taking measures, for instance, against Russian Government ships. In the *Sedov* case, the Brest County Court had to decide whether the world's tallest sailing ship, the *Sedov*, that was anchored at the Port of Brest and was deemed to belong to the Russian State, could be seized for the satisfaction of debts incurred by the Russian State. The Court concluded that the question has to be answered in the basis of international public maritime law, and more particularly in the Montego Bay Convention.

> "The Montego Bay Convention establishes the distinction between government vessels used for non-commercial activities (which correspond to functions of sovereignty) and those which are used for commercial activities.
>
> The contracting States have undertaken not to exercise acts of sovereignty of the government vessels of the other powers used for non-commercial activities when they are authorized to be in their territorial waters (Article 32)..."

Within a few weeks after this denial of measures of enforcement against the vessel *Sedov*, similar decisions by the Dutch Regional Court of Haarlem, the German Regional Court Oldenburg and the Hanseatic Higher Regional Court Tribunal Bremen relating to the vessel *Sedov* as well as Russian warship *Krusenstern* followed.

The ILC's Special Rapporteur, Sompong Sucharitkul, offered a compelling reason for the requirement of special waiver: in his view States are

> "often pressured into concluding agreements containing a clause waiving sovereign immunity not only from jurisdiction, but also from attachment and execution".

However, in particular developing States must be protected, as they

> "might otherwise be lured into including in an agreement an expression of consent affecting certain types of property which should under no circumstances be seized or detained, owing to the vital nature of their predominantly public use (such as warships), or to their inviolability (such as diplomatic premises), or to their vulnerability (such as the funds of central banks)."

These cases provide sufficient evidence that States recognize that under the Convention and the law of the sea warships of foreign States and ships used for non-commercial purposes enjoy immunity irrespective of any general waiver contained in a contract, even if this waiver relates to enforcement jurisdiction. The practice of national courts quoted above gives sufficient evidence that properties intended for a military purpose are not subject to such a general waiver, but that any exercise of jurisdiction, in particular measures of constraint against a foreign warship, require an explicit waiver by the flag State specifying this warship. As a rule of general customary international law that is reflected in the Convention, it is binding also on Ghana.

Mr President, Mr Vice-President, distinguished Members of the Tribunal, in addition to the absence of the required special and specified waiver, Ghana has acknowledged the immunity of the warship by agreement. On the one side, this agreement is constituted by the Notes of the Embassy of the Argentine Republic in Nigeria, of 21 May 2012, of 24 May 2012, of 19 June 2012, of 21 June 2012, of 28 June 2012, of 18 August 2012 and of 25 September 2012. These Notes were sent to the High Commission of Ghana in Abuja. The other side of the agreement has been established by a Note of the Ghana High Commission of 4 June 2012.

In the above-mentioned Note of 24 May 2012 Argentina made a request in relation to the frigate *ARA Libertad* for "the Permit from the appropriate authorities" of Ghana "to enter the jurisdictional waters of Ghana and stop over at the Tema Port". This request was positively answered by Ghana, stating that the High Commission of the Republic of Ghana, "with reference to the latter's Note Verbale No. EE/206/12 dated 21 May 2012, requesting for its naval ship to dock at Tema Harbour from 1 to 4 October 2012, has the honour to inform that the Ghanaian Authorities have granted the request".

These instruments constitute a concordance of will, a mutual engagement and, consequently, an agreement of both sides, Ghana and Argentina. Accordingly, Argentina requested Ghana's consent and Ghana gave its permission to Argentina regarding the entry, presence and timely departure of the warship *ARA Libertad* into the jurisdictional waters of Ghana. As a further consequence, both sides are bound by this agreement according to the rule *pacta sunt servanda*.

By the Note of 4 June, Ghana is bound to accept the warship *ARA Libertad* of the Argentine Navy within the waters under its jurisdiction. It was informed and accepted that this vessel has been a warship of a foreign State since the Note explicitly referred to the "naval ship". This qualification automatically involves the granting of immunities in its ports and territorial sea in accordance with, and as recognized by, the Convention and other rules of the International Law of the Sea, otherwise the explicit consent would not have been needed. Accordingly, on the one hand, Ghana

cannot deny the knowledge of this fact and of the legal obligations resulting therefrom and incumbent upon it, whereas Argentina could and can rely on this legal consequence. If such a reliance on the words of another State were not possible, the friendly relations among States would be heavily affected. The disregard of such commitments resulting from an international agreement would not only run counter to the basic principle of international law reflected in the principle *pacta sunt servanda*, but would also shake the bottom of international relations.

That the consent to the presence of a warship automatically entails the limitation of the jurisdiction is confirmed by the Supreme Court of New South Wales in *Wright v. Cantrell*, in which the Court held:

> A State which admits to its territory an armed force of a friendly foreign power impliedly undertakes not to exercise any jurisdiction over the force collectively or its members individually which would be inconsistent with its continuing to exist as an efficient force available for the service of its Sovereign.

Moreover, according to the Australian High Court's decision in *Chow Hung Ching and Si Pao Kung v. The King*, public international law recognizes that consent by a receiving State to the entry of forces of another State implies a waiver of the receiving State's normal supervisory jurisdiction over those forces.

Even if these instruments of Argentina and Ghana could not qualify as an agreement, the Note of Ghana of 4 June is a unilateral commitment on the side of Ghana to which it is bound.

This declaration was subsequently followed by supporting conduct of the Ghanaian authorities before the case was brought before Ghana's courts so that the conduct of Ghana gave sufficient evidence of its consent to grant the warship *ARA Libertad* the immunity of warships in foreign waters as prescribed by the Convention. The statement of the Legal Adviser of Ghana, Mr Appreku, in the Superior Court of Judicature, according to which the frigate *ARA Libertad* enjoys immunity from any measures of enforcement jurisdiction, removes any doubt from this conclusion.

Mr President, Mr Vice-President, distinguished Members of the Tribunal, let me summarize the most important points of my statement: Contrary to the submissions of Ghana, the causes of action of Argentina are based entirely on the Convention. Specifically, Argentina seeks a protection of its right to innocent passage, the freedom of navigation and other lawful uses of the sea as well as the immunity of its warship. These rights are denied on the basis of an alleged waiver that, as doctrine and practice prove, cannot have any legal effect with respect to the frigate *ARA Libertad*. These rights belong to the fundamental rules of the law of the sea and serve as means to foster the friendly relations among States.

Mr President, Mr Vice-President, distinguished Members of the Tribunal, I thank you for the attention you paid to my statement and ask you, Mr President, to give now the floor to Professor Kohen.

THE PRESIDENT: Thank you very much, Mr Hafner. We have reached about eleven o'clock. At this stage the Tribunal will withdraw for a break of thirty minutes. We will continue the hearing at 11.30.

(Short adjournment)

THE PRESIDENT: We will now continue the hearing. *(Interpretation from French)*. Mr Marcelo Kohen has the floor. Mr Kohen.

MR KOHEN: Mr President, Mr Vice-President, Members of the Tribunal, it is an honour to appear before this Tribunal for the first time to defend the rights of my country and one of the symbols dearest to the hearts of all the people of Argentina, the frigate *ARA Libertad*. I have also a special thought for my 45 compatriots who are on board in extremely difficult conditions.

It is no exaggeration, Mr President, to start by affirming that, in this case, you are confronted with the most self-evident and urgent case in the Tribunal's history for the prescription of provisional measures. My colleague, Gerhard Hafner, has just demonstrated to you that the rights at issue in this dispute, which must be upheld, are covered by the United Nations Convention on the Law of the Sea and are entirely plausible. My task will be to demonstrate, firstly, that the other conditions required for the prescription of a provisional measure are met; secondly, that only a provisional measure can preserve the rights in question; and, thirdly, that there is nothing to prevent the Tribunal from adopting such a measure.

Mr President, the conditions that must be met for provisional measures to be prescribed by the Tribunal, as set out in article 290 of the Convention and in case law are: (a) that the arbitral tribunal provided for in Annex VII has *prima facie* jurisdiction; (b) that the provisional measures requested are designed to preserve the respective rights of the Parties; and (c) that the situation is urgent.

As you know, Mr President, we learnt of Ghana's position with regard to these three conditions only a few hours ago.

I shall examine the points on which there is disagreement between the Parties without addressing other considerations that Ghana has not contested and which, therefore, we take to be beyond dispute.

Let me start, therefore, by considering Ghana's claim that the Annex VII tribunal has no *prima facie* jurisdiction. In its written statement, Ghana rejects the jurisdiction *ratione materiae* of the Annex VII tribunal. Its reasoning can be summed up as follows. First, the immunity of warships recognized by the 1982 Convention and their right of innocent passage ends at the territorial sea, and, since the *ARA Libertad* is in its internal waters,

> "The Convention does not provide any rule or other guidance on the immunities of a warship which is present in internal waters."

Moreover, in the Respondent's view, the freedom of the high seas and the rights of navigation of the *ARA Libertad* are not affected because the measures of constraint were taken against the warship in the port of Tema.

Secondly, according to Ghana, the central issue is the interpretation and application of a waiver of immunity that is found in the bonds, a matter that is not regulated by the 1982 Convention, or, to quote Ghana:

> "In the absence of any relevant provision of UNCLOS Ghana submits that the Annex VII Tribunal has no jurisdiction over the issue of the waiver of immunity in this matter."

Members of the Tribunal, Argentina takes exactly the opposite position in regard to each and every one of these claims, and my colleague, Gerhard Hafner, has just shown you that they are entirely unfounded.

With regard to the *prima facie* jurisdiction of the arbitral tribunal, it is sufficient to point out that Argentina considers that the detention of the *ARA Libertad* violates the rights recognized by the Convention in article 18, paragraph 1, article 32, article 87, paragraph 1, and article 90, and that Ghana contests this. Applying the Tribunal's analysis in the *Blue Fin Tuna* cases – the same analysis that the Court in The Hague consistently applies –it is quite apparent that there is a dispute relating to the interpretation and application of the Convention.

The second strand of Ghana's reasoning is no less surprising than the first. Argentina maintains that the immunity of warships recognized in article 32 extends to the whole of the 1982 Convention. Ghana claims that it is necessary to establish whether Argentina waived this immunity, and that the Convention provides no rules capable of providing an answer to that question. But, Mr President, if we follow Ghana's reasoning, you would find it impossible to resolve more or less any of the cases submitted to you. Just as you are able to turn to the rules of general international law on the environment where, for instance, the Convention refers to the protection of the marine environment, you can apply the rules of general international law on immunity where the Convention refers to that concept. Nor do we find in the Convention any rules relating to the interpretation of treaties or provisions relating to the content and forms of liability, but that, of course, does not prevent this Tribunal or an Annex VII tribunal from seeking them elsewhere and applying them to the dispute *sub judice*.

Your case law is absolutely clear on this. I quote the judgment in *Saiga 2*:

> "In the view of the Tribunal there is nothing to prevent it from considering whether or not, in applying its laws to the *Saiga* in the present case Guinea was acting in conformity with its obligations towards Saint Vincent and the Grenadines under the Convention in general international law …"

And later in that same judgment:

> "Although the Convention does not contain express provisions on the use of the force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must

be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances."

Similarly, in its Advisory Opinion, the Seabed Disputes Chamber cites as a rule of general international law the precautionary approach which does not appear in any clause in the 1982 Convention. In order to do this, the Chamber invokes article 31, paragraph 1 (c) of the Vienna Convention, according to which the interpretation of a treaty should take account not only of the context but also of "any relevant rule of international law applicable in relations between the Parties".

Members of the Tribunal, if we were to follow Ghana's reasoning, any time a State were to claim before this Tribunal that a right under the Convention had been violated, it would suffice for the other party to affirm that the first State had waived those rights, and that since the waiving of rights is not covered by the Convention, the Tribunal has no jurisdiction. That, in my view, members of the Tribunal, is an extremely weak argument to seek to escape international jurisdiction.

Members of the Tribunal, Ghana does not contest that the other requirements relating to the Tribunal's jurisdiction, which we mentioned in our Request for provisional measures, are met. The first condition required by article 290, paragraph 5, of the Convention is thus clearly satisfied in this case.

I shall now move on to examine the substantive conditions for the prescription of provisional measures, and they too are fully met in this case.

Mr President, I shall set out the situation which calls for the prescription of provisional measures "to preserve the respective rights of the Parties to the dispute", as required by article 290, paragraph 1, of the Convention. The 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, as recognized by article 18, paragraph 1 (b), of the Convention, and pursuant to the exchange of Notes between the two Parties on this subject. That, by the way, is an agreement on which Ghana has remained totally silent in its written statement, as submitted to the Tribunal yesterday.

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, as my colleague Gerhard Hafner has fully demonstrated. In fact, Argentina is being subjected to an affront on a daily basis, and this will continue, if the requested provisional measure is not prescribed.

In this case, if the provisional measure is not prescribed, Argentina will be unable to exercise its rights for an indeterminate period. The question to be asked in order to establish whether a provisional measure is necessary in the present case is the following: what would remain of its immunity, its right to leave the port of Tema and

Ghanaian jurisdictional waters and its freedom of navigation, if the frigate *Libertad* were to continue to be detained until the conclusion of the arbitral procedure?

Mr President, Members of the Tribunal, a State's inability to enforce its immunity undoubtedly constitutes one of the most clear-cut cases in which the prescription of provisional measures is imperative. Immunity touches upon the very essence of State sovereignty, upon the respectful relations that should exist between States and upon the fundamental principle of their sovereign equality. When it is disregarded, above all in a manner as blatant as in the present case, since even the Government of Ghana recognized it before its country's commercial court, the very existence of the right is placed at risk. By definition, immunity entails exemption from the jurisdiction of foreign courts and from the adoption of measures of constraint. This is particularly true when it comes to the immunity of a warship, since disregard of immunity in this case precludes the performance of the ship's essential function, namely sailing.

While retaining a sense of proportion, reference should be made here to the order of the International Court of Justice indicating provisional measures in the case concerning *United States Diplomatic and Consular Staff in Tehran*. To paraphrase the Court of The Hague in the light of our context, it may be argued that there is no more fundamental requirement for the conduct of peaceful relations between States in connection with the presence of foreign warships in the maritime waters under their jurisdiction than respect for their immunity, that throughout history States of all regions have observed reciprocal obligations for that purpose, and that the obligations thus assumed are unqualified and inherent in their character and function.

Aside from the impossibility of exercising these rights for an indeterminate though certainly lengthy period, and from the fate of the crew during this period, a point to which I shall return in a few moments, one may wonder about the kind of situation in which the *ARA Libertad* will find itself at the end of the proceedings on the merits if the provisional measure is not prescribed. In the best-case scenario, an operation would be required to restore the frigate's navigational capacity, the outcome of which is uncertain. In the worst-case scenario, the warship would be irremediably lost, either in material terms because the conditions of enforced detention in Tema post a serious risk to its safety and preservation, or in legal terms because of the reckless act of a Ghanaian commercial court which, throwing caution to the wind, assumes competence that it manifestly lacks and, openly disregarding international law, does not hesitate to consider itself endowed with authority to order execution tin respect of the ship.

Mr President, Mr Vice-President and Members of the Tribunal, if the present conditions of detention of the frigate and its entirely unlawful subjection to Ghanaian jurisdiction persist, a judgment or an arbitrary ruling on the merits would produce only a partial or limited effect – or indeed no effect at all – in terms of safeguarding the exercise of Argentine rights.

Mr President, the condition required by article 290, paragraph 1, of the Convention is the existence of a circumstance that requires the preservation of the rights of the parties to the dispute. The facts that I have just described amply demonstrate, to my

mind, the existence of such a circumstance. The prescription of a provisional measure becomes even more essential when there is a risk of irreparable damage or prejudice. Of course, the risk of irreparable prejudice or damage does not preclude a subsequent decision to award some form of reparation when a judgment or arbitral ruling on the merits is handed down. Otherwise, it would be simply impossible to meet this condition and hence to order provisional measures.

In its first order indicating provisional measures, the Permanent Court of International Justice referred to what is now regarded as the classic definition of the notion of irreparable prejudice. It found that irreparable prejudice was constituted when the possible violation of the rights in question – and I quote –"could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form".

Pecuniary reparation for the economic loss sustained as a result of the detention of the *ARA Libertad* may certainly be envisaged. Several types of satisfaction may also be envisaged, as indeed Argentina demands when it comes to the merits. However, members of the Tribunal, nothing – absolutely nothing – can compensate for the fact that the *Libertad* frigate has been forcibly detained for an indeterminate period, that its immunity and dignity have been ignored, that it has been threatened with execution of judgment and prevented from being used to perform its primary function, i.e. sailing, serving as a platform for the training of navy cadets and representing Argentina in seas and ports all over the world. The damage to these rights, members of the Tribunal, is irreparable. Can we seriously ask Argentina to be "patient" and to await a decision on the merits in order to have its immunity finally recognized and to be able to sail its navy's flagship? No, Mr President, such a scenario would void those rights of their entire substance.

Mr President, in its Written Statement submitted yesterday Ghana claims that Argentina has not suffered any irreversible prejudice from the detention of the *ARA Libertad* in Tema. In so doing, the Respondent relies on a twofold argument: first, it paints an idyllic picture of the situation, which is unfortunately far from the truth; and, secondly, it claims that Argentina simply needs to pay a US $20 million bond to secure the release of its warship. I shall address each of those baseless arguments.

Mr President, I cannot help feeling shocked by the affirmation in Ghana's Written Statement that (*continued in English*)

> "while it remains in Port Tema 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".

(*Interpretation from French*) As for the following paragraph, any comment would be superfluous:

(*continued in English*)

> "Indeed, 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."

Mr President, aside from the blatantly euphemistic approach adopted in the Ghanaian Written Statement, it is necessary to recall that in the context of peaceful relations, as in the present case, no use of force against a warship can be considered "reasonable" or not hostile, as maintained in the Ghanaian Written Statement. Any use of force against a warship under these circumstances is intolerable.

Let it be said once and for all, Mr President: the gravity of the situation should not be disregarded, as seems to be the case on the part of the Ghanaian port authorities, who characterize the measures taken against the warship as quite normal or not out of the ordinary. Bernard Oxman, who attended the Conference with some of you and who is a colleague well known to your Tribunal, has written in this connection:

> "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."

Mr President, Members of the Tribunal, let us look at the facts that occurred even after the introduction by Argentina of the arbitral procedure on 30 October last. As you know, on 5 October 2012 Judge Frimpong authorized the Ghanaian Port Authority to move the vessel. On 7 November, even though the ruling of the court in question was not final because of the appeal entailing a stay of execution filed immediately by Argentina, the Port Authority unsuccessfully attempted to move the warship and then cut off the power and water supply to the *ARA Libertad*. All these facts are, moreover, acknowledged in Ghana's Written Statement.

A judicial decision on the appeal against the forced relocation of the vessel is due to be taken in the coming days. Furthermore, the Ghanaian judicial authorities have stated their intention to rule on the merits and, notwithstanding the immunities enjoyed by the *ARA Libertad*, on the application for execution of the judgment concerning the warship filed by the NML vulture fund. In other words, the risks of such a policy of disregard of the warship's immunity are not only real and serious; they are also exacerbated by the clearly stated intention to deprive Argentina of the ownership and use of its warship.

Members of the Tribunal, there is another factor of vital importance that renders the prescription of the requested provisional measure imperative under the circumstances. Of course, the direct rights enjoyed by Argentina as a State must be preserved – rights which, it should be recalled, differ from those that Argentina would assert on behalf of its nationals. In such circumstances, exhaustion of domestic remedies is not required, as your Tribunal held in the *Saiga* ship case (No. 2). Nonetheless, as stated by the International Court of Justice in its decision ordering provisional measures in the *Cameroon v Nigeria* case – and I quote – "these rights also concern persons". The fact is that, underlying Argentina's rights in this regard, there are individuals who are personally suffering the consequences of the damage caused to the rights of their State. In the current circumstances, as described by Captain Salonio in his testimony, which you will find in Annex 1 to our Request, the crew of the *ARA Libertad*, or rather its remaining members, are subjected to living conditions that are extremely stressful in both physical and psychological terms.

Ghana claims that the ship's crew have had access to all available port facilities and to the use of a generator to supply power to the vessel. These claims are fallacious. As Ghana itself has acknowledged, the ship's supply of water and electricity was cut off following the Commander's refusal to allow the Port Authority to assume control of the ship. It merely contests the grounds for this action. The generator in question was hired at Argentina's expense and was not made available to the ship by the port authorities. Moreover, it was disconnected following the failed attempt to move the vessel without its Commander's authorization. Although it has since been reconnected, the facts demonstrate that its presence depends on the goodwill of the Port Authority. Contrary to what Ghana maintains in its Written Statement, the Argentine Ambassador was initially denied access to the ship and was subsequently permitted to board subject to certain conditions. The persons who deliver food are subjected to malicious comments and acts, which render their task increasingly difficult. This situation persists.

For the crew, this painful situation is tantamount to a state of detention. Since the events of 7 November last, which involved attempts on the part of the Ghanaian authorities to take control of the vessel and move it by force, the crew has been unable to go ashore. To make matters worse, Captain Salonio is currently subject to proceedings for "*contempt of the commercial court*", which constitutes a flagrant disregard of the immunity of the captain of the *ARA Libertad* and an additional aggravating factor in the dispute.

Mr President, allowing this situation to continue is tantamount to accepting the risk of an assault on the safety, dignity and life of the persons concerned.

Mr President, that brings me to Ghana's contention that Argentina can secure the release of the frigate *ARA Libertad* by posting a security bond in the amount of US$ 20 million. To Ghana's way of thinking, this proves that there is no need to prescribe provisional measures. Looked at from a different angle, what Ghana's claim would mean is a denial of the immunity that warships enjoy exempting them precisely from this kind of measures of constraint, as my colleague Gerhard Hafner has already explained. What then is Ghana saying? That Argentina should pay a security bond in order to exercise its right of innocent passage and to leave the port and Ghanaian jurisdictional waters – a right that the Convention unconditionally guarantees and concerning the exercise of which Argentina and Ghana have already reached agreement down to the minutest detail? Since when has one had to pay to exercise these rights?

In point of fact, Mr President, this requirement is further proof of the need to grant the provisional measure requested by Argentina, because it testifies to the impossibility of my country exercising its rights unconditionally, as required by the relevant provisions of the Convention and the rules of general international law.

I turn now to the third condition. Article 290 (5) of the Convention provides that, pending the constitution of the arbitral tribunal, your Tribunal may prescribe provisional measures if it considers that the urgency of the situation so requires. In the present case the procedure for constituting an arbitral tribunal is really only at the initial stage. Ghana has not replied to the proposal made by Argentina to initiate

contacts in order to proceed to the nomination of three arbitrators. To date, all Ghana has done is to announce, just a few hours ago, that it considers that this arbitral tribunal has no jurisdiction.

However, Mr President, in claiming that there is no urgency prior to the constitution of the Tribunal, Ghana is mistaken on two counts: first, because, as I shall explain in a moment, the urgency already exists today; and, second, as you stated in the Land Reclamation case, "the urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to 'modify, revoke or affirm those provisional measures'". Given the background to the case, it is hard to say when the arbitral tribunal will be in a position to rule on an application for provisional measures. Not only could the nomination of the arbitrators take a considerable amount of time, but Ghana would also have to radically change the stance it has taken thus far. It would have to reply to the Argentine notes and agree to participate in good faith in the constitution of the arbitral tribunal so that this tribunal could commence its work as soon as possible. What is certain, however, is that it will be a very long time before the arbitral tribunal rules on the merits, given that Ghana has already announced that it will contest the tribunal's jurisdiction.

Mr President, there are several reasons that indicate beyond the shadow of a doubt that the prescription of the provisional measure is an urgent matter. The condition of urgency has been deemed by your Tribunal and by your fellow institution, the Court in the Hague, to be met when "action prejudicial to the rights of either party is likely to be taken before [a] final decision is given" or when there is a "real" or "imminent" risk that irreparable prejudice may be caused to such rights.

Members of the Tribunal, in this case it is scarcely necessary to speculate about the probability, imminence or reality of a risk of irreparable prejudice or damage to those rights. This irreparable prejudice or damage is not hypothetical. It is occurring day after day. In truth, the only risk that remains is that over time such irreparable damage will become entrenched and indeed worsen to the point where all the rights that Argentina possesses in respect of its training ship are destroyed, while it awaits the constitution of and eventual ruling by the arbitral tribunal.

I must also point out that, given the Respondent's conduct so far, the probability that this prejudice will worsen during the time it takes to constitute the arbitral tribunal and thereafter is very real. The events of 7 November 2012 bear this out. What guarantee is there for Argentina, Mr President, with regard to the behaviour of the other Party, if the Government of Ghana has not made the slightest comment even about the fact that the Port Authority took forcible action against the *ARA Libertad* while the court decision on which that action was allegedly based was not even final? What can Argentina expect of a State that has not even replied to any of its notes and has proceeded to use such violence even before the arbitral proceedings have started?

Ghana further claims that there is no urgency since its Port Authority, among others, is always ready to respond reasonably to any need of the *ARA Libertad* for fuel. That cannot be true, Mr President, because the measure of constraint ordered by Judge Frimpong on 2 October explicitly prohibits, in paragraph 2, the possibility of refuelling the vessel and it is the Port Authority which is applying that order.

Another argument that Ghana has put forward to dispute the urgency of the situation is the alleged end of the domestic proceedings towards the end of January 2013. Mr President, leaving aside any consideration of what that would imply for Argentina's rights, nothing leads us to accept the affirmation of the alleged speed of the Ghanaian proceedings. Given the current state of those proceedings, in fact, one could maintain the exact opposite.

Mr President, Mr Vice-President, Members of the Tribunal, in the light of the use of force that has already taken place, which Ghana has acknowledged in its Written Statement, and the threats still pending, the risk of a confrontation is very real and very serious, particularly if the Ghanaian authorities - judicial, port or other - decide, as they have already done and are still considering doing, to exercise their power against the *ARA Libertad*. In a few days the Ghanaian court is expected to rule on the appeal against the decision to authorise the movement of the vessel by the Port Authority. Captain Salonio, as is his right and duty, will not tolerate the use of violence against his warship and his personnel.

Mr President, this is the first time that your Tribunal has been confronted with a situation in which the life, the safety and the physical integrity of individuals, as well as a special asset such as a State's warship, have been subjected to such irreparable damage. In similar circumstances, where there were similar risks, the Court in The Hague did not hesitate to order provisional measures. This was true in the case of the *United States Hostages in Tehran* and the case of *Nicaragua*. It was also the case in the frontier disputes between Burkina Faso and Mali, and between Cameroon and Nigeria, in the case of *Bosnia and Herzegovina v Yugoslavia* and in the *Breard*, *LaGrand* and *Avena* cases, and finally in the cases of *Democratic Republic of the Congo v Uganda*, *Georgia v Russian Federation*, and more recently in the cases of *Certain Activities carried out by Nicaragua in the Border Area* and the Request for interpretation of the Judgment in the case concerning the Temple of Preah Vihear.

To sum up, Mr President – and this concludes the first part of my oral statement – there is an imperative need to preserve Argentina's rights. If provisional measures are to be prescribed when there is a risk of damage, and not even actual damage, all the more reason to prescribe them when real damage has already occurred and has been worsening since the start of the arbitral proceedings, and since there is every indication that the continuation of this damage will only be aggravated further. What is at stake here is not just the exercise of the rights invoked but their integrity and their very existence.

I now come to the Request for the prescription of provisional measures, which reads – and I quote:

> "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."

Mr President, Mr Vice-President, distinguished Members of the Tribunal, in order to preserve the rights of Argentina that are at stake in the arbitral proceedings which

began on 30 October, the unconditional release of the warship being detained in Tema and clearance for the ship to be resupplied so that it can leave the port of Tema and Ghana's jurisdictional waters is the only provisional measure that can be taken. Any other provisional measure, particularly any measure implying that the ship should remain in the port of Tema or that it be moored at anchorage elsewhere in the jurisdictional waters of Ghana – as the Ghanaian Port Authority had initially requested before Judge Frimpong – is incapable of preserving Argentina's rights. Indeed, even if there were a suspension of Ghanaian legal proceedings pending a decision on the merits, Argentina would be deprived of the exercise of its rights for an undefined period of time, and the ship and the crew would continue to be under precarious and abnormal conditions. In the best of cases – should the present situation improve and the tension diminish – the state of the frigate could only deteriorate because the vessel cannot be maintained properly in the port of Tema. Furthermore, the risk of confrontation which I mentioned earlier would not disappear. Quite the contrary: the probability would only increase over time. In other words, we would be prolonging a situation which is plainly unbearable and unsustainable.

Mr President, Members of the Tribunal, in the case of the *United States Diplomatic and Consular Staff in Tehran*, it is difficult to imagine any measure other than the immediate freeing of the hostages and the diplomatic and consular premises that the Hague Court could have taken. The same holds true here: any measure other than the unconditional release of the *ARA Libertad* would be equivalent to assuring a perennial disregard of the warship's immunity and rendering arbitrary and conditional the right of passage and freedom of navigation which it enjoys.

Similarly, 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. Such a requirement would also be a massive confusion between the situation of warships and that of private or commercial vessels.

Mr President, allow me to make a comparison between the situation of the *ARA Libertad* and the hypothetical situation of a commercial ship which might have been seized by Ghana and detained in the port of Tema for having been in breach, *in flagrante*, of the laws and regulations concerning fishing in Ghana. Would Ghana be able to hold the ship until a judgment was handed down with regard to the ship’s offence? The answer is No. The Convention of 1982 has in fact provided a procedure that is well known to you: prompt release as laid down in article 292. In other words, to what does the Convention give primacy? Freedom of navigation – although, as one would immediately note, in exchange for the posting of a bond.

However, let us compare the situation of the *ARA Libertad* and that of this hypothetical commercial vessel engaged in illegal fishing. Has the *ARA Libertad* committed any wrongful act in the jurisdictional waters of Ghana or elsewhere? The answer is No. On the contrary, the *ARA Libertad* exercised its right of innocent passage in order to reach the port of Tema, as agreed in the exchange of notes between Argentina and Ghana in the framework of an official visit.

Thus, Mr President, it is not a situation comparable to that of a commercial vessel which might be accused of acting in breach of fishing, environmental or other

regulations, where the prompt release mechanism provides for the possibility of posting a bond in exchange for the release of the ship. No one is suggesting that the *ARA Libertad* has committed any offence, and even if it had and the responsibility of the flag State were involved, the only thing that the Convention provides with regard to a warship is the possibility of asking the warship to leave the territorial waters of the coastal state. There is a striking parallel between this and what the accrediting State can do with regard to a diplomat. Even if the possibility exists of ceasing to recognize diplomatic status for someone declared *persona non grata*, should the accrediting State refuse to execute or fail to execute that action within a reasonable period of time, such does not apply with regard to a warship. In other words, distinguished Members of the Tribunal, the immunity of warships is subject to no condition. The immunity of the *ARA Libertad* and its right of innocent passage is not subordinated to the payment of a sum of money. The immunity of the *ARA Libertad* and its right to leave Ghana is not subject to a decision by a commercial judge. The Convention of 1982 is unambiguous on this point. A warship is untouchable in this regard, even if it were to commit offences. The same is true for the right of innocent passage in the territorial sea of Ghana, which the *ARA Libertad* has been denied.

Please allow me, Mr President, to recall the fact that Argentina notified Ghana of the dates, times and coordinates of the ship's passage for its arrival at and departure from the port of Tema and for its travel within the jurisdictional waters of Ghana, and that – as you can see on screen – Ghana accepted this information. Should it be necessary for a bond to be posted or any other requirement to be met in order to exercise a right of passage, leave the port as agreed and continue free navigation outside the territorial sea of Ghana?

Distinguished Members of the Tribunal, the logic of the Montego Bay Convention is to prevent delays in allowing ships and their crews to return to sea: in other words, to ensure that there are no obstacles to the ability of vessels to continue at all times to fulfil the function for which they have been created, that is, to navigate, and, I might add, to guarantee the fundamental freedom relating to the sea, freedom of navigation. The only measure that can be unconditionally imposed in the case at hand is to allow the *ARA Libertad* to leave the port of Tema and the jurisdictional waters of Ghana and to be resupplied for that purpose.

Mr President, Mr Vice-President, distinguished Members of the Tribunal, any order prescribing provisional measures has the aim of protecting whatever rights the parties may have. Of course, these rights must be plausible. Argentina's rights are clearly plausible, as has been demonstrated, and in fact there has been no disagreement between the parties in regard to those rights. The Government of Ghana itself recognized this when it came before the commercial judge of first instance who imposed the measure of constraint against the frigate, as you can see on screen, even though it is true that it did not identify all the consequences flowing from this observation.

The provisional measure requested by Argentina today before this Tribunal aims to preserve the rights which are subject to the dispute that has been submitted to the arbitral tribunal. If you accede to the Argentine request, it will not be the first time that your Tribunal will have ordered a provisional measure protecting the rights of only one of the Parties to a proceeding. You have done so previously in your order of 11

March 1998 in the *Saiga (No. 2)* case with regard to the rights of Saint Vincent and the Grenadines. Accordingly, this Tribunal unanimously decided as follows:

> "Guinea shall refrain from taking or enforcing any judicial or administrative measure against the M/V Saiga and its Master and the other members of the crew […] ."

That being said, the situation of the *ARA Libertad* is different from that of the *Saiga (No. 2)* case. In the *Saiga (No. 2)* case, the indication of provisional measures requesting the release of the crew ceased to be relevant since the crew and the ship had already been released by Guinea.

The ICJ also underscored this in the *Hostages* case, and I quote:

> "[…] in indicating provisional measures, [the Court] has not infrequently done so with reference to both the parties; and […] this does not, and cannot, mean that the Court is precluded from entertaining a request from a party merely by reason of the fact that measures which it requests are unilateral."

One might wonder if by prescribing the unconditional release of the *ARA Libertad* certain rights of Ghana might be affected or challenged. No established right or right declared by Convention or even any other rule of international law in fact is in question with regard to Ghana. The reality, Mr President, Mr Vice-President, distinguished Members of the Tribunal, is that there is not a single right of Ghana's that needs to be protected in the present proceedings.

It cannot be the right to exercise its own jurisdiction and to apply measures of constraint against a foreign warship such as the *ARA Libertad*. The Government of Ghana is aware of that and has already explicitly recognized that in its Written Statement, in footnote 16 of which I shall quote the beginning:

(Continued in English)

> "The executive branch of the Government of Ghana has indicated its position with regard to the immunity of warships before the Ghanaian Court. However, the executive is unable to intervene directly to effect the release of the vessel in the way that Argentina has demanded. The Constitution of Ghana provides for a clear separation of powers between the three branches of the government and establishes an independent judiciary."

(Interpretation from French)

Mr President, it is a well known fact and it has been known for a long time that, as was affirmed by the Permanent Court, and I quote:

> "A State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force."

Distinguished Members of the Tribunal, we are not here to entertain issues that go to the merit of the case, that is, the attribution of wrongful behaviour to the State of Ghana. We need only affirm here that what the Government of Ghana claims it is unable to do by reason of its internal provisions, is a matter which your Tribunal has full authority to prescribe.

Let me take advantage of this last comment to examine now the question of an alleged advance judgement on the merits, if the provisional measures sought were to be adopted. In fact, Mr President, distinguished members of the Tribunal, your case-law has consistently stated that your orders do not in any way prejudge the jurisdiction of your Tribunal or of an arbitral tribunal, or the merits of the case. You have also stated that the fact of a party's acting or refraining from acting in the framework of provisional measures – I quote – *"should not be construed as a waiver of any of its claims or an admission of the claims of the other party to the dispute".*

Mr President, we are not asking the Tribunal to prejudge the merits of this dispute. At this stage of the proceedings the aim is not to establish the existence of one or more internationally unlawful acts committed by Ghana, nor is that what we seek. The measure requested does not in any way prejudge the existence or otherwise of an internationally unlawful act or its attribution to Ghana. In no way does it prejudge the remainder of the Argentine requests that were formulated when the arbitral tribunal was introduced. In the present interlocutory proceedings, we are in no sense asking you to rule on the nature, in international law, of the ongoing legal proceedings in Ghana or on the actual nature of the actions taken by the Ghanaian port authorities. The release of the *ARA Libertad* does not affect those questions, which relate to the merits of the dispute.

A parallel with the ordering of provisional measures by the Hague Court is called for here. When the ICJ ordered in its provisional measures that the mining of Nicaraguan ports by the United States be stopped, or that the staff and diplomatic and consular premises of the United States in Iran be released, for example, it did not prejudge the merits of the disputes, even if it had to succinctly assess the rights at issue and the manner in which they should be protected pending a decision on the merits. Let me now, Mr President, quote *verbatim* paragraph 28 of the Court's order, setting out the provisional measures in the hostage case, because it is highly relevant:

> "Whereas, in the first place, [Iran] maintains that the request for provisional measures, as formulated by the United States, "in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it" ; whereas it is true that in the Factory at Chorzów case the Permanent Court of International Justice declined to indicate interim measures of protection on the ground that the request in that case was "designed to obtain an interim judgment in favour of a part of the claim" (Order of 21 November 1927, P.C.I.J., Series A, No. 12, at p. 10); whereas, however, the circumstances of that case were entirely different from those of the present one, and the request there sought to obtain from the Court a final judgment on part of a claim for a sum of money; whereas, moreover, a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party ; and whereas in the present

> case the purpose of the United States request appears to be not to obtain a judgment, interim or final, on the merits of its claims but to preserve the substance of the rights which it claims *pendente lite*…"

Here again, Mr President, Vice-President, distinguished members of the Tribunal, prescription of the provisional measures requested will not entail a provisional judgment on the merits. Furthermore, the unconditional release of the frigate would not cause any prejudice to Ghana.

Moreover, Mr President, ordering the unconditional release of the frigate does not in any way mean infringing any of Ghana's rights, since Ghana itself agreed with Argentina that the frigate would leave the port of Tema on 4 October 2012. There is a special agreement relating to the entry and exit of the *ARA Libertad* into and from the territorial waters of Ghana that is binding upon the Parties. This situation may be compared with your order prescribing provisional measures in the *Bluefin Tuna* case. In that case the provisional measure you prescribed was application of the special agreement binding on both Parties relating to annual national quotas for permissible catches, without prejudice to any decision that might be handed down by the arbitral tribunal.

Here again, it is likewise necessary to order implementation of the special agreement between Argentina and Ghana concerning the visit of the *ARA Libertad* to Ghana, and to allow this warship to leave the port and Ghana's territorial waters as agreed by the two Parties.

Mr President, Vice-President, distinguished members of the Tribunal, I now come to my conclusions. We believe we have demonstrated that the rights of Argentina, as recognized by the Convention and explicitly accorded and acknowledged by Ghana, merit urgent protection by way of the prescription of the only necessary provisional measure, namely the release of the *ARA Libertad*. There is nothing to prevent the Tribunal from proceeding in this manner; there are no jurisdictional reasons and there are no substantive ones either. On the contrary, your decision to order provisional measures in this case will clarify in more general terms the treatment that should be accorded to warships. Public order on the oceans requires that the three fundamental rights of States in the field of maritime law that are at issue in this case, namely the immunity of warships, the right of innocent passage, including the right to leave a port – all the more so in the case of an official visit - and freedom of navigation in the different maritime areas concerned, should be safeguarded.

The release of the frigate *ARA Libertad* will mean not only safeguarding the rights of Argentina in this unfortunate affair driven by speculative financial interest, but will also constitute a re-affirmation and a guarantee of rights that are firmly rooted in the legal conscience of all States as being necessary in order to give permanence to "a legal order for the seas and oceans which will facilitate international communication", as is so well put in the preamble to the United Nations Convention on the Law of the Sea.

Mr President, distinguished members of the Tribunal, I thank you for your attention. This brings to a close the first round of pleadings by the Argentine Republic.

THE PRESIDENT *(Interpretation from French)***:** Thank you, Mr Kohen, for your presentation. *(Continued in English)* The first round of pleadings by Argentina is concluded.

We shall continue this afternoon at 3 p.m. with the first round of pleadings by Ghana.

(Luncheon adjournment)