

# Does a Sovereign State Immunity Say More than We Think? ITLOS's Decision in ARA LIBERTAD Case

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## Abstract

Nation's immunity from the jurisdiction of other nations' Courts has been recognized and codified by many nations under the term of 'Sovereign States Immunity'. But, States still have to emphasize on the scope of this immunity in order to prevent conflicts of States' sovereignty from enjoyment of other States immunity on their territory. Thus, many nations have provided for a 'restrictive immunity' in their domestic law. Following the path of these nations, the 2004 UNCSI has also provided for a 'restrictive immunity'. However, the 1982 UNCLOS has addressed the issue of Sovereign State Immunity too. Surprisingly or interestingly, the interpretation of UNCLOS Article 32 by ITLOS in Libertad Case demonstrates that unlike to many pretensions or understandings, UNCLOS provides Sovereign States for an 'absolute immunity' for warships. This paper will try to find out some justifications for ITLOS's position before coming to the conclusion that rather than a creative role, ITLOS played its role of interpretation.

**Keywords:** Sovereign State Immunity; Warship; Restrictive immunity; Absolute immunity; ITLOS.

## 1. INTRODUCTION

Rather than mere grace, comity, or usage, centuries ago Sovereign State Immunity has gradually been developed in the way that it occupies a remarkable place in international law today. From mere civilities of friendly relationship between States, Sovereign State Immunity has started to be considered, organized and codified in different national laws and legislations. This consideration has then attracted attentions from international legal institutions and international community in general so that they finally negotiated a convention which governs issues of States immunity. Thus, after decades of controversies about the issues of State Immunity, the United Nations International Law Commission (ILC) in order to bridge formidable cleavages during a period of rapid changes in State practices concerning sovereign immunity finalized the 2004 UN Convention on Jurisdictional Immunities of States and their properties (the 2004 UNCSI). Unfortunately, to date, the 2004 UNCSI has attracted little support as an international treaty, and thus one must ask whether it has any significance as evidence of an evolving customary international law of sovereign immunity. Moreover, similarly like many domestic laws on State Immunity, the 2004 UNCSI provides for a 'restrictive immunity' whereas the UN Convention of the Law of the Sea provides for 'absolute immunity'. This point of views may fit with the one shared by the International Tribunal of the Law of the Sea (ITLOS) in the Libertad case involving Argentina against Ghana on the issues of application of Sovereign State Immunity to the Argentina warship arrested by Ghana in its internal water.

In this case, although the key issue was the fact that the two states disputed whether article 32 on the sovereign immunity of warships applied to such vessels while in the internal waters of a state, the issue of waiver has been voluntarily ignored by ITLOS. Unlike to Ghanain High Court, the ITLOS after having ignored the 2004 UNCSI and strictly relying on UNCLOS, though it does not contain a section directly addressing the issue of a waiver of enforcement immunity in connection with warships, came to the conclusion that "a warship is an expression of the sovereignty of the State whose flag it flies" and "in accordance with general international law, a warship enjoys immunity, including in internal waters". A finding which although surprising can be justified since it has the merit to provide for interpretation of UNCLOS provisions. Very interestingly, through ITLOS's decision, can we say that 'a warship's immunity under UNCLOS says more than we think?' ITLOS, in deserving an 'absolute immunity' rather than a 'restrictive immunity' didn't move a little bit far from its interpretative role to a creative role? Can we justify ITLOS's ignorance on the issue of waiver in this case?

In order to handle the puzzles left by ITLOS's decision in Libertad case, this essay will try to find out some conceptual definitions of the principle of Sovereign State Immunity. Then, it will focus on the development of this principle from domestic laws to customary international law. Finally, some analysis of ITLOS's decision on Libertad case will provide us for some implications of this principle under UNCLOS in order to show us that ITLOS did remain in its interpretative role in Libertad case.

## 2. Concept of Sovereign State immunity

Traditionally Sovereign State Immunity is known as a doctrine precluding the institution of a suit against the sovereign government without its consent. Though commonly believed to be rooted in English law, it is actually rooted in the inherent nature of power and the ability of those who hold power to shield themselves. In England

it was predicated on the concept that ‘the sovereign can do no wrong’. However, since the American Revolution explicitly rejected this idea, the American rulers had to come up with another rationale to protect their power. One they came up with is that the ‘sovereign is exempt from suit on the practical ground that there can be no legal right against the authority that makes the law on which the right depends. Many nations have followed the example of these two States so that the customary character of the principle of Sovereign State Immunity can’t be rejected in international law.

## 2.1. Definition

The term ‘immunity’ is defined by *The Oxford Companion to Law* as a state of freedom from certain legal consequences or the operation of certain legal rules. In municipal law for particular reasons particular categories of persons are immune from civil or criminal liability in particular cases. Thus young children are immune from criminal liability. In the same way, foreign sovereigns and the governments of foreign states have immunity from the jurisdiction of municipal courts in other states.<sup>1</sup> Sovereign immunity can be referred to ‘act of State doctrine’ which is a domestic doctrine of judicial self-restraint whereby domestic courts will refrain from judging the acts of a foreign sovereign done in his own territory. In other words, it is a form of non-justiciability. As such, we can say that sovereign State immunity precludes a claim or defence that relies upon an assertion that a foreign official act was illegal under foreign law. In fact, State immunity which acts as a bar to the civil and administrative jurisdiction of States when faced with claims against foreign States has uncertain legal origins. It is often contended that State immunity arose out of the principles of independence, equality and dignity of States.<sup>2</sup> However, this assertion has been authoritatively challenged<sup>3</sup> and the alternative explanation put forward that State immunity may be traced to foreign head of State immunity. Another explanation is that it arose out of tensions between two fundamental international law norms- sovereign equality and exclusive territorial jurisdiction.<sup>4</sup> But, in these tensions, the maxim *par in parem non habet imperium* or sovereign equality seems to prevail. Applying this logic, Sucharitkul argues that the principle of State jurisdiction must give way to the principle of sovereign equality to effectuate a State’s right of immunity.<sup>5</sup> This is also the view of the Institut de Droit International (IDI), when it opined that immunities ‘are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States’<sup>6</sup>

Sovereign immunity is a shield, which prevents many types of legal action against foreign states.<sup>7</sup> There are two primary types of accepted sovereign immunity: (1) jurisdictional immunity and 2) enforcement immunity.<sup>8</sup> Jurisdictional immunity refers to limitations on the adjudicatory power of national courts, particularly regarding whether a litigant may even properly file suit against a foreign State. While States originally took an “absolute” stance in regards to jurisdictional immunity that barred most types of legal actions against foreign sovereigns, in the twentieth century many courts shifted towards a less burdensome “restrictive jurisdictional immunity” system.<sup>9</sup> Under this system, courts have been much more willing to entertain legal actions against foreign sovereigns.<sup>10</sup>

This shift did not come quite as quickly for enforcement immunity. “Enforcement immunity” is an offshoot of jurisdictional immunity that prevents the property of a state from being taken in connection with an adjudicatory ruling.<sup>11</sup> Enforcement immunity protects government property including “immovable, land, movable assets, and rights such as intellectual property, and bank accounts.”<sup>12</sup> While jurisdictional immunity typically focuses on the nature of the action against the state, enforcement immunity tends to focus on the purpose of the property being examined in connection with a potential seizure. The limitations on enforcement immunity are, therefore, typically less “intrusive” than those of jurisdictional immunity, because they merely

<sup>1</sup> The Oxford Companion to Law (1980), Walter M. David, see at 600.

<sup>2</sup> For an overview of this subject, see Hazel Fox QC, *The Law of State Immunity* (Oxford: OUP, 2004).

<sup>3</sup> Hersch Lauterpacht, “The Problems of Jurisdictional Immunities of Foreign States”, 28 BYIL (1951), at 228

<sup>4</sup> See Lee M. Caplan, “State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory”, 97 AJIL, 741 (2003).

<sup>5</sup> Sompong Sucharitkul, “Immunities of Foreign States Before National Authorities”, 149 RJC 87 (1976 I), at 117-119.

<sup>6</sup> Edwards J. Kionka, *Torts in a Nutshell*, 2<sup>nd</sup> edn. (1992). At 341.

<sup>7</sup> Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT’L LAW 853, 857 (2010)

<sup>8</sup> Idem

<sup>9</sup> See August Reinisch, *European Court Practice Concerning State Immunity and Enforcement Measures*, 17 EUR. J. INT’L LAW 803, 803-05 (2006)

<sup>10</sup> Idem

<sup>11</sup> Idem

<sup>12</sup> See Peter-Tobias Stoll, *The Max Planck Encyclopedia of Public International Law, STATE IMMUNITY*, <http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690e1106?rskey=W0M0mt&result=1&q=state%20immunity&prd=EPIL>

affect the remedies available as a result of a proceeding as opposed to considering whether a proceeding is appropriate at all.<sup>1</sup> Recently there has been a trend toward courts taking a more lenient approach in connection with the seizure of state property, particularly state-owned commercial property and other types of government property that does not serve a “public” purpose. And this position holds its basis from national laws as well as some treaties in the issue of Sovereign States Immunity.

## 2.2. Warships’ Sovereign Immunity as Customary International Law

The practice of States and international judicial bodies proved that Sovereign Immunity is based upon customary international law. If customary international law can be summarized as treaties and domestic law, we can say that Sovereign immunity is a creature of both treaty and domestic law.

Warships have long been considered immune from enforcement measures as evidenced by a number of multilateral treaties.<sup>2</sup> The 1926 Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels makes a distinction between normal State-owned ships and such State-owned ships that exclusively serve governmental non-commercial purposes, the later being immune from enforcement measures.<sup>3</sup> Similarly, Both Article 22 of the 1958 Geneva Convention on the Territorial Sea and Article 32 of the UNCLOS provide for sovereign immunity. Warships and government vessels should comply with certain rules indicated by those conventions, but they do not derogate from the principle of sovereign immunity. If a warship does not abide by the laws and regulations of the coastal State concerning passage in the territorial sea, the coastal State is not entitled to take any act of coercion and may only ask the ship to leave the territorial sea (Article 23 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 30 of the UNCLOS). In other words they are immune from the enforcement jurisdiction of the coastal State, even if they are not completely beyond its legislative/prescriptive jurisdiction when they navigate through waters falling under the competence of the coastal State. And, very interesting as it can also be surprising, this ITLOS stood for this position in Libertad Case. As far as the prevention of marine pollution is concerned, Article 236 of the UNCLOS exempts warships, naval auxiliary and government vessels from rules on the protection and preservation of marine environment. Also, the 1972 London Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter does not apply to ships entitled to sovereign immunity under international law. As far as the high seas are concerned, both the Geneva Convention on the High Seas (Article 8, para. 1) and the UNCLOS (Article 95) state that warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State. The same is true for ships owned by a State and operated only on government non-commercial service (Article 9 Geneva Convention on the High Seas; Article 96 UNCLOS). The principle of sovereign immunity is reflected in other sectors of international law. For example, the 1991 commentary to the ILC Draft Articles states property of a military character includes navy, air force and army property.<sup>4</sup> Article 16 of the 2004 UNCSI confirms the immunity from jurisdiction of a foreign State in relation to its warships, naval auxiliaries and government vessels (i.e. “vessels owned or operated by a State and used, for the time being, only on government non-commercial purposes”).<sup>5</sup> The 2004 UNCSI has been identified as a “comprehensive legal instrument” that covers the issue of sovereign immunity for it provides measures of constraint in pre-judgment and post-judgment circumstances. For example, Article 19 provides that in post-judgment circumstances, such as the NML-Argentina dispute, the types of measures of constraint allowed are: (1) the state has “expressly consented to the taking of such measures as indicated;” (2) the parties have “allocated or earmarked property for the satisfaction of the claim; or (3) the property is in use for a “commercial purpose” by the government. Furthermore, Article 21 of the same Convention provides for immunity for non-commercial and related military property and the ‘ARA LIBERTAD’ can be considered as such.

Thus, one may wonder why the ITLOS didn’t rely on such clear provisions to render its decision on NML-Argentina/ Ghana dispute. While talking about this Convention, we may not lose focus on its binding force, better we might question or reject its customary character in international law for it is still young. Not only is the Convention yet in force, but it has had relatively few adoptions to date; only twenty-eight states have signed and only eleven have ratified or acceded as of the symposium’s date. These numbers fall far short of what is typically considered reliable evidence that a treaty reflects customary international law binding on nonparties

<sup>1</sup> See Reinisch, *supra* note 67, at 804.

<sup>2</sup> Crawford, *Execution of Judgements and Foreign Sovereign Immunity*, 75 AJIL, 820,862(1981).

<sup>3</sup> Art.1,Art.3, Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, 10 April 1926, 176 LNTS 199.

<sup>4</sup> ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 2(2) YBILC 59 (1991), UN-Doc.A/46/10.

<sup>5</sup> See Article 16(2) of the 2004 UN Convention. The following examples are given in the Commentary by the ILC on Article 16, para. 2 in relation to this category of vessels: police patrol boats, custom inspection boats, hospital ships, oceanographic ships, training vessels and dredgers, owned and operated by a State and used or intended for use in government non-commercial service.

to the treaty.<sup>1</sup>

States practices also evidence the customary character of State sovereign immunity although this concession is done under a restrictive approach. Accordingly, many States began to adhere to the doctrine of restrictive immunity, under which immunity was available as regards governmental activity, or termed as acts *jure imperii*, while immunity was not granted to a State in relation to its private or trade activity, or termed as acts *jure gestionis*.<sup>2</sup>

We can find this in many domestic legislations such as United States Foreign Sovereign Immunity Act 1976;<sup>3</sup> Australia Foreign State Immunity Act 1985;<sup>4</sup> Canada State Immunity Act 1982;<sup>5</sup> United Kingdom State Immunity Act 1978;<sup>6</sup> Pakistan State Immunity Ordinance 1981;<sup>7</sup> Singapore State Immunity Act 1985;<sup>8</sup> South Africa Foreign States Immunities Act 1981<sup>9</sup> and Ghana Shipping Act.<sup>10</sup>

As to national legislations, the FSIA of 1976 of the USA and State Immunity Act of 1978 of the UK, both adopting a restrictive approach, served as a model for the national legislations of other countries including Canada, Singapore, Australia, South African, Pakistan and Malaysia.<sup>11</sup> In addition and prior to these legalizations, national courts accepted the doctrine of State immunity. For example, in 1812 and according to Chief Justice Marshall in *The Schooner Exchange v McFadden & Others* a warship constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.<sup>12</sup> No matter how subsequent commentators interpreted or framed *The Schooner Exchange* for their own purposes, this US judicial practice marks the beginning of the development of the modern law of State immunity. Moreover, from this practice, we could notice that the determination of the validity of a foreign official act is a political, rather than a legal, inquiry for which courts are ill-suited. The concern is that courts, by ruling on a case which has foreign policy issues, might embarrass the executive branch in its conduct of foreign relations and infringe upon its prerogatives in this area. Therefore, the act of State doctrine appropriately restricts courts to their traditional role as law interpreters rather than law makers, the latter being appropriately reserved to the executive and legislative branches.

### 3. Foreign State Immunity to Warships or Absolute immunity to warships under UNCLOS

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

#### 3.1. Immunity of a warship under UNCLOS

Unlike other issues at the Third United Nations Conference on the Law of the Sea, the issue of immunity of warships did not engender any controversy and finds expression in various provisions of the convention; despite the acknowledgment of coastal states’ sovereignty in their territorial seas. Article 3 of UNCLOS provides for 12 mile territorial sea for each coastal state and grants these states absolute sovereignty subject only to the right of innocent passage.<sup>13</sup> The sovereignty extends to the air space over the territorial sea as well as to its bed and

<sup>1</sup> On the relationship of custom and treaties, see generally INTERNATIONAL LAW: CASES AND MATERIALS 118 21 (Lori F. Damrosch et al. eds., 5th ed. 2009).

<sup>2</sup> M.N. SHAW, International Law (5th edin. 2003), 625.

<sup>3</sup> Section 1611(b)(2)

<sup>4</sup> Section 32(3)(a)

<sup>5</sup> Art. 12(3)

<sup>6</sup> Section 14(2)(3)

<sup>7</sup> Section 15(3)

<sup>8</sup> Section 16(3)

<sup>9</sup> Section 15(2)

<sup>10</sup> Section 392

<sup>11</sup> Hazel Fox, The Law of State Immunity, (2002), Chapter 5.

<sup>12</sup> See Sompong Sucharitkul, State Immunities and Trading Activities in International Law (1959), 7–8.

<sup>13</sup> UNCLOS, Art.17.

subsoil.<sup>1</sup> As regards what constitutes innocent passage, the convention goes beyond merely specifying that it is passage that is not prejudicial to the security, peace and good order of the coastal state by specifying activities which when engaged in will be deemed to be non-innocent, and endows the coastal states with the power to enact appropriate legislation governing passage in the territorial sea. UNCLOS also confers civil and criminal jurisdiction on the coastal state. Article 21 of UNCLOS enjoins foreign ships navigating the waters of a coastal state to comply with all the rules and regulations of the coastal state and the relevant rules of international law. However, it exempts warships and other state vessels operated for non-commercial purposes from the jurisdiction of the coastal state.<sup>2</sup>

Article 30 clearly expressed non-compliance by warships with the laws and regulations of the coastal State. According to this article, if any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may simply require it to leave the territorial sea immediately. Moreover, if that warship caused a damage to the coastal State, Article 31 requires that “*the flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law*”. Article 30 and 31 are therefore some exceptions granted to warships from the jurisdiction of a coastal State in order to permit the officials on board of these ships to fulfill their mission like a diplomatic agent enjoys immunity in the host State where he is in mission. Likewise, in *the Schooner Exchange case*, the French government resisted the *in rem libel* action against the ship for recovery of their property, arguing that, as a ship of war, the *Exchange* was an arm of the emperor and was thus entitled to the same immunity privileges as the emperor himself.<sup>3</sup> order to consolidate such immunity, Article 32 mentions that “*nothing in this Convention (UNCLOS) affects the immunities of warships and other government ships operated for non-commercial purposes*”.

It follows from these provisions that the doctrine of immunity of government ships is derived from the wider principle of jurisdictional immunity of sovereign states under traditional international law. It is the immunity of a foreign state from jurisdiction or execution in respect of its maritime property that entitles a state’s vessel to immunities while outside its waters. Therefore, through UNCLOS provisions, we can understand that warships enjoy ‘absolute immunity’ from the jurisdiction of a coastal state; and where a warship flouts the laws and regulations of a Coastal State, it cannot be arrested. The Convention only requires the offended state to require such an offending vessel to leave the territorial sea immediately. Whatever harm or damage caused a coastal state may be pursued through diplomatic channels or international proceedings.

These conventional outcomes had motivated the ITLOS decision in LIBERTAD case. And even more, ITLOS findings in that case surprisingly went beyond the traditional scope of warship’s immunity when it explained that this immunity applied everywhere in the ocean portions including internal waters.

### 3.2. ITLOS in the “ARA LIBERTAD” CASE

Relying on a particular provision of the Fiscal Agency Agreement (FAA) and the bond documents that waived Argentina’s jurisdictional immunity,<sup>4</sup> NML sought and obtained an injunction from the Commercial Division of the Accra Fast Tack High Court of Ghana detaining the Argentine Navy training vessel, the ARA Libertad, at the Tema Port, off of the coast of Ghana. Although the Ghanaian Court did recognize the sovereign immunity of the Argentinian Navy training vessel, it contended that this immunity can be waived and has been already waived by the Republic of Argentina. Therefore, the Ghanaian court issued an order allowing NML to seize the ARA Libertad.

Surprised by Ghanaian Court’s ruling, Argentina informed Ghana that it was submitting the dispute to the ITLOS under Annex VII of the United Nations Convention of the Law of the Sea (UNCLOS). Two weeks later, Argentina filed a request for provisional measures with the ITLOS.<sup>5</sup> Thus, in order to claim a *prima facie* jurisdiction of the ITLOS, rather than a question of waiver of sovereign state immunity on warship, Argentina argued that the interpretation of UNCLOS Articles is the sole problem.<sup>6</sup> The tribunal rejected three of the four

<sup>1</sup> Ibid, Art.2

<sup>2</sup> Ibid Art. 30, 31 and 32.

<sup>3</sup> 11 US (7 Cranch) 116 (1812) at 126-127.

<sup>4</sup> See Ghana Superior Court of Judicature, High Court of Justice Accra Commercial Division, 11/10/2012, “NML Capital Ltd. vrs Republic of Arg.,” (RPC/343/12) at 23.

<sup>5</sup> See Request for Prescription of Provisional Measures, Under Art. 290, para. 5, of UNCLOS (2012), available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.20/C20-Request\\_for\\_official\\_website.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_for_official_website.pdf)

<sup>6</sup> article 18(1)(b) on innocent passage in the territorial sea, article 32 on the sovereign immunity of warships and articles 87(1)(a) and 90 on high seas freedom of navigation.

grounds<sup>1</sup>, but found that the dispute did, at least *prima facie*, concern the interpretation or application of article 32.<sup>2</sup> As far as it concerns provisional measures, Ghana's temptations to refute the existence of the need for such measures have been rejected by the tribunal since there is the continuing serious prejudice to Argentina posed by Ghana's refusal to permit the warship to depart its port. Thus, after observing that "a warship is an expression of the sovereignty of the State whose flag it flies"<sup>3</sup> and "in accordance with general international law, a warship enjoys immunity, including in internal waters,"<sup>4</sup> the tribunal then concluded that "the urgency of the situation requires the prescription by the Tribunal of provisional measures that will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the Parties."<sup>5</sup> However, while focusing on the key issue of the dispute between Argentina and Ghana and ITLOS's conclusion in this case, one could be surprised with the scope of State immunity of warships on the Sea as far as it concerns coastal States' sovereignty under UNCLOS. This remark retains many attentions so that one may think that rather than interpretation, ITLOS innovates in extending States sovereignty of warships beyond territorial waters since according to ITLOS:

*Although article 32 is included in Part II of the Convention entitled 'Territorial Sea and Contiguous Zone,' and most of the provisions in this Part relate to the territorial sea, some of the provisions in this Part may be applicable to all maritime areas, as in the case of the definition of warships provided for in article 29 of the Convention.*<sup>6</sup>

Unlike to a number of domestic law on State Immunity which provide a 'restrictive immunity', UNCLOS under the following phrasing of Article 32 "[.....,nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.]" is impliedly providing States for an 'absolute immunity'. And the 'absolute' character of the immunity suffices to apply this immunity everywhere on the Sea including 'internal waters' which are undisputable parts of the Sea. Thus, UNCLOS by providing an unlimited scope of application of State immunity differentiates itself from domestic laws on this matter and become the sole international convention which confers such immunity to States. Even the 2004 UNCSI which has been identified as a "comprehensive legal instrument" doesn't afford States for such a immunity since it followed the legislative path of existing domestic laws in providing States for a 'restrictive immunity'. Moreover, since the disputing States are party to UNCLOS and not to the 2004 UNCSI, the ITLOS did well in preferring UNCLOS to 2004 UNCSI to handle the dispute. And even if the disputing States ratified the latter convention, it has no binding force since it hasn't entered into force yet. However, UNCLOS bears the character of customary international and apprehended the issue of State immunity of warships which is also admitted as customary international law. Finally, considering that the Annex XII Arbitration tribunal's role is to interpret and to apply UNCLOS,<sup>7</sup> and that UNCLOS provides for implied 'absolute immunity' to States on their warships, we may understand that the ITLOS interpreted Article 32 of UNCLOS in the spirit of that provision rather than the provision itself. Therefore, rather than innovation, ITLOS achieved its goal in providing us for the broad meaning of that article. And, by behaving so, ITLOS hasn't played a creative role. It rather sticks to its interpretative role.

Another surprising behavior of ITLOS in this case is the ignorance of the waiver of immunity issue. In the LIBERTAD Case, could ITLOS tackle this issue through a surprising decision?

#### **4. Can we justify ITLOS attitude towards the issue of the waiver of States immunity?**

When we consider that Article 19(a) of the 2004 UN Convention on State Immunity,<sup>8</sup> Article 23 of the European Convention on State Immunity,<sup>9</sup> Article VIII(A) of the International Law Association's Draft articles on a Convention on State Immunity,<sup>10</sup> Article 5 of the Resolution of the Institut de Droit International on Contemporary Problems concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement<sup>11</sup> and also a wide range of domestic laws on States Immunity allowing for the possibilities to waive immunity from jurisdiction, we can say that Customary international law recognizes that a state may waive either

<sup>1</sup> See M/V Saiga (No. 2) (Argentina v. Ghana), Case No. 20, Order of Dec. 15, 2012, Para. 61.

<sup>2</sup> Ibid, Para. 65-67.

<sup>3</sup> Ibid, Para. 94.

<sup>4</sup> Ibid, Para. 95.

<sup>5</sup> Ibid, Para. 100.

<sup>6</sup> Ibid, Para. 64.

<sup>7</sup> UNCLOS, Art.287(1)

<sup>8</sup> See Article 19(1) of the 2004 UN Convention.

<sup>9</sup> See Art.23 of European Convention on State Immunity 1972, 16 May 1972, ETS No. 74, Reprinted in 11 ILM 470, 1972.

<sup>10</sup> See Art. III(A), Revised Draft Articles for a Convention on State Immunity, ILA, Report of the 66<sup>th</sup> Conference, (Buenos Aires, 14-20 August 1994).

<sup>11</sup> See Art. 5 of the Resolution of the Institut de Droit International on Contemporary Problems concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991.

its jurisdictional or enforcement immunity (or sometimes both). In fact, a waiver of State needs the consent of the Defendant State. And this waiver can be obtained through international agreement, arbitration agreement, written contract, declaration before the court, or written communication after the dispute has arisen. Consent to measures of enforcement cannot be found from consent to jurisdiction; rather a separate express waiver of consent for enforcement measures is required.<sup>1</sup>

Prior to ITLOS, It will be recalled that on 2 October 2012, whilst on an official visit, the Argentinean naval training vessel the *ARA Libertad* was arrested in the Ghanaian port of Tema. Its arrest was ordered by Justice Richard Adjei Frimpong, sitting in the Commercial Division of the Accra High Court, on an application by NML to enforce a judgment against Argentina obtained in the US Courts. After looking to the 2004 UNSCI for guidance, the Ghanaian judge considered that the waiver of immunity contained in Argentina's FAA and bond documents, (which are at the heart of the dispute with NML) operated to lift the vessel's immunity from execution. That waiver provides that:

*To the extent the Republic [of Argentina] or any of its revenues, assets or properties shall be entitled ... to any immunity from suit, ... from attachment prior to judgment, ... from execution of a judgment or from any other legal or judicial process or remedy, ... the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment).*

A waiver "must give a clear, complete, unambiguous and unmistakable manifestation of the sovereign's intent to waive immunity."<sup>2</sup> However, through the phrasing of Argentina's FAA, we may notice some ambiguities and unclear manifestation of the intent to waive its sovereign immunity. Thus, we can notice that this FAA did not provide a clear waiver of sovereign enforcement immunity as required by customary international law although it provides for jurisdictional immunity. Additionally, assuming that this FAA established the Argentina's consent to jurisdiction, its consent to enforcement measures is still needed since consent to measures of enforcement cannot be found from consent to jurisdiction. Moreover, apart Articles 18 and 19 of the UNSCI provide methods of prejudgment and post-judgment constraint to be followed, Article 21 of the Convention provides for immunity for non-commercial and related military property and the *ARA Libertad* can be regarded as such.

Argentina has strongly resisted this assertion of jurisdiction, claiming that it violates the immunity enjoyed by public vessels, which cannot be impliedly waived. Despite all the temptations of Ghana to justify decision of its domestic High Court on the issue of Argentina's waiver of the jurisdictional and enforcement measures, the Tribunal completely ignored the issue of whether Argentina's FAA had waived sovereign immunity. This cautionary behavior of the tribunal may be understood on the sense that it does not want to make the same mistake like the Ghanaian High Court by relying on the 2004 UNSCI since none of the disputing State ratified this Convention. Obviously, this consideration may justify the ITLOS's reluctance to rely on that Convention. The reliance on a treaty which hasn't a binding force by the Tribunal can be considered as a wasting time and may lead to considerable fault since one could be doubtful about the credibility of its decision. Even if implied consent to waiver is possible according to a few legal documents<sup>3</sup>, the tribunal has played a wise role in skipping this issue. So, ITLOS has succeeded in avoiding any reliance, interpretation or application of the 2004 Convention. Also, the ITLOS had limited its role on the interpretation and the application of UNCLOS. But, can we admit that this interpretation has been conducted under VCLT's Article 31?

According to Article 31 Vienna Convention on the Law of Treaties (VCLT),<sup>4</sup> a treaty must be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Thus, the 'context' of Article 32 can be summarized under these terms 'the *Libertad* is in Ghanaian internal water for an official visit in peace time'. The 'object' can be understood as the 'LIBERTAD, an Argentinian military navy (warship) which is supposed to enjoy immunity' and the 'purpose' here can be accepted as 'enforcement measures through this Argentinian property in Ghana by a Ghanaian Court. Therefore, although such a ship is in Ghana internal waters, the ordinary meaning of the term 'nothing in this convention' except the Argentineans warship from enforcement measure in Ghana. Then, a prompt release sounds well in this case. And consequently, we can say that ITLOS didn't go beyond its interpretative role in this case.

<sup>1</sup> See Peter-Tobias Stoll, The Max Planck Encyclopedia of Public International Law, STATE IMMUNITY, Op cit.

<sup>2</sup> *quamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999); see also *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, 676 F.2d 47,49 (2d Cir. 1982).

<sup>3</sup> Only United State Foreign Sovereign Immunity Act (Section 1610(a)(1) , the Canada State Immunity Act(Section 12(1)(a)) and the ILA's Draft Articles (Art. III(A) (1)) allows for an implied waiver

<sup>4</sup> Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155 331, 8 ILM (1969) 679.

## 5. CONCLUSION

Sovereign State Immunity is an old principle recognize as customary international law. Through many national laws, regional laws and the 2004 UN Convention, international community expresses their will to protect sovereign properties as long as they are not committed to commercial purposes. UNCLOS also enshrined this assumption or understanding of Sovereign States Immunity on non commercial properties. But, with the interpretation given by ITLOS to Article 32 in *Libertad* case, we can see that unlike to other legislations UNCLOS give an absolute immunity to this category of States' properties. And this finding seems to be on line with Chief Justice John Marsall's argument in the US Supreme Court on the appeal of the *Schooner Exchange case*. He observed that although international law dictated that '[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute', the principle of sovereign equality discouraged one sovereign from standing in judgment of another.<sup>1</sup>

This interpretation has to be taken into consideration by international investors while dealing with States because from the *Libertad* case, we may draw lesson that State Sovereignty can be neutralized by another Sovereign State immunity of a warship wherever on the Sea. Therefore State's warship has no border limit on the Sea. And any arrest of such a property for enforcement measure can be defeated by a provisional measure regardless of the issue of waiver if the arresting States and defendant States are parties to UNCLOS. As far as it concerns the issue of waiver of a sovereign State immunity, investors may ensure that the provisions are very clear, without any interpretation ambiguities while contracting agreement with sovereign States. Another lesson to learn from this case concerns Argentina's tactic to seize ITLOS's jurisdiction. This tactic has consisted in quickly amending its article 298 declaration on October 26<sup>th</sup> (four days before instituting its first legal action under Annex VII of the LOS Convention) to remove its early rejection of the LOS Convention's compulsory dispute settlement procedures with respect to "military activities by government vessels and aircraft engaged in noncommercial service."<sup>2</sup>

Thus, the tactic of Argentina to seize the jurisdiction of ITLOS under Annex VII tribunal seems to give hope to the States which are not party to UNCLOS yet, that they don't need to rush. They can wait until their non commercial property has been threatened. Nice strategy may be! But as long as a party can exclude many things from the jurisdiction of UNCLOS and accepts them when its interests are threatened, we think that States can also think about securing their rights in standing for inserting 'Anti-Ambush jurisdiction'<sup>3</sup> into their acceptance of UNCLOS's jurisdiction like some States do while accepting ICJ's jurisdiction.

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<sup>1</sup> 11 US (7 Cranch) 116 (1812) at 136-137

<sup>2</sup> See M/V Saiga (No. 2) (Argentina v. Ghana), Case No. 20, Order of Dec. 15, 2012, para. 34.

<sup>3</sup> An Anti-Ambush jurisdiction excludes a State from being sued by another State for a lapse of time. For example, See UK's acceptance declaration to ICJ's jurisdiction in its para.iii (12months prior to the filling of an application to ICJ).

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