

## SEPARATE OPINION OF JUDGE LUCKY

1. I have voted in favour of the measures prescribed in the Order. However, I have the following additional views.
2. Briefly, the Request by Argentina for the prescription of provisional measures seeks the release of the *ARA Libertad*, an Argentine warship. The vessel was on a visit to the Ghanaian Port of Tema. While in the port, the ship was seized in accordance with an order of the Ghanaian High Court of Justice (Commercial Division), in which a foreign financial institution, NML Capital Limited, obtained judgment against Argentina for a debt which was owed to it. Argentina claims that a warship enjoys immunity and cannot be seized.
3. Argentina requests the International Tribunal for the Law of the Sea (hereinafter “the Tribunal”) prescribe the following provisional measure:

That Ghana unconditionally enables the Argentine warship Frigate ARA Libertad to leave the Tema port and the jurisdictional waters of Ghana and to be re-supplied to that end.
4. Applications or requests for Provisional Measures before international courts or tribunals are similar to applications for injunctive relief during interlocutory proceedings in the national courts. The circumstances must be compelling and urgent.
5. When a party to a dispute seeks the prescription of provisional measures, the Tribunal has to consider whether by granting the Request, it prevents the parties from taking any action that would render the final decision on the merits otiose. In other words, the Order should preserve the status quo and the inherent rights of the parties. Further, pursuant to article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”), the Tribunal must ensure that *prima facie* the arbitral tribunal which is to be constituted under Annex VII would have jurisdiction over the dispute.

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

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

before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded.

*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea) Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998, p. 24, para. 29.*

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

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

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

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

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

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

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

## Urgency

14. Article 290 paragraph 5, provides *inter alia* that the Tribunal  
  
may prescribe ... provisional measures if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.
15. In these proceedings, Argentina and Ghana have annexed affidavits to their written pleadings.
16. Argentina provided affidavits to support its contention that the matter is urgent. Ghana submitted its affidavit and statements to demonstrate why the *ARA Libertad* has been detained.
17. I think it is necessary to devote a few comments to evidence on affidavit.
18. The Rules of the Tribunal do not address the issue of the admissibility of affidavits. While affidavits are treated as admissible evidence in some international courts and tribunals, their evidentiary value in those cases has been questioned. International Courts and distinguished jurists have opined that “witness statements produced in the form of affidavits should be treated with caution.” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *I.C.J. Reports 2007*, p. 659 at p. 731, para. 244).
19. Pablo Lucio Salonio, the captain of the *ARA Libertad*, deposes that the situation is “worrisome and uncertain”. He claims that he is unable to go on land because of the contempt of Court Order against him and that there is uneasiness among the crew because of tensions and fatigue as 43 men have to carry out the duties of 135 men.
20. In response, Ghana tendered another affidavit dealing with reasons why the *ARA Libertad* should not be freed or moved, claiming that it may flee from the jurisdiction of the High Court of Justice (Commercial Division). The deponent has neither confirmed nor refuted the allegations of captain Salonio. However, Counsel

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

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

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

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

### **Rights invoked under the Convention**

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

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

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

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

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

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

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

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

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

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

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

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

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

*Article 4. Conduct of organs of a State*

1. *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*

2. *An organ includes any person or entity which has that status in accordance with the internal law of the State.*

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

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

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

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

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

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

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

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

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

*(signed)*

A. Lucky