

## Immunity of State Owned Non-Commercial Ships and Vessel Protection Detachments in the Foreign Criminal Jurisdiction

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### ABSTRACT

This article studying the issue of sovereign immunity of ships and vessel protection detachments from criminal jurisdiction of foreign courts. The issue immunity of ships from foreign criminal jurisdiction can be understand from Schooner Exchange case onwards. In the initial stages the courts were given absolute immunity of the government ships in the foreign jurisdiction. Later on the courts, jurists and states classified the immunity in two heads such as personal immunity and functional immunity. Immunity not only given to the troika but also to the other officials engaged in the sovereign functions for their respective states with the exception of universal crimes. The status of the warships, government non commercial ships under the law of the sea convention is analysing. At the end the Article considering whether functional immunity applicable to the vessel protection detachments appointed by the states to protect their ship from piracy in accordance with the IMO guidelines.

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## 1. Introduction

Under customary international law, all states are equal and one sovereign state has no jurisdiction over another sovereign state.<sup>1</sup> Since States can act only through individuals, State agents enjoy immunity from official conduct.<sup>2</sup> The primary question to be addressed is, whether the officials in a state is responsible to answer for the crime

<sup>1</sup> James Crawford, (1983). International Law and Foreign Sovereigns: Distinguishing Immune Transactions. *British Yearbook of International Law*, 54(1), 75-118; The Fletcher School of Law, Law of the Sea, A policy Primer, Available from: <<https://sites.tufts.edu/lawofthesea/chapter-5/>>. [Accessed: 20 January 2020].

<sup>2</sup> Zachary Douglas, (2012). State Immunity for the Acts of State Officials. *British Yearbook of International Law*, 82 (1), 281-348.

committed by them while in official duty in the foreign country? The foundation of customary international law is that a state shall not abridge another state's sovereignty, "An equal has no power over an equal".<sup>4</sup> It is recognised that, state have full sovereignty over its territory, person and objects within the territory subject to the limitation imposed by the international norms and comity.<sup>5</sup> International law recognised two kinds of immunities in the criminal matters one is the personal immunity i.e., *immunity ratione personae* or Immunity attaching to an office or status and the second one is functional immunity, i.e., *immunity ratione materiae*.<sup>6</sup>

One of the basic principles of international legal order is the Charter of the United Nations, Article 2, Paragraph 1, concerning States' sovereign equality.<sup>7</sup> The Commission on International Law is examining the question of sovereign Immunity of foreign officials in the international criminal jurisdiction. The above commission has submitted ten reports to this date and the matter is still under consideration by the Commission.<sup>8</sup> In this article discussing the the extent and scope of immunity of sovereign ships from foreign criminal jurisdiction and analysing the principle of immunity of state officials from foreign criminal jurisdiction to clarify, whether the new Vessel Protection Detachments constituted to protect vessels from pirate attack will be exempted from the criminal jurisdiction of the foreign courts.

## 2. Evolution of the Concept of Sovereign Immunity

The origins of the notion of sovereign immunity can be found in Europe and the USA in the 19th century.<sup>9</sup> In the case of *Schooner Exchange v. McFadden* the classical doctrine of absolute sovereign immunity developed.<sup>10</sup> The schooner Exchange, a merchant vessel owned by two Americans, sailed from the United States to Spain on 30 December 1810, the vessel was captured at Napoleon Bonaparte's order. The ship was then armed and commissioned under the name Balaou, as a French warship. When the Balaou anchored

<sup>3</sup> This doctrine referred in roman guise as: *par in parem non habet imperium*

<sup>4</sup> Dapo Akande and Sangeeta Shah, (2011). Immunities of State Officials, International Crimes, and Foreign Domestic Courts. *European Journal of International Law*, 21, 815-852.

<sup>5</sup> Dapo Akande, (2004). International Law Immunities and The International Criminal Court. *The American Journal of International Law* 98 ( 3), 407-433. ; (1973). *Vienna convention on diplomatic relations and optional protocol on disputes, done at Vienna, April 18, 1961. [Washington] : United Nations, Treaty Series, vol. 500.*

<sup>6</sup> International Law Commission. (2008). *Preliminary report on immunity of State officials from foreign criminal jurisdiction* By Roman Anatolevich Kolodkin, Special Rapporteur (Vol. 35715). Available from: <[www.icj-cij.org](http://www.icj-cij.org)> [Accessed: 24 January 2020].

<sup>7</sup> Charter of the United Nations, Chapter I – Purposes and Principles, Article 2(1)-(5) “The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

<sup>8</sup> International law commission decided to study the concept of “Immunity of State officials from foreign criminal jurisdiction” in its 59<sup>th</sup> session 2007 and appointed Mr. Roman A. Kolodkin as Special Rapporteur, At its 2940<sup>th</sup> meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 376).; The Commission received and considered three reports of the Special Rapporteur in the years 2008 and 2011 in its 60<sup>th</sup> and 63<sup>rd</sup> session., A/CN.4/601, A/CN.4/631 and A/CN.4/646.; In the 64<sup>th</sup> session during the year 2012 Ms. Concepción Escobar Hernández had appointed as Special Rapporteur by replacing Mr. Kolodkin.; *Sixty-seventh Session, Supplement No. 10 (A/67/10)*, para. 266.; Ms. Concepción Escobar Hernández had submitted six reports from 64<sup>th</sup> session of the commission held on 2012 to the 71<sup>st</sup> session of the commission held in the year 2019.; A/CN.4/654, A/CN.4/661, A/CN.4/673, A/CN.4/686, A/CN.4/701, and A/CN.4/722, respectively.

<sup>9</sup> Edward Chukwuemeke Okeke (2018). *Jurisdictional Immunities of States and International Organizations*, Oxford University Press, Oxford, pg. 22.

<sup>10</sup> *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 7 Cranch 116 (1812). In this case the American Supreme Court propounded the ‘absolute State immunity’ doctrine.

in Philadelphia due to bad weather. The aggrieved American owners who lost the ownership because of seizure brought an *in-rem* action to repossess the French warship in the American court. Justice Marshall granted the French warship absolute immunity, and dismissed the *in-rem* action against the ship.<sup>11</sup> The decision noted that jurisdictional immunity is based on the “perfect equality and absolute independence of sovereigns.” The court also held that:

*The [Exchange], being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the authority of the [country].*<sup>12</sup>

Till the end of 19<sup>th</sup> century the decision was the order of the day and recognized the absolute immunity principle the other national court also. In UK, the absolute immunity doctrine was applied in the case of *Parlement Belge*,<sup>13</sup> which was an *in-rem* action against the acclaimed vessel owned by Belgium. The ship used to transport mails, as well as passengers and goods. The court held that, after considering a bundle of precedents like *Schooner Exchange*.

Another landmark judgment that made fundamental changes from absolute immunity principle is the *Pinochet (No. 3)*.<sup>14</sup> In the *Pinochet case*,<sup>15</sup> the House of Lords was debated the immunity of a head of state. Former Chilean president was detained by the English authorities in 1998 when he visited UK for a private purpose. The detention was carried out in compliance with an international warrant issued for the extradition to Spain by a Spanish judge, in order to face charges for suspected crimes committed by Pinochet. He applied to quash the criminal proceedings in UK by claiming sovereign immunity. The British apex court held that, immunity *ratione personae* precludes any prosecution of incumbent Heads of State while immunity *ratione materiae* is precluded when former Heads of State or other State officials are suspected of committing crimes under international law. So the court rejected sovereign immunity claim of former Chilean president for the international crimes in UK.

In the countries of civil law such as Belgium, France , Italy, as well as the Egyptian and Mexican Courts, the doctrine of restrictive State immunity was recognised. The Belgian Court of Cassation held that, a foreign State official is immune when acting in a

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<sup>11</sup> Ramona Pedretti (2014). *Immunity of Heads of State and State Officials for International Crimes*, Martinus Nijhoff Publishers, Chicago, pg. 7.

<sup>12</sup> *Schooner Exchange*, 11 U.S. at 147.

<sup>13</sup> *The Parlement Belge*, [1874– 1880] All ER Rep 104.

<sup>14</sup> In September 1997 General Pinochet, Chile's former president, entered the United Kingdom to undergo surgery in London. Just before his return to Chile, he was arrested, on the basis of two provisional arrest warrants issued by British magistrates at the request of Spanish courts in accordance with the European Convention on Extradition. The House of Lords decided to set aside its previous judgment on 17 December 1998 and appointed a jury of seven judges, which made its verdict on the case on 24 March 1999. The House of Lords held, by a majority of six to one, that General Pinochet was not immune to torture and conspiracy to commit torture in respect of actions committed after 8 December 1988, when the United Kingdom signed the Convention on Torture, following the entry into force of section 134 of the Criminal Justice Act, 1988 enforcing the Convention.

<sup>15</sup> Andrea Bianchi (1999). Immunity versus Human Rights: The Pinochet Case. *European Journal of International Law*, 10, 237–277.

sovereign role, but is subject to Belgian jurisdiction just like any private person when the dispute relates to that State's commercial activities.<sup>16</sup>

The judgment of the ICJ in the case of *Arrest Warrant* is one of the notable and latest judgments in the area.<sup>17</sup> The Congo approached the ICJ to institute proceedings against Belgium on an international arrest warrant issued by the Belgian magistrate against their Foreign Minister.<sup>18</sup> The warrant seeking minister's arrest and eventual extradition to Belgium for the numerous speeches that incited racial hatred during August 1998, thus committing serious violations of the Geneva conventions and protocols and also committing serious violations of international human rights. By invoking jurisdiction, Belgian court held that courts had jurisdiction over the above-mentioned crimes wherever they had committed.

At the time of issuance of warrant the Belgian court undermine the fact that alleged offence was not committed against any of the Belgian citizen, not committed within the territory of Belgium, the offender and the victims are not the citizen of the Belgium. The Belgian court also not considered the position of the offender. The concerns posed by Congo are that "Belgium violated the concept of sovereign equality and the protection of state officials in international criminal jurisdiction by attributing Universal Jurisdiction".

The ICJ discussed the concept of sovereign immunity in detail and held that, "the foreign ministers in power were absolutely inviolable and immune from criminal proceedings". The court noted that "the immunity given to the Minister of Foreign Affairs is not for their personal benefits but to effectively exercise their power on behalf of their State". The Court held that, "the functions exercised by a foreign minister were such that a foreign minister enjoyed full immunity from criminal jurisdiction and inviolability throughout his or her office. Since that protection and inviolability were intended to prevent any State from hindering the Minister in the performance of his duties, no distinction could be made between acts performed by the latter in a 'public' capacity and acts claimed to have been performed in a 'private capacity' or, in that case, acts performed before taking office as Minister for Foreign Affairs and acts committed during the period of office".

The Court then observed that, contrary to Belgium's arguments, it could not deduce from its examination of state practice that any form of derogation from the rule of immunity from criminal jurisdiction and inviolability existed under customary international law to incumbent foreign ministers when they were suspected of committing war crimes or crimes against humanity.

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<sup>16</sup> Notes and Comments. (1965). Sovereign Immunity Waiver and Execution: Arguments from Continental Jurisprudence, *Yale Law Journal* 74 (5), 887-918. The above notes and comment pointed out that, The absolute doctrine was rejected by the Italian courts in the latter half of the nineteenth century. The highest court of Belgium took a similar position in *Societe Anonyme des Chemins de Fer Liegeois-Luxembourgeois v. Etat Neerlandais*, Cour de Cassation, June 11, 1903, [1903] *Pasicrisie beige* [hereinafter cited as P.B.] I. 294 (Bel.).

<sup>17</sup> Neil Boister (2002). The ICJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law. *Journal of Conflict and Security Law*, 7 (2), 293-314.

<sup>18</sup> Mr Abdulaye Yerodia Ndombasi was the foreign minister of the Democratic Republic of Congo.

### 3. Exceptions to the Immunity of State Officials from Foreign Criminal Jurisdiction

With the development of international criminal laws, the requirement for the prosecution of those officials who tend to misuse the state machinery in order to commit crimes needs to be brought to justice. This tension perpetuates when the domestic courts of the states fail to conduct the prosecution of such officials.<sup>19</sup> There is certain exemption to the concept of sovereign immunity recognized by the customary laws, civilized state practices, different international covenants, and the judgement of different national international courts. Exception to immunity can be found in the customary international law.<sup>20</sup> The exemption from immunity or exception to immunity can also be established through international treaties. Another thing is that exception from immunity means not the absence of immunity. The former officials will not get the advantage of immunity for the private acts committed after their service. Generally, foreign officials enjoy immunity from criminal jurisdiction but, in exceptional cases, they can not claim immunity if the act committed is of the utmost seriousness and is recognized as an international crime.<sup>21</sup> In the case of *Germany v. Italy* of the International Court of Justice, Judge Cançado Trindade concluded in his dissenting opinion that "sovereign immunity cannot be prayed with respect to international crimes, stating that international crimes are not State acts, nor are they private acts; crime is a crime, irrespective of who committed it."<sup>22</sup> The International Court of Justice held that absolute personal immunity was for the troika.<sup>23</sup>

The question of the exemption from immunity is mainly discussed in the case of functional immunity claimed by the officials and former officials and they can be summed up as follows:- "Serious criminal acts committed by an official can not be regarded as acts carried out in an official capacity under international law; because the international crime committed by an official in official capacity is attributed not only to the State but also to the official; notes out how the norm of international law prohibiting and stigmatizing certain acts prevails over the norm of immunity; International law has established a standard of customary international law which provides for an exception to functional immunity in cases where an official has committed serious crimes under international law; there is a link between the existence of universal jurisdiction in relation to the most serious crimes and the invalidity of immunity as applicable to such crimes; there is an analogous link between either extradite or prosecute and the invalidity of immunity as it applies to crimes in respect of which such an obligation exists."<sup>24</sup> The courts also denied immunity to foreign officials committed torture, i.e. violated *jus cogens* norms.<sup>25</sup>

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<sup>19</sup> Bianchi, A. (1999). Immunity versus human rights: the Pinochet case. *European Journal of International Law*, 10(2), 237-277.

<sup>20</sup> Sean D. Murphy (2018). Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?. doi:10.1017/aju.2018.8.

<sup>21</sup> Rosa Freedman, (2014). UN immunity or impunity? A human rights based challenge. *European Journal of International Law*, 25(1), 239-254.

<sup>22</sup> Jurisdictional Immunities of the State (Germany v. Italy, Judgment, I.C.J. Reports 2012, Dissenting opinion of Judge Cançado Trindade, para. 181. See, in general, para. 178 ff.

<sup>23</sup> Arrest Warrant, Judgment, paras. 51, 54, 56, 58; Djibouti v. France, Judgment, paras. 170, 174.

<sup>24</sup> Kolodkin, R. A. (2010). Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, Un Doc. A/CN.4-631.

<sup>25</sup> *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); In Re *Estate of Ferdinand Marcos Human Rights Lit*, 25 F. 3d 1467 (9th Cir. 1994).



Recent immunity policies of state officials from foreign criminal jurisdiction show a tendency to limit the impunity for gross fundamental human rights violations. In the case of gross human rights violations committed by the foreign officials, functional immunity is not applicable.<sup>26</sup> In its draft Article 7, the international law commission stated that, with the exception of functional sovereign immunity, certain crimes such as genocide, crimes against humanity, war crimes, torture and enforced disappearances occur.<sup>27</sup> Lastly another exemption is the “territorial tort” exception which was incorporated in Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property.<sup>28</sup>

#### 4. Sovereign Immunity of Warships

Sovereign immunity of state owned, operated non-commercial vessels used for government and non-commercial purposes shall be acknowledged by the state practices and international covenants and the customary international law. In 1812, American Supreme Court recognized that American courts have no jurisdiction over warships in the service of another state, as military vessels were considered to be state political and military instruments.<sup>29</sup> The UNCLOS has defined the warship in Article 29 and is exempt from some of the requirements of the Convention.<sup>30</sup> UNCLOS and other international legal regulations make a distinction between military and commercial vessels, one of the major distinctions being that sovereign immunity is attached to non-commercial vessels.<sup>31</sup> UNCLOS identified a ship operated by nuclear power, a nation training vessel, a frigate, a tanker and a submarine are just a few examples of vessels having immunity as warships.<sup>32</sup>

In UNCLOS, warships are often associated with:

- a. Government ships operated for non-commercial purposes (Articles 31 and 32);
- b. Ships owned or operated by a State and used only for non-commercial government services (Article 96);
- c. The state ship (Article 102);
- d. Marine Auxiliary, other vessels owned or operated by the State and used, for the time being, only for government non-commercial purposes (Article 236).<sup>33</sup>

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<sup>26</sup> The Restatement (Third) of the Foreign Relations Law of the United States maintains that any plea based on act of state would probably be defeated in cases involving violations of human rights, as human rights law permits external scrutiny of states’ conduct.

<sup>27</sup> Concepción Escobar Hernández (2016). Fifth Report Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN, 4-701.

<sup>28</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, done in New York on 2 December 2004 (not yet in force).

<sup>29</sup> Schooner Exchange Case.

<sup>30</sup> Article 29 of the LOSC 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 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 who are under regular naval discipline Under this definition, a ship does not need to be armed in order to be considered a warship. A warship and naval auxiliary (collectively called “warship”) are special classes of vessels exempt from many the Law of the Sea Convention requirements’.

<sup>31</sup> Gold, E. (1986). The future of maritime transit. In *International Navigation: Rocks and Shoals Ahead: A workshop of the Law of the Sea Institute* (pp. 237-259).

<sup>32</sup> LOSC art. 20, 22, and 23; see also The “Ara Libertad” Case (Argentina v. Ghana), Case No. 20, International Tribunal for the Law of the Sea, Order of 15 December 2012, Judges R. Wolfrum and J.-P Cot).

<sup>33</sup> McDorman, T. L. (2015). 4 Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions. In *Jurisdiction over Ships* (pp. 82-102). Brill Nijhoff. at pg.88.

UNCLOS has recognized the sovereign immunity of warships<sup>34</sup> in territorial waters, subject to certain limitations set out in Articles 30 and 31. In functional terms, a warship and its crew are not subject to interdiction,<sup>35</sup> disciplinary or judicial action by authorities other than the flag State.<sup>36</sup> The provisions of the UNCLOS regarding Preservation of the Marine Environment do not apply to any warships.

Immunity of warships and other government vessels operating in the high seas for non-commercial purposes are enshrined in the Articles 95 and 96 of the UNCLOS.<sup>37</sup> Following the commencement of the LOSC in 1994, the first case concerning the sovereign immunity of warships was discussed by the ITLOS was the *Argentina v. Ghana* in 2012.<sup>38</sup> The case concerned release of the Argentine frigate ARA Libertad from the port city of Tema, Ghana.<sup>39</sup> It is a warship which enjoys immunity in the internal waters of a coastal state under international law and state law. In addition, the court also cites the case of the American *Schooner Exchange*.<sup>40</sup> Judges Wolfrum and Cot have reached a different conclusion regarding immunity and held that "immunity of warships in foreign internal waters, including ports, is a rule of customary international law which is not incorporated in the Convention.<sup>41</sup> They also note that Article 32 does not provide for the immunity of warships, rather that immunity is taken for granted, and that Article 32 does not incorporate customary international law on the immunity of warships into the Convention, rather than simply takes the immunity of warships as a matter of fact". More generally, they argue that internal waters in principle do not come under the purview of the Convention but of international customary laws.<sup>42</sup> The ITLOS unanimously decided that, as a provisional measure, Ghana would immediately and unconditionally release the Argentinean ship.<sup>43</sup> The ITLOS also held that, "a warship is an expression of the sovereignty of the state whose flag it flies. Any act that prevents a warship from carrying out its mission by force is a source of conflict that could jeopardize friendly relations between states; the action taken by the Ghanaian authorities

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<sup>34</sup> Article 32, 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.

<sup>35</sup> Boarding, inspection, investigation, detention, arrest or other enforcement and disciplinary actions.

<sup>36</sup> Article 97 of the UNCLOS, 1982.

<sup>37</sup> Article 95. Immunity of warships on the high seas; Article 96. Immunity of ships used only on government non-commercial service.

<sup>38</sup> Kraska, J. (2013). The "ARA Libertad" (*Argentina v. Ghana*). *American Journal of International Law*, 107(2), 404-410.

<sup>39</sup> The Republic of Ghana, by holding the "ARA Fragata Libertad" warship, not allowed to leave the port of Tema and Ghana's jurisdictional waters in accordance with the right of innocent passage and not to allow it to refuel, the forced detention of the frigate prevents Argentina from using this emblematic vessel to exercise its navigation rights, as guaranteed by the Convention, in violation of the provisions of the Treaty. Infringes the international obligation to respect the immunity of warships pursuant to Article 32 of the UNCLOS and Article 3 of the 1926 Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, as well as the well-established rules of general or customary international law in this regard; and the right of freedom of navigation enjoyed by the said vessel, and its crew, pursuant to Articles 18, paragraph 1(b), 87, paragraph 1(a), and 90 of UNCLOS; The court found that the Argentinian "ARA Fragata Libertad" had reached the port of Tema in Ghana with the permission of Ghana. ARA Fragata Libertad, a naval training vessel, may be treated as a warship within the meaning of Article 29 of the UNCLOS.

<sup>40</sup> *Ibid*, 83.

<sup>41</sup> ARA Libertad case, joint and separate opinion of justice Wolfrum and Cot, para. 26.

<sup>42</sup> Djibril Moudachirou (2015). Does a Sovereign State Immunity Say More than We Think? ITLOS's Decision in ARA LIBERTAD Case. *Journal of Law, Policy and Globalization*, 37 (6).

<sup>43</sup> McDorman, T. L. (2015). 4 Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions. In *Jurisdiction over Ships* (pp. 82-102). Brill Nijhoff. at pg.82.

to prevent *ARA Libertad* from discharging its mission affects the immunity enjoyed by this warship under general international law".<sup>44</sup>

Difference between government vessels and non-commercial vessels may be seen as *Acta jure gestionis* i.e. private, commercial or non-sovereign acts and *acta jure imperii*, i.e. public, governmental or sovereign acts. In this case, the ship used for the *acta jure imperii* is exempted from the jurisdiction of a foreign state. The Brussels Convention,<sup>45</sup> restricted the immunity of state-owned commercial ships and Article 16 of the United Nations Convention on Jurisdictional Immunities, 2004 established a distinction between warships and commercial vessels.<sup>46</sup> The sovereign immunity of the warship is a matter of fact determined by the functions performed by the ship, the link between the ship and the state. Article 16(6) of the 2004 Immunities Convention specifies that a certificate signed and sent to the court by a diplomatic delegate or other competent authority of a State shall serve as proof of the existence of that ship or cargo.

The sovereign immunity of a warship is recognized by the international community as a matter of *jus cogens* norms. However UNCLOS, explicitly recognize the existence of sovereign immunity of vessels indicates that certain activities must be undertaken by warships or related vessels, in certain situations. what actions coastal states may take in respect of non-compliant sovereign immune vessels. The international legal responsibility of flag states of sovereign immune vessels for non-compliance with the Convention and, in certain situations, the laws of coastal states, and indicates that sovereign immune vessels are exempt from the provisions of the Convention dealing with marine environmental pollution.

## 5. Waiver of Immunity of the ship by the state

If we look at the ECSI,<sup>47</sup> the resolution of the Institut de Droit International on Contemporary Problems of the Immunity of States on Jurisdiction and Enforcement, 2 September 1991. Draft articles of the ILACSI,<sup>48</sup> the UNCSI, 2004 and various municipal laws, it can be noted that there are provisions for the waiving of sovereign immunity from jurisdiction or for the enforcement of sovereign immunity by States.<sup>49</sup> Article 21 UNCSI Convention provides for immunity for non-commercial and related military assets, and *ARA Libertad* may be regarded as such.<sup>50</sup> "The State may waive immunity by means of an international arbitration, agreement, written contract, declaration before the court or written communication after the dispute has arisen". Waiver of immunity should be a clear, unmistakable manifestation of the sovereign 's intention to waive immunity, it should also be unequivocal and complete.<sup>51</sup> "It appears to be universally

<sup>44</sup> B.M. Dimri (2013): The Arrest of Argentine Warship 'ARA Libertad': Revisiting International Law Governing Warships, Sovereign Immunity, and Naval Diplomatic Roles, *Journal of Defence Studies*, 7(3), 97-124.

<sup>45</sup> The Unification of Certain Rules relating to the Immunity of State Owned Vessels, 1928.

<sup>46</sup> McDorman, T. L. (2015). 4 Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions. In *Jurisdiction over Ships* (pp. 82-102). Brill Nijhoff.at pg.89.

<sup>47</sup> European Convention on State Immunity (1972)

<sup>48</sup> International Law Association on the Convention on State Immunity

<sup>49</sup> Djibril Moudachirou (2015). Does a Sovereign State Immunity Say More than We Think? ITLOS's Decision in ARA LIBERTAD Case. *Journal of Law, Policy and Globalization*, 37 (6).

<sup>50</sup> *Aziz v Republic of Yemen CA* (Bailii, [2005] EWCA Civ 745).

<sup>51</sup> Djibril Moudachirou (2015). Does a Sovereign State Immunity Say More than We Think? ITLOS's Decision in ARA LIBERTAD Case. *Journal of Law, Policy and Globalization*, 37 (6); see also Quamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1292 (11th Cir. 1999); *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, 676 F.2d 47,49 (2d Cir. 1982).



recognized in most industrialized states that a state may irrevocably waive immunity by express contract in advance and there is some support for the principle that a waiver from jurisdiction is not a waiver from enforcement".<sup>52</sup>

In the *ARA Libertad* case the Ghanaian Judge considered that the waiver of immunity contained in Argentina's FAA<sup>53</sup> and bond documents operated to lift the vessel's immunity from execution. The Supreme Court of Ghana discussed the issue of waiver of immunity in detail by analysing the foreign and municipal laws and held that the courts of Ghana ought not to promote conditions leading to possible military conflict, when they have the judicial discretion to follow an alternative path. This public policy consideration persuades us that waiver of sovereign State immunity over military assets should not be recognized under Ghanaian common law. Thus, though we accept the issue estoppel raised by *NML Capital Ltd. v Republic of Argentina* to the effect that Argentina has effectively waived its immunity by contract before courts such as this Court in relation to the enforcement of the judgment debt in this case.<sup>54</sup>

## 6. Sovereign Immunity of the State Ships

In the "Parlement Belge case" sovereign immunity of the government ships was deliberated.<sup>55</sup> Tug *Daring* was at the anchors in the Dover harbour, hit by the Belgian cross channel steamer, the *Parlement Belge* owned by Belgian government. The owners of the *Daring* filed *in rem* proceedings against the *Parliament Belge* and initially the court denied the request for sovereign immunity of the Belgian ship. The Court examined the difference between commercial and non-commercial activities carried out by the ship:

*Public property of any State intended for public use. The opinion of the Court the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity.*

Article 1 of the Immunity convention states that "warships, state yachts, patrol vessels, hospital ships, fleet auxiliaries, supplies and other vessels owned or operated by the State and used exclusively at the time of action on government and non-commercial services shall not be subject to seizure, arrest or detention, any legal process or proceedings in rem".<sup>56</sup>

As per the provisions of the UNCLOS Like warships, sovereign immunity is also applicable to state-owned vessels used for non-commercial governmental purposes. In compliance with UNCLOS rules, sovereign immunity applies, just as warships do, also to vessels of state or governmental ownership used for non-commercial purposes. Immunity of government ships in the contiguous zone is recognised in the Article 32 of the LOSC. In Article 96, government ships complete immunity in the high seas is mentioned. Environmental protection regulations applicable to commercial vessels do

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<sup>52</sup> Philip R. Wood (1995). *Law and Practice of International Finance*, Sweet & Maxwell, pg. 88-89.

<sup>53</sup> Fiscal Agency Agreement ("FAA")

<sup>54</sup> *NML Capital Ltd. v Republic of Argentina*, Available from:< <https://jursmundi.com/en/document/decision/en-the-ara-libertad-arbitration-argentina-v-ghana-judgment-of-the-supreme-court-of-ghana-thursday-20th-june-2013>> [Accessed: 27 June 2020].

<sup>55</sup> 5 P.D. 197 (1880)

<sup>56</sup> The Convention for the Unification of Certain Rules Concerning the Immunity Of State-Owned Ships, 1926, art.1

not apply to state owned government vessels.<sup>57</sup> The obligations and responsibilities of warships shall also apply to state-owned vessels.

## 7. Sovereign Immunity Issues of Vessel Protection Detachment

Piracy is a universal threat that threatens maritime safety and causes significant economic damage to the shipping industry. Now a days the maritime industry witnessed several kinds of armed robbery and other pirate attacks.<sup>58</sup> Modern piracy can no longer be compared with the romantic piracy of the past that is more brutal and has an even greater impact on maritime safety.<sup>59</sup> Because of the Somalia's piracy,<sup>60</sup> the International Maritime Organization has decided to incorporate a number of security measures to protect seafarers and the shipping industry from pirates.<sup>61</sup> Many European countries and Scandinavian countries have deployed their armed Navel or Military officers on private oil tankers and other commercial vessels.<sup>62</sup> Another model is the State Affiliated Escort or State military asset assistance of the Coastal State Embarked Personnel. Embarked armed personnel originating in the Coastal State on the basis of arrangements between ship operators and national authorities not specifically endorsed by the Flag State.

The PCASP is an effective model for regulating and controlling armed robbery and piracy in ships, leading to the proliferation of weapons at sea. To address the issue of piracy, many maritime countries have deployed their military personnel or Navel personnel on board ships across Somalia and the Indian ocean regions and other hotspot areas for piracy.<sup>63</sup>

The Vessel Protection Detachments is a squad of Armed Military or Navel personnel, usually from the flag state navel force. With declining defence budgets, governments of countries such as Germany, Denmark, the Netherlands and Italy hire their military

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<sup>57</sup> In section 10 of the Article 236 of Part 12 of UNCLOS Sovereign Immunity states that the protection and conservation of the marine environment does not apply to non-commercial government vessels.

<sup>58</sup> Thomas M Jopling (2009). The Growing Threat of Piracy to Regional and Global Security. NATO Doc. 023 CDS 09 E). Available from: <<https://www.parlament.ch/centers/documents/en/atalanta-nato-2009-04-05-e.pdf>> [Accessed: 30 June 2020].

<sup>59</sup> Caroline Reuker, "Combating piracy - Legal and technical solutions", In Patrick Chaumette, ed., Maritime Areas: Control and Prevention of Illegal Traffics at Sea, Patrick Chaumette (France, Gomylex, 2016) pp.1-320, at, p. 40.

<sup>60</sup> EU Naval Force - Somalia Operation Atalanta, Operation Atalanta Warship ITS Euro Escorts World Food Programme Vessel Eunavfor. Available from: < <http://eunavfor.eu/operation-atalanta-warship-its-euro-escorts-world-food-programme-vessel/> > [Accessed: 24 January 2020].

<sup>61</sup> IMO, 'Best Management Practices for Protection against Somalia Based Piracy', annex to MSC.1/Circ.1339 (14/ 09/2011) 39, para 8.15 ('BMP4'), para 8.15 stipulates: 'The use, or not, of armed Private Maritime Security Contractors on-board merchant vessels is a matter for individual ship operators to decide following their own voyage risk assessment and approval of respective Flag States. This advice does not constitute a recommendation or an endorsement of the general use of armed Private Maritime Security Contractors. ... Subject to risk analysis, careful planning and agreements the provision of Military Vessel Protection Detachments (VPDs) deployed to protect vulnerable shipping is the recommended option when considering armed guards'

<sup>62</sup> Gian Maria Farnelli (2015). Vessel Protection Detachments and Maritime Security: An Evaluation of Four Years of Italian Practice. *MarSafeLaw Journal*, 1,16-32.

<sup>63</sup> Since early 2011 the Dutch Government has placed military teams on board of especially vulnerable merchant ships flying the flag of the Netherlands to protect them against piracy off the coast of Somalia. The very first Italian VPD was embarked on the M/N Montecristo on 2 November 2011, pursuant to Italian Law no. 130/2011s.

persons to provide protection to their merchant vessels.<sup>64</sup> VPDs are hired by individual shipping companies for protection duties in high-risk transit areas such as the Caribbean, South East Asia (Malacca Strait), East African and Western waters and the Indian Ocean.

There are a number of legal issues related to the use of VPD, which are expensive than private security. The military persons engagements as VPD in ships, has so many issues such as credential issues, the issue of innocent passage and coastal state sovereignty, the introduction of arms and ammunition, national security issues and the issue of sovereign immunity.<sup>65</sup> Short supply of VPD further increased use of private maritime security as a means of reducing state responsibility and avoiding domestic political costs and diplomatic externalities resulting from the use of state military personnel in the commercial vessels.<sup>66</sup>

## 8. The legal issue of Immunity of VPD

Vessel protection detachments shall be uniformed officers of the state military or navel force appointed by the flag state in their ships to protect vessels from armed robbery and piracy, which is treated as an international crime.<sup>67</sup> The main question to be addressed is whether they are entitled to immunity from the exercise of criminal jurisdiction by the coastal State. In one of the most controversial cases in India, the issue of immunity of Italian armed soldiers was discussed by Indian S.C. decided that, VPD of the Italian tanker ship were not entitled to claim sovereign immunity for the criminal act committed by them in the contiguous zone of India. As the Italian Professor of International Law, Natalino Ronzitti pointed out in his work:

*First of all, the rationale for functional immunity and the state of international law on the matter, since the Supreme Court judgment of 18 January confused the issue of personal or Diplomatic Immunity and Functional Immunity, as demonstrated by the Vienna Convention on Diplomatic Relations and to the Pinochet case.*

Hence, we must re-examine the judgment of the India apex Court, which rejected immunity of the Italian Mariners. The Supreme Court has confused the immunity ratio persona with the immunity ratio materiae and failed to appreciate the functional immunity of the Italian Military personal.

The sailors, acting as the Vessel Protection Force, are part of the Italian Défense Force and are expressly appointed by that State in order to contain the threat of piracy a universal crime. When the military acted to protect the state flagged vessel from piracy, two fishermen were wrongly killed. In this situation, the concept of immunity ratione materiae may be applied. Italian mariners are directly accountable to the Défense Ministry of Italy. They are wearing military uniforms of Italy. Moreover they have been

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<sup>64</sup> Apart from Italy, whose legislation will be dealt with in the following, also France, Germany, Norway, the Netherlands and the United Kingdom, amongst others, have been using VPDs in order to protect vessels flying their flags; see Marten Zwanenburg (2012). Military Vessel Protection Detachments: The Experience of the Netherlands. *MarSafeLaw Journal*, 51, 97-98.

<sup>65</sup> Jean Edmond Randrianantenaina (2012-2013). Maritime Piracy and Armed Robbery Against Ships: Exploring the Legal and the Operational Solutions. The Case of Madagascar, The United Nations Nippon Foundation Fellowship Programme.

<sup>66</sup> Caldwell and Graham (2012). Private Security and Armed Military Guards: Minimising State Liability in the Fight against Maritime Piracy. *RUSI Journal* 157(5),16-20.

<sup>67</sup> Renée de Nevers (2015). Sovereignty at Sea: States and Security in the Maritime Domain, *Security Studies*. 24(4), 597-630. doi: 10.1080/09636412.2015.1103132.

deployed onboard private merchant vessels as qualified law enforcement officers by law granting authorisation to embark armed personnel. Italian mariners are subject to Italian martial law and are subject to martial law of Italy.

In addition, their mission is to protect the ship and seafarers from the pirate attack. The Italian VPD has only been deployed in the Italian flag vessels. The VPD is working under the direction of the head of the military team and Ministry of Défense. The master of the ship do not have any direct control over the VPD. Military personnel shall be paid directly by the Ministry of Défense and Italian government. The link between the state and the military personnel can be extinguished through a waiver of immunity by the appointed state. However, they are acting on the mission for the international community to curb the threat of piracy and can not be compared with the private security force.

In a recent judgment of the Permanent Court of Arbitration in the case of "*Enrica Lexie*"<sup>68</sup> it was held that the Italian Mariners appointed to *Enrica Lexie* as Vessel Protection Detachment Forces have sovereign immunity for acts committed by them during their duty on the ship.<sup>69</sup> The Indian Government also took positive steps in accordance with the judgment referred to above and filed a petition before the SC of India to withdraw the case against the Italian mariners in India.

## 9. Conclusion

The principle of sovereignty is based on mutual respect of the sovereign states. If a civilized State is disrespecting the immunity of another sovereign State, the entire system of public international order and law will be dilapidated. In the present Globalised world international relations should be respected and keep utmost priority for a friendly relation with the foreign states. Not only the international conventions and treaties but also the Customary international law also be respected. In the context of the Article, it is submitted that piracy is an international crime that collapsing the international trade and the shipping industry as such. As a precaution to overcome piracy international community is recognised to keep security officials for the protection of the ship. But their protection in the foreign criminal jurisdiction is not recognised by the international community. However, present state practices and customary international law recognised the concept of functional immunity. So the VPD, appointed by the state to protects its floating territory from the universal criminal act of piracy, should be immune from foreign criminal jurisdiction. Because they are acted for the state while discharging their official functions. If they have made any mistake or indifference, it is the duty of the deployed State to check and correct it. But in the case, if a state hires its military force to some flag of convenience vessel owned by a private company of

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<sup>68</sup> PCA Case No. 2015-28, *The Italian Republic v. The Republic of India*, (July 20, 2020). <https://pcacases.com/web/sendAttach/1707>; *Italian Republic v. Republic of India*, The Parties' dispute concerns an incident, of shooting happened in the coast of India and two Indian fishermen were died, that occurred on 15 February 2012 approximately 20.5 nautical miles off the coast of India involving the MV "*Enrica Lexie*", an oil tanker flying the Italian flag, and India's subsequent exercise of jurisdiction over the incident, and over two Italian Marines from the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, who were on official duty on board the "*Enrica Lexie*" at the time of the incident

<sup>69</sup> By three votes to two, in respect of Italy's Submission (2)(f), that the Marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines.

some other nation, and the flag state and the VPD do not have any link, in that context claim of sovereign immunity may be considered as absurd.

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**Conflict of Interest Statement:**

The author(s) declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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