.IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2013

CORAM: DR. DATE-BAH JSC (PRESIDING)
DOTSE JSC
YEBOAH JSC
GBADEGBE JSC
AKAMBA JSC

CIVIL MOTION

No.J5/10/2013

20TH JUNE, 2013

IN THE MATTER OF AN APPLICATION TO INVOKE THE SUPERVISORY JURISDICTION OF THE SUPREME COURT

ARTICLES 88(6) AND 132 OF THE 1992 CONSTITUTION, RULE 61 OF THE SUPREME COURT RULES, 1996 (C.I.16)

THE REPUBLIC

VRS.

HIGH COURT (COMM. DIV.) ACCRA
EX PARTE; ATTORNEY GENERAL - - - APPLICANT

NML CAPITAL LTD - - - 1ST INTERESTED PARTY
THE REPUBLIC OF ARGENTINA - - - 2ND INTERESTED PARTY

RULING

DR. DATE- BAH JSC:

Introductory Analysis of the Relationship between International Law and Ghanaian Municipal Law.

This case raises important issues on the nature of the relationship between international law and municipal law in Ghana. The main purpose of the learned Attorney-General in bringing this application for *certiorari* and prohibition would seem to be to enable the Republic to comply with the orders of the International Tribunal on the Law of the Sea (hereafter referred to as the "Tribunal"), established under the United Nations Law of the Sea Convention. This circumstance raises the question, quite apart from the other legal issues which arise in this case, whether this court or any other court of Ghana is obliged to enforce the orders of the Tribunal.

Before entering into the full details of the facts of this case, it would thus be worth our while to examine this question of the relationship between international law and municipal law in Ghana. Ghanaian law on this basic question is no different from the usual position of Commonwealth common law jurisdictions. It is that customary international law is part of Ghanaian law; incorporated by the weight of common law case law (for instance, *Triquet v Bath* (1764) 3 Burr. 1478 (Court of King's Bench) and *per* Lord Denning in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 (Court of Appeal)). In *Chung Chi Cheung v The King* [1939] AC 160, the Judicial Committee of the Privy Council, speaking through Lord Atkin, stated this common law position as follows (at p. 168): "The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals." However, treaties, even when the particular treaty has been ratified by Parliament, do not alter municipal law until they are incorporated into Ghanaian law by appropriate legislation.

This position of the law is usually referred to as reflecting the "dualist" school of thought, as distinct from the monist approach followed by some other States. Under a dualist approach,

orders of the Tribunal cannot be binding on Ghanaian courts, in the absence of legislation making the orders binding on Ghanaian courts. In any case, the orders of the Tribunal given subsequent to the orders and ruling of the High Court cannot be a valid basis for the grant of *certiorari,* according to the authorities governing the grant of that remedy in this jurisdiction.

It is trite knowledge that *certiorari* is granted by this court in respect of fundamental errors of law patent on the face of the record of a superior court or for a wrong assumption of jurisdiction. (See, for instance, the *Republic v High Court Accra, Ex Parte CHRAJ* [2003-2004] SCGLR 1 and *Republic v Court of Appeal, Ex Parte Tsatsu Tsikata* [2005-2006] SCGLR 612.) It thus lies in respect of particular kinds of errors committed by a superior court in its judicial decision. It cannot lie simply to enable the Republic of Ghana to fulfill its obligations on the international plane. It is not a tool of diplomacy, but rather a remedy available in respect of fundamental errors of a court below. Accordingly, the request of the Honourable Attorney-General in paragraph 16 of his affidavit in support of his motion:

> "That in order to be able to comply with the Republic's international obligations under International Law in general, and with the Orders of the Tribunal in particular, the aforesaid Orders and Ruling must be quashed"

has no basis in law. The arguments of the applicant that the orders and ruling of the High Court stand in the way of Ghana meeting her international obligations are fundamentally flawed. The attempt to justify these arguments by reference to the 1992 Constitution are next dealt with.

The applicant argues in his Statement of Case (paras 20 and 30) that the United Nations Convention on the Law of the Sea ("UNCLOS") is incorporated into Ghanaian law by virtue of Article 75 of the 1992 Constitution. This is a spectacularly erroneous proposition of law. It is important for this court to make it clear that Article 75 does no such thing. Article 75 provides as follows:

> "(1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.

> (2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by-
>
> (a) Act of Parliament; or
>
> (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament."

The mere fact that a treaty has been ratified by Parliament through one of the two modes indicated above does not, of itself, mean that it is incorporated into Ghanaian law. A treaty may come into force and regulate the rights and obligations of the State on the international plane, without changing rights and obligations under municipal law. Where the mode of ratification adopted is through an Act of Parliament, that Act may incorporate the treaty, by appropriate language, into the municipal law of Ghana.

It follows from the foregoing analysis that the following proposition of law made by the applicant in para 30 of his Statement of Case is completely erroneous:

> "It will be recalled that incorporation of treaty-based public international law into Ghana law is through Article 75 of the 1992 Constitution which states that an international treaty or agreement becomes effective in Ghana once ratified by Parliament."

This analysis applies equally to the provision in the "constitution" in force in Ghana at the time UNCLOS was ratified. That was section 8(2) of the Provisional National Defence Council (Establishment) Proclamation 1981 (PNDCL 42), which stated:

> "The Council shall execute or cause to be executed treaties, agreements or conventions in the name of Ghana, so however that such treaties, agreements or conventions shall come into force on ratification by the Council."

In any case, in relation to UNCLOS, there has been no incorporation of its provisions into Ghanaian municipal law, except to a limited extent in the Maritime Zones (Delimitation) Act, 1986 (PNDCL 159).

The need for the legislative incorporation of treaty provisions into municipal law before domestic courts can apply those provisions is reflective of the dualist stance of Commonwealth common law courts and backed by a long string of authorities, such as *The Parlement Belge* [1880] 5PD 197 (English Court of Appeal); *Walker v Baird* [1892] AC 491 at 497 (English House of Lords); *Attorney-General (Canada) v Attorney-General (Ontario)* [1937] AC 326 (Judicial Committee of the Privy Council), *per* Lord Atkin at p. 347; *Theophile v Solicitor-General* [1950] AC 186, at pp 195-6 (English House of Lords); *J.H. Rayner (Mincing Lane) Ltd. v Dept of Trade and Industry* [1990] AC 418, at p.476 (English House of Lords); *Chow Hung Ching v R* (1948) 77 CLR 449 at p. 478, *per* Dixon J. (High Court of Australia) and *New Zealand Airline Pilots' Association v Attorney-General* [1997] 3 NZLR 269 at pp. 280-1 (New Zealand Court of Appeal).

In delivering the judgment of the New Zealand Court of Appeal in the last case, Keith J., in answer to the question: "Is the Chicago Convention part of the law of New Zealand?", stated pithily (at pp 280-1) that:

> "As Lord Atkin said for the Privy Council in *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 at p. 347, it is well established that while the making of a treaty is an Executive act, the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. The stipulations of a treaty duly ratified by the Executive do not, by virtue of the treaty alone, have the force of law."

The New Zealand Court of Appeal reached another decision on the same lines in *Ashby v Minister of Immigration* [1981] 1 NZLR 222. In this case, the plaintiffs' case was based on the International Convention on the Elimination of All Forms of Racial Discrimination 1965, which had been ratified by New Zealand. The plaintiffs sought a declaration that the proposed decisions by the Minister of Immigration to exercise his discretionary power under a New Zealand statute to grant temporary entry permits to members of the South African rugby team was invalid, "Because the Minister is required to exercise his discretion in a manner that is consistent with New Zealand's international obligations under the Convention". The declaration was denied, with Cook J, delivering the lead judgment of the Court of Appeal, stating the law as follows (at p. 224):

"The Convention has been implemented in New Zealand by the Race Relations Act 1971, but no breach of that Act is alleged. If the Convention does have some wider scope, which is not clear, it has not as to any such wider scope been incorporated into New Zealand law by any Act of Parliament. It is elementary that international treaty obligations are not binding in domestic law until they have become incorporated in that way. So the Convention cannot possibly override the Immigration Act by depriving the Minister of authority to grant permits to the Springboks."

These two New Zealand cases restate admirably the Commonwealth common law approach on the issue under discussion. This basic common law position is not altered by the directive principle of State policy and the direction to the Executive which have been cited by the applicant in support of his case on this issue. These are contained in articles 40 and 73, respectively, of the 1992 Constitution. They state that:

"40.

In its dealings with other nations, the Government shall

(a) promote and protect the interests of Ghana;

(b) seek the establishment of a just and equitable international economic and social order;

(c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means;

(d) adhere to the principles enshrined in or as the case may be, the aims and ideals of-

i) the Charter of the United Nations;

ii) the Charter of the Organisation of African Unity;

iii) the Commonwealth;

iv) the Treaty of the Economic Community of West African States; and

v) any other international organisation of which Ghana is a member."

"73.

The Government of Ghana shall conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana".

Neither of these two constitutional principles is to be interpreted as altering the dualist stance of Ghanaian law. They do not authorize the courts to enforce treaty provisions that change rights and obligations in the municipal law of Ghana without legislative backing. If the law were otherwise, it would give the Executive an opportunity to bypass Parliament in changing the rights and obligations of citizens and residents of Ghana.

A recent International Court of Justice case illustrates the fact that a State's judiciary may attract for it responsibility under international law which the Executive cannot avert by itself, except by praying in aid the legislative function vested, obviously, in the Legislature. That case is *Jurisdictional Immunities (Germany v Italy: Greece Intervening)*. (3 February 2012. General List No. 143). This case arises from atrocities committed by German forces during the Second World War. The German occupation forces in Italy massacred civilians and deported large numbers of civilians to be used in forced labour. Many victims of these atrocities having failed, after the war, to secure reparation in respect of them, the Italian courts in a series of decisions asserted jurisdiction over claims relating to these atrocities brought against the German Government, in spite of that Government's claim of sovereign immunity. Consequently, Germany, in December 2008, filed a suit at the International Court of Justice seeking to assert its claim of sovereign immunity against the claims before the Italian courts. Greece intervened in the case on the side of Italy, because of similar acts by German troops on its territory.

The Court in its judgment delivered on 3rd February 2012 (http://www.icj-cij.org/docket/files/143/16883.pdf) held that Italy was obliged, by means of its own choosing, to render void the decisions of its courts that had infringed the sovereign immunity due to Germany. It rejected various ingenious arguments by Italy to establish exceptions to the state immunity doctrine and upheld the fundamental principle of the jurisdictional immunity of States. It held that Italy, having violated this principle, must "by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of the courts and those of other judicial authorities" that infringed Germany's rights were nullified. (See p. 51, para 139 of the judgment). The point to be adverted to here is that the ICJ did not purport to render the decisions of the Italian courts void directly, but rather imposed an obligation on the Italian State to choose its own means of rendering void the decisions of its courts which were in breach of international law on the issue in question. Subsequent to the ICJ decision, the Italian legislature has taken action showing its willingness to act to implement the decision of the Court. This is a precedent which the Government of Ghana needs to note. Where the actions of national courts attract delictual or contractual responsibility for a State on the international law plane, the most effective remedial measure will usually be the enactment of legislation. Without prejudice to the merits of this present application, this approach is urged on the Government of Ghana in relation to its obligations under the United Nations Law of the Sea Convention.

Having clarified the law relating to the obligation of this court with respect to the orders of the international tribunal established under UNCLOS, most of whose provisions have not been incorporated into Ghanaian law by appropriate legislation, we can now move on to a more plausible ground argued by the Attorney-General. It should be mentioned, though, that some of the provisions of UNCLOS have become customary international law through the practice of States. Such customary public international law would, of course, be given effect in Ghanaian law as part of the common law of Ghana.

The second ground relied on by the learned Attorney-General is that the High Court wrongly assumed jurisdiction in this case by putting an incorrect interpretation on a clause by which the Government of Argentina is alleged to have waived its sovereign immunity. A narration of the

facts of this case is needed at this stage for a proper appreciation of the cogency or not of this argument.

The Facts (and Some Related Law)

The Attorney-General filed a motion on notice on 19th December 2012 praying this Court for:

1. "An Order of Certiorari to quash the Orders of interlocutory injunction made on the 2nd of October 2012, as well as the ruling delivered on the 11th of October 2012 refusing the application of the 2nd Interested Party herein and the Defendant therein to set aside the Order of the 2nd October 2012, both of the High Court, (Commercial Division), Accra: Coram Richard Adjei-Frimpong J;
2. An Order of Prohibition barring all lower Courts from entertaining any previous or further actions or proceedings in the suit in respect of which the Orders sought to be quashed were made; AND
3. Any other or further Order(s) as this Honourable Court may deem fit."

This motion was supported by an affidavit deposed to by the Honourable Attorney-General, then Mr. Benjamin Kunbour, M.P. The title of the motion paper specifies article 88(8) of the 1992 Constitution as one of the enactments pursuant to which the application is brought. This clause states that: "The Attorney-General shall have audience in all courts in Ghana." The other parties to the suit never raised any objection to the Attorney-General's capacity to sue under this authority.

The facts the Attorney-General deposed to were as follows: there had been diplomatic correspondence between the Republic of Ghana and the Republic of Argentina (the 2nd Interested Party) that had led to Ghana granting the 2nd Interested Party's request for its warship, the ARA Fragata Libertad, to dock at Tema Harbour. The warship was on a diplomatic mission of promoting friendship between Argentina and other States. However, when docking at Tema, the warship was arrested and detained by the security services of the Republic of Ghana in enforcement of the orders of the High Court granted by Adjei-Frimpong J. in a suit filed by the 1st Interested Party against the 2nd Interested Party.

The 2nd Interested Party applied to the High Court to set aside its order detaining the warship, but it was dismissed in a ruling delivered on 11th October 2012. In his ruling, Adjei-Frimpong J. recounted the background events that had resulted in the suit before him. He indicated that sometime in October 1994, the 2nd Interested Party herein, had entered into a Fiscal Agency Agreement ("FAA") with the Bankers Trust Company, a New York banking corporation. Under this FAA, the 2nd Interested Party had issued securities for purchase by the public. The 1st Interested Party herein had purchased two series of bonds issued by the 2nd Interested Party. When the 2nd Interested Party defaulted on the bonds, the 1st Interested Party sued it and obtained judgment in the United States District Court for the Southern District of New York. The 2nd Interested Party failed to settle the judgment debt. On 15th May 2005, the 1st Interested Party commenced action against the 2nd Interested Party in the English High Court on the debt obligation adjudged by the New York court.

The 2nd Interested Party raised an objection to the jurisdiction of the English High Court on the ground of state immunity. This issue went before the English Supreme Court which held that the 2nd Interested Party did not enjoy state immunity in relation to the suit and that the English court had jurisdiction to entertain the suit. The 2nd Interested Party subsequently submitted to judgment and a consent order was made against it in favour of the 1st Interested Party. In spite of this, the 2nd Interested Party had not paid the judgment debt.

When the 2nd Interested Party's vessel, ARA Libertad, entered Tema Harbour on or about 1st October 2012, the 1st Interested Party, with the leave of the High Court (Commercial Division), Accra, issued a writ against it, claiming:

a. The sum of US $ 284,184,632 being the amount of the judgment awarded by the United States District Court for the Southern District of New York.
b. Interest on the sum of US $ 284,184,632.30 at the rate of 4.95% per annum (compounded annually) and amounting to US $ 91,784,681.30 as at October 1st 2012
c. Continuing interest at the rate of 4.9% per annum (compounded annually) currently amounting to US$49,071.03 per day from 1st October 2012 until judgment or sooner payment or

d. Alternatively, interest on the amount at the prevailing commercial bank rate from 18th December 2006 to date of final payment.

After filing the writ, the 1st Interested Party applied *ex parte* for an order of interlocutory injunction restraining the movement of the ARA Libertad and its interim preservation. This order was granted and it was under its authority that the 2nd Interested Party's vessel was restrained. It was this order that the 1st Interested Party applied to the High Court to set aside.

Adjei-Frimpong J. refused to set aside his earlier order. The pivotal provision of the FAA (in evidence before this Court as Exhibit A-G 6 attached to the affidavit of the Attorney-General in support of his motion) on which the ruling of Adjei-Frimpong J hinged was the following (contained in both bonds):

> "The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York State or Federal Court sitting in the borough of Manhattan, the City of New York and the Courts of the Republic of Argentine ("the specified Courts") over any suit, action or proceeding against it or its properties assets or revenues with respect to the securities of this series or the fiscal Agency Agreement (a "Related Proceeding") except with respect to any actions brought under the United States Federal security laws. The Republic has in the fiscal Agency Agreement waived any objection to the Related proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related proceedings have been brought in an inconvenient forum. The Republic agrees that a final non-appealable judgment in any such Related proceeding (i.e. "Related Judgment") shall be conclusive and binding upon it and may be enforced in any specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the 'other courts') by a suit upon such a judgment…To the extent that the Republic or any of its revenues, assets or properties shall be entitled, in any jurisdiction in which any specified court is located, in which any related proceeding may at any time be brought against it or any of its revenues, assets or properties or in any jurisdiction in which any specified court or other court is located in which any suit action or proceedings may at any time be brought

> solely for the purpose of enforcing or executing any Related judgment, to any immunity from suit from the jurisdiction of any such court, from setoff from attachment prior to judgment, from attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy and to the extent that in any such jurisdiction there shall be attributed such an immunity, 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…"

The learned trial judge's view on this waiver clause was as follows:

> "Counsel for the Plaintiff submitted whilst invoking the jurisdiction of this court for leave to issue and serve notice of the writ and has re-submitted in arguing the instant motion that, this court is perfectly within the description of the designation "other courts" specified in the term of the agreement. He argues that once an asset of the Defendant/Applicant being the vessel has found itself in the territorial waters of Ghana which asset being the property of the Judgment Debtor is liable to be attached in aid of execution of the Plaintiff's subsisting judgment, the Ghana court becomes one of the "other courts" envisaged by the term and since the judgment constitutes a civil contract under common law, Order 8 rule 3 subrule 1(m) operates to property (*sic)* invoke the jurisdiction of this court.
>
> I find the logic in the argument sound just as I did when the court was invited to assume jurisdiction over this matter….".

Order 8, rule 3, subrule 1(m) states as follows:

"**Cases where leave may be granted**

3(1) Service out of the jurisdiction of notice of a writ may be effected with leave of the Court in the following cases

> …

(m) if the action begun by the writ is in respect of a contract which contains a term to the effect that the Court shall have jurisdiction to hear and determine any action in respect of the contract."

The learned trial judge did not doubt the 1st Interested Party's status as a sovereign State entitled to immunity from the court's jurisdiction. But he also acknowledged the universally recognized right of sovereign States to waive immunity. For him, therefore, the crucial issue was whether the 1st Interested Party had waived its immunity under the FAA.

He stated his view on this issue in the following terms:

> "Nation states' historical enjoyment of absolute immunity from adjudication by foreign courts has given way to the common law restrictive immunity approach whereby a claim to state immunity would not be upheld in disputes arising out of transactions entered into between states and entities which were of commercial or private law nature. Various states have varied legal regimes on the restrictive immunity approach. E.g. The U.K. has the State Immunity Act 1978 whilst the US has the Foreign Sovereign Immunity Act of 1976.
>
> It is also universally recognized that states may irrevocably waive immunity by express contract.
>
> PHILIP R. WOOD in his work LAW AND PRACTICE OF INTERNATIONAL FINANCE (1995) at page 88-89 writes on principles of waiver clauses as follows:
>
> > "It appears to be universally 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".
>
> I agree with this view. So has the Defendant/Applicant waived its sovereign immunity to the jurisdiction of this court?

Reading and re-reading the wavier provision in the Fiscal Agency Agreement and the bonds which I have already cited, my understanding is that not only did the Defendant/Applicant waive its sovereign immunity to the specified courts", but it did' so to the "other courts" of which in the opinion of this court once again it is one.

Aside my understanding of the provision, the record before me shows that the prime issue before the U.K. Supreme Court when the case travelled there was whether the Defendant/Applicant has waived its immunity to the jurisdiction of the U.K High Court which to my understanding was one of the "other courts."

In the decision of the U.K Supreme Court which is now reported in the [2011] 4 ALL ER 1191, holding 3 of the headnote reads:

> "The bonds contained a submission to the jurisdiction of the English Court; Argentina had unambiguously agreed that a final judgment on the bonds in New York should be enforceable against Argentina in other courts in which it might be amenable to a suit on the judgment…"

Adjei-Frimpong J. then goes on to quote with approval the following passage from Lord Phillips P.S.C. in that case (at pp 1210-1211):

> "If a state waives immunity it does no more than place itself on the same footing as any other person. A waiver of immunity does not cover jurisdiction where, in the case of another Defendant it would not exist. If however state immunity is the only bar to jurisdiction, an agreement to waive is tantamount to a submission to the jurisdiction.
>
> In this case Argentina agreed that the New York Judgment could be enforced by a suit upon the judgment in any court to its jurisdiction of which absent immunity, Argentina would be subject. It was both an agreement to waive immunity and an express agreement that the New York Judgment could be sued on it any country that state immunity apart would have jurisdiction. England is such a country…The provision in the first paragraph constituted a submission to the jurisdiction of the English court. If consideration of the first paragraph alone left any doubt that the terms of the bonds

> included a submission to this jurisdiction, this would be dispelled by the second paragraph…
>
> "The words 'may at any time be brought' which I have emphasized once again constitute Argentina's agreement that the waiver of immunity applies in respect of any country where, immunity apart, there is jurisdiction to bring a suit for the purposes of enforcing a judgment on the bonds. England is such a jurisdiction. Both jointly and severally the two paragraphs amount to an agreement on the part of Argentina to submit to the jurisdiction of the English (no doubt among others) courts."

In the light of the views expressed by the English Supreme Court, Adjei-Frimpong J. held that the issue of waiver of sovereign immunity by the 2nd Interested Party had been determined between the same parties by a court of competent jurisdiction and therefore the 1st Interested Party was estopped *per rem judicatam* from relitigating the same issue before him.

This conclusion of the learned trial judge appears at first sight startling and an affront to the independence of the sovereign courts of this land. However, it has to be remembered that the independence of Ghanaian courts is subject to the received common law rules on conflict of laws relating to foreign judgments. Those rules allow, quite apart from the effect of statute, for the recognition, in accordance with certain principles prescribed by the common law, of foreign judgments given by courts of foreign countries. The rules therefore allow for the application of the principle of *res judicata* for the purpose of proceedings properly brought in a Ghanaian court in which issues determined in a foreign court arise.

Subsequent to the 2nd Interested Party's failure to persuade the High Court to set aside its orders, it brought action against Ghana before the International Tribunal on the Law of the Sea, alleging that Ghana had breached international law by detaining its warship and requesting the release of the ship, among other reliefs. Pending the determination of this substantive suit, the 2nd Interested Party filed an application before the Tribunal for provisional measures against Ghana. On 15th December 2012, the Tribunal gave its ruling on the application for provisional measures, in which it ordered Ghana to release the detained ship unconditionally

and immediately and to ensure that it was resupplied to enable the ship to sail out of Ghana's maritime areas.

It was after this order by the Tribunal that the learned Attorney-General filed, as earlier indicated, on 19th December, 2012 the present motion on notice for orders of *certiorari* and prohibition against the High Court.

Finally, judicial notice is taken of the fact that during the pendency of these proceedings the *ARA Fragata Libertad*, the Argentinian warship, sailed away from Ghana in breach of the High Court orders without resistance from the Ghanaian authorities.

The Law

In the affidavit sworn to by the learned Attorney-General to support his motion, the principal ground that he appears to urge in support of this application is that in his paragraph 14, which is in the following terms:

> "That a true and proper construction of the above provision of the FAA neither confers jurisdiction on the Court in respect of the substantive Suit nor confers jurisdiction on it in respect of subjecting the warship to civil proceedings commenced in any Court within the Republic of Ghana."

He is, of course, referring to the waiver provision in the bonds, which has been quoted above. In the light of the view of Adjei-Frimpong J that the doctrine of *res judicata* applies in relation to the interpretation put by the English Supreme Court on the waiver clause, it would be worth this Court's while to explore the extent to which *res judicata* applies to the interpretation of the waiver clause and is therefore conclusive of this issue in this case. In other words, to what extent is the interpretation is to be put on the waiver clause an open issue before this Court?

There is case law in England which has decided that a foreign judgment entitled to recognition in England may give rise to *res judicata,* either in the sense of a cause of action estoppel, which precludes a party to proceedings from asserting or denying the existence of a cause of action

whose existence or non-existence has been pronounced on by a foreign court, or in the sense of an issue estoppel, which prevents a matter of fact or law necessarily decided by a foreign court from being re-litigated in England.

Regarding issue estoppel, which is what is relevant on the facts of this case, the House of Lords held by a majority in *Carl Zeiss Stiftu*ng v *Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853, 917, 925, 967 that a foreign judgment can give rise to issue estoppel. Lords Reid, Hodson, Upjohn and Wilberforce expressed the view in this case that issue estoppel can be based on a foreign judgment, although in such a case the doctrine should be applied with caution because of the uncertainties flowing from differences in procedure in foreign jurisdictions. Lord Wilberforce made the following illuminating remarks in his judgment (at p. 967):

> "As a matter of principle (and we are really thrown back upon principle), whether the recognition of vested rights, or upon considerations of public interest in limiting relitigation, there seems to be no acceptable reason why the recognition of foreign judgments should not extend to the recognition of issue decisions. From the nature of things (and here it is right to recall Lord Brougham's warning) this, in the case of foreign judgments, may involve difficulties and necessitate caution. The right to ascertain the precise issue decided, by examination of the court's judgment, of the pleadings and possibly of the evidence, may well, in the case of courts whose procedure, decision-making technique, and substantive law is not the same as ours, make it difficult or even impossible to establish the identity of the issue there decided with that attempted here to be raised, or the necessity for the foreign decision. And I think that it would be right for a court in this country, when faced with a claim of issue estoppel arising out of foreign proceedings, to receive the claim with caution in circumstances where the party against whom the estoppel is raised might not have had occasion to raise the particular issue. The fact that the court can (as I have stated) examine the pleadings, evidence and other material, seems fully consistent with its right to take a broad view of the result of the foreign decision. But with these reservations, where after careful examination there appears to have been a full contestation and a clear decision on an issue, it would in my

> opinion be unfortunate to exclude estoppel by issue decision from the sphere of decision."

The requirements that need to be satisfied before issue estoppel can be applied are that: the foreign court must be a court of competent jurisdiction; its decision must have been final and conclusive; and it must have been on the merits. Also the parties to the Ghanaian litigation should be the same as in the foreign litigation or their privies. Finally, the issue concerned must be the same and must have been necessary for the decision of the foreign court.

Because of the familiarity of Ghanaian courts with the English legal and judicial systems, issue estoppel from a decision of the English Supreme Court would be easy to accept. What is needed next is to examine *NML Capital Ltd. v Republic of Argentina* [2011] A.C. 495 to ascertain whether it meets the requirements for the acceptance of issue estoppel from it and what exactly is the issue litigated before the English Supreme Court which raises an estoppel for this Court.

In *NML Capital Ltd. v Republic of Argentina (supra)*, the claimant (which is the term used for plaintiff under the current English Civil Procedure Rules) was the same as or a privy of the 1st Interested Party in the case before us. It sought enforcement in England of the same judgment as it is seeking to enforce in Ghana. An English High Court judge made an order granting the claimant permission to serve the Republic of Argentina out of the jurisdiction. Argentina applied to set aside that order of the High Court and for a declaration that the English High Court had no jurisdiction to try the claim of the claimant. Another High Court judge refused to set aside the order of his brother and dismissed the application. On appeal to the Court of Appeal, the appeal was allowed, with the Court declaring that the High Court did not have jurisdiction to entertain proceedings against Argentina for recognition and enforcement of the judgment obtained in New York. With leave of the Supreme Court, the claimant appealed to that Court.

The issues that the Supreme Court had to decide were: first, whether the proceedings before them were "proceedings relating … a commercial transaction" within the meaning of section 3 of the State Immunity Act 1978; second, whether Argentina was prevented from

claiming state immunity in respect of the proceedings by section 31 of the Civil Jurisdiction and Judgments Act 1982; third, whether the bonds contained a submission to the jurisdiction of the English court in respect of the proceedings before the Supreme Court within the meaning of section 2 of the State Immunity Act 1978; fourth, whether the claimant was entitled to raise at the *inter partes* hearing two new points that it had not relied on in its earlier *ex parte* application; the final issue was whether, having regard to the answers to the issues already outlined above, Argentina was entitled to claim state immunity in respect of the claimant's claim.

The third of the above issues is the relevant one with respect to issue estoppel on the interpretation of the waiver clause in the FAA. Although it was cast in terms of submission to jurisdiction within a particular statutory framework, in substance the issue to be decided was whether Argentina had effectively waived its state immunity through the language contained in the waiver clause. However, to put the answer to the third issue in context, I will set out the answers of the English Supreme Court to some of the other issues as well. The Supreme Court held that proceedings "relating to … a commercial transaction" within the meaning of section 3 of the State Immunity Act 1978 did not extend to proceedings for the enforcement of a foreign judgment which itself related to a commercial transaction and therefore the English proceedings were not proceedings relating to a commercial transaction. Accordingly, Argentina was not excluded from state immunity by virtue of section 3. The appeal was allowed on the second issue, the Court holding that section 31(1) of the Civil Jurisdiction and Judgments Act 1982 was not an additional barrier to be overcome before enforcing a foreign judgment against a state, but was an alternative scheme for restricting state immunity in the case of foreign judgments and that its effect was that a foreign judgment against a foreign state would be recognized and enforceable in England if the normal conditions for recognition and enforcement of judgments were fulfilled and the foreign state would not have been entitled to state immunity if the foreign proceedings had been brought in the United Kingdom.

On the third issue, of particular interest to this Court, the English Supreme Court held that on a true construction, the relevant provisions of the bonds constituted both an agreement to waive immunity and an express agreement that the New York judgment could be sued on in any

country which would have jurisdiction, but for state immunity. It held further that England was such a country. Accordingly, Argentina had submitted to the English jurisdiction by a prior written agreement for the purposes of section 2 of the State Immunity Act 1978. Accordingly, Argentina was not entitled to claim state immunity in respect of the proceedings brought by the claimant. The decisions of the Court on the fourth and fifth issues, which related to procedure, will not be gone into here.

It is clear that, although the proceedings in England were at a preliminary stage in the sense that the action was an application to set aside an order giving leave to the claimant to serve Argentina out of jurisdiction, the construction of the provisions of the bonds relating to waiver of immunity by Argentina was on the merits.

We are thus willing to accept as *res judicata* the interpretation put by the English Supreme Court on the contested waiver clause quoted *supra.* The issue attracting the estoppel is that relating to whether the language of the waiver clause was to be interpreted to mean that the Republic of Argentina had waived its sovereign immunity and subjected itself to the jurisdiction of "other courts."

As indicated earlier, Adjei-Frimpong J. quoted with approval the words of Lord Phillips of Worth Matravers, PSC, by which he affirmed that Argentina had waived its immunity through the clause under consideration. This is how Lord Phillips ended his judgment on the third issue (at p. 519):

> "62. This conclusion does not involve a departure from the narrow approach to construction required by the law of New York. It gives the provisions as to immunity in the bonds the only meaning that they can sensibly bear. Neither Aikens LJ nor Mr. Howard suggested any alternative meaning for the words. The reality is that Argentina agreed that the bonds should bear words that provided for the widest possible submission to jurisdiction for the purposes of enforcement, short of conferring jurisdiction on any country whose domestic laws would not, absent any question of immunity, permit an action to enforce a New York judgment. No doubt those responsible were anxious to make the bonds as attractive as possible.

63. Aikens LJ held at para 103 that because, in the present proceedings, NML had to bring an action in this jurisdiction to obtain recognition of the New York judgment, the proceedings here were not "brought solely for the purpose of enforcing or executing any related judgment". This was to confuse the means with the ends. Obtaining recognition of the New York judgment is no more than an essential stepping stone to attempting to enforce it. No suggestion has been made that there is any other purpose in bringing these proceedings."

Lord Collins of Mapesbury in agreeing with Lord Phillips on the third issue, stated (at p. 542) that:

"127. The "waiver and jurisdiction clause" in the bonds provided that a related judgment:

> "shall be conclusive and binding upon [Argentina] and may be enforced in any specified court or in any other courts to the jurisdiction of which the Republic is or may be subject (the 'other courts') by a suit upon such judgment."

128. The New York judgment was on any view a "related judgment." Argentina agreed that it could be enforced in any other courts "to the jurisdiction of which the Republic is or may be subject." This was the clearest possible waiver of immunity because Argentina was or might be subject to the jurisdiction of the English court since the English court had a discretion to exercise jurisdiction in an action on the New York judgment by virtue of CPR r6.20(9) (now Practice Direction 6B supplementing CPR Pt 6, paragraph 3.1(10).

129. The waiver is confirmed by the second paragraph of the clause, which provides:

> "To the extent that the republic … shall be entitled, in any jurisdiction … in which any … other court is located in which any suit, action or proceeding may at any time be brought solely for the purpose of enforcing or executing any related judgment, to any immunity from suit, from the jurisdiction of any such court … from execution of a judgment or from any other legal or judicial process or

> remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the republic has hereby irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction … solely for the purpose of enabling the fiscal agent or a holder of securities of this series to enforce or execute a related judgment."

130. Again England is a jurisdiction in which an action "may … be brought" to enforce the New York judgment and Argentina agreed not to claim any immunity in that jurisdiction. The contrary conclusion of the Court of Appeal is not readily explicable."

But even after accepting the view of the English Supreme Court, set out above which was adopted by Adjei-Frimpong J. in the court below, this Court will still need to determine an additional issue, before this case can be decided. Quite apart from the issue of the interpretation of the waiver clause in the FAA, there is the further issue of whether Ghanaian courts should give effect to Argentina's waiver of state immunity, in so far as it relates to a military asset. In resolving this further issue, there is a relevant doctrine in the conflict of laws which will be invoked.

This case, quintessentially, requires the application of the branch of law referred to as conflict of laws. There is a rule in the common law on conflict of laws which states that the courts will not enforce or recognize a right, power *et cetera* arising under the law of a foreign country, if the enforcement of that right, power etc. would be inconsistent with the fundamental public policy of the law of the forum. For instance, Lord Simon of Glaisdale said in *Vervaeke v Smith* [1983] AC 146 at 164:

> "There is abundant authority that an English court will decline to recognize or apply what would otherwise be the appropriate foreign rule of law when to do so would be against English public policy; although the court will be even slower to invoke public policy in the field of conflict of laws than when a purely municipal legal issue is involved."

On the facts of this case, it could be argued that the claimed right of the First Interested Party, which is based on a combination of customary public international law, the law of New York and the common law, to attach a foreign military asset in Ghana in execution of a judgment debt obtained abroad, is against the fundamental public policy of Ghana, since it imperils, to a degree, the peace and security of Ghana. As already mentioned, there is no obligation to enforce a foreign judgment which offends the local public policy of the forum state. On the facts of this case, it is not the foreign judgment itself which is the source of difficulty, but the nature of the asset against which execution is sought. However, the net effect is the same. The enforcement of the foreign judgment against the particular asset attached by the foreign claimant could be subversive of the peace and security of the forum state.

It is reasonable to contend that a State's sovereign right to waive its sovereign immunity in relation to its military assets, through a contractual provision, will not be recognized in Ghanaian common law because of the public policy implications outlined above. A similar, but not necessarily the same, public policy-influenced approach has been implemented in the USA by legislation which forbids the attachment or execution of foreign military property in the US. A similar provision is also to be found in Canadian law. Section 11(3) of the State Immunity Act, 1982 of Canada provides as follows:

> "Property of a foreign state
>
> (a) that is used or is intended to be used in connection with a military activity, and
> (b) that is military in nature or is under the control of a military authority or defence agency
>
> is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture."

There is no reason why the same result cannot be achieved by case law in Ghana.

Seizing military assets, particularly a warship, carries with it an inherent risk of generating military conflict, or at least diplomatic rows likely to undermine the security of the State. In principle, the law ought to allow the exclusion of foreign law, on public policy grounds, where

the enforcement of a right under that foreign law contributes to such risk of military conflict or insecurity. It may well be that this is a novel perspective of what may be included in the category of public policy in relation to conflict of laws and the enforcement of foreign law, but it seems to us reasonable and legitimate to insist that the enforcement in the Ghanaian courts of a right under the law of a foreign country should not imperil the security of the Ghanaian state, broadly defined. The fundamental public policy of the State should surely include the need to preserve its security.

Our hesitation with respect to this issue, however, is on whether the failure of the learned trial judge to respond to it constitutes a fundamental error patent on the face of the record. It could be contended that this is a ground more suited to being argued as a ground of appeal, rather than as a ground for the invocation of *certiorari.* However, a cogent counter-argument is that the learned trial High Court judge, in deciding this case of first impression in this jurisdiction, made a fundamental error which is patent on the face of the record, by failing to respond to the significance of the military nature of the asset sought to be attached. The order to attach a military vessel was on its face palpably and fundamentally wrong in law and principle.

There is no doubt that, under customary international law, warships are covered by sovereign immunity in foreign ports. For instance, as far back as in 1812, the United States Supreme Court, after a careful review of this issue in *The Schooner Exchange v Mcfaddon & Others* 7 Cranch 116, 11 U.S. 116 (U.S.Pa), 1812 WL 1310 (U.S.Pa) reached the following conclusion (*per* Marshall CJ, delivering the opinion of the Court):

> "But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; 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 seems to the Court, ought to be construed, as

containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality."

The ICJ case already referred to, *Jurisdictional Immunities (Germany v Italy: Greece Intervening)* confirms the general principle of the sovereign immunity of states in the courts of other states. Recent state practice has carved out an exception in relation to the commercial acts of sovereigns, but the other acts of sovereigns remain immune. This sovereign immunity being an incident of sovereignty must, logically, be capable of being waived by the sovereign, if it so chooses. Therefore, the principal issue in this case is not whether the warship in this case was covered by sovereign immunity, but rather whether that immunity was effectively waived.

However, as admitted in the expert opinion by Professor Maurice Mendelson QC, attached as an exhibit to the 1st Interested Party's Further Affidavit of 11th March 2013, though international law requires immunity to be granted in specific circumstances, it does not prohibit a State from granting wider immunities (including restricting the effect of a waiver).

We have already cited the example of the grant of such a wider immunity which is found in the Foreign Sovereign Immunities Act of 1976. This is a Federal statute of the United States (Public Law 94-583; 94th Congress). Section 1611 of the Statute provides for certain types of property to be immune from execution. Section 1611(b)(1) states that the assets of central banks and monetary authorities are immune from attachment or execution unless these authorities have explicitly waived their immunity. In contrast to the language in 1611(b)(1), subsection 1611(b)(2) contains a similar protection for military property, but does not state any express provision about waiver. Section 1611 is therefore to be construed as meaning that the immunity of military property from execution or attachment is not subject to waiver. No one has doubted the sovereign right of the US to enact this broader immunity provision for military assets. As already stressed above, there is no reason why a Ghanaian court cannot do what the US has done by legislation. The actual text of section 1611 of the Foreign Sovereign Immunities Act of 1976 is in the following terms:

"**Certain types of property immune from execution**

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of a foreign state as the resu**lt** of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if –

1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

2) the property is , or is intended to be, used in connection with military activity and

A. is of a military character, or

B. is under the control of a military authority or defense agency."

Where a High Court is faced with a case of first impression, in the sense that there is no binding Ghanaian precedent on the issue before it, the common law permits it to make law, within the constraints imposed by the common law judicial method. By the decision made by the learned trial judge in this case, he made new law. The question is whether the law that he made was the right law. In our view, the learned judge was in fundamental error in holding that, as a result of a contractual provision, he had jurisdiction, through a waiver, to arrest a warship. By this decision, he made new law which had the potential of endangering the peace and security of the Ghanaian state. *Certiorari* should be available to quash this fundamentally erroneous decision of the learned High Court judge.

The Applicant, in his Statement of Case, raises a similar point, though he concentrates on stating what he believes the international law to be, rather than what Ghanaian case law ought to be. This is what he states in para 37:

> "The second and third international law errors of the High Court arise from its view that sovereign immunity with respect to warships can be waived under international law and that this can be easily waived as a matter of contract. It fell into this error because it took the view that the waiver clause in the FAA has the effect that Argentina has waived: (1) its State immunity in a general sense; (2) its rights of sovereign immunity with respect to its warships – given that there are separate categories of immunity, and the immunity of warships is not easily waived or abridged. It is a matter of error that the special character of the immunity of warships is insufficiently appreciated by the High Court and indeed is not even systematically addressed in the judgment. Instead it appears to see warships as a sub-category of state property or asset and argues the decision with respect to the warship on the basis that the primary source of law with respect to the immunity of warships is the UN Convention on Jurisdictional Immunities of States and their Properties. This Convention was opened for signature after the FAA was signed and neither Argentina nor Ghana have ratified it. The primary source of law on the immunity of warships is the UN Law of the Sea Convention and the codifications of customary international law set out in its text. Additionally, more generally, with respect to waivers of sovereign immunity, there is a considerable body of court jurisprudence as well as authoritative commentary on differing categories of waivers of sovereign immunity (general; specific and explicit; waivers before the court; broad ambit waivers etc.). The High Court failed to canvass this body of literature. Had it done so, the stricter requirement applicable to waivers affecting specialized categories of immunity (warships; Central bank accounts; diplomatic property) would have been obvious to the High Court and a general waiver would not have been deemed sufficient to allow Ghana to attach the warship."

This passage from the Applicant's Statement of Case focuses on the international law on sovereign immunity and its waiver. Whilst we do not necessarily agree with all the propositions of law contained in it (for instance, that UNCLOS is the primary source of law on the immunity of warships), the Applicant is right in drawing attention to the special nature of waiver in relation to warships and to the international law on sovereign immunity and how it may be waived. The point that we have made above is that that customary international law does not prohibit municipal law from expanding the scope of immunity beyond what international law requires. Accordingly, even if sovereignty logically implies that a sovereign state can waive its sovereignty, the dictates of the public policy of a host state may impel its courts to refuse to accept waiver of sovereignty over a warship. The High Court should, on public policy grounds, have refused jurisdiction on the ground that a contractual waiver of sovereignty over a warship would not be effective in conferring jurisdiction over the warship. In short, we are saying that the position of Ghanaian municipal law should be that Ghanaian courts will not accept a waiver of sovereign immunity over a warship, for the reasons already explained above. The error of the learned trial judge in failing to refuse jurisdiction to seize the military asset of a sovereign State is to our mind fundamental enough to merit the grant of the remedy of *certiorari.*

The applicant, in her Supplementary Statement of Case filed pursuant to an Order of this court dated 13th March 2013, also identified the Ghanaian common law as the route by which to regulate the issue of the seizure of the military assets of foreign sovereigns. (The gender of the applicant had changed by the time of the filing of that Statement, since the Honourable Mrs Appiah-Opong had become the Attorney-General). She there made the following submission:

> "…The New York law exempts protected assets as the Libertad under the Foreign Sovereign Immunity Act of 1976 (FSIA). Section 1611 of the said Act is what was quoted in the above Order of Attachment. It is submitted that by the judgment the 1st Interested Party procured from the U.S., military assets were exempted from enforcement. The learned trial judge could not purport therefore to grant them what they were not entitled to in the 'Specified Courts' by virtue of a "related judgment".

> Additionally, in view of the phrase, "to the fullest extent permitted by the laws of such jurisdiction…" Ghanaian Courts in enforcement proceedings, based on the New York judgment, would also have to consider the extent to which the waiver of immunity is permitted by Ghana law. The Learned Trial Judge however, simply dismissed the significance of this, in his ruling by stating that, "*… if under U.S. law, it is not permissible to attach military assets, then that is U.S. law not Ghana law."*
>
> The learned trial judge then went on to state that he was not aware of any Ghanaian law similar to the U.S. regime which allowed him to exempt such assets except section 392 of the Ghana Shipping Act, 2003 (Act 645) which provides for sovereign immunity for non-commercial cargo owned by a state and entitled at the time of salvage operations to sovereign immunity.
>
> It is submitted that the learned trial judge had a duty to look to common law for the Ghana law relating to protected assets when he could not find any statute on the subject similar to the FSIA. It is therefore necessary to examine the common law on immunity from enforcement for military, diplomatic and other assets of foreign states."

The applicant's Supplementary Statement of Case then proceeds to examine the common law of sovereign immunity before the passage of the State Immunity Act, 1978 of the U.K. It then resorts to a fossilized view of the waiver of sovereign immunity, citing *Mighell v Sultan of Johore* [1894] 1 Q.B. 149, where Lord Esher said (at p. 159) in respect of the Sovereign there concerned that submission had to be: "when the court is about or is being asked to exercise jurisdiction over him and not any previous time" and Lopes LJ said (at p. 161) that: "the only mode in which a sovereign can submit to the jurisdiction is by submission in the face of the court, as, for example, by appearance to a writ." This nineteenth century common law position has subsequently been criticized as being inconsistent with modern international practice and this court should not follow it and the other cases that have followed it, such as *Duff Development Co. Ltd v Government of Kelantan* [1924] AC 797 and *Kahan v Pakistan Federation* [1951] 2 KB 1003. In the latter case, Pakistan had agreed "to submit for the purposes of this agreement to the jurisdiction of the English courts" in connection of a sale of tanks to it, but the

English Court of Appeal held that this contractual undertaking was not binding on the sovereign, since it was one made *inter partes*, and was not an undertaking given to the court at the time when the other party asked the court to exercise jurisdiction over the sovereign. This holding was reversed in England by section 2(2) of the State Immunity Act, 1978 which provides that a state can submit to the jurisdiction of the English courts "by a prior written agreement". That was a welcome modernization of the law which this Court is entitled to follow by analogy since it is not bound to follow *Kahan v Pakistan Federation.* Even before the 1978 Act, that case was probably no longer good law even in England. In *NML Capital Ltd. v Republic of Argentina (supra)* Lord Collins of Mapesbury made the following illuminating remarks (at p. 541):

> "125 As Dr. F.A. Mann said, "the proposition that a waiver or submission had to be declared in the face of the court was a peculiar (and unjustifiable) rule of English law": (1991) 107 LQR 362, 364. In a classic article (Cohn, *Waiver of Immunity* (1958) 34 BYIL 260) Dr. E.J. Cohn showed that from the 19th century civil law countries had accepted that sovereign immunity could be waived by a contractual provision, and that the speeches in *Duff Development* on the point were obiter (and did not constitute a majority) and that both *Duff Development* and *Kahan v Pakistan Federation* had overlooked the fact that submission in the face of the court was not the only form of valid submission since the introduction in 1920 in RSC Ord. 11, r2A (reversing the effect of *British Wagon Co. Ltd. v Gray* [1896] 1 QB 35) of a rule that the English court would have jurisdiction to entertain an action where there was a contractual submission. In particular, in *Duff Development* Lord Sumner had overlooked the fact that *British Wagon Co v Gray* was no longer good law."

The Applicant was thus in error in insisting that this Court should apply the law as laid down in *Mighell v Sultan of Johore (supra)*. However, what is persuasive in the Supplementary Statement of the Applicant is the plea to look to the Ghanaian common law for a solution to the central issue of this case. The analysis set out above endeavours to do this. That analysis is sufficient to dispose of this case.

The 1st Interested Party proffers a contrary analysis based on an erroneous assumption made in its Supplementary Statement of Case filed on 16th May 2013 that the common law of Ghana does not contain any restriction on the waiver of state immunity. Here is the relevant passage from that Statement:

> "Also at page 12 of the Applicant's Supplementary Statement of Case, the Applicant argues that because New York law governs the bonds, and US Foreign Immunities Act excludes warships etc. from waiver, the court in Ghana, applying the proper law of the bonds, has to give effect to that restriction on waivability. My Lords, with utmost respect to the Applicant, this reasoning is fallacious. It is well established at Common Law, that questions of immunity are procedural, not substantive, and so are governed by the law of the forum, in this case Ghana. Ghana law does not *have any such restriction unless it is part of the Common Law, which it is not.* (Emphasis supplied). The learned trial judge was therefore right to hold that he need not take into account United States substantive law (contrary to the Applicant's arguments on page 13 of the Applicant's Supplementary Statement of Case.)"

It is surprising that the 1st Interested Party was so categorical about the content of the common law of Ghana, which we should remember is judge-made law, when he had no Ghanaian decided cases to rely on. It is, of course, right that the law we should be applying to the issue of whether to give effect to the waiver of the immunity is Ghanaian law and not New York law. However, as the highest court in the land, we have clarified the content of the common law of Ghana along the lines set out above, which is contrary to the assumption made by the 1st Interested Party.

In sum, what has been said is that although the 2nd Interested Party waived its immunity through the contractual waiver clause, that waiver of immunity is not binding on the Ghanaian courts, in so far as it relates to a military asset. Customary international law permits sovereign States to decide whether to accord a wider immunity in their municipal law than required under international law. There is thus no obligation in municipal law to recognize waivers of

sovereign State immunity in all circumstances, except those required by public international law.

The learned trial judge, who was not bound by any previous decided Ghanaian case on this issue, made a fundamentally and patently wrong decision by holding that the 2nd Interested Party's contractual waiver of immunity, in so far as it related to the seizure of a military asset, should be given effect to. 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 (supra)* 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 issue in this case, we are saying that this waiver of immunity has no effect in relation to military assets in Ghana, for the public policy reasons canvassed above.

With this clarification of the law by this Court, there should be no need for any order of prohibition to be issued. All lower courts are obliged to follow and apply the law as clarified in this case. There should accordingly be no further seizures of military assets of sovereign states by Ghanaian courts in execution of foreign judgments, even if the sovereign concerned has waived its immunity.

Conclusion

In the result, the application for *certiorari* is granted, but that for prohibition denied.

Postscript

Counsel for both the Applicant and the 1st Respondent are to be congratulated for their industry in making well-researched submissions to the court which facilitated the court's determination of the issues before it.

(SGD) **DR. S. K. DATE-BAH**

JUSTICE OF THE SUPREME COURT.

GBADEGBE JSC:

My lords, as the judgment just delivered by my worthy brother Dr. Date-Bah JSC (presiding) is unanimous, the opinion that I am about to read relates only to a point of procedure, which in my thinking is of some importance to civil procedural law. It is an extremely short one that is intended for future guidance only. We have recently observed that several applications for judicial review in the nature of certiorari that are filed before us relate not only to a single order, ruling or judgment but to multiple such orders, rulings or judgments. For the sake of convenience, the word order shall hereinafter in this opinion be employed to refer to order, ruling or judgment. Indeed, by the very formulation of rule 61 (1) (b) of CI 16, the Supreme Court Rules, the applications to be good must relate to an order and not to orders. To suggest to the contrary would mean that such processes bear the description applications and not application. The reason for the rule is that every order, which falls from the lips of a judge is either appealable or might be the subject matter of some other judicial correction such as certiorari or prohibition. Although in practice, applications for certiorari might be coupled with other orders- injunction and or prohibition for example, that part of the application which seeks judicial review in the nature of certiorari is limited to a single order of the court whose order is the subject matter of the application for judicial review.

In my opinion as every such order is a competent ground for an application for certiorari better practice requires that each such order, from which an appeal might be filed creates a separate and distinct right in a party to apply. I am of the view that for this purpose the requirements of practice and procedure by which appeals are filed from single orders only, applies with equal force to applications for certiorari. It is observed that although in appropriate situations several applications pending before a court may be consolidated by the court on its own or upon the application of a party to the proceedings, the right to bring an application for certiorari in respect of more than a single order has never been left to the parties but appears from the practice of the court to be consequent upon the exercise of judicial discretion that is the sole preserve of a single judge or a panel of judges. When one goes through reported cases in this jurisdiction and elsewhere they turn on an order made by a court and or other tribunal in the course of adjudication. While a single order might suffer from several grounds that render it amenable to certiorari, applications for certiorari are made in respect of an order and not orders.

In the instant case, the application relates to two separate orders made on 2 October 2012 and 11 October 2012. I think that each of these orders ought to have been the subject matter of a separate application as different considerations flow from their making. It is of no moment in such matters that they were delivered on the same date by the same judge and are all brought within the time frame provided by law for the initiation of such applications. In permitting the application whose ruling has just been read to proceed in respect of the two different orders, we took into account the urgency of the matters they related to and the need in that event to expedite justice. It is

hoped that non-insistence on the strict requirement of the rules in this matter, be not construed as a relaxation of the settled practice of the court in such matters.

(SGD) **N. S. GBADEGBE**

JUSTICE OF THE SUPREME COURT.

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT.

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT.

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ACE AKOMAH WITH HIM KOW ESSUMAN FOR THE 1ST INTERESTED PARTY.

KIZITO BEYUO FOR THE 2ND INTERESTED PARTY.