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International Decisions: Territorial and Maritime Dispute (Nicaragua v. Colombia)

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INTERNATIONAL DECISIONS

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United Nations Convention on the Law of the Sea—territorial dispute—maritime boundary delimitation—methodologies—exclusive economic zone—continental shelf beyond 200 nautical miles

TERRITORIAL AND MARITIME DISPUTE (Nicaragua v. Colombia). *At* http://www.icj-cij.org. International Court of Justice, November 19, 2012.

On November 19, 2012, the International Court of Justice rendered its judgment in a dispute involving territorial and maritime claims raised by Nicaragua against Colombia in the Caribbean Sea.[1] The Court considered Nicaragua's requests for a declaration of Nicaraguan sovereignty over seven disputed maritime features and delimitation of a single maritime boundary between the continental shelves and exclusive economic zones appertaining to Nicaragua and Colombia. The Court awarded all disputed territory to Colombia and delimited the maritime boundary between the states' continental shelves and exclusive economic zones by using a novel mix of weighted base points, geodetic lines, parallels of latitude, and enclaving.

Nicaragua lies in the southwestern portion of the Caribbean Sea, bordering Honduras to the north and Costa Rica to the south, while Colombia's mainland is located in the south of the Caribbean Sea (see map, Southwestern Caribbean Sea, p. 397). San Andrés, Providencia, and Santa Catalina Islands are situated about 100 nautical miles from the Nicaraguan coast and about 380 nautical miles from Colombia's mainland coast. Various reefs, cays, atolls, and banks lie in the western Caribbean, within 200 nautical miles of Nicaragua's coast, but beyond 200 nautical miles of Colombia's mainland coast.

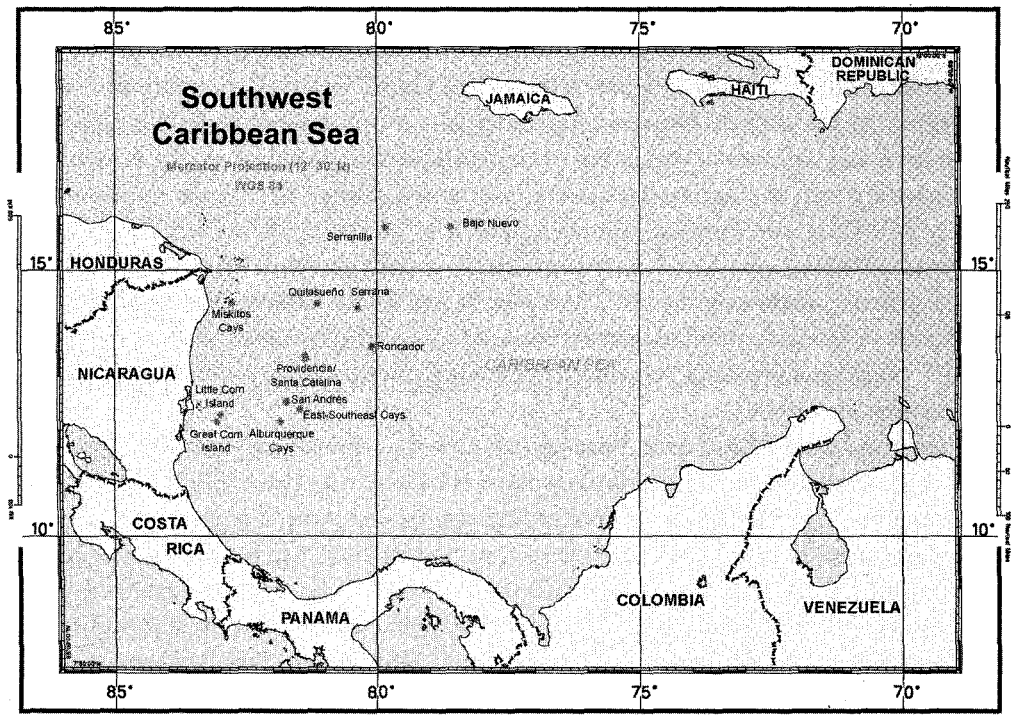
Nicaragua filed its application with the Court on December 6, 2001. In addition to the disputed claims examined by the Court in the judgment on the merits, Nicaragua claimed sovereignty over San Andrés, Santa Catalina, and Providencia. It sought to base jurisdiction on the Pact of Bogotá,[2] as well as the parties' declarations under Article 36 of the Statute of the Permanent Court of International Justice.[3] Colombia raised preliminary objections to jurisdiction on July 21, 2003. In a judgment of December 13, 2007, the Court concurred with Colombia that a 1928 treaty and 1930 protocol between the parties had "settled" any dispute over San Andrés, Providencia, and Catalina within the meaning of Article XXXI of the Pact of Bogotá.[4] Consequently, the issue of title to these three islands lay outside its jurisdiction. The

[1] Territorial and Maritime Dispute (Nicar. v. Colom.) (Int'l Ct. Justice Nov. 19, 2012) [hereinafter Judgment]. Decisions of the Court cited herein are available at its website, http://www.icj-cij.org.

[2] American Treaty on Pacific Settlement, Apr. 30, 1948, OASTS Nos. 17 & 61, 30 UNTS 55 [hereinafter Pact of Bogotá].

[3] Statute of the International Court of Justice Art. 36(5); Statute of the Permanent Court of International Justice Art. 36.

[4] Territorial and Maritime Dispute (Nicar. v. Colom.), Preliminary Objections, 2007 ICJ REP. 832 (Dec. 13).



Editor's note: Derived from the judgment of the International Court of Justice of November 19, 2012, in *Territorial and Maritime Dispute* (Nicar. v. Colom.), Sketch-map No. 1, at 16.

Court upheld its jurisdiction concerning title to the seven remaining maritime features and the maritime delimitation, and in separate judgments rendered on May 4, 2011, rejected requests to intervene on the merits by Honduras and Costa Rica.[5]

The Court began its judgment of November 19, 2012, by addressing sovereignty over the maritime features (para. 25). The parties agreed that six of the seven features were islands, remaining above water at high tide, and were therefore capable of appropriation consistent with the Court's practice. They presented conflicting evidence, however, regarding the status of Quitasueño. The Court found that only one of its features, QS 32, was an island despite its small size and coral debris composition, relying on *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*[6] and the absence of any minimum size requirement for islands (para. 37).

The Court based its award of title over all disputed territory to Colombia on *effectivités* after deeming historical evidence regarding interpretation of the 1928 treaty and 1930 protocol concerning the geographic scope of the "San Andrés Archipelago" inconclusive (paras. 66,

[5] Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene (Int'l Ct. Justice May 4, 2011); Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene (Int'l Ct. Justice May 4, 2011).

[6] Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 2001 ICJ REP. 40, 99, para. 195 (Mar. 16) [hereinafter Qatar v. Bahrain].

103). Further, neither Colombia nor Nicaragua had established title to the disputed features by virtue of *uti possidetis juris* at the time of independence from Spain. After tracing the critical date to a 1969 exchange of notes between the parties (para. 71), the Court determined that Colombia had acted *à titre de souverain* concerning all of the disputed features through public administration and legislation, regulation of economic activities, public works, law enforcement measures, naval visits and rescue operations, and recognition of consular representation (paras. 82–84). The Court found additional support for Colombia's claims in Nicaragua's failure to protest a 1900 arbitral award involving Colombia and Costa Rica (para. 88),[7] maps, and third-state practice, including the 1972 Vázquez-Saccio Treaty between Colombia and the United States, in which the United States renounced sovereignty over two of the disputed cays (para. 95).[8] Nicaragua provided no evidence of having acted *à titre de souverain* over the disputed maritime features.

In its reply and final submissions, Nicaragua for the first time claimed an extended continental shelf generated by the natural prolongation of its landmass beyond 200 nautical miles from its baselines, creating an area of overlapping entitlements with Colombia's continental shelf. While acknowledging Nicaragua's claim as new, the Court held it admissible because it did not transform the subject matter of the dispute.[9] Rather, it changed the legal basis for the delimitation claim from distance to natural prolongation and modified the solution sought from a single maritime boundary to a continental shelf delimitation. But the Court refrained from adjudicating the extended continental shelf claim, finding that Nicaragua had not established that its continental margin extended far enough to overlap with Colombia's 200-nautical-mile continental shelf entitlement (para. 129). Moreover, Nicaragua had not provided any examples of courts tasked with determining the outer limits of an extended continental shelf (para. 125). The Court distinguished the recent decision of the International Tribunal for the Law of the Sea in *Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* because of the unique circumstances of the Bay of Bengal (*id.*).[10] Further, the Court stated that parties to the United Nations Convention on the Law of the Sea (UNCLOS)[11] must submit extended continental shelf claims to the Commission on the Limits of the Continental Shelf (Commission), in accordance with Article 76, and Colombia's nonparty status did not relieve Nicaragua of this obligation (para. 126). Finally, the Court noted Nicaragua's admission that the "Preliminary Information" it had submitted to the Commission did not meet Article 76's requirements (para. 127).

Both the Court and the parties concurred that the law applicable to the delimitation included UNCLOS Articles 74 (exclusive economic zone), 83 (continental shelf delimitation), and 121 (legal regime of islands) (para. 138). The Court had previously recognized the first two

[7] Boundary Dispute (Colom./Costa Rica), 28 R.I.A.A. 341, 345 (1900) (in French).

[8] Treaty Concerning the Status of Quita Sueño, Roncador, and Serrana [Vázquez-Saccio Treaty], U.S.-Colom., Art. 1, Sept. 8, 1972, 33 UST 1405, 1307 UNTS 379 (entered into force Sept. 17, 1981).

[9] The Court relied on its previous judgments in *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), 2007 ICJ REP. 661, 695 (Oct. 8) [hereinafter Nicaragua v. Honduras]; and *Ahmadou Sadio Diallo* (Guinea v. Dem. Rep. Congo), 2010 ICJ REP. 639, 657, para. 41 (Nov. 30).

[10] Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl. v. Myan.), Case No. 16 (ITLOS Mar. 14, 2012), *at* http://www.itlos.org (reported by D. H. Anderson at 106 AJIL 817 (2012)).

[11] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 3, *available at* http://www.un.org/depts/los/ [hereinafter UNCLOS].

paragraphs of Article 121 as customary international law.[12] In this judgment, the Court added paragraph 3, which denies an exclusive economic zone and continental shelf to rocks "which cannot sustain human habitation or economic life,"[13] leaving them only a territorial sea (para. 139). Also, it emphasized the "indivisible" nature of the legal regime of islands established in Article 121 (*id.*).

The Court determined that Nicaragua's relevant coast was the mainland coast projecting into the area of overlapping entitlements, and it measured the 200-nautical-mile continental shelf and exclusive economic zone from the islands fringing the Nicaraguan coast (para. 145). Colombia's relevant coasts were limited to the islands over which Colombia has sovereignty since no overlapping entitlement exists between the mainland coasts of Colombia and Nicaragua projected out to a distance of 200 nautical miles (para. 151). The entire coastlines of the Colombian islands were deemed relevant because the area of overlapping entitlements extends to the east of the islands. In defining the relevant area, the Court took pains to avoid the numerous other maritime boundaries in the Caribbean Sea and emphasized that its decision in this case would not prejudice the position of any third states. In measuring the relevant coastal length, the Court excluded the Nicaraguan islands' east-facing coasts as being parallel to the mainland, and some Colombian maritime features as being too small to affect Colombia's coastal length. The final ratio between the relevant coasts was 1:8.2 in favor of Nicaragua (para. 153).

The Court agreed with the parties that San Andrés, Providencia, and Santa Catalina are entitled to a territorial sea, continental shelf, and exclusive economic zone. It rejected Nicaragua's argument for a 3-nautical-mile territorial sea for four additional maritime features, Roncador, Serrana, the Alburquerque Cays, and the East-Southeast Cays, emphasizing that it has never restricted a state's right to establish a 12-nautical-mile territorial sea because of overlap with another state's continental shelf and exclusive economic zone (paras. 178–80). The Court declined to determine whether any of these features fall within UNCLOS Article 121(3), and are therefore not entitled to a continental shelf and exclusive economic zone, because any such entitlement within the relevant area would overlap entirely with the entitlements of San Andrés, Providencia, and Santa Catalina to a continental shelf and exclusive economic zone (para. 180). In addition, Colombia could use low-tide elevations within 12 nautical miles of QS 32 for the purpose of measuring the breadth of Quitasueño's territorial sea, in accordance with Article 13, which the Court had deemed part of customary international law in *Qatar v. Bahrain* (paras. 182–83).

The Court reiterated its commitment to its long-established three-step methodology for maritime delimitation: (1) construction of a provisional equidistance/median line, (2) consideration of relevant circumstances requiring adjustment or shifting of the line, and (3) determination of whether the parties' "respective shares of the relevant area are markedly disproportionate to their respective relevant coasts" (para. 193). It rejected Nicaragua's arguments for a different methodology because of the unique geographical circumstances in this case, but it noted that the methodology could be used in conjunction with the enclaving of islands (paras. 197–99).

To construct the provisional equidistance line, the Court selected base points for Nicaragua because Nicaragua had not indicated any base points in its presentation (para. 200). Some, but

[12] Qatar v. Bahrain, 2001 ICJ REP. at 91, para. 167; 97, para. 185; 99, para. 195.

[13] UNCLOS, *supra* note 11, Art. 121(3).

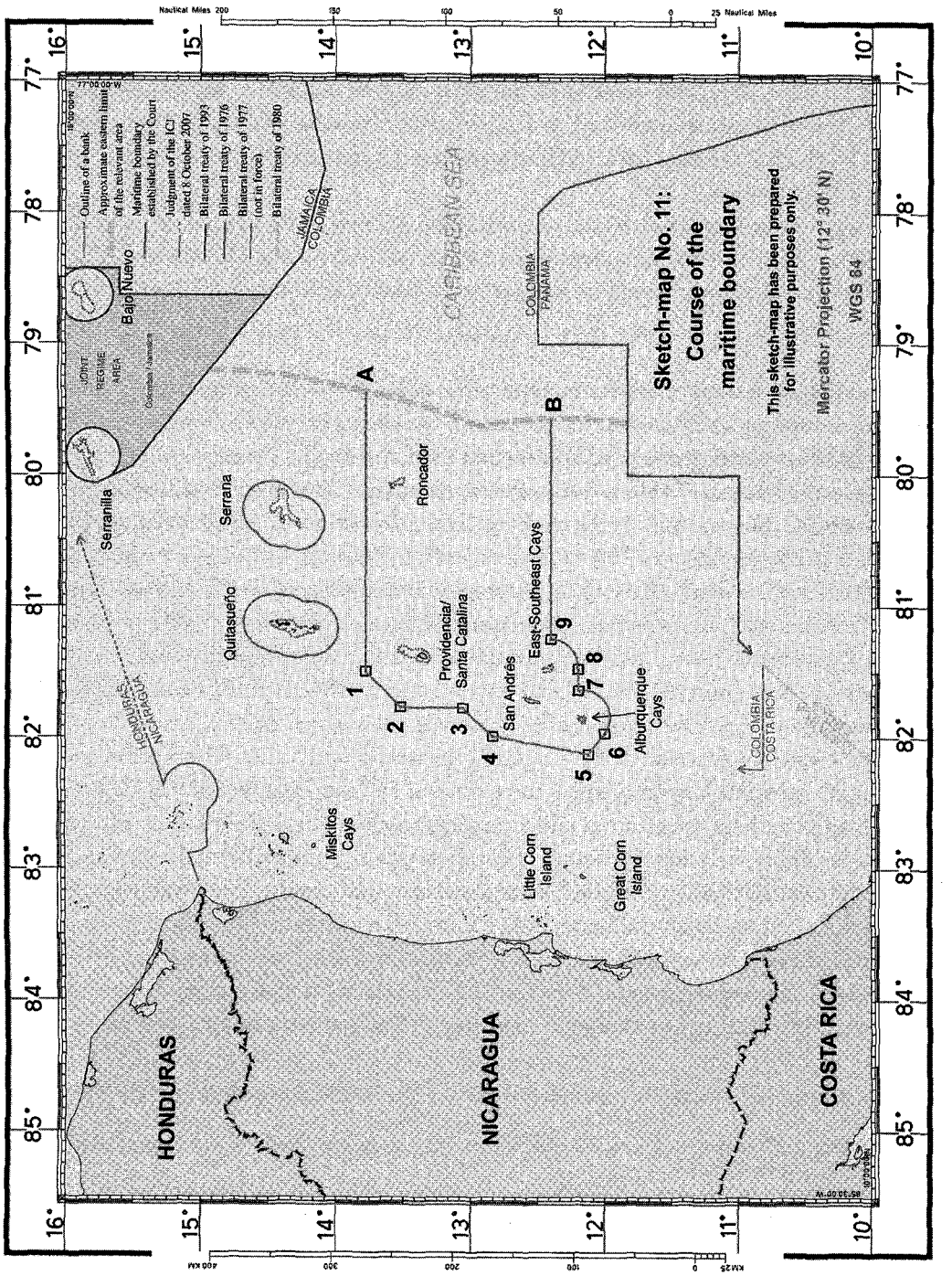
not all of the base points suggested by Colombia were used. For example, the Court disregarded a base point placed on QS 32, stating that it was minuscule and would unduly distort the relevant geography (para. 202).

According to the Court, two relevant circumstances merited shifting the provisional equidistance line, namely, the significant disparity in length between the relevant coasts and the cutting off of maritime areas into which Nicaragua's coastline projects by small island territories located far apart from each other (paras. 211, 215). The Court rejected arguments that Colombia's conduct east of the 82nd meridian, security and law enforcement considerations, and equitable access to natural resources constituted relevant circumstances (paras. 220, 222). Nonetheless, it noted that security concerns may be relevant if a maritime delimitation is effected particularly close to a state's coast and that it would "bear this consideration in mind" in deciding what adjustments to make to the provisional median line or how to shift it (para. 222). Colombia's agreements with third states were deemed irrelevant because they cannot afford Colombia rights in a dispute with Nicaragua, an independent third party (para. 227). Similarly, the Court emphasized that its decision in this dispute is without prejudice to third states' claims or claims by one of the parties against a third state (para. 228).

The Court found that the disparity in coastal lengths merited a meaningful shift of the equidistance line eastward (para. 233). The methodology of weighted base points adopted by the Court afforded Nicaraguan base points three times as much weight as those of Colombia in constructing the line. Consequently, each point on the line is three times as far away from the Nicaraguan base points as from the Colombian base points (para. 234). The Court simplified the weighted line by connecting several turning points with geodetic lines (para. 235). It chose not to extend the line north of the northernmost point or south of the southernmost point to avoid giving Colombia a larger share of the relevant area in view of the much greater length of Nicaragua's relevant coast (para. 236). Instead, the Court continued the boundary line along parallels of latitude to 200 nautical miles from Nicaragua's baselines to give proper weight to the relevant circumstances previously identified (*id.*).

From the northernmost point of the 12-nautical-mile area around Roncador, the delimitation line follows a parallel of latitude out to 200 nautical miles from Nicaragua's baselines (para. 237) (see the Court's Sketch-map No. 11, p. 401). Since Nicaragua has not yet established baselines from which its territorial sea is measured, the Court noted that the location of the end point is approximate (*id.*). From the southernmost point of the adjusted line, the delimitation line travels southeast until it reaches the 12-nautical-mile envelope of arcs of the South Cay of Alburquerque Cays. A parallel connects this area to the 12-nautical-mile envelope of arcs of the East-Southeast Cays at the latter's southernmost point. The delimitation line follows the envelope of arcs until the East-Southeast Cays' easternmost point and then runs out to 200 nautical miles from Nicaragua's baselines along a parallel of latitude.

The Court turned, next, to Quitasueño and Serrana, Colombian features on the Nicaraguan side of the delimitation line. It chose not to extend the boundary line to these islands because of their size, remoteness, and distance from the larger Colombian islands, finding that the "use of enclaves" would yield the "most equitable solution" (para. 238). After determining that Quitasueño was a rock within the meaning of Article 121(3), the Court ruled that it was entitled only to a 12-nautical-mile territorial sea (*id.*). By virtue of its small size and remoteness, Serrana was granted only a 12-mile territorial sea (*id.*).


Sketch-map No. 11:
Course of the maritime boundary
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
Nautical Miles
Outline of a bank
Approximate eastern limit of the relevant area
Judgment of the ICJ dated 8 October 2007
Maritime boundary established by the Court
Bilateral treaty of 1993
Bilateral treaty of 1976
Bilateral treaty of 1977 (not in force)
Bilateral treaty of 1980
JOINT REGIME AREA
Bajo Nuevo
Serranilla
Serrana
Quitasueño
Roncador
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Albuquerque Cays
Miskitos Cays
Little Corn Island
Great Corn Island
HONDURAS
NICARAGUA
COSTA RICA
COLOMBIA
PANAMA
JAMAICA
CARIBBEAN SEA
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The Court checked the resulting delimitation line for significant disproportionality, which could render it impermissibly inequitable (para. 239). Although the delimitation generated a ratio of 1:3.44 in Nicaragua's favor, while the ratio of relevant coasts was 1:8.2 in Nicaragua's favor (para. 243), the Court considered the delimitation equitable in light of previous judgments.[14] Given the area attributed to Colombia by the new delimitation line, the Court rejected Nicaragua's request for a declaration concerning its rights to natural resources east of the 82nd meridian (para. 250).

Although Judge Owada dissented as to the admissibility of Nicaragua's continental shelf claim, the remainder of the judgment was unanimous on all points. On November 27, 2012, eight days after the Court issued its judgment, Colombia denounced the Pact of Bogotá.[15]

* * * *

The judgment is noteworthy for its application of innovative and numerous techniques for maritime boundary delimitation, interpretation of states' obligations pursuant to UNCLOS Article 76(8) concerning extended continental shelf claims, and potential to influence other delimitations in the area. The Court constructed an equiratio line using weighted base points,[16] utilized geodetic lines to simplify the equiratio line, and employed parallels of latitude from the end points of the boundary to 200 nautical miles from Nicaragua's base points and enclaving. When faced with similarly challenging geographic circumstances, the Court has adopted varied methods and techniques such as applying angle bisectors, granting half effect to islands, and shifting equidistance lines,[17] but this appears to be its first use of equiratio lines. A maritime boundary line is an equiratio line "when every point of it will be defined by a constant ratio of its distances from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured."[18] By weighting the base points 1:3 in Nicaragua's favor, each point on the maritime boundary line is three times as far from Nicaraguan base points as from Colombian ones. The use of novel and varied approaches by a unanimous court may signal renewed flexibility for achieving equity in complex maritime boundary delimitations. Nonetheless, the Court's creativity resulted in a somewhat complicated line between Nicaragua and Colombia[19] and may be unsettling to states comfortable with more conventional approaches.

The judgment is remarkable, too, for its discussion of states' obligations under UNCLOS Article 76(8), concerning extended continental shelf claims. The Court ultimately refrained from delimiting Nicaragua's extended continental shelf claim on burden-of-proof grounds;

[14] *See, e.g.*, Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 ICJ REP. 38 (June 14).

[15] OAS Dep't of International Law, Pact of Bogotá: Signatories and Ratifications, *at* http://www.oas.org/juridico/english/sigs/a-42.html.

[16] Shortly after UNCLOS was concluded, Wijnand Langeraar proposed equiratio lines as an alternative when equidistance lines engender inequitable results. Wijnand Langeraar, *Maritime Delimitation: The Equiratio Method—A New Approach*, 10 MARINE POL'Y 3 (1986), *available at* http://www.csc.noaa.gov/mbwg/_pdf/biblio/Langeraar.pdf.

[17] *See, e.g.*, Nicaragua v. Honduras, 2007 ICJ REP. at 695 (angle bisectors); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246 (Oct. 12) (half effect to islands); Continental Shelf (Libya/Malta), 1985 ICJ REP. 13 (June 3) (shifting equidistance lines).

[18] Langeraar, *supra* note 16, at 7.

[19] Decl. Cot, J. *ad hoc*, para. 14.

Nicaragua had failed to establish the existence of overlapping continental shelves generated by Colombia and its own mainland coasts. Yet the Court stressed that Nicaragua had also failed to comply with its obligation to submit adequate information to the Commission on the Limits of the Continental Shelf pursuant to UNCLOS Article 76(8) and that Colombia's nonparty status did not alter Nicaragua's obligation. Several judges expressed concerns about the Court's reasoning and its implications in separate opinions.[20] First, treaty provisions generally do not give rise to rights and obligations between a state party and a nonstate party.[21] The Court did not engage in any analysis to demonstrate that this procedural requirement reflects a customary international law obligation, relying instead on the object and purpose of UNCLOS derived from its preamble (para. 126).[22] Second, the discussion of Article 76(8) raises questions about whether submission of extended continental shelf claims to the Commission is a prerequisite to delimitation by a court.[23] Several of the Court's judges, in separate opinions, sought to dispel this notion.[24] For example, Judge Donoghue emphasized that it may be appropriate to delimit a continental shelf area beyond 200 nautical miles from a state's coast before the outer limits of an extended continental shelf are identified, as in the recent *Bay of Bengal* case.[25]

The judgment's potential impact on third states in the Caribbean Sea region remains to be seen. While the Court repeatedly emphasized that the judgment would not prejudice third states with maritime boundary claims in the area, four judges disagreed,[26] asserting that it could affect interpretation of the Court's judgment in *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*[27] and bilateral agreements between states in the Caribbean Sea.[28] Time will tell whether new claims or requests for interpretation of previous judgments arise as a result of this case.

Colombia's denunciation of the Pact of Bogotá, named after its capital city, raises concerns for future pacific resolution of disputes in the region. Despite the unanimous judgment, Colombian president Juan Manuel Santos declared, "Never again should we have to face what happened to us on November 19th."[29] Colombia is the second state to withdraw from the pact since its entry into force in 1948.[30]

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[20] *See* sep. op. Donoghue, J., paras. 26–30; decl. Cot, J. *ad hoc*, para. 19. *See generally* decl. Mensah, J. *ad hoc*.

[21] *See* Vienna Convention on the Law of Treaties, Arts. 34–38, *opened for signature* May 23, 1969, 1155 UNTS 331, 8 ILM 679 (1969).

[22] Decl. Cot, J. *ad hoc*, para. 18; *see also* decl. Mensah, J. *ad hoc*, paras. 2–3.

[23] Decl. Mensah, J. *ad hoc*, para. 12; sep. op. Donoghue, J., para. 2.

[24] Decl. Mensah, J. *ad hoc*, para. 12; sep. op. Donoghue, J., paras. 2, 19.

[25] Sep. op. Donoghue, J., para. 19.

[26] *Id.*, para. 30; decl. Cot, J. *ad hoc*, para. 9; decl. Mensah, J. *ad hoc*, para. 13; decl. Xue, J., paras. 11–13.

[27] Sep. op. Donoghue, J., para. 35.

[28] Decl. Cot, J. *ad hoc*, paras. 4–7, 9.

[29] *An Islet for a Sea*, ECONOMIST, Dec. 8, 2012, *available at* http://www.economist.com/news/americas/21567986-colombia-smarts-loss-territorial-waters-islet-sea.

[30] El Salvador notified denunciation of the treaty on November 24, 1973. OAS Dep't of International Law, *supra* note 15.

Convention on the Law of the Sea—warship immunity—scope of applicability of Convention—provisional measures—definition of warship—arbitral jurisdiction

THE "ARA LIBERTAD" (Argentina v. Ghana). ITLOS Case No. 20. Provisional Measures. *At* http://www.itlos.org.
International Tribunal for the Law of the Sea, December 15, 2012.

On December 15, 2012, the International Tribunal for the Law of the Sea (Tribunal or ITLOS) ordered Ghana to resupply and, upon payment of security, to refuel and release the Argentine naval frigate *ARA Libertad*, which was being held by authorities in the Ghanaian port of Tema.[1] The Tribunal ordered release of the vessel in response to Argentina's request for provisional measures under Article 290(5) of the United Nations Convention on the Law of the Sea (Convention or UNCLOS).[2] The Tribunal accepted Argentina's prima facie showing that the *Libertad*, a tall, three-masted sailing ship commissioned in the Argentine Navy being used as a training vessel for officer cadets, qualifies as a "warship" under Article 29 of UNCLOS, and was therefore entitled to immunity and release to avoid irreparable harm to Argentina pending the final outcome of the case (paras. 93–95).

The voyage of the *Libertad* to the west coast of Africa had been planned at a meeting between Argentina and the countries of sub-Saharan Africa in Buenos Aires in April 2011. Diplomats from Ghana were present at the meeting and agreed that the ship would visit that country as part of a thirteen-nation goodwill cruise and official engagement visit to West Africa. The vessel was on its forty-third training mission when it arrived in Tema, near Accra, on October 1, 2012. It carried a crew of 220, including 69 members of the Argentine Navy and 110 naval officer cadets.

The day after the *Libertad* arrived in port, a U.S. judgment creditor, NML Capital, filed a Statement of Claim before the High Court of Ghana (Commercial Division) of the Superior Courts of Judicature[3] seeking an order of *in rem* attachment of the *Libertad* to satisfy a judgment against Argentina that had earlier been granted in the United States. The judgment was awarded in favor of NML Capital by the United States District Court for the Southern District of New York in a case involving Argentina's default in payment obligations under sovereign bonds.[4]

NML Capital held $370 million worth of distressed debt obligations arising from $95 billion in bonds issued by the Argentine government in 2001. Argentina's subsequent default on those bonds led to dozens of complex litigation cases in federal court by the Cayman Islands–based fund NML Capital, which is owned by the investment firm Elliott Management Corp. and other creditors. The bonds in question contained an explicit waiver of sovereign immunity from suit by Argentina:

[1] "ARA Libertad" (Arg. v. Ghana), Case. No. 20, Request for the Prescription of Provisional Measures, para. 108 (ITLOS Dec. 15, 2012) [hereinafter Libertad]. The order and other documents of the International Tribunal for the Law of the Sea cited herein are available online at its website, http://www.itlos.org.

[2] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, *available at* http://www.un.org/depts/los/ [hereinafter UNCLOS].

[3] The Superior Courts of Judicature of Ghana are composed of the Supreme Court, the Court of Appeal, and the High Court.

[4] NML Capital, Ltd. v. Republic of Arg., 2009 U.S. Dist. LEXIS 19046 (S.D.N.Y. Mar. 3, 2009), *aff'd*, 699 F.3d 246 (2d Cir. 2012).

> The [Argentine] 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 . . . provided further that such agreement and waiver, in so far as it relates to any jurisdiction . . . is given solely for the purpose of enabling the fiscal agent or a holder of securities of this series to enforce or execute a related judgment.[5]

On the basis of that waiver, the High Court granted NML Capital's request for an order attaching the vessel.

The order ignited a two-month standoff between port authorities and the Argentine government. The ship had originally been scheduled to leave Tema on October 4, 2012. At 8:00 p.m. on October 2, however, an official of the Judicial Service of the Superior Courts of Judicature, on behalf of the High Court, arrived at the *Libertad* to deliver the court's order that the ship be held in port. In the ensuing days, Susana Pataro, Argentina's ambassador to Ghana, and Ebenezer Appreku, director of the Legal and Consular Bureau of Ghana's Ministry of Foreign Affairs and Regional Integration, both advised the High Court that the vessel was immune from the court's jurisdiction and inviolable as a matter of international law. A high-level diplomatic delegation from Argentina visited Accra from October 16 to 19, to meet with the minister of defense, the minister of the interior, and advisers to the president of Ghana to try to find a solution to the impasse. The interventions failed to resolve the dispute.

On November 5, 2012, High Court judge Richard Adjei-Frimpong granted Tema port officials authority to move the ship from its original position to a new anchorage because of congestion at the pier. Two days later, in an effort to move the ship to a different berth, port officials attempted to board the ship forcibly but were prevented from doing so by armed Argentine watchstanders. By then, Argentina had removed everyone from the ship except a skeleton crew of forty-five naval personnel. When the *Libertad* refused to comply with the order, port authorities cut off water and electricity to the ship, which forced the vessel to resort to onboard power. Without fresh water and ample fuel to power the engines, conditions on the ship deteriorated.

Argentina then sought arbitration under UNCLOS to resolve the crisis. Both Argentina and Ghana are parties to the Convention. Compulsory jurisdiction under Article 287 is limited to disputes regarding "the interpretation and application" of the treaty, and the article offers various choices for the proceedings, including ITLOS, the International Court of Justice, and two types of arbitral tribunals (arbitration or special arbitration). On November 14, Argentina submitted a request to ITLOS for the prescription of provisional measures in accordance with UNCLOS Article 290(5)[6] pending constitution of the arbitral tribunal it was requesting under Annex VII to the Convention. Argentina sought the following provisional measure: "that Ghana unconditionally enables the Argentine warship Frigate ARA Libertad to leave the Tema port and the jurisdictional waters of Ghana, and be resupplied to that end."[7]

The gravamen of Argentina's complaint was that Ghana had violated its international obligation to respect the immunity of the ship from jurisdiction and execution, which is enjoyed

[5] Libertad, Written Statement of the Republic of Ghana, app. 3, at 61–62 (Nov. 28, 2012).

[6] Libertad, Republic of Argentina Request for the Prescription of Provisional Measures, para. 1 (Nov. 14, 2012) [hereinafter Argentina Request].

[7] *Id.*, para. 28.

by warships pursuant to Article 32 of UNCLOS, Article 3 of the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Vessels, and customary international law.[8] Article 32 of UNCLOS is derived from Article 22 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.[9]

The ITLOS hearing opened on November 29. On the first morning, the government of Argentina presented the rationale and evidence for its request for provisional measures so that the *Libertad* could leave Tema port and Ghana's jurisdictional waters and be resupplied to that end.[10] Argentina claimed that its rights were suffering "irreparable damage," with dire consequences to the sovereignty and dignity of the state.[11] Under Article 290(5), provisional measures also require an element of urgency. In the *MOX Plant* case, for example, ITLOS stated that Article 290(5) may be applied pending the constitution of an Annex VII arbitral tribunal if the tribunal considers that "the urgency of the situation so requires in the sense that action prejudicial to the rights of either party . . . is likely to be taken before constitution of the Annex VII arbitral tribunal."[12] The Annex VII tribunal upheld this formula two years later.[13]

Ghana submitted that the request for provisional measures should be rejected and that Argentina be required to pay all costs incurred in connection with the case.

Even though the Tribunal found prima facie jurisdiction, it was not required to prescribe provisional measures. ITLOS balanced the risk of inaction—injury to state sovereignty and the national dignity of Argentina—against the risk borne by Ghana that releasing the vessel would make enforcement proceedings impossible. As a provisional order, the ITLOS decision postponed judgment on the merits of Argentina's claim and considered only whether the request for relief constituted a prima facie basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded (para. 60). Under UNCLOS Article 290(1) and (5), such a prima facie finding of jurisdiction is required to hear cases of provisional measures, and ITLOS applied the same standard as the one articulated in the International Court of Justice's *Iceland Fisheries* case for finding a colorable basis for jurisdiction.[14]

Argentina argued that the *Libertad* met the definition of a warship in UNCLOS Article 29[15] and accordingly was immune from the jurisdiction of any state under UNCLOS Article 32. Article 32 states that "nothing in this Convention affects the immunities of warships." Ghana countered that Article 32 applied only to the territorial sea, whereas the ship lay in Ghana's

[8] *Id.*, para. 31. *See* International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Vessels, Art. 3, Apr. 10, 1926, 176 LNTS 199, *reprinted in* 26 AJIL Supp. 527, 566 (1932) (in French); *see also* Convention Relating to the Regulation of Aerial Navigation, Art. 32, Oct. 13, 1919, 11 LNTS 173; Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295.

[9] Geneva Convention on the Territorial Sea and the Contiguous Zone, Art. 22, Apr. 29, 1958, 15 UST 1606, 516 UNTS 205. The relevant provision of the 1958 Convention states that "nothing in these articles affects" the immunities of government ships operated for noncommercial purposes.

[10] Libertad, Public sitting, Doc. ITLOS/PV.12/C20/1, at 1 (Nov. 29, 2012) [hereinafter Public sitting].

[11] *Id.* at 25.

[12] MOX Plant (Ir. v. UK), Case No. 10, Provisional Measures, para. 64 (ITLOS Dec. 3, 2001).

[13] MOX Plant (Ir. v. UK), Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, paras. 35, 38, 58 (UNCLOS Ann. VII Arb. Trib. June 24, 2003), 42 ILM 1187 (2003), *available at* http://www.pca-cpa.org.

[14] Fisheries Jurisdiction (UK v. Ice.), Provisional Measures, 1972 ICJ REP. 12, paras. 15, 20–21 (Aug. 17).

[15] The definition in Article 29 is drawn almost verbatim from Article 8(2) of the Geneva Convention on the High Seas, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82.

internal waters. The Tribunal noted, however, that the immunity of warships applies in internal waters as well under general international law. Although "most of the provisions" in Part II relate to the territorial sea, some provisions, such as the definition of warships in Article 29, "may be applicable to all maritime areas" (para. 64). ITLOS therefore affirmed that a dispute existed between the parties over the applicability of Article 32 that "affords a basis on which *prima facie* jurisdiction of the Annex VII arbitral tribunal might be founded" (para. 66).

Argentina also claimed that Ghana was precluding the *Libertad* from exercising its right to enjoy innocent passage in the territorial sea according to Articles 17 and 18(1)(b) of UNCLOS; freedom of navigation and related internationally lawful uses of the sea reflected in Articles 56(2) and 58 of UNCLOS; and the right to exercise high seas freedoms set forth in Articles 87 and 90 of the Convention, by preventing the vessel from getting under way.[16] Professor Gerhard Hafner, co-agent for Argentina, argued that the exercise of navigational rights directly depends upon the ability to make departure from port. He referred to the International Court of Justice's declaration on the merits in *Military and Paramilitary Activities in and Against Nicaragua*:

> [I]n order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; article 18, paragraph 1(*b*), of [UNCLOS] does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters . . . , it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for maritime navigation.[17]

Ghana countered that the dispute between the two parties was one of general international law, rather than the interpretation or application of specific provisions of UNCLOS, and was therefore not justiciable under the Convention. Argentina suggested that the relationship between general international law and UNCLOS involved much more cross-pollination. Article 300 of the Convention, for example, stipulates that the obligations are incumbent on the parties under international law, and not only the law of the sea: "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right." Article 301 continues by linking the exercise by states of their rights and performance of their duties under the Convention to observance of "the principles of international law embodied in the Charter of the United Nations."

Provisional measures were granted to defuse the tense standoff (para. 97). The Tribunal's order states, "[A]ny act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States" (para. 97). Interlocutory relief was awarded to Argentina to avoid an urgent risk of irreparable harm, since the *Libertad* was deemed a tangible expression of the flag state's sovereignty (paras. 94, 100). The unanimous decision was joined by Judge *ad hoc* Thomas Mensah, who served as the first president of ITLOS and in this case was appointed by Ghana.

[16] Public sitting, *supra* note 10, at 8.

[17] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 214 (June 27), *quoted in id.* at 9.

The Tribunal ordered Ghana to release the frigate, its commander, and its crew by December 22, and to ensure that the vessel was "resupplied toward that end" (para. 108). Ghana complied with the provisional order. The vessel departed from Ghana on December 19 and was welcomed back in Argentina on January 9, 2013.

* * * *

ARA Libertad marks the twentieth case to be heard by ITLOS. The provisional order merely concluded the first stage in the litigation between Argentina and Ghana over the detention of the tall sailing ship. ITLOS acted with dispatch and played a constructive role in a dispute that appears almost to have spiraled out of control. Argentina submitted a note to the Tribunal on October 29 and a detailed request for provisional measures on November 14, 2012. The Tribunal began deliberations within two weeks[18] and issued the order for provisional measures on December 15.

The order is important for upholding the immunity of a warship broadly and inclusively defined—as a tall sailing ship used for training by the Argentine Navy. ITLOS found that "in accordance with general international law, a warship enjoys immunity" (para. 95). Perhaps even more important, the order applied sovereign immunity as a general principle of international law to the internal waters (port) of Ghana, even though Article 32 on sovereign immunity is contained in Part II of UNCLOS on the territorial sea. This finding raises interesting questions about the scope of ITLOS's jurisdiction beyond the specific provisions of the text of the Convention.

The Tribunal viewed Article 32 as an effective restatement of customary international law. The inclusive definition of sovereign immunity and the applicability to port facilities and internal waters should provide a level of comfort for conventional naval forces concerned about attempts by coastal states and port states to exercise jurisdiction over warships (and by extension, military aircraft). In this regard, ITLOS has left another compelling reason for the United States to accede to UNCLOS: to take advantage of the dispute settlement provisions of the Convention.

The interlocutory order also raises questions about how national courts treat waivers of sovereign immunity by foreign governments. Judge Frimpong's interpretation of the waiver clause means that Argentina would be virtually devoid of sovereignty. Argentina argued that military property is absolutely excluded from any kind of execution measure by a foreign state; or (in the alternative) even if a state can waive immunity from execution, the waiver must be explicit and specific to the related military asset at stake. As a rule, a general waiver cannot be applied to military or diplomatic assets.[19] The waiver of immunity typically involves jurisdiction to adjudicate, but not enforcement against any state asset whatsoever its nature.

Ghana never contested the immunity of the warship under customary international law—sidestepping the core equity at stake by relying on a bare textual argument grounded in

[18] The Tribunal conducted oral proceedings on November 29 and 30, 2012. *See* Public sitting, *supra* note 10, at 9; Libertad, Docs. ITLOS/PV.12/C20/2 (Nov. 29, 2012); ITLOS/PV.12/C20/3–4 (Nov. 30, 2012).

[19] Argentina Request, *supra* note 6, paras. 40, 41; *see also* XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 404 (2002) ("Certain categories of property are regarded as so sensitive that they are under special protection and absolutely immune from execution . . . ."), *quoted in id.*, para. 47.

UNCLOS. Under such circumstances, whatever the relative strength of the arguments surrounding Article 32 for jurisdictional purposes, Ghana did not assert (and was denied) a legal right to hold the ship under international law more generally.

On the broad question of immunity, the ITLOS order bears a striking resemblance to the U.S. Supreme Court's holding in the famous 1812 case of *The Schooner Exchange*.[20] There, a schooner owned by John McFaddon and William Greetham had been seized by order of Napoleon Bonaparte on December 30, 1810. The ship was armed and converted into a public vessel and renamed *Balou*. During a deployment to the West Indies in the summer of 1811, the *Balou* pulled into port in Philadelphia, and McFaddon and Greetham sought to recover their vessel. The district court dismissed their action in libel on the ground that a public armed vessel of a foreign power at peace with the United States was not subject to the jurisdiction of U.S. courts. The circuit court reversed; on appeal to the Supreme Court, Chief Justice Marshall upheld the district court's order, stating that the "whole civilized world" concurred in the construction that

> [a warship] constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it 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.[21]

Notably, the Tribunal found that Article 32 may apply to Ghana's internal waters. It is uncertain whether the Annex VII arbitral tribunal will apply the text of Article 32 to internal waters during the merits phase. A strong case can be made that Article 32 affirmatively preserves warship immunity under customary international law, rather than that the issue lies entirely outside the Convention and is therefore dependent on customary law. In the choice between reading Article 32 to exclude immunity under the Convention and reading the article to incorporate immunity under international law by reference, the text and negotiations suggest that the latter analysis is stronger. The final decision, however, awaits an order on the merits.

In the United States, the case once again raised the issue of ratification of UNCLOS. An editorial in the *Wall Street Journal* on December 24, 2012, called the order more evidence of the treaty's assault on national (this time Ghana's) sovereignty.[22] ITLOS, the editorial argued, had overlooked that Argentina had waived immunity and made the error of treating the vessel "as if this is an actual warship." Ghana was "bullied by a global tribunal." American courts, Congress, and the president, however, have always protected the sovereign immunity of warships, even of such unconventional vessels as the three-masted frigate *Libertad*. The order will be particularly valuable for the protection of U.S. Navy warships that are not conventional fighting vessels, such as the naval auxiliary special mission ships USNS *Impeccable*, USNS *Victorious*,

[20] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

[21] *Id.* at 144.

[22] Editorial, *Lawless at Sea*, WALL ST. J., Dec. 24, 2012, at A12. The incident provides "[a] case study in the dangers of the Law of the Sea Treaty." *Id.*, text box.

USNS *Sumner*, and USNS *Bowditch*, which may not be painted warship gray or carry armament. The United States recognizes sovereign immunity for American warships even after they have sunk, which underscores the great weight placed on the preservation of immunity to foreign states' legal process.[23] Consequently, the preservation of sovereign immunity for warships in this order, even for an unconventional training ship and even only as a prima facie showing during an interlocutory appeal, is an encouraging precedent for stability of expectations and the rule of law at sea and in port.

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Treaty on the Functioning of the European Union—amendment—simplified revision procedure—economic and monetary policy—validity of stability mechanism for euro area member states

PRINGLE v. IRELAND. Case C-370/12. *At* http://curia.europa.eu.
Court of Justice of the European Union, November 27, 2012.

In the judgment *Pringle v. Ireland*,[1] the full Court of Justice of the European Union (Court or ECJ) upheld the validity of the decision of the European Council enabling the simplified amendment of the Treaty on the Functioning of the European Union (TFEU).[2] In its Decision 2011/199/EU, the Council had provided for the establishment of a permanent European Stability Mechanism (ESM) by those member states of the European Union (Union or EU) that had adopted the euro as their common currency and legal tender. The Court also found in this judgment that those member states had not violated EU law by negotiating and concluding the Treaty Establishing the European Stability Mechanism (ESM Treaty).[3] The Court based the latter finding on the long-awaited clarification of the scope and content of the TFEU's "no-bailout clause" (Art. 125(1)), which had been the subject of intense controversies among legal scholars, in particular in Germany.

The European sovereign debt crisis started when the newly elected Greek government announced in late 2009 that the real Greek budget deficit was much higher than the one previously notified to the European Commission. In the spring of 2010, it became obvious that Greece was going to lose access to market financing for its enormous budget deficit. The European institutions and the member states of the euro area repeatedly stressed their willingness to "take determined and coordinated action, if needed, to safeguard financial stability in the

[23] President William J. Clinton issued the following statement during the last hours of his presidency: "Pursuant to the property clause of Article IV of the Constitution, the United States retains title indefinitely to its sunken State craft unless title has been abandoned or transferred . . . ." Statement on United States Policy for the Protection of Sunken Warships, 37 WEEKLY COMP. PRES. DOC. 195, 195 (Jan. 22, 2001), 2001 WLNR 4638318; *see also* David J. Bederman, *Congress Enacts Increased Protections for Sunken Military Craft*, 100 AJIL 649 (2006); Jason R. Harris, *Protecting Sunken Warships as Objects Entitled to Sovereign Immunity*, 33 U. MIAMI INTER-AM. L. REV. 101 (2002); J. Ashley Roach, *France Concedes United States Has Title to CSS* Alabama, 85 AJIL 381 (1991).

[1] Pringle v. Ireland, Case C-370/12 (Eur. Ct. Justice Nov. 27, 2012), *at* http://curia.europa.eu.

[2] Consolidated Version of the Treaty on the Functioning of the European Union, Sept. 5, 2008, 2008 O.J. (C 115) 47, *available at* http://eur-lex.europa.eu. This is the version of the TFEU referred to by the Court in this case.

[3] Treaty Establishing the European Stability Mechanism, Feb. 2, 2012, *at* http://www.esm.europa.eu/pdf/esm_treaty_en.pdf.

euro area as a whole."[4] To prevent a Greek default, the member states of the euro area agreed in May 2010 to a package of bilateral loans to Greece, supplemented by loans from the International Monetary Fund (IMF). At the same time, as it turned out that the Greek package would not ensure market confidence and stability, two new institutions were established: the European Financial Stabilization Mechanism—based on an EU regulation—and the temporary European Financial Stability Facility—a special purpose vehicle under Luxembourg private law that was guaranteed by the euro area member states. In addition, the IMF committed itself to further financial assistance worth 250 billion euros.

The overall "rescue umbrella" was designed to provide financing of up to 750 billion euros to other member states that might face unfavorable market situations. In the ensuing period, these funds were used to make loans to Ireland and Portugal, and again to Greece. Despite the substantial amount of "money in the window," participants in the financial market remained skeptical about the ability of the euro area and its member states to solve the crisis and return to sound fiscal policies. This skepticism more and more gained the character of a self-fulfilling prophecy, as the need for a continuous rollover of their debt burden makes countries extremely vulnerable to changes in the market perception of their creditworthiness.

In reaction to the ongoing crisis, the European Council agreed in December 2010 on the need to establish a permanent stability mechanism. Giving in to German demands, it decided to initiate a procedure for the limited amendment of the TFEU. On March 25, 2011, the European Council adopted Decision 2011/199/EU amending TFEU Article 136 by adding a new paragraph 3, which states: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."[5]

The decision was based on the "simplified revision procedure" under Article 48(6) of the Treaty on European Union (TEU), which had been added by the Lisbon Treaty.[6] That procedure waived the requirement for a convention and a conference of the representatives of the member states as specified under the ordinary revision procedure of TEU Article 48(2) and replaced it with a European Council decision. Such a decision must still be "approved by the Member States in accordance with their respective constitutional requirements." But the scope of application of the simplified revision procedure is limited. It applies only to Part Three of the TFEU and shall not increase the competences conferred on the Union in the TFEU and TEU.

After lengthy negotiations, on February 2, 2012, the euro area member states finally concluded the ESM Treaty and initiated their respective ratification procedures. The treaty establishes the European Stability Mechanism as an international financial institution (Art. 1(1)) tasked with mobilizing funding and providing stability support "under strict conditionality . . . to the benefit of ESM Members which are experiencing, or are threatened by, severe financing

[4] Statement by the Heads of State or Government of the European Union (Feb. 11, 2010); Statement by the Heads of State or Government of the Euro Area (Mar. 25, 2010), *at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/112856.pdf, and 113563.pdf, respectively.

[5] Council Decision 2011/199/EU, Art. 1, 2011 O.J. (L 91) 1, 2.

[6] Consolidated Version of the Treaty on European Union, Art. 48(6), Sept. 5, 2008, *as amended by* Treaty of Lisbon, Dec. 13, 2007, 2008 O.J. (C 115) 13, *available at* http://eur-lex.europa.eu. This is the version of the TEU referred to by the Court in this case.

problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States" (Art. 3).[7]

The dispute addressed by the ECJ in this judgment arose out of an action brought against the government of the Republic of Ireland and its attorney general by Thomas Pringle, a citizen of Ireland and a member of the Dáil Éireann, the lower house of the Irish national parliament. In his action, Pringle claimed (besides charging under Irish law that Ireland's ESM participation was unconstitutional) that Decision 2011/199/EU had not been lawfully adopted pursuant to the simplified revision procedure under TEU Article 48(6). He argued that the amendment entailed an alteration of the competences of the Union and was inconsistent both with provisions of EU law concerning economic and monetary union and with general principles of EU law, in particular the principle of legal certainty.

The Supreme Court of Ireland rejected the claims submitted by Pringle under Irish constitutional law and his request that it grant an injunction restraining the Irish government from ratifying the ESM Treaty.[8] It did, however, refer two questions and one optional question to the ECJ:

> — whether European Council Decision 2011/199/EU was valid;
>
> — whether a member state of the European Union whose currency is the euro was entitled to enter into and ratify an international agreement such as the ESM Treaty; and
>
> — if the European Council decision was held valid, whether the entitlement of a member state to enter into and ratify an international agreement such as the ESM Treaty was subject to the entry into force of that decision. (Para. 28)[9]

Before addressing these questions, the Court of Justice had to deal with arguments questioning the jurisdiction of the Court and the admissibility of the reference. The European Council and several member states first challenged the Court's jurisdiction to review the compatibility of the decision with substantive primary EU law, on the ground that TFEU Article 267 provides for references regarding only the interpretation, but not the validity of the TEU and TFEU. Because the decision creates new primary law, they claimed, it cannot be subject to judicial scrutiny by the Court of Justice; holding otherwise would preclude the member states from amending these instruments as the "masters of the treaties." But the new, simplified category of treaty amendments introduced by the Treaty of Lisbon is limited in scope and subject to certain procedural requirements. Its central feature is its initiation by a European Council decision (TEU Art. 48(6), (7)), that is, an act of an institution of the Union (TFEU Art. 288; TEU Arts. 13(1), 15) that in principle can be subject to legal scrutiny by the ECJ (TEU Art. 19(1); TFEU Arts. 263, 267(b)). Accordingly, the advocate general and the Court accepted the admissibility of the reference and the jurisdiction of the Court (paras. 31–37), though limited to reviewing whether the strictures imposed by TEU Article 48(6) had been obeyed—namely, that Decision 2011/199/EU will not increase the Union's competences and that it may revise

[7] For a more detailed account of the content of the ESM Treaty, see Judgment, paras. 8–23, and Christoph Ohler, *The European Stability Mechanism: The Long Road to Financial Stability in the Euro Area*, 54 GER. Y.B. INT'L L. 47 (2011).

[8] Pringle v. Ireland, [2012] IESC 47, No. 339/2012, *at* http://www.courts.ie.

[9] *Id.*, attachment, pt. VI.

all or some of the provisions only of Part Three of the TFEU ("Union Policies and Internal Actions").

Second, Ireland contended that Pringle ought to have challenged the validity of the decision directly by an action for annulment under TFEU Article 263. As the two-month time limit for such an action had already expired when Pringle submitted his complaint, the Irish government claimed that the indirect challenge amounted to a circumvention of the applicable procedural provisions that should therefore not be considered. The Court correctly rejected this Irish claim because a direct action for annulment would not have been admissible beyond doubt (paras. 38–44) (quite the contrary, as it would have required that Decision 2011/199/EU was at least of "direct concern" to Pringle).

The Court then turned to the substantive issues raised by the reference: whether the amendment envisaged by Decision 2011/199/EU solely concerned provisions of Part Three of the TFEU and, second, whether it increased the competences of the Union. With regard to the latter, the Court examined whether the insertion of TFEU Article 136(3) grants competence to the member states that would encroach on the Union's exclusive competence over monetary policy for the euro area (TFEU Art. 3(1)(c)), and whether the establishment of the ESM improperly encroached upon the competence of the Union in the field of monetary union and economic policy coordination. The Union has exclusive competence over monetary policy for the euro area member states, which means that member states may not enact legally binding acts in this field unless the Union expressly empowers them to (TFEU Arts. 2(1), 3(1)(c)). As "monetary policy" is not defined precisely in the TEU and TFEU, the Court compared the objectives of the monetary policy of the euro area (primarily maintaining price stability, TFEU Art. 127(1)) with the objectives of the stability mechanism (safeguarding the stability of the euro area) and concluded that granting financial assistance "clearly does not fall within monetary policy" (para. 57). The Court then compared the stability mechanism envisaged in TFEU Article 136(3) with the reformed framework of economic governance in the Union, which consists of various regulations and directives enacted since 2010, pointed to their essentially preventive character, and contrasted that with the function of the stability mechanism, which is to serve as a crisis instrument in situations where the preventive instruments have failed (paras. 58–59). In sum, the Court concluded that the establishment of a stability mechanism does not fall under monetary policy as defined in the TFEU, but under economic policy (para. 60), which is not within the Union's exclusive competence. Consequently, the member states are entitled to enter into an international agreement between themselves as long as they do not create legal norms that violate provisions of EU law in that field. As no EU legislation provides for a permanent stability mechanism like the ESM and since the European Financial Stabilization Mechanism governs financial assistance only by the European Union as a separate legal entity (but not by the member states), the Court did not find any conflict between the ESM Treaty and EU legislation as regards economic policy coordination (paras. 64–69).

The second question referred by the Irish Supreme Court concerned the compatibility of the ESM Treaty as such with several provisions of the TEU and TFEU, as well as general principles of EU law. As the referring court did not adequately explain the relevance of some of the provisions mentioned in its request for a preliminary ruling, the Court of Justice held the second question to be partly inadmissible (paras. 82–87). The following examination of the ECJ's response touches on many of the problems that were being discussed in legal writing prior to the judgment. We will focus here on those aspects that are most pertinent to this discussion.

Initially, that part of the judgment again considered the competences of the Union—essentially, whether the conclusion of the ESM Treaty by the member states (regardless or in spite of the still pending entry into force of the Council decision) encroached upon these competences. For the same reasons as in the earlier part of the judgment, the Court held that the establishment of the ESM Treaty did not constitute a measure of monetary policy and therefore did not fall within the exclusive competence of the Union. It also found that the ESM may neither set key interest rates nor issue euro currency, but must fund grants entirely from paid-in capital or by issuing financial instruments on the financial markets (paras. 93–96). Notably, the Court at this point also referred to the necessary respect for TFEU Article 123(1), the prohibition of monetary financing, which had gravely concerned the German Bundesverfassungsgericht in its judgment on Germany's ratification of the ESM Treaty in September 2012.[10] One may read this reference—like others in the judgment—as a friendly signal to the German Court, indicating that the Luxembourg Court would also not permit the ESM to have access to refinancing by the European Central Bank.

The Court then examined whether the ESM Treaty could encroach upon the competence deriving from TFEU Article 3(2), which grants the Union exclusive treaty-making power if the conclusion of an international agreement "may affect common rules or alter their scope." According to the Court, this provision also applies to agreements between the member states themselves, but the Court did not find that the ESM Treaty affected common rules or altered their scope (paras. 103–07). As for the ESM Treaty's provisions on strict economic conditionality, the Court held that they did not affect the competence of the EU Council under TFEU Article 126 to issue recommendations to a member state with excessive deficits (paras. 108–14).

The analysis of TFEU Article 125(1) is certainly the core and most important part of the judgment, as numerous commentators had claimed that practically all the rescue packages violated this no-bailout clause. The Court began by observing that the wording of the clause does not prohibit the Union or the member states from "granting any form of financial assistance whatever to another Member State" (para. 130). The Court supported this verbal interpretation of Article 125(1) by a comparison with the phrasing of TFEU Articles 122 and 123 and their content (permitting financial aid to member states and prohibiting overdrafts or other credit facilities, respectively) (paras. 131–32). Having established that some forms of financial assistance may thus be in conformity with Article 125(1), the Court explored the objective of the provision so as to identify which forms might be permissible. It found the overall rationale of Article 125(1) to reside in ensuring both that member states follow sound budgetary policies and that they remain subject to the logic of the financial market when they enter into debt (para. 135). Consequently, the Court reasoned that financial assistance would be prohibited if it diminished "the incentive of the recipient Member State to conduct a sound budgetary policy" (para. 136).

In an interesting twist, the Court then referred to the wording of the future Article 136(3) of the TFEU to shed light on the meaning of its Article 125(1). This is interesting because the

[10] *See* Bundesverfassungsgericht [Federal Constitutional Court], Sept. 12, 2012, docket nos. 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, *at* http://www.bundesverfassungsgericht.de/pressemitteilungen/brg12-067en.html (links to full German text and extracts in English).

question at this point was whether the ESM Treaty (not the amendment of the TFEU) is compatible with EU law, and especially because the Court later found that the legality of the ESM Treaty did not depend on the entry into force of Decision 2011/199/EU, that is, the amendment of Article 136. In its further analysis, the Court returned to the wording of Article 125(1) and considered whether the different kinds of financial instruments provided for by the ESM are permitted under the various alternatives of Article 125(1), and confirmed their legality (paras. 138–42).

A subsequent part of the judgment addresses the question whether the euro area member states could entrust the European Commission, the European Central Bank, or the Court of Justice with tasks under the ESM Treaty. Such allocation could be contrary to the principle of attributed powers of the institutions under TEU Article 13(2). The advocate general had stressed two points in favor of the legality of this institution borrowing: a decision by the governments of all member states adopted on June 20, 2011, which acknowledged that the ESM Treaty would "contain provisions under which the European Commission and the European Central Bank are to perform tasks provided for in the Treaty,"[11] and the fact that neither the Commission nor the central bank was obligated to carry out the tasks imposed on it by the ESM Treaty.[12] The Court of Justice, however, followed different reasoning. In its view, it was decisive that the tasks entrusted to the Commission and the central bank outside the actual EU law framework "do not alter the essential character of the powers conferred on those institutions by the [TEU and TFEU]" (para. 158). Notably, the Court did not consider at this point whether it made a difference if—as in the case of the so-called Fiscal Compact of March 2, 2012[13]—not all member states supported the use of the institutions outside the EU legal framework *stricto sensu*. With regard to the role assigned to the ECJ itself, the Court endorsed the argument by the advocate general that disputes between the ESM and one or more of its members are—since all ESM members are also EU member states—de facto disputes between EU member states that can be submitted to the Court of Justice under TFEU Article 273 (paras. 170–77).

Last, the Court answered optional question 3, holding that the right of member states to conclude the ESM Treaty did not depend on the validity of Decision 2011/199/EU (and the entry into force of new Article 136(3)), as—according to its prior analysis—this decision confirmed a right the member states possessed anyway (paras. 183–85).

* * * *

The judgment of the Court must be praised for most of its conclusions. The academic discussion of TFEU Article 125(1) had increasingly departed from strict legal arguments and in particular frequently ignored the wording of the provision. Most commentators focused on the moral hazards purportedly triggered if member states could pursue unsound budgetary policies

[11] Pringle v. Ireland, Case 370/12, View of Advocate General Juliane Kokott, para. 172 (Oct. 26, 2012) (quoting Decision of the Representatives of the Governments of the Member States of the European Union, Annex, Council Cover Note, Doc. 12114/11 (June 24, 2011)), *at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CP0370:EN:HTML.

[12] *Id.*, paras. 175, 181.

[13] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Mar. 2, 2012, *at* http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf. All EU member states except the United Kingdom and the Czech Republic are parties to the treaty.

and then get a "cheap bailout." These arguments were misguided in many respects. First, the conditionality attached to the loan programs is anything but cheap, in political as well as social terms. The Irish, Portuguese, and Spanish governments were not seeking shelter under the umbrella but instead had to be pulled under it by the rest of the euro area members. Moreover, funds will not be granted automatically (but with the solid expectation that similar cases will be treated similarly). Slovakia abstained from the Greek bailout, Finland preserved preferential insurance, and Cyprus has been awaiting a decision on its application for financial assistance (to recapitalize its banking sector) for nine months at the time of writing. Furthermore, it would have been surprising if a provision of EU law whose wording does not explicitly prohibit the member states from taking a certain course of action were interpreted as restricting sovereignty more than necessary. Finally, it was legally and politically almost absurd to purport to interpret the TEU and TFEU in a way that would have left the euro area member states helpless when the danger of the breakup of the euro area was real.

The consequences of the judgment may nevertheless be problematic because of its possible effect on the European integration process as a whole. The (correct) finding that the member states remain competent to conclude international agreements complementing EU law in a central policy field like the economic and monetary union may be seen as a necessary corollary to the construction of the European Union as *Staatenverbund* (association of sovereign states). But it also reveals the insufficiencies and the lack of flexibility of the existing legal framework. In addition, the conclusion of agreements such as the ESM Treaty and the Fiscal Compact significantly increases the already high complexity of the wider legal framework of the European Union and makes it even more difficult to ensure the coherence, transparency, efficiency, and democratic legitimacy of the integration process.

The judgment also deserves to be critiqued on one technical point. As pointed out above, the Court found that Article 3(2) of the TFEU (on the exclusivity of the Union's treaty-making power) also precluded inter se agreements by the EU member states. This conclusion is by no means convincing. Article 3(2) applies—according to its wording—only to international agreements, those governed by title V of Part Five of the treaty (entitled "International Agreements") and defined as "agreement[s] with one or more third countries or international organisations" (TFEU Art. 216(1)). Article 3(2) was designed to prevent the member states from entering into agreements that would be binding under public international law despite being contrary to EU law. This underlying reasoning does not apply to inter se agreements, over which EU law prevails anyway because of its primacy.

Overall, the Court of Justice has now struck a balance between fiscal self-responsibility and the solidarity and sovereignty of member states. Even if the European sovereign debt crisis is not yet over, some of the most pressing legal questions regarding the crisis have been settled and the legality of the "rescue policy" and its core elements can no longer be substantially challenged. Nevertheless, further proceedings are pending, in particular before the Bundesverfassungsgericht, that concern the announcement by the European Central Bank in September 2012 of its intention to buy government bonds of euro area countries without limits (so-called outright market operations), if it should be the only way to prevent the breakup of the euro area.

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European Convention on Human Rights—Article 3—torture or inhuman or degrading treatment—forcible repatriation of asylum seekers—collective expulsion—right to a remedy

HIRSI JAMAA v. ITALY. Application No. 27765/09. *At* http://www.echr.coe.int.
European Court of Human Rights (Grand Chamber), February 23, 2012.

In a unanimous judgment in the case *Hirsi Jamaa v. Italy*,[1] the Grand Chamber of the European Court of Human Rights (Court) held that Italy's "push back" operations interdicting intending migrants and refugees at sea and returning them to Libya amounted to a violation of the prohibition of torture and other inhuman or degrading treatment under Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention),[2] the prohibition of collective expulsions under Article 4 of Protocol 4 to the Convention, and the right to an effective remedy under Article 13 of the Convention. *Hirsi Jamaa* is the Court's first judgment on the interception of migrants at sea and it addresses issues concerning the 1982 United Nations Convention on the Law of the Sea and the 1979 International Convention on Maritime Search and Rescue, as well as the 1951 Convention Relating to the Status of Refugees.[3]

The applicants, eleven Somali and thirteen Eritrean nationals, together with some two hundred other persons, were on board three vessels intercepted by the Italian Revenue Police (*Guardia di Finanza*) and Coast Guard on May 6, 2009, approximately thirty-five nautical miles south of the Italian island of Lampedusa in an area that may be considered, for present purposes, as high seas.[4] The operation formed part of a series of migration control efforts (so-called push-back operations) undertaken by Italy during the period from May 6 to November 6, 2009, aimed at interrupting the flow of refugees and migrants by sea from Libya toward Italian territory. The interdictions were conducted in agreement with Libya under bilateral treaties between the two states and were intended to apply European Union policies on border surveillance and migration control. All the individuals were taken on board the Italian military vessels where their personal effects, including identity documents, were confiscated. None were interviewed, nor was any information given to them as to their destination. On their return to Tripoli, they were handed over to the Libyan authorities (paras. 9–14). Subsequently, two of the applicants died "in unknown circumstances" and fourteen were granted refugee status by the United Nations High Commissioner for Refugees in Tripoli (paras. 15, 16).

[1] Hirsi Jamaa v. Italy, App. No. 27765/09 (Eur. Ct. H.R. Feb. 23, 2012) [hereinafter Judgment]. Judgments and decisions of the Court cited herein are available online at http://www.echr.coe.int.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Nov. 4, 1950, ETS No. 5, 213 UNTS 222.

[3] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 3 [hereinafter UNCLOS], *available at* http://www.un.org/Depts/los/; International Convention on Maritime Search and Rescue, Apr. 27, 1979, TIAS No. 11093, 1405 UNTS 118; Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150, *as amended by* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267.

[4] The interdiction and most of the travel took place in Libya's exclusive economic zone, declared in 2009. General People's Committee Decision No. 260 of A.J. 1377, Concerning the Declaration of the Exclusive Economic Zone of the Great Socialist People's Libyan Arab Jamahiriya (May 31, 2009), *at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/lby_2009_declaration_e.pdf. Since, according to Article 58(1) of UNCLOS, *supra* note 3, all states enjoy the freedom of navigation applicable to the high seas in the exclusive economic zone of other states, the distinction does not result in any practical consequences.

The applicants brought their case directly to the Court under the provisions of ECHR Article 34, which permits "applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties." Italy made several preliminary objections (including by challenging the right of the applicants' attorneys to represent them and the applicants' failure to exhaust available local remedies), which were rejected. The Court also rejected Italy's jurisdictional argument that the vessels had been intercepted "in the context of the rescue on the high seas of persons in distress," an obligation imposed by international law (including the Law of the Sea Convention and the Convention on Maritime Search and Rescue), and that this "rescue" in no way constituted "a maritime police operation" and therefore did not involve an exercise of "absolute and exclusive control" over the applicants (paras. 64–65, 95).[5]

Substantively, the applicants contended that Italy had breached its obligations under the Convention both by returning them to Libya, where they were likely to suffer treatment prohibited by Article 3, and by handing them over to the Libyan authorities, who were likely to send them back to their countries of origin, where they also risked treatment contrary to Article 3.[6] More particularly, the applicants contended that they were victims of an arbitrary *refoulement* and had been denied the opportunity to challenge their forced return or to seek international refugee protection. The government countered that at the time Libya was a "safe host country" and that the applicants had never requested political asylum in Italy or any other form of international protection (paras. 96–97).

In its analysis the Court first stressed that "expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the expelling State under the Convention" (para. 114). The prohibition of torture and inhuman and degrading treatment has an "absolute character" (para. 120) and qualifies the right to control the entry, residence, and expulsion of aliens (para. 113), since Article 3 implies the obligation *not* to expel the individual to another state "where substantial grounds have been shown for believing that the person in question, if expelled, would face a *real* risk of being subjected to treatment contrary to Article 3 in the receiving country" (para. 114, emphasis added). The existence of such a risk must be assessed, the Court said, "primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of removal" (para. 121).

In light of the numerous reports by international organizations, states, and nongovernmental organizations concerning the situation in Libya at the time (paras. 123–30), the Court concluded, the Italian authorities "knew or should have known that, as irregular migrants, [the applicants] would be exposed in Libya to treatment in breach of the Convention" (para. 131). Moreover, with regard to "indirect removal" to third states, the Court similarly found ample

[5] The Court's rejection of this argument was particularly based on declarations by Italian officials in the aftermath of the operation. See, for example, the statements of Roberto Maroni, minister of the interior, to the Italian Parliament on May 14, 2009, *at* http://www.camera.it/_dati/leg16/lavori/stenografici/sed177/pdfs005.pdf, and on May 25, 2009, *at* http://www.senato.it/service/PDF/PDFServer/BGT/00424000.pdf (in Italian).

[6] In their pleadings and at oral argument, the applicants also alleged the use of excessive force, seizure of documents and other items, and other mistreatment by the Italian authorities on board the military vessels, but these claims were not addressed in the Court's final judgment. *See* Grand Chamber Hearing, Hirsi and Others v. Italy (June 22, 2011), *at* http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/Webcasts2011.htm; *see also* UN High Commissioner for Refugees, Submission in the Case of Hirsi and Others v. Italy, para. 2.2.6 (Mar. 2010), *at* http://www.unhcr.org/refworld/docid/4b97778d2.html.

evidence to indicate prima facie that the situation in Somalia and Eritrea "posed and continues to pose widespread serious problems of insecurity" (para. 151) and that the Italian authorities knew or should have known that the applicants lacked sufficient protection against arbitrary return (para. 156). In both contexts, therefore, Italy's actions in returning the applicants to Libya violated Article 3.

The Court also found that the push-back operations violated the prohibition against collective expulsions in Article 4 of ECHR Protocol 4.[7] This case was the first time the Court was called upon to assess the application of that article to the removal of aliens to a third state carried out *outside* national territory (para. 169). In fact, Italy had argued that the provision did not apply since the applicants had been trying to enter its territory and the measures could not therefore be considered an expulsion (para. 172). The Court disagreed. In light of the *travaux préparatoires* of Article 4, its evident purpose and meaning, and the need to apply it to contemporary conditions in accord with the principle of effectiveness (paras. 174–79), the Court concluded that the provision applies to "the removal of aliens carried out in the context of interceptions on the high seas . . . the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State" (para. 180).

As to the procedural obligations under ECHR Article 13, Italy had claimed that the factual circumstances of the operation made it practically impossible to provide an effective remedy for the applicants while on board the Italian vessels and that the applicants could have brought a case in Italian courts for compensation after their return to Libya (paras. 191–92). The point at issue was whether this *ex post* possibility was sufficient to constitute an "effective remedy" within the meaning of Article 13. The Court said that the remedies envisaged by Article 13 may vary but must be effective "in practice as well as in law" (para. 197), and, in the case of removal, must permit "independent and rigorous scrutiny"[8] and be capable of having a "suspensive effect" (para. 199). In this instance, the applicants had no access either to information about where they were being taken or to a procedure to assess their personal circumstances, much less to one that could have prevented their return to Libya. They were thus denied the protections called for by Article 13 (and certainly could not be criticized for having failed to exhaust domestic remedies) (para. 207).

Having found that Italy had violated Articles 3 and 13 of the Convention and Article 4 of Protocol 4, the Court not only awarded the applicants fifteen thousand euros each for "non-pecuniary damage" (para. 213), but also ordered the Italian government to undertake "all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated" (para. 211).

An extensive concurring opinion by Judge Pinto de Albuquerque examined the "intrinsic link" between "the international protection of refugees, on the one hand, and the compatibility of immigration and border control policies with international law, on the other hand." While acknowledging the right of states to control their borders, Judge Pinto also noted that under the Convention "a refugee cannot be subjected to *refoulement* to his or her country of origin

[7] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto, Art. 4, *opened for signature* Sept. 16, 1963, ETS No. 46, *as amended by* Protocol No. 11, ETS No. 155 (entered into force Nov. 1, 1998), *at* http://www.coe.int.

[8] Judgment, para. 198 (quoting Shamayev v. Georgia, 2005-III ECR 153, para. 460).

or to any other country where he or she risks incurring serious harm caused by any identified or unidentified person or public or private entity." Indeed, the content of the right to international protection is the same under human rights law and refugee law and does not depend on whether an individual is a de jure or de facto refugee. "A person does not become a refugee because of recognition, but is recognised because he or she is a refugee." In the view of Judge Pinto, the prohibition of *refoulement* is today "an absolute obligation of all States," a "principle of customary international law," and "a rule of *jus cogens*" that allows no derogation and applies to "extra-territorial State actions, including action occurring on the high seas."[9] In consequence, the necessary procedural protections (including individual evaluation of asylum claims) are "not limited to the land and maritime territory of a State but also apply on the high seas."

* * * *

The judgment adds significantly to European jurisprudence on three critical subjects: the extraterritorial application of human rights; the treatment to be accorded to migrants, refugees, and asylum seekers; and the rules governing interdiction of persons at sea.

The increase in activities carried out by state organs beyond national boundaries—be they de-territorialized migration controls, targeted killings, law enforcement activities during military occupation, or others—has brought to the forefront the issue of the extraterritorial application of human rights treaties. Coming shortly after the watershed *Al-Skeini* judgment,[10] the *Hirsi Jamaa* judgment confirms and strengthens the Court's more recent liberal jurisprudence aimed at ensuring accountability for state action outside national boundaries.[11] It upholds the existence of two alternative grounds for the applicability of the Convention: *de jure* jurisdiction and *de facto* jurisdiction (para. 80).[12] Interestingly, the Court adopts an "objective" assessment of the existence of jurisdiction within the meaning of Article 1 of the Convention. Italy argued that it had not exercised jurisdiction, since the only aim of the operation was to come to the rescue of the boats and their passengers, and not to enforce its migration laws. The Court replied that "[s]peculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion" (para. 81). The existence of de facto jurisdiction must be assessed objectively on the basis of the facts and not the intention of the state. While the objectives of a state in pursuing a specific course of action can be relevant in assessing whether it has complied with the applicable human rights standards, good intentions alone cannot justify a factual violation of those standards. This general statement is to be welcomed since it strengthens the rule of law and legal certainty, and can be of guidance in other cases, on land as well as at sea.

Coming at a time when more than one state has tried to evade the applicability of its human rights obligations vis-à-vis migrants, refugees, and asylum seekers by de-territorializing border

[9] In this connection, and "[w]ith all due respect," Judge Pinto explicitly criticized the decision of the U.S. Supreme Court in *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993). The Concurring Opinion of Judge Pinto de Albuquerque is attached to the Judgment. The paragraphs are not numbered and emphasis is omitted from all the quotations here except the first and the seventh.

[10] Al-Skeini v. United Kingdom, App. No. 55721/07 (Eur. Ct. H.R. July 7, 2011) (reported by Miša Zgonec-Rožej at 106 AJIL 131 (2012)).

[11] Medvedyev v. France, App. No. 3394/03, 51 Eur. H.R. Rep. 39 (2010).

[12] *See also id.*, para. 67; Al-Saadoon v. United Kingdom, App. No. 61498/08, 49 Eur. H.R. Rep. SE11, paras. 87–88 (2009).

controls, including, but not limited to, by undertaking push-back operations on the high seas, the *Hirsi Jamaa* case provides helpful guidance that is relevant beyond European space. Furthermore, most of the Court's findings may well apply to any kind of migration control, be it by sea, by land, or by air. The prohibition of returning individuals to states where there is a real risk of torture, and the de facto prohibition of push-back operations that do not allow for the personal identification of the individuals involved and examination of each one's personal circumstances, may also work for other types of migration control.

The link between the extraterritorial exercise of migration control and the extraterritorial application of the prohibition enshrined in Article 4 of Protocol 4 may constitute a significant check on states' efforts to delocalize migration control and asylum processing. The Court seems to warn states that whenever their organs impede collective group entrance into their territory, whether at their own borders, on the high seas, or on the territory of another state, they may incur responsibility for breach of Article 4. It does not matter, in this respect, if the persons are also returned to another country or are simply stopped from crossing the border (para. 180). The conclusions of the Court could therefore also be applied to interdiction operations aimed at preventing vessels from sailing into the territory of the destination country.

What options does a state have in implementing these principles through its immigration policies? It may still intercept boats with migrants in all cases allowed by the law of the sea.[13] When the lives of the persons on board are in danger, the state is obligated to give assistance. Upon interception, however, the state must take steps to identify the individuals, and only then may it decide whether to bring them to its territory or to disembark them in another state. In the latter case, the state will have to determine if, in the light of their personal characteristics and the situation in the receiving country, returning the migrants will put them at a real risk of torture or inhuman and degrading treatment. Even if they do not make any claim for asylum or invoke any remedy for the suspension of their transfer, the intercepting state bears the burden of assessing the situation *proprio motu*.

If the intercepting state decides that there is no risk under Article 3, it must inform the individuals of their destination and make sure that each of them has access to an effective remedy to challenge the decision, with "suspensive effect," *before* they are transferred. Since it may be impractical, if not infeasible, to carry out all these obligations and to provide for such mechanisms while migrants are on board state vessels, the migrants would have to be brought to a safe place where they could invoke their rights. This may be the territory of the intercepting state or that of another state, as long as the Convention's requirements are respected.

Nothing in the *Hirsi Jamaa* judgment prevents the application of its conclusions to all migrants, be they refugees/asylum seekers or not. The Court's opinion consistently refers to "persons," "applicants," or "migrants," and its description of the appalling conditions in Libya focuses on the treatment of "clandestine" or "irregular" migrants (para. 125). It follows that

[13] The one point that has not been addressed at all by the Court and consequently remains open concerns the legality of push-back operations themselves, even in situations where the modalities fully conform to the requirements of human rights law. According to one of the best-established principles of international law, states have exclusive jurisdiction over vessels flying their flag and navigating on the high seas. UNCLOS, *supra* note 3, Art. 92(1). Even if the vessel is flagless, as vessels used for travel between Libya and Italy generally are, it is not certain that a rule has crystallized allowing third states to undertake enforcement action with respect to migrants on board. *See* DOUGLAS GUILFOYLE, SHIPPING INTERDICTION AND THE LAW OF THE SEA 231 (2009).

a state cannot apply a lower standard than the one prescribed in the judgment by claiming that the individuals intercepted are "simply" economic migrants. This conclusion is further warranted by the Court's dictum that "problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention" (para. 179). While refugees and asylum seekers also enjoy rights under other regimes, these rights are *in addition to* those afforded by human rights law and therefore must be *added to* those indicated by the Court in the *Hirsi Jamaa* case as applicable to all migrants.[14]

Migrants and refugees are of course not the only persons who can be affected by maritime interdictions. In this regard, two aspects of *Hirsi Jamaa* deserve attention as relevant for *all* individuals interdicted at sea, regardless of their status. The first concerns the applicability of human rights obligations in areas beyond the territorial seas of the parties. While the *Drieman*[15] case testified to the existence of jurisdiction, also for human rights purposes, in the exclusive economic zone of a state, the *Medvedyev*, *Women on Waves*, *Xhavara*, and *Rigopoulos*[16] cases all point to the fact that interdiction by military or other state-owned vessels against other vessels on the high seas (or otherwise outside the first state's jurisdiction) brings the persons on board the targeted vessel within the state's jurisdiction. The same conclusion was arrived at by the Inter-American Commission on Human Rights and the Committee Against Torture[17] in two cases concerning situations mirroring those of the *Hirsi Jamaa* case. The *Hirsi Jamaa* judgment therefore consolidates the law in this respect by incorporating relevant notions of jurisdiction under the law of the sea into human rights law and using them to determine whether the interdicting state has de jure or de facto jurisdiction.[18]

The second significant aspect concerns how human rights obligations, designed with situations on land in mind, must be applied at sea. Nothing in the ECHR or any other human rights treaty warrants lesser protection. However, states have sometimes tried to justify such behavior by referring to the practical difficulties arising from the marine environment or their obligations under the law of the sea. In *Hirsi Jamaa*, Italy did so by invoking Article 98(1)(b) of the Law of the Sea Convention requiring the rescue of persons in distress at sea (para. 65). The Court responded that "the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention" (para. 178). In fact, nothing in either the Law of the Sea Convention or other maritime law rules (such

[14] All individuals are protected by the global human rights law instruments regardless of their categorization and some in addition by the ECHR, but only refugees are entitled to the further protection afforded by the 1951 Geneva Convention and 1967 Protocol on refugees, *supra* note 3, and other relevant instruments. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW, ch. 2 (3d ed. 2007).

[15] Drieman v. Norway, App. No. 33678/96 (Eur. Ct. H.R. May 4, 2000).

[16] *Medvedyev*, *supra* note 11, paras. 66–67; Women on Waves v. Portugal, App. No. 31276/05 (Eur. Ct. H.R. Feb. 3, 2009) (in French); Xhavara v. Italy, App. No. 39473/98 (Eur. Ct. H.R. Jan. 11, 2001); Rigopoulos v. Spain, 1999-II ECR 435 (1999).

[17] Haitian Centre for Human Rights v. United States, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev., at 550 (1997), *available at* http://www.iachr.org; P.K. v. Spain, Communication No. 323/2007 (Nov. 11, 2008), Report of the Committee Against Torture 366, UN GAOR, 64th Sess., Supp. No. 44, UN Doc. A/64/44 (2009).

[18] Irini Papanicolopulu, *A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea*, *in* THE LIMITS OF MARITIME JURISDICTION (M. S. Kwon, C. Schofield, & S. Lee eds., forthcoming 2013).

as the Maritime Search and Rescue Convention) prevents states from complying with human rights requirements. While some accommodation may be necessary (for example, to take into account the time needed for navigation or the limited space on board ships), states cannot use the "marine" exception to avoid their human rights obligations.

The judgment did not address all concerns. Since Italy has apparently renewed the agreements under which the 2009 push-back operations were carried out,[19] one might ask whether the outcome of the case would have been different if presented on the basis of events that occurred after the change of government in the two states. In light of recent reports, the Libyan change of government does not seem to justify a different conclusion.[20] In addition, what if the migrants had not been brought on board the Italian vessel but had simply been left in their boat and escorted back to Libya? Furthermore, the Court has failed to address the responsibilities of the state in case it does not intervene, or the responsibilities of the international organizations to which it belongs.[21]

Major questions also remain with respect to push-back operations by states not party to the Convention. The findings of the Court, in particular those concerning the extraterritorial applicability of human rights duties and the prohibition of return that would amount to torture, are capable of implementation beyond the borders of Europe and the Mediterranean Sea. Yet the same cannot be said for the remedies provided by the ECHR, since the Court can hear only cases against parties to the Convention.

Finally, the Court's decision to order the Italian government to obtain assurances from the Libyan authorities that the applicants would not be mistreated or arbitrarily repatriated seems appropriate since, at the moment of the judgment, most applicants remained in the hands of the Libyan government. But it is doubtful whether, had Italy actually obtained such assurances before sending the applicants back to Tripoli, it would have been found in compliance with the requirements of Article 3. Given the well-documented situation of human rights violations in Libya, the return of the applicants would nonetheless have breached Article 3.

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[19] As reported by the Italian news agency ANSA, *Intesa tra Italia e Libia su migranti* [Agreement Between Italy and Libya on Migrants] (Apr. 3, 2012, 7:05 PM), *at* http://www.ansa.it/web/notizie/videogallery/italia/2012/04/03/visualizza_new.html_160711462.html. According to journalists, the content of the new agreements follows that of the previous ones. Livia Ermini, *Respingimenti, accordi Italia-Libia identici a quando c'era Berlusconi* [Push-Backs, Italy-Libya Agreements the Same as When Berlusconi Was in Charge], LA REPPUBBLICA.IT, June 19, 2012, *at* http://www.repubblica.it/solidarieta/profughi/2012/06/19/news/livia_ermini-37510944/.

[20] Report of the High Commissioner Under Human Rights Council Resolution S-15/1, UN Doc. A/HRC/17/45 (June 7, 2011), *available at* http://www.ohchr.org/EN/HRBodies/HRC/Pages//Documents.aspx; Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68 (Mar. 8, 2012), *available at id.*; AMNESTY INTERNATIONAL, ANNUAL REPORT 2012—LIBYA (2012), *at* http://www.amnesty.org/en/region/libya/report-2012.

[21] This issue was recently submitted to the French courts. Complaint submitted to the Tribunal de Grande Instance of Paris in the name of four Ethiopian survivors of a failed attempt to reach Italy by sea from Libya (Apr. 11, 2012), *at* http://www.fidh.org/IMG/pdf/plainte.pdf (in French). Data on the presence of NATO vessels in the marine area between Italy and Libya, where more than fifteen hundred persons lost their lives in 2011, are analyzed in a report on the incident that is the subject of the above complaint. Charles Heller, Lorenzo Pezzani, & Situ Studio, *Report on the "Left-to-Die Boat"* (Apr. 11, 2012), *at* http://migrantsatsea.files.wordpress.com/2012/04/forensic-oceanography-report-11april2012.pdf.

Sierra Leone civil war—individual criminal responsibility—crimes against humanity—war crimes—head of state immunity

PROSECUTOR v. TAYLOR. Case No. SCSL-03-01-T. Judgment. *At* http://www.sc-sl.org. Special Court for Sierra Leone, April 26, 2012.

PROSECUTOR v. TAYLOR. Case No. SCSL-03-01-T. Sentencing Judgment. *At* http://www.sc-sl.org. Special Court for Sierra Leone, May 30, 2012.

On April 26, 2012, Trial Chamber II (Chamber) of the Special Court for Sierra Leone (Special Court or Court) in The Hague convicted former Liberian president Charles Ghankay Taylor of crimes against humanity and war crimes committed from November 30, 1996, to January 18, 2002, in the territory of Sierra Leone during its civil war.[1] Specifically, Taylor was found guilty of the crimes against humanity of murder, rape, sexual slavery, enslavement and other inhumane acts, and the war crimes of committing acts of terror, murder, outrages upon personal dignity, cruel treatment, pillage, and conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. In a separate judgment rendered on May 30, 2012, the Chamber sentenced Taylor to a single term of fifty years for all the counts on which the accused had been convicted.[2]

By way of providing the necessary factual background for judging Taylor's personal guilt, the judgment recites at some length the events that occurred in Sierra Leone from the end of November 1996 until the end of the civil war on January 18, 2002. During this period, many attacks against the civilian population took place, including the burning of homes, murder, sexual violence, physical violence, the illegal recruitment of child soldiers, abduction and forced labor, and looting. These acts were perpetrated within the broader context of the armed conflict in Sierra Leone, which had started on March 23, 1991, when the Revolutionary United Front (RUF) launched a war from the east of the country near the border with Liberia (paras. 30–70).

The Special Court was established by the United Nations and the government of Sierra Leone pursuant to an agreement signed on January 16, 2002, to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.[3] Despite the conclusion of the Abidjan Peace Agreement, signed on November 20, 1996, by President Ahmad Tejan Kabbah of Sierra Leone and Foday Sankoh (the leader of RUF), the conflict resumed in January 1997. On May 25, 1997, members of the Sierra Leone army overthrew the democratically elected government of Kabbah, formed the African Forces Revolutionary Council (AFRC), and invited RUF to join it in a junta. The joint AFRC/RUF alliance could control major towns and diamond-producing areas in Sierra Leone, relying on diamond proceeds to fund its fighting. In this regard, Taylor was alleged to be regularly involved with RUF

[1] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment (Spec. Ct. Sierra Leone Apr. 26, 2012) [hereinafter Judgment]. Decisions and documents of the Court cited herein are available online at its website, http://www.sc-sl.org, unless otherwise noted.

[2] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment (Spec. Ct. Sierra Leone May 30, 2012) [hereinafter Sentencing Judgment].

[3] Statute of the Special Court for Sierra Leone, Art. 1 (Jan. 16, 2002) [hereinafter Statute].

leaders by supplying arms and ammunition in exchange for diamonds mined in Sierra Leone (paras. 42–46).

Taylor served as president of Liberia from August 2, 1997, to August 11, 2003, when he stepped down in the face of challenges from rebel groups and political pressure. Afterward, he went into exile in Nigeria. Before resigning, Taylor had already been indicted by the Special Court, but his indictment and warrant of arrest were made public only during his first trip outside Liberia in June 2003. The indictment was unsealed when he was participating in peace talks with rebel leaders in Ghana. But Nigeria refused to follow Interpol's instruction to arrest Taylor. Nearly three years later, on March 29, 2006, following a request by the president of Liberia, Ellen Johnson-Sirleaf, he was arrested by the Nigerian authorities and surrendered to the Special Court. The accused was transferred into the Court's custody in Freetown and then, because of security concerns about holding the trial in West Africa, to The Hague in June 2006 (paras. 8–10).[4]

In addition to contesting his personal responsibility for the atrocities committed in Sierra Leone, Taylor challenged the Special Court's jurisdiction on several grounds. Because he had been head of state of Liberia at the time the indictment and arrest warrant were issued, he initially claimed immunity from any exercise of the Court's jurisdiction and sought to have the proceedings terminated. Both the Trial and Appeals Chambers rejected that request on the ground that the customary international law doctrine of head-of-state immunity does not apply to prevent an individual from being prosecuted before an international criminal tribunal.[5] Moreover, according to the Appeals Chamber, Article 6(2) of the Special Court's Statute, which provides that those in an official capacity shall not be exempt from responsibility, does not conflict with any peremptory norm of international law.[6]

The Chamber also rejected Taylor's claims that the prosecution was selective and vindictive (paras. 73–84). In this regard, the Chamber referred to the *Čelebići* test of the International Criminal Tribunal for the Former Yugoslavia (ICTY) providing that, to demonstrate whether a prosecution is selective, the defense must establish: "(i) an unlawful or improper (including discriminatory) motive for the prosecution and (ii) that other similarly situated persons were not prosecuted" (para. 79).[7] The Chamber rejected the argument that statements by Prosecutor David M. Crane to the U.S. Congress and leaked U.S. Embassy cables constituted clear evidence of the existence of political and improper motives behind the prosecution (para. 81).

Similarly, the Chamber rejected the defense's submissions that Taylor's trial was based on discriminatory or improper motives because the prosecution had alleged that he, Col.

[4] Security Council Resolution 1688 (June 16, 2006) was issued pursuant to Chapter VII of the United Nations Charter. Importantly, the Security Council noted the intention of the president of the Special Court to establish a chamber in the Netherlands for Taylor's trial and requested that all states cooperate in assisting the Court in making arrangements for the proceedings.

[5] Prosecutor v. Taylor, Case No. SCSL-03-01-I, [Appeals] Decision on Immunity from Jurisdiction, paras. 52–53 (May 31, 2004), *at* http://www.sc-sl.org/LinkClick.aspx?fileticket=7OeBn4RulEg=&tabid=191.

[6] *Id.*, paras. 43–53. Article 6(2) of the Statute provides, "The official position of any accused persons, whether as Head of State or Government or as a responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment."

[7] Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Judgment, para. 611 (Feb. 20, 2001).

Muammar el-Qaddafi, and Blaise Compaoré were members of the same joint criminal enterprise, but the latter two were not prosecuted by the Special Court. The defense cited the prosecutor's assertion that the destruction of Sierra Leone was "[s]ustained by a joint criminal enterprise backed by three heads of state . . . [those of] Libya, Liberia, and Burkina Faso."[8] The Chamber nonetheless found that these allegations did not establish that other persons who had not been charged bore the same level of responsibility as the accused (para. 82).

On the merits, the defense denied that the former Liberian president himself bore any criminal responsibility for the atrocities that had been committed by armed groups during the conflict in Sierra Leone (paras. 16–17). The facts of those atrocities had already been established by the Special Court in other proceedings.[9] The question was whether (or how) they could be attributed to Taylor. The prosecutor charged him with crimes against humanity and war crimes under different modes of liability pursuant to both paragraphs 1 and 3 of Article 6 of the Court's Statute.

Indeed, according to the indictment, as Liberian president, Taylor had planned, instigated, ordered, committed, or aided and abetted in the planning, preparation, or execution of the crimes in question. The accused, as a leader of the National Patriotic Front of Liberia (NPFL) and later as president of Liberia, had acted in concert with members of RUF, the AFRC, the AFRC/RUF junta or alliance, and/or Liberian fighters, including members or ex-members of the NPFL. Thus, the prosecutor argued that Taylor, as a member of a joint criminal enterprise (JCE), was a principal perpetrator of the crimes committed; Taylor had participated in a common plan, common criminal purpose, or design "to forcibly control the population and territory of Sierra Leone and to pillage its resources, in particular diamonds, by the use of criminal means, specifically a campaign of terror encompassing the Indictment crimes with [members of the different warring factions] and officials in his government during his Presidency" (para. 6888).[10]

The Chamber rejected the prosecutor's submissions in relation to both superior responsibility and participation in a joint criminal enterprise, by holding that the accused did not have effective control over the AFRC/RUF and that he was not acting pursuant to a common plan to terrorize the population of Sierra Leone (paras. 6986, 6900). Taylor was found guilty, however, on the basis of two modes of liability pursuant to Article 6(1) of the Statute: "aiding and abetting" and "planning."

Regarding the first of these modes, the Chamber held Taylor guilty as a *secondary perpetrator* under Article 6(1), for *aiding and abetting* the planning, preparation, and execution of war crimes and crimes against humanity (para. 6953). Consistently with the ICTY jurisprudence, the Chamber held that such a mode of liability requires that the accused provided "practical assistance, encouragement, or moral support which had a substantial effect upon the commission of the crimes (*actus reus*)" (para. 6904). Moreover, the subjective element (*mens rea*) of

[8] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Defence Final Trial Brief, para. 11 (May 23, 2011) (quoting Court's first prosecutor, David M. Crane, *in Taylor*, Case No. SCSL-03-01-T-1029, Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and Its Investigators, Annex O, at 30,439–40 (Sept. 24, 2010)).

[9] Prosecutor v. Sesay, Kallon, and Gbao, Case No. SCSL-04-15-A, Appeal Judgment (Oct. 26, 2009); Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-A, Appeal Judgment (May 28, 2008); Prosecutor v. Brima, Kamara, and Kanu, Case No. SCSL-04-16-A, Appeal Judgment (Feb. 22, 2008).

[10] Citing *Taylor*, Case No. SCSL-03-01-T, Public Prosecution Final Trial Brief, paras. 574–87 (Apr. 8, 2011).

aiding and abetting requires that the "accused knew that his acts or omissions would assist the commission of the crime, or that he was aware of the substantial likelihood that his acts would assist the commission of the crime" (*id.*).

The Chamber established that as president of Liberia, Taylor had provided arms and ammunition, military personnel, operational support, moral support, and operational guidance to RUF, the AFRC, the AFRC/RUF junta, and Liberian fighters for military operations during the relevant time. For instance, the Chamber found that there was a continuous supply to Taylor of diamonds mined from areas in Sierra Leone, often in exchange for arms and ammunition. In the Chamber's view, Taylor's practical assistance, encouragement, and moral support "substantially contributed to" the commission of the crimes by the AFRC/RUF during the course of the military operations in Sierra Leone (para. 6946).

Regarding the second mode of liability, the Chamber found Taylor criminally responsible for *planning* the crimes committed by members of the AFRC/RUF and Liberian fighters during the attacks on Kono and Makeni in December 1998, and in the invasion of, and retreat from Freetown between December 1998 and February 1999 (para. 6971). In particular, it said, in November 1998, Taylor and RUF leader Sam Bockarie conceived a plan to carry out an attack that would have culminated in the invasion of Freetown (para. 6958). That plan, the Court noted, had defined the various military targets and the modus operandi of the attack. Moreover, the military campaign to recapture Freetown by the AFRC/RUF fighters had been characterized by extreme violence and involved the commission of war crimes and crimes against humanity. Indeed, during the invasion, over seven thousand people were killed on January 6, 1999, while countless others were raped, mutilated, and displaced from their homes. According to the Chamber, the plan "substantially contributed to" the AFRC/RUF's military operations leading to and involving the Freetown invasion, during which these groups committed the war crimes and crimes against humanity (para. 6968).

In sum, the Chamber found sufficient evidence to establish Charles Taylor's liability for aiding and abetting the planning, preparation, and execution of war crimes and crimes against humanity in Sierra Leone between November 30, 1996, and January 18, 2002, and of planning the crimes committed by AFRC/RUF and Liberian fighters during the above-mentioned attacks on Kono and Makeni, and the invasion of Freetown. As a consequence, the Chamber imposed a combined sentence of fifty years on Taylor for multiple convictions pursuant to Article 19 of the Court's Statute and Rule 101 of the Rules of Procedure and Evidence.

* * * *

The *Taylor* judgment is notable for the extensive detail with which it describes the events during the civil war in Sierra Leone, for its application of the concepts of planning and aiding and abetting to the role played by Taylor in those events, and for the severity of its sentence.

At nearly twenty-five hundred pages, the length of the judgment would create a sense of bewilderment even in the most enthusiastic reader. The Chamber dedicated innumerable pages to a discussion of the pre-civil-war context and, in particular, the pre-indictment period, focusing, for example, on Taylor's role between 1990 and 1996. Moreover, because some of this discussion concerned actions that were not included in the indictment submitted by the prosecutor, it was not *directly* relevant to the establishment of Taylor's individual criminal responsibility in this proceeding. But this approach could be justified on the basis that, unlike domestic criminal courts, international criminal tribunals serve in part to document and draw

attention not only to the specific culpable conduct of the individual defendant but also to its larger context. According to the Chamber, the evidence prior to the indictment period was considered "only for the purposes of clarifying the context, or establishing by inference the elements of criminal conduct" (para. 2193).

Still, it is legitimate to ask whether the assessment of evidence not *strictly* relevant to the establishment of liability can jeopardize the right to a fair trial, especially with regard to the expeditiousness of the proceedings. In the present case, for instance, the criminal proceedings lasted well over nine years, during seven of which the accused was held under detention. That question also triggers another concerning the main purpose of international criminal tribunals. Is the historiographical reconstruction of the events in a country fraught with civil or international conflicts a function more appropriate to a truth and reconciliation commission than a criminal tribunal? As one author has suggested, the role of the latter is properly limited to assessing legally relevant matters, while "[a]n increasing number of facts that are important to historical research remain unexamined, because they appear 'neutral'—and thus uninteresting—in the beam of partisan lights."[11]

In any event, the salience of the *Taylor* judgment rests on a number of facts. Charles Taylor is only the second head of state to have been indicted, tried, and convicted by an international criminal tribunal (the first was Admiral Karl Dönitz, who succeeded Hitler as head of state of the Third Reich in April 1945 and was thereafter convicted by the International Military Tribunal in Nuremberg). The verdict clarifies Taylor's role in the civil war in Sierra Leone. Yet the judgment—consistently with the findings of the Truth and Reconciliation Commission—describes his involvement in the Sierra Leone conflict as very modest. In fact, the Special Court substantially rejected the prosecutor's thesis that the accused was a principal perpetrator pursuant to Article 6(1) and that the crimes suffered by the people of Sierra Leone would therefore not have occurred but for Taylor's supervision and support for RUF and the AFRC (paras. 6890–900).

Unlike the Rome Statute of the International Criminal Court, the Special Court's Statute in Article 6(1) adopts a "unitarian" concept of perpetration, which does not provide for different forms of participation in the commission of a crime. In this regard, to distinguish between principal and accessorial liability, the *Taylor* judgment discussed the concept of the JCE (paras. 457–68). According to this theory, an individual who did not perform the *actus reus* of the crime may still be held responsible for its commission on the basis of his participation in a joint criminal enterprise. The prosecution must prove the existence of a common plan, design, or purpose (which amounts to or involves the commission of a crime provided for in the Statute) and the *significant* contribution to the crime by the accused. With respect to the subjective element, the Chamber concluded that a principal may be liable as a co-perpetrator even when the crimes committed by other members of the criminal enterprise exceed the scope of the common plan, if they constitute a natural and foreseeable consequence of the common plan.[12]

[11] Mirjan R. Damaska, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 337 (2008).

[12] An exception to such a type of JCE applies in the case of special intent crimes like terrorism where, as noted by the Chamber, it would be an anomaly to convict an individual as a co-perpetrator "for a *dolus specialis* crime without possessing the requisite *dolus specialis*." Judgment, para. 468 n.1101 (quoting Prosecutor v. Ayyash, Case

The Chamber found insufficient evidence to establish Taylor's responsibility as a principal for the commission of war crimes and crimes against humanity. It held that the prosecution had failed to prove Taylor's participation in any common plan involving the commission of crimes falling within the Special Court's jurisdiction during either the pre-indictment period (between 1991 and 1996) or the indictment period (between 1996 and 2002).

During the former, Taylor had provided RUF with a training camp in Liberia, instructors, recruits, and material support, including food and other supplies, but the Chamber did not view the evidence as establishing that he had participated in any common plan involving the commission of crimes with RUF leader Sankoh or the Gambian revolutionary known as Dr. Manneh. The cooperation between the NPFL, under Taylor's command, and RUF did not present any critical element of criminality but, instead, was a military action and limited in purpose (para. 6897). While Taylor supported the invasion of Sierra Leone in March 1991, the prosecutor had not proved that the invasion was commenced pursuant to a common purpose to terrorize the civilian population (para. 6896). After his election as president of Liberia in 1997, Taylor supplied RUF leaders with arms and ammunition in exchange for diamonds throughout the indictment period, but the prosecution had also not proved that the armed groups in question were actually supported pursuant to a *common plan* to terrorize the civilian population of Sierra Leone (para. 6898).

Similarly, the Chamber refused to hold the accused criminally responsible under Article 6(3), which defines superior responsibility, since Taylor did not have effective control over RUF or the AFRC/RUF junta (paras. 6977–86). Despite his substantial influence over rebel leaders, the Chamber concluded that he was not in a position to take necessary and reasonable measures to prevent or punish members of the armed groups who were responsible for the perpetration of the acts in question. As for the Liberian fighters who had participated in the commission of crimes in Sierra Leone, the Chamber found insufficient evidence to establish that they remained under his authority or effective control once in Sierra Leone.

Apparently, the imposition of a lengthy sentence of imprisonment was significantly influenced by the official position of Taylor as head of state, rather than his involvement in the commission of the crimes. He was convicted only as an accomplice under Article 6(1), and was not shown to be a primary perpetrator of, hence responsible for, the crimes committed during the relevant time in Sierra Leone. In the sentencing judgment, the Chamber stated that, "[a]lthough Mr. Taylor has been convicted of planning as well as aiding and abetting, his conviction for planning is limited in scope."[13] In line with the Special Court's jurisprudence, as well as that of the ICTY and the International Criminal Tribunal for Rwanda, the Chamber admitted in principle that secondary liability, like aiding and abetting, warrants a lesser sentence than those imposed on principal perpetrators.[14]

Nevertheless, it recognized an exception to this principle when the aider and abettor is a head of state, since such a special status places the accused in a different category of offenders for the purpose of sentencing.[15] According to the Chamber, the betrayal of public trust, which characterizes crimes committed by individuals who are charged with the duty to protect or defend

No. STL-11-01/I, Interlocutory Decision on the Applicable Law, para. 248 (Spec. Trib. Leb. Feb. 16, 2011) (Cassese, J.)).

[13] Sentencing Judgment, para. 101.

[14] *Id.*, para. 36.

[15] *Id.*, para. 100.

the victims, "outweighs the distinctions that might otherwise pertain to the modes of liability discussed above."[16] Indeed, the Chamber explicitly stated that holding a leadership position by an accused found criminally responsible for a crime under Article 6(1) of the Statute could be considered an aggravating circumstance.[17]

To underscore the significance of the leadership role in the sentencing context, it is worth noting that the direct perpetrators of the crimes in question, RUF leaders Issa Sesay, Morris Kallon, and Augustine Gbao were convicted and sentenced to fifty-two, forty, and twenty-five years, respectively.[18] Trial Chamber I found that they had participated in a joint criminal enterprise that consisted of a common plan, shared by leaders of the AFRC and RUF, to "take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas."[19]

In assessing the gravity of the crime—the core element in the determination of the sentence—the principle of culpability should play a central role, especially in the case of international crimes, which are generally perpetrated by a multiplicity of actors. That is, sentencing decisions should reflect the specific responsibility of individual defendants for their own contribution to the crime in question. Such a decision should take into account, for instance, that an aider and abettor need not share the exact criminal intent of the perpetrator; it suffices for him to have knowledge that the perpetrators intend to commit the crime. Judges should refrain from excessive reliance on those elements that do not fall within the culpability principle.

In this regard, it seems problematic that an international tribunal should give more weight to the official status of the accused as head of state than to his actual contribution to the commission of the crime. The risk, of course, is that an accused individual may end up being sentenced on the basis of his official position rather than his actual conduct. The notable arbitrariness of judges in determining sentences sheds light, more generally, on the importance of the principle of legality (*nulla poena sine lege*), whose role has not yet been secured as a cornerstone of a fair and stable international criminal justice system.

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[16] *Id.*, para. 102.
[17] *Id.*, para. 29.
[18] Prosecutor v. Sesay, Kallon, and Gbao, Case No. SCSL-04-15-T, Sentencing Judgment, pt. VI (Apr. 8, 2009).
[19] *Id.*, Judgment, para. 1985 (Mar. 2, 2009).