

Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea

Liber Amicorum Judge Hugo Caminos

Edited by

Lilian del Castillo

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LEIDEN | BOSTON

Library of Congress Cataloging-in-Publication Data

Law of the sea : from Grotius to the International Tribunal for the Law of the Sea : liber amicorum Judge Hugo Caminos / Edited by Lilian del Castillo.

pages cm

Includes bibliographical references and index.

ISBN 978-90-04-28379-4 (hardback : alk. paper) — ISBN 978-90-04-28378-7 (e-book)

1. Law of the sea. 2. Law of the sea—History. I. Castillo, Lilian del, editor. II. Caminos, Hugo, honouree.

KZA1145.L383 2015

341.4'5—dc23

2014035821

ISBN 978-90-04-28379-4 (hardback)

ISBN 978-90-04-28378-7 (e-book)

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The UNCLOS and the Settlement of Disputes: The *ARA Libertad* Case

Susana Ruiz-Cerutti

Introduction

One of the achievements of the negotiations of the United Nations Convention on the Law of the Sea (UNCLOS) is to have incorporated a mechanism for the settlement of disputes broad enough to live up to the expectations of most States Parties. In that regard, the International Tribunal for the Law of the Sea (ITLOS) is one of the means that has proved to be very effective and valuable since its creation in 1996. According to Article 290 paragraph 1 of UNCLOS if a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under Part XV or Part XI, section 5 of the Convention, ITLOS may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision. Regarding this ITLOS' compulsory jurisdiction to intervene in provisional measures, this article will be focused on the *ARA Libertad* Case.¹

Background of the Case

The Frigate *ARA Libertad* is a warship of the Argentine Navy within the scope of Article 29 of the UNCLOS. It is the flagship of the Argentine Navy and, as such, represents Argentina. It has been sailing the world's seas for more than 50 years, conveying a message of peace and friendship with a view to consolidating relations between the Argentine Navy and its counterparts in third countries. Frigate *ARA Libertad* is used for navy cadet training trips. Within the framework of its 43rd instruction voyage, the Governments of Argentina

¹ Request for the prescription of provisional measures pending the constitution of an arbitral tribunal in the *ARA Libertad* Case (*Argentina v. Ghana*) Case N° 20, Provisional measures, International Tribunal for the Law of the Sea (ITLOS), Order of December 15, 2012.

and Ghana agreed on the visit of the Frigate to the port of Tema (Republic of Ghana) and it arrived on the scheduled date of October 1, 2012. However, the following day Judge Richard Adjei-Frimpong [Superior Court of Judicature of Ghana (Commercial Division)] rendered an order requiring that Frigate ARA Libertad be held at the Tema Port in the context of a claim made in New York by 'NML Capital Limited', a 'vulture' private corporate fund registered in the Cayman Islands against Argentina. NML's New York judgment is based on its ownership of defaulted Argentine Republic debt. NML acquired its interests in this debt at a deep discount both immediately before, and well after, Argentina suspended payments on its unsustainable external debt as a consequence of the worst economic crisis of its modern history. By the end of 2001, this crisis made it impossible for Argentina to service its overwhelming debt burden—some \$80 billion in public external debt alone—while maintaining basic governmental services necessary for the health, welfare, and safety of the Argentine populace. Unable to service its debt, Argentina forced to defer interest and principal payments to debt holders and to seek a voluntary restructuring of its debt burden.² In accordance with its business strategy, NML refused to participate in the Republic's 2005 and 2010 voluntary, global debt exchange offers, which together resulted in the successful restructuring of approximately 92% of the Republic's non-performing debt.³

Such order rendered by Judge Frimpong was contrary to international law, in particular, a violation of the immunities enjoyed by warships. Therefore, Argentina requested Ghana to adopt urgently the necessary measures to put an end to this situation. In spite of clear precedents and the unambiguous content of the applicable international rules giving rise to Ghana's international responsibility, Judge Frimpong, on October 2012, 11 confirmed his previous order for the seizure of Frigate ARA Libertad.

Given the fact that the parties had not chosen the same means of settlement, Argentina submitted the dispute to the arbitral procedure provided for in UNCLOS Annex VII, by virtue of Article 287 of the said Convention.⁴

² *NML Capital Limited v. Argentina* (Suit MISC 58/12), In the Superior Court of Judicature in the Commercial Division of the High Court Justice Accra, Submission on behalf of the Republic of Argentina, paragraph 7.

³ *Ibid.*, paragraph 8.

⁴ Note dated 29 October 2012 from the Argentine Ambassador in Ghana to the Foreign Minister instituting proceedings against Ghana under Annex VII of the UNCLOS.

Argentine Arguments

Pending the constitution of the Arbitral Tribunal, as provided in Article 290, paragraph 5, of UNCLOS, Argentina requested ITLOS to adopt 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.⁵

The main reason for requesting the provisional measure is that Ghana's action produced an irreparable damage to the Argentine rights in question, namely the immunity that the Frigate ARA Libertad enjoys, the exercise of its right to leave the territorial waters of Ghana, and its freedom of navigation more generally.

The rights that Argentina requested to be preserved are well established both in the UNCLOS and in customary international law. In its Statement of Claim included in the notification instituting arbitral proceedings, Argentina

requests the arbitral tribunal to declare that the Republic of Ghana, by detaining the warship "ARA Fragata Libertad", keeping it detained, not allowing it to refuel and adopting several judicial measures against it:

- (1) Violates the international obligation of respecting the immunities from jurisdiction and execution enjoyed by such vessel pursuant to Article 32 of UNCLOS and Article 3 of the 1926 Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels as well as pursuant to well-established general or customary international law rules in this regard;
- (2) Prevents the exercise of the right to sail out of the waters subject to the jurisdiction of the coastal State and the right of freedom of navigation enjoyed by the said vessel and its crew, pursuant to Articles 18, paragraph 1 (b), 87, paragraph 1 (a), and 90 of UNCLOS.

Thus, Argentina requests the arbitral tribunal to assert the international responsibility of Ghana, whereby such State must:

- (1) immediately cease the violation of its international obligations as described in the preceding paragraph;

⁵ Argentine Request for the prescription of provisional measures under article 290, paragraph 5, of UNCLOS dated November 14, 2012, paragraph 28. *ARA Libertad Case (Argentina v. Ghana)*, Case N° 20, International Tribunal for the Law of the Sea (ITLOS).

- (2) pay to the Argentine Republic adequate compensation for all material losses caused;
- (3) offer a solemn salute to the Argentine flag as satisfaction for the moral damage caused by the unlawful detention of the flagship of the Argentine Navy, ARA *Fragata Libertad*, preventing it from accomplishing its planned activities and ordering it to hand over the documentation and the flag locker to the Port Authority of Tema, Republic of Ghana;
- (4) impose disciplinary sanctions on the officials of the Republic of Ghana directly responsible for the decisions by which such State has engaged in the violations of its aforesaid international obligations.⁶

Since the celebrated *Schooner Exchange case*,⁷ it is clear that a warship enjoys immunity. Furthermore, Article 32 of the UNCLOS confirms a well-established rule of general international law. Ghana, which agreed to the visit of the Frigate ARA *Libertad* to its port, recognized the warship character of the Frigate ARA *Libertad*, as well as the immunity that this warship enjoys. In fact, at a hearing called by Judge Frimpong, the legal adviser of the Ghanaian Ministry of Foreign Affairs expressed its full support to and recognition of Argentina's immunity from the jurisdiction of the Ghanaian Courts as well as the immunity and inviolability enjoyed by the ARA *Libertad* as a warship, as follows: "It became the Court's duty in conformity to established principles to release the vessel and to proceed no further in the course".⁸

6 Note dated 29 October 2012, paragraphs 6 and 7.

7 *The Exchange v. Mc Faddon*, 11 U.S. 116 (1812): "It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise." pp. 145–146.

8 In the Superior Court of Judicature in the Commercial Division of the High Court Justice Accra held on Tuesday, 9 October 2012 before his Lordship Justice Richard Adjei-Frimpong. Statement by Mr. Ebenezer Appreku, Director of the Legal and Consular Bureau of the Ministry of Foreign Affairs and Regional Integration of Ghana.

In the case *Chung Chi Cheung v. The King* the Judicial Committee of the Privy Council quoted the *Schooner Exchange* case and confirmed that, in the area of immunity:

[...] in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation: acts under the immediate and direct command of the sovereign [...] 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 rights of hospitality.⁹

The UNCLOS has not established any exclusion to the immunities of warships. The exceptions mentioned in Article 32—in any event do not apply to the question at issue in the present case—are telling in this regard.¹⁰ Whereas the flag State bears responsibility for losses or damages caused by its warship to the coastal State, the latter State cannot take any measure against the warship.¹¹ This holds true to such an extent that even if a warship does not comply with the laws and regulations of the coastal State, all that this State can do is to require it to leave its territorial sea immediately.¹²

The general waiver of a State to its immunity from jurisdiction and enforcement does not affect the immunity of warships whose autonomous character has been recognized by case law and scholars. In fact, the most recent study published on State Immunity stresses the idea that “certain categories of property are regarded as so sensitive that they are under special protection and absolutely immune from execution; that is, they cannot be subjected to execution without express consent of the foreign State concerned”.¹³ Military property obviously falls within this category.¹⁴ In addition, it is important to point out the fact that the US District Court for the Southern District of New

9 *Chung Chi Cheung v. The King*, Appeal from the Full Court of Hong Kong, Judicial Committee of the Privy Council, 2 December 1938, 19 Aspinall's Maritime Law Cases 234, 246; 33 AJIL, pp. 376–384, p. 383.

10 See Bernard H. Oxman, “The Regime of Warships Under the United Nations Convention on the Law of the Sea”, *Virginia Journal of International Law*, vol. 24 N°4 (1983–1984): 809, 816–819.

11 Article 31 of UNCLOS.

12 Article 30 of UNCLOS.

13 Xiaodong Yang, *State Immunity in International Law* (Cambridge: Cambridge University Press, 2012), 404.

14 *Id.*, 417.

York having dealt with the same corporate claim against Argentina and having granted an order for attachment of Argentina's assets in New York excluded military assets.¹⁵ Furthermore, the immunity of a warship is not subject to the payment of a caution or a similar measure.

Ghanaian Arguments

The main arguments of Ghana could be synthesized as follows:

First, whereas Article 32 of UNCLOS refers to the immunity of warships in the territorial sea, it does not refer to any such immunity when in internal waters. Article 32 provides that "with such exceptions as are contained in subsection A and in Articles 30 and 31 (which are not at issue in the present case), *nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes*". In other words, according to Ghana's view the Convention does not provide any rule or other guidance on the immunities of a 'warship' which is present in internal waters.¹⁶ Unlike Article 95 of the Convention which stipulates in express terms that "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State", Article 32 does not establish any rule with regard to the grant of immunity (or any rule on the waiver of immunity).¹⁷

Another Ghanaian argument relates to the interpretation and application of the rules concerning the immunity of a 'warship' in internal waters that does

¹⁵ *NML Capital LTD v. Argentina and NML LTD and EM LTD v. Argentina and Banco de la Nación Argentina*, Order of Attachment dated Sept. 12, 2008 (order in NML cases excluding from attachment, *inter alia*, any "property that is, or is intended to be, used in connection with a military activity, and is of a military character or is under the control of a military or defense agency").

¹⁶ However, it is relevant to note that some scholars point out an opposite view: "Warships as defined in UNCLOS and military aircraft have complete immunity in the territorial sea, in internal waters and in ports, which are usually located in internal waters". George K. Walker, "Symposium Paper: The Ins And Outs Of The Modern Port: Where Do We Go From Here?: Self-Defense, The Law Of Armed Conflict And Port Security", 5 *S.C.J. Int'l L. & Bus.* 347 (2009): 367.

¹⁷ Written statement of Republic of Ghana dated November 28, 2012, *ARA Libertad Case (Argentina v. Ghana) Case N° 20*, International Tribunal for the Law of the Sea, paragraph 11.

not involve the interpretation and application of the UNCLOS. To the extent that such a rule might exist it could only be found outside the Convention, whether under other rules of customary or conventional international law. Consequently, Article 32 cannot be a legal basis for Argentina's claim, and therefore neither the Annex VII Tribunal nor ITLOS can establish jurisdiction on the basis of that provision.¹⁸

Argentina has also invoked Articles 18(1)(b), 87(1)(a) and 90 of UNCLOS as a basis for its claim. However, in Ghana's opinion none of these provisions are applicable to the facts of this case. Article 18(1) defines 'passage' as navigation through the territorial sea without entering the internal waters of the coastal State or for the purpose of entering or leaving the internal waters. It clarifies the meaning of passage for the purpose of 'innocent passage' in the territorial sea,¹⁹ without extending that right to the internal waters of a coastal state. Internal waters are an integral part of a coastal state and are therefore not the subject of detailed regulation by the Convention. The coastal state enjoys full territorial sovereignty over internal waters, and any foreign vessel that is located in internal waters is subject to the legislative, administrative, judicial and jurisdictional powers of the coastal State.

As set out by Argentina, the ARA Libertad was detained by the authorities of Ghana at the Port of Tema and is thus within the internal waters of Ghana. It was not in Ghana's territorial sea: Ghana argues that Article 18(1)(b) is therefore not applicable or in dispute and cannot provide a basis for asserting the jurisdiction of the Annex VII Tribunal.²⁰

Secondly, according to Ghana's position the central issue in relation to this matter concerns the interpretation and application of a waiver of immunity that is found in the bonds. In its ruling on the question of immunity and the extent of the waiver, the decision of the High Court (Commercial Division) of Ghana was based on an interpretation of Argentina's waiver that was based on judgments of courts in the United States and the United Kingdom. Ghana notes that the Convention contains no rule or provision on the issue of waiver of immunity, and that the matter is entirely unregulated by the Convention.²¹

¹⁸ Ibid., paragraph 12.

¹⁹ UNCLOS, Article 19: Meaning of Innocent Passage.

²⁰ Written statement of Republic of Ghana dated November 28, 2012, *ARA Libertad Case (Argentina v. Ghana)*, Case No 20, International Tribunal for the Law of the Sea, paragraph 13.

²¹ Ibid., paragraph 15.

Provisional Measure

ITLOS issued an Order that entirely granted the Argentine Request in the following terms:

(1) Unanimously,
Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under Article 290, paragraph 5, of the Convention:

Ghana shall forthwith and unconditionally release the frigate ARA Libertad, shall ensure that the frigate ARA Libertad, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and shall ensure that the frigate ARA Libertad is resupplied to that end.

(2) Unanimously,
Decides that Argentina and Ghana shall each submit the initial report referred to in paragraph 103 not later than 22 December 2012 to the Tribunal, and authorizes the President to request such information as he may consider appropriate after that date.²²

The main argument was the interpretation of Article 32 of UNCLOS. In fact, ITLOS considered that Article states that “nothing in this Convention affects the immunities of warships” without specifying the geographical scope of its application.²³ Along these lines, the Tribunal affirmed that some provisions of UNCLOS may be applicable to all maritime areas, as in the case of the definition of warships provided for in Article 29 of the Convention.

Additionally, the Tribunal made a strong statement affirming that a “warship is an expression of the sovereignty of the State whose flag it flies”.²⁴ Furthermore, ITLOS stated that actions taken by the Ghanaian authorities that prevented the ARA Libertad, a warship belonging to the Argentine Navy, from discharging its mission and duties affect the immunity enjoyed by this warship under general international law.²⁵

²² Request for the prescription of provisional measures pending the constitution of an arbitral tribunal in ARA Libertad Case (Argentina v. Ghana) Case N° 20, Provisional measures, Order of December 15, *ITLOS* (2012), paragraph 108.

²³ *Id.*, paragraph 63.

²⁴ *Id.*, paragraph 94.

²⁵ *Id.*, paragraph 98.

Arbitration

After the mentioned provisional measure issued by ITLOS, regarding the matter of substance of the ARA Libertad Case, the Arbitral Tribunal was constituted on February 4, 2013 with the intervention of the President of ITLOS, Judge Shunji Yanai in accordance with Article 3 of Annex VII to the UNCLOS. The arbitrators appointed were: Bruno Simma (Germany—President), Elsa Kelly (Argentina), Thomas Mensah (Ghana), Awn Shawkat Al-Khasawneh (Jordanian), Bernard Oxman (United States).

On May 21, 2013, a first meeting between the parties and the Tribunal was held in order to deal with formal aspects such as the adoption of the Rules of Procedure to supplement Annex VII to UNCLOS; language and venue of the arbitration; procedural timetable (deadlines for filing memorial and counter-memorial); fixing dates for oral hearings and witnesses' evidence.

On June 20, 2013, the Ghanaian Supreme Court delivered a judgment along the lines of the said ITLOS' decision that quashed the orders of interlocutory injunction made on the 2nd of October 2012 by Judge Frimpong against the Argentine warship, as well as the ruling delivered on the 11th of October 2012 by the same judge confirming such injunction order. In fact, the Court stated that "There is no doubt that, under customary international law, warships are covered by sovereign immunity in foreign ports".²⁶ It also pointed out that all lower courts are obliged to follow and apply the law as clarified in this case. According to Ghanaian Supreme Court's decision, there should accordingly be no further seizures of military assets of sovereign states by Ghanaian courts in execution of foreign judgments, even if the sovereign concerned has waived its immunity.²⁷

Such judgment triggered the possibility to initiate negotiations between Argentina and Ghana in view to terminate the arbitration on agreed terms. In an effort to reestablish the historical links of friendship between both countries and strengthen the so-called "South-South Cooperation", Argentina considered that the dissemination of the Ghanaian Supreme Court's decision at international level constitute sufficient satisfaction to discharge the injury occasioned by the injunction measure over the Frigate ARA Libertad issued by a Ghanaian Tribunal High Court in violation of the international obligation to respect the immunity that enjoys the said warship enjoys, according to Article 32 of UNCLOS as well as the well-established general or customary international rules.

²⁶ Ghanaian Supreme Court, Judgment dated June 20, 2013, 24.

²⁷ *Id.*, 32.

Conclusions

Although this case was initiated due to an unfortunate decision of a judge of a Ghanaian inferior tribunal contrary to international law, it offered the opportunity to reaffirm once again that the means of settlement of disputes instituted by UNCLOS, in particular—ITLOS—continue to be effective and valuable for States Parties. In that sense, it would be positive for States that still have not done so, to consider the acceptance of ITLOS' jurisdiction as one of the means to solve their disputes concerning the interpretation or application of UNCLOS in the terms of its Article 287.²⁸

At the same time, this case allowed the chance to reaffirm that warships undoubtedly enjoy immunities under international law, in particular under the scope of UNCLOS. In fact, given the rights at stake such reaffirmation is not only useful for the parties involved in the dispute but also for the rest of States Parties and the international community as a whole.

Moreover, it led to the reaffirm that UNCLOS sets out the legal framework within which *all* activities in the oceans and seas must be carried out as the United Nations General Assembly points out annually in its Resolution on Oceans and the Law of the Sea.²⁹

All in all, the termination of the arbitration on agreed terms between both parties formalized before the Arbitral Tribunal on September 27, 2013 reflects the strong commitment of Argentina regarding the international cooperation that constitutes one of the pillars of its foreign policy. In that context, “South-South Cooperation” represents one of the priorities of our country; in particular, it is extremely relevant to emphasize the links between South America and Africa, namely, through Africa-South America Cooperation Forum. Undoubtedly, the termination of this case will contribute to that goal.

²⁸ Currently, more than 30 States Parties have accepted ITLOS' jurisdiction in the terms of Article 287 of UNCLOS.

²⁹ UNGA Resolution 67/78, preambular paragraph 4.