

THE CASE "A.R.A. LIBERTAD"

By **Alejandro Kenny**

On October 2, 2012, a judge from Ghana –pursuant to the laws of this country– ordered to seize the frigate A.R.A. "Libertad" in the port of Tema.

THE SITUATION

On October 2, 2012, the frigate A.R.A. "Libertad", a training ship of the Argentine Navy, was seized as ordered by a judge from Ghana in the port of Tema where it had arrived with the cadets of the last year of the Army School in their training voyage.

By means of a 20- page judgment, which seemed not to have any error, the judge did not even question the condition of warship of this frigate, but his interpretation did not consider the importance of its immunity under these circumstances.

The Argentine Administration, after having verified that the government of Ghana could not influence the decisions of the Ghana courts and that it was not an issue that could be dealt with by the Security Council of the United Nations,

resorted to the International Tribunal for the Law of the Sea based in Hamburg. And this was the right decision.

INTERNATIONAL FORA

The International Tribunal for the Law of the Sea- created in 1996 as a stage for solving disputes arising from the application of the Convention of the Law of the Sea of the year 1982- established the Case "ARA Libertad" (Argentina v. Ghana). This was the last of the 20 cases dealt with by the Tribunal. Although there was some hope because Ghana and Argentina were signatory countries, there was no certainty of success.

Why was this issue not simple? After some unsuccessful diplomatic negotiations, on October 30, 2012, Argentina informed Ghana that it would resort to the International



Tribunal for the Law of the Sea. On November 14, our country presented a motion for injunctive relief. First, the Tribunal had to admit that they had jurisdiction over the case, but the strong arguments of Ghana presented by their Legal Counsel –from one of the best lawyers’ buffets from London– expected the Tribunal to decline.

The Argentine representatives, also, stated that the sovereign immunity of warships had to be acknowledged even in the internal waters of a country. The regulations about immunity of warships, as established in Part II “Territorial Sea and Adjacent Area” of the Convention of the Law of the Sea, seemed to favor Ghana.

But, *prima facie*, the Tribunal acknowledged its jurisdiction and duly interpreted; stating the prevalence to custom law which states, the sovereign immunity of warships established in Article 32 of the Convention, that it does not exclude internal waters².

THE RULING

The ruling issued on December 15, 2012 held the release of the frigate as provisional measure under no conditions. Arbitration was pending but, in this case, curiously, the

provisional measure is more important than the ruling on the subject matter of the dispute.

This ruling is historic for several reasons. First, this case was solved unanimously by the 21 judges that ordered the provisional measure, as it was required by one of the parties³. This has been unprecedented in the Tribunal for the Law of the Sea. Even the *ad hoc* judge from Ghana who is a member of this Tribunal ruled accordingly.

Moreover, the ruling constitutes doctrinaire background which, in general, strengthens the concept of sovereign immunity of warships. This also implies that the international acknowledgment of the sovereign immunity of the ARA Libertad Frigate as warship has been shown.

But the Navy has an additional role that is sometimes put sideways. The Navy, such as the Navy from the Argentine Republic, has to safeguard, by being present in the sea, freedom of navigation. This is so because in South America, we are an edge country and we are closely related to the sea, a fruitful source of resources that have to safeguard a maritime hemisphere *par excellence*. Presence in the sea gives rise to the exercise of a right that is one of the best ways to make it be acknowledged.

And the Frigate, although it did not totally comply with its previous mission related to the training of naval officers, could comply with another mission which is even more significant in historic terms. It contributed to clarify and explain the concept and scope of sovereign immunity of warships and their corollary, which is simply the strengthening of the concept of freedom of navigation as stipulated in the Convention of the Law of the Sea, by means of the right to innocent passage in the straits used for international navigation, right to innocent passage and passage through archipelago maritime ways and freedom of navigation in the exclusive economic zone and the high seas⁴.

The cause of the release was the result of the serious work carried out by a truly professional team from our Ministry of Foreign Affairs which led to the detention order to be revoked at an international stage.

Therefore, thanks to the ruling that ordered the release of the ARA Libertad, its future presence in the sea and any port in the world cannot be questioned.

Alejandro Kenny

Real Admiral (Retired), Bachelor in Navy Systems. He graduated from the US Naval War College. He holds a Master in International Relations from the Universidad de Belgrano and Master in Administration from the Salve Regina University, United States. He holds a post- degree in Research in Public Policies from the Escuela de Posgrado Ciudad Argentina, Universidad del Salvador.

He is a member of the Argentine Council for International Relations. He is the author of several articles and has given conferences on International Security, Maritime Protection and Convention of the Sea.

He is a consultant, naval expert in maritime and river navigation and communications. He is a professor of Operational Strategy at the Escuela Superior de Guerra de las Fuerzas Armadas and Submarine Operations and Introduction to Operational Strategy at the Escuela de Guerra Naval.

REFEREED ARTICLE

1. United Nations: Third Convention of the United Nations on the Law of the Sea of 1982; Part II, Section 1, Subsection C, Article 32: Immunities of warships and other government ships operated for non-commercial purposes.
2. United Nations; International Tribunal for the Law of the Sea; "The "ARA Libertad" Case (Argentina v. Ghana). List of cases 20, Request for Provisional Measure, ruling in English and French dated December 15, 1982; Hamburg; Germany; paragraph 37: Considering that therefore the Tribunal, before prescribing provisional measures under article 290, paragraph 5, of the

Convention, must satisfy itself that *prima facie* the Annex VII arbitral tribunal would have jurisdiction. 94: "Considering that, in accordance with general international law, a warship enjoys immunity, including in internal waters, and that is not disputed by Ghana.

3. United Nations; International Tribunal for the Law of the Sea; *Op. cit.*; paragraph 108.

4. United Nations; United Nations Convention on the Law of the Sea of 1982; articles 17, 38, 45, 52, 53, 58 and 87.