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

Liber Amicorum Judge Hugo Caminos

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CHAPTER 9

Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?

Marcelo G. Kohen

Internal waters are one of the eight or nine different existing maritime areas. They are part of the territory of the State and, as such, fall under its sovereignty. In other words, States exercise the maximum of their competencies therein. This is a feature internal waters share with the territorial sea and with archipelagic waters. Indeed, before the first half of the 20th century there was no distinction between internal waters and the territorial sea. The only two existing maritime areas were territorial waters and the high seas. This is an often-neglected aspect of the question, which deserves attention. Unsurprisingly, much of the argumentation used to exclude internal waters from the realm of the international law of the sea, in order to consider that these waters as simply governed by the domestic law of the coastal State, recalls the arguments employed to deny any international regulation of territorial waters, at the time when the distinction between territorial sea and internal waters did not exist.

As will be explained below, it has then been contended, in recent litigation, that the International Convention on the Law of the Sea (hereinafter, 'UNCLOS' or the 'Convention') does not govern internal waters. These waters would even escape international concern, to be governed exclusively by domestic law and subject to the same conditions as the rest of the territory under the sovereignty of the State. This is a common belief in part of the doctrine.[1] The purpose of this contribution is to demonstrate precisely the opposite. This is not a purely academic debate. It has practical importance, since the dispute settlement mechanism set out in Part XV of the UNCLOS, and particularly the compulsory procedures entailing binding decisions, only relate to disputes as to the interpretation or the application of this Convention.[2] Indeed, the attempt to exclude any question concerning internal waters from the UNCLOS essentially aims at equally excluding it from the dispute settlement procedures.

1 See i.e. Kaare Bangert, "Internal Waters", in *The Max Planck Encyclopedia of Public International Law, vol. V*, ed. R. Wolfrum (Oxford: Oxford University Press, 2012), 310–316.

2 See Arts. 279 and 286 of the UNCLOS.

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The present contribution, which pays homage to the leading Argentine specialist in the law of the sea, will be divided into three parts. First, it will examine the arguments developed to deny the application of the UNCLOS to internal waters. Second, it will expose that it is the UNCLOS that determines the spatial and legal scope of internal waters. Third, it will specifically describe the rights and obligations of coastal and third States in internal waters as established or recognised by the UNCLOS. As a result, the logical conclusion that will follow is that the UNCLOS does contain regulations applicable to internal waters, and taken together, establishes a legal regime for them.

Arguments Developed to Deny the Application of the UNCLOS to Internal Waters

It has been asserted that in all the codification efforts of the law of the sea, it was decided to exclude internal waters. Counsel acting for Ghana in the *ARA Libertad* case (Argentina v. Ghana), emphatically asserted before ITLOS that

> [a]t each stage it was understood that the regime of ports and internal waters was excluded from the relevant instrument and from the 1982 Convention, on the basis, as one member of the International Law Commission put it in 1954, that it was 'universally agreed' that the regime of ports and internal waters was 'different from that of the territorial sea'.[3]

As is known, the *ARA Libertad* case related to the detention of an Argentine warship,while in a Ghanaian port as a result of a State visit agreed upon by both parties,throughan order of injunction delivered by a Ghanaian judge. One of the main arguments of the defendant was that the Convention does not regulate the immunity of warships in internal waters. In its written statement before ITLOS, Ghana contended that

> [i]nternal 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.[4]

3 ITLOS, The *Ara Libertad* Case, 30 November 2012, ITLOS/PV.12/C20/4, p. 3, lines 39–43 (Sands).

4 ITLOS, The *Ara Libertad* Case (Argentina v. Ghana), Written Statement of the Republic of Ghana, 28 November 2012, par. 13.

And further, "[t]o 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."[5]

Contrary to the position of Ghana, the order of the ITLOS of 15 December 2012 was unanimous in stating that "the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute".[6] The reason for this finding was that Article 32 of the Convention ("Immunities of warships and other government ships operated for non-commercial purposes")

> states that 'nothing in this Convention affects the immunities of warships' without specifying the geographical scope of its application [...] [and] that, although article 32 is included in Part II of the Convention entitled 'Territorial Sea and Contiguous Zone', and most of the provisions in this Part relate to the territorial sea, some of the provisions in this Part may be applicable to all maritime areas, as in the case of the definition of warships provided for in article 29 of the Convention.[7]

Notwithstanding this unanimity, two members of the ITLOS agreed "in principle" with the respondent in the idea that "none of the provisions of the Convention provide for the immunity of warships in the internal waters of a foreign State".[8] With regard to the general question discussed in this contribution, i.e. whether internal waters are governed by the UNCLOS, it is worth quoting the joint separate opinion of Judges Cot and Wolfrum, since it explains this position in a better way than was done by the Respondent during the proceedings for the request for the prescription of provisional measures. According to these judges:

> there are certain provisions in the Convention having a bearing on the legal regime governing internal waters; these are article 2, paragraph 1, article 7, paragraph 3, article 8, article 10, paragraph 4, article 18, paragraph 1, article 25, paragraph 2, article 27, paragraph 2, article 28, paragraph 3, article 35 (a), article 50, article 211, paragraph 3, and article 218 of the Convention. But even a cursory assessment of these provisions clearly indicates their limited scope. They only deal with the status of internal waters, equating that area with the land territory, the access

5 Id., para. 12.

6 ITLOS, The *Ara Libertad* Case (Argentina v. Ghana), Case N° 20, Order of 15 December 2012, para. 67.

7 Id., paras. 63–64.

8 Joint separate opinion of Judges Cot and Wolfrum, id., paras. 22–23 of this opinion.

> thereto, their delimitation vis-à-vis the territorial sea, the rights of coastal States exercising their jurisdiction vis-à-vis vessels having left internal waters and the rights of coastal States to prevent the entry of vessels into their internal waters. However, all these provisions taken together do not constitute a comprehensive legal regime comparable to the one on the territorial sea (see the different approach taken in the Order).[9]

Interestingly enough, the joint separate opinion enumerates a rather considerable number of provisions of the UNCLOS that deal with internal waters, even though, as will be explained below, this list is not exhaustive, since other important provisions also refer to the conduct of the coastal State in internal waters and ports. It is not explained why these provisions taken together, plus those of general character applicable to all maritime areas, would not constitute a 'comprehensive legal regime'. Instead, the joint separate opinion states that in any event this legal regime would not be comparable to the 'comprehensive legal regime' of the territorial sea. However, the question here is not whether the regime of the territorial sea is more elaborate or 'comprehensive' than that of internal waters. One could easily argue that the UNCLOS regime of the Zone is more elaborate and therefore more 'comprehensive' than that of the territorial sea. It may simply be the case that one maritime area may require more rules than others, but this fact does not prevent those areas from being regulated in the UNCLOS.

What is considered a decisive example in the joint separate opinion demonstrating that internal waters would not be governed by the UNCLOS is that "an equivalent to article 21 of the Convention describing the laws and regulations of the coastal State relating to innocent passage in the territorial sea is missing. The principle governing internal waters is the sovereignty of the coastal State concerned."[10] This example does not demonstrate that internal waters are not governed by the UNCLOS. It simply shows that, contrary to the territorial sea, there is no right of passage in internal waters. This is simply the main difference between internal waters and the territorial sea, precisely that which justifies the distinction between these two different regimes,[11] while some time ago

9 Id., paras. 23–24 of the joint separate opinion.

10 Id., para. 24 of the joint separate opinion.

11 According to the report prepared by the UN Secretariat (Codification Division of the Office of Legal Affairs) on the "Juridical Régime of Historic Waters, Including Historic Bays" (Doc. A/CN.4/143), the importance of the distinction between internal waters and the territorial sea "lies in the fact that (…) the coastal State must allow the innocent passage of foreign ships through its territorial sea, but has no such obligation with respect

there was one regime, covering both, unspecifically referred to as 'territorial waters'. As the *Report on Historic Waters* prepared in the framework of the work of the International Law Commission explained: " 'Territorial waters' could be used as a term comprehending both the 'territorial sea' and 'internal waters'; what is now known as 'internal waters' was therefore often referred to as 'territorial waters'."[12]

Furthermore, the distinction between internal waters and the territorial sea through the existence of the right of innocent passage is not an absolute one. There are internal waters in which the right of innocent passage does exist. According to Article 8, paragraph 2 of the UNCLOS, where the establishment of a straight baseline "has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters." Furthermore, there are other internal waters whose regime includes UNCLOS provisions granting a right of transit passage, such as those constituting straits used for international navigation.[13]

A further argument developed by both the Respondent and the joint separate opinion was that the internal waters regime is that of the territorial sovereignty of the coastal State. Judges Cot and Wolfrum based their analysis of this question in the way Article 2, paragraph 1, of the UNCLOS explains the sovereignty of the coastal State over its territorial sea. According to their joint separate opinion, this provision

> equates internal waters and archipelagic waters with the land territory whereas it 'extends the sovereignty to an adjacent belt of sea called the territorial sea'. This clearly establishes that internal waters originally belong to the land whereas the territorial sea so belongs but only on the basis of international treaty and customary international law. As a consequence thereof limitations of the coastal States' sovereignty over internal waters cannot be assumed.[14]

This alleged distinction, putting internal and archipelagic waters on the one side, and the territorial sea on the other, is not justified for a number of reasons. Article 2, paragraph 1, reads as follows:

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to its internal waters", *Yearbook of the International Law Commission*, vol. II (1962): 23, para. 160.

12 Id., p. 23, para. 162.

13 See Art. 34 and ff. of the UNCLOS.

14 Joint separate opinion of Judges Cot and Wolfrum, id., paras. 25 of this opinion.

> The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

First, this text in no way 'equates' the internal and archipelagic waters with land territory and distinguishes this ensemble from the territorial sea. The text is absolutely clear. Not only is there no distinction between the given regimes of each area, but rather the contrary: the same attribute of the State applies, i.e. the *sovereignty* of a coastal State extends to *all* the relevant areas this article mentions: land territory, internal waters, archipelagic waters *and* territorial sea. The first paragraph of Article 2 simply geographically describes where the territorial sea is located.

Second, nothing in the text, or even outside this article, allows the conclusion according to which internal waters "originally belong to the land" whereas the territorial sea only 'belongs' to that land "on the basis of treaty and customary law". Indeed, the three maritime areas are the result of the recognition of their existence by customary and conventional law. As indicated earlier, the distinction between internal waters and territorial sea is not an old one. It started during the first half of the 20th century and has its background in the discussion about the existence or not of a right of innocent passage in the territorial waters of the coastal State.[15] It is telling that the Central American Court of Justice, while considering in a 1917 judgment that the Gulf of Fonseca is a historic bay, called its waters 'territorial' and not 'internal'.[16] And it is all the more significant that the Chamber of the ICJ dealing with the *El Salvador/Honduras: Nicaragua intervening* case, while agreeing with the Central American Court of Justice on the legal qualification of the Gulf of Fonseca, considered its waters "internal", following the terminology contemporary to its judgment in 1992.[17] It is not by chance that the *Institut de Droit international*, only in 1957, adopted

15 For an account and discussion of the existence of the right of innocent passage in territorial waters see Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York: Jennings, 1927).

16 Central American Court of Justice, *El Salvador v. Nicaragua*, Opinion and Decision of 9 March 1917, *AJIL*, vol. 11 (1917): 705. For the original text in Spanish of the judgment, see: *Sentenciapronunciada en el juiciopromovidopor el Gobierno de la República de El Salvador contra el Gobierno de la República de Nicaragua por la celebración del Tratado Bryan-Chamorro*. Corte de Justicia Centroamericana. San José, Costa Rica, 9 (mars 1917).

17 Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), judgment of 11 September, *ICJ Reports* (1992): 593, para. 393, p. 605, para. 412 (for the qualification of the waters as "internal"), p. 616, para. 432, (1) (for the operative part deciding that the Gulf of Fonseca is a historic bay).

a resolution on "The distinction between the *régime* of the territorial sea and the *régime* of internal waters".[18] Furthermore, 'archipelagic waters' were a creation of the UNCLOS as a way to also settle a difference existing between those archipelagic States, particularly Indonesia and the Philippines, that claimed these waters as internal, and others who denied them that character. The compromise was precisely the creation of a new third category between internal waters and the territorial sea.[19]

Third, the fact that "limitations of the coastal States' sovereignty over internal waters cannot be assumed" is not relevant for the matter under discussion. Those limitations cannot be assumed over the territorial sea either. In all cases, these limitations to sovereignty must be established by international law. As will be demonstrated below, these limitations exist with regard to internal waters and find their basis within the UNCLOS. As a matter of course, they can also be the result of other agreements, i.e. bilateral and multilateral treaties.[20]

Finally, the joint separate opinion relied upon a quick examination of the *travaux préparatoires* in order to consider that there is no regime of internal waters in the UNCLOS. In particular, it is mentioned that no State suggested including rules about that regime or about ports.[21] As will be seen below, the fact is that the Convention does contain rules relating to the rights and obligations of coastal and third States in internal waters and ports, even though they are not put together in a single section. Furthermore, no State objected to this on the ground that regulations relating to internal waters should be excluded from the scope of the Convention. The rest of the references mentioned in the joint separate opinion are exclusively concerned with the regime of ports and not with internal waters in general. Tellingly, the references to the Second Commission of the Hague Conference for the Codification of International Law in 1930, the work of the International Law Commission, or that of the Conference adopting the 1958 Geneva Convention on the Territorial Sea and

18 Resolution adopted at the Session of Amsterdam on 24 September 1957. Available at: www.idi-iil.org/idiE/resolutionsE/1957_amst_01_en.pdf.

19 See, i.e. Donald R. Rothwell & Tim Stephens, *The International Law of the Sea* (Oxford/Portland Hart, Oregon, 2010), 53.

20 Example of a bilateral agreement is the 1984 Treaty of Peace and Friendship between Argentina and Chile, Annex 2, Article 1, recognising a right of passage for Argentine vessels through Chilean internal waters between the Strait of Magellan and Argentine ports in the Beagle Channel (available at: http://www.un.org/depts/los/legislationandtreaties/pdffiles/treaties/chl-arg1984pf.pdf). Example of multilateral conventional law is the International Convention for the Safety of Life at Sea (SOLAS) and the International Maritime Organisation regulations on access to ports.

21 Joint separate opinion of Judges Cot and Wolfrum, id., para. 26 of this opinion.

the Contiguous Zone, all mention the fact that the regime of ports fell outside what the respective works were about, i.e. the territorial sea.[22] All this reasoning led Judges Cot and Wolfrum to conclude that they "cannot assume that all activities of the coastal State in its internal waters and its ports are governed by the Convention and accordingly come under the jurisdiction of the Tribunal".[23]

However, nobody contended—nor was this the question at issue in the relevant case—that *all activities* of the coastal State in internal waters are governed by the UNCLOS. One could also claim that not all activities of the coastal State in its territorial sea are governed by the UNCLOS. The key issue is in fact whether the relevant aspects of the problem or the activities concerned are governed by the Convention or not. A perusal of the UNCLOS easily demonstrates that this instrument is crucial for the determination of the legal scope of internal waters, and establishes some important rights and obligations for coastal and other States in this maritime area that otherwise would not exist.

It is the UNCLOS that Determines the Spatial and Legal Scope of Internal Waters

The decision about what constitutes the internal waters of a State is not a matter for it to exclusively decide. It has always been a matter for determination by international law. Customary international law progressively developed from the notion of historic bays and waters to accepting the drawing of straight base lines for the measurement of the breadth of the territorial sea, attributing to the waters lying inside these lines the character of internal waters. The UNCLOS consecrates this development by explicitly determining which are the internal waters of the coastal State.

Article 8 denounces that "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State". Article 7 describes the conditions that straight base lines must follow in order to be in accordance with international law. Its paragraph 3 specifically describes the rationale: "The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters". In this regard, the Convention allows the coastal State to use

22 Id., paras. 29–33.

23 Id., para. 34.

fringing islands and low tide elevations for the drawing of straight base lines, and consider the waters within these base lines as internal.[24]

Article 10 also allows coastal States to consider as internal waters those enclosed within a closing line of bays that do not exceed 24 miles. The same article recognises the existence of 'historic' bays, whose waters are internal irrespective of the width of their mouths. This is so even if the Convention does not include any definition of historic bays or waters. According to the uncontroversial definition given by the ICJ, "[b]y 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title'."[25]As a matter of course, the fact that the UNCLOS does not define 'historic bays', let alone refer to 'historic waters', does not mean that, if a question relating to the nature of a bay, or of waters that are claimed as historic, arises in a maritime delimitation dispute between parties to the Convention, the matter is not covered by it and therefore falls outside the scope of the compulsory means of dispute settlement established by Part XV.

It is generally assumed that the waters of any port are to be considered as internal. However, Article 11 of the UNCLOS only establishes that "[f]or the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast." Although it is true that in most cases these outermost permanent harbour works must be linked through straight lines, rendering the waters inside these internal, this must be not the case in all circumstances. Consequently, it may be that port facilities belong to the territorial sea. This is confirmed by the fact that, i.e. Art. 18, while referring to the right of innocent passage, mentions internal waters *or* 'a roadstead or port facility *outside* internal waters'.[26]

To sum up, internal waters, according to the UNCLOS, are those situated within straight base lines drawn in accordance with the Convention, closing lines of bays also as established by the Convention, historic bays and, in most cases, port waters.

It is true that the UNCLOS does not contain a provision for the delimitation of internal waters, as is the case for the territorial sea, the continental shelf and the exclusive economic zone. It must be pointed out that the Convention does not provide for a delimitation rule with regard to the contiguous zone either, as is the case in the 1958 Geneva Convention on the Territorial Sea and

24 See Art. 7 para. 1 and Art. 13.

25 Fisheries case, Judgment of December 18th, 1951, *ICJ Reports* (1951): 130.

26 Emphasis added.

the Contiguous Zone.[27] Article 15 of the UNCLOS, however, affirms that the provision establishing equidistance as the delimitation method for the territorial sea does not apply "where it is necessary by reason of historic title or other special circumstances". The reference to historic titles may imply either the existence of internal waters or territorial sea, "according to whether the sovereignty exercised over them in the course of the development of the historic title was sovereignty as over internal waters or sovereignty as over the territorial sea".[28] Consequently, a delimitation of the territorial sea between States parties to the UNCLOS may in some cases require the determination of the existence of internal waters and a departure from the equidistance line. Yet in other cases, the Court or Tribunal dealing with a maritime delimitation may decide whether a given maritime zone constitutes internal waters or the territorial sea, as it was the case of the I.C.J. in the *Qatar v. Bahrain* case.[29]

Given the nature of internal waters as essentially closed within straight lines, the factual possibility of the need to delimit the internal waters of two or more coastal States is really very exceptional. The most suitable case for delimitation would be a historic bay surrounded by two or more States. For example, the maritime delimitation concluded by Honduras and Nicaragua on 12 June 1900 in the Gulf of Fonseca, a historic bay, delimited internal waters, as the Chamber of the ICJ examined in *El Salvador/Honduras* (*Nicaragua intervening*) case.[30]

The question may arise whether a maritime delimitation dispute which includes the delimitation of internal waters would be suitable for the compulsory procedures of Part XV of the UNCLOS. If the position is followed according to which internal waters are excluded from the regime of the UNCLOS, then the natural consequence would be that such a delimitation would not be subject to those procedures. In the author's view, this would be an erroneous analysis. As seen throughout this contribution, the UNCLOS does include rules

27 See Arts. 15, 74 and 83 of the UNCLOS and Art. 24 para. 3 of the Convention on the Territorial Sea and the Contiguous Zone.

28 "Juridical Régime of Historic Waters, Including Historic Bays", Report prepared by the Secretariat, (Doc. A/CN.4/143), Yearbook of the International Law Commission, 1962, vol. II, p. 23, para. 167.

29 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, *ICJ Reports* (2001): 110, para. 223.

30 Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, I.C.J. Reports 1992, pp. 601–602, para. 404, and p. 605, para. 413.

for the regime of internal waters. Moreover, Article 15, through its reference to historic title, would allow a delimitation of internal waters.[31]

Rights and Duties of the Coastal State in Internal Waters as Recognised by the UNCLOS

What is decisive in order to demonstrate that the UNCLOS has regulated and, indeed, established a regime for internal waters, is its ascertainment of rights and duties for coastal and third States in these waters. This can be done by way of establishment by the UNCLOS of new and not previously existing rights and obligations, or by the recognition of rights and obligations already existing at the customary law level or in other treaties. A perusal of the relevant rules of the Convention indicates that both of these propositions are present here. The following is a list of these rights and obligations:

1) Right of innocent passage for foreign vessels in areas of internal waters that were not considered such before the drawing of straight base lines (Article 8, paragraph 2).

2) Right of transit passage for foreign vessels in straits used for international navigation whose waters are internal (Arts. 34 and 35 a]).

3) Right of transit of land-locked States for their exercise of the right of access to and from the sea and all rights provided for in the Convention (Art. 125).

4) Obligation to grant ships flying the flag of land-locked States equal treatment to that accorded to other foreign ships in maritime ports (Art. 131). This is a conventional obligation establishing a clear limitation to port State decisions. Here there is a clear difference with regard to the 1923 Convention on the international regime of maritime ports, based on reciprocity of the contracting parties. While reciprocity could be a reason for granting some advantages to other states regarding maritime ports, land-locked States cannot be disadvantaged by the impossibility of reciprocity in this regard.

5) Obligation for coastal states to communicate and to give due publicity to particular requirements for the prevention, reduction and control of pollution

31 In his dissenting opinion appended to the judgement in *El Salvador/Honduras* (*Nicaragua intervening*) case, Judge Oda was of the view that the expression "historic waters" has become a redundancy, because it "was used to justify the status of internal waters", *ICJ Reports* (1992): 757, para. 44.

of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters (Art. 211, para. 3).

6) Right of enforcement of measures for the prevention, reduction or control of pollution by coastal States with regard to foreign vessels voluntarily within their ports in relation to discharge from those vessels occurring outside the areas under their sovereignty or jurisdiction (Art. 218). This conventional right established by the UNCLOS is a derogation from the normal jurisdiction of flag States for acts accomplished by vessels in areas outside national jurisdiction. Equally, this right to exercise jurisdiction by the port State for acts accomplished within areas under the sovereignty or jurisdiction of other States, with their consent (Art. 218, para. 2), is also a conventional right.

7) Obligation for coastal States, subject to the domestic regulations, to facilitate access to their harbours to marine scientific research vessels (Art. 255).

8) Obligation for coastal States of prompt release of detained foreign vessels and their crews after the posting of a reasonable bond or other financial security (Art. 292). This is also a conventional obligation and a limitation to municipal regulations, regardless of whether domestic law provides this possibility.

9) Obligation to respect the sovereign immunity of warships or other governmental vessels used for non-commercial activities, even in cases of breach of their obligations relating to the protection of the marine environment (Arts. 32 and 236). As Judge Paik stated in his declaration appended to the Order of 15 December 2012, immunity of a warship in the port of a foreign State "constitutes one of the most important pillars of the *ordre public* of the oceans".[32]

10) Obligation of the coastal State not to impede the freedom of navigation of foreign vessels by arbitrarily preventing them from leaving their internal waters. An arbitrary detention of a foreign vessel by the coastal State, after having allowed it to enter its internal waters and/or call at port, cannot but be a blatant breach of the freedom of navigation in other maritime areas and the right of innocent passage in the territorial sea, as established in Articles 18, 58 and 87 of the Convention.[33] ITLOS, in its order of 15 December 2012 in

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32 Declaration of Judge Paik in *The Ara Libertad* Case (Argentina v. Ghana)*, ITLOS* Case N° 20, para. 29.

33 See the Separate Opinion of Judge Lucky in *The Ara Libertad* Case (Argentina v. Ghana), *ITLOS* Case N° 20, para. 29. In their joint separate opinion, judges Cot and Wolfrum find it "hard to imagine how the detention of a vessel in port in the course of national civil proceedings can be construed as violating the freedom of navigation on the high seas. To take this argument to the extreme, it would, in fact, mean that the principle of the

the "*ARA Libertad*" case, simply established that Article 18, paragraph 1 b) and Articles 87 and 90 "do not relate to the immunity of warships in internal waters".[34] Indeed, respect for the immunity of warships and the arbitrary detention of any foreign vessel in port are two different questions. They need not be put together. As the ICJ stated in the *Nicaragua v. USA* case, "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."[35] This includes the right for ships to leave if there is no reason to detain them.[36]

Conclusion

The previous concise analysis reveals that there emerges from the UNCLOS a clear regime for internal waters. While sovereignty is the status that coastal States enjoy over these, the Convention establishes a number of rights and obligations completing that status. There is nothing surprising about this, since the same can be said about the territorial sea. Whether States were unwilling to have a separate part of the Convention specifically dealing with internal waters is completely immaterial. It is also immaterial whether this

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freedom of navigation would render all vessels immune from civil proceedings and in consequence from the implementation of the national law of the port State in question". (Id., para. 37 of their opinion). This statement is highly misleading. As a matter of course, not any vessel is immune from civil proceedings. One thing is to initiate proceedings relating to foreign vessels in port and yet another is to arbitrarily prevent them from leaving the port after having allowed them to enter the internal waters and to call at port. It is only the latter that would constitute a breach to the freedom of navigation.

34 ITLOS, *The Ara Libertad* Case (Argentina v. Ghana), Case N° 20, Order of 15 December 2012, para. 61.

35 Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, *ICJ Reports* (1986): 14, para. 214.

36 In the *M/V "Louisa"* case, ITLOS considered that the freedom of navigation in the high seas consecrated in Article 87 "cannot be interpreted in such a way as to grant the M/V 'Louisa' a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it". This generalisation could have been avoided if it is taken into consideration that the "Louisa", which were performing activities in the territorial sea and internal waters of Spain, was detained in the port of Santa María (Spain) in the context of criminal proceedings initiated after a search of the vessel, in which undersea archaeological pieces and weapons of war were found (see *ITLOS, The M/V "Louisa"* Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Case N° 18, Judgment, 28 May 2013, in particular paras. 48, 104 and 109, and the Declaration of Judge Paik, paras. 20–29).

choice obeyed to the idea of recognising the sovereignty of the coastal State over internal waters to be as extensive as possible. The contention according to which internal waters fall outside the scope of the Convention is clearly contradicted by the important number of provisions establishing—in some cases for the first time—or recognising rights and obligations for the sovereign State. What has not been regulated or acknowledged by the UNCLOS residually falls within the realm of the sovereign decision of the coastal State. This is the case of the admission of foreign vessels to internal waters and ports, and the exercise of jurisdiction therein, subject to the limitations described above. Clearly, the UNCLOS does not contain a rule granting freedom of entry into maritime ports. It cannot be claimed that such a right exists at the customary level either, as it was claimed by the arbitral award rendered in the "Aramco" case between Saudi Arabia and the Arabian American Oil Company.[37]

Considering that everything what coastal States do in their internal waters falls outside the regime of the UNCLOS also flies in the face the essential object and purposes of the Convention, as expressly affirmed in its Preamble: 1) "the desire to settle, in a spirit of mutual understanding and cooperation, *all issues* relating to the law of the sea", 2) the consciousness that "problems of ocean space are closely interrelated and need to be considered *as a whole*" and 3) "the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a *legal order of the seas and oceans* which will *facilitate international communication*".

Internal waters are maritime waters. They should not be confused with inland fresh waters, which are subject to a completely different regime.[38] Internal waters constitute a specific maritime area, one in which the coastal State enjoys the maximum of competencies. This specificity does not mean that their situation is exactly the same as that of land territory or waterways. As part of the seas,they are governed by the law of the sea and the Convention that comprehensively deals with it. The determination of what constitutes internal waters is not a matter of domestic law but is governed by the UNCLOS. It is also this Convention that has for the first time established rights and obligations for coastal and third States with regard to those waters, as seen in this contribution. It would be seriously damaging, for the understanding of the

37 *ILR*, vol. 27, 117. See A. V. Lowe, "The Right of Entry into Maritime Ports in International Law", *San Diego Law Review*, vol. 14 (1976–1977): 597.

38 "Les eaux qualifiées d'eaux intérieures au sens juridique et dont s'occupe le droit public maritime international sont les eaux maritimes qui se trouvent en deçà de la ligne de départ des eaux dites territoriales", Gilbert Gidel, *Le droit international public de la mer, Tome II : Les eaux intérieures* (Paris: Sirey, 1932), 10.

law of the sea as a whole and for the effort of establishing compulsory mechanisms of dispute settlement, to start differentiating law of the sea issues that are included in the UNCLOS and others that would be "taken for granted" and, as a result, would not be included in the Convention.

The freedom of navigation is certainly one of the major freedoms long recognised by the law of the sea. To attribute to the coastal State in its internal waters the absolute right to proceed as it may find fit, and to consider that nothing in the UNCLOS prevents it from acting in that manner, constitutes a double mistake. First, because it would go against the rationale of the Convention. Second, because the UNCLOS itself recognised, by including the institution of prompt release, that freedom of navigation is paramount in its overall regime, and consequently created the way to allow vessels to perform what constitutes their *raison d'être*: to navigate.

The simple ascertainment that the farther the maritime area from the coastal State, the lesser its sovereignty or jurisdiction, does not constitute a ground for excluding internal waters from the law of the sea. They are not on an equal footing to land territory, even though the coastal State possesses sovereignty over both. In territorial waters, there are some limitations to sovereignty derived from the law of the sea that do not exist on land. The same—and this is absolutely uncontroversial—applies to the territorial sea. The fact that at one time two different regimes came into existence for internal waters and the territorial sea does not, as demonstrated here, exclude the former from being regulated by the UNCLOS.