

LAWS GOVERNING NAVIGATIONAL RIGHTS AND SOVERIGN IMMUNITY OF WARSHIPS

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The evolution of the law of the sea has been shaped largely by two notions, namely, freedom of navigation on the one hand, and restricted access on the other hand. The interaction between these two opposing notions has led to the acceptance of two compromise concepts, namely, the territorial sea and the right of innocent passage. These concepts have now been codified in the 1982 United Nations Convention on the Law of the Sea. This research paper examines the rights of warships to traverse maritime areas subject to the sovereignty of the coastal state. The issue of military activities in the sea will continue to be a complex subject, without clear definitions in the nature and scope of permissible activity. The ARA Libertad Case (Argentina v. Ghana) is the first instance where the International Tribunal for the Law of the Sea (ITLOS), Hamburg, Germany considered the issue of the release of a warship which was detained in a foreign port contrary to the principles of sovereign immunity of warships. This article examines the ITLOS order at the backdrop of warship rights and duties under the International Law of the Sea. It concludes that states should create dialogues and form agreements to help clarify the contours of military activity in the sea, focusing on mutual interests, interdependence, and coexistence rather than perceiving the ocean as a zero-sum resource.

Keywords: Warships, ITLOS, Navigation, Rights, Immunities

INTRODUCTION

The United Nations Convention on the Law of the Sea (UNCLOS) defines the rights and responsibilities of nations with respect to their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources. Articles 29-32, as laid down in Part II of UNCLOS, specifically deal with the rules applicable to warships and other government ships operated for non-commercial purposes.¹

It is noted that any assessment of the navigational rights of warships is closely connected to the rights and duties held by the coastal states. The right of warships to traverse maritime areas subject to the sovereignty of the coastal state has been recognized as a legitimate derogation on that state's sovereignty.²

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¹ Part II(Territorial Sea and Contiguous Zone); Section 3(C) Rules Applicable To Warships And Other Government Ships Operated For Non-Commercial Purposes

² This right is also accorded to commercial and other non-governmental vessels, but the discussion here is focused on warships.

The International Tribunal for the Law of the Sea (ITLOS) is an intergovernmental organization created by the mandate of the UNCLOS, and has the power to settle disputes between party states.³ The ARA Libertad Case (Argentina v. Ghana) is the first instance where the ITLOS (Hamburg, Germany) considered the issue of the release of a warship, which was detained in a foreign port contrary to the principles of sovereign immunity of warships. It is a dispute about whether sovereign immunity of warships can be waived, and if so, and under what circumstances.

WARSHIPS⁴

Article 29 of UNCLOS III states: ‘For the purposes of this Convention, “warship” means a ship belonging to the armed forces of a state bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the Government of the state and whose name appears in the appropriate service list or its equivalent and manned by a crew which is under regular armed forces discipline.’ Though this definition occurs in Section 3 of Part II, (concerning Innocent Passage) of UNCLOS III, the wording ‘For the purposes of this Convention’ make it clear that this definition applies to the entire Convention.⁵

A vessel would, however, cease to be ‘warship’ (a state organ) if shipwrecked and abandoned, or under the control of mutinous crew.⁶ An act of piracy committed by a warship, under the control of a mutinous crew would thus be treated as an act committed by a private ship [Article 102]. Fleet auxiliaries, who are deployed on various duties related to navies, cannot be treated as warships, unless and until they are commissioned.⁷ However, a Coast Guard vessel is considered to be a warship.⁸

RIGHTS AND DUTIES

Under UNCLOS III, warships can only perform the following functions, inter alia:

- (a) A seizure on account of piracy [Article 107],
- (b) On the high seas, the right to visit when the ship is:

³ Section 5, Part XI, UNCLOS

⁴ According to Oppenheim, a warship is distinguishable ‘by its outward appearance’ since it ‘flies the war flag and the pendant of its state’. They are ‘state organs’, and form a part of the armed forces of a state so long as they are manned by the crew, subject to Naval Laws, commanded by a commissioned naval officer, and are in the service of a country. See L. Oppenheim, *International Law: A Treatise Peace*, Vol. I—Peace, pp. 851–52 [eighth edition edited by Sir Hersch Lauterpacht], and C.J. Columbus, *The International Law of the Sea*, Longmans, 1967, p. 259.

⁵ Oxman, Bernard H., ‘The Regime of Warships under the United Nations Convention on the Law of Sea’, *Virginia Journal of International Law*, Vol. 24, p. 812

⁶ Ibid., p. 818. According to Bernard H. Oxman, the word ‘exception’ is ill suited here because ‘immunity from enforcement jurisdiction of the coastal state does not excuse a warship from the duty to respect the provisions of the convention regarding the regulation of innocent passage’.

⁷ Oxman, Bernard H., ‘The Regime of Warships under the United Nations Convention on the Law of Sea’, *Virginia Journal of International Law*, Vol. 24, p. 812

⁸ Ibid. A warship under the control of a mutinous crew would deem to lose its status as a warship. Once the state regains control, its status would revert back to that of being a warship.

- (i) Engaged in piracy,
 - (ii) Engaged in the slave trade,
 - (iii) Engaged in unauthorised broadcasting,
 - (iv) without nationality,
 - (v) Of the nationality as that of the warship but flying a foreign flag or refusing to show its flag [Article 110].
- (c) To exercise the right of hot pursuit [Article 111(5)].
- (d) To exercise the power of enforcement as regards protection and preservation of the marine environment [Article 224].

IMMUNITIES

Articles 32, 95 and 236⁹ of UNCLOS III deal with warship immunities. Article 32 is an adaptation of Article 22 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, while Article 95 is a reproduction of Article 8, Para 1 of the 1958 Geneva Convention on the High Seas.

The phrase ‘nothing in this Convention’ occurring in Article 32 seems to convey that Article 32 is in contrast to Article 95 because it also applies to the whole Convention, including Exclusive Economic Zones (EEZs) and the high seas to which Article 95 applies. However, this is not the case as the two Articles operate in different spheres.¹⁰ Article 32 does not apply to those regions, which are covered by Article 95. This change in the phraseology of Article 32 was necessitated because of the separate parts of UNCLOS III dealing with ‘strait passage’ and ‘archipelagos’ to which Article 32 also applies.¹¹

The immunities under this article are not absolute. It is subject to the following two exceptions¹²:

- (i) While exercising the right of innocent passage through the territorial sea, warships are required ‘to comply with the laws and regulations of the coastal state concerning passage through the territorial sea’, and if there is any violation or disregard, the coastal state may require the warship ‘to leave the territorial sea immediately’ [Article 30].
- (ii) The flag state would bear responsibility for any loss and damage resulting to a coastal

⁹ Columbus, *The International Law of the Sea*, n. 4, p. 507.

¹⁰ Dimri, B.M., “The Arrest of Argentine Warship ‘ARA Libertad’ Revisiting International Law Governing Warships, Sovereign Immunity, and Naval Diplomatic Roles”, *Journal of Defence Studies*, Vol. 7, No. 3, July–September 2013, pp. 97–124

¹¹ Dimri, Brij M., ‘The Regime of Warships Contemporary Naval Missions and Activities and Emerging Law of the Sea: Part I,’ *Indian Defence Review*, Vol. 6, No. 3, July 1992, p. 80.

¹² The predecessor of this article is Article 3, ‘International Convention for the Prevention of Pollution from Ships’, November 1973.

state due to non-compliance with the coastal state laws concerning passage through the territorial sea or with the provisions of the Convention or other international laws by a warship [Article 31].

NAVIGATIONAL RIGHTS AND PASSAGE REGIMES OF WARSHIPS

Coastal nations exercise the same jurisdiction and control over their internal waters as they do over their land territory.¹³ Warships and auxiliaries require specific and advance entry permission, unless other bilateral or multilateral arrangements have been concluded.¹⁴

The right of innocent passage in the Territorial Sea

International law provides that ships of all nations enjoy the right of innocent passage for the purpose of continuous and expeditious traversing of the territorial sea¹⁵ or for proceeding to or from internal waters. Innocent passage includes stopping and anchoring, but only insofar as incidental to ordinary navigation, or as rendered necessary by force majeure or by distress.¹⁶ Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal nation.¹⁷ All warships, including submarines, enjoy the right of innocent passage on an unimpeded and unannounced basis. As stated by the Court in the *Corfu Channel Case*¹⁸, “it is generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation ...without the previous authorization of a coastal state, provided that the passage is innocent.”

Transit passage in International Straits

Transit passage applies in respect of straits used for international navigation that lie between one part of the high seas or an EEZ and another part of the high seas or an EEZ.¹⁹ In establishing a regime of transit passage in UNCLOS, there was an effort on the part of the more militarily powerful states to ensure that the restriction associated with the passage of warships under the regime of innocent passage would not apply in vital traffic routes. As with innocent passage, transit passage requires ships and aircraft to proceed without delay.²⁰ Rather than prohibiting a series of acts that may be prejudicial to the peace, good order or security of the coastal state, transit passage requires that warships refrain from any threat or use of force against the territorial integrity or political independence of the littoral state.²¹

¹³ 1982 LOS Convention Article 8

¹⁴ Thomas, A.R., and Duncan James. C., “International Status and Navigation of Warships and Military Aircraft”, *International Law studies*, Vol. 73, p. 7

¹⁵ UNCLOS Article 17

¹⁶ Territorial Sea Convention, Article 14(2), (3) & (6); 1982 LOS Convention, Article 18

¹⁷ A.R Thomas and James C Duncan (eds), “International Status and Navigation of Warships and Military Aircraft”, *International Law studies*, Vol. 73

¹⁸ *Corfu Channel Case*(UK v Albania) [1949] ICJ Rep 4, 28

¹⁹ UNCLOS Article 37

²⁰ UNCLOS Article 39(1)(a)

²¹ UNCLOS Article 39(1)(b); See Larson, DL., “Security Issues and the Law of the Sea: A General Framework”, *ODIL*, Vol. 15, 1985, No. 2, p. 116

Vessels in transit passage, including warships, must also refrain from activities' other than those incident to their normal modes of continuous and expeditious transit' in their exercise of the freedom of the navigation.²² Compared to innocent passage, transit passage allows for greater surface navigation rights. Transiting warships are permitted to perform activities that are incidental to passage through the strait and consistent with the security of the unit (such as the use of radar, sonar, and air cover).²³ The manner of the passage, rather than the purpose of the passage, is again the important consideration in determining whether passage rights have been violated.²⁴

The reference to 'normal mode' has been considered as opening up the possibility of a wide range of activities being undertaken by different types of military vessels. Whether a particular activity falls within the scope of the normal mode of a particular warship will be a matter for interpretation in any given situation. Much will depend on how broadly the reference to 'freedom of navigation and overflight' is to be understood in the context of transit passage.²⁵ In considering the debates as to whether transit passage is more like innocent passage or the freedom of navigation on the high seas, Reisman has noted that some limitation had to be imposed on the traditional freedom of navigation to prevent overt military exercises and weapons testing, surveillance and intelligence gathering, and refueling, in international straits.²⁶

Archipelagic sea-lanes passage

UNCLOS creates a regime for the legal recognition of archipelagic states,²⁷ whereby these states are entitled to enclose their outermost islands with straight baselines, transforming the legal status of the waters within those lines into archipelagic waters over which sovereignty is exercised.²⁸ Within archipelagic waters, the right of innocent passage exists for the ships of all states,²⁹ except where the archipelagic state has designated sea-lanes and air routes there above in which the right of 'archipelagic sea lanes passage' applies.³⁰ In the event that such designation has not occurred, then 'the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.'³¹ This provision has

²² UNCLOS Article 39(1)(c)

²³ Rear Admiral Harlow B., "UNCLOS III and Conflict Management in Straits", *ODIL*, Vol. 15, 1985, p. 197, 201

²⁴ See A.V. Lowe, 'The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea' in Horace B. Robertson Jr (ed), 64 *International Law Studies: The Law of Naval Operations* (William S. Hein and Co, Inc, New York 1991) 111, 126

²⁵ UNCLOS Article 38(2) refers to the meaning of transit passage as 'the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait...'

²⁶ Reisman, WM., "The Regime of Straits and National Security: An Appraisal of International Lawmaking", *American Journal of International Law*, Vol. 74, 1980, p. 72

²⁷ The definition of 'archipelago' is 'a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, water and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such'. UNCLOS Article 46(b)

²⁸ UNCLOS Articles 47 and 49

²⁹ UNCLOS Article 52 (noting this is subject to Article 53)

³⁰ UNCLOS Article 53

³¹ UNCLOS Article 53 (12)

been described as supplying ‘the lowest common denominator or “safety valve” which enabled the maritime states to accept the concept of archipelagic sea lanes passage’.³² All ships including warships enjoy the right of archipelagic sea-lanes passage while transiting through, under or over archipelagic waters and adjacent territorial seas via all routes normally used for international navigation. This means that submarines may transit while submerged and that surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security, such as formation steaming and the launching and recovery of aircraft.³³

The right of archipelagic sea-lanes passage is substantially identical to the right of transit passage through international straits. There are nonetheless differences between the passage regimes, as archipelagic sea-lanes passage is deemed a right,³⁴ as opposed to a freedom as is the case with transit passage.³⁵ Archipelagic sea-lanes passage is also more restricted because vessels must stay within the designated sea-lanes,³⁶ whereas transit passage does not require vessels to stay within specific boundaries while traversing straits.

SOVERIGN IMMUNITY OF WARSHIPS: AN ITLOS ORDER

On December 15, 2012, the International Tribunal for the Law of the Sea 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.³⁷ 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. 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.³⁸

The dispute between the two states had its roots in Argentina’s 2001 default on roughly \$100 billion in sovereign debt. NML Capital Investments (a U.S. Judgment Creditor) had a right to execute its judgment against Argentina’s assets in the U.K., a decision extensively relied on by agents for Ghana during oral argument at the ITLOS.³⁹

³² Bernhardt, P.A., “The Right of Archipelagic Sea Lanes Passage: A Primer” 35 *Virginia JIL*, 1995, p 719

³³ Thomas, A.R., and Duncan James. C., “International Status and Navigation of Warships and Military Aircraft”, *International Law studies*, Vol. 73, p. 19

³⁴ UNCLOS Article 53(2)

³⁵ See UNCLOS Article 28(2)

³⁶ UNCLOS Article 53(5) setting forth the ‘10 percent rule’.

³⁷ The “ARA Libertad” Case (Argentina v. Ghana), Case.No.20, Request for the Prescription of Provisional Measures, para. 108 (ITLOS December 15, 2012) retrieved on August 16, 2014, from http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf

³⁸ Kraska, J., “A Report on the Case of the ARA Libertad (Argentina v. Ghana), International Tribunal for the Law of the Sea, Case No. 20, Provisional Measures”, *American Journal of International Law*, Vol. 107, 2013, p. 1

³⁹ NML Capital Ltd v Republic of Argentina, [2010] EWCA Civ. 41

This particular dispute before the ITLOS between Argentina and Ghana arose on October 2, 2012, during the ARA Libertad's October 1-4 port visit to Tema, an industrial port east of Ghana's capital, Accra. The Libertad carried 330 navy cadets and crew at the time. A local Ghanaian court granted NML's application for an injunction, which prevented the vessel from taking on the fuel she needed before departure until Argentina posted \$20 million with the court, in partial satisfaction of NML's judgment.⁴⁰

Ghana and Argentina are both parties to the 1982 U.N. Convention on the Law of the Sea. On October 30, 2012, Argentina instituted dispute settlement proceedings under Annex VII of that Convention. On November 14th, after waiting the required two weeks, Argentina filed its application in ITLOS for provisional measures under article 290 of the Convention, pending constitution of the Annex VII arbitral tribunal. ITLOS heard two days of oral arguments on November 29-30 and issued its order on December 15, 2012. The decision of the judges to order the vessel's release was unanimous; however, five judges issued separate declarations or opinions.⁴¹

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 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.⁴² Article 32 of UNCLOS is derived from Article 22 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.⁴³

Argentina argued that the Libertad met the definition of a warship in UNCLOS Article 29⁴⁴ 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 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

⁴⁰ Allen, C., "Law of the Sea Tribunal Resoundingly Affirms the Sovereign Immunity of Warships and Orders Ghana to Release Argentine Tall Ship ARA Libertad", *Opinio Juris* (2014) retrieved on August 19, 2014, from <http://opiniojuris.org/2012/12/15/law-of-the-sea-tribunal-resoundingly-affirms-the-sovereign-immunity-of-warships-and-orders-ghana-to-release-argentine-tall-ship-ara-libertad/>

⁴¹ Dimri, BM., "The Arrest of Argentine Warship 'ARA Libertad' Revisiting International Law Governing Warships, Sovereign Immunity, and Naval Diplomatic Roles", *Journal of Defence Studies*, Vol. 7, No. 3, July–September 2013, pp. 97–124

⁴² Kraska, J., "A Report on the Case of the ARA Libertad (Argentina v. Ghana), International Tribunal for the Law of the Sea, Case No. 20, Provisional Measures", *American Journal of International Law*, Vol. 107, 2013, p. 3

⁴³ 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.

⁴⁴ The definition in Article 29 is drawn almost verbatim from Article 8(2) of the Geneva Convention on the High Seas, April 29, 1958, 13 UST 2312, 450 UNTS 82.

Article 29, “may be applicable to all maritime areas” (para. 64).⁴⁵ 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. 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*:

In 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.⁴⁶

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 justifiable under the Convention. Provisional measures were granted to defuse the tense standoff. The Tribunal’s order states, “Any 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”. 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. 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.

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”. Ghana complied with the provisional order. The vessel departed from Ghana on December 19 and was welcomed back in Argentina on January 9, 2013.

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”. Perhaps even more

⁴⁵ The “ARA *Libertad*” Case (Argentina v. Ghana), Case.No.20, Request for the Prescription of Provisional Measures, para. 64 (ITLOS December 15, 2012) retrieved on August 16, 2014, from http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf

⁴⁶ The “Military and Paramilitary Activities in and Against Nicaragua” Case, (Nicar. v. U.S.), 1986 ICJ REP. 14, para 214

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.

CONCLUSION

While the protection of sovereignty and national interests remain fundamental to maritime security and the law of the sea, there is increasing acceptance of a common interest that exists among states when seeking to respond to a variety of modern maritime security threats.⁴⁷ An inclusive interest in promoting maritime security should be the primary focus in case of conflicting claims between different states. Without an effective dispute settlement mechanism in the international legal system, a treaty/convention will not be of much avail. For exercising maritime rights at sea, an orderly mechanism to regulate these rights is a necessary requirement. A maritime dispute cannot be resolved every time by resorting to force.

Lastly, the preservation of sovereign immunity for warships in the ITLOS 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.

⁴⁷ Klein, N., *Maritime Security and The Law of the Sea*, United Kingdom, Oxford University Press, 2011, p 24