

# The Regime of Warships Under the United Nations Convention on the Law of the Sea

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The United Nations Convention on the Law of the Sea ("Convention")<sup>1</sup> adopted in 1982 is the result of negotiations that began with diplomatic communications between the Soviet Union and the United States and other States in 1966 and 1967. The purpose of these communications was to ascertain whether a basis could be found for convening a new conference on the law of the sea to fix the maximum permissible breadth of the territorial sea at twelve nautical miles, without prejudice to continued maritime mobility through international straits.

This underlying purpose was different from that of Ambassador Pardo of Malta in his 1967 speech in the U.N. General Assembly calling for the establishment of an international regime for the seabeds beyond the present limits of national jurisdiction.<sup>2</sup> There was a shared concern for the effects of the rapidly increasing extensions of coastal State jurisdiction out to sea. But the objective of the maritime powers engaged in conversation by the Soviet Union was,

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1. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), reprinted in 21 *LL.M.* 1261 (1982) [hereinafter cited as *Convention*].

2. 22 U.N. GAOR Annex 3 (Agenda Item 92) at 1, U.N. Doc. A/6695 (1967).

dition of warships to this clause in the 1982 Convention does not, however, reflect any dispute regarding the scope or effect of the immunity of warships. Rather, it reflects a common opinion that the rules of international law regarding immunity of warships and government noncommercial ships will continue to apply. This explains the deletion of the arguably illogical reference to "the immunities which such ships enjoy under these articles" that appears in article 22 of the 1958 Territorial Sea Convention.<sup>22</sup> It does not, however, explain the deletion of the reference to international law in article 32.

As a purely textual matter, the last preambular paragraph of the 1982 Convention compensates for the deletion of the reference to international law, as it affirms "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."<sup>23</sup> The deletion reflects a general (although not consistent) allergy toward references to international law in the Convention by representatives of developing countries who, for unrelated reasons, fought such references in the U.N. Charter of Economic Rights and Duties<sup>24</sup> and in the U.N. Declaration of Principles regarding the seabeds beyond the limits of national jurisdiction.<sup>25</sup> Both the context of article 32 and the preambular provision cited suggest that no change in legal result is mandated by the deletion of the reference to international law.

The "exceptions" referred to in article 22, paragraph 2, of the 1958 Territorial Sea Convention are all included in the "exception" for sub-section A referred to in article 32 of the 1982 Convention.<sup>26</sup> Sub-section A contains the rules regarding innocent passage in the territorial sea applicable to all ships. The point being made is that 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. The word "exception" is not the best word that could have been selected to convey the nature of this cross-reference.

Article 32 of the new Convention also contains two other cross-

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22. Territorial Sea Convention, *supra* note 4, art. 22.

23. Convention, *supra* note 1, art. 30.

24. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 52, U.N. Doc. A/9631 (1974).

25. G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8028 (1970) [hereinafter cited as Declaration of Principles].

26. Compare Territorial Sea Convention, *supra* note 4, arts. 14-18 with Convention, *supra* note 1, arts. 17-26, 30, 31.

## 6. *Dispute Settlement*

Subject to certain exceptions regarding coastal State jurisdiction over natural resources and other matters, all disputes between States relating to the interpretation or application of the Convention that have not been settled by other means, and that are not subject to binding third-party arbitration or adjudication under another treaty, are subject to binding arbitration or adjudication under the Convention.<sup>38</sup> On the other hand, a State party may at any time declare that it excludes certain categories of disputes from this dispute-settlement obligation, including *inter alia*:

— disputes concerning military activities, including military activities by government vessels and aircraft engaged in noncommercial service;<sup>39</sup>

— disputes concerning coastal State law enforcement activities with regard to marine scientific research or fisheries in its economic zone;<sup>40</sup>

— disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in the Convention.<sup>41</sup>

Since the text of the Convention distinguishes between military activities and law enforcement activities, it would appear that law enforcement activities that are neither military activities, nor an exercise of coastal State enforcement rights over marine scientific research or fisheries in the exclusive economic zone, are subject to compulsory, third-party settlement.

The most important situation in which this might occur is one in which it is alleged that a warship of a coastal State, not engaged in military activities but attempting to enforce coastal State regulations, has acted in contravention of the provisions of the Convention in regard to freedom of navigation. The exclusion of law enforcement activities applies only to coastal State law enforcement

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38. Id. arts. 282, 286.

39. Id. art. 298, para. 1(b).

40. Id. See also id. art. 297, paras. 2-3.

41. Id. art. 298, para. 1(c).