

Proelss

United Nations
Convention on the
Law of the Sea

A Commentary

C.H.BECK · HART · NOMOS

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Convention.¹² Of relevance are the seizure of suspected pirate vessels without adequate basis in law (→ Art. 106), the unfounded exercise of right of visit (→ Art. 110 (3)), and the unjustified interdiction of vessels in hot pursuit (→ Art. 111 (8)). The reference to international law reaffirms that potential responsibility is not merely limited to conventional rules.

Article 32

Immunities of warships and other government ships operated for non-commercial purposes

With such exceptions as are contained in subsection A and in Articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

Bibliography: *James Crawford*, Execution of Judgments and Foreign Sovereign Immunity, *AJIL* 75 (1981), 820-869; *Ingrid Delupis*, Foreign Warships and Immunity for Espionage, *AJIL* 78 (1984), 53-75; *Hazel Fox*, The Law of State Immunity (2008); *Don W. Greig*, Specific Exceptions to Immunity under the International Law Commission's Draft Articles, *ICLQ* 38 (1989), 560-588; *Douglas Guilfoyle*, Article 16, in: Roger O'Keefe/Christian Tams (eds.), *The United Nations Convention on the Immunities of States and their Property: A Commentary* (2013), 259-276; *Bernard H. Oxman*, The Regime of Warships under the United Nations Convention on the Law of the Sea, *VJIL* 24 (1983), 809-863; *Thamarappallil Kochu Thommen*, Legal Status of Government Merchant Ships in International Law (1962); *Xiaodong Yang*, State Immunity in International Law (2012)

Documents: US Navy, *The Commander's Handbook on the Law of Naval Operations* (2007)

Cases: *The Charkeih* [1873] LR 4 A&E 59 (UK); *The Prins Frederik* [1820] 4 Dods. 451 (UK); *The Parlement Belge* [1880] 5 PD 197 (UK); ITLOS, *The 'ARA Libertad'* (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports (2012), 332; *Chung Chi Cheung v. The King*, [1938] 4 All ER 786 (UK); *Rechtsbank Amsterdam* (District Court of Amsterdam), *Wijsmuller Salvage BV v. ADM Naval Services*, Judgment of 19 November 1987, NYIL 20 (1989), 294; *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812)

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I. Purpose and Function

- 1 This article restates the immunity under general international law for warships and vessels operated for government non-commercial purposes. This position continues except as provided for in Arts. 30 and 31.
- 2 It is not clear if Art. 32 regulates immunity or merely references an existing rule of general international law. It can be contrasted with Art. 95,¹ which clearly stipulates that warships on the high seas enjoy complete immunity from States other than the flag State. Art. 32 is more complex since it does not explicitly state a right of immunity, but rather relies upon the existence of a general right and subjects this to certain conventional exceptions. This aspect of Art. 32 was at issue in the '*ARA Libertad*' Case.² The Tribunal decided that it had *prima*

¹² See for example the Tribunal's remarks in respect of Art. 31 in the ITLOS, *The 'ARA Libertad' Case* (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports (2012), 332, para. 64.

¹ See *Guilfoyle* on Art. 95 MN 5-7.

² ITLOS, *The 'ARA Libertad' Case* (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports (2012), 332.

facie jurisdiction to deal with provisional measures, since Ghana and Argentina were in dispute about the meaning of Art. 32, but it did not explicitly determine the meaning of Art. 32.³ However, Judges WOLFRUM and COT issued a strongly worded disagreement with the Tribunal's reasoning in their Joint Separate Opinion, which explicitly categorized Art. 32 as a rule of reference and not a rule of incorporation.⁴

As indicated in the commentary on Arts. 30 and 31, the Convention does not except 3 certain public vessels from the prescriptive jurisdiction of the coastal State.⁵ As such, warships and other non-commercial government vessels remain subject to the requirements of innocent passage under Arts. 19-21, and coastal State laws and regulations adopted in conformity with Arts. 21 and 22.⁶ They also remain subject to the coastal State's right of protection against non-innocent passage under Art. 25.

II. Historical Background

Domestic courts have recognised the immunity of State-owned or operated vessels since 4 the early nineteenth century, although the precise scope and operation of this immunity was subject to variations arising from the peculiarities of domestic law.⁷ The first clear recognition of this immunity was made by the US Supreme Court in *The Schooner Exchange v. McFaddon*.⁸ This was followed in a number of important English cases including *The Prins Frederik*,⁹ *The Charkeih*,¹⁰ and *The Parlement Belge*.¹¹

In the early part of the twentieth century, a number of treaties dealing with the liabilities of 5 ships under private maritime law generally excluded warships and vessels on public service from their application.¹² A general regime relating to the immunity of State vessels was set forth in the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships.¹³ Although it received limited ratifications, it helped influence domestic practice on immunity of State vessels. The general principle of immunity was recognised by the Institut de Droit International Resolutions of 1928.¹⁴ When the 1930 Hague Codification Conference failed to produce an agreement on the law of the sea, the matter received no further attention until the International Law Commission began its preparatory work for UNCLOS I.

The Convention on the Territorial Sea and the Contiguous Zone (CTSCZ) was developed 6 against a background of increasing restrictions on the immunity of public vessels. In the light

³ *Ibid.*, paras. 62-66.

⁴ The 'ARA Libertad' Case (note 2), Separate Opinion of Judge Wolfrum and Judge Cot, paras. 38-46, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Wolfrum-Cot_E_corr.pdf.

⁵ See: *Barnes* on Art. 30 MN 5; *Barnes* on Art. 31 MN 4.

⁶ See *Bernard H. Oxman*, *The Regime of Warships under the United Nations Convention on the Law of the Sea*, VJIL 24 (1983), 809, 818; see also *Barnes* on Art. 21 MN 25.

⁷ See the commentary on draft Art. 19 in: ILC, Sixth Report on Jurisdictional Immunities of States and Their Property by Mr. Sompong Sucharitkul, Special Rapporteur, UN Doc. A/CN.4/376 and ADD. 1 and 2 (1984), 6, 53.

⁸ *The Schooner Exchange v. McFaddon*, 11 US 116 (1812).

⁹ *The Prins Frederik* [1820] 4 Dods. 451 (UK).

¹⁰ *The Charkeih* [1873] LR 4 A&E 59 (UK).

¹¹ Court of Appeal, *The Parlement Belge* [1880] 5 PD 197 (UK).

¹² See Art. 11 of the International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, 23 September 1910, CTS 212, 178; Art. 14 of the International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, 23 September 1910, UKTS 4 (1914) Cd. 6667; Art. 13 of the Geneva Statute on the International Regime of Maritime Ports, 9 December 1923, LNTS 58, 287.

¹³ International Convention for the Unification of Certain Rules concerning the Immunity of State-Owned Ships of 10 April 1926, LNTS 176, 199.

¹⁴ Art. 26 of *Règlement sur le régime des navires de mer et de leurs équipages dans les ports étrangers en temps de paix*, available at: http://www.idi-iiil.org/idiF/resolutionsF/1928_stock_02_fr.pdf.