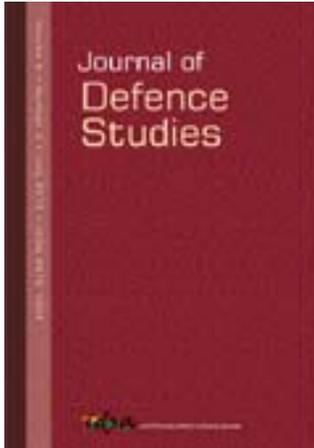


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The Arrest of Argentine Warship 'ARA Libertad'

Revisiting International Law Governing Warships, Sovereign Immunity, and Naval Diplomatic Roles

*B.M. Dimri**

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. The Argentinian warship was detained based on a commercial case filed by an American hedge fund against Argentina in the Ghanaian Court. According to the Court, Argentina had waived sovereign immunity in respect of the claims of the bondholders and, therefore, the warship could be arrested for execution of a monetary claim. This article examines the ITLOS order at the backdrop of warship rights and duties under the International Law of the Sea.

INTRODUCTION

On 15 December 2012, it was a unique distinction for the International Tribunal for the Law of the Sea (ITLOS), Hamburg, Germany, when it ordered the release of a warship detained in a foreign port in contravention of the established rule of the sovereign immunity of warships. The ship in question was an Argentinian warship, the naval training vessel ARA Libertad, and the place was the port city of Tema, in Ghana. The tribunal (ITLOS) ordered Ghana to 'forthwith and unconditionally release the frigate ARA Libertad' as a "provisional measure" so that its Commander

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and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana.¹

The Argentinean warship port call to Tema was an official goodwill visit to Ghana, and Tema was one of the dozen ports it had planned to call for training and supplies during its six-month circumnavigation of the Atlantic Ocean. The detention of the warship by Ghana had nothing to do with a maritime or any other dispute between her and Argentina. In fact, it was based on an interim injunction issued by the Ghanaian High Court in response to a petition filed by NML Capital, a subsidiary of the hedge fund Elliott Capital Management (one of the creditors of the Argentine Government) against Argentina. In 2001, Argentina had defaulted on a public debt to the tune of \$80 billion, including bonds issued under a 1994 Fiscal Agency Agreement (FAA). After the restructuring of the debt in 2005, and again in 2010, the majority of the creditors agreed to the new repayment terms offering reduced returns. However, some creditors, including Elliott Capital, demanded full value of the sum owed to them.² After obtaining a decree from the US court against Argentina in 2006, the creditor pursued enforcement proceedings under many jurisdictions, including the United Kingdom (UK). The UK Supreme Court³ declared the US judgement enforceable. The Ghanaian Court, while rejecting the Argentinean petition for the release of the warship, observed that the wording of the FAA made it clear that Argentina had waived sovereign immunity in respect of the claims of the bondholders. The warship was thus detained at port Tema on 2 October 2012.

It is in the context of the tribunal (ITLOS) ordering release of the frigate ARA Libertad, that this article examines the rights, duties and privileges of warships provided under the 1982 United Nation Convention of Law of the Sea (UNCLOS-III), and also the diplomatic functions that warships undertake.

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, which 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, the following functions can only be performed, inter alia, by warships:

- (a) A seizure on account of piracy [Article 107].
- (b) On the high seas, the right to visit when the ship is:
 - (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. 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.¹⁰

The immunities under this article are not absolute. It is subject to the following two exceptions:¹¹

- (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 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].

Article 236¹² exempts warships from various provisions concerning protection and the preservation of the marine environment, both under national or international regulations. The Article was included in view of the fact that pollution regulation of a general character may be 'inappropriate to the special configuration or mission of certain warships. This provision can be politically misused against the flag state. Besides, warships are not considered to be a substantial source of marine pollution.'¹³

Navigational Rights of Warships

Owing to the classification of ocean waters in different oceanic regimes (namely, internal water, territorial water, international straits, archipelagic waters, exclusive economic zone, high seas), the navigational rights of warships are subject to various restrictions and also privileges. However, from the perspective of the navigational rights of the warships, broadly, four classifications of waters can be made.

- (a) Waters where no right of passage exists, for example, internal waters.
- (b) Waters where suspendible rights of passage exist, for example, territorial sea, archipelagic waters.
- (c) Waters where unsuspendible rights of passage exist, for example, straits used for international navigation and archipelagic sea lanes.

- (d) Waters where the freedom of navigation, as exercised on the high seas, exists, for example, exclusive economic zones and high seas.

These classifications are discussed in some detail below.

Internal Waters

Article 8(1) defines Internal waters as 'waters on the landward side of the baseline of the territorial sea'. This is, however, not applicable to archipelagic waters as, in their case, the delimitation of internal waters is subject to a different criterion [Article 50]. These waters, which are also called 'inland or national waters', generally include lakes, canals, rivers, ports, harbours, and historical bay waters¹⁴ and bays¹⁵ etc. A coastal state exercises complete sovereignty and absolute control over its internal waters.¹⁶ It exercises similar sovereignty over its territorial seas, but with a difference:

1. A coastal state has the exclusive authority to allow access of vessels (merchant and warships alike) to its internal waters¹⁷, that is, in internal waters there is no right of innocent passage¹⁸ whereas it exists in territorial seas. However, Article 8 provides that 'where the establishment of a straight baseline', which is determined in accordance with Article 7 of the Convention, has the effect of enclosing as internal waters areas which have not previously been considered as such, a right of innocent passage shall exist in those waters.
2. Coastal state jurisdiction exercisable over foreign vessels, in certain cases differs in internal waters and territorial seas.¹⁹

In other words, access to internal waters is subject to the discretion²⁰ of the coastal states, and it could be exercised discriminatingly.²¹ Whereas, under the customary international law, a merchant ship or a government ship operating for commercial purpose is generally allowed access to a foreign port²², no such access is available to a warship except with the consent of the coastal state, and subject to conditions laid down by the coastal state.²³ Hence, within the internal waters, as also air space and sea bed thereof, no state can have access except with the explicit or implicit permission of the coastal state. To protect its legal rights within this regime, a coastal state can take whatever measures are deemed necessary.²⁴

Territorial Sea (Suspendible Passage/Innocent Passage)

A regime of suspendible passage which applies to the territorial seas and archipelagic waters is known as 'innocent passage'. Under customary international law, this right only applies to territorial seas; but with the emergence of the concept of archipelagic states in UNCLOS III, this 'right of innocent passage' is also applicable to archipelagic waters [Article 52] and archipelagic territorial sea [Article 48, read with Part II Section 3].

UNCLOS III Part II, Section 3 deals with innocent passage in the territorial sea. It's Sub-section 'A' [Articles 17 to 26] deals with the general principles of innocent passage applicable to all ships. Sub-section 'B' [Articles 27 and 28] covers merchant ships and government ships operated for commercial purposes. Sub section 'C' [Articles 29 to 32] deals with warships, etc. All ships enjoy the right of innocent passage through the territorial sea [Article 17]. Article 18 defines 'passage' to mean 'traversing territorial sea, without entering into internal waters' or 'proceeding to or from internal waters'. A Passage is considered innocent as long as it is not prejudicial to the peace, good order, or security of the coastal state [Article 19 (1)]. Article 19(2) enumerates an exhaustive list of items to show when a passage ceases to be innocent. The words 'peace or good order' were incorporated during the 1958 Geneva Convention at the instance of India.²⁵ To adjudge the innocence of a passage, an objective text has now been laid down in Article 19.²⁶ The Laws and Regulations which a coastal state can promulgate in the territorial sea have been outlined in Article 21, and foreign ships exercising the right of innocent passage through the territorial sea have to comply with those Laws and Regulations [Article 21 (4)]. While defining the duties of a coastal state, UNCLOS III forbids it to adopt any law or regulation in respect of territorial sea which may deny or impair the right of innocent passage [Article 24(1)].

The provisions which specifically deal with warships are contained in Articles 29 to 32. Article 29 defines a warship. Article 30 empowers a coastal state to expel any warship from its territorial sea immediately if the latter fails to 'comply with the laws and regulations of the coastal state', and 'disregards any request for compliance.' Article 31 deals with the damages which a flag state will have to pay due to a wrongful act of a warship during passage. Article 32 deals with the immunities of warships.

Like the Geneva Convention, UNCLOS III also does not contain any provision which allows the warship to exercise the right of innocent

passage. However, major maritime countries claim this right based on sub-section 'A' by interpreting that the phrase 'All ships' as including 'warships' as well. However, there are about 28²⁷ states which have enacted laws which require 'prior notice or authorization' for warships to exercise the right of innocent passage in their territorial sea.

Straits²⁸ (*Unsuspendable Passage/Transit Passage*)

The International Court of Justice (ICJ) in the case of the Corfu Channel case²⁹ established a firm basis for the passage of a warship through the straits. While deliberating over the issue, ICJ had to decide on the legality of warships passage through straits. In this regard the Court ruled that '...states in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without previous authorisation of a coastal state provided that the passage is innocent.'³⁰ For laying down a criterion to decide whether a particular strait was used for international navigation, the court laid down two tests³¹: one, its geographical situation, that is, a strait connecting two parts of the high seas; and two, its use for international navigation.

From the perspective of UNCLOS III, straits can be divided in two broad categories.

1. Straits not used for international navigation. [They would form part of the territorial seas of the riparian states and would be subjected to a regime of innocent passage as provided in Part II Section 3.]
2. Straits used for international navigation. [These straits would be governed by Part III.]

Straits used for international navigation can be further categorized as follows:

- (a) Straits in which passage is regulated in whole or in part by long standing international Conventions, for example, the Turkish Straits, the Danish Straits, the Straits of Magellan, the Bosphorus and Dardanelles, and the Kattegat and Skagerrak³² [Article 35(c)].
- (b) Straits in which there exists a route through the high sea, or an EEZ, of similar convenience, for example, the Florida and Formosa straits between Cuba and Florida Keys, and the mainland of China and Taiwan, respectively³³ [Article 36].
- (c) Straits between a part of the high sea, or an EEZ, and the territorial

- sea of a foreign state, for example, Straits of Tiran, Georgia, and the Head Harbour Passage [Article 45(1) (b)].
- (d) Straits between one part of the high sea or an EEZ and another part of the high sea or an EEZ in which there is an island which forms the straits and there exists seaward of the island a route through the high sea, or an EEZ of similar convenience; a ‘Messina Exception’³⁴, for example, Straits of Pemba and Messina, and the Santa Barbara Channel³⁵ [Articles 38 (1) and 45(1) (a)].
 - (e) Straits between one part of a high sea or an EEZ and another part of the high sea or an EEZ which do not fall in either of the above categories.³⁶

The Straits mentioned in paragraph (a) are governed by the relevant ‘International Convention’; those in paragraph (b) by ‘Innocent passage (suspendible)’; those in paragraphs (c) and (d) by ‘Innocent passage’ which cannot be suspended; and those in paragraph (e) by ‘Transit passage’.

Article 38 (2) of UNCLOS III defines ‘Transit passage’ to mean an exercise in accordance with Part III of the freedom of navigation and over flight solely for the purpose of continuous³⁷ and expeditious transit of straits, and involves a right which cannot be impeded [Article 38(1)] and/or hampered [Article 44]. Ships and aircraft while exercising the right of ‘Transit passage’ have to abide by the following [Article 39 (1)]:

- (a) proceed without delay;
- (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering straits;
- (c) refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or distress; and
- (d) comply with other provisions of part III.

In addition to the above, ships in transit are required to comply with international safety and pollution regulations [Article 39(2) (a) and (b)]. Likewise, aircraft are required to observe international aviation rules, and operate keeping in view other safety measures [Article 39 (3) (a) and (b)]. Research or survey activities during transit, without the prior authorization of the states bordering the straits are prohibited [Article 40] and, furthermore, a vessel engaged in any of these activities could not be considered to be exercising its right of continuous and expeditious transit passage of the strait.³⁸

The right of transit passage (that is, freedom of navigation and over flight) has been provided 'solely' for the purpose of continuous and expeditious transit. Ships or aircraft have to proceed without delay, and refrain from any activity unless covered by the *force majeure* clause. Accordingly, a ship carrying out 'military exercise and weapons testing surveillance, intelligence gathering and refueling' would be considered to be engaged in activities 'other than the incident to her normal modes of continuous and expeditious transit', and the states bordering the straits would be justified in denying such passage.³⁹

Apart from the above, artificial canals (for example, Suez, Panama, etc.) are not covered by the Convention.⁴⁰ Straits (6 nautical miles [nm] in breadth or less) which were governed by a non-suspendable innocent passage under UNCLOS-I, have also been included within the purview of transit passage. Hence, the width of the straits is not a criterion to decide whether any transit passage regime applies to them.

Archipelagic Water (Unsuspendable Passage, that is, Archipelagic Sea Lanes Passage and Suspendable Passage, that is, Innocent Passage)

There are two regimes of passage applicable to the 'archipelagic waters': 'innocent passage' [Article 52] and 'archipelagic sea lanes passage' [Article 53].

- (a) *Innocent Passage*: The innocent passage is generally applicable to territorial sea and the archipelagic waters. But, within the archipelagic waters, it does not apply to 'internal waters',⁴¹ and 'designated sea lanes and air routes there above'.⁴² Innocent passage is governed by Part II, Section 3, and can be suspended temporarily in specified areas of archipelagic waters for security reasons [Article 52] (that is, an internal or external threat to an archipelagic state's security or by reason of any separatist movement but doesn't include any weapon exercise or tactical maneuvers by the archipelagic state⁴³).
- (b) *Archipelagic Sea Lanes Passage*: Article 53 (3) defines 'archipelagic sea Lane Passage' to mean the exercise of 'the right of navigation and over flight in normal mode solely for the purpose of continuous expeditious and unobstructed transit'. The archipelagic state may designate sea lanes and air routes for the continuous and expeditious passage of foreign ships and aircraft [Article 53 (1)]. Regarding the designation of sea lane passage (and also traffic

separation schemes), an archipelagic state shall refer the proposal to a competent international organization for adoption.⁴⁴ These sea lanes and air routes are to traverse the archipelagic waters and territorial sea, and include all normal passage routes used as routes for international navigation, or over flight through the archipelago, and 'all normal navigational channels' [Article 53 (4)]. Where there are no such sea lanes or air routes designated by the archipelagic state, the passage can be exercised 'through the routes normally used for international navigation' [Article 53 (12)]. While exercising this right, the duties of ships and aircraft, and the power of archipelagic state to enact laws and regulations concerning the passage are similar to 'transit passage' (Article 54).

All ships and aircraft enjoy the right of passage through archipelagic sea lanes in the designated sea lanes and air routes [Article 53 (2)]. This right is not liable to be suspended [Article 44 read with 54] because the regime of straits has been subsumed within the regime of archipelagic sea lanes passage.⁴⁵

Within the archipelagic waters, sea lanes and air routes have to be defined by 'a series of continuous axis lines from the entry points of passage routes to the exit points'.⁴⁶ During the passage through these 'lanes', ships and aircraft are not to 'deviate more than twenty five nautical miles on either side of the axis', and 'not to navigate closer to the coasts' or islands bordering the sea lanes more than 10 per cent of the distance between such islands [Article 53 (5)]. A 'sea lanes passage' was incorporated in UNCLOS III to permit naval vessels, including submarines and military aircraft, to enjoy a free and uninterrupted passage through archipelagic waters.⁴⁷ A merchant vessel does not require a 50 nm wide sea lane for safe passage.⁴⁸ It was incorporated to accommodate the needs of warships and a military task force in archipelagic waters 'to employ evasive tactics and to disperse a broad defensive screen of ships, helicopters and fixed wing aircraft around the heart of the task force'.⁴⁹

Exclusive Economic Zone⁵⁰

Part V of UNCLOS III deals with the regime regulating the EEZ, and defines it to be an area beyond and adjacent to the territorial seas [Article 55], whose breadth shall not extend beyond 200 nm from the baseline from which the breadth of the territorial seas is measured [Article 57].

It has been excluded from the purview of Part VII which deals with the regime of high seas [Article 86], and subjected to the specific legal regime established in Part V [Article 55]. Whereas UNCLOS III outlines elaborately the rights and duties of coastal states [Article 56] and other states [Article 58] in EEZ, the 'Due regards' [Article 56 (2) and 58 (8)] clause tries to create a balance by accommodating these rights, where more specific provisions may not be applicable.⁵¹ The basic components of the EEZ encompass the economic rights of coastal states, non economic rights of all states (including the coastal states), and residual rights.⁵² The text of Part V of the UNCLOS III, however, does not deny the traditional freedom of navigation, over flight, and the laying of submarine cables in the zone which were considered part of the freedom of high seas.⁵³

Article 55 of the Convention, which creates the specific legal regime of the EEZ, subjects the relevant rights, jurisdiction, and freedom of coastal states and other states to the relevant provisions of UNCLOS III. This clearly rules that there may be specificity in the constitution of the zone but not in the functionality of the zone.⁵⁴ Part V, which specifies the rights of the coastal states exercisable in the zone, also allows other states to exercise the rights and freedom governed by the relevant provision of UNCLOS III in the zone [Article 58 (1), (2) and Part VII]. Article 56 (1) (a) says that coastal states have 'sovereign right for the purpose of exploring and exploiting natural resources', but not sovereignty over the zone.⁵⁵

For the warships, the indicative factor for permissible uses is the range of functions which they generally perform and the purposes for which they are traditionally utilized, that is, navigation, military manoeuvre, weapons-testing, presence mission, deterrence, etc. Unlike merchant ships which transport goods, the passage of warships is not always 'continuous and expeditious'. One of the main functions performed by warships is to guard and keep open the sea lines of communication (SLOCs) used by the merchant ships of a country. This sometimes requires patrolling by warships of the high seas and EEZ through which these SLOCs pass.⁵⁶ However, the activities of warships are subject to the test of Articles 88, 301 and the UN Charter.⁵⁷ Further, these activities are to be performed with 'due regard' to the rights of the coastal state.⁵⁸ According to Bernard H. Oxman, warships can undertake military activities in the EEZ, subject to the following:

- (a) Abstaining from unlawful threat or use of force;
- (b) 'Due regard' to the rights exercisable by other states at sea;

- (c) Not contravening any applicable treaty and/or rules of international law; and
- (d) 'Due regard' to the rights and duties of coastal states.⁵⁹

NAVAL DIPLOMACY AND UNCLOS III⁶⁰

As per the Tribunal order, 'the visit of the frigate ARA Libertad to the port of Tema, a port near Accra, Ghana, from 1–4 October 2012 was the subject of an exchange of diplomatic notes' between Argentina and Ghana. In reply to

...a *note verbale* of 21 May 2012 from the Embassy of Argentina in Abuja, Nigeria, concerning the organization of the visit of the *ARA Libertad* to the port of Tema from 1 to 4 October 2012, the High Commission of Ghana in Abuja, by a *note verbale* of 4 June 2012, informed the Embassy that 'the Ghanaian Authorities have granted the request.'⁶¹

Thus, the Argentine frigate arrived at Ghana on a naval diplomatic visit, that is, a port call. However, the question that arises is: what was the purpose of these port visits? Before deliberating the role of naval port calls, the naval diplomacy from the perspective of UNCLOS III needs to be examined.

'Naval diplomacy' relates to the use of navies (warships in particular) for furthering foreign policy objectives in a manner short of resorting to force.⁶² To achieve the objective, states use their navies in various ways which, inter alia, involve the use of warships for communicating their intentions, making a show of strength to coerce others, compelling others to do or abstain from doing an act, in a supportive role, or for influence building, or for representative tasks of various kinds.⁶³ The modalities to carry out these functions depend on the shape, size and strength of the navy of a country; however, the underlying principle remains the same. Naval Diplomacy is, however, viewed from two perspectives: the exercise of power, and the exercise of influence. The exercise of 'power' implies the application of limited naval force as one of the instrument of foreign policy, that is, gunboat diplomacy. On the other hand, the exercise of influence is one of the less coercive aspects of naval diplomacy.

The exercise of 'influence' is mainly political influence which a naval force tries to exert on a victim state. The influence is exerted either in a positive manner (for example, through a supportive role), or in a negative manner (for example, coercion, deterrence, etc.). For this purpose, the

visibility of a warship is the prime requirement—visibility not in a strictly visual sense, but in a political sense, and which could be created also by propaganda. For the purpose of creating such influence, neither the number of warships nor the actual capability is a decisive factor. The crucial factor is the political will to use warships for such a role. For effective naval diplomacy to exercise appropriate influence on an adversary, the determining factors include not only the quality or quantity of warships but also the diplomatic game played on the shore.

Be that as it may, naval diplomacy could not have acquired such prominence in the strategy of maritime powers if the warship had not possessed the following characteristics:⁶⁴

- (a) *Versatility*: Warships (single or in fleet) could perform various operational (military) or non-operational (non-military) tasks. This versatile capability of a warship provides flexibility to a naval force.⁶⁵
- (b) *Controllability*: Naval force is less provocative and dangerous and more controllable than the Army or the Air Force.⁶⁶ The controllability is because of the ease with which they can be deployed and withdrawn.
- (c) *Mobility*: Naval force has easy and fast access to desired places despite speed constraints.
- (d) *Projection ability*: The warship also possesses the ability to carry troops, tanks, aircraft, etc., to distant coasts. They are suited to carry out amphibious attacks, naval bombardment of shores, air attacks on ships or targets on land, etc. This projection of power from the sea is always helpful in the projection of political influence.⁶⁷
- (e) *Access potential*: In spite of the restrictions imposed by various oceanic regimes, the sea essentially remains the 'great common'⁶⁸ as there is no inviolable territory beyond territorial sea limits. The movement of armed forces across the seas is easier than over the land or in the air.
- (f) *Symbolism*: In a figurative sense, a warship symbolizes the nation it represents.⁶⁹ The symbolism is conveyed more purposefully the bigger the size of the warship.⁷⁰
- (g) *Endurance*: A warship can endure at sea for weeks and even months. By doing so, a warship can continue to make its presence felt in a region of strategic concern and, if need be, demonstrate its readiness to undertake operations.⁷¹

In other words, a warship can be in close proximity but is also removable; and likewise, it can remain committable even after its withdrawal.⁷²

In a nutshell, naval diplomacy demonstrates the concept of 'power' or 'influence'. These may not be easily discernible in every case; but they do surely exist in every diplomatic mission. From a wider perspective, naval diplomacy can be defined as follows:⁷³

1. The demonstration of power:
 - (a) Demonstration of naval power by presence
 - (b) Deployment specific operation
2. The exercise of influence:
 - (a) Naval aid
 - (b) Port calls
 - (c) Specific goodwill visits, etc.

Port or Specific Goodwill Visit

A port call or specific goodwill visit is common to all navies of the world. These are generally politically motivated. The objectives of such visits are: to foster goodwill; to convey or gain information; to demonstrate an ideology; to impress a demonstrating power; to support or facilitate negotiations; and to support economic activities, among other issues.⁷⁴ Such visits are occasionally commercially motivated, as in the case of Global 86, a voyage by a British naval task group.⁷⁵ But, generally, the objective is the 'showing of the flag' which is the naval equivalent of the ceremonial and symbolic practice of diplomacy.⁷⁶

An isolated port call or visit is not really significant unless appropriate diplomatic elements are involved in it. Strikingly, the importance of a port call visit is gauged from its absence rather than from routine visits. A routine port call or visit may or may not be helpful in achieving diplomatic objectives. However, the absence of such a visit would certainly reflect a lack of interest, or diplomatic apathy between the two states.

Emerging Law of the Sea and Naval Diplomacy

UNCLOS III granted certain legalistic status to various oceanic regimes and, accordingly, functional changes in the duties and liabilities of these regimes have also been introduced. Primarily, these functional changes are meant to protect the interests of both the coastal states and the major maritime users of the sea. However, as a matter of fact, UNCLOS III has

created certain regimes where a coastal state exercises greater jurisdiction than before. This tilt in favour of coastal states has made certain areas non-available for naval manoeuvrability (for example, the extension of territorial limits), and restricted naval activities in certain areas (example, activities in the EEZ/continental shelf effecting coastal states' rights).

From the perspective of the major maritime powers, these inhibitions are more conducive for the use of purposeful naval diplomacy. With the emergence of more conflicting maritime borders now, warships could be deployed appropriately to send credible diplomatic signals. Naval diplomacy should be selective and used purposefully for communicating the clear intentions of the country whose warships they are. As regards naval diplomacy in the non-coercive sense, a warship's access to a foreign port is made usually by prior arrangement, and as a friendly gesture.

DISPUTE SETTLEMENT PROCEDURE AND UNCLOS-III

International disputes are generally settled through diplomatic means, and adjudication, if any, is possible only when the parties involved consent to the procedure involved. UNCLOS III is one of the very few multilateral treaties that prescribes mandatory jurisdiction for 'any disputes concerning the interpretation or application of the Convention.'⁷⁷

Part XV of UNCLOS III deals with the settlement of disputes. Under Section 1 of Part XV, the Convention allows flexibility of choice on the mode of settlement of disputes. While making it obligatory to settle disputes between themselves [Article 279], the Convention acknowledges the right of contracting parties 'to agree at any time to settle a dispute between them concerning the interpretation or application of the Convention by peaceful means of their own choice' [Article 280]. In the event that recourse to Section 1 fails, the parties are required under Section 2 to submit their dispute to compulsory procedures resulting in a binding decision [Article 286] by resorting to any one of the following means [Article 287]:

- (a) International Tribunal for the Law of the sea (Annexure VI);
- (b) International Court of Justice;
- (c) Arbitral Tribunal (Annexure VII); and
- (d) Special Arbitral Tribunal for one or more of the categories of disputes mentioned in Annexure VIII.

The application of compulsory procedure is, however, subject to certain limitations contained in Section 3. It excludes certain disputes

closely related to the sovereign rights of coastal states from the purview of compulsory settlement procedures resulting in a binding decision because, if subjected to the compulsory dispute settlement procedure, the complexion of these rights would have changed.⁷⁸ In view of this pollution control, scientific research and fisheries in the exclusive economic zone have been subjected to automatic exception.⁷⁹

The second category of exceptions is 'optional'. Article 298 of the Convention enumerates those disputes which are subject to 'optional exception': namely, disputes relating to delimitation, military activities or law enforcement activities, and cases where the Security Council is exercising functions assigned to it by the UN Charter. Unlike an 'automatic exception', a state, while becoming party to the Convention, may make a declaration that it does not accept the dispute settlement procedures of the Convention in respect of one or more of the categories of disputes enumerated above [Article 298(1)]. A state making such a declaration may any time withdraw it, or agree to submit a dispute excluded by such declaration to any dispute settlement procedure [Article 298(2)]. A state which has made a declaration regarding the optional exception clause is not entitled to submit any dispute falling within the excepted category to any settlement procedure, without the express consent of the other party involved in the dispute [Article 298(3)]. A new declaration or withdrawal of a declaration, does not in any way affect proceedings before a court or tribunal unless the parties otherwise agree [Article 298(5)]. Various states have made declarations to this effect.⁸⁰

This military exception clause, though a vestige of concession to sovereign immunity,⁸¹ excludes a military/naval dispute from the compulsory international⁸² forum where it could have been resolved peacefully.⁸³ On the one hand, it protects a state from the invidious situation of either having to disclose sensitive military information to defend its case or to be in a position where it cannot defend itself even against a frivolous case by not disclosing that information.⁸⁴ On the other hand, this clause is liable to be misused by both coastal and user states.⁸⁵ Though favoured by the maritime powers, this clause could be more disadvantageous to them by the exclusion of a forum where the coastal state's acts of restricting naval activities in the EEZ could have been challenged. Because of this, the dispute settlement mechanism has lost its effectiveness. The maritime powers obviously rely more on naval might rather than on the dispute settlement mechanism.

It is an overstatement to say that the military activities of a naval power in the exclusive economic zone of another state would fall within the national jurisdiction of the latter.⁸⁶ Warships will have complete immunity [Articles 56(2) and 95], and other military activities would be judged by striking a balance between coastal and other states' rights contained in Articles 56 and 58 respectively. But either way, if a coastal state wrongfully interferes with the other state's military activities, which may otherwise be permissible under the Convention, the problem would be how to resolve the dispute. The coastal state may term this interference to be part of military activities which are excluded from the purview of dispute settlement mechanism under the Convention by virtue of the optional clause.⁸⁷

In the premise of the law governing the rights and privileges of warships, as ascribed under UNCLOS-III, the ITLOS, for the very first time, had the occasion to adjudicate this unique case of the arrest of a warship, contrary to the principle of sovereign immunity.

THE ITLOS ORDER

Both Ghana and Argentina are parties to UNCLOS III, and have not issued any declaration under Article 298 regarding the 'optional exception'.⁸⁸ Having failed to secure the release of the warship, Argentina instituted dispute settlement proceedings under the Convention on 30 October 2012. In accordance with Article 287 UNCLOS, Argentina chose ITLOS as the first in order of preference, and Arbitration under Annex VIII as second. Ghana has not designated any particular forum and, therefore, by virtue of Article 287(3), Ghana 'shall be deemed to have accepted arbitration in accordance with Annex VII' because Article 287(5) UNCLOS stipulates that '[i]f the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree'. Accordingly, Argentina initiated the process of instituting proceedings against Ghana to constitute an Arbitral Tribunal under Annex VII 'to declare that the Republic of Ghana, by detaining the warship ARA *Fragata Libertad*',

...violates the international obligation of respecting the immunities from jurisdiction and execution enjoyed by such vessel pursuant to Article 32 of UNCLOS and Article 3 of the 1926 Convention for the Unification of Certain Rules concerning the Immunity of

State-owned Vessels as well as pursuant to well-established general or customary international law rules in this regard.

Under Article 290 of the Convention, a court or tribunal has the discretion to prescribe any 'provisional measures' which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision. However, Article 290 (5) provides that, during the pendency of the constitution of an arbitral tribunal to which a dispute is being submitted, any court or tribunal agreed upon by the parties or, failing any such agreement within two weeks from the date of the request for 'provisional measures', ITLOS may prescribe, modify or revoke provisional measures if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction, and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke, or affirm those provisional measures. Parties are to comply promptly with any provisional measures ordered by the tribunal.

Argentina filed an application before ITLOS on November 14, after the mandatory period of two weeks, for 'provisional measures' of releasing the warship under Article 290 of the Convention, pending the constitution of the Annex VII Arbitral Tribunal. After hearing both the parties, ITLOS unanimously ordered the release of the vessel. Five judges, however, appended their separate declarations/opinions.

The Tribunal (ITLOS) jurisdiction to order 'provisional measures' under Article 290 (5) was linked to the question of *prima facie* jurisdiction of Arbitral Tribunal under Annex VII. In other words, ITLOS had to first decide the preliminary question as to whether the Court or Tribunal that will eventually adjudicate the dispute on the merits (that is, Annex VII Arbitral Tribunal) would have jurisdiction over the dispute under Article 288 of the Convention because jurisdiction under the Article is limited to 'any dispute concerning the interpretation or application of the Convention.' Argentina contended the issue of *prima facie* jurisdiction on the basis of four Articles of the Convention: Article 18(1) (b)—Innocent Passage in the Territorial Sea; Article 32—Sovereign Immunity of Warships; and Articles 87(1) (a) and 90—High Seas Freedom of Navigation. The tribunal, however, ruled that Article 18, paragraph 1(b) and Articles 87 and 90 of the Convention 'do not relate to the immunity of warships in internal waters and, therefore, do not seem to provide a

basis for prima facie jurisdiction of the Annex VII arbitral tribunal.' On the fourth count, the Tribunal observed that a difference of opinions exists between the parties as to the applicability of Article 32, and 'a dispute appears to exist between the Parties concerning the interpretation or application of the Convention.' The Tribunal further observed that Article 32 affords a basis on which prima facie jurisdiction of the Annex VII Arbitral Tribunal might be founded and accordingly, 'the Annex VII arbitral tribunal would prima facie have jurisdiction over the dispute.'⁸⁹

After deciding the jurisdictional question in favour of Argentina, the Tribunal considered the issue of 'provisional measures'. Under Article 290 (1), provisional measures can be ordered 'to preserve the respective rights of the parties to the dispute or to prevent serious harm to the environment, pending a final decision.' According to Ghana, 'Argentina has the ability to ensure the immediate release of the ARA Libertad by the payment of security to the Ghanaian courts' and therefore, while the dispute is pending before the Ghanaian courts, there is no need for any additional remedy by the Tribunal 'in order to prevent any prejudice being caused to the rights of Argentina'.⁹⁰

However, the Tribunal was not persuaded that provisional measures were inappropriate. It cited the continuing serious prejudice to Argentina posed by Ghana's refusal to permit the warship to depart its port. The Tribunal observed that 'a warship is an expression of the sovereignty of the State whose flag it flies'⁹¹ and 'in accordance with general international law, a warship enjoys immunity, including in internal waters.'⁹² It then declared that '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'⁹³, and 'actions taken by the Ghanaian authorities that prevent the ARA Libertad, a warship belonging to the Argentine Navy, from discharging its mission and duties, affect the immunity enjoyed by this warship under general international law.'⁹⁴ The Tribunal then concluded that 'the urgency of the situation requires the prescription by the Tribunal of provisional measures that will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the Parties.'⁹⁵

The Tribunal did not address the question raised during oral argument regarding Argentina's waiver of sovereign immunity. Argentina had argued that such waivers must be specific as to warships. Arguably, to find prima facie jurisdiction, the Tribunal did not need to reach the waiver issue.

There is one important aspect of this case. The Ghanaian authority had pleaded before the Ghana High Court that the warship enjoyed immunity, and that it was the duty of the Judge to release the vessel forthwith.⁹⁶ But Ghana did not take the same stand before the Tribunal as had been taken before its own court. Its stand was that in Ghana the independence of the Ghanaian Judiciary is fully respected, and the executive arm of Government is 'unable to interfere with the work of the Ghanaian courts; it is not within the powers of the Government to compel the Ghanaian courts to do anything'.⁹⁷ In this regard, Judge Rao⁹⁸ and Judges⁹⁹ Wolfrum and Colt held that a 'State cannot take shelter behind a decision of any of its organs as an excuse for not implementing its international legal obligations.' To support their views, the following Advisory Opinion of International Court of Justice in 'Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights' was quoted:

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State.¹⁰⁰

CONCLUSION

The Tribunal (ITLOS) ordering the Ghanaian authority to release the Argentinean warship forthwith is a 'provisional measure', that is, an 'interim order' pending the decision on the merit of the Arbitral Tribunal to be constituted under Annex VII, as per Argentina's request.

The facts of the case reveal that the warship was detained at the behest of the Ghanaian High Court. The Ghanaian authority, in fact, pleaded before the High Court to release the warship as per international law, and not to proceed in the matter. The High Court, however, took the contrary view. The Ghanaian constitutional mandate does not permit the Executive to order the Judiciary to release a warship. The modalities adopted by Ghana to implement the Tribunal order immediately are not known. A somewhat similar situation arose in India when, in the Italian Marines case, the Supreme Court of India restrained the Italian Ambassador Daniele Mancini from leaving India without the Court's permission. Italy considered this restriction contrary to immunity under

the Vienna Convention. But, in this case, even if the Government of India had a different perception of the issue, they had to follow the Court's directives. However, under the general principles of International Law, a state cannot use its internal laws, including its Constitution, as a shield to circumvent its international obligations. Thus, the question that arises is how to reconcile International and Domestic (National) Laws? Since each state has its own legal system, the problem becomes complex. If a universally acceptable solution to this problem is to be evolved under international law, each state will have to make a provision for it in its legal system.

The order of the ITLOS has far reaching implications for the maritime community. Without an effective dispute settlement mechanism in the international legal system, a treaty/convention will not be of much avail. Though the principles of International Law are based on 'Comity', their wider acceptability is needed for their effective implementation. 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.

NOTES

1. See http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf, accessed on 21 December 2012.
2. See 'Argentina Orders Sailors to Evacuate Libertad Ship Seized by Ghana', *BBC*, available at <http://www.bbc.co.uk/news/world-africa-20020321>, accessed on 21 December 2012.
3. *NML Capital vs. Republic of Argentina* [2011] UKSC 31.
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.* 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.

7. Columbus, *The International Law of the Sea*, n. 4, p. 507. In the Indian Navy, there are two oil tankers—INS Shakti and INS Deepak—which have been commissioned as warships.
8. 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.
9. *Article 32: Immunities of warships and other government ships operated for non-commercial purposes*
With such exceptions as are contained in sub section 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.
Article 95: Immunity of warships on the high seas
Warships on the high seas have complete immunity from the jurisdiction of any state other than the flag state.
Article 236: Sovereign immunity
The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a state and used, for the time being, only on government non-commercial service. However, each state shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.
10. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of Sea', n. 5, p. 816.
11. *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'.
12. The predecessor of this article is Article 3, 'International Convention for the Prevention of Pollution from Ships', November 1973.
13. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of Sea', n. 5, pp. 820–21.
14. Rao, P.C., *The New Law of Maritime Zone: With Special Reference to India's Maritime Zones*, New Delhi: Milind Publications, 1983, p. 16.
15. Schwarzenberger, George, *A Manual of International Law*, fifth edition, London: Stevens & Sons Ltd., 1967, p. 126.
16. Article 2(1) of UNCLOS III; also see David L. Larson, 'Naval Weaponry and the Law of the Sea' in E.D. Brown and R.R. Churchill (eds), *The UN Convention on the Law of the Sea: Impact and Implication*, Proceedings of the

- Nineteenth Annual Conference of the Law of the Sea Institute, Honolulu: Law of the Sea Institute, University of Hawaii, p. 47.
17. McDougal, Myres S. and William T. Burke, *The Public Order of the Oceans* New Haven: Yale University Press 1962, p.93.
 18. Brownlie, Ian, *Principles of Public International Law*, Oxford: Clarendon Press and New York: Oxford University Press, 1979, p. 123.
 19. Ibid.
 20. McDougal and Burke, *The Public Order of the Oceans*, n. 17, p. 93.
 21. Ibid.
 22. Rao, *The New Law of Maritime Zone*, n. 14, p. 17.
 23. Columbus, *The International Law of the Sea*, n. 4, p. 177.
 24. Larson, 'Naval Weaponry and the Law of the Sea', n. 16, pp. 47-48.
 25. S.N. Sikri (India), *UNCLOS-I Official Records*, 1958, Vol. 3, pp. 84-85.
 26. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of Sea', n. 5, p. 853 and F. David Froman, 'Uncharted Waters: Non Innocent Passage of Warships in the Territorial sea,' *San Diego Law Review*, Vol. 21, 1984, p. 645. However, according to A.V. Lowe, the problem with paragraph (2) of Article 19 is that it is not clear whether the list is illustrative or exhaustive. By virtue of this long list, the coastal states have been given wider rights to prevent passage than they had formally. See A.V. Lowe, 'Some Legal Problems Arising from the Use of the Seas for Military Purposes', *Marine Policy*, Vol. 10, p. 174.
 27. Albania, Algeria, Antigua and Barbuda, Bangladesh, Barbados, Brazil, Bulgaria, Burma, Cambodia (Contiguous zone only), Cape Verde, China, Denmark, Djibouti (Nuclear powered & nuclear weapons), Egypt, Finland, German Democratic Republic, Grenada, Guyana, India, Iran, North Korea, South Korea, Lebanon, Libya, Maldives, Malta, Mauritius, Netherlands (Western Schelde only), Nicaragua, Norway, Pakistan, Poland, Rumania, Seychelles, Somalia, Sri Lanka, Sudan, Sweden (except Oresund), Syria, Vietnam, Yemen (YFR), Yemen (PORY), Yugoslavia. See *The Commander's Handbook on the Law of Naval Operations* [NWP 9 (Rev. A)], US Naval Warfare Publications, 1989, pp. 2-17.
 28. Eric Bruel defines a strait as 'as a contraction of the sea between two territories, being of a certain limited width and connecting two seas otherwise separated at least in that particular place by the territories in question'. See Eric Bruel, *International Straits: A Treaties on International Law*, London: Sweet & Maxwell 1947, p. 19. This definition is based on the geographical connotation of the word. Bruel has also examined the linguistic conception of straits (Ibid., pp. 15-17). In a geographical sense, this narrowness could vary 'from 900 yards to over 150 miles'; see R.P. Anand, 'Transit Passage and Overflight in International Straits', in Jon M. Van Dyke, Lewis M. Alexander

- and Joseph R. Morgan (eds) *International Navigation: Rocks and Shoals Ahead*, Honolulu: Law of the Sea Institute, University of Hawaii, 1988, p. 125. The Dardenelles Straits is 800 yards wide at its narrowest point; the Hudson Straits is about 155 miles wide (Ibid., see note 2 on p. 147). But, from the perspective of the law, the mere geographical concept of straits does not suffice. Subjecting it to a legal regime of strait passage it, should have some use (or may be indispensable) for 'international maritime traffic. See D.P. O'Connell, *International Law of Sea Vol. I*, edited by I.A. Shearer, Oxford: Clarendon Press, p. 299.
29. On 22 October 1946, two ships (HMS Saumarez and HMS Voyager) of a Royal Navy squadron, while proceeding through the North Corfu Channel struck mines and suffered damages (including loss of life). See the Corfu Channel, Merits Judgment (9 April 1949), *International Court of Justice Reports*, 1949, pp. 4–38, available at <http://www.icj-cij.org/docket/files/1/1645.pdf>, accessed on 19 June 2013.
 30. Ibid., p. 28.
 31. Ibid.
 32. Larson, David L., 'Innocent Transit and Archipelagic Sea Lane Passage', *Ocean Development and International Law*, Vol. 18, 1987, p. 415.
 33. Ibid., p. 416.
 34. Alexander, Lewis M., 'Ocean Enclosure Movement', *San Diego Law Review*, Vol. 20, 1983, p. 530.
 35. Larson, 'Innocent Transit and Archipelagic Sea Lane Passage', n. 32, p. 416.
 36. According to Robertson, in the Convention, a transit passage regime not covering passage between an EEZ and other EEZ or the high seas would have been inappropriate because many important ocean areas such as the Mediterranean Sea, the Sea of Japan, the South China Sea, and the Caribbean Sea are entirely the EEZ of the surrounding coastal states. See, Horace B. Robertson, 'International Straits', *Virginia Journal of International Law*, Vol. 20, pp. 829–30.
 37. Though the requirement of continuous transit is meant for a user state, it becomes obligatory for the coastal state to permit the transiting ships or aircraft to make a continuous uninterrupted voyage or flight. Ibid., p. 837.
 38. Article 40 was inserted in the Convention to correct an oversight in the earlier version of the text. Since MSR in EEZ is subject to coastal state consent, it is quite obvious that for 'international strait' (which forms the territorial waters of a coastal state) there should be a similar provision. See Robertson, 'International Straits', pp. 832–33.
 39. Amin, S.H., 'The Regime of International Straits: Legal Implications for the Straits of Hormoz', *Journal Maritime Law and Commerce*, Vol. 12, 1981, p. 391.

40. Articles 35 and 311; see Oxman, 'The Regime of Warships under the United Nations Convention on the Law of Sea', n. 5, p. 858.
41. Article 50. The waters of rivers, bays and ports of an archipelagic state can be delimited as internal waters where no right of 'innocent passage' exists.
42. Article 53. In these lanes, a much more liberal regime of Archipelagic Sea Lanes Passage applies.
43. Rothwell, Donald R., 'The Indonesia Strait Incident: Transit or Archipelagic Sea Lanes Passage', *Marine Policy*, Vol. 14, 1990, p.502.
44. Article 53 (9). The competent organization is prepared to be the Intergovernmental Maritime Consultative Organization (IMCO). See Elliot L. Richardson, 'Law of the Sea-Navigation and other Traditional National Consideration', *San Diego Law Review*, Vol. 19, Note 54, 1982, p. 568.
45. Ibid. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of Sea', n. 5, p. 859.
46. The reason for defining a passage in terms of axis was probably linked with a view to finding a via media to allow international transit through archipelagic waters, without incorporating the concept of free or unimpeded passage and overflight as advocated by the Maritime Powers. See H.P. Rajan, 'The Legal Regime of Archipelagos', *German Yearbook of International Law*, Vol. 29, 1986, p. 149.
47. Shigeru Oda, 'The Passage of Warship through Straits and Archipelagic Waters, in Lewis Van Dyke, M. Alexander and Joseph R. Morgan (eds.), *International Navigation: Rocks and Shoals Ahead*, Honolulu: Law of the Sea Institute, University of Hawaii, 1988, p.156.
48. Comments of Rear Admiral F.L. Fraser, in J.K. Gamble (ed.), *Law of the Sea, Neglected Issues, Honolulu: Law of the Sea Institute, University of Hawaii*, 1979, p. 402.
49. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of Sea', n. 5, p. 861.
50. The origin of EEZ, an innovation of UNCLOS III, is attributed to the Truman Proclamation of 1945, although Ann Hollick does not concur with this (see Ann L. Hollick, 'The Origin of 200 Mile Offshore Zones (Notes and Comments)', 71, *American Journal of International Law*, 1977, p. 494. Oxman considers it to be an 'outgrowth of the contiguous zone and the continental shelf', which is meant to resolve a deadlock of mare clausum and mare liberum (Oxman, 'UNCLOS III,' in 71, *American Journal of International Law*, p. 259). According to O'Connell, the zone is an area of high seas on which the coastal states' right of enjoyment and protection of marine resources have been superimposed. See D.P. O'Connell, 'Transit Right and Maritime Strategy', *Journal of the Royal United Services Institute for Defence Studies*, Vol. 123, No. 2, June 1978, p. 16.

51. Richardson, Elliot L., 'Law of the Sea-Navigation and Other Traditional National Security Considerations', *San Diego Law Review*, Vol. 19, 1982, p. 575.
52. Zedalis, Rex J., 'Military Uses of Ocean Space and the Developing International Law of the Sea: An Analysis in the Context of Peacetime ASW', *San Diego Law Review*, Vol. 16, 1979, p. 623.
53. *Ibid.*, p. 648.
54. Oxman, 'UNCLOS III', *American Journal of International Law*, Vol. 72, 1978, p. 72
55. Phillips, J.C., 'The Exclusive Economic Zone as a Concept in International Law', *International and Comparative Law Quarterly*, Vol. 26, 1977, p. 587.
56. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of Sea', n. 5, p. 837.
57. Attard, D., *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987, p. 85. See also Elliot L. Richardson, 'Law of the Sea: Navigation and other Traditional National Consideration', 19 *San Diego Law Review*, 1982, p. 574.
58. Article 58 (3). See Oxman, 'The Regime of Warships under the United Nations Convention on the Law of Sea', n. 5, p. 837; and Attard, *The Exclusive Economic Zone in International Law*, n. 57.
59. *Ibid.*, Oxman.
60. For the complete article, see Brij M. Dimri, 'Naval Diplomacy and UNCLOS-III', *Strategic Analysis*, Vol. 17, No. 1, April 1994, pp. 55-77.
61. Note. 1. Para 38.
62. Booth, Ken, *Law, Force and Diplomacy at Sea*, Winchester: Allen and Unwin, 1985, p. 138.
63. *Ibid.*, pp. 137-38.
64. Booth, Ken, *Navies and Foreign Policy*, New York: Crane and Russack, 1977, pp. 33-35.
65. Till, Geoffrey, *Modern Sea Power*, London: Brassy's, 1987, p. 169.
66. *Ibid.*, p. 169.
67. Nathan, James A. and James K. Oliver, *The Future of United States Naval Power*, Bloomington: Indiana University Press, 1979, p. 41.
68. Hill, J.R., *Maritime Strategy for Medium Powers*, London: Croom Helm, 1986, p. 30.
69. Martin, L.W., *The Sea in Modern Strategy*, London: Chatto and Windus and Institute for Strategic Studies, 1967, p. 138
70. Booth, Ken, 'Warships and Political Influence', in Michael McGwire and John McDonnell (eds), *Soviet Naval Influence: Domestic and Foreign Dimensions*, London: Praeger, 1977, p. 467.

71. Martin, *The Sea in Modern Strategy*, n. 69, p. 142.
72. Booth, Ken, 'Naval Strategy and the Spread of Psycho-Legal Boundaries at Sea', *International Journal*, Vol. 38, No. 3, 1982-83, p. 467.
73. *Ibid.*, p. 471.
74. Hill, *Maritime Strategy for Medium Powers*, n. 68, p. 98.
75. For this voyage, sales brochures were obtained from 170 British companies along with displays of models. See James Cable, 'Showing the Flags: Past and Present', *Naval Forces*, Vol. VIII, No. 2, 1987, p. 49.
76. Cable, James, *Navy in Violent Peace*, Houndmills: Macmillan, 1989, p. 72.
77. Klein, Natalie, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, 2005, p. 2.
78. Vicuna, Francisco Orrego, *The Exclusive Economic Zone: Regime and Legal Nature Under International Law*, New York: Cambridge University Press, 1989, p. 123.
79. Article 297; and *Ibid.*, pp. 123-34.
80. Egypt, Cuba, Guinea-Bissau, Byelorussia, Democratic Republic of Germany, Ukraine, USSR, Uruguay and Tunisia, etc.
81. Janis, Mark W., 'Dispute Settlement in the Law of the Sea Convention: The Military Exception', *Ocean Development and International Law*, Vol. 4, 1977, p. 62. See also Gurdip Singh, *United Nation Convention on the Law the Sea, Dispute Settlement Mechanism*, New Delhi: Academic Publications, 1985, p. 148.
82. UNCLOS III, 5, Official Record, New Zealand p. 12.
83. Janis, 'Dispute Settlement in the Law of the Sea Convention: The Military Exception', n. 81.
84. Hull, Roger H., 'Much Ado about Something: Dispute Settlement and the Law of the Sea Convention', *International Lawyer*, Vol. 11, 1917, p. 368.
85. Janis, 'Dispute Settlement in the Law of the Sea Convention: The Military Exception', n. 81, p. 56. See also, Elizabeth Young, 'Jurisdiction at Sea', *Word Today*, Vol. 34, No. 6, June 1978, p. 20.
86. Singh, n. 81, p. 148.
87. Bernhard, *United Nation Convention on the Law the Sea, Dispute Settlement Mechanism*, 'Compulsory Dispute Settlement', *Virginia Journal of International Law*, Vol. 19, 1978-79, pp. 69-68.
88. On October 26, 2012, Argentina modified its declaration upon the ratification of the UNCLOS. '[...] in accordance with article 298 of [the] Convention, the Argentine Republic withdraws with immediate effect the optional exceptions to the applicability of section 2 of part XV of the Convention provided for in that article and set forth in its declaration dated 18 October 1995 (deposited on 1 December 1995)' to 'military activities

by government vessels and aircraft engaged in non-commercial service'. See http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#ArgentinaUpon ratification, accessed 7 March 2013.

89. Para 61 to 67, Note 1, ante.
90. Para 92, *ibid.*
91. Para 94, *ibid.*
92. Para 95, *ibid.*
93. Para 97, *ibid.*
94. Para 98, *ibid.*
95. Para 100, *ibid.*
96. Para 2, Separate Opinion of Judge Chandrasekhara Rao available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15_12_2012_SepOp_Ch_Rao_E_.pdf, accessed 21 December 2012.
97. Para 4, *ibid.*
98. Para 6, *ibid.*
99. Para 55, Separate Opinion of Judge Wolfrum *Colt.* See http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Wolfrum-Cot_orig-no_gutter.pdf, accessed 21 December 2012.
100. Para 7, Note 99 *ibid.*