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AN OVERVIEW ON THE FREEDOM OF HIGH SEAS: JURISDICTION

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INTRODUCTION

Brief overview of the topic

The principle of “freedom of seas” can be found in the United Nations Convention on the Law of the Sea under Article 87(1) which expresses: “the high seas are open to all states, whether coastal or land-locked”. According to UNCLOS, the high seas are areas beyond the exclusive economic zones (EEZs) and territorial waters of any state. States have the freedom to navigate, fish, lay submarine cables and pipelines, and conduct scientific research on the high seas. The high seas include the largest part of the 71 percent of the earth’s surface that is covered by oceans. Grotius is the main figure in the development of the law of the sea, who did nothing less than revolutionize it.

Grotius’ main argument was that the freedom of navigation, and consequently of trade, reflected primary natural laws. He said: “Every nation is free to travel to every other nation, and to trade with it.”¹ According to him, the sea is *res communis*, which cannot become the private property of any person or state. This in contrast to his views on the land, which were also *res communis*, but could be appropriated under the natural laws. If a part of the sea were to be occupied by a state, this would not create ownership, only the semblance of ownership.²

Grotius was also the first person to state that universal jurisdiction should be applied to piracy. If you accept the *mare liberum* theory, then it follows that acts that infringe on that right (*hostis humani generis*), like acts of piracy, can be Punished.³ The 20th century also saw the first

¹ Papastavridis, E.D. (2011). The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited. *Leiden Journal of International Law*, 24, 45 - 69.

² Benton, L., & Straumann, B. (2010). Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice. *Law and History Review*, 28(1), pp. 24.

³ R. FANTAUZZI, (2011)“Rascals, scoundrels, villains, and knaves: the evolution of the law of piracy from ancient times to the present”, *International Journal of Legal Information*,, vol. 39, issue 3, pp. 346-383

codifications of the freedom of the high seas with the 1958 Geneva Convention⁴ and later the several United Nations Conventions of the Law of the Sea (hereafter referred to as LOSC), which listed several examples of the specific freedoms and posed that states, international organizations and interstate cooperations couldn't place on parts of the high seas under their jurisdiction. It is actually composed of four different conventions and one additional protocol. The conventions are: the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf, plus the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. The basics have not changed significantly since the late 20th century, since the main source of information is still the Law of Seas Convention, in particular Articles 86, 87 and 89.

While the high seas are generally considered beyond the jurisdiction of any single state, certain limitations and restrictions exist. For example, states must comply with international agreements and conventions addressing issues such as pollution, navigation safety, and the protection of marine biodiversity.

Relevance of the study

The research paper delves into the concept of the freedom of the high seas, a fundamental principle of international maritime law. It aims to explore the jurisdictional aspects surrounding the freedom of the high seas and the implications for states engaging in maritime activities beyond their territorial waters.

Objectives of the study

1. To analyze the legal framework, particularly focusing on the United Nations Convention on the Law of the Sea (UNCLOS).
2. To assess the jurisdiction of the flag state.

Research Methodology

This research is a review of relevant international treaties, conventions, and legal literature. It examines case studies and examples to illustrate the practical implications of the freedom of the high seas and its interaction with jurisdictional considerations.

⁴ Geneva Convention on the Law of the Sea, Geneva, 29 April 1958

Research Questions

1. What is the Legal Framework Governing the Jurisdiction of the Freedom of the High Seas, with a Focus on UNCLOS?
2. What is the Flag State Jurisdiction in Law of Sea Convention?

RESEARCH QUESTION

I. What is the Legal Framework Governing the Jurisdiction of the Freedom of the High Seas, with a Focus on UNCLOS?

The Freedom of the high seas is brought up with the main objective of promoting international commerce and trade. The high seas are considered international waters, and no state has sovereignty over these areas. According to UNCLOS, the high seas are areas beyond the Exclusive Economic Zones (EEZs) and territorial waters of any state.

Article 87 Freedom of the high seas⁵

- 1) 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
 - a) freedom of navigation;
 - b) freedom of overflight;
 - c) freedom to lay submarine cables and pipelines, subject to Part VI;
 - d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
 - e) freedom of fishing, subject to the conditions laid down in section 2;
 - f) freedom of scientific research, subject to Parts VI and XIII.

Freedom of Navigation

Clearly, for a considerable amount of time, the freedom of navigation has been essential. In addition to being mentioned in Article 87 generally, Article 90 states that every state, whether coastal or landlocked, has the right to send ships flying its flag on the high seas. This freedom is applicable to many different types of ships, including warships, commerce ships, and ships used for public service. It doesn't matter what the force source is either; it might be the wind, an engine, or thermal energy. States that are landlocked can also benefit from this independence, as was previously mentioned. The Versailles Treaty recognized this as early as 1919 in terms of

⁵ Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

international law. A vessel essentially possesses the identity of the state in which it is registered. The states themselves have the authority to determine the requirements that must be met in order to grant a vessel its nationality. Whatever the case, a confirmed link between the state and the vessel is required. Certain rights and obligations are transferred to the state and the vessel by this bond. The vessel must be registered under the government of the State in which it is navigating. The Flag ship has the right to travel in the high seas without the interference of others.

Freedom of Fishing

Article 116 of UNCLOS, which provides that every state has the right to allow its citizens to engage in high seas fishing, guarantees the freedom of fishing. The article quickly clarifies that this right is restricted rather than unrestricted. Keep in mind that the majority of fishing occurs within 200 miles of the shore, meaning it is not covered by the laws that apply to the high seas. Nevertheless, during at least a portion of their life cycle, several fish stocks exist in the open ocean. Many states have willingly restricted their access, as this liberty clearly benefited the states with the most resources and growth. When fishing is unrestricted in those areas, overfishing a large portion of the time occurs.

Freedom to Lay Submarine Cables and Pipelines

This freedom has long been protected by international law. In 1884, there was a program on undersea messaging and phone links, but it was limited to the area outside of the territorial zone during peacetime. Given the similarities between pipelines and links, this show has served as a major basis for most of the international and domestic legislation pertaining to underwater cables and pipelines. This is also the reason why those two have consistently been handled in tandem. However, there are several notable differences between linkages and pipes, much as pipelines may theoretically lead to marine contamination.

Freedom to construct artificial islands and other installations

States are permitted to construct these things, although there are certain restrictions on this possibility. If the establishment is established with the intention of researching or abusing resources that are significant for the regular heritage of humanity, then the International Seabed Authority's approval is necessary for that particular something. Since the great majority of these developments are located in coastal waters, the coastal state is likely to be in charge of them. Fake islands that are utilized for reasons for a logical, military or segment nature.

Freedom of overflight

Overflight freedom is more commonly linked to air law than sea law. In an effort to stay out of the purview of air law, sea law did not create more specific regulations on this. None of the treaties pertaining to the law of the sea intended to resolve issues related to aviation law. In essence, the pact provides that aircraft from any state may fly over the high seas for peaceful purposes. It goes without saying that airspace over the high seas is governed by the same rule that prohibits states from imposing their will on portions of the ocean. Due to overflight, this is not all. This restricts the ability to overfly freely.

Freedom of Scientific Research

Articles 238 to 257 of the agreement, which declare that every state may take the lead in conducting maritime scientific research, including in waters outside the Exclusive Economic Zone, represent this freedom. The treaty does not provide a definition for logical study on marine life. In any case, the beach coastal state conducts research related to the continental shelf. This suggests that this freedom is irrelevant to that particular area of the high seas if the continental shelf extends more than 200 nautical miles.

Limitations on the Freedom of High seas:

According to the Article 88 of the UNCLOS, the high seas shall be reserved for peaceful purposes. The peace and security of the states and international communication are some of the importance of the high seas. The states are obligated to maintain *bon usage* of the risk of abuse or overuse of the freedom. The states must also preserve the public order and maintain the social welfare.

The physical nature of the high seas makes it difficult to monitor the freedom from misusing the freedom of the high seas. There are many factors which have led to the occurrence of international crimes in the high seas which include the ease in the transportation, high safety, less supervision, low cost and other factors. This gave raise to the crimes including transportation of mass destruction weapons, slave trade, maritime piracy, maritime terrorism, human trade and immigrants and drug dealing etc.⁶

States have a duty to take the necessary actions to protect and manage the high seas' life resources along with the freedom of fishing. UN Fish Stocks Agreement⁷ includes further limits to the

⁶ Peyman Hakimzade Khoei, Mohsen Abdollahi (2016), "Limitations of Freedom of Navigation on the High Seas" Vol, 1 (1): 60-66

⁷ The 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations

freedom of the high seas. This involves issues such as the precautionary approach and the compatibility of conservation and management measures.⁸

While utilizing the high seas, states must take other states' interests into account and be aware of them. It also suggests that states must refrain from actions that obstruct other states' ability to enjoy the principle of freedom of the high seas. States must refrain from actions that could jeopardize another state's ability to use the high seas. Since every state is entitled to exercise its high seas freedoms, it is important to maintain a healthy balance between them.⁹

II. What is the Flag State Jurisdiction in Law of Sea Convention?

The concept of flag state came into being through the evolution of the customary use of the flag as a means of identification and symbol of nation States when ships belonging to a particular sovereign State were playing the seas and started moving further on the high seas. State would have territorial jurisdiction, even if the crime was committed outside its territory. This is called Subjective territorial jurisdiction. On the high seas, vessels are subject to the exclusive jurisdiction and control of the flag State. This rule of customary international law is codified in Article 92(1) un Convention on the Law of the Sea. As a rule, other States have no right to exercise prescriptive, enforcement, and adjudicative jurisdiction over foreign ships on the high seas.¹⁰

Flag state jurisdiction refers to jurisdiction exercised by a state, “whose flag the ship flies and is entitled to do so under UNCLOS”, over that said vessel. The concern here is jurisdictional rights, not responsibilities.¹¹ Flag States have been given the right to sail ships on the high seas and the right to fix conditions for registering ships under their flag and giving their nationality to these ships, vide Art. 90 and 91 of UNCLOS.

Article 105 of the LOSC, which grants nations the power to capture, detain, and prosecute suspected pirates, and Article 110 of the LOSC, which authorizes warships to board boats suspected of engaging in piracy, do not offer a legal foundation for actually trying the accused.

Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

⁸ Stefán Ásmundsson (2016), “Freedom of Fishing on the High Seas, and the Relevance of Regional Fisheries Management Organisations (RFMOs)”

⁹ G.K. WALKER, Definitions for the Law of the Sea: terms not defined by the 1982 Convention, Martinus Nijhoff, 2012, pp. 184.

¹⁰ D König, ‘Flag of Ships’ (2009) Max Planck Encyclopaedia of Public International Law, at para. 25

¹¹ Honniball, A. N. (2016). The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?. The International Journal of Marine and Coastal Law, 31(3), 499-530. <https://doi.org/10.1163/15718085-12341410>

Vessel commanders might require permission to carry out law enforcement duties. Domestic criminal procedural laws may give rise to real-world issues that have legal ramifications.

For example: In the Netherlands piracy is punishable by law under articles 381-385 of the Dutch Criminal Code. In addition, article 539(d) of the same Code enables commanders of Dutch warships to be appointed as special agents in order to deal with piracy. In China there is no article that specifically criminalizes piracy, but the articles on murder and robbery are used to bring pirates to justice.¹²

FLAG STATE JURISDICTION

A State may exercise jurisdiction over a vessel that is registered with the State and flying its flag. This exercise of jurisdiction is based on the internationally recognized principle that a State may regulate the conduct of its nationals even when those nationals are acting outside of the State's territory.

The *Apollon*,¹³ it was held that the laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.. Because flag state jurisdiction depends on the nationality of the vessel, it may be exercised upon the high seas and within the waters over which a foreign State exercises jurisdiction.

*United States v. Marino-Garcia*¹⁴ held that a vessel will be deemed stateless where it sails under the authority of two or more States and uses them according to convenience.

*United States v. Zehe*¹⁵, holding that under international law, a State can punish criminal acts that threaten national security or directly obstruct governmental functions even if committed outside its territory by persons who are not its citizens.

The *S.S. Lotus Case (France/Turkey)*¹⁶, holding that international law permitted a Turkish court to exercise jurisdiction over the captain of a French ship, which had collided with and sank a Turkish ship on the high seas.

¹² Nikki Vercruyssen (2012-13) FREEDOM OF THE HIGH SEAS: LIMITATIONS, PROBLEMS AND EVOLUTIONS

¹³ *The Apollon* 22 U.S. (9 Wheat.) 362, 370 (1824)

¹⁴ *United States v. Marino-Garcia*, 679 F.2d 1373, 1378 n. 3

¹⁵ *United States v. Zehe*, 601 F. Supp. 196

¹⁶ *S.S. Lotus Case (France/Turkey)*, P.C.I.J. Ser. A, No. 10, p. 4 (1927)

CONCLUSION

The jurisdiction of the freedom of the high seas is shaped by international law, with UNCLOS serving as a key instrument. While states enjoy significant freedom on the high seas, they are also subject to international agreements and obligations aimed at promoting responsible and sustainable use of the oceans.

In addressing these contemporary challenges, states, international organizations, and stakeholders must collaborate to strike a balance between the freedom of the high seas and the imperative to ensure security, environmental sustainability, and responsible resource management. International legal frameworks, conventions, and cooperative agreements play a crucial role in navigating these challenges and finding equitable solutions.

The convention promotes cooperation among states to ensure the peaceful and equitable use of the world's oceans. In summary, UNCLOS provides a comprehensive and detailed legal framework that governs the jurisdiction of the freedom of the high seas.

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