

DOI: <https://www.doi.org/10.36719/2663-4619/65/405-407>

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LEGAL ANALYSIS OF THE PRINCIPLE OF THE FREEDOM OF THE HIGH SEAS

Summary

The high sea is the part of the world's oceans that does not fall under the jurisdiction of any state and is open to the use of all states. As can be seen from the definition, the seabed and ocean floor are not included in the concept of open sea due to their special legal status. No state can subjugate any part of the high seas to its sovereignty. The high seas are free for both coastal states and landlocked states. The legal regime of the high seas includes the following freedoms: 1) freedom of navigation; 2) freedom of flight; 3) freedom of fishing; 4) freedom of laying submarine cables and pipelines; 5) freedom of scientific research; 6) Freedom to create artificial islands and facilities. These freedoms must be exercised taking into account the requirements of international law and the interests of other states.

Key words: *high seas, flag state, military ships, international acts, United Nations Convention on the Law of the Sea, navigation, overflight, fishing, cables and pipelines*

Introduction

Most of the world's oceans are under the sovereignty of any state is an area that is not. There are maritime spaces that differ in their legal regime; for example, exclusive economic zone, continental shelf, high seas, etc.

The high seas is the part of the world's oceans that does not fall under the jurisdiction of any state and is open to the use of all states. As can be seen from the definition, the seabed and ocean floor are included in the concept of high seas due to their special legal status. No state can subjugate any part of the high seas to its sovereignty. The high seas are free for both coastal states and landlocked states. (1, p.247)

The doctrine that the high seas in time of peace are open to all nations and may not be subjected to national sovereignty was proposed by the Dutch jurist Hugo Grotius as early as 1609. It did not become an accepted principle of international law, however, until the 19th century. Freedom of the seas was ideologically connected with other 19th-century freedoms, particularly laissez-faire economic theory, and was vigorously pressed by the great maritime and commercial powers, especially Great Britain. Freedom of the high seas is now recognized to include freedom of navigation, fishing, the laying of submarine cables and pipelines, and overflight of aircraft.

By the second half of the 20th century, demands by some coastal states for increased security and customs zones, for exclusive offshore-fishing rights, for conservation of maritime resources, and for exploitation of resources, especially oil, found in continental shelves caused serious conflicts. The first United Nations Conference on the Law of the Sea, meeting at Geneva in 1958, sought to codify the law of the high seas but was unable to resolve many issues, notably the maximum permissible breadth of the territorial sea subject to national sovereignty. A second conference (Geneva, 1960) also failed to resolve this point; and a third conference began in Caracas in 1973, later convening in Geneva and New York City.

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.

These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area. (2, art.87).

Freedom of navigation means that ships of any state, or rather ships under its flag, can sail freely on the high seas. On the high seas, a ship is subject to the exclusive jurisdiction of that state. The state exercises its jurisdiction and control over the ship and its crew in administrative, technical and social matters. Criminal or administrative

liability against the master of a ship or any other member of the crew may be imposed only by the relevant authorities of the State in which the ship sails. However, there are a number of exceptions to this principle. Thus, a naval or aircraft carrier of any State may detain and inspect a foreign vessel in the following cases (if there are sufficient grounds to suspect that such acts have been committed):

- a) a foreign ship is engaged in piracy;
- b) is engaged in the slave trade;
- c) engages in drug trafficking;
- d) damaged submarine telegraph cables and pipelines;
- d) transmits unauthorized radio or television programs from the high seas;
- e) violated the rules in the waters under the jurisdiction of the coastal state (persecution on "hot traces"), etc.

Although this freedom's existence is well established and its status is not generally put into question, recent practice indicates that there are numerous modern challenges which may result in limitations of that freedom *de iure* or *de facto*.(3, p.89)

Freedom of flight means that aircraft from all countries can fly over the high seas. States must ensure the safety of their aircraft flying over the high seas. These flights shall not impede shipping or the use of the sea for other purposes.

The LOSC simply states that the airspace above the high seas is open to aircrafts of all states for peaceful purposes. The principle that states cannot subject parts of the high seas to their sovereignty of course applies to the airspace above the high seas as well. In the case of overflight, this is not absolute, since all states have the right to seize a pirate aircraft or an aircraft taken by pirates and under their control. They can arrest the pirates and seize the property on board. This is a restriction on the freedom of overflight.(4, p.22)

The freedom to lay submarine cables and pipelines extends beyond the continental shelf to the seabed. States should not obstruct the free use of the high seas when laying cables and pipelines.

Every State shall adopt the laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable, shall be a punishable offence. This provision shall apply also to conduct calculated or likely to result in such breaking or injury. However, it shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.(2, art.113)

Freedom to construct artificial islands and other installations is exercised both in the waters of the open sea and on its bottom (for the extraction of minerals). A generally accepted definition is that an artificial island is a construction surrounded by the sea, that is not an island or a ship. States are free to construct such objects, but this freedom is not without its limitations.

In 1970, the UN General Assembly Resolution expressed concerns on claims of territorial sovereignty over the seabed of the high seas. It was held: "The establishment of installations on the deep seabed and in its subsoil creates a marginal problem of territorial sovereignty over the respective area of the deep seabed and subsoil. The concept of such territorial acquisition is based upon the terra firma nature of the deep seabed and subsoil. The establishment of installations on that terra firma may enable States to exercise effective control over a certain part of the deep seabed and subsoil.

According to the present LOSC, under no circumstances can any State ever claim territorial sovereignty over the seabed of the high seas. Article 89 of the LOSC confirms that: "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty."

The freedom to construct artificial islands and other installations is made subject to that which is "permitted under international law".(5, p.110)

Freedom of fishing includes not only direct fishing activities, but also the exploitation of other living resources. However, this freedom must be exercised taking into account the international obligations of states and the interests of littoral states. First of all, the living resources of the sea must be preserved to a certain extent, and for this the states must cooperate.

Citizens of all States have the right to engage in offshore fishing, subject to: (a) their contractual obligations; (b) the rights, duties and interests of the coastal State referred to in Article 63, paragraph 2, and Articles 64-67; (c) the provisions of this Chapter.(2, art.116)

Article 116 explicitly establishes that the right of States to authorise their nationals to fish on the high seas is subject to specific limitations. This means that States simply do not have the right to authorise their nationals to fish on the high seas unless they fulfil the conditions.

Management of high seas fisheries is in many areas done through competent regional fisheries management organisations (RFMOs), who thereby play a key role in high seas fisheries and whose measures are relevant for all States, including non members.(6, p.1)

Freedom of scientific research belongs to all states, regardless of their geographical location, as well as to competent international organizations. Marine scientific research should be carried out exclusively for peaceful purposes and should not impede the use of the sea in other forms.

Until the 1950s, marine scientific research was not regulated under any international treaty. Customary law provided the main source of law in this field. An increase in scientific research in the oceans and technology development after World War II, together with their gradual application to resource exploration and exploitation and military purposes, prompted the international community to develop and codify the international legal framework in this regard.

Future development will always require the establishment of marine scientific research on the high seas. Article 5, paragraph 1, of the 1958 Geneva Convention on the Continental Shelf states that the study of the continental shelf and its natural resources shall not result in any interference with fundamental oceanographic and scientific research conducted for the purpose of public publication. The ‘fundamental’ qualification of scientific research shows that research is preferred on the continental shelf, which is a priority.

All States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research in the water column beyond the limits of the exclusive economic zone (art. 257). The reference to “all States, irrespective of their geographical location” ensures that not only coastal States, but also landlocked and other geographically disadvantaged States, have the right to conduct marine scientific research in the high seas. (7, p.16)

Conclusion

The main legislative act regulating the legal regime of the principle of freedom of the high seas is the United Nations Convention on the Law of the Sea. According to article 87 of UNCLOS: 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. 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area. The high seas shall be reserved for peaceful purposes. No State may validly purport to subject any part of the high seas to its sovereignty. The exercise of these freedoms is guaranteed by international law. At the same time, these freedoms may be restricted by international law in order to protect the environment and protect the legitimate interests of states.

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Rəyçi: h.f.d. K.Səlimov

Göndərilib: 12.04.2021

Qəbul edilib: 16.04.2021