

# *The Legal Regime of Maritime Areas and the Waning Freedom of the Seas*

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Abstract:

The principle of the freedom of the seas dates back to the early 17<sup>th</sup> century. The balance in favour of the doctrine of the *mare liberum* remained unchallenged until the twentieth century. The old order of the seas, laid down in the four 1958 Geneva Conventions, collapsed for a number of reasons and was re-codified in the 1982 United Nations Convention on the Law of the Sea, which today strikes a careful balance between the rights of coastal States and the freedom enjoyed by all States. The freedom of navigation continues to be a core element of the freedom of the seas, but the rate of erosion of this freedom has undoubtedly accelerated in recent years.

## **Part I. Introduction**

In addressing the legal regime of maritime areas and the waning freedom of the seas I, first of all, wish to make a few brief introductory remarks which seem pertinent to this topic.

It should be borne in mind that ever since humankind managed to venture out onto the seas, the freedom of this seemingly limitless space was challenged by domination from the land. Many of the principal features of the international law of the sea have been formed by the interplay between two opposing forces – later referred to as the doctrines of *mare liberum* and *mare clausum*. The doctrine of *mare liberum* was elaborated and reinforced in 1609 by the famous Dutch lawyer Hugo Grotius who was also influenced by Spanish theologians as well as perhaps by ancient Asian traditions of unobstructed freedom of commercial shipping and international maritime trade. The opposite view of *mare clausum* was propounded by the British jurist John Selden in 1635. It was the Grotian concept of freedom of the seas that gradually attracted general support and became a principle of customary international law.

The balance in favour of the doctrine of *mare liberum* was not really challenged until the twentieth century. This was prompted by the growing realisation of the enormous resources and the great economic potential of the seas, growing concern over the toll taken on coastal

fish stocks by long-distance fishing fleets and over the danger of pollution and wastes from ships carrying hazardous cargoes. A process was set into motion that gradually led to a transition of the law of the sea from what had been called a ‘law of movement’ to a ‘law of territory and appropriation’. The old order of the seas, laid down in the four 1958 Geneva Conventions and also reflected in customary international law, collapsed under the weight of three causes: the progress of science and technology, the failure of the traditional law to deal adequately with the concerns of coastal States regarding the utilisation of oceanic resources, and the changing composition of the international community in view of the emergence of a large number of developing countries. The contemporary law of the sea as enshrined in the 1982 United Nations Convention on the Law of the Sea,<sup>1</sup> although characterized by a number of major changes in favour of coastal States, nevertheless tries to strike a careful balance between the rights of coastal States and the freedoms enjoyed by all States; it has rightly been called a ‘Constitution for the oceans’.<sup>2</sup>

## **Part II. The Legal Regime of Maritime Areas According to the LOSC**

The LOSC is based on three principles: freedom of the seas, sovereignty of coastal States and common heritage of mankind. The principle of the freedom of the seas aims to ensure continued uses of the seas by all nations: navigation, overflight, laying of submarine cables and pipelines, construction of artificial islands, fishing, marine scientific research; the principle of coastal States sovereignty is the basis for the extension of national jurisdiction into maritime spaces; and finally the principle of common heritage of mankind seeks to promote the common interest of all human beings for present and future generations.

The LOSC divides maritime areas into several jurisdictional zones: spaces with varying degrees of national jurisdiction – internal waters, territorial sea, archipelagic waters, the contiguous zone, the exclusive economic zone (EEZ), the continental shelf, and spaces

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<sup>1</sup> United Nations Convention on the Law of the Sea. Multilateral convention, 10 December 1982, United Nations Treaty Series, vol 1833, 397-581, <[www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf)> accessed 10 May 2016. This convention entered into force on 16 November 1994. Hereinafter LOSC.

<sup>2</sup> Expression used by the President of the Third United Nations Conference on the law of the Sea (UNCLOS III) at the time of signature of the LOSC <[http://www.un.org/depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf)> accessed on 10 May 2016.

beyond national jurisdiction – the high seas and the ‘Area’, that is the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. The first category of maritime areas can be subdivided in spaces under national sovereignty – internal waters, the territorial sea, archipelagic waters – and spaces where the coastal State only enjoys sovereign rights and limited jurisdiction – the contiguous zone, the EEZ and the continental shelf.

In dealing with the legal regime of maritime areas the question first needs to be addressed of how to determine their extent. The outer limits of the territorial sea, the contiguous zone and the EEZ are measured from the baseline, the waters on the landward side of which are internal waters. The LOSC distinguishes between normal baselines and straight baselines. Its Article 5 stipulates that, except where otherwise provided for in the LOSC, ‘the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognised by the coastal State’.<sup>3</sup> According to Article 7, which is largely based on the 1951 judgement of the International Court of Justice (ICJ) in the *Anglo-Norwegian Fisheries* case, a coastal State may utilise straight baselines ‘[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity’.<sup>4</sup> There are, furthermore, particular rules regarding baselines for bays, mouths of rivers, harbour works, low-tide elevations, islands, and reefs.

It should, however, be noted that ‘straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently linked to the land domain to be subject to the regime of internal waters’.<sup>5</sup> Although the LOSC regards the use of straight baselines as limited to exceptional geographical circumstances and the ICJ in the 2001 *Qatar/Bahrain* case unequivocally stated that the method of straight baselines in accordance with the LOSC ‘must be applied restrictively’,<sup>6</sup> many States have in fact drawn such lines along all or parts of their coasts. In a number of instances such baselines have thus provoked objections and protests from other States. The practical effect of straight baselines is that the area where the coastal State enjoys varying degrees of competence is moved much further toward the high seas than this would otherwise have been the case, besides creating large areas of internal waters.

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<sup>3</sup> Art 5 of the LOSC.

<sup>4</sup> *Ibid* art 7, para 1.

<sup>5</sup> *Ibid* art 7, para 2.

<sup>6</sup> *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)* (Merits) [2001] ICJ Rep 103, para 212.

The legal regime of internal waters is essentially based on customary international law and treaties. It has not been codified by the LOSC, although reference is made to these waters in some of its provisions. Article 8, paragraph 2 of the LOSC thus provides that where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had not been previously been considered as such, a right of innocent passage exists in those waters. There has never been any doubt that a State has full sovereignty over its internal waters and other States have therefore no right to carry out maritime activities in these waters unless specifically permitted by customary international law or treaty. The prevailing view is that there is no general right of access to ports for foreign ships under customary international law. There is nevertheless general agreement that, as an exception, a foreign ship in distress does have a right to seek refuge in a port or other internal waters in order to preserve human life. This right has also been recognised by the 2009 FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing<sup>7</sup> and is likewise found in the Regulation of the European Union on IUU fishing of 2008.<sup>8</sup> In the 2012 ‘ARA Libertad’ case, *Argentina v. Ghana*, the International Tribunal for the Law of the Sea clarified that, a warship enjoys immunity also in internal waters ‘in accordance with general international law’.<sup>9</sup>

Article 3 of the LOSC provides for a right of the coastal State to establish the breadth of the territorial sea up to a limit not exceeding twelve nautical miles from the baselines. Within that limit, coastal States are in principle free to enforce any law, regulate any use and exploit any resource. Such laws and regulations cannot, however, be applied to the design, construction, manning or equipment of foreign ships unless in accordance with generally accepted international rules or standards. The right of innocent passage through the territorial sea – defined as passage ‘not prejudicial to the peace, good order or security of the coastal State’<sup>10</sup> – which had long since formed part of customary international law, was confirmed in Article 17 of the LOSC for ships of all States, whether coastal or landlocked. There is, however, no right of overflight.

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<sup>7</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Multilateral agreement, 25 November 2009, art 10. This agreement has not yet entered into force <<ftp://ftp.fao.org/docrep/fao/meeting/018/k6339e.pdf>> accessed 10 May 2016.

<sup>8</sup> Council Regulation (EC) No. 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, OJ L286, 29 October 2008, 1.

<sup>9</sup> *The ‘Ara Libertad’ Case (Argentina v. Ghana) (Provisional Measures)* [2012] para 95 <[https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.20/C20\\_Order\\_15.12.2012.corr.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15.12.2012.corr.pdf)>.

<sup>10</sup> Art 19, para 1 of the LOSC.

The LOSC also contains a list of activities as to when passage, which must be continuous and expeditious, is not considered to be innocent. This includes any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, any exercise or practice with weapons of any kind, the launching, landing, or taking on board of any aircraft or any military device, any act of wilful or serious pollution, any fishing activities or any other activity not having a direct bearing on passage. As before, submarines and other underwater vehicles must navigate on the surface and show their flag. A coastal State may however, ‘without discrimination in form or in fact among foreign ships’<sup>11</sup> suspend temporarily the innocent passage of foreign ships in specified areas of its territorial sea if such suspension is essential for the protection of its security, including weapons exercises.

Whether the right of innocent passage through the territorial sea also applies to warships in an unqualified manner is not undisputed. The prevalent view based on the LOSC – which does not distinguish between categories of ships – is that it does, and that the passage of warships through the territorial sea does not require prior notification of the coastal State, or even gaining that State’s prior permission. A substantial number of coastal States nevertheless insist on such a requirement. In any case, if a warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea, the coastal State may require it to leave the territorial sea immediately.

The extension of the limit of the territorial sea from hitherto generally three to 12 nautical miles placed more than one hundred straits used for international navigation under national sovereignty. The LOSC therefore, as a corollary to this extension, introduced the novel concept of transit passage, maintaining the right to unimpeded navigation and overflight with respect to such straits by allowing ships, aircraft, and submarines to transit through, over, and under such straits and their approaches. Ships and aircraft in transit passage must, however, observe international regulations on navigational safety, civilian air-traffic control and prohibition of vessel-source pollution, to proceed without delay and without stopping, except in distress situations, and refrain from any threat or use of force against the sovereignty, territorial integrity and independence of States bordering the straits. In all matters other than such transient navigation, straits are to be considered part of the territorial sea of the coastal State. Differences of opinion exist, as to whether the term ‘strait used for international

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<sup>11</sup> Ibid art 25, para 3.

navigation'<sup>12</sup> means capable of being used or whether a strait must actually have been used or be in use for international navigation in order to be subject to the legal regime of transit passage.

States bordering straits used for international navigation may designate sea lanes and prescribe traffic separation schemes for navigation in the straits, after having referred the respective proposals to the International Maritime Organizations (IMO) for adoption, where such regulations are necessary to promote the safe passage of ships. These regulations must be in conformity with generally accepted international regulations in order to prevent strait States from imposing excessive or unreasonable requirements on international shipping. It is important to note that contrary to the regime of innocent passage of foreign ships through the territorial sea, transit passage may not be suspended by a State bordering the strait. The question has been raised as to whether nuclear-powered ships and ships carrying nuclear materials or cargoes are subject to a duty of prior communication when transiting straits used for international navigation. Attempts by States bordering such straits to restrict passage of that kind of ships have met with strong protests from flag States.

The LOSC in Part IV contains a new concept in international law: that of the archipelagic State – a State that is constituted wholly by one or more archipelagoes, a group of closely spaced islands. Archipelagic States are permitted to draw straight archipelagic baselines joining the outermost points of the outermost islands, provided that within such baselines the main islands are included. Furthermore, the ratio of the area of the water to the area of the land must be between 1:1 and 9:1. The waters between the islands are declared archipelagic waters, which are under national sovereignty. Archipelagic States are, however, obliged to respect existing submarine cables laid by other States, and ships of all States enjoy the right of innocent passage, except for areas declared as internal waters. Moreover, all ships and aircraft enjoy the right of 'archipelagic sea lanes passage,' akin to transit passage, in sea lanes and air routes designated by an archipelagic State for 'the purpose of continuous, expeditious and unobstructed transit.' The designation of such sea lanes by the coastal State in both cases of passage requires approval by the IMO.

The exercise of the rights of transit passage and archipelagic sea lanes passage has, in practice, given rise to certain problems of interpretation as these rights of passage are to be exercised by ships and aircraft in the 'normal mode'. While it is generally accepted that the

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<sup>12</sup> Ibid Part III.

‘normal mode’<sup>13</sup> of transit for submarines is submerged – which under certain circumstances may lead to safety risks – it seems sometimes rather difficult to determine the ‘normal mode’ in the case of aircraft. There is also continuing disagreement between the maritime powers and the archipelagic States over the appropriate locations and regimes for archipelagic sea lanes passage. An open question is whether there should be some form of burden sharing between the coastal States concerned and transiting States with respect to measures required for ensuring the safety of passage.

The LOSC, in Article 33, provides for the possibility of the coastal State declaring a contiguous zone up to a maximum of 24 nautical miles - instead of previously 12 nautical miles. In that zone, the coastal State may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. In the contiguous zone the coastal State does not, however, enjoy the same kind of jurisdiction as it has in the territorial sea. It is nevertheless a fact that quite a number of States have asserted rights in that zone beyond the enumeration contained in the LOSC, in particular, regarding security jurisdiction.

The EEZ with a maximum limit of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured, has been called one of the most revolutionary features of the LOSC on the Law of the Sea, recognizing the right of coastal States to jurisdiction over the resources of some 38 million square nautical miles of ocean space. The EEZ has a *sui generis* legal status constituting a compromise between the sovereignty of the coastal State and freedom for all States. It is a zone not of territorial, but of functional sovereignty; it does not form part of the territorial sea nor of the high seas, nor can it be assimilated to either maritime space. The rights of jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the LOSC. In exercising their rights and duties in the EEZ, coastal States are required to have due regard to the rights and duties of other States, and *vice versa*.

In the EEZ, the coastal State, according to Article 56 of the LOSC, has sovereign rights for the purpose of exploring and exploiting, conserving and managing all natural resources of the waters superjacent to the sea-bed and of the sea-bed and the subsoil and also with regard to other activities for economic exploitation and exploration of the zone. The coastal State, moreover, has jurisdiction with regard to the establishment and use of artificial islands,

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<sup>13</sup> Ibid arts 39, para 1(c) and 53, para 3.

installations and structures, marine scientific research, the protection and preservation of the marine environment, as well as other rights and duties provided for in the LOSC. As regards artificial islands, installations and structures, the coastal State has exclusive rights as well as exclusive jurisdiction, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations. Where necessary, the coastal State may establish safety zones around such artificial islands, installations and structures, which must not exceed a distance of 500 meters around them.

It is important to note that the provisions of the LOSC relating to the high seas – Articles 88 to 115 – and other pertinent rules of international law continue to apply to the EEZ in so far as they are not incompatible with it. All States, whether coastal or landlocked, enjoy the high seas freedoms of navigation and overflight and of laying submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of the LOSC.

Coastal States thus have two types of rights in the EEZ: sovereign rights that are directly resource related, and jurisdictional rights that are intimately linked to the exploration, exploitation and protection of resources. It would therefore not seem legitimate for a coastal State to restrict navigational rights in that zone unless such rights interfered with its ability to explore, exploit or protect its resources. It should be pointed out that the legislation of a number of States parties is not in conformity with the navigational rights of other States in the EEZ as these States, *inter alia*, claim to be able to extend any law in force to that zone.

According to Article 73, paragraph 1 of the LOSC the coastal State with respect to the EEZ may take such measures as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the LOSC. These measures may include boarding of ships, inspection, arrest and judicial proceedings. That provision thus allows coastal States to stop and search any fishing vessel suspected of violating its laws governing resource exploitation in its EEZ. It appears to grant the power to coastal States to expect every foreign fishing vessel to identify itself and explain its intentions whenever it enters such a zone, even if the vessel is only transiting on its way to distant fishing grounds.

The LOSC also grants the coastal State legislative and enforcement competence in its EEZ to deal with the dumping of waste, other forms of pollution from vessels and pollution from seabed activities. This competence may raise questions about the extent to which interference



with navigational rights to achieve this end is justified. In this context, there is potential disagreement over the transportation of hazardous materials through the EEZ. In any case, there is no indication in the LOSC of any restrictions that can be placed on navigation that are based upon the nature of the cargo.

The controversies regarding military activities in the EEZ persist in state practice. The basic problem is a matter of interpretation as to whether military activities are included in the freedoms of navigation, of overflight and other internationally lawful uses of the sea under the LOSC. Some coastal States claim that other States cannot carry out military activities in or over their EEZs without their consent, and have sought to apply restrictions on navigation and overflight in these zones that are not accepted by those other States. The opposing view, obviously held by major maritime powers, is that the regime of the EEZ does not permit the coastal States to limit traditional non-resource related, high sea activities in that area. Such activities may in their view include task force manoeuvring, flight operations, military exercises, telecommunications and space activities, intelligence and surveillance activities, marine data collection and weapons' testing and firing.

The concept of the continental shelf which had evolved after 1945 was substantially broadened by the LOSC. According to Article 76, paragraph 1 it is now subject to a twofold definition: on the one hand, the customary notion of the continental shelf is applied to the entire continental margin, comprising the shelf, the slope and the rise; on the other hand, that notion was extended to 200 nautical miles, even where no geological shelf exists. Article 77 confirmed the existing sovereign rights of the coastal States over the continental shelf for the purpose of exploring it and exploiting its natural resources. These resources are defined as mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species. The rights enjoyed by the coastal States in the EEZ with respect to artificial islands, installations and structures also apply to the continental shelf. While an EEZ needs to be proclaimed by the coastal State, its continental shelf rights do not depend on occupation or proclamation but are inherent.

The rights of the coastal States over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters. The exercise of these rights must furthermore not infringe upon, or result in any unjustified interference with, navigation and other rights and freedoms of other States as provided for in the LOSC. The right of all States to lay submarine cables and pipelines on the continental shelf is maintained. It is, however,

accompanied by conditions which render it a regulated right that can hardly any longer be considered a freedom. The requirement of consent by the coastal State regarding the delineation of the course for the laying of pipelines appears to stress the fact that the course may not be delineated if no agreement exists.

As the legal regime of the EEZ also relates to the seabed it overlaps with the rights of the coastal State with respect to the continental shelf. Delimitation of maritime areas between neighbouring coastal States may therefore result in a so-called ‘grey area’ in which there are concurrent rights of these States. As the International Tribunal for the Law of the Sea in its 2012 judgement in the Bangladesh/Myanmar case pointed out, in such a situation, ‘each coastal State must exercise its rights and perform its duties with due regard to the rights and duties of the other’.<sup>14</sup>

An essential innovation relating to the continental shelf concerns its more precise delineation which was indispensable in view of the seabed and its resources beyond the limits of national jurisdiction, having been declared the ‘common heritage of mankind’.<sup>15</sup> According to Article 76 of the LOSC, the outer limit of the continental shelf may be set beyond 200 nautical miles at a maximum distance of up to 350 nautical miles from the baselines from which the breadth of the territorial sea is measured, or up to 100 nautical miles from the 2,500 meter isobath, which is a line connecting the depth of 2,500 meters.

Where a coastal State intends to establish the outer limits of its continental shelf beyond 200 nautical miles, it is obliged to submit the particulars of such limits to the Commission on the Limits of the Continental Shelf, set up under Annex II of the LOSC, consisting of 21 experts in the field of geology, geophysics and hydrology. The outer limits of the continental shelf as established by a coastal State, however, only become ‘final and binding’ - with respect to all States parties to the LOSC and the International Seabed Authority (ISA) – if adopted ‘on the basis’ of recommendations by the Commission,<sup>16</sup> the broad mandate of which is thus ‘to act as a watchdog to prevent excessive coastal State claims’.<sup>17</sup>

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<sup>14</sup> *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (Merits) [2012] para 475 <<https://www.itlos.org>> accessed 10 May 2016.

<sup>15</sup> Art 136 of the LOSC.

<sup>16</sup> *Ibid* art 76, para 8.

<sup>17</sup> Dolliver DM Nelson, ‘The Continental Shelf: Interplay of Law and Science’ in Ando Nisuke, Edward Watson MacWhinney and Shigeru Oda (eds), *Liber Amicorum Judge Shigeru Oda* (vol. 2, Kluwer Law International 2002) 1235, 1237.

States with a continental shelf extending beyond 200 nautical miles, with certain exceptions for developing countries, are under the obligation, according to Article 82 of the LOSC, to make payments or contributions in kind for the exploitation of the non-living resources of that area – at 7 per cent of the value or the volume of production at the site as of the twelfth year after the commencement of exploitation. The payments or contributions are to be made through the ISA which shall distribute them to States parties to the LOSC on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the landlocked among them. As no exploitation of the resources of the continental shelf beyond 200 nautical miles has so far taken place, this provision has not yet become operational.

Let me now turn to the high seas: the LOSC in Part VII essentially retained the existing legal situation, declaring the high seas to be open to all States, whether coastal or landlocked, reiterating the invalidity of claims of sovereignty over the high seas, and confirming the exclusive jurisdiction of the flag State over its ships. The legal status of the high seas is characterized by the total prevalence of the principle of freedom. It is a zone of no sovereignty, neither territorial nor functional, open to common use by all States. The basic rule of the high seas is that every State can make free use of that maritime space within the limits of equality of freedom for other States and with due regard to their interests. The exercise of high seas freedoms is, of course, subject to the general rules of international law, such as those governing the use of force. There is an explicit requirement in the LOSC that the high seas ‘be reserved for peaceful purposes’<sup>18</sup> which is generally interpreted as permitting non-aggressive military activities.

Article 87, paragraph 1 of the LOSC sets forth a non-exhaustive list of freedoms of the high seas, both for coastal and landlocked States, which are to be exercised not only under the conditions laid down by the LOSC, but also by other rules of international law. While the freedoms of navigation and overflight are not qualified by any specific limitations, the freedoms to lay submarine cables and pipelines, to construct artificial islands and other installations permitted under international law, of fishing, and of scientific research, are subject to other provisions of the LOSC.

The freedom of navigation provides vessels of any State with the right to traverse the high seas with minimal interference from any other State, a key exception being the right of visit

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<sup>18</sup> Art 88 of the LOSC.

under certain well-defined circumstances. Article 110 the LOSC sets out four instances where warships may exercise a right of visit against a foreign-flagged vessel: piracy, slavery, unlawful broadcasting, and where suspicions as to the nationality of the vessel arise. Article 111 also enshrines the right of hot pursuit, already recognized in customary international law. A coastal State is thus allowed to pursue a vessel, which has violated its laws within internal waters or the territorial sea, on the high seas by maintaining an uninterrupted and continuous chase.

A ship is to sail under the flag of one State only and there must be a genuine link between that State and the ship. Exceptions to the exclusive jurisdiction of the flag State are limited to those expressly provided for by treaty. Warships and ships owned or operated by a State and used only on government non-commercial service are entitled to complete immunity from the jurisdiction of any State other than the flag State. An attempt to exercise law enforcement jurisdiction against a foreign warship could be tantamount to a threat or use of force against a sovereign instrumentality of a foreign State.

The right to fish the high seas has long been considered a constituent element of the freedom of the seas. With increased knowledge and dynamic development of fisheries it was realized that the living resources of the high seas, although renewable, are not infinite and need to be properly managed. According to Article 116 of the LOSC, the right to fish the high seas is therefore subject to certain limitations and conditions. It is, in particular, qualified by the provisions on the protection and preservation of the living resources, including the duty to cooperate with other States in the adoption of conservation measures, and by other relevant treaty obligations.

Finally, I will deal with the principle of the common heritage of mankind, which determines the legal status of the international seabed 'Area' and is reflected in Part XI of the LOSC. The core provision is Article 136 declaring the 'Area' and its resources the common heritage of mankind. The States parties to the LOSC also agreed that there shall be no amendments to this basic principle and that they shall not be party to any agreement in derogation thereof. According to Article 137 of the LOSC no claim or exercise of sovereignty or sovereign rights over any part of the Area or its resources nor appropriation by any State, natural or juridical person is to be recognized.

The LOSC further enshrines the principle of non-recognition of any such claim or appropriation, the latter also being valid for private persons. Moreover, that provision

constitutes an obligation of all States and not only of the States parties to the LOSC, thus establishing an objective legal regime. A central aspect of the legal status of the international seabed 'Area' is also its use exclusively for peaceful purposes. A final determination of the geographic scope of the 'Area' will however, only be possible once the Commission on the Limits of the Continental Shelf will have made all the recommendations regarding the submissions by coastal States with respect to the outer limits of the continental shelf. In view of the heavy workload of the Commission this may take another two decades. It can nevertheless be assumed that the ocean floor beyond national jurisdiction covers some 50 per cent of the world's surface.

The legal status of the superjacent waters of the international seabed 'Area' and that of the airspace above those waters, however remains unaffected. The rules of international law in respect of the high seas and the airspace above are thus preserved. The freedoms of the high seas are, however, to be exercised with due regard for the rights under the LOSC with respect to activities in the 'Area'.

The term resources of the 'Area' is defined in Article 133 the LOSC as 'all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules'.<sup>19</sup> When recovered from the Area, the resources are referred to as 'minerals'.<sup>20</sup> This provision is based on the understanding that mineral resources include other non-living resources, such as hydrocarbons. All rights in these resources are vested in mankind as a whole on whose behalf the ISA is to act. A revolutionary new element has thus been introduced into the law of the sea as the States parties to the LOSC, which are *ipso facto* members of the ISA, have to act through it as a kind of trustee on behalf of mankind. The ISA has to provide for the equitable sharing of financial and other economic benefits derived from activities in international seabed 'Area', taking into particular consideration the interests and needs of developing States. At the present time, it is, however, impossible to predict when this provision will become operational and which criteria will be applied for the distribution of these benefits.

The question remains unresolved whether besides minerals also genetic resources of the seabed in the 'Area', which are considered to be of future substantial economic importance, form part of the common heritage of mankind – as advocated by the developing countries.

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<sup>19</sup> Ibid art 133(a).

<sup>20</sup> Ibid art 133(b).

Industrialized countries, however, hold the view that the LOSC itself clarifies that it only encompasses mineral resources and access to genetic resources therefore falls within the high seas freedoms. The opinion has also been expressed that there is a legal gap to close which might be filled by a another implementation agreement to the LOSC, as proposed by the European Union and its Member States, creating a new regime for marine biodiversity and genetic resources beyond national jurisdiction.

### **Part III. Conclusions**

In conclusion, I wish to sum up that the LOSC sets out the legal framework within which all activities in the oceans and seas must be carried out. It represents a compromise between the rights and duties of coastal States on the one hand, and those of the international community on the other, thereby limiting the traditional freedoms of the seas. That balance of interest is under pressure from an extensive interpretation of some of the provisions of the LOSC by coastal States attempting to increase their competence with respect to ever larger areas of the sea. Some coastal States are striving to expand their influence in the EEZ by also attempting to exercise control over non-resource related activities. There are further indications that the EEZ and the continental shelf are increasingly becoming subject to claims to sovereignty over the area itself and not just to the resources.

The freedom of navigation continues to be a core element of the freedom of the seas. The rate of erosion of this freedom has, however, undoubtedly accelerated in recent years. As regards the EEZ, it does no longer seem accurate to say that the freedom of navigation exists in that zone to the same extent as on the high seas. There is also growing pressure for more control of shipping, in particular, in the wake of prominent disasters involving major pollution. The freedom of navigation will thus continue to be impacted by growing environmental concerns – which may also affect the exploitation of mineral resources from the seas, both within and beyond the limits of national jurisdiction. The freedom of the seas may further erode if the number of States asserting a right to take measures beyond their territorial sea in order to safeguard their security and other interests continuous to grow.

When considering the waning freedom of the seas, it must, however, also be borne in mind that the legal system relating to the oceans and seas based on the LOSC needs to be further

developed in order to cope with new challenges facing the international community. An enhanced protection of the environment, the conservation of natural resources, increased security from various threats of violence at the sea are in the interest of humankind as the whole. As long as measures resulting in infringements upon the freedom of the seas are based on multilateral agreements and/or involve competent international organizations they certainly seem justified. If such measures are decreed bilaterally or unilaterally they may, however, give rise to concern from the point of view of the balanced legal framework established by the LOSC.