

ARF Seminar on UNCLOS (Day 1)

The High Seas:
Freedom, Obligations and Jurisdiction

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Introduction

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- Rules governing the high seas (HS): 1958 HS Convention, 1982 LOSC, customary international law
- The status of HS as *res communis*: customary law
 - No appropriation allowed; Open to the enjoyment of every state; (reserved only for the use for peaceful purposes?)
- No clear definition under UNCLOS: cf. LOSC 86
 - All parts of the sea except internal waters, the territorial sea, the exclusive economic zone (EEZ) and archipelagic waters of an archipelagic state
 - The water column outside any zone of national jurisdiction
 - EEZ as a *sui generis* zone
- 'Freedom of the seas':
 - Every state has freedom of navigation and activities
 - Flag state's exclusive jurisdiction over a ship on the HS

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HS Freedoms under UNCLOS

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- The right to exercise freedom of the HS comprises, *inter alia*:
 - (a) freedom of navigation
 - (b)freedom of overflight
 - (c) freedom to lay submarine cables and pipelines
 - (d) freedom to construct artificial islands and other installations
 - (e) freedom of fishing
 - (f) freedom of scientific research

✦ Cf. 1958 HS Convention does not comprise (d) or (f)

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Freedom of navigation

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- Every state's right to sail ships flying its flag on the HS (90)
- The flag state's primary duty to regulate its ships
- Immunity enjoyed by warships and ships owned or operated by states (95-96)
- A warship's right of visit (110): ships engaged in piracy, slavery, unauthorized broadcasting, etc.

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Freedom of Overflight

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- Overflight in the airspace above the HS without interference from or regulations by other States
- 1944 Chicago Convention on International Civil Aviation:
 - With due regard for the safety of navigation of civil aircraft, at all times

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Freedom of Fishing

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- All States' freedom subject to the rights and obligations of coastal States
- Fisheries are no longer inexhaustible
- Drafters' great concern for unregulated fishing
 - EEZ mechanism (LOSC 56)
 - Taking measures for the conservation and management of the living resources of the HS
 - International cooperation needed (87, 117-118)

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Other freedoms

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- Besides the six expressly mentioned freedoms, the conduct of military exercises (naval manoeuvres) may be included.

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Limits

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- 'with due regard for ' the interests of other States' freedom and the rights concerning deep seabed activities (87(2))
 - All States are bound to refrain from activities that interfere with the exercise by other States of the HS freedom: balance all States' rights and interests
 - A temporary warning areas on the HS in military exercises/tests
- HS reserved for peaceful purposes (88)
- Invalidity of claims of sovereignty over HS (89)

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Flag State Jurisdiction

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- Ships have the nationality of the State whose flag they are entitled to fly. (LOSC 91(1))
- A flag state's exclusive jurisdiction over its ship (LOSC 92)
 - The state of nationality may exercise criminal and civil jurisdiction in respect of the ship
 - All ships must be registered according to the laws of a State. No stateless ship is allowed. No ship may fly more than one flag. (92(2))
- Every State is to effectively exercise its jurisdiction and control in all the matters over ships flying its flag (94(1))
 - A 'genuine link' between a State and its ship must exist (91(1)): cf. 'flags of convenience'
 - Effective control over its ships

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Exceptions to Flag State Jurisdiction

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- Exceptions:
 - Piracy (100): universal jurisdiction
 - Unauthorised broadcasting (109)
 - 'hot pursuit' from the territorial sea or contiguous zone (111)
 - Certain pollution matters (221)
 - Collisions on the HS (97)
 - Rights of visit (110)
 - Where other treaties apply (ex. 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances)

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Piracy

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- Pirates as 'enemies of all mankind' (*hostis humani generis*): universal jurisdiction, duty to cooperate in the repression of piracy (LOSC 100)
- The definition given narrowly (LOSC 101(a))
 - 'any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, person or property in a place outside the jurisdiction of any State'
- 1988 Rome Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention, for safety of navigation):
 - The *Achille Lauro* incident: boarding terrorists' attack
 - A highly developed framework for cooperation between contracting States

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Piracy: Recent development

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- Securing safety of maritime transport routes such as the Strait of Malacca and Singapore needs enhancing cooperative relations with states concerned
- The capability of the Information Sharing Center (established based on the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), cf. Singapore C2 Information Fusion Center) needs to be enhanced. (support for the activities and fostering human resources)
 - Facilitation of information sharing, regional collaboration for securing key sea lanes in Southeast Asia
 - Collaboration of a private sector with law enforcement agencies
 - Challenges: limited resources, different levels of capacities to sustain efforts, ReCAAP focal points' various levels, etc.
 - Coherent national policies, close cooperation among authorities
- A system/mechanism to prevent piracy needs to be developed in accordance with rules of international law.

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Anti-Piracy: Japan's Commitment

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- Law on the Penalization of Acts of Piracy and Measures against Acts of Piracy enacted in June 2009
 - A series of UNSC resolutions (ex. Res. 1816) calling for States to dispatch naval vessels to waters off the Somalian coast and the Gulf of Aden
 - To protect both Japanese-related and other States' vessels from piracy; To take more effective and appropriate measures against piracy in cooperation with other countries
 - Japan's geological and economic situation
- Two destroyers (officials of Maritime Self Defense Forces and Japan Coast Guard) dispatched in March 2009 to waters off the Somalian coast and the Gulf of Aden in order to escort ships in the maritime areas.
- Coordinated and cooperated international anti-piracy operations needed.

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Hot pursuit

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- 'when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State' (LOSC 111(1))
- 'continuous' pursuit

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Unauthorised Broadcasting

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- All States shall cooperate in the suppression of unauthorised broadcasting from the high seas.
- The transmission of sound radio or television broadcasts from a ship or installation on the HS
- Jurisdiction of the flag State of a ship, of the State of registration of the installation, of the State whose nationality the author holds, of any State where the transmissions can be received, or any State where authorised radio communication is suffering interference

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Prohibition of the transport of slaves

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- Every State shall 'take effective measures' to prevent and punish the transport of slaves in ships authorised to fly its flag and to prevent the unlawful use of its flag for that purpose (LOSC 99)
- LOSC does not permit non-flag State to arrest ships engaged in slave trading.
- A right to visit by warships vessels suspected of being involved in slave trading

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Drugs trafficking

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- All States are obliged to cooperate to suppress illicit traffic in drugs engaged in by ships on the HS. (LOSC 108)
- International cooperation expected to tackle a matter of major international concern.
- 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
 - Primacy of flag state jurisdiction: notification and authorisation to take measures needed.
- Mutual enforcement and assistance arranged after the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime navigation (SUA Convention) framework:
 - Against the safety of navigation

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Terrorism

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- The utilization of cooperative arrangements for facilitation of taking necessary measures by non-flag States
- 2005 Protocol to the SUA adopted by IMO
 - Permission for boarding and searching is to be presumed under certain conditions
 - 'Proliferation Security Initiative' introduced by the USA in 2003, and other bilateral agreements

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Marine resources

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- Fisheries:
 - Freedom of fishing subject to the coastal states' rights and duties and interests (116(2))
 - Cooperation of States in the conservation and management of living resources (118): regional/sub-regional fisheries organizations
 - Conservation of the living resources of the HS (119) : consideration of various factors
 - Possibilities and limits of a unified international regulatory mechanism/arrangement?
- Deep seabed resources

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IUU Fisheries and the Freedom of the High Seas

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- Illegal, Unreported and Unregulated (IUU) Fishing
 - Framework: UNCLOS, 1993 Compliance Agreement, 1995 Implementation Agreement
- International and regional response
 - UNGA, FAO, IMO
 - Regional Fisheries Management Organizations (RFMOs):
 - CCAMLR (Antarctic Sea), ICCAT (Atlantic Tuna), NAFO (Northwest Atlantic), NEAFC (Northeast Atlantic), IOTC (Indian Ocean), CCSBT (Southern Bluefin Tuna), IATTC
- Technical development:
 - Catch documentation scheme (CDS): trade-related measures
- Jurisdiction:
 - Flag state jurisdiction, **port state control**, visit & inspection by member states on HS, trade related measures
 - Non-member states' freedom limited?

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Concluding Remarks

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- Implementation of international law rules (ex. UNCLOS) in an appropriate manner over 'commons'
 - Shrinking part of open seas and encroaching/creeping coastal State jurisdiction: how to balance?
- Flag state jurisdiction enough?: cf. port state control for pollution
 - Harmonization of maritime policies and legal frameworks
 - Proper level (homogeneity) of enforcement
 - Responsible manner
- Regional cooperation
 - Network building
 - Collaboration of work
 - Through international organizations (ex. IMO)

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