

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

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.

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, 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'.

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 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’.

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’. 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’. 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’, 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.

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 and is likewise found in the Regulation of the European Union on IUU fishing of 2008. 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’.

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Judge Helmut Tuerk currently serves as Vice - President of International Tribunal for the Law of

the Sea.

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