



ENFORCEMENT OF LAW AND ORDER ON THE
HIGH SEAS: A LEGAL ANALYSIS

BY

ANTONY NICHOLSON

A dissertation submitted in fulfilment of the requirement
for the degree of Master of Comparative Laws

Ahmad Ibrahim Kulliyyah of Laws
International Islamic University
Malaysia

MAY 2013

ABSTRACT

The high seas refer to the open sea which is beyond the national jurisdiction of States, that is, beyond the 200 nautical mile limit of the Exclusive Economic Zones of coastal States. The high seas are open to all States and shall be reserved for peaceful purposes. All States have the right of navigation on the high seas and every State has the right to sail ships flying its flag on the high seas. The legal status of the high seas is regulated by the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and by international law. Ships sailing on the high seas are subject to the exclusive jurisdiction of the flag State save in exceptional cases provided for in the UNCLOS or in international treaties. However, in the interests of the maintenance of law and order on the high seas, international law allows certain exceptions to this general principle of the flag State's exclusive jurisdiction over its ships on the high seas, where other States share legislative and enforcement jurisdiction with the flag State. This study evaluates the laws relating to the high seas and examines the effectiveness of the enforcement of law and order on the high seas by the flag States and the other States based on the provisions of the UNCLOS and other rules of international law.

ملخص البحث

الرجوع أعالي البحار إلى البحر المفتوح الذي خارج الولاية الوطنية للدول، وهي تتجاوز حد الـ 200 ميل بحري من المناطق الاقتصادية الخالصة للدول الساحلية. أعالي البحار مفتوحة لجميع الدول وتكون محجوزة لأغراض سلمية. جميع الدول لديها الحق في الملاحة في أعالي البحار، ويحق لكل دولة أن تبحر السفن التي ترفع علمها في أعالي البحار. وينظم الوضع القانوني لأعالي البحار "اتفاقية الأمم المتحدة" لقانون البحار عام 1982 (اتفاقية قانون البحار) والقانون الدولي. السفن التي تبحر في أعالي البحار تخضع للاختصاص الحصري للعلم حفظ الدولة في الحالات الاستثنائية المنصوص عليها في اتفاقية قانون البحار أو في المعاهدات الدولية. ومع ذلك، توخياً للحفاظ على القانون والنظام في أعالي البحار، القانون الدولي يسمح بعض الاستثناءات لهذا المبدأ العام للعلم الولاية القضائية الحصرية للدولة عبر السفن في أعالي البحار، حيث تتقاسم الدول الأخرى الولاية التشريعية وإنفاذ القوانين مع دولة العلم. هذه الدراسة بتقييم القوانين المتعلقة بأعالي البحار وفعالية إنفاذ القانون والنظام في أعالي البحار ويدرس العلم للدول والدول الأخرى استناداً إلى أحكام اتفاقية قانون البحار وغيرها من قواعد القانون الدولي.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarship presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

.....
Abdul Ghafur Hamid
Supervisor

I certify that I have read this study and that in my opinion, it conforms to acceptable standards of scholarship presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

.....
Mohd Hisham Mohd Kamal
Examiner

This dissertation was submitted to the Department of Civil Law and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.

.....
Puteri Nemie Jahn Kassim
Head, Department of
Civil Law

This dissertation was submitted to the Ahmad Ibrahim Kulliyah of Laws and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.

.....
Hunud Abia Kadouf
Dean, Ahmad Ibrahim
Kulliyah of Laws

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Antony Nicholson

Signature.....

Date.....

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

**DECLARATION OF COPYRIGHT AND AFFIRMATION
OF FAIR USE OF UNPUBLISHED RESEARCH**

Copyright © 2013 by Antony Nicholson. All rights reserved.

**ENFORCEMENT OF LAW AND ORDER ON THE HIGH SEAS:
A LEGAL ANALYSIS**

No part of this unpublished research may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without prior written permission of the copyright holder except as provided below:

1. Any material contained in or derived from this unpublished research may only be used by others in their writing with due acknowledgement.
2. IIUM or its library will have the right to make and transmit copies (print or electronic) for institutional and academic purposes.
3. The IIUM library will have the right to make, store in a retrieval system and supply copies of this unpublished research if requested by other universities and research libraries.

Affirmed by Antony Nicholson

.....
Signature

.....
Date

ACKNOWLEDGEMENTS

First and foremost I would like to express my sincere appreciation and gratitude to my supervisor, Prof. Dr. Abdul Ghafur Hamid @ Khin Maung Sein, Deputy Dean (Research and Postgraduate), Ahmad Ibrahim Kulliyah of Laws (AIKOL), for his invaluable assistance, constant encouragement and motivation, tremendous support, useful suggestions and continuous guidance throughout the research period which have been so vital for making this dissertation a reality.

Besides Prof. Dr. Abdul Ghafur Hamid, I would also like to thank my other law lecturers at AIKOL especially Prof. Dr. Hunud Abia Kadouf, Dean, AIKOL, Prof. Dr. Najibah Mohd Zin, Deputy Dean (Academic Affairs), AIKOL, Prof. Dr. Syed Khalid Rashid and Associate Prof. Dr. Shamrahayu Ab. Aziz from whom I have learned so much during the course of my MCL studies at IIUM and to whom I am greatly indebted. It was indeed a pleasure and an honour to be taught by these learned and experienced academics who have displayed such a high level of dedication and commitment in their work.

My sincere thanks also go to the staff at AIKOL, the Centre for Postgraduate Studies and the IIUM Library for their ever willing readiness to assist me and for their thoughtful cooperation in times of need.

To my fellow MCL students, I must say a very big thank you for the stimulating discussions and exchange of ideas we had and for making my studies at IIUM such a pleasant, fruitful and memorable one.

My deepest gratitude and indebtedness go to my beloved late parents for instilling in me the importance of education from my early childhood days, for their unwavering love and care, and for being my pillars of support.

Last but not least, my deepest appreciation and indebtedness go to my beloved wife, Rose and my loving children, Marina and Alicia, for their support, patience and understanding, throughout the course of my MCL studies at IIUM.

May God bless them all.

TABLE OF CONTENTS

Abstract	ii
Abstract in Arabic	iii
Approval Page.....	iv
Declaration Page	v
Copyright Page.....	vi
Acknowledgements	vii
Table of Contents	viii
List of Cases.....	x
List of Statutes	xi
List of Treaties	xii
List of Abbreviations	xiii
CHAPTER 1: INTRODUCTION.....	1
1.1 Summary of the dissertation.....	1
1.2 Statement of the problem	3
1.3 Objectives of the dissertation	5
1.4 Hypothesis.....	5
1.5 Literature review	5
1.6 Scope and limitations	7
1.7 Methodology	8
CHAPTER 2: FREEDOM OF THE HIGH SEAS	9
2.1 Historical development of the law of the sea	9
2.2 Definition of “high seas	14
2.3 Freedom of the high seas.....	15
2.4 Reservation of the high seas for peaceful purposes	16
2.5 Warships and ships used on governmental non-commercial service on the high seas	17
2.6 Freedom not absolute	19
2.7 Evaluation	21
CHAPTER 3: NATIONALITY OF SHIPS AND EXCLUSIVE JURISDICTION OF THE FLAG STATE ON THE HIGH SEAS.....	24
3.1 Nationality and the flag state	24
3.1.1 Nationality and registration of ship.....	25
3.1.2 Registration of ships in Malaysia.....	27
3.1.3 The flag state status.....	28
3.1.4 Flags of convenience.....	30
3.1.5 Stateless ships	31
3.2 The <i>Lotus</i> case.....	33
3.3 The exclusive jurisdiction of the flag State.....	36
3.4 Exceptions to flag State’s exclusive jurisdiction	37
3.4.1 Penal jurisdiction in matters of collision or other incidents of navigation.....	37

3.4.2 Prohibition of the transport of slaves	38
3.4.3 Illicit traffic in narcotic drugs or psychotropic substances	38
3.4.4 Unauthorised broadcasting from the high seas	39
3.4.5 Major pollution incidents	40
3.5 Evaluation	41
CHAPTER 4: PIRACY	44
4.1 Introduction	44
4.2 Definition of “piracy” under international law	45
4.3 The essential elements of piracy	48
4.3.1 Committed for private ends.....	48
4.3.2 Two-ship rule	49
4.3.3 Locus of piracy.....	50
4.4 Universal jurisdiction: Seizure of a pirate ship or aircraft	51
4.5 The Malaysian practice	52
4.5.1 Jurisdiction and the issue of lack of piracy statute in Malaysia..	52
4.5.2 Recent prosecution of Somali pirates in Malaysia (2011)	53
4.6 Evaluation	54
CHAPTER 5: RIGHT OF HOT PURSUIT	58
5.1 Introduction.....	58
5.2 Requirements of a lawful hot pursuit.....	59
5.3 Justifiable use of force	64
5.4 The doctrine of constructive presence	66
5.5 Liability for unjustified measures	68
5.6 Evaluation	70
CHAPTER 6: RIGHT OF VISIT AND OTHER LAW ENFORCEMENT MEASURES ON THE HIGH SEAS	72
6.1 Right of visit	72
6.2 Prohibition of the transport of slaves	74
6.3 Unauthorised broadcasting from the high seas	75
6.4 Illicit traffic in narcotic drugs or psychotropic substances	76
6.5 Penal jurisdiction in matters of collision or other incident of navigation.....	77
6.6 Major pollution incidents	79
6.7 Self-defence	80
6.8 Evaluation	82
CHAPTER 7: CONCLUSION.....	85
BIBLIOGRAPHY	94

LIST OF CASES

- Anglo-Norwegian Fisheries* case (UK v. Norway) (1951) ICJ Rep. 116
Araunah (1888) Moore, International Arbitrations, 824
Castle John v. NV Mabeco (Belgium, Court of Cassation) (1986) 77 ILR 537
Chorzow Factory (1928) PCIJ Series A, No. 17
Corfu Channel case (UK v. Albania) (1949) ICJ Rep. 14
Laurotzen v. Larsen (1953) U.S. S.Ct 921, 97 L.Ed. 1254
M/V Saiga case (Saint Vincent and the Grenadines v. Guinea) (1997) ITLOS Case No 1
M/V Saiga case (No 2) (Saint Vincent and the Grenadines v. Guinea) (1999) ITLOS Case No 2
MT Bunga Laurel (2011)
Naim Molvan v. Attorney-General for Palestine (1948) 81 LI L Rep. 277
Nuclear Test cases (Australia v. France; New Zealand v. France) (1974) ICJ Rep. 253, 457
P.P. v. Chia Kwek Chin & Ors (1915) 13 SSLR 1
P.P. v. Muka Bin Musa [1964] 30 MLJ 275
P.P. v. Nya Abu & Others (1885-1890) 4 Ky 169
R v. Mills (1995) 44 ICLQ 949
R v. Tunku Mahomed Saad & Others (1840) 2 Ky 18
Re Piracy Jure Gentium [1934] AC 586
Santa Maria (1961)
The Achille Lauro incident (1985)
The Caroline incident ([United States](#) v. [Britain](#)) (1937) 22 AJIL (1938) 82
The Grand Prince case (Belize v France) (2001) ITLOS Case No. 8
The I'm Alone case (Canada v. United States) (1935) 3 RIAA 1609; (1935) 29 AJIL 326
The Lotus case (France v. Turkey) (1927) PCIJ Series A, No. 10
The Nottebohm case (*Liechtenstein v. Guatemala*) (1955) ICJ Rep. 4
The Red Crusader (Denmark v. UK) (1962) 35 ILR 485
The South Tommy (2001)
The Tomimaru case (Japan v. Russian Federation) (2007) ITLOS Case No. 15
The Torrey Canyon incident (1967)
The Viarsa I (2002)
The Virginius Affair (1873), Moore, Digest, vol. 2, 895
United States v. Conroy (1979) 589 F.2d 1258 (5th Cir.); (1979) 444 U.S. 831

LIST OF STATUTES

Courts of Judicature Act 1964 (Act 91)
Firearms (Increased Penalties) Act 1971 (Act 37)
Merchant Shipping (Amendment) Act 1988 (Act A 895)
Merchant Shipping Ordinance 1952
Penal Code (Act 574) (Revised 1997)

LIST OF TREATIES

Charter of the United Nations, 1945
Convention for Civil Liability of Oil Pollution Damage, 1992
Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), 1990
Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73/78)
Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, 1952
Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969
Convention to Suppress the Slave Trade and Slavery, 1926 (Slavery Convention)
Geneva Convention on the High Seas, 1958
Nuclear Test Ban Treaty, 1963
Protocol Amending the Slavery Convention, 1953
Single Convention on Narcotic Drugs, 1961
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956
Treaty Banning Nuclear Weapons Tests in the Atmosphere, in the Outer Space and Under Water (Partial Test Ban Treaty), 1963
United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988
United Nations Convention on Conditions for Registration of Ships, 1986
United Nations Convention on the Law of the Sea, 1982

LIST OF ABBREVIATIONS

AC	Appeal Cases
AJIL	American Journal of International Law
All ER	All England Law Reports
ed.	edition
EJIL	European Journal of International Law
EPIL	Encyclopedia of Public International Law
HSC	Geneva Convention on the High Seas 1958
ICJ	The International Court of Justice
ICLQ	The International and Comparative Law Quarterly
PCIJ	Permanent Court of International Justice
ILC	International Law Commission
ILR	International Law Reports
IMO	International Maritime Organisation
ITLOS	International Tribunal for the Law of the Sea
Ky	Kyshe's Reports
MLJ	Malayan Law Journal
n.	footnote
P.P.	Public Prosecutor
Rep.	Reports
RIAA	Reports of International Arbitral Awards
S.Ct.	Supreme Court
SSLR	Straits Settlements Law Reports
UNTS	United Nations Treaty Series
UNCLOS	United Nations Convention on the Law of the Sea 1982
UNCTAD	United Nations Conference on Trade and Development
v.	versus, against
vol.	volume

CHAPTER 1

INTRODUCTION

The introductory chapter of this dissertation consists of the summary of the dissertation, statement of the problem, objectives of the dissertation, hypothesis, literature review, scope and limitations, and methodology.

1.1 SUMMARY OF THE DISSERTATION

This research evaluates the laws relating to the high seas and examines the effectiveness of the enforcement of law and order on the high seas by the flag States and the other States based on the provisions of the United Nations Convention on the Law of Sea, 1982 (the UNCLOS 1982) and other rules of international law. In particular, the dissertation addresses some of the main problems affecting law enforcement on the high seas especially those related to nationality and registration of ships, piracy and the right of hot pursuit with reference to the Malaysian position, where applicable.

In chapter 2, the researcher discusses the “freedom of the high seas”, starting by tracing briefly the historical development of the law of the sea and then goes on to define the “high seas”, the meaning of “freedom of the high seas”, the permissible uses of the high seas and the non-absoluteness of this freedom.

In the following chapter, the dissertation looks into the issue of nationality and registration of ships, the flag State status, “flags of convenience” and the jurisdiction over stateless ships. In addition, the researcher addresses the issue of territorial

sovereignty and discusses in some depth the *Lotus case*,¹ which is the leading case on the territorial principle. The focus is on the exclusive jurisdiction of the flag State on the high seas and the exceptions to the flag State's exclusive jurisdiction.

In chapter 4, the researcher proceeds to examine the issue of "piracy" under international law, the essential requirements of piracy, particularly the requirements that it must be committed for "private ends" and not "political ends" and the "two-ship" rule, and discusses in particular the 1961 *Santa Maria* and 1985 *Achille Lauro* incidents. In this chapter, the researcher also discusses the issue of piracy under the Malaysian practice especially on the question of jurisdiction and the recent prosecution of Somali pirates in Malaysia in 2011.

In the next chapter, the dissertation addresses the issue of the "right of hot pursuit", the requirements of a lawful hot pursuit, the justification for the "use of force", the doctrine of "constructive presence" and the liability for unjustified measures.

In chapter 6, the dissertation discusses some other law enforcement measures on the high seas such as those relating to the "right of visit", "penal jurisdiction of collision or other incidents of navigation", "prohibition of the transport of slaves", "illicit traffic in narcotic drugs or psychotropic substances", "unauthorised broadcasting from the high seas", major "pollution incidents" and the issue of "self-defence".

In the final chapter, and in conclusion, the researcher highlights some lacunae in the current laws regarding the law of the sea, especially the high seas, and the

¹ The *Lotus case* (France v Turkey) (1927) PCIJ Series A, No. 10.

reasons why it is sometimes difficult to enforce these laws against the violators and proposes some recommendations to address these issues.

1.2 STATEMENT OF THE PROBLEM

This dissertation addresses the problem regarding "the effectiveness of the enforcement of law and order on the high seas as a result of the sharing of legislative and enforcement jurisdiction by the flag State and the other States based on the provisions of the UNCLOS 1982 and other rules of international law".

Some of the problems which are not addressed clearly by the provisions of the UNCLOS 1982 and rules of international law are as follows:

- (1) In respect of registration of ships, one of the basic principles recognised by international law is that the flag State has exclusive jurisdiction of ships flying its flag on the high seas. Article 92(1) of the UNCLOS 1982 provides that "Ships shall sail under the flag of one State only..." and Article 91(1) further provides that "Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a "genuine link" between the State and the ship." A question that arises is regarding stateless ships, that is, ships without nationality or ships that sail under two or more flags. Which State could exercise jurisdiction over them?

There is also some controversy regarding this requirement of "genuine link" between the State and the ship.

- (2) In respect of piracy, the international law applicable is quite straight-forward (it is provided for in Articles 101-107 and 110 of the UNCLOS 1982) but

the real problem is the lack of appropriate national laws to deal with this problem and the Convention's reliance on States to implement national laws regarding piracy.

Yet another problem regarding piracy that this dissertation addresses is on what constitutes piracy. Article 101 defines "piracy" as consisting of, among others, the following acts: (1) "any illegal acts of violence or detention, or any act of depredation, committed for private ends..." and (2) it must be committed from one ship against another. The questions that arise are, must the illegal acts always be committed for "private ends"? and, must there always be two ships involved, that is, must it be committed from one vessel against another? What about political acts not sanctioned by their respective governments? Could they be regarded as being committed for "private ends"?

- (3) The dissertation also discusses the problems associated with the "right of hot pursuit". The power of the coastal State to undertake hot pursuit is provided for under Article 111 of the UNCLOS 1982 in certain circumstances, one of which is that "the hot pursuit of a foreign ship must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State...." and "the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State". Which State then will have jurisdiction to deal with this problem? If it is not the coastal State, is it the flag State or the third State?

Again, can the hot pursuit be commenced when the pursued vessel is on the high seas and still continue when the pursued ship enters the territorial sea of the pursuing State or a third State?

1.3 OBJECTIVES OF THE DISSERTATION

- (1) To examine the effectiveness of the provisions of the UNCLOS 1982 and other rules of international law in maintaining law and order on the high seas.
- (2) To inquire into some of the main problems affecting law enforcement on the high seas especially those related to piracy and the right of hot pursuit.
- (3) To look into the Malaysian position regarding the law of the sea with special reference to the registration of ships under the Merchant Shipping Ordinance 1952 and the issue of piracy and the lack of a piracy statute.

1.4 HYPOTHESIS

- (1) The rules and regulations laid down by the UNCLOS 1982 for maintaining law and order on the high seas are ineffective in addressing the current problems confronting users of the high seas.
- (2) Lawlessness on the high seas will continue to increase because of the treaty's reliance on national laws to implement its policies and the international community's lack of willingness and commitment to deal with violations that have taken place on the high seas.

1.5 LITERATURE REVIEW

Abdul Ghafur Hamid @ Khin Maung Sein in his book *Public International Law, A Practical Approach*, (3rd edition), Petaling Jaya: Sweet & Maxwell Asia, 2011, has this to say about the maintenance of law and order on the high seas:

“Even though the high seas are free, unwarranted lawlessness on the high seas cannot be allowed. That is why international law requires States to grant nationality to ships registered in their countries, to allow them to fly their own flags while sailing on the high seas and to exercise jurisdiction over these ships.”²

Although there have been a number of articles and books written on the law of the sea, including the high seas, they deal mainly with the substantive and procedural law, especially the UNCLOS 1982 and to some extent international law, which lays down the rules and regulations including the requirements under the law. There were hardly any emphasis (and, if any, has been done only very briefly) found in the books addressing the problems associated with law enforcement on the high seas especially with regard to the registration of ships, piracy and the right of hot pursuit or proposing guidelines and solutions to overcome these problem. Most of the books written were on the Law of the Sea or Public International Law of which the high seas was only a small part. Although it was covered briefly, they failed to address the issues related to enforcement of laws on the high seas.

R.R. Churchill and A.V. Lowe in their book, *The Law of the Sea*, (3rd edition), Manchester: Manchester University Press, 1999,³ has a chapter on the High Seas but there is little or no discussion on these problems.

E. D. Brown in his book, *The International Law of the Sea*, Aldershot: Dartmouth Publishing Company Limited, 1994,⁴ also has a chapter on the high seas but then these problems are not addressed.

² Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law, A Practical Approach*. (3rd edn.). (Petaling Jaya: Sweet & Maxwell Asia, 2011) at 278.

³ Churchill, R.R., and Lowe, A.V., *The Law of the Sea*. (3rd edn.). (Manchester: Manchester University Press, 1999).

⁴ Brown, E.D., *The International Law of the Sea*. (Aldershot: Dartmouth Publishing Co. Ltd., 1995).

Again, Louis B. Sohn in his book, *The Law of the Sea in a Nutshell*, (2nd edition), Minnesota: West Publishing Company, 2010,⁵ had nothing much to say about these problems. Moreover, some of the books written on this area were outdated and so the current issues were not addressed.

However, Abdul Ghafur Hamid @ Khin Maung Sein in his recently published book,⁶ provided extensive coverage on the topic on the Law of the Sea and highlighted the current problems regarding the high seas. The author also looked at the problems plaguing the high seas from a Malaysian perspective. The invaluable input from the book was of great help to the researcher in his quest to explore further the challenges facing the high seas.

1.6 SCOPE AND LIMITATIONS

The scope of the research was restricted to the High Seas and obtaining detailed literature and information/data on this area of the law of the sea has posed some difficulties to the researcher. Very few books and articles have been written specifically on this area of the high seas. The books available have been mainly on the law of the sea or on public international law with a small part on the high seas. Moreover, some of the books available have been outdated. Hence the researcher had to also rely on the United Nations materials and their website for reference. This research may not be complete and exhaustive due to time and budget constraint since it has been self-funded.

⁵ Sohn, Louis B., *The Law of the Sea in a Nutshell*, (2nd edn.), (Eagon, Minnesota: West Publishing Company, 2010).

⁶ Abdul Ghafur Hamid @ Khin Maung Sein, n. 2.

1.7 METHODOLOGY

This research has largely depended on the following methodologies:

(a) Library-based Research

This research has looked at a number of cases decided by the International Tribunal for the Law of the Sea (ITLOS) in relation to violations of the provisions of the UNCLOS and other rules of international law and has also referred to some books and articles written on the law of the sea with special reference to the high seas.

(b) Non-library based Research

Here the main objective has been to consult various eminent scholars or experts in the area of public international law and their advice was sought on certain specific issues regarding the law of sea especially those related to the high seas.

CHAPTER 2

FREEDOM OF THE HIGH SEAS

2.1 HISTORICAL DEVELOPMENT OF THE LAW OF THE SEA

From the earliest days the high seas were considered as international territory that all nations could use for navigation and trade and no nation could deny others access to it. The high seas were free and open to use by all nations and there was essentially unrestricted freedom of navigation on the high seas. Over time, especially during the Middle Ages,¹ this freedom of navigation on the high seas began to be somewhat restricted when the maritime powers began to assert their territorial sovereignty over larger areas of the sea. Challenges by other countries to such claims increased markedly during the sixteenth and seventeenth centuries, largely because of the growth in world trade following the discovery, exploration, and colonisation of new lands² especially by the Spanish and the Portuguese. Thus there was a need for balance between the corresponding interests of the countries and this balance was reflected in the historical development of the law of the sea.

The seventeenth century witnessed the development of the international law of the sea as a consequence of “the interplay between two opposing fundamental principles of international law, the principle of sovereignty and the principle of the freedom of the high seas”.³ As Anand has so succinctly put it, “The history of the law

¹ The period of European history encompassing the 5th to the 15th centuries; and normally is marked from the collapse of the Western Roman Empire until the beginning of the Renaissance and the Age of Discovery, the periods which ushered in the Modern Era. See http://en.wikipedia.org/wiki/Middle_Ages (accessed 17 August, 2012).

² Free seas. See <http://www.navis.gr/marinarv/freeseas.htm> (accessed 17 August, 2012).

³ Brown, E.D., “Freedom of the High Seas versus the Common Heritage of Mankind: Fundamental Principles in Conflict”, *San Diego Law Review*, (1983), 20(3), 521.

of the sea is to a large extent the story of the development of the freedom of the seas doctrine and the vicissitudes through which it has passed through the centuries. For nearly 200 years, it had been accepted as an undisputed principle, almost a dogma, which no one could dare challenge”.⁴

The doctrine that the ”freedom of the seas” – the principle that high seas in time of peace are open to all nations and may not be subjected to national sovereignty was written by the Dutch jurist, Hugo Grotius, and published anonymously in 1609 under the title *Mare Liberum* (‘the free sea’). As Anand has noted, few works of such small size have gained such great reputation as the *Mare Liberum*. It is said to be ”the first, and classic, exposition of the doctrine of the freedom of the seas” which has been the essence and backbone of the modern law of the sea ever since its origin and this has earned him the title of ”father of International Law”. According to Anand, Grotius wrote and published his *Mare Liberum* in order to defend his country’s right to navigate in the Indian Ocean and other Eastern seas and to trade with India and the East Indies (Southeast Asian Islands), over which Spain and Portugal asserted a commercial monopoly as well as political domination.⁵

Grotius is believed to have based his contention on the principle of *res nullius*, a Latin term derived from Roman law which literally means “nobody's property or a thing which has no owner”⁶ and being nobody’s property no nation may assert control over the sea or deny others access to it and it is therefore free and open to use by all nations. The doctrine basically limits the coastal State’s national rights and

⁴ Anand, R.P., “Non-European Sources of Law of the Sea: The European Challenge”, *Pacem in Maribus 2002 XXVIII*, Hamburg, Germany, December 3-6, 2002.

⁵ Anand, R.P., *Origin and Development of the Law of the Sea*. (The Hague: Martinus Nijhoff Publishers, 1983) 2.

⁶ See <http://definitions.uslegal.com/r/res-nullius> (accessed 18 August 2012).

jurisdiction over the oceans to a narrow belt of sea surrounding nation's coastline. The remainder of the seas is proclaimed free to all and belonging to none.⁷

Freedom of the seas meant essentially non-regulation and *laissez faire* which was in the interests of the big maritime powers. This law, or rather lack of law, under the freedom of the seas doctrine was often used by European powers to threaten small States to get concessions from them or simply to subjugate them.⁸ It was therefore in their interests to have the seas open and free so that they could fully exploit the potential of the vast unexplored regions of the world.

In the seventeenth century there was an intense debate between those advocating freedom of navigation and the right to trade and those who favoured coastal State's jurisdiction over sea areas adjacent to its coast. Grotius' idea of the free seas was opposed not only by Spain and Portugal but also England who declared that the sea around the British Isles was closed to other countries. In 1635 the Englishman John Selden in support of the British policy published *Mare Clausum* ("the closed sea"), that is, a sea that is closed and not accessible to other States.⁹ The consequence of this debate was the eventual emergence of two key principles in the law of the sea – state sovereignty over the territorial sea or "small sea" close inshore and freedom of navigation on the "high seas".¹⁰ However, the international community demanded an end to the *Mare Clausum* policy and established freedom of the sea as an essential condition for the development of maritime trade. By the middle of the seventeenth century, the doctrine of the freedom of the seas was firmly established as the primary

⁷ See www.un-ngls.org/orf/documents/pdf/ED/unclos (accessed 18 August 2012).

⁸ Anand, n. 5.

⁹ Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law, A Practical Approach*. (3rd edn.). (Petaling Jaya: Sweet & Maxwell Asia, 2011) at 255.

¹⁰ Chris Carleton and Clive Schofield, *Developments in the Technical Determination of Maritime Space, Charts, Datums, Baselines, Maritime Zones and Limits*, (England: International Boundaries Research Unit, Department of Geography, University of Durham, 2001) vol. 3 no. 3.