



FREEDOM OF NAVIGATION AND COMBATING
ILLEGAL ACTIVITIES ON THE HIGH SEAS FOR
SAFETY OF MARITIME NAVIGATION

BY

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ABSTRACT

This study discusses the freedom of navigation on the high seas. Many problems exist that jeopardise the safety of maritime navigation in this zone. The concept of freedom of navigation on the high seas emerged under the rules of international customary law and was further organised under conventional law. Therefore, no State can claim any part of the high seas as its territorial sea. This principle was adopted in the 1958 Geneva Convention on the High Seas and also in the 1982 Convention on the Law of the Sea (UNCLOS). The right of navigation essentially stipulates that every State whether coastal or land-locked has the right to sail. Freedom of navigation has always been threatened due to numerous aggressions, attacks and killings as a result of piracy and slave trading to name but two reasons, which in turn threatens the security of the States where they interfere. The danger has increased in the beginning of the twentieth century with the development of international trade and maritime transportation. Many crimes have emerged, example of which include maritime terrorism, drug trafficking, smuggling of migrants and the use of weapons of mass destruction against many vessels including commercial, military and touristic vessels. In contrast, exclusive jurisdiction of the flag State is not sufficient to combat these crimes. In addition, it must be through a cooperation of international community that these crimes can be minimised in order to guarantee the safety of maritime navigation on the high seas. This can only be brought about through the many efforts of combating and punishment. The high seas are considered a sensitive area and therefore the UNCLOS has reserved them only for peaceful purposes.

خلاصة البحث

تعالج هذه الدراسة حرية الإبحار في أعالي البحار و المشاكل الكثيرة التي تعيق السلامة البحرية في هذه المنطقة. لقد تكرست فكرة حرية الإبحار في أعالي البحار و نشأت في أحضان القانون و قواعد العرف الدولي. بحيث أنه لا يمكن لأي دولة أن تخضع أي جزء من أعالي البحار لسيادتها الإقليمية، و قد اعتمد هذا المبدأ في إتفاقية جنيف لأعالي البحار لعام 1958 ثم إتفاقية قانون البحار لعام 1982 و التي تسمى UNCLOS. و للذكر فإن حرية الملاحة البحرية في أعالي البحار حق مضمون لكل دولة دون إستثناء سواء كانت دولة ساحلية أو غير ساحلية. و عليه فإن حرية الإبحار و منذ قديم الزمان لم تخل من خطورة الإعتداءات من سلب و نهب و قتل جراء أعمال القرصنة و الإبتجار بالرقيق لما فيه من خطر أمني في حالة التصدي و المواجهة. يبدأ أنه في مطلع القرن العشرين ومع تطور التجارة الدولية و النقل البحري إزداد حجم الخطر على الملاحة البحرية ، وظهر ما يسمى بالإرهاب البحري و الإبتجار الغير المشروع بالمخدرات بالإضافة إلى الهجرة الغير شرعية و إستعمال الأسلحة الثقيلة للهجوم على السفن التجارية و العسكرية و السياحية. و لهذا لم يعد قانون و سلطة دولة العلم قادرين على التصدي لمثل هذه الجرائم، حيث لا بد من تعاون دولي مشترك للحد من إنتشار هذه الجرائم و ضمان السلامة البحرية في أعالي البحار من خلال تكثيف الجهود في مجال المكافحة و العقاب. و مما يستشف فإن منطقة أعالي البحار هي منطقة جد هامة لذا فقد كرست إتفاقية قانون البحار لعام 1982 كافة جهودها لجعلها منطقة للأغراض السلمية فقط.

APPROVAL PAGE

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

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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.

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*The thesis is dedicated to
The memory of My Father LAALA BITAM (1930-2002)
To My Beloved Mother BADDA ZAIM
To My Beloved Wife
ABIR RIMA DOUKARI*

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United Nations Convention of Psychotropic Substances (1971).
United Nations Convention on the Law of the Sea, (UNCLOS 1982).

LIST OF ABBREVIATIONS

ASG	Abu Sayyaf Group
AU	African Union
BCN	Biological Chemical Nuclear
CE	Council of Europe
COLREGS	Convention on the International Regulation for Prevention of Collision at Sea
CTC	Counter Terrorism Committee
ECCP	European Committee Crime Problem
Ed	Edition
ENHR	European Nation Human Rights
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organisation
IMO	International Maritime Organisation
ITLOS	International Tribunal for the Law of the Sea
ITU	International Telecommunication Union
LAS	League of Arab States
MARPOL	International Convention on the Prevention of Pollution from Ships
MLJ	Malaysian Law Journal
n.	note
n.d.	no date
no.	number
n.p	no page
NATO	North Atlantic Treaty Organisation
OAS	Organisation of American States
OIC	Organisation of Islamic Cooperation
OSCE	Organisation of Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
PSI	Proliferation Security Initiative
RFO	Regional Fisheries Organisation
SCO	Shanghai Cooperation Organisation
SOLAS	International Convention for the Safety of Life at Sea
SUA	Convention on the Suppression of Unlawful Acts against the Safety Maritime Navigation
UN	United Nations
UNCCROS	United Nations Convention on Conditions for Registration of Ships

UNCLOS	United Nations Convention on the Law of the Sea
UNDCP	United Nations International Drug Control Programme
UK	United Kingdom
USA	United States of America
UNSC	United Nations Security Council
USCG	United States Coast Guards
VBSS	Visit Board Search Seizure
Vol.	Volume
WMD	Weapons of Mass Destruction

CHAPTER ONE

OVERVIEW OF THE STUDY

1.1 INTRODUCTION

Freedom of navigation is among the oldest practices and principles recognised by international law. The high seas have traditionally been characterised by the dominance of the principles of freedom of navigation and the exclusive jurisdiction of the flag State.¹ It is clear that all ships enjoying freedom of navigation should be subject exclusively to the jurisdiction of the flag State. This matter is stated under article 92 of the United Nations Convention on the Law of the Sea (UNCLOS). Historically, in his *Mare Liberum* (Freedom of the Seas is Common to all States) published in 1609, Grotius effectively stated two principles; firstly, that the high seas could not be the object of either private or state possession, and secondly, that the right to use the high seas is awarded to all States.² Grotius' concept of freedom of navigation on the high seas remained largely in place until the early twentieth century, where the usage of navigation became problematic among States due to the increase in maritime trade and the advance of technology in the exploitation of ocean resources.³ The freedom of navigation is the first of listed freedoms in Article 2 of the Geneva Convention on the High Seas and in Article 87 of the 1982 United Nations Convention on the Law of the Sea.⁴

¹ R.R. Churchill & A.V. Lowe, *The Law of the Sea*, (Juris Publishing, 3rd edition, 1999), 204-205.

² Ian Brownlie, *Principles of Public International Law*, (Oxford, 7th edition, 2008), 225; Rosemary Gail Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, (Martinus Nijhoff Publishers, 2004), 19.

³ David Garfield Wilson, "Interdiction on the High Seas: the Role and Authority of a Master in the Boarding and Searching of his Ship by Foreign Warships", *Naval Law Review*, vol. 55, (2008), 163.

⁴ Article 2 of the 1958 Geneva Convention and article 87 of the 1982 Convention on the Law of the Sea.

In actuality, the principle of the freedom of navigation is unsafe due to the violations and aggressions committed on the high seas. From this standpoint, one may find numerous international conventions established to protect the high seas from various crimes, among them the 1988 Convention for the Suppression of the Unlawful Acts against the Safety of Maritime Navigation. In essence, the freedom of navigation faces extreme challenges on the high seas especially with increased shipping; the danger has increased due to crimes such as slave trading, terrorism, illegal trafficking of drugs, proliferation of weapons of mass destruction and human trafficking.

The present dissertation consists of an attempt to conduct a thorough study on the freedom of navigation on the high seas and various crimes that threaten the principles of navigation and whether the international community will agree on the applicability of the principle of universality in light of the aforementioned crimes.

1.2 STATEMENT OF PROBLEM

As the high seas are open to all mankind, the oceans are considered a shared heritage. Nowadays, freedom of navigation is becoming increasingly unsafe due to maritime crimes that threaten the freedom of navigation. In order to tackle this issue, the application of universal jurisdiction is needed. Piracy is the only crime that falls under this principle of universality. Despite this, this paper argues that crimes such as terrorism, drug trafficking, slave trade and other heinous deeds should also fall under the principle of universality. The framework of this study is how the international community ought to collaborate together in order to reduce problems in this sensitive area by applying universal jurisdiction over the aforementioned crimes. In this regard, the questions that arise are:

1. What are the problems and challenges of the freedom of navigation faced by States on the high seas?
2. Does the 1982 Convention on the Law of the Sea control all aspects and issues of the high seas?
3. How can the international community form solutions to illicit activities on the high seas by providing more security to this area?
4. Does the regime of the high seas require a measure of control and enforcement concerning terrorism, slave trade, illegal immigration and trafficking of narcotic drugs, or does this regime need extended jurisdiction regarding such crimes?

1.3 OBJECTIVES OF THE RESEARCH

This study focuses on the regulations of the high seas and the actual crimes which occur in this important zone. The objective of this study is to cast light on the future of the high seas while touching on how to promote freedom in the high seas. More specifically, this research is based on the customary international law, the international conventions, and agreements in solving illegal activities on the high seas. The high seas zone is a rather important area that is regulated by both the 1982 United Nations Convention on the Law of the Sea and the 1958 High Seas Convention. Likewise, this study casts light on the Islamic perspective on this matter, and identifies the treatments established from an Islamic view for each particular crime.

The main objectives of the study are as follows:

1. To identify the category of international crimes and whether States possess jurisdiction to punish the offenders.

2. To analyse the 1958 High Seas Convention, the 1982 United Nations Convention on the Law of the Sea, the rules of customary international law and any other international convention related to crimes committed on the high seas.
3. To examine the efforts of the international community in protecting the high seas and assuming the freedom of navigation.

1.4 HYPOTHESIS

The dissertation hereby hypothesises the following:

1. The existing regulatory framework does not adequately guarantee the freedom of navigation on the high seas, thereby leading to high numbers of crimes being committed on the high seas.
2. The cooperation of all states is necessary to reduce the amount of crimes being committed on the high seas.

1.5 LITERATURE REVIEW

There are many considerable books and articles written on the subject of the universal jurisdiction in international law. Most books and articles discuss the principle of universality on piracy as a historical crime committed on the high seas, but they fail to address maritime terrorism and drug trafficking as severe crimes committed on the high seas and the requisite protections of the universal jurisdiction in order to eliminate such threats. The crimes necessitate the imposition of the principle of the universal jurisdiction on the high seas by introducing methods for combating and punishing such crimes.

R.R. Churchill and A.V. Lowe, in their book, *The Law of the Sea*,⁵ discussed jurisdiction on the high seas, where the flag State holds the exclusive right to exercise legislative and enforcement jurisdiction over its ships on the high seas. However, they did not discuss whether the high seas were in need of universal jurisdiction over various crimes committed in the said area. This lacuna in their research justifies the current research.

E.D. Brown, in his book, *The International Law of the Sea*,⁶ discussed the various crimes which jeopardise the principle of freedom of navigation on the high seas. The problem which arises here is how to eliminate the constraints on the principle of freedom of navigation on the high seas in accordance with jurisdiction. The dissertation aims to fill this gap through the course of the study.

Abdul Ghafur Hamid @ Khin Maung Sein, in his book, *Public International Law*,⁷ discussed universal jurisdiction, and asserted that only piracy has this privilege of universality in international law. The problem, however, is that many crimes in the high seas should also be subjected to universal jurisdiction. Nevertheless, there is no discussion about the universal jurisdiction for handling the issues of drug trafficking and maritime terrorism.

Rosemary Gail Rayfuse, in her book, *Non-Flag State Enforcement in High Seas Fisheries*,⁸ discussed the flag States' enforcement on the high seas as a matter of necessity. In addition, she only mentioned the five crimes embodied under article 110 of the UNCLOS against which other States have the right to interfere on the high

⁵ R.R. Churchill & A.V. Lowe, *The law of the Sea*, (Juris Publishing, 3rd edition, 1999), 208-209.

⁶ E.D. Brown, *The International Law of the Sea*, vol. 1, (Dartmouth Publishing Company, 1994), 293-294.

⁷ Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach*, (Pearson Prentice Hall, 2006), 341.

⁸ Rosemary Gail Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, (Martinus Nijhoff Publishers, 2004), 52.

seas. However, she failed to mention the principle of universal jurisdiction over such crimes being committed on the high seas.

Tim Hiller, in his book, *Principles of Public International Law*,⁹ discussed the status of the flag State, as having the exclusive right to exercise legislative and enforcement jurisdiction over its ships on the high seas. He noted that the flag State's jurisdiction is not absolute. There are several exceptions in which other states share legislative or enforcement jurisdiction over the ships. In this regard, he neglected the universal jurisdiction as a substitute for the purpose of punishment and enforcement over many crimes on the high seas.

Helmut Tuerk, in his book, *Reflection on the Contemporary Law of the Sea*,¹⁰ opined that the principle of universal jurisdiction is awarded solely to the crime of piracy, while others crimes were framed by different principles. Helmut failed to specify the offences committed in the high seas zone. In addition, he discussed piracy as an exception which international law permits the right of visit against piracy on the high seas.

Debra Doby, in her article, "Piracy Jure Gentium: The Jurisdictional Conflict of the High Seas and Territorial Waters",¹¹ discussed the status of piracy in territorial waters and in international water in accordance with universal jurisdiction. She focused on how to pursue, board, arrest and prosecute pirates inside a state's territorial waters. She did not discuss the universal jurisdiction as a principle matter in combating maritime terrorism and drug trafficking on the high seas.

⁹ Timothy Hillier, *Principles of Public International Law*, (Cavendish Publishing Limited, 2nd edition, 1999), 205.

¹⁰ Helmut Tuerk, *Reflection on the Contemporary Law of the Sea*, (Martinus Nijhoff Publishers, 2012), 79-81.

¹¹ Debra Doby, "Piracy Jure Gentium: The Jurisdictional Conflict of the High Seas and Territorial Waters", *Journal of Maritime Law & Commerce*, vol. 41, (2010), 561.

Luis Benavides, in his article, “The Universal Jurisdiction Principle: Nature and Scope”,¹² discussed the exercise of the universal jurisdiction as an exception to international law. He noted however that the application of universal jurisdiction is limited to a number of international crimes.

Efthymios Papastavridis, in his article, “Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the role of Law on the High Seas”,¹³ discussed the assertion of enforcement jurisdiction over illicit activities on the high seas of the Mediterranean Sea. These crimes effectively merit such enforcement jurisdiction in international law. Papastavridis specified the Mediterranean Sea as meriting such enforcement jurisdiction.

Laura L. Roos, in her article, “Stateless Vessels and the High Seas Narcotics Trade: United States Courts deviate from international principles jurisdiction”,¹⁴ discussed stateless vessels on the high seas over which the United States holds the right of prosecution under extraterritorial jurisdiction. With regards to trafficking of narcotic drugs on stateless vessels on the high seas, the United States has no jurisdiction over them in case the crime does not threaten the country. However, the issue could be dealt with by all States agreeing over the trafficking of drugs travelling on stateless vessels, thereby rendering it beneath universal jurisdiction everywhere.

Eugene Kontorovich, in his article, “The Define and Punish Clause and the Limits of Universal Jurisdiction”,¹⁵ discussed piracy and its universal jurisdiction. He

¹² Luis Benavides, “The Universal Jurisdiction Principle: Nature and Scope”, <http://www.crimeshumanite.be/data/documents/competence_universelle_Anuario_mexicano_de_derecho_intern_2001.pdf>. (Accessed on 13 June, 2011).

¹³ Efthymios Papastavridis, “Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Role of Law on the High Seas”, *The International Journal of Marine and Coastal Law*, vol. 25, (2010), 569.

¹⁴ Laura L. Roos, “Stateless Vessels and the High Seas Narcotics Trade: United States Courts Deviate from International Principles of Jurisdiction”, *Tulane Maritime Law Journal*, vol. 9, (1984), 273.

¹⁵ Eugene Kontorovich, “The Define and Punish Clause and the Limits of Universal Jurisdiction”, *Northwestern University Law Review*, vol. 103, (2009), 149.

elaborated that other crimes cannot be imputed to universal jurisdiction, and that universal jurisdiction is rarely used by nations.

Kenneth C. Randall, in his article, “Universal Jurisdiction under International Law”,¹⁶ discussed the principle of universality and how in some cases various tribunals refer to the principle and in other cases they do not. This research demonstrates how in many cases States do not exercise the universal jurisdiction.

Anne Bardin, in her article, “Coastal State's Jurisdiction over Foreign Vessels”,¹⁷ discussed the freedom of navigation and the principle of exclusivity of the flag State on the high seas as not being absolute, but rather in need of support of legislative or enforcement jurisdiction of other States alongside that of the flag State. She failed to mention, however, whether crimes committed on the high seas are in need of protection through universal jurisdiction.

Ian Patrick Barry, in his article, “The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative”,¹⁸ discussed the principle of freedom of navigation and its limitations on the high seas in Customary International Law and Treaties Law. He asserted that there are interdictions of freedom of navigation which need greater collaboration for security to be assumed for this principle.

From all the available literature and upon its careful perusal, it can be said that there is a need for a general approach that can develop a complete understanding of

¹⁶ Kenneth C. Randall, “Universal Jurisdiction under International Law”, *Texas Law Review*, vol. 66, (1988), 785.

¹⁷ Anne Bardin, “Coastal State's Jurisdiction over Foreign Vessels”, *Pace International Law Review*, vol. 14, (2002), 27.

¹⁸ Ian Patrick Barry, “The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative”, *Hofstra Law Review*, vol. 33, (2004), 299.

universal jurisdiction among all scholars, as opposed to focusing on selected aspects. In the literature referred to above, no mention or reference is made whatsoever to Islamic law. Moreover, it may be inferred that this is an area which requires further study.

1.6 SCOPE AND LIMITATIONS OF THE STUDY

The study focuses on the 1982 United Nations Convention on the Law of the Sea and the 1958 Geneva Convention of High Seas, as well as other international conventions and court cases relating to the subject. This particular research does not dwell on offences that are not included as illicit crimes on the high seas, examples being pollution and illegal fishing.

1.7 RESEARCH METHODOLOGY

The methodology of this research is predominantly qualitative. It performs a content analysis of international treaties and multilateral conventions as well as bilateral treaties. The researcher utilises the analytical method to discuss the relationship between the actual issues on freedom of navigation on the high seas and international agreements to deal with challenges in the high seas zone. The materials obtained for the purpose of writing this research are relevant law journals, online articles, law cases, books, magazines, as well as internet-based and unpublished materials. In general, library tools are most relevant.

1.8 OUTLINE OF THE CHAPTERS

Chapter One of the dissertation presents an overview of the study, which includes the statement of the problem, the objective of the research, hypothesis, literature review,

scope and limitations of the study as well as the research methodology used in the dissertation. Chapter Two discusses the concept of freedom of navigation on the high seas and its relation to the exclusive jurisdiction of the flag State. It discusses the challenges facing the freedom of navigation and possible solutions. The chapter then addresses the exceptions and constraints of the flag State's jurisdiction on the high seas and whether the international community can guarantee the freedom of navigation on the high seas. Chapter Three is a study of terrorism in international law such as its concept, elements and whether terrorism can be categorised under universal jurisdiction for punishment. The chapter includes a discussion of terrorism from an Islamic perspective. In a similar vein, Chapter Four discusses the trafficking of drugs on the high seas and how States cooperate to restrict this illegal activity. The trafficking of drugs is also discussed from an Islamic perspective.

Chapter Five highlights the right of visit on the high seas, and whether the right of visit is the best means of intervention to control vast areas of the oceans. The dissertation concludes with the proposal of suggestions and recommendations on how to reduce the number of problems on the high seas.