NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF POSTGRADUATE STUDIES

FACULTY OF LAW

COURSE CODE: JIL807

COURSE TITLE: INTERNATIONAL LAW OF THE SEA I

NATIONAL OPEN UNIVERSITY OF NIGERIA

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14/16 Ahmadu Bello Way
Victoria Island, Lagos

Published by

National Open University of Nigeria

Printed
ISBN:

COURSE GUIDE

Course Code: JIL807

Course Title: **INTERNATIONAL LAW OF THE SEA II**

Credit Unit: 3

Course Status: C

Semester: FIRST

Edition: 2022

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JIL807– INTERNATIONAL LAW OF THE SEA I

COURSE GUIDE

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INTRODUCTION

Generally, international law of the sea regulates the rights of States, international actors as well as individuals regarding the use of the seas and exploitation of the resources therein. The present legal regimes of the sea, including the United Nations Convention on the Law of the Sea (UNCLOS), 1982 set boundaries in the sea, identifying various juridical zones in relation to States' jurisdictions.

Our discussion in this semester commences with the general concept of the sea. It however focuses on areas like, the meaning of the sea including the history and sources of the law of the sea. It discusses the principles of the freedom of the sea as well as the uses of the high seas, the seabed and States' jurisdiction over maritime zone adjacent to their sea coast.

Course Learning Outcomes

At the end of the study in this unit, you should be able to

1) Appreciate in general, the concept of the sea
2) Explain the principles of the freedom of the sea
3) Understand the jurisdiction of States over the maritime zones adjacent to their sea coasts.

WORKING THROUGH THIS COURSE

To complete this course, you are advised to read the study units, recommended books, relevant cases and other materials provided by NOUN. Each unit contains a Self-Assessment Exercise, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course there is a final examination. The course should take you about 11 weeks

to complete. You will find all the components of the course listed below. You need to make out time for each unit in order to complete the course successfully and on time.

COURSE MATERIALS

The major components of the course are.

a) Course guide.
b) Study Units.
c) Textbooks
d) Assignment file/Seminar Paper
e) Presentation schedule.

MODULES AND STUDY UNITS

The discussion in this course is broken down to 19 (nineteen) study units that are broadly dividedinto SEVEN modules as follows –

MODULE 1: GENERAL CONCEPT OF THE SEA

Introduction

Unit 1: Meaning and Nature of the Sea

Unit 2: History and Sources of the Law of the Sea

Unit 3: Delimitation of Maritime Zones

Unit 4: The Juridical Nature of the Relevant Zones of the Sea

MODULE 2: PRINCIPLES OF THE FREEDOM OF THE SEA

Unit 1: Jurisdiction over the Sea/Ocean

Unit 2: The Traditional Freedoms of Access to the Sea by all States
Ordinary and extraordinary rights of jurisdiction in time of peace

Unit 3: The Need for or Importance of the Freedom of the Sea

Unit 4: Limitations and Exemptions to the Freedom of the Sea

Unit 5: Piracy, Slave Trade and Freedom of the Sea

MODULE 3: USES OF THE HIGH SEAS AND THE SEABED

Unit 1**:** Navigation and Fisheries in the High Seas

Unit 2**:** Exploitation of other Economic resources in the High seas and the Seabed

Unit 3**:** The Concept of Scientific Research and Experiments in the High seas

Unit 4**:** Disposal of Radioactive waste

Unit 5**:** Laying of Submarine Cables & Pipelines, and Mechanical Installations

MODULE 4: JURISDICTION OVER MARITIME ZONE ADJACENT TO THE COAST

Unit 1: The Regime of Ports and Internal Waters

Unit 2: The Regime of the Continental Shelf

Unit 3: Doctrine of Maritime Hot Pursuit and Ship in Distress

MODULE 5: THE REGIME OF THE HIGH SEAS AND SEABED

Unit 1: The Commonage Concept of the High Seas and the Seabed

Unit 2: Fishing Rights and Pollution Regulations

All these Units are demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods. You may require several hours for each.

We suggest that the Modules be studied one after the other, since they are linked by a common theme. You will gain more from them if you have first carried out work on the law of sea.You will then have a clearer picture into which to paint these topics. Subsequent units are written on the assumption that you have completed previous units.

Each study unit consists of one week's work and includes specific Learning Outcomes, directions for study, reading materials and Self-Assessment Exercises *(SAE).* Together, these

exercises will assist you in achieving the stated Learning Outcomes of the individual units and of the course.

Textbooks/REFERENCES

Certain books have been recommended in the course. You should read them where so directed before attempting the exercise.

ASSESSMENT

There are two aspects of the assessment of this course, the Tutor Marked Assignments and a written examination. In doing these assignments you are expected to apply knowledge acquired during the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the Assignment file. The work that you submit to your tutor for assessment will count for 30% of your total score.

SELF-ASSESSMENT EXERCISES

There is a self-assessment exercise at the end for every unit. You are required to attempt all the assignments. You will be assessed on all of them, but the best three performances will be used for assessment. The assignments carry 10% each. Extensions will not be granted after the due date unless under exceptional circumstances.

FINAL EXAMINATION AND GRADING

The duration of the final examination for this course is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self- assessment exercises and the tutor marked problems you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit and taking the examination to revise the entire course. You may find it useful to review yourself assessment exercises and tutor marked assignments before the examination.

COURSE SCORE DISTRIBUTION

The following table lays out how the actual course marking is broken down.

Assessment	**Marks**
Assignments 1-4 (the best three of all the assignments submitted)	Four assignments. Best three marks of the four counts at 30% of course marks.
Final examination	70% of overall course score
Total	100% of course score.

COURSE OVERVIEW/PRESENTATION

The law of the sea forms the basis for the conduct of maritime commerce critical to our economy; codifies the rules of freedom of navigation that are essential to national security; and enables the U.S. to conserve, regulate, and exploit the resources of our neighboring waters and continental shelf for the benefit of the environment and economy. America's commercial and military position in the world is preserved by the rule of law at sea. This primer outlines the key maritime zones agreed to in the LOSC, ranging from internal waters controlled by individual sovereign States to the high seas where all States enjoy unhindered freedom of navigation. That discussion underscores a central tenet of the law of the sea, which is the fair balancing of the desire by coastal

HOW TO GET THE MOST FROM THIS COURSE

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best.Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, you study units provide exercises for you to do at appropriate times. Each of the study units follows the same format. The first item is an introduction to the subjectmatter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should beable to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you haveachieved the objectives. If you make a habit of doing this, you will significantly improve yourchances of passing the course.

Self-Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self-Assessment Exercise as you come to it in the study unit.Examples are given in the study units. Work through these when you have come to them

TUTORS AND TUTORIALS

There are 11 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of the tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group. Your tutor will mark and comment on yourassignments. Keep a close watch on your progress and on any difficulties you might encounter. Your tutor may help and provide assistance to you during the course. You must send your TutorMarked Assignments to your tutor well before the due date. They will be marked by your tutorand returned to you as soon as possible.

Please do not hesitate to contact your tutor by telephone or e-mail if:

- You do not understand any part of the study units or the assigned readings.
- You have difficulty with the self-assessment exercises.

- You have a question or a problem with an assignment, with your tutor's comments onan assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutor and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

MODULE 1: GENERAL CONCEPT OF THE SEA

Introduction

The sea has been part of man's concern and consciousness from time immemorial. This is as a result of the fact that greater part of man's existence and fortune is tied to the sea owing to the rich resources, both living and non-living which are buried in the seas. The seas are increasingly becoming more strategic to the survival and sustenance of man due to different factors. For instance, the increase in the discovery of the presence of these rich economic resources in the seas and seabed through advancement in technology, growth in world population and increased economic values of these resources has resulted in an increase in States' interests and agitations over the rights to own portions of the for purpose of exploitation and use.

Unit 1: Meaning and Nature of the Sea

Contents

1.1 Introduction

The seas have historically played two important functions in support of human life on earth. First it has been used as a medium of communication. Long before the advent of air travel and instantaneous communication, through the use of internet, people, goods and services as well as ideas travelled round the world by ship. In the second place, the vast reservoir of resources, both living and non-living plays important roles in the survival and sustenance of lives globally. Both these functions prompted the development of legal rules of the seas which govern the law of the sea as we have it today. The seas have also long been utilized as a critical arena for international relations as there had always been struggle for supremacy and sovereign control over the seas and its resources among the nations of the world.

1.2 Learning Outcomes

At the completion of this unit, you are expected to be able to:

i. Understand and define the term ‘Sea’
ii. Relate the Importance of the sea to man
iii. Appreciate the nature of the world sea.

1.3 Definitions of the Sea

The sea in a simple definition means a continuous body of salt water that covers most of the earth’s surface, especially this body regarded as a geographical entity separate from earth and the sky. It has also been defined as “the salt water covering the Earth or a large

body of salt water which is partially enclosed by land. Examples of the seas are the oceans of the world". (www.Dictionary.com/sea, 2014). It is the large area or body of salt water that covers most of the surface of the Earth. The sea is the 'interconnected system of all the Earth's oceanic waters, including the Atlantic, Pacific, Indian, Southern and Arctic Oceans' (Meriam-webster .com: 2013). In some cases however, the term "sea" can also be used for some specific, much smaller bodies of seawater, such as the *Red Sea* or the *North Sea*.

Self-Assessment Exercise

1. Bearing in mind the improvements in technology and the discovery of the rich economic resources of the sea, outline briefly the benefit/importance of the seas to man.

2. Explain the nature of the sea

1.3.1 Nature of the Sea

By nature of the sea, we intend here to give brief analysis of the state of the sea as a result of various activities of man. That is, how sea and its inhabitants behave or react to the various activities of man that affect its state. Despite the sea's great natural capacity for self-purification, the health, productivity and biodiversity of the marine environment is under a serious threat by human activities. For instance, the level of harmful substances entering the seas has greatly multiplied over the last few decades (C. Schwarte & L Siegele, 2008). Plastic and synthetic materials form the most common types of marine debris resulting in the death of sea lives due to injury and or entanglement in or ingesting these materials in the seas. Marine creatures increasingly show signs of contamination and damage resulting from sea pollution. Equally, fishing, shipping and other uses of the sea have resulted in the pollution of the sea additional damage to sea lives, and there is fear that many species will be lost before they have even been discovered.

Experience shows that fishing activities seem to be posing the most pressing threat to open ocean and deep seabed biodiversity. Today, harvesting the living resources of the sea has been transformed into a highly industrialized business reaching even the remotest areas. Overfishing and the unfettered use of destructive fishing practices have drastically reduced many fish stocks as well as other marine lives well below sustainable levels. It has been observed that pelagic longlines, widely used to catch tuna and billfish, also kill hundreds of thousands of seabirds, turtles and cetaceans. In a quest to catch sparser and more far flung fish stocks, many fishing fleets have resorted to 'bottom trawling', a fishing method

where heavily weighted nets are towed along the seafloor catching everything in their path and scraping off the coral cover of seamounts and other sea structures.

Shipping also has tremendous negative impacts on sea wildlife and habitats as a result of noise, accidental spills of oil or the deliberate, operational discharge of wastes, chemical residues and ballast water as well as the use of anti-fouling paints. The use of powerful sonar system in military operations and scientific researches, air guns for seismic surveys and drilling for mineral, gas and oil exploration are thought to cause heavy loss of marine lives and disrupt feeding, communication, mating and migration pattern in whales, dolphins and other ocean-going species thereby distabilising the sea nature. In addition, the laying of submarine cables and pipelines and large-scale scientific research can also result in significant disruption of sensitive ecosystems.

It is believed however that the relevant provisions of the various Articles of the United Nations Convention on The Law of the Sea 1982 has adequately addressed this situation since the conservation of the seas living resources and marine environment forms one of the core purposes of the preamble when it stated *inter alia*:

> Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection, and preservation of the marine environment

1.4 Importance of the Sea and why Man depends on Sea for Life

The sea greatly supports human life on the earth. For instance, the sea or ocean should be seen as the world's greatest reservoir of biodiversity, marine mammals, fish, moluscs and various other species, which are necessary for human existence. It therefore, provides substantial supplies of food for man such as fish, shellfish, mammals and seaweed, either caught by fishermen or farmed underwater. Man also uses the sea as a medium for communication, trade, travel, mineral extraction, power generation and warfare. The sea is also important in the area of leisure activities such as swimming, sailing, and scuba diving. In fact, the seas have played crucial roles in the development of virtually every nation of the world. They provide the marine highways/transportation network that binds man

together through trade, carrying about ninety percent of nations' imports and exports, and most world's oil passing through shipping choke points such as Suez Canal and the straits of Malacca (S. S. G. Borgerson, 2009). As stated earlier, the seas yield much of the food that feed us. They also serve as laboratories for scientific research and contain such enormous natural resources that can help sustain and foster economic development of various nations. Salt, sand, gravel, and some manganese, copper, nickel, iron and cobalt are some natural resources that can be found in the deep sea and drilled for crude oil. The seas also shape the planet's weather and climate through redistribution of heat from the tropics to cooler regions. They serve as massive sinks for carbon dioxide (CO_2) emissions, thereby slowing global warming. Above all today, with the improvements in technology, seaborne commerce has become the inchpin of the international economy especially with the discovery of the rich economic resources of the sea and the tremendous increase in the capacity to explore and exploit them.

In contrast however, the seas are a theater of conflict among nations, an arena in which traditional navies extend sovereign power, and a frontier where pirates, drug traffickers and human smugglers take place. In peacetime, the ability of national forces to navigate and overfly the seas is considered a critical deterrent to conflicts. (S. G. Borgerson, n). These odds are part of what the United Nations Convention on the Law of the Sea was established to address.

1.5 Development of International Conventions on the Law of the Sea in the 20th century

The foundation and formulation of the Law of the sea was led by the father of the Modern International Law, *Hugo Grotius* Dutch jurist and scholar (1583-1645). The Law of the sea is a body of international law which governs the rights and duties of States in maritime environments. Its major concern is on matters such as navigational rights, sea mineral claims, and coastal waters jurisdiction. Law of the sea is largely drawn from a number of international customs, treaties, and agreements. However, modern law of the sea derives largely from the United Nations Conference on the Law of the Sea including the 1956 and 1958 Conventions and lately, the United Nations Convention on the Law of the Sea (UNCLOS) 1982, effective since 1994. The UNCLOS has been generally accepted as a codification of customary international law of the sea, and is sometimes regarded as the "constitution of the oceans". The doctrine of freedom of the seas was followed for a long time which limited the rights of the Nations and their jurisdiction only over the narrow belt of which surrounds the coastline of a Nation. According to the principle, there is this

freedom by all nations to navigate the oceans in accordance also with the doctrine the open sea without any regulation. The open sea belonged to all but belonged to none.

1.6 Summary

What can be deduced from the above discussion is that the seas as a large body of waters play vital roles in the existence and sustenance of human and marine lives. The world seas are so rich in both living and non-living resources needed for economic development of the nations. However, the state of the sea is being seriously disrupted due to harmful activities of man which in turn affect both marine and human lives negatively.

In this unit, we have discussed

i. What the seas are
ii. The State/ nature of the sea
iii. The importance of the sea to man

1.7 References/Further Readings/Web Resources

1. C Schwarte& L Siegele, *Marine Protected Areas on the High Seas* (London: Field, 2008) p.1. <www.citeulike.org/user/highsea/article/2836920>.

2. S. G. Borgerson, 'The National Interest and the Law of the Sea', (2009) *Council on Region Relations Special Reports N0. 46*

3. Russell, F. S. *& Yonge, C. M. "The Seas: Our Knowledge of Life in the Sea and How It is Gained", (1929) The Geographical Journal. 73*

4. *Bruce C. Douglas, "Global sea rise: a redetermination", (1997) Surveys in Geophysics 18*

5. J Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (2011), p. 1.

1.8Possible Answers to Self-Assessment exercise

1. **The sea is important to the life of man on the earth in many ways:**

   i. It provides supplies of food to man in terms of fish and mammals
   ii. It is used as a medium of communication, trade and transportations
   iii. Man uses the sea for leisure activities such as swimming, sailing and scuba diving

iv. More so, with the advancement in technology, the discovery of the rich economic resources of the sea has been made possible and seaborne commerce has become the inchpin of the international economy.

2. The question of the nature of the sea tends to analysis the state of the sea as a result of various activities of man. It explains how the sea and its inhabitants react to the various activities of man that affect its state. Example, shipping and fishing in the sea have led to the pollution of the sea and thereby greatly affect its self-purification nature. In fact, the health, productivity and biodiversity of the marine environment are under a serious threat as a result of various human activities.

Unit 2: History and Sources of the Law of the Sea

2.1 Introduction

Law of the Sea is an aspect of international law which governs the rights, duties and responsibilities of States with regard to maritime environments (J Harrison, 2011). It addresses issues relating to navigational rights, sea mineral claims, and coastal waters jurisdiction. While drawn from a number of international customs, treaties, and agreements, the present legal regime of the sea derives mainly from the United Nations Convention on the Law of the Sea (UNCLOS), 1982 which became effective since 1994, and generally accepted as a codification of customary international law of the sea, and is sometimes regarded as the 'constitution of the oceans'.

2.2 Learning Outcomes

At the completion of this unit, it is expected that you will be able to:

i. Relate the history of the law of the sea
ii. State the sources of the law of the sea, and
iii. Appreciate the relation between the law of the sea and maritime law

2.3 History of the Law of the Sea

One of the earliest examples of legal codes concerning activities in the sea is the Byzantine *Lex Rhodia,* promulgated between 600 and 800 C.E. to govern trade and navigation in the Mediterranean Sea. Maritime law codes were also established during the European Middle Ages, including the Rolls of Oléron, which drew from *Lex Rhodia,* and the Laws of Wisby, promulgated among the mercantile city-states of the Hanseatic League.

However, the earliest known promulgation of *public* international law of the sea took place in Europe during the 17th century which stimulated unprecedented navigation, exploration, and trade across the world's oceans. Portugal and Spain spearheaded this movement, laying claims over both the land and sea routes they discovered. Spain considered the Pacific Ocean a *mare clausum*—meaning a "closed sea" off limits to other naval powers, part of which was to protect its possessions in Asia *(L. S Williams, 1992).* In the same way, as the only known entrance from the Atlantic, the Strait of Magellan was frequently patrolled by Spanish fleets to prevent entrance by foreign vessels. The papal bull *Romanus Pontifex* (1455) recognized Portugal's exclusive right to navigation, trade, and fishing in the seas near discovered land, and on this basis the Portuguese claimed a monopoly on East Indian trade, generating opposition and conflict from other European naval powers.

So, certain nations, particularly, the Portuguese in the seventeenth century proclaimed huge tracts of the high seas as part of their territorial domain. These arbitrary claims however generated conflict and competition especially over sea trade. This ultimately provoked a response by Dutch jurist and philosopher *Hugo Grotius* considered as the father of international law generally who elaborated the doctrine of the open seas, whereby, according to him, the ocean as *res communis* were to be accessible to all nations but incapable of appropriation by any nation. He wrote *Mare Liberum* (*The Freedom of the Seas*), published in 1609, which set forth the principle that the sea was international territory and that all nations were thus free to use it for trade. He premised this argument on the idea that "every nation is free to travel to every other nation, and to trade with it (G. Hugo, 1609). Thus, there was a right to innocent passage over land and a similar right of innocent passage at sea. Grotius argued that unlike land, on which sovereigns could demarcate their jurisdiction, the sea was akin to air being a common property of all. ‘The air belongs to this class of things for two reasons. First, it is not susceptible of occupation; and second its common use is destined for all men. For the same reasons the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries’.

The freedom of the seas rapidly became a cardinal principle of international law. However, not all the seas were so treated or characterized as it was permissible for coastal States to appropriate a maritime belt around its coastline as territorial water and treat same as an indivisible part of their territorial domain. States under the relevant provisions of the United Nations Convention on the Law of the Sea have the right to exercise jurisdiction over some maritime zones adjacent to their coast including the territorial Sea, Contiguous Zone,

Exclusive Economic Zone and the Continental Shelf. So, not every portion of the sea is free today as Grotius envisaged.

The first attempt to codify and promulgate a comprehensive legal regime of the sea was in the 1950s, not quite long after the Truman proclamation on the continental shelf. In 1956, the United Nations held its first Conference on the Law of the Sea (UNCLOS I) in Geneva, Switzerland, which led to the creation of four treaties concluded in 1958. Convention on the Territorial Sea and Contiguous Zone, entry into force in 10 September 1964

- Convention on the Continental Shelf, entry into force: 10 June 1964
- Convention on the High Seas, entry into force: 30 September 1962
- Convention on Fishing and Conservation of Living Resources of the High Seas, entry into force: 20 March 1966

The Convention on the Continental Shelf successfully codified proclamation of Truman as customary international law. While UNCLOS I was widely considered a success, its weakness lies in the fact that it left unattended the crucial issue of the extent of territorial waters. In 1960, the UN organised a second Conference on the Law of the Sea ("UNCLOS II"), but there was no truce at the conference (M. Thomas, 1978). The unresolved issue of divergent claims of territorial waters was raised at the UN in 1967 by Malta, making it imperative the third United Nations Conference on the Law of the Sea in New York City. In an attempt to reduce the possibility of groups of nation-states dominating the negotiations, the conference used a consensus process rather than majority vote. With more than 160 nations participating, the conference lasted until 1982, resulting in the UN Convention of the Law of the Sea, also known as the Law of the Sea Treaty, which defines the rights and responsibilities of sovereign States in their use of the seas.

Self-Assessment Exercise

1. In succinct form, discuss the principle of non-appropriation of the high seas as propounded by *Grotius Hugo*.

2. Briefly discuss the various sources of the law of the sea.

2.4 Sources of the Law of the Sea

i. The United Nations Convention on the Law of the Sea 1982

The Convention is by far the most known source of the law of the sea. In fact, many have viewed the Convention as the only statement and source of the law of the sea. Going by its elaborate provisions, size, scope and universal acceptance as customary international law which is binding on nations that do not specifically decline to adhere to the provisions, there is no gainsaying that it is the major source of the law of the sea. The Convention provides the overall legal framework for the governance of the sea and codifies such important principles such as freedom of the high sea, rights of states in exclusive economic zone etc. It is however, by no means the only definitive statement of the law of the sea as there are also other sources.

ii. International Customs

According to the Statute of International Court of Justice, international custom is an evidence of a general practice accepted as law and is a second source of international law. Custom, whose importance reflects the decentralized nature of the international system, involves two basic elements: the actual practice of states and the acceptance by states of that practice as law. The actual practice of states (termed the "material fact") covers various elements, such as the duration, consistency, repetition, and generality of a particular kind of behaviour by states. All such elements are relevant in determining whether a practice may form the basis of a binding international custom. The ICJ has required that practices amount to a "constant and uniform usage" or be "extensive and virtually uniform" to be considered binding. Also, in the *North Sea Continental Shelf* cases, ***(Federal Republic of Germany & Denmark; Federal Republic of Germany & Netherlands)* Judgment of 20 February 1969)**, the ICJ observed that the practice in question must have "occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

iii. Treaties

Article 2 (1) (a) of the Vienna Convention on the Law of Treaties defines a 'treaty' as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. It is an agreement between sovereign States and in some cases international organisations, which is binding at international law.

iv. International Agreement

v. These are formal understandings or commitments between two or more countries. An agreement between two countries is called "bilateral," while an

agreement between several countries is “multilateral.” The countries bound by an international agreement are generally referred to as “States Parties”.

vi. Juristic writings on the law of the sea and Judicial Decisions

Pursuant to Article 38(1)(d) of its Statute, the International Court of Justice is also to apply "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". It is difficult to tell however, what influence these materials have on the development of the law. Pleadings in cases before the ICJ are often replete with references to case law and to legal literature. The decisions of international and municipal courts and the publications of academics can be referred to, although not as a source of law per say, but as a means of recognizing the law established in other sources. In practice, the International Court of Justice makes reference to domestic decisions although it does invoke its previous case-law.

It should be noted that the rule of stare decisis does not apply in international law. Also, according to Article 59 of the Statute of the ICJ, the decision of the Court has no binding force except between the parties and in respect of that particular case. Nevertheless, often the Court would refer to its past decisions and advisory opinions to support its explanation of a present case. The International Court of Justice in a number of occasions will consider General Assembly resolutions as indicative of customary international law.

2.5 Relation of Law of the Sea with Maritime Law

The law of the sea and the maritime law are counterpart rules both of which are concerned with the affairs of the sea. Law of the sea is the public law counterpart to admiralty law (commonly referred to as maritime law), which applies only to private maritime cases, such as the carriage of goods by sea, rights of salvage, ship collisions, and marine insurance. Maritime law is concerned with maritime issues and disputes among private parties, such as individuals, international organizations, or corporations. Maritime law is primarily concerned and applies to private entities like ship owners, their employees, and any clients that they may have on board. Many of these laws have been in practice for decades, developing from various sets of rules and customs. On the other hand, the Law of the Sea involves more complex rules which govern the activities of States in relation to other countries concerning maritime issues. Unlike maritime law, the Law of the Sea was

codified in 1994's United Nations Convention on the Law of the Sea (UNCLOS) but both maritime law and the law of the sea stem from many other rules and customs.

2.6 Summary

The rule to regulate the activities of states in the sea became imperative as a result of arbitral, divergent and conflicting claims to portions of the sea by various States. The sea was thought to subject to appropriation without any regulation that is why the Portugal claimed a huge track of the sea as part of their territorial domain which claim provoked the promulgation of the law of the sea by Grotius Hugo wherein the sea was declared free for all. Although there are various sources of the law of the sea, the law largely derives from the United Nations Convention on the Law of the Sea. In this unit we have succinctly discussed the history of the law of the sea and also examined sources of the law of the sea which include the United Nations Convention on the Law of the Sea, international customs, treaties as well as international agreements. We explained maritime law which applies to private maritime cases unlike the law of the sea which covers the public international cases.

2.7 References/Further Readings/Web Resources

1. James Harrison, Making the Law of the Sea: A Study in the Development of International Law (2011), p. 1.
2. *Thomas E. Behuniak (Fall 1978). "The Seizure and Recovery of the S.S. Mayaguez: Legal Analysis of United States Claims, Part 1*
3. *The Oxford Handbook of the Law of the Sea. Oxford University Press. 2015-03-01.*
4. *The Truman Proclamation and the Rule of Law". Australia's Magna Carta Institute - Rule of Law Education. 2016-09-28*
5. *G Hugo, Mare Liberum [The Freedom of the Seas] (1609) in Latin, Lodewijk Elzevir. p. 7.*
6. *Lytle Schurz, William, "The Spanish Lake", (1922) the Hispanic American Historical Review, 5 (2): 181–94*

2.8 Possible Answer to Self-Assessment Exercise

1. The principle of non-appropriation of the high seas is a doctrine which according to *Grotius Hugo,* the father of international law, states that the sea as *res communis* is open and accessible to all nations and incapable of appropriation by any nation. The

sea is an international territory and so all nations were thus free to use it for trade. He premised this argument on the idea that "every nation is free to travel to every other nation, and to trade with it.

2. **Sources of the Law of the Sea include:**

   i. **The UNCLOS 1982**. This is the foremost source of the law of the sea. The UNCLOS has elaborate provisions with universal acceptance as customary international law binding also on nations that do not specifically decline to adhere to the provisions

   ii. **International Customs**. The ICJ states that international custom is an evidence of a general practice accepted as law and is a second source of international law.

   iii. **Treaties.** A treaty is an international agreement concluded between States in written form and is a source of the law of the sea.

   iv. **International Agreement.** This is a bilateral or multilateral formal understandings or commitments between two or more countries.

Unit 3: Delimitation of Maritime Zones

3.1 Introduction

Delimitation is a process which involves the division of maritime zone in a situation where two or more States have divergent and competing claims. The maritime zones of two States frequently meet and overlap, which necessitate that the line of separation has to be drawn in order to distinguish the rights and obligations between the States involved. The sea generally is divided into various zones as we will discuss in this unit.

3.2 Learning Outcomes

At the completion of this unit, you are expected to be able to:

i. Know and state the different maritime zones
ii. Explain the different maritime zones
iii. Gain knowledge and understanding of the rules/principles of delimitation

3.3 Different Maritime Zones

i. Internal Waters

A nation's internal waters according to the provisions of *Article 8* of the United Nations Convention on th Law of the Sea, means the waters on the side of the baseline of a nation's territorial waters that is facing toward the land, with the exception of archipelagic states. Waterways such as rivers and canals, and sometimes the water within small bay are some of the examples of internal waters and a State can exercise full sovereignty here as over its land territory.

ii. Territorial Sea and Contiguous Zone

In a general usage, the term territorial waters is sometimes used informally to cover any area of water over which a state can exercise sovereignty such as internal waters, the territorial sea, the contiguous zone, the exclusive economic zone and potentially the continental shelf. However, in a narrower sense, the term is used in synonymous with 'territorial sea'. Territorial sea therefore means a belt of coastal waters extending at most 12 nautical miles (22 km; 14 mi) from the baseline of a coastal state. In international law, territorial sea is that area of the sea immediately adjacent to the shores of a state and which is subject to the territorial sovereignty of that state. Territorial sea can be distinguished on the one hand from the high seas, which are free and open to all countries, and on the other from internal or inland waters, such as lakes wholly surrounded by the national territory. The UNCLOS regards the territorial sea as part of the sovereign territory of a coastal State (Art. 2, UNCLOS 1982).

The concept of territorial waters, according to history resulted from the controversy over the status of the sea in the early days of modern international law during the seventeenth century. Although the doctrine of open sea later became widely recognised, most commentators believed that, as a practical matter, a coastal states needed to exercise some jurisdiction in the waters adjacent to their coast. *Two different concepts developed—that the area of jurisdiction should be limited to cannon-shot range, and that the area should be a much greater belt of uniform width adjacent to the coast—and in the late 18th century these concepts coalesced in a compromise view that proposed a fixed limit of 3 nautical miles (1 marine league, or 3.45 statute miles [5.5 km])* (High Seas, Maritime Law by editors of Encyclopedia Britannica). In 1793 the United States adopted three miles for neutrality purposes, but although many other maritime states during the 19th century came to recognize the same limit, it never garnered such universal acceptance as to form part of customary international law.

At the process of time, it became settled that the coastal state can assert full sovereignty over the belt of territorial sea, together with the seabed and subsoil beneath it and the airspace above. The universally recognized width of the belt of territorial sea is 12 nautical miles as set out in *Article 3* of the UNCLOS.

In the case of the delimitation of the territorial sea between States with opposite or adjacent coasts, the Convention requires that none of the States involved should, except there is an agreement between them to the contrary, extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. *Article* 15 of the Convention specifically provides that:

> *Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.*

The contiguous zone is a band of water extending farther from the outer edge of the territorial sea to up to 24 nautical miles (44.4 km; 27.6 mi) from the baseline, within which a state can exert limited control for the purpose of preventing or punishing "infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea". Unlike the territorial sea, the contiguous zone must be claimed as it does not exist automatically. The coastal states have to exercise the control necessary to prevent and or punish infringements of customs, sanitary, fiscal, and immigration regulations within and beyond its territorial sea. In every other respect, the contiguous zone is an area subject to high seas principle of freedom of navigation, overflight, and related freedoms, such as the conduct of military exercises.

iii. Bays

A bay is defined as a recessed, coastal body of water that directly connects to a larger main body of water, like an ocean, a lake, or another bay. A large bay is usually called a gulf, sea, sound, or bight. A cove is a type of smaller bay with a circular inlet and narrow entrance (*Dictionary.com Unabridged. Random House, Inc.*). *According to Article 10 (2) of the Convention,* 'a bay is a well-marked indentation whose penetration is in such

proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation'.

iv. Habour works and Roadsteads

Harbours and sea works refers to any part of a body of water and the artificial structures surrounding it that effectively shelters a vessel from wind, waves, and currents thereby ensuring safe anchorage or the discharge and loading of cargo and passengers. Roadstead is a body of water sufficiently sheltered from rip currents, spring tides or ocean swell enabling the ships lie firmly at anchor without dragging or snatching. Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea (*Art. 12, UNCLOS 1982*).

v. International Straits and Waterways

International straits refer to straits which are within the territorial sovereignty of a certain state, but which are used for international navigation and so are subject to special rules of international law aimed at securing the rights of passage for vessels registered in foreign states. It is a strait used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic. See *United Nations Convention on the Law of the Sea, Arts. 34 – 36.* International waterways are the narrow channels of marginal sea or inland waters through which international shipping has a right of passage. They are straits, canals, and rivers that connect two areas of the high seas or enable ocean shipping to reach interior ports on international seas, gulfs, or lakes that otherwise would be land-locked. International waterways also may be rivers that serve as international boundaries or traverse successively two or more states.

vi. The High Seas

Under the Law of the Sea, high seas include all parts of the mass of saltwater surrounding the world that do not form part of the territorial sea or internal waters of any nation. It is referred to as international waters. *See Article 36 of the United Nations Convention on the Law of the Sea, 1982.* In the past for many centuries ago, beginning in the European Middle Ages, many maritime states asserted sovereignty over large portions of the high seas until Hugo Grotius propounded the doctrine of the high seas states that the high seas in time of peace are open to all nations and no portion can be appropriated by any nation.

vii. The Continental Shelf

This is part of land territory a continent that is submerged under an area of relatively shallow water referred to as a shelf sea. The shelf surrounding an island is known as an insular shelf. The definition of the continental shelf and the conditions under which a coastal State may establish the outer limits of its continental shelf are outlined in *article 76 of the United Nations Convention on the Law of the Sea, 1982*. '*The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance*' (Art. 76 [1], UNCLOS 1982).

viii. Exclusive Economic Zone

This is an area of coastal water and seabed within a certain distance of a country's coastline as permitted by, to which the country claims exclusive rights for fishing, drilling, and other economic activities. It is a sea zone prescribed by the 1982 United Nations Convention on the Law of the Sea, 1982 over which a sovereign state has special rights relating to the exploration and use of marine resources, including energy production from water and wind. The *UNCLOS* defined the zone as 'an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention' (*Art. 55 of the UNCLOS*). The difference between the territorial sea and the exclusive economic zone is that whereas in the territorial sea a coastal state exercises full sovereignty over the waters, in the exclusive economic zone the state has a mere sovereign right which refers to the coastal state's rights below the surface of the sea.

ix. The Seabed and Subsoil

Seabed is also referred to as seafloor or ocean floor and means the bottom of the ocean, no matter how deep. It is the he solid surface of the earth that lies at the bottom of the sea. The Convention refers to it as an 'Area'. "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (Art.1 para. 1 of UNCLOS).

Self-Assessment Exercise 1

1. Identify the need for the delimitation of maritime boundaries among coastal States.
2. Explain the reason behind the rule of proportionality in the delimitation of maritime coasts

3.4 Delimitation of Maritime Zone

The maritime delimitation entails a complicated process because of both the number of real and potential situations involved, and the complexities of the delimitation procedure especially in cases like extended continental shelf. The delimitation process itself involves a number of issues ranging from the source of authority or jurisdiction, the methods by which delimitation is carried out, to the issue of technical questions regarding the determination of the actual lines in space (L. M. Alexander, 1986).

Those maritime zones of States frequently meet and overlap, thereby creating the need for the line of separation to be drawn to distinguish the rights and responsibilities of each State involved. Delimitation therefore puts limits to the sovereign rights of the States regarding the exploitation and use of the sea resources. It is worthy of note that maritime boundary delimitation is an essential precursor to the full realisation of the resource potential of national maritime zones and the peaceful use management of the seas. Regarding the seabed resources, which could prove crucial to the economic well-being and political stability of various coastal States, divergent and overlapping claims hamper development where maritime boundaries remain unsettled (Prescott V and Schofield C, 2005). This underscores the need for the delimitation of maritime boundaries in order to forestall conflicts among States with overlapping maritime boundaries.

Under the international law, delimitation of maritime zones is primarily by agreement through negotiation. The negotiating process is very important for reaching agreement. The delimitation process must be effected by agreement between parties on the basis of international law, as provided by the United Nations Convention on the Law of the Sea 1982. Accordingly, *Article 74 paragraph 1* of the Convention provides that, *the delimitation of the exclusive economic zone/continental shelf with the opposite or adjacent coasts shell be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.*
On the Delimitation of the territorial sea between States with opposite or adjacent coasts, *Article 15* of the Convention states that:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

The Convention enjoins the State parties to reach agreement through negotiation. However, where agreement could not be achieved within a reasonable period, the parties are encouraged to reach provisional agreement pending the final agreement, all in the spirit of understanding and cooperation. Once an agreement has been concluded and in force between the States concerned, questions regarding the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement. *See Article 74 (2) to (4).*

For the delimitation of the continental shelf between States with opposite or adjacent coasts, *Article 83* of the Convention stipulates thus:

> 1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
>
> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
>
> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

It should be noted that the fundamental procedural principle of general application that forms part of the doctrine of the International Court Justice, as indicated in 1982 United Nations Convention on the Law of the Sea is the principle of effecting maritime boundary delimitation by agreement. This principle constitutes a special application of the general principle of peaceful settlement of international disputes which emphasises on State obligation to negotiate in good faith with spirit of understanding and cooperation with a view to conclude agreement.

3.5 Legal Principles and Methods for Delimitation of Maritime Zones

The delimitation of maritime boundaries between States with adjacent coasts can be undertaken using the following principles and methods:

Self-Assessment Exercise 2

1. Discuss the principle of equidistance

i. Equidistance

Equidistance in the wordings of *Article 15* of the UNCLOS is defined as "…*the line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each of the two States is measured…*" See also *Article 12* of the 1958 Territorial Sea Convention. The 1958 Continental Shelf Convention also defined equidistance in a similar way. This Convention uses the term "median line" for an equidistant line between opposite States and refers only to a boundary determined by application of the principle of equidistance in the case of adjacent States (Article 6 1958 Geneva Convention on the Continental Shelf). The understanding here is that the use of equidistance methods depends on the baselines along the coasts of the concerned States whose offshore areas are to be separated by the boundary. There may be difficulties here if one State utilizes normal baselines,

following the sinuosities of the coasts, and the other adopts a straight baseline system connecting the outermost islands, promontories and rocks (L. M. Alexander, 1986).

The 1958 Conventions made the use of the equidistance method obligatory in the absence of an agreement, historical titles or special circumstances. This was called the combined equidistance/special circumstances rule. The application of the principle of distance gives pertinence in normal situations to the equitable method of the equidistance/median line (N Dundua, 2006-2007). However, notwithstanding the recognition of the principle of distance as the basis of entitlement to both the exclusive economic zones (EEZ) and the Continental shelves within 200 nautical miles, the privileged role of equidistance was seriously objected by the International Court of Justice (ICJ) and dissenting judges (Barbara, 1988). The privileged status of equidistance method was diluted by the ICJ and arbitral tribunals, it was considered as a method which in some cases may lead to inequitable and unreasonable results. In the majority of cases, it was declared that equidistance was not a binding rule of law, but merely one method among others and it was not regarded as part of customary international law which plays the major role in delimitation process. The defects of the equidistance principle, even tempered by the notion of special circumstances, resulted in its diminution. The disregard for equidistance method went so far that the terms "equidistance" and "median line" have disappeared from the wordings of *Article 74* and *83* of the 1982 Convention on the Law of the Sea which provide for the delimitation of the exclusive economic zone and continental shelf respectively. The principle was however retained in *Article 15* of the 1982 Convention on the delimitation of territorial sea.

It should be noted however, that despite the diminished status of equidistance, it is still part of State practice. The majority of bilateral treaties on maritime delimitation still use a line based on simplified or modified equidistance. In a number of cases, governments begin the negotiations by considering an equidistance line, which they may subsequently modify as circumstances may call for (Nelson L.D.M, 1990). Even in most ICJ cases and arbitral awards, judges found it very convenient to use the equidistance line as the starting point in the delimitation process. In recognition of this, Judge *Jimenes De Arechaga* declared in the 1982 ICJ Continental shelf case (Tunisia/Libyan Arab Jamahiriya) that "*naturally, in all cases the decision-maker looks at the line of equidistance, even if none of the parties has invoked it."* Accordingly, the point of departure should be the line of equidistance, which should be altered only if it is found to produce inequitable results.

The first case came before the International Court of Justice (ICJ) in 1969 was the case between three adjacent States that is the *North Sea Continental Shelf Case* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment of 20 February, 1969. The case started the demolition of the equidistance principle. After this case, the principle ceased to be the only and obligatory principle and became merely one method among others. The parties requested the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out delimitations on that basis. The Court rejected the argument of Denmark and the Netherlands to the effect that the delimitations in question had to be carried out in accordance with the principle of equidistance as defined in *Article 6* of the 1958 Geneva Convention on the Continental Shelf. The court decided *inter alia*

> That the Federal Republic, which had not ratified the Convention, was not legally bound by the provisions of *Article 6;*
>
> That the equidistance principle was not a necessary consequence of the general concept of continental shelf rights, and was not a rule of customary international law.

While rejecting the contentions of Denmark and the Netherlands, the Court considered that the principle of equidistance, as codified in *Article 6* of the 1958 Geneva Convention on the Continental Shelf, had not been proposed by the International Law Commission as an emerging rule of customary international law.

It should be noted that the court refused to adopt this method here because it found the use of the equidistance line inapplicable in the present case after taken into account the particular coastal configuration of States concerned. The coasts of Denmark and the Netherlands were convex, while that of the Federal Republic of Germany was concave. In such a case, the use of equidistance left Germany an exceptionally small part of the North Sea Continental Shelf and the delimitation process would not produce an equitable result.

The Court however, commented that it *"has never been doubted that the equidistance method of delimitation is a very convenient one"* and that "it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application".

The second case brought before the Court involving adjacent States was in 1982, concerning the delimitation of the continental shelf between *Tunisia and Libyan Arab Jamahiriya*. The two parties requested the Court to clarify what are the principles and rules of international law which may be applied for the delimitation of a Continental Shelf between two States and during the process to apply equitable principles and relevant circumstances, as well as recent trends admitted at the United Nations Convention on the Law of the Sea, 1982. The parties further requested the Court to show the practical way to apply the indicated rules and principles so as to enable the experts of the two States to delimit those areas without any troubles.

Regarding the use of equidistance, the Court reviewed the developments since the 1969 North Sea Continental Shelf Case involving adjacent States and concluded that:

> Treaty practice, as well as the history of *Article 83* of the draft convention on the Law of the Sea, leads to the conclusion that equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed.

ii. Equity and the equitable principle

The notion of equity is at the core of the delimitation of exclusive economic zone and the continental shelf. Accordingly, *Articles 74* and *83* of the 1982 Convention on the Law of the Sea concerning the delimitation of the exclusive economic zone and the continental shelf require that delimitation should be effected by agreement, in accordance with international law and in order to achieve an equitable result.

The International Court of Justice and arbitral tribunals have tried in many occasions to determine the concept of equity:

> Equity as a legal concept is a direct emanation of the idea of Justice. The Court is bound to apply equitable equity as a part of general international law. When applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice (1982 Tunisia/Libya case Par. 71).

The Court added further that *"it is not a question of applying equity simply as a meter of abstract justice, but of applying a rule of law"* during the 1969 North Sea case, and later, during the 1985 Libya/Malta case, the court reaffirmed that *"the Justice of which equity is an emanation, is not abstract justice but justice according to the rule of law."* It therefore appears that equity is applied by the Courts as a part of international law and as a rule of law for the delimitation of the Continental Shelf. In an explanation as to why the law made equity its own, and perhaps to give it more force, the Judgments emphasize that law and equity are close because they start from, and give expression to, the same idea which is the idea of *justice*. The understanding from the Court's jurisprudence is that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind while carrying out the delimitation (2002 Cameroon/Nigeria case. Par. 294).

The difficulty associated with the idea of equity is that it does not provide any precise principle or criteria for the achievement of an equitable result. Regarding the delimitation of exclusive economic zone and continental shelf, the 1982 Convention provides only a goal which must be achieved and makes no provisions concerning how to achieve the result. This impreciseness made some scholars to argue that there is a loss of normativity in the idea of equity and this idea allows the level of normativity to rise and fall (Kolb R. 2003). The definition of equitable principles is closely related to the idea of *unicum*, implying that geographical features of each delimitation case varied so greatly that it will be always nearly impossible to posit any fixed principles applicable for the establishment of maritime boundaries between States. The jurisprudence of the ICJ and arbitral tribunals has lead significant credence to the idea of the uniqueness of each maritime boundary.

iii. Single maritime boundary

As a consequence of the establishment of the exclusive economic zone, the trend among many States is to adopt, in the interest of simplicity, certainty and convenience, a single maritime boundary to divide their maritime zones beyond the territorial sea. With regard to adjacent coasts, a line drawn seaward from the coast will usually separate only the territorial waters of the two States for the first twelve nautical miles. Beyond that, depending on the agreement between the States, the same may separate the two maritime zones between them (P. Surya, 1987).

The recourse to the single maritime boundary is supported by the parallelism and similar character between the exclusive economic zone and the continental shelf up to 200 nautical miles. Under the 1982 Convention on the Law of the Sea, particularly

Articles 57 and *76*, the 200 nautical mile distance criterion governs the attribution of legal title to both the exclusive economic zone and the continental shelf in cases where the continental margin extends up to 200 nautical miles. Furthermore, referring to *Article 56* of the Convention, the notion of the exclusive economic zone comprises both the sea-bed and water column and the provision relating to the continental shelf is nearly identical to the corresponding rights and duties of States in their exclusive economic zone regarding the sea-bed resources, artificial islands, and scientific research. The wordings of *Articles 74* and *83* concerning the delimitation of the exclusive economic zone and continental shelf are similar also. The establishment of the distance criterion by the ICJ in the 1985 *Libya/Malta case* as the sole basis of title to the sea-bed and subsoil within 200 nautical miles equally gives support to the single maritime boundary between the two zones.

iv. Proportionality

The concept of proportionality plays a very significant role in various spheres of international law and the law of the sea, and in particular maritime delimitation. *Some rules of international law leave judgment on the legality of an act to the consideration of the specific situation of the case, and offer only a general notion of the criteria for evaluation. One of these rules is the concept of proportionality* (N Dundua, 2006-2007). Many judgments relating to the delimitation of maritime zone have taken into consideration the concept of proportionality. The concept of proportionality explains that, maritime delimitation should be effected by taking into consideration the ratio between the water and continental shelf areas attributed to each party and the length of their respective coastlines. The implication is that, the Court and tribunals have to estimate roughly, or calculate exactly, the lengths of the relevant coastlines and compare that ratio to the ratio of the provisionally delimited relevant water and continental shelf areas. In case the proportion of the relevant maritime zones does not roughly coincide with the relative length of the coastlines, further analyses or adjustment would be needed and considered (Charney, 1994). However, the concept of proportionality was not considered in every ICJ case and arbitration tribunal award.

According to the ICJ in the *1969 North Sea case,* there are three geographical features that would justify having the recourse to the rule of proportionality. These include:

1) The coasts of the States concerned are adjacent to each other;
2) The coastlines of the FRG are concave; and

3) The coastlines of the States abutting on the North Sea are comparable in length.

The idea surrounding the rule of proportionality was to use it as a corrective measure for inequitable results in order to avoid an unreasonably inequitable result deriving from geographical peculiarities of the coasts. Also, it should be noted that the Court viewed proportionality not as a distinct principle of delimitation, but as one of the means of ensuring delimitation in accordance with equitable principles, meaning that, proportionality is a test of the equity.

3.6 Summary

The seas as we have seen in this unit are delineated into different zones majorly for the purpose of jurisdiction and governance. Although these zones were not sufficiently addressed in the earlier conventions on the law of the sea (1958 Conventions on the Law of the Sea Geneva, 29th April 1958) the present legal regime of the sea has carefully treated these zone with their juridical nature and has provided principles and rules to be followed in the delimitation exercises. In this unit, we have discussed the relevant maritime zones and their meanings. We also considered the various methods of delimitation of maritime boundaries and the disposition of courts in their applications.

3.7 References/Further Readings/Web Resources

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3.8 Possible Answer to Self-Assessment Exercise 1

A) i. Where the maritime zones of States meet and overlap, delimitation becomes important to draw the line of separation in order to distinguish the rights and responsibilities of each State involved.

ii. Delimitation puts limits to the sovereign rights of the States regarding the exploitation and use of the sea resources.
iii. This is essential to forestall conflicts and ensure the full realisation of the resource potential of national maritime zones and the peaceful use management of the seas.

B) The idea behind the rule of proportionality is to use it as a corrective measure for inequitable results in order to avoid an unreasonably inequitable result deriving from geographical particularities of the coasts involved.

Possible Answer to Self-Assessment Exercise 2

1. The principle of equidistance is a method of maritime zone delimitation by which the line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each of the two States is measured. This in line with *article 15* of the UNCLOS. The use of equidistance methods would largely depend on the baselines along the coasts of the concerned States whose offshore areas are to be separated by the boundary. Although this principle has been held sacrosanct for as the only method of maritime delimitation, it is no longer so today as other principles of delimitation have been developed and applied by courts.

Unit 4: Juridical Nature of the Relevant Zones of the Sea

4.1 Introduction

The Geneva Conventions on Territorial Sea and Contiguous Zone, Continental Shelf and High Sea, and the United Nations Convention on the Law of the Sea (UNCLOS) adopted on 29 April 1958 and 10 December 1982 respectively, have been widely recognized as universal legal documents on the seas. These Conventions provide a comprehensive legal regime for the international waters and delineated marine space into different recognized zones and set out the rights, duties as well as responsibilities of sovereign States within the zones. These maritime zones include internal waters, territorial and contiguous zone, exclusive economic zone and continental shelf which are to be established by the States. The Conventions equally set out the rights and responsibilities of the States concerning the management and governance of their activities including protection and preservation of natural resource in the zones (M. Ravin, 2005). In addition to this, the States enjoy their

rights in the Area and High Sea which are beyond their national jurisdiction, majorly for the purpose of exploration and exploitation. We will examine briefly the interests of States in these zones and their rights and obligations over these areas.

4.2 Learning Outcomes

At the completion of this unit, you are expected to be able to:

i. Explain the juridical nature of the relevant maritime zones
ii. Explain the power and jurisdiction of the States in the sea zone within their territorial jurisdiction
iii. State the rights and obligations of States in the Areas beyond national jurisdiction

4.3 Internal Waters

The United Nations Convention on the Law of the Sea, provides that a nation's internal waters include waters on the side of the baseline of a nation's territorial waters that is facing toward the land, except in archipelagic states. These include waterways such as rivers and canals, and sometimes the water within small bays. See *Article 8* of the Convention. States possess equal sovereignty in their internal waters to that which they can exercise on their land territory. Coastal states are therefore free to make laws with regard to their internal waters, regulate any use, and use any resource. Except there is an agreement to the contrary, foreign vessels have no right of passage within a State’s internal waters, and this lack of right to innocent passage forms the major difference between internal waters and territorial waters (UNCLOS Part II, Art. 2). The "archipelagic waters" within the outermost islands of archipelagic states are akin to internal waters although in this case, innocent passage must be allowed but the archipelagic state has the right to designate certain sea lanes in these waters. When a foreign vessel is authorized to enter internal waters, it is subject to the laws of the coastal state, with one exception that the crew of the ship is subject to the law of the flag state.

Self-Assessment Exercise

1. Discuss the differences between the territorial sea and the exclusive economic zone in relation to the coastal States’ jurisdiction.
2. Briefly discuss the concept of innocent passage
3. Who exercises jurisdiction over the high seas?

4.4 Territorial Sea and Contiguous Zone

The Territorial sea can be defined as an area extending from internal waters to the sea- ward side which in this present law of the sea extends up to twelve nautical miles. The territorial sea gradually snowballed from early assertion that the coastal State had special interests in waters adjacent to its shores for some purposes. With the passage of time, the various interests in combination culminated into "sovereignty" over a "territorial sea" (L Henkin et al, 1987). The claim for Coastal States full sovereignty over their territorial sea has been based on the need to protect their territorial interests against any form of aggression.

The coastal State therefore, in accordance with the United Nations Convention on the Law of the Sea, possesses sovereignty and exercises jurisdiction over territorial sea which jurisdiction equally extends to the air space above the territorial sea, its bed and subsoil. *Article 2* of the Convention provides that:

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

On the rights and duties of coastal States in the territorial sea *Articles 24* and *25* of the Convention provide respectively as follow:

Article 24 provides that:

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:

(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
(b) discriminate in form or in fact against the ships of any state or against ships carrying cargoes to, from or on behalf of any State.

> 2. The coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.

From the above provisions, it is understood that the sovereignty of coastal State over the territorial sea is qualified only by a right of innocent passage. That is, right of peaceful transit for merchant vessels of other States not prejudicial to the good order or security of the coastal state. It is a concept in the law of the sea that allows for a vessel to pass through the territorial waters of another state, subject to certain restrictions. The right of innocent passage does not however cover submerged submarines, aircraft, nor does it include a right to fish.

For a passage to be innocent, the Convention places several restrictions on the vessel transiting through the territorial sea of other state. For instance, *Article 19 (2)* of Convention stipulates that:

> passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal state and thus in non-innocent passage if, in the territorial sea (less than 12 nautical miles from shore), it engages in any of the following activities:
>
> (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
>
> (b) any exercise or practice with weapons of any kind;
>
> (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
>
> (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
>
> (e) the launching, landing or taking on board of any aircraft;
>
> (f) the launching, landing or taking on board of any military device;
>
> (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of willful and serious pollution contrary to this Convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.

It seems that the mere carriage of weapons, locked or stowed, cannot be considered as a violation of paragraph 2 (b). Similarly, the use of a weapon in a *bona fide* self-defense situation against genuine threats of piracy, armed robbery or terrorism would also not classify as an exercise or practice under this article.

Also, in the modern maritime security context, where a vessel defends itself against *bona fide* pirate or terrorist threats that cannot constitute a use of force against the coastal state because the attackers are *hostis humani generis*, or enemies of all mankind, and are thus subject to universal jurisdiction. Consequently, engaging in genuine self-defense against pirates would not necessarily be a violation of innocent passage.

Establishment of non-innocent passage can be challenging any way. One of the most challenging enforcement activities for a coastal state is establishing without doubts that a foreign ship is in non-innocent passage. Some commentators of UNCLOS, specifically concerning physical and environmental security, believe that actual damage must occur before a coastal state can declare the passage of a ship in its territorial sea non-innocent. Where a ship is wrongly accused, the ship or charterer can hold coastal state responsible for damages.

Article 25 which stipulates for the rights of coastal States provides that:

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.
2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

The Convention however provides that the sovereignty over the territorial sea must not be exercised arbitrarily by the coastal States but must be in conformity with the clear provisions of the Convention. It therefore states in *Article 2 (3)* that "the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law".

For contiguous zone, the 1982 United Nations Convention on the Law of the Sea, grants the coastal States rights to establish their contiguous zone which is adjacent to the territorial sea. The Convention in its *Article 33* states that the contiguous zone may extend up to but not beyond 24 nautical miles from baseline from which the territorial sea is measured. The establishment of contiguous zone is aimed at preventing violation of laws and regulations within the coastal State's territorial sea.

The Convention provides that in contiguous zone, the coastal State may exercise control necessary to:

a. Prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea;
b. Punish infringement of the above laws and regulations committed within its territory or territorial sea.

A coastal State can exercise its rights in a contiguous zone to defend its interests by stopping foreign ship suspected of offending against its laws and regulations, in order to search, inspect or punish the offenders. All these rights should however be exercised with caution as they do not in any case change the legal status of the zone as part of the high seas.

4.5 Bays

Bays constitute one of the more complex maritime features. A bay is defined as a large indentation in a shoreline. This can become an issue with straight baselines as States may

try to characterise large bays as internal waters to project maritime boundaries and thereby control over-flight access. To prevent this, the Convention defines a bay as "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation" (UNCLOS Art. 10). The level of control a State has over a bay is determined by the distance between the low-water line on either side of the bay's entrance. If the entrance is equal to or less than 24 miles wide at low-tide then a State can draw a straight baseline across the entrance, effectively making the entire bay internal waters. If the entrance is more than 24 miles wide, a State can only draw a straight baseline 24 miles across the bay in a way that maximizes the area of internal waters. However, the so-called "historic" bays, such as the Chesapeake Bay, are not subject to this provision.

4.6 International Straits and Waterways

We defined international straits under unit 3 to mean, 'straits which are within the territorial sovereignty of a certain state, but which are used for international navigation and so are subject to special rules of international law aimed at securing the rights of passage for vessels registered in foreign states'. The above definition indicates that the straits are within the territorial sovereignty of coastal states. By this, it is logical to argue that since the coastal states enjoy full sovereignty within their internal waters and the straits are within this zone they would exercise control in the straits. In general, therefore, there seems to be no right of navigation for foreign vessels through internal waters even under customary international law notwithstanding the often-quoted dictum that "...the ports of every state must be open to foreign vessels and can only be closed when the vital interest of the state so requires" (R. R. Churchhill and A. V. Lowe, 1999). However, the coastal states are expected not to unnecessarily and unreasonably forbid navigation in its internal waters. Where there is unnecessary closure, or conditions of access to ports are grossly unreasonable or discriminatory, it might be held to amount to an *abus de droit*, and the coastal state might be internationally responsible even where there was no right of entry to the port (Churchill and Lowe, 1999).

4.7 The High Seas

This is an area beyond the limit of national jurisdictions and therefore excluded from States claims and sovereignty. Under *Article1,* 1958 Convention, the high seas began where territorial sea ends, however, in the equivalent *Article 86* of 1982 Convention the concept of the high seas is a more limited one in that it applies only beyond the limit of the exclusive

economic zone. The high seas are open to all States, whether coastal or landlocked States and are reserved for peaceful purpose. No States can therefore lay claim to any portion of the high seas.

Study reveals that the legal concept of the high seas began to be developed in the 17th century. In fact, during in 1608 the Dutch jurist, philosopher, poet and playwrite *Hugo Grotius* published his book *Mare Liberum*, meaning; 'Freedom of the Seas'. The book justified the Netherland's trading activities in the Indian Ocean and formulated the principle that beyond a limited area under national jurisdiction, the use of the seas was free for all nations (F. O. Agama PhD Dissertation, 2016).
By the first half of the 19th century, the recognition of the high seas as an area exempt from claims to State sovereignty had, with some exceptions, become generally accepted. The implication of that principle is that no State had the right to prevent ships belonging to other States from using the high seas for any lawful purpose. What constitutes lawful purpose is nowadays essentially determined by the United Nations Convention on the Law of the Sea, (UNCLOS).It follows that, as with outer space and celestial bodies, the high seas are considered *re communis omnium*, or 'things common to all', and are not subject to the sovereignty of any State, apart from general acquiesce that States are bound to refrain from any acts which might adversely affect the use of the high seas by other States or their nationals, including navigational rights (Art. 90 UNCLOS). This constitutes the rights and duties of states in the high seas.

It follows therefore that the high seas are purely free from national jurisdiction and no nation can acquire or appropriate any part of the high seas as forming part of its territory. This general rule however is subject to the operation of the doctrines of recognition, acquiescence and prescription, where, by long usage accepted by other nations, certain areas of the high seas bounding on the territorial waters of coastal States may be rendered subject to that State's sovereignty (M N Shaw, 2004). This was emphasized by the Court in the *Anglo-Norwegian Fisheries Case* (1951 ICJ Reports, p.116). Every State whether coastal or land-locked has free access to the high seas in accordance with the provision of *Article 87* of the 1982 Convention on the Law of the Sea. They have the freedom of navigation, over flight, freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations permitted under international law, and lastly, freedom of fishing and scientific research. These freedoms are to be exercised by States with due regard to the interests of other States in their exercise of the freedom of the high seas (UNCLOS, Art. 87(1) & (2)). Also, in addition to those freedoms mentioned in *Article 87* of the 1982 Convention is the freedom to use the high sea for weapon testing and naval exercises.

One may ask, since the high seas are declared to be beyond national jurisdiction, how is jurisdiction exercised there, who exercises jurisdiction and upon whom. Because the use or exercise of freedom to use the high seas is strictly with due regard to the rights of other users of the seas who are equally entitled to enjoy the same freedom, the issue of jurisdiction cannot be completely ruled out in the high seas. It should be emphasised that the foundation of the maintenance of order on the high seas has rested upon the concept of the nationality of the ship and the consequent jurisdiction of the flag State over the ship. It is, basically, the flag State that enforces the rules and regulations both of its own municipal law and that of international law on the high seas. *Article 82 paragraph 2* of the Convention provides that *these freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.*

4.7.1 Continental Shelf

The continental shelf can be defined as a geological expression referring to the ledges that project from the continental landmass into seas and which are covered with only a relatively shallow layer of water (some 150- 200 meters) and which eventually fall away into the ocean depths some thousands of meters deep (M N Shaw, 2004) p. 521. The ledges or shelves take up some 7 to 8 percent of total area of ocean and their extent varies considerably from place to place. The 1982 Convention describes continental shelf as:

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.
3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

With regard to coastal state's power, the court reiterated in the *North Sea Continental Shelf Case Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands* (1969) ICJ Reports, pp.3, 22; 41 ILR, pp.29,51 that:

> The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio,*by virtue of its sovereignty over the land and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short there is here an inherent right.

The United Nations Convention on the law of the Sea, 1982 grants the coastal State sovereign rights over the continental shelf for the purposes of exploring and exploiting its natural resources. Such rights are exclusive in that no other State may undertake such activities without prior and express authorization from the coastal State (UNCLOS, Art. 77).

4.7.2 Exclusive Economic Zone

Article 55 of the Convention defines Exclusive Economic Zone as 'an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention'. This definition reveals that in the Exclusive Economic Zone, there are shared rights and jurisdictions between coastal States and their neighbouring States especially the geographically disadvantaged States. It follows that coastal States, unlike what obtains in the territorial seas, lack absolute sovereignty over their exclusive economic zone. A coastal State can only exercise jurisdiction with respect to exploitation of the natural resources within its exclusive economic zone and as it regards other activities such as marine research and conservation of the living resources of the zone. Unlike the case with territorial sea, other States have freedom of navigation and over-flight within the exclusive economic zone.

4.7.3 The Seabed and Subsoil

This zone is known as the **'Area'.** It is the deep seabed adjacent to the continental shelf which lies beneath the high sea. The seabed is beyond national jurisdiction and its resources are declared the common heritage of mankind (Art. 136, UNCLOS). The implication is that no State or juridical person shall exercise the sovereignty or sovereign rights over any part of the Area or its resources (Art. 137, UNCLOS). The Area is therefore open to use

exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the relevant provisions of the Convention under the supervision and control of the International Seabed Authority (ISA) established under *section 4* of this Convention.

4.8 Summary

From our discussion in this unit, we understand that marine space is divided into various zones. In some of these zones, coastal States can exercise full and exclusive sovereignty in relation to others States rights. In other zones, the sovereign rights of these States are limited in some ways whereas in yet other zones such as the high seas and seabed, States have no jurisdiction whatsoever save as it relates to the ships that fly their flags and other rights recognized under the Convention. In this unit, we have discussed: The juridical nature of the various zones of the sea and states' rights and responsibilities in these sea zones.

4.9 References/Further Readings/Web Resources

1. M Ravin, *Law of the Sea, Maritime Boundaries and Dispute Settlement Mechanisms* (Germany: Nippon Foundation, 2005) p.5.

2. M. N. Shaw *International Law (5th edn Cambridge: Cambridge University Press, 2004)* p. 543.

3. *Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands* (1969) ICJ Reports, pp.3, 22; 41 ILR, pp.29,51

4. R. R. Churchill and A. V. Lowe, *The Law of the Sea, 3rd ed. (Manchester: Juris Publishing,* 1999) 61.

5. L Henkin *et al*, *International Law Cases and Materials* (2nd edn, St. Paul Minn.: West Publishing Co., 1987) P.1244.

4.10 Possible Answer to Self-Assessment Exercise

1. In the territorial sea coastal States possess full sovereignty and exercises jurisdiction which jurisdiction extends to the air space above the territorial sea, its bed and subsoil. The jurisdiction of coastal state in territorial sea is qualified/limited only by the right of innocent passage. However, in the contiguous zone coastal State can only exercise control in order to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea which does not change the status of the zone as part of the high sea with navigation freedom for other States.

2. Innocent passage is a concept within the law of the sea which allows for a vessel to pass through the territorial waters of another State, subject to certain restrictions. To be innocent, the passage or transit must not be prejudicial to the good order or security of the coastal State. This concept is captured in *article 19* of the UNCLOS.

3. The high sea is beyond the limit of national jurisdictions and therefore excluded from States claims and sovereignty. However, flag States must assert jurisdiction over the ships that fly their flag. Therefore, it is the flag State that enforces the rules and regulations both of its own municipal law and that of international law on the high seas.

MODULE 2: PRINCIPLES OF THE FREEDOM OF THE SEA

Introduction

In this module, we will concentrate on the doctrine of the freedom of the high seas. In fact, the sea is an international arena and just like the outer space, it has been proclaimed to be incapable of national appropriation. It is therefore treated as a common heritage of mankind. This does not mean that States activities in the high sea are without any regulations.

Unit 1: Jurisdiction over the Sea/Ocean

Contents

1.1 Introduction

The seas were at the earlier period of human relations thought of subjugation to national sovereignties; that was why some nations, the Portuguese in particular, during the seventeenth century claimed huge tracts of the high seas as part of their territorial domain. The proclamation of large portions of the high seas as being part of their national territory by the Portuguese provoked a response by Grotius who elaborated the doctrine of the open seas, whereby, according to him, the ocean as *res communis* were to be open and accessible to all nations but cannot be appropriated by any State. The freedom of the seas became widely accepted as a cardinal principle of international law although not all the seas were so characterized as it was permissible for a coastal State to appropriate a maritime belt around its coastline as territorial water and treat same as an indivisible part of its territory. Beyond the territorial sea, coastal States may under the present legal regime of the sea exercise certain jurisdictional functions in the Contiguous zones, Continental Shelf and even in the Exclusive Economic Zone as we have seen in the preceding module. The predominance of the concept of the freedom of the high seas has been modified by the

realization of resources present in the seas and seabed beyond the territorial seas. Thus, the concept and limit of the high seas has been seriously reduced under the United Nations Convention on the Law of the Sea, 1982 unlike what obtained the Geneva Conventions on the Law of the Sea, 1958.

1.2 Learning Outcomes

At the completion of this unit it is expected that you will be able to:

i. Explain the limit of the high sea
ii. Appreciate the juridical nature of the high sea

1.3 Limit of the High Sea

The high seas are the large body of waters which are beyond national jurisdiction. This is usually referred to as international waters. Thus, no states can appropriate or proclaim any portions of the high seas as part of their territorial domain. This is what the principle of freedom of the sea contemplates. The high seas are beyond States' jurisdiction, known under the doctrine of *'Mare liberum'*. Every State therefore has the right to fishing, navigation, overflight, laying submarine cables and pipelines, as well as scientific research in the high seas. The waters outside the national jurisdiction are referred to as the high seas which in *Latin* are called *mare liberum* (meaning free sea).

High Seas, under the law of the sea consist of all parts of the mass of saltwater surrounding the globe that are not part of the territorial sea or internal waters of a state. For several centuries beginning in the European Middle Ages, a number of coastal states have sought to exercise jurisdiction s over large portions of the high seas. This led to the promulgation by Grotius on the doctrine of the freedom of the high seas. Freedom of the seas was ideologically connected with other 19th-century freedoms, particularly laissez-faire economic theory, and was vigorously pressed by the great maritime and commercial powers, especially Great Britain. Freedom of the high seas is now recognized to include freedom of navigation, fishing, the laying of submarine cables and pipelines, and overflight of aircraft.

The high sea is massive occupying almost 50 per cent of the earth surface and one third of the entire sea surface. Under the 1958 Conventions on the Law of the Sea particularly the Convention on the High Seas of 29th April, 1958, the high seas began immediately from where territorial sea ends (Art. 1 UNCLOS I). The first United Nations Conference on the Law of the Sea, convened at Geneva in 1958, sought to codify the law of the high seas but

was unable to resolve some important issues, notably the maximum permissible breadth of the territorial sea subject to national sovereignty. However, the increased demands by some coastal states for increased security on waters adjacent to their territorial sea, for exclusive offshore-fishing rights, for conservation of maritime resources, and for exploitation of resources, especially oil, found in continental shelves necessitated other conventions to consider the limit of the high seas. But unfortunately a second conference (Geneva, 1960) also did not resolve the issue hence the United Nations Convention on the Law of the Sea, 1982 effective from 1994. Under this Convention, concept of the high seas is a more limited one in that it applies only beyond the limit of the exclusive economic zone (Art. 86 UNCLOS III):

> The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

Self-Assessment Exercise

1. Briefly narrate the limit of the high seas
2. Who has jurisdiction over vessels on the high sea?
3. Discuss briefly the three forms of jurisdiction you know

1.4 Jurisdiction on the High Seas

The principle of the freedom of the high seas is vividly captured under *Article 87* Paragraph 1 (a) – (f) of the United Nations Convention on the Law of the Sea when it provides thus:

> The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
> (a) freedom of navigation;
> (b) freedom of overflight;
> (c) freedom to lay submarine cables and pipelines, subject to Part VI;

(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in the section ;
(f) freedom of scientific research, subject to Parts VI and XIII.

Since the high seas are declared to be beyond national jurisdiction and free for use by all States, the important question then is, how is jurisdiction exercised on the high sea, who may exercise jurisdiction and upon whom? The truth is that in the use or exercise of freedom to use the high seas States must strictly pay due regard to the rights of other users of the seas who are equally entitled to enjoy the same freedom. As a result, the issue of jurisdiction cannot be completely ruled out in the high seas. In the main, the foundation of the maintenance of peace and order on the high seas lies squarely upon the concept of the nationality of the ship and the consequent jurisdiction of the flag State over the ship. It is, fundamentally, the flag State that enforces the rules and regulations both of its own municipal law and that of international law. Therefore, a ship without a flag will be deprived of many of the benefits and rights available under the legal regime of the high seas (M. N Shaw, 2004). *Article 87 (2)* of the Convention stipulates to this effect that 'these freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area'.

1.4.1 Jurisdiction over Vessels on the High Seas

Under international law, the general proposition is that the right to requisition ships (that is the right to make an official order or request by a State demanding for surrender, and assuming control of a ship in the sea, usually when members on board are suspected to have committed a crime) rests with the State of registry. Requisition is usually done with the aim of checking criminal activities in the sea. In the high seas, vessels are generally subject to the exclusive jurisdiction and control of the State whose flag they fly. This rule of customary international law is codified in Article 92(1) United Nations Convention on the Law of the Sea. The article state that Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.

This proposition was a formulation following the British-Dutch exchange on whose right it was to requisition a vessel owned by Dutch corporation. In 1917, the British Government informed the Netherland that it intended to requisition a number of vessels which, although owned by Dutch corporation and registered in the Netherlands, were 'in reality British' because of the fact that British nationals owned the shares of the controlling corporations.

The Netherland Government vehemently opposed the move, asserting that it alone had the right to requisition vessels flying the Dutch flag. In reply, the British Government changed its position, noting that it did not seek to rely upon the fact of British ownership or control but upon the recognized right of a belligerent to requisition neutral ships present in its territory. It was admitted that a State of 'ultimate ownership' is entitled to requisition foreign-flag vessels with the consent or acquiescence of the country of registry (L. Henkin). If the State of registry should resist the transfer of its vessels to the control of another State, the latter could still requisition these or other vessels, whether or not owned by its nationals, which it finds within its territory. A suggestion has also been made that requisition by a State of national-owned vessels found on the high seas or in foreign ports might be justified, even without the consent of the flag State, on the ground that the latter is unable to afford the vessels adequate protection against the dangers of hostilities.

In customary international law, a State must have the legal capacity to act, and a legitimate interest in exercising jurisdiction. They are three distinct bundles of rights that compose the concept of state jurisdiction according to the American Law Institute, *Restatement* (*Third*) *Foreign Relations Law of the United States* (1987) at § 401(a) – (c). These include:

i. ***Prescriptive jurisdiction***

Meaning to prescribe, *that is capacity of a State* to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act, or order, by administrative rule or recognition, or by determination by a court.

ii. ***Adjudicative jurisdiction***

Meaning to adjudicate, *that is the capacity of a State* to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings.

iii. ***Enforcement jurisdiction***

This means the capacity of a State to enforce or compel compliance or to punish non-compliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action.

Each of state jurisdictions is distinct; they differ in scope and are subject to different tests, through different internationally accepted basis for establishing 'sufficient connections' (Honniball, 2016). Legitimate prescriptive jurisdiction may exist for a state with regard to

a particular form of conduct, but not for concurrent adjudicative (C Ryngaert, 2015) or enforcement jurisdiction. The valid basis for one form of jurisdiction cannot, in and of itself, justify the existence of another form. The implication is that each doctrine is completely independent, but the issue is that each form must be established by its own international legal criteria. For example, a port state's enforcement jurisdiction for a particular law would also *depend* on its jurisdictional right to first prescribe the said law. Thus in practice, any limitations on prescription will also operate to limit enforcement. See generally (Honniball, 2016).

Furthermore, States can allow other States to stop, board, search or arrest its vessels through international agreements or on an *ad hoc* basis. States have, for example, entered into international treaty arrangements to facilitate the interception of drug trafficking, terrorism, illegal fishing and other unlawful acts on the high seas. In addition, measures against foreign ships on the high seas have also been justified on the grounds of self-defence or necessity.

It is the requirement of the law that ships should sail under the flags of one State only and are subject to its exclusive jurisdiction, save in exceptional circumstances (**M N Shaw, 2004**). Where a ship sails under the flags of more than one State, it may be treated as a ship without nationality and will not be able to claim any of the nationalities concerned (**The Geneva Convention, Art.6 and UNCLOS, Art.92**). Where a ship sailing the high seas is stateless, and does not fly a flag, it may be boarded and seized. This was the decision of the Privy Council in the case of *Naim Molvan v Attorney- General for Palestine* ((1948) AC 351, 13AD 51; *US v Monroy* (1980) 614 F.2d 61.). This basic doctrine of customary international law that 'vessels on the high seas are subject to no authority except that of the State whose flag they fly' is enunciated and elaborated in the *Lotus Case* ((1927) PCIJ, Series A, N0.IO 25.; *Sellers v Maritime Safety Inspector* (1999) 2NZLR 44, 46- 48.) by the Permanent Court of International Justice (PCIJ), when it explained questions relating to jurisdiction on the high seas. The exclusivity of the flag State jurisdiction is without exception regarding warships and ships owned or operated by a State where they are used solely on governmental non-commercial service. In which case such ships, according to *Articles 95* and *96* of the 1982 Convention, have, 'complete immunity from the jurisdiction of any State other than the flag State'.

1.5 Jurisdiction over Acts Committed on National Vessels

Rights and duties are those of the flag State to exercise jurisdiction over acts committed on vessels which fly its flag. In the *Rights and Duties of the Flag State Restatement (Revised). 502:*

1. The flag State is obliged
   a. to exercise effective authority and control over the ship in administrative, technical and labour matters; and
   b. i. to take such measures as are necessary to ensure safety at sea, prevent collisions, and prevent, reduce and control pollutions of the marine environment, and
   ii. to adopt laws and regulations and take such other steps as are required to achieve the conformity of these measures with generally accepted international standards, regulations, procedures and practices, and to secure their implementation and observance

2. The flag State may exercise jurisdiction to prescribe, to adjudicate, and to enforce by non-judicial means with respect to the ship or any conduct that takes place on the ship.

Article 97 of the Convention provides as follow on this issue:

> In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be initiated against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national

See *inter alia* the *Lotus Case* (*France v. Turkey* (1926-7) PCIJ Series A N0. 10

In conclusion, the high seas are a purely free zone so that every State whether coastal or land-locked has unfettered access to the high sea. Although the high sea is free for use by all States, the Convention still provides that such rights of usage must be exercise with due respect of other States' rights to use the high sea also. Jurisdiction on the high sea mainly relate to that which the States exercise on the vessels which fly their flags on the high sea and those exercised as exception to the general rule of the freedom of the high sea as discussed under this unit.

1.6 Summary

In this unit we discussed the concept of *The High Seas* wherein we observe that the high sea is the body of waters which is beyond national jurisdiction. The high seas also referred to as international waters constitute a global common and no portions thereof can be

appropriated by any States. The flag-state has exclusive jurisdiction over its vessels operating on the High Seas except in certain circumstances as where other States can assert jurisdiction in accordance with the rules of international law.

1.7 References/Further Readings/Web Resources

1. Arron N. Honniball, The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States? (2016) *The International Journal of Marine and Coastal Law*, Vol. 31

2. C Ryngaert, *Jurisdiction in International Law*. (2nd ed., Oxford University Press, Oxford, 2015) at p. 10

3. K Hixson, 'Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States' (1988) 12 *Fordham International Law Journal* 127–152, at p. 130, referring to the 'Second Restatement, § 7

4. D König, 'Flag of Ships', (2009) *Max Planck Encyclopaedia of Public International Law*, at para. 25.

1.8 Possible Answer to Self-Assessment Exercise

1. **High Seas**, under the law of the sea consist of all parts of the mass of saltwater surrounding the globe that are not part of the territorial sea or internal waters of a state. This is more akin to the 1958 Convention on the High Seas under which the high sea begins immediately where the territorial sea ends. See *article 1* of the Convention. However, under this UNCLOS III, the concept of the high seas is a more limited one in that it applies only beyond the limit of the exclusive economic zone. See article 86 of the UNCLOS III.

2. Under the rule of customary international law, vessels in the high sea are generally subject to the exclusive jurisdiction and control of the State whose flag they fly. This customary international law rule is codified in Article 92(1) UNCLOS

3. **Three forms of Jurisdiction include:**

i. Prescriptive Jurisdiction: This refers to the *capacity of a State* to prescribe or make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act, or order, by administrative rule or recognition, or by determination by a court.
ii. Adjudicative Jurisdiction: This refers to *the capacity or right of a State* to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the State is a party to the proceedings.
iii. Enforcement Jurisdiction: This is the right or capacity of a State to enforce or compel compliance or to punish non-compliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action.

Unit 2: Traditional Freedoms of Access to the Sea by all State

Contents

2.1 Introduction

Freedom of the seas (Latin: *mare liberum*, meaning (free sea) as we have already known here is a principle in the international law and sea which stresses freedom of the States to navigate the Seas. The principle also disapproves of war fought in waters. The freedom is to be breached only in a necessary international agreement. The former President of America Thomas Woodrow Wilson had this principle as one of his Fourteen Points proposed during the First World War. In his speech to the Congress, he stated in the following terms:

> Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.

Today, the concept of freedom of the seas is contained in the *United Nations Convention on the Law of the Sea* particularly *Article 87(1)* which provides that 'the high seas are open to all states, whether coastal or land-locked'. *Article 87(1) (a) to (f)* enumerate the freedoms to include navigation, overflight, the laying of submarine cables, building artificial islands, fishing and scientific research.

2.2 Learning Outcomes

At the end of this unit, you are expected to be able to:

i. Give an overview of the principle of the freedom of the seas

ii. Explain what is the rights of jurisdiction in time of peace, and

iii. The extraordinary rights of jurisdiction in time of peace

2.3 Freedoms of Access to the Sea by all States

This is a doctrine which stipulates that the high seas in time of peace are open to all nations and cannot be subjected to national sovereignty. This doctrine essentially limits national rights and jurisdiction over the Seas to a narrow belt of sea surrounding its coastline. Freedom of the Seas in time of peace has gained general and wide acceptance that we hardly recall that it was not so in the beginning. It was once asserted that the ships of one nation might lawfully search the vessels of another nation even in time of peace. For instance, Algeria, Tripoli, Tunis, and Morocco once supported themselves by the 'tribute levied on commerce as an alternative to piratical depredations' (A G Hays, 1918). However, the America's first military excursion to Europe put an end to this practice which was inimical to the notion of the freedom of the High seas. However, the fact that the freedom of the sea is no longer questioned by any State today does not mean that the doctrine is not without some qualification.

Self-Assessment Exercise

1. Differentiate between ordinary and extraordinary jurisdiction in time of peace in relation to the use of high seas.

2. What does the doctrine of freedom of access state?

2.4 Ordinary Rights of jurisdiction in time of Peace

The high seas are not subject to any State's jurisdiction under the doctrine of *'Mare liberum'*. All States therefore have the right to sail the high seas as well as many other rights including fishing, navigation, overflight, laying submarine cables and pipelines, and scientific research (UNCLOS, Art. 90). Ordinarily in peaceful atmosphere, ships sailing the high seas are generally under the jurisdiction of the flag State where there is one in accordance with *Article 92 (1)* of the Convention. However, when a ship is involved in certain criminal acts, such as piracy any State can exercise jurisdiction under the doctrine

of universal jurisdiction (UNCLOS Art. 105). *Universal jurisdiction* allows states or international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime occurred based on the notion that such crimes harm the international community and disturbs international order itself. The United Nations Convention on the Law of the Sea equally contains, under part XII, special provisions for the protection of the marine environment, which, in certain cases, grants port States the rights to exercise extraterritorial jurisdiction over foreign ships on the high seas. Such rights of extraordinary jurisdiction can only be exercised where and when foreign ships have violated international environmental rules (adopted by the International Maritime Organisation), such as the MARPOL Convention (J J Fanø, 2019).

2.5 Extraordinary Rights of jurisdiction in time of Peace

This is a situation whereby a State assumes jurisdiction on the ground of the fact that the act or behavior of another State is producing effect within its territory (D J Harris, 2004) p. 612. In this case, some States have sought to apply their law outside their territory (A V Lowe, 1983). In certain circumstances, a State cannot wait for arrival of a perceived danger to its security within its territorial jurisdiction before it acts. In such circumstance, it must take preventive measure to forestall the danger from materializing while still outside its territorial jurisdiction. Under this circumstance, a state may claim a measure of extraordinary protective jurisdiction beyond the limit of its territory. Thus, a country whose peace is threatened by persons on board vessels sailing under the flag of another State may in an emergence, exercise extraordinary jurisdiction by way of search and capture such vessels and arrest the persons on board, despite the general rule that there is no right of visiting and seizing vessels of a friendly power in time of peace on the High Seas. Whether the danger was sufficient to justify the seizure of the vessel at the moment it was effected may be a different question altogether.

2.6 Summary

The concept of the freedom of the Seas is one the most important principles of the law of the sea. This is because it grants all States including those that are land-locked the free access to the high seas. This freedom is however qualified by the relevant provisions of the Convention in that it must be exercised with great regard to other States' rights and freedom as stipulated under Article 87 (2) of the Convention. In this unit we discussed: Freedom of the sea, Ordinary rights of jurisdiction in time of peace and Extraordinary rights of jurisdiction in time of peace

2.7 References/Further Readings/Web Resources

1. Knock, Thomas J., *To End All Wars. Woodrow Wilson and the Quest for a New World Order,* (Princeton: 1992), pp. 34-36, 113-115
2. A V Lowe (ed), *Extraordinary Jurisdiction* (London: 1983).
3. Jesper Jarl Fanø (2019), *Enforcing International Maritime Legislation on Air Pollution through UNCLOS. Hart Publishing.*
4. Arthur Garfield Hays, *'What is meant by the freedom of the Sea, (1918) The American Journey of International Law, Vol. N0.12. pp. 283-290.*

2.8 Possible Answer to Self-Assessment Exercise

A)

i. Ordinarily in peaceful atmosphere, ships sailing the high seas are generally under the jurisdiction of the flag State where there is one in accordance with *Article 92 (1)* of the UNCLOS. However, when a ship is involved in certain criminal acts, such as piracy or slave trade, any State can exercise jurisdiction under the doctrine of universal jurisdiction in line with *article 105* of the UNCLOS.

ii. Extraordinary right of jurisdiction in peaceful time depicts a situation whereby a State assumes jurisdiction on the ground of the fact that the act or behavior of another State is producing effect within its territory. it can apply its law outside its territorial zone to avert any perceived threat to its security.

B) The doctrine of freedom of access to the sea stipulates that the high seas in time of peace are open to all nations and incapable of appropriation by any nation.

Unit 3: The Need for or Importance of the Freedom of the Sea

Contents

3.1 Introduction

Freedom of the seas was the early 20th century concept which projects that the world's seas serve as a global common for the purpose of carrying cargo and facilitating commerce. As both a communal property and throughway, the seas thus could not be controlled by any sovereign State outside of territorial waters, according to freedom of the seas (J L Young, 2014).

3.2 Learning Outcomes

At the completion of this unit you are expected to be able to:

i. Appreciate the general need for freedom of the seas
ii. Understand the relation between freedom of the sea and conservation of living resources

Self-Assessment Exercise

1. In what ways is the doctrine of the freedom of the sea important to mankind?
2. How does the doctrine of the freedom of the seas relate with the concept of conservation of sea resources?

3.3 Importance of the freedom of the sea

The history of the law of the sea has been dominated by one relevant and persistent theme involving the competition between the exercise of national jurisdiction over portions of the

sea and the idea of the freedom of the seas. Such divergent and conflicting claims waxed and waned through the centuries especially with the creation of the United Nations Convention on the Law of the sea, 1982. All these only reflect the political, strategic, and economic importance of this concept of the freedom of the seas (D.P. O'Connell and I.A. Shearer, 1985).

i. Economic Importance

The doctrine of the freedom of the high seas has a purpose and this purpose actually underpins its essence and importance. It should be reiterated that while this principle grants all States free and unhindered access to the high seas, there are rules and regulations to guide the activities of States in this zone for maximum cooperation and productivity. The principle of the high seas which makes this area open for use to all States, with every State including those that are land-locked possessing the freedoms of navigation and overflight and the freedom to lay submarine cables and pipelines, to conduct scientific research, and to fish has enormous economic and political fortune for the entire world. Even the land-locked States which naturally are without coastline are granted free access to the high seas by reason of this principle (UNCLOS Art 87). The economic implication of this freedom is that greater number of States will partake in the exploration of the sea and exploitation of the sea resources within this zone. This, in turn will add to the economic growth of the individual nations and by implication the international economy.

ii. Political Importance

Politically, the principle of the freedom of the seas forbids any nation from the claim of any portions of the high seas. No nations shall exercise jurisdiction on other users of the seas except as allowed by the law. This is the basis for cooperation among sovereign States on the high seas ensuring the peaceful uses of the high seas as contemplated by the Charter of the United Nations. Which principle, the United Nations Convention on the Law of the Sea builds upon when it provides that, 'No State may validly purport to subject any part of the high seas to its sovereignty' (UNCLOS Art. 89). The principle of the freedom of the high seas is therefore crucial for peaceful uses of the high seas and for prosperous economic activities in this international zone.

3.4 Freedom of the High Seas and Conservation of Living Resources of the Sea

The Convention has provided to the effect that the freedoms to use the high seas 'shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area' (UNCLOS Art. 87). The rights to freely use the high seas by all States are qualified by the need to respect the equal rights and freedoms of other

states on the high seas. Apart from this the question of how the freedom to use the seas might impact the living resources of the seas negatively if not appropriately regulated need to be given attention. The Convention also envisaged the possibility of such unfettered freedom endangering the continued existence of some marine resources when it made provisions to that end.

Generally, *Articles 116* to 120 of UNCLOS provide for the conservation and management of the living resources of the high seas. The Convention provides to the effect that all States have the right to engage in fishing on the high seas subject to their treaty obligations (Article 116). *Article 117* of the Convention particularly requires States to adopt measures for the conservation of the living resources of the high seas while *Article 118* gives them the obligation to cooperate with other States in conservation and management of living resources in the areas of the high seas. In all these cases it is generally the responsibility of States whose nationals are engaged in fishing on the high seas to negotiate with other States fishing in the same area or fishing the same stocks to enter into negotiations with a view to taking the necessary measures for the conservation of the living resources concerned.

Concerning *Straddling Stocks* and *Highly Migratory Species*, the Convention states that 'it is the responsibility of States whose nationals are engaged in the fishing of these resources in the high seas and the coastal States involved to negotiate directly or through sub-regional or regional fisheries organizations to agree upon the measures necessary for the conservation of these resources' (UNCLOS Art. 63 and 64) respectively. The basic issue that must be tackled if expectations and needs in this respect are to be will realised is that of controlling open access to fisheries. The extension of national jurisdiction was a good but insufficient step towards this aim, and open access continues to exist within exclusive zones of most coastal States as well as on the high seas. The results of continued open access are seriously damaging. These can lead to further depletion of marine stocks, the dissipation of economic rents and increased conflicts among States. With no price or value placed on the resource, capital and labour will continue to enter the fishery as long as revenues exceed costs, leading to wasteful misallocations of inputs. There is therefore an urgent need to address the problems related to free and open access and to review and establish alternative management concepts and mechanisms, especially property allocation systems including exclusive use rights. Without further efforts to control the concept of open access, the survival of the living resources of the sea is in danger.

3.5 Summary

From the discussion in this unit, it has been established that the freedom of the seas is one the fundamental principles of the seas. It is strategic and central in the economic and political activities of States in the highs. It among other things ensures cooperation among the users of the sea and allows for wider participation of states in the economic and scientific activities of the seas. In this unit, we discussed the various ways in which the doctrine of the freedom of the high seas is important mankind. The doctrine is important especially in economic and political activities of States. The doctrine has close correlation with the issue of the conservation of the living resources of the sea.

3.6 References/Further Readings/Web Resources

1. James Leroy Young, Freedom of the Seas (2014) *encyclopedia.1914-1918-online.net › article › freedom.*
2. D.P. O'Connell and I.A. Shearer, *The International Law of the Sea,* (Oxford: OUP, 1985*).*

3.7 Possible Answer to Self-Assessment Exercise

A) The doctrine of the freedom of the sea is important to man in two major aspects:

i. Economically: The economic implication and importance of the freedom of the sea is that greater number of States including those that are land-locked can partake in the exploration and us of the high seas and in the exploitation of its resources. This invariably will add to the economic growth of the individual nations and by implication the international economy.

ii. Politically: This doctrine of the freedom of the high sea forbids any nations from asserting jurisdiction on other users of the seas except as allowed by the law. Also, no State can validly lay claim to any portions of the high sea to the exclusion of others. This indeed is the basis for cooperation among sovereign States on the high seas ensuring the peaceful uses of the high seas as contemplated by the Charter of the United Nations which the UNCLOS builds upon.

B) The freedom of the high seas includes the right of States to engage in fishing, navigations and other lawful activities. This must be done with due respect and regard to the need for the conservation and management of the living resources of

the high seas in line with *articles 116* to 120 of UNCLOS concerning the measures for the conservation of the living resources of the high seas

Unit 4: Limitations and Exemptions to the Freedom of the Sea

4.1 Introduction

The basic concept of the freedom of the high seas is limited by the operation of a series of exceptions, likewise the principle of the exclusivity of the flag-state jurisdiction under the international law of the sea. The United Nations Convention on the Law of the Sea under its *Article 92 (1)* stipulates that 'ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas'. Thus this basic doctrine relating to jurisdiction on the high seas which states that vessels on the high seas are subject only to the authority of the flag State is not without some exceptions, except in the case of warships which are not used for merchant purpose. Even the wider concept of the freedom of the high seas is also limited by exercise of a series of exceptions (M N Shaw, 2004) P. 549. When a ship is involved in certain criminal acts leading to the existence of any of the under-listed exceptions, the above basic concept of the freedom of the sea and exclusivity of the flag-state jurisdiction can no longer hold sway.

4.2 Learning Outcomes

At the completion of this unit, you are expected to be able to:

i. Enumerate, and
ii. Explain each of the various circumstances that would constitute limitation to the principle of the freedom of the sea and exclusivity of flag-state jurisdiction.

4.3 Limitations to the Freedom of the Sea

The general doctrine of the freedom of the seas is however, subject to certain limitations and exceptions as highlighted below:

Self-Assessment Exercise

1. How does piracy relate to the jurisdictional freedom of the high sea?
2. Who has the right to seize a pirate vessel?
3. Based on the rule of right of visit, mention the circumstances that would justify a warship boarding a foreign ship on the high sea.

4.3.1 Right of visit

This is the right granted to warships under customary international law to approach and ascertain the nationality of ships in the high seas. However, the right of approach, to identify vessels, does not automatically incorporate the right to board or visit ships. Such visit may be undertaken under certain circumstances such as: in the absence of hostilities between the flag States of the warship and a merchant vessel and in the absence of special treaty providing to the contrary, where the ship is engaged in piracy or the slave trade, or, though flying a foreign flag or no flag at all, is indeed of the same nationality as the warship or of no nationality. However, the warship should always exercise some caution in such circumstances, since it may be liable to pay compensation for any loss or damage sustained if its suspicions are unfounded and the ship boarded has not committed any act justifying such suspicions. *Article 110* of the Convention provides to this effect that:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
>
> (a) the ship is engaged in piracy;
> (b) the ship is engaged in the slave trade;
> (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
> (d) the ship is without nationality; or
> (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
>
> 2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination onboard the ship, which must be carried out with all possible consideration.
> 3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
>
> 4. These provisions apply mutatis mutandis to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

4.3.2 Piracy

Piracy in its original and strict meaning is every unauthorized act of violence committed by a private vessel on the high seas against another vessel with intent to plunder *animofurandi* (D J Harris, 2004). According to *Article 101* of the *1982 United Nations Convention on the Law of the Sea,* Piracy consists of any of the following acts:

(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, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

4.3.3 Pirate Vessel

A vessel whether ship or aircraft is treated as a pirate vessel if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in *Article 101*of the UNCLOS. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act (Article 103).

Piracy constitutes a very formidable exception to the exclusive jurisdiction of the flag State and the principle of the freedom of the high seas (M N Shaw, 2004) p. 549. The essence of or what amounts to piracy under international law is that it must be committed for private ends, that is to say, it is not committed to serve the political purpose of other States. Where therefore a vessel involves in piracy, any and every State may seize such private ship or

aircraft whether on the high seas or on *terra nullius* and arrest the persons and seize the property on board.

i. Seizure of a Pirate Vessel

Whether on the high seas or in any other place beyond the jurisdiction of any State, every State may seize a pirate vessel, (a ship or aircraft) taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide what penalties to be imposed, and may also determine the action to be taken in relation to the ships, aircraft or property, subject to the rights of third parties acting in good faith. See *Article 105* of the Convention. However, only warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect have the right to seize on account of piracy.

ii. Liability for wrongful seizure

Article 106 of the Convention provides that where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

4.3.4 Hot Pursuit

The right of hot pursuit of a foreign ship is a principle in international law designed to ensure that a vessel which has infringed the laws of a coastal State does not evade punishment by fleeing to the high seas. In this circumstance, a coastal State's jurisdiction is extended onto the high seas to enable it pursue and seize a ship which is reasonably suspected of infringing its laws. The right of hot pursuit is covered by *Article 111* of the 1982 Convention built upon *Article 23* of the High Seas Convention, 1958. Hot pursuit may only begin when the pursuing ship has satisfied itself that the ship being pursued or one of its boats is within the limits of internal waters, territorial sea, contiguous zone or economic zone or on the continental shelf of the coastal State, and may only continue in that pursuit outside the territorial sea or such other zones if it is uninterrupted. Where the pursuit commences while the foreign ship is in the continuous zone, it may only be undertaken or justified if there has been any form of violation of the rights for the protection of which the zone was established. The right may commence in a similar way from the archipelagic waters. It is however, essential that prior to that chase, a visual or auditory signal to ship has been given at a distance enabling it to be seen or heard by the foreign

ship and pursuit may be undertaken by warships or military aircrafts or by specially authorized government ships or planes. The right of hot pursuit terminates as soon as the ship pursued has entered the territorial waters of its own or that of a Third State.

It should be reiterated here that,

a. the hot pursuit of a foreign ship may only be undertaken when the competent authorities of the coastal State have reasonable grounds to believe that the ship has violated the laws and regulations of that State.
b. Such pursuit 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
c. may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.

It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in *Article 33* of UNCLOS, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established (paragraph *1*, Article *111*).

4.3.5 Unauthorised Broadcasting

It is the position of the law that all States are to co-operate in the suppression of unauthorized broadcasting from the high seas. This unauthorized broadcasting is defined as transmission of sound radio or television from a ship or installation on the high seas intended for reception by the general public, contrary to international regulations, but excluding the transmission of distress calls. Paragraph 2 of *Article 109 of the Convention* defined *unauthorized broadcasting* as *the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls.* In accordance with paragraph 3, any person engaged in unauthorised broadcasting may be prosecuted before the court of:

a. the flag State of the ship,
b. the State of registry of the installation,
c. the State of which the person is a national,
d. any State where the transmission can reach/be received, or

e. any State where authorized radio communication is suffering interference.

Any of the above States having jurisdiction may arrest any person or ship engaging in unauthorized broadcasting on the high seas and seize the broadcasting apparatus. States may enter treaty allowing each other's warships to exercise certain powers of visit and search any vessels flying the flags of the signatories to the treaty (M N Shaw, 2004) p. 552.

Article 11 of the High Seas Convention provides to the effect that where ships involved in collisions on the high seas, the penal or disciplinary proceedings may only be taken against the master or other persons in the service of the ship by the authorities of either the flag State or the State of which the person in question is a national. The law further provides that in such a case, no arrest or detention of the ship even for investigations can be ordered by any other than the authorities of the flag State. *Article 97* of UNCLOS reaffirms the above stance.

4.4. Pollution

Pollution represents another instance in which States are enjoined to assume corporate responsibility or jurisdiction for the purpose of its prevention. For instance, *Article 24 of* the1958 Convention on the High Seas as well as *Article 194* of the United Nations Convention on the Law of the Sea, 1982 provide to the effect that States shall take, individually and jointly as appropriate, all measures consistent with the Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities. The law also enjoins states to endeavour to harmonise their policies in this connection (M N Shaw, 2004) pp.553-555.

4.4.1 Straddling Stock

The development of the exclusive economic zone led to the reduction of the limit of the high seas under the legal regime of the sea. One of the implications of this development is that the bulk of fish stocks are now found within the exclusive economic zones of coastal states. Consequently, the interests of these coastal States have now been unavoidably extended to impinge upon the regulation of the high seas. The present law of the sea therefore grants the coastal States the sovereign rights over their exclusive economic zones for the purpose of exploration, exploitation, conservation and management of the fish stocks found within the zone (UNCLOS Art. 56 {1}). The rights given to the coastal states are accompanied by the duties to take such conservation and management to ensure that the fish stocks found in the exclusive economic zones are not endangered by reason of

over-exploitation and that such stocks are maintained at, or restored to, levels which can produce the maximum sustainable yield (UNCLOS Art. 61)

The freedom to fish on the high seas is therefore qualified by the rights and duties as well as the interests of the coastal states as stated above (UNCLOS Art. 116 {b}). A particular concern is given with regard to straddling stocks that is stocks of fish that straddle both exclusive economic zone and the high seas. The argument being that if the later were not regulated in some way, fishery stocks regularly present in the exclusive economic zones could be depleted through over-exploitation (UNCLOS Art. 117 -120).

4.5 Summary

From our discussion in this unit, we discovered that the basic principle of the freedom of the high seas and the similar concept of the exclusivity of the flag-state jurisdiction are not after all absolute but are subject to several qualifications. Where any of the circumstances as recognized by the relevant law arises, it will operate against the exercise of the rights to freely use the high seas or the exclusive jurisdiction conferred on the Flag-State. In this unit, we discussed: Limitations to the freedom of the high seas and Exemptions to the concept of the exclusivity of the flag-state jurisdiction

4.6 References/Further Readings/Web Resources

1. D J Harris, *Cases and Materials on International Law* (6th edn London: Sweat and Maxwell Ltd, 2004).
2. W T Burke, *International Law of Fisheries*, (Oxford, 1994)
3. F O Vicuna, *The changing International Law of High Seas Fisheries*, (Cambridge, 1999).
4. J C Woodlife, 'The Demise of Unauthorized Broadcasting from Ships in International Waters', (1986) 1 *Journal of Estuarine and Coastal Law*, 402. ; UNCLOS Art. 109 (1)-(4)
5. W C Gilmore, 'Hot Pursuit: The Case of *R v Mills and Others*' (1995) 44 *ICLQ*, 949.
6. N Poulantzas, *The Right of Hot Pursuit in International Law* (2nd edn, The Hague: Martinus Njihoff, 2002).

4.7 Possible Answer to Self-Assessment Exercise

1. Piracy refers to every unauthorized act of violence committed by a private vessel on the high seas against another vessel with intent to plunder. See *article 101*of the UNCLOS for more definition. Piracy is inimical to the peaceful uses of the sea as contemplated by the UNCLOS and therefore constitutes an exception to the exclusive jurisdiction of the flag State and the principle of the freedom of the high seas. Pirate vessel is therefore subject to universal jurisdiction.

2. Being subject to universal jurisdiction, every State has jurisdiction to seize a pirate vessel whether on the high sea or any other zone outside the jurisdiction of any State. Read *Article 105* of the UNCLOS.

3. A warship can justifiably board a foreign ship on the high only under a circumstance warranting reasonable ground for suspecting that:

(i) the ship is engaged in piracy;
(ii) the ship is engaged in the slave trade;
(iii) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under *article 109*;
(iv) the ship is without nationality; or
(v) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship

Unit 5: Piracy, Slave Trade and Freedom of the Sea

5.1 Introduction

While slave trade involves the capturing, selling, and buying of enslaved persons, piracy is an act of robbery or criminal violence by ship or boat-borne attackers upon another ship or a coastal area, typically with the goal of stealing cargo and other valuable items or properties. The seas are typically the arena for the operation of these crimes. This principle of freedom of the seas normally forbids visit and search of foreign merchant vessels on the high seas in time of peace. However, where ships involve in piracy slave trade, such ships will lose the privilege of using the high seas freely.

5.2 Learning Outcomes

At the completion of the unit you are expected to be able to:

i. Further appreciate the meaning of piracy
ii. Discuss the term ‘slave trade’]
iii. Relate them to the concept of freedom of the seas

5.3 Piracy

The existing international law on piracy is found in the provisions of the United Nations Convention on the Law of the Seas 1982 (Arts. 100-107) although the UNCLOS is not the first to make provisions on the subject matter. We had already considered piracy in the previous unit wherein it is stated to mean any unauthorized act of violence committed by a private vessel on the high seas against another vessel with intent to plunder *animofurandi* **(D J Harris, 2004).** Any ship that involves in piracy will be stripped off the general right to use the high seas freely. It therefore constitutes a formidable exception to the basic principle of the freedom of the seas. Peter and Smallman writing about piracy maintained that, ‘Piracy, in particular, threatens the freedom of the seas, increases the cost of international business, endangers political security through corruption, and could trigger a major environmental disaster if carried out in congested maritime corridors traversed by heavily laden oil tankers’ (P Chalk and L Smallman, 2009).

Self-Assessment Exercise

1. How do States combat the menace of slave trade under the present regime of the sea?
2. Discuss the relation between slave trade and piracy

Piracy serves as one of the major threats to international trade, and maritime security and to the freedom of the seas. Piracy threatens maritime security and the legitimate uses of the seas for peaceful purposes and the freedom of navigation as contemplated by the United Nations Convention on the Law of the Sea. International piracy law is international law that is meant to protect against piracy. It was enacted primarily by the United Nations and UNCLOS, and defines different types of piracy and ways to combat the menace. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides for the laws of piracy under its *Articles 100 to 110* which are a replica of *Articles 14 to 21* of the 1958 Geneva Convention on the High seas. According to *Article 101* of the UNCLOS:

Piracy consists of any of the following acts:

(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, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

The summary here is that, piracy is inimical to concept of the freedom of the high seas and the principle of the exclusive jurisdiction of the flag-state. Any State can therefore seize a pirate ship or aircraft whether on the high seas or on *terra nullius* and arrest the persons and seize the property on board. Furthermore, the courts of the state which carried out the arrest would have the jurisdiction to impose penalties and may determine the action to be taken regarding the ship or air craft and the property.

5.4 Slave Trade

The term slave trade is defined in the *1926 Slavery Convention*, particularly by *Article 2* as follow:

> The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves

The United Nations Convention on the Law of the Sea, 1982 in its *Article 99* enjoins that every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Therefore, any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free. This is also the provision of *Article 13* of the High Seas Convention of 1958. According to *Article 110* of the UNCLOS, warships may board foreign merchant ships under a reasonable suspicion of engaging in the slave trade and offenders must be handed over to the flag-state for trial. From the foregoing it is established that slave trade is another formidable exception to the general concept of the freedom of the seas.

5.5 Relations between freedom of the sea, piracy and slave trade

The relations among the three terms can be seen in the fact that while the concept of the freedom of the seas makes the high seas open and accessible to all states, so that any ship can freely sail the high seas unmolested, both piracy and slave trade constitute such formidable exception to this high seas rule. As we noted above, the high seas are mainly the arena for the commission of these crimes. There has been some confusion as to whether the act of piracy can take place on land within the territorial integrity of any state. The definition given to piracy by W. E. hall suggests that piracy can occur in a State’s land territory (W. E. Hall, 1880), a notion which has been rejected by many other writers.

According to him, ‘pirates are persons who deprecate by sea or land without authority from a sovereign’. Thomas Joseph however argued that the mark of a piratical act is that it must be one outside the territorial jurisdiction of any civilized state. ‘And commenting on Hall's view, Joseph noted that Hall seemed to hold the view that a descent from the sea on to the coast of a state to rob and destroy without any national authorization would be accounted as piratical, but that surely the fact that the crime was committed within the territorial jurisdiction would make the perpetrators amenable to the law of the state and not international law’ (L Azubuike, 2009) p. 47. The idea therefore is that the offence of piracy must be committed on high seas which is an international zone and that is why it is subject to universal jurisdiction. The high seas are the arena for both slave trade and piracy and the both constitute exceptions to the basic principle of the freedom of the high seas.

Additionally, piracy usually involves violence which can be a means of gaining control over persons on the high seas and subject same to conditions of slavery. For instance, the inclusion of the words: “*all acts involved* in the … *acquisition* … of a person with intent *to reduce him to slavery*” in the definition of slave trade above broadens the scope of the slave trade beyond the mercantile sense of trading and transporting slaves (Cullen, 2012). Bearing in mind, that slavery extends to the *de facto* condition, and that it exists on a continuum with other forms of severe exploitation such as piracy, it is right to argue that the slave trade thus encompasses the acquisition of vulnerable persons through manning agents with the intention to reduce them to conditions amounting to slavery (Douglas, 2017).

5.6 Summary

From the discussion in this unit, we understand that the act of piracy must be committed on the high seas which constitute an area beyond national jurisdiction. So the relations between the offences of piracy, slave trade and the freedom of the high seas is that they always take place on the high seas but are not in any stretch covered by the freedom of the high seas concept. They, especially, piracy today constitute a grave danger to the concept of the freedom of the high seas. In this unit, we discussed: Piracy, Slave trade, and the relation among them.

5.7 References/Further Readings/Web Resources

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1 Douglas Macfarlane, **"**The Slave Trade and the Right of Visit Under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand**"**, (2017), *Asian Journal of International Law*, Volume 7, Issue 1

2 Cullen, Holly, Contemporary International Norms of Slavery" in Jean ALLAIN, ed., *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: Oxford University Press, 2012), at 307

5.8 Possible Answer to Self-Assessment Exercise

1. States can effectively fight the menace of slave particularly under article 99 of the UNCLOS by taking effective measures to prevent and punish the transport of slaves in ships authorized to fly their flag and by preventing any unlawful use of their flagged ships for that purpose.

2. Both piracy and slave trade constitute exception to doctrine of the freedom the high seas and the principle of the exclusive jurisdiction of the flag-state. in other words, both the two are inimical to the concept of the freedom of the high sea and consequently subject to universal jurisdiction.

MODULE 3: USES OF THE HIGH SEAS AND THE SEABED

Unit 1: Navigation and Fisheries in the High Seas

1.1 Introduction

The concept of the freedom of the high seas as discussed in the preceding module pre-supposes that the high seas are important for State exploration and use. States having freedom to freely access the high seas go there to put the seas into various uses. The high seas can be put into numerous uses such as navigation, fisheries, scientific research and experiment, exploitation of natural resources in the seabed, disposal of radioactive waste where this is adjudged safe, laying of submarine cables & pipelines, and mechanical installations. The principle of the freedom of the high seas is now recognized to include freedom of navigation, fishing, and other economic and scientific uses to which the high seas can offer. Traditionally, the high seas are beyond the territorial waters of all states so are regarded as open to all States. Under this unit, we will examine the concepts of freedom of navigation and fishing on the high seas.

1.2 Learning Outcomes

At the completion of the unit, you are expected to be able to:

i. The rights every sovereign State has to navigate the high seas, and
ii. The rights of States to fish on the high seas

1.3 Freedom of Navigation on the High Seas

Freedom of navigation is a customary international law principle which declares that ships flying the flag of any sovereign State shall not suffer interference from other states, apart from those exceptions provided for in international law (A J Hoffmann, 2011). The concept provides ships of any States with the right to traverse the high seas with no or minimal interference from any other State. A key aspect of freedom of navigation as provided for under *Articles 92 (1)* of the United Nations Convention on the Law of the Sea and *Article 6 (1)* of the High Seas Convention is that it is exercised under the exclusive jurisdiction of the flag State. The Permanent Court of International Justice (PCIJ) in The 'Lotus' *(France v Turkey) (1927)* held that, except in limited instances expressly recognized by

international law, ships on the high seas are not subject to any authority other than the State whose flag they fly. For a ship to fly the flag of a State there must be a genuine link between the State and the ship (Art. 91 (1) UN Convention on the Law of the Sea). In the realm of international law, it has been defined as “freedom of movement for vessels, freedom to enter ports and to make use of plant and docks, to load and unload goods and to transport goods and passengers. This right is now also codified as *Article 87(1)* of the 1982 United Nations Convention on the Law of the Sea and stated that “The high seas are open to all States, whether coastal or land-locked” and lists “freedom of navigation” as one of the several rights for all States on the high seas. *Article 90* of the Convention provides that, ‘Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas’. Freedom of navigation came to be embodied in bilateral treaties to become part of what has today become known as international law. Many treaties have already existed between countries centuries ago concerning free navigation during which ‘free ship free goods’ principle was recognized. This culminated in 1982, when freedom of navigation became part of the broader body of laws of the sea presently embodied in the United Nations Convention on the Law of the Sea (UNCLOS) as already stated.

Freedom of Navigation as established under the United Nations Convention on the Law of the Sea has been a trade-off between the developed and the developing world (W Christian, 2019). The Pacific Review 32.4 (2019): 475–504. Under this understanding, the developed world had an interest in a maximum of their freedom to sail and explore the seas the developing world wanted to protect their offshore resources and their independence. In other words, it was a conflict between understanding the seas through the principle of *mare liberum* that asserts the oceans to be open to all nations or *mare clausum* that advocates that the seas should be under the sovereignty of a state. The UNCLOS upheld freedom of navigation on the high seas but also invented different zones of sovereignty that limited the rules of foreign ships in these waters with concepts like internal waters and Exclusive Economic Zones (EEZ) (G Munriaj, 2016). Additionally, navigation rights of warships were guaranteed on the high seas with complete immunity from the jurisdiction of any State other than the flag State.

The Convention introduced a number of legal concepts that allowed freedom of navigation within and outside of the maritime jurisdictions of States. They include:

a. right of innocent passage,
b. right of transit passage,
c. right of archipelagic sea lanes passage, and
d. freedom of the high seas.

The right of innocent passage grants ships the freedom to travel in other States territorial seas if it is not prejudicial to the peace, good order or security of the costal State. However, some countries like China demand that warships to obtain prior authorization before they enter Chinese national waters ((G Munriaj, 2016). Transit passage refers to passage through straits used for international navigation between one part of the high seas or an exclusive economic zone (EEZ) and another with more relaxed criteria for passage. The passage must be continuous and expeditious transit of the strait. With archipelagic sea lanes passage archipelagic States may provide sea-lanes and air-routes passage though their waters were ships can enjoy freedom of navigation (F. Eleanor & F. Andrew, 217).

Self-Assessment Exercise

1. Discuss the freedom of fishing on the high seas
2. Identify the pre-requisite conditions for the exercise of the right of navigation in the high sea.

1.4 Conditions for the Exercise of Navigation Rights on the High seas

Even in the high seas, freedom of navigation is not without some qualifications. Although under the Convention, the high seas are free and open to all States, whether coastal or land-locked, and no State may validly purport to appropriate any part thereof to its sovereignty (A J Hoffmann, 2011). The freedoms under this present legal regime must be exercised subject to certain conditions laid down by the United Nations Convention on the Law of the Sea and by other rules of international law (*Art. 82 (1)* UN Convention on the Law of the Sea). States exercising their navigation rights in the high seas must therefore do so with due regard for the interests of other States in their exercise of high seas freedoms. This principle of due or reasonable regard, as provided for, under *Article 87 (2)* of the United Nations Convention on the Law of the Sea and *Article 2* of the High Seas Convention, is similar to that applied in the exclusive economic zone (EEZ) and seeks to maintain the balance between the rights and interests of States when exercising their respective high seas freedoms (A J Hoffmann, 2011). It further ensures that the rights of others are protected with respect to activities in the International Seabed Area in accordance with *Article 87 (2)* of the UNCLOS. This principle provides an objective test which international courts and tribunals may apply where there is a conflict between two uses of the high seas.

1.5 Freedom of Fishing on the High Seas

The United Nations Convention on the Law of the Sea also recognizes the free access and the freedom of fishing on the high seas to all States. The Convention however calls upon all States and particularly upon States fishing to cooperate in the conservation and management of fishery resources occurring in the high seas. International law of the sea however limits the right of States to authorise their nationals to engage in fishing on the high seas. This right must be exercised subject to conditions such as:

a. setting appropriate conservation and management measures, and
b. cooperating with other relevant States.

'Management of high seas fisheries is in most areas done through competent regional fisheries management organisations (RFMOs), who thereby play a key role in high seas fisheries and whose measures are relevant for all States, including non-members'(S. Asmundsson). *Article 87 (1)* of the Convention provides in respect of the freedom of fishing on High Seas which must be exercised subject to the conditions laid down in *section 2* of the Convention. Also *Article 116* of the Convention explicitly establishes that the right of States to authorise their nationals to fish on the high seas is subject to specific limitations. It provides that:

> All States have the right for their nationals to engage in fishing on the high seas subject to:
>
> (a) their treaty obligations;
>
> (b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and
>
> (c) the provisions of this section.

Article 63 (2) of the Convention provides to the effect that:

> Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

The necessary implication of the above provision is that States simply do not possess automatic right to authorise their nationals to fish on the high seas until they fulfill the conditions laid down in the relevant article. The freedom to fish on the high seas is therefore limited by the rights and duties as well as the interests of the coastal states with whom the States fishing in the high seas must cooperate on best measures to be adopted.

1.6 Summary

Freedom of navigation and that of fishing remain an essential principle of international law established to ensure public order in the world oceans. Notwithstanding the expansion of maritime zones and the extension of coastal State jurisdiction over large areas of the sea with the creation of the exclusive economic zones, the right of States to navigate and fish on the high seas without undue interference is guaranteed in the relevant provisions of the present legal regime of the sea. These provisions are designed not only to regulate the often divergent state interest on high seas but also to ensure that the balance between them is maintained. Any emerging challenges not envisaged or regulated by the present legal regime of the sea may require additional measures that would permit States to legally intervene and to exercise legislative and enforcement jurisdiction over suspected ships. However, any security-related initiatives States may wish to adopt on the high seas or within their jurisdictional zones must to be in conformity with accepted norms and principles of international law. In this unit, we discussed: Freedom to navigate on the high seas, and freedom to fish on the high seas

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1.8 Possible Answer to Self-Assessment Exercise

1. The UNCLOS recognizes the free access to and the freedom of fishing on the high seas to all States. However, this must be done with a kind of coordinated international cooperation for the conservation of the fishery resources occurring in the high seas. This right must therefore be exercised subject to certain conditions such as:

    i. Setting appropriate conservation and management measures, and
    ii. Cooperating with other relevant States. Read *article 116* of the UNCLOS

2. Under customary international law, there is this principle of freedom of navigation by which ships flying the flag of any sovereign State shall sail freely and not to suffer interference from other States. This freedom must however be exercised subject to certain conditions. States exercising the said right must do so with due regard for the interests of other States in their exercise of high seas freedoms. Read *article 87 (2)* of the UNCLOS.

Unit 2: Exploitation of other Economic resources in the High Seas and the Seabed

2.1 Introduction

The United Nations Convention on the Law of the sea has established an international legal regime for the world's oceans. This comprehensive legal regime formed the basis of an international programme of action on the sustainable development of the resources and uses of the seas as laid out in the Convention. The United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALS) of the Office of Legal Affairs has developed a programme of activities for the realization by States of benefits under the legal regime and the programme of action established by the Convention. One area where potential benefits assumed a crucial role in the formulation of the legal regime in the Convention and its elaboration is that of marine mineral resources. The potential for the realization of benefits from these resources has expanded considerably both in areas within national jurisdiction and in the international area due mainly to advancement in scientific discoveries. We will examine here how the marine resources beyond national jurisdiction are exploited under the present sea regime.

2.2 Learning Outcomes

At the completion of this unit, you are expected to be able to:

i. Identify the economic resources of the high seas and seabed
ii. Appreciate how these resources can be exploited
iii. Have first-hand knowledge of the body that mans the activities in on the seabed.

2.3 Identification of the High Seas and Seabed Resources

The world seas are wondrously rich with diverse resources both living and non-living. The seas serve as a source of energy and natural resources, and play a crucial role in global weather patterns, although they are under some threats from over consumption of certain living resources, pollution and climate change (R Wolfrum, 2012). The world has scarcely begun to explore what the seas contain in terms of marine life and resources. However, some flexible legal frameworks and sophisticated scientific models are seriously required to deal adequately with these changes, to ease conflict and guarantee sustainable use of the sea.

Study shows that more than seventy percent of the Earth's surface is covered with seawater. It therefore has a huge influence on life on our planet. However, the potential wealth available in the sea is largely untapped and even unexplored yet by man. This is partly because of the logistical difficulties and the specialist equipment needed to reach all areas. Reserves of **gas and oil** have not been fully identified and man has not yet begun to exploit alternative energy sources in the seas such as **thermal**, **wind**, **wave** or **tidal energy**, significantly, let alone the mineral stores beneath the sea bed (R Wolfrum, 2012). The sea contains large amounts of mineral resources. Based on potential recoverable reserves of one thousand to five thousand billion barrels, there is likely four hundred to six hundred billion barrels of oil offshore, and possibly as much as two trillion. It has been estimated that eight percent or more of these reserves are within 200 nautical miles offshore (the evolving boundary between coastal State and international jurisdiction over economic resources in the sea) (J Johnston, 1980). This and more estimates still leave a substantial portion of the resources, up to twenty percent, in the seabed, though one expert had expressed doubts as to whether these reserves will ever become commercially recoverable (F Singer, 1981). In any event, the value of the sea deposits of oil is immense, and would be worth between fourteen and seventeen trillion dollars, at a price of thirty-five dollars per barrel. Significant mineral deposits also lie on the ocean basin – the deep seabed. The most important of these mineral resources are **manganese nodules**. Estimation shows that the Pacific Ocean has the richest deposits, containing one to one and a half trillion tones, making this perhaps the largest mineral deposit on earth (W Hawkins, 1982). **Nodules**, rounded mass of manganese oxide which form through chemical precipitates from the ocean, accreting around objects such as bones, stones or teeth are also found on the seabed of the Atlantic and Indian Oceans and an estimated 250 million metric tons of them are found on America's outer continental shelf (W Hawkins, 1982).

Other rich deep seabed deposits have been discovered of recent. These include **Polymetallic sulfides** found in the East Pacific, along the Juande Fuca Ridge, on the Galapagos Rift off Ecuador, in the Guayamas Basin in the Gulf of California, and also in the Red Sea (D Bandow, 1982). These minerals collect near volcanic hot springs, and contain **copper zinc**, and **silver** in addition to **sulfur**. All these rich resources are necessary for industrial purposes. It equally contains **titanium**, **cerium**, **nickel**, **platinum**, **manganese**, **thallium**, **tellurium** and other rare earth elements.

The increased awareness and knowledge of these rich resources found in the sea and their benefits account for the reason why nations of the world are developing stronger and divergent interests in the seas. It is unfortunately however, that the value of these rich

mineral deposits in the seabed may remain theoretical for some time as only small fraction of them are presently exploited due to some scientific, technical, economic and legal limitations.

Self-Assessment Exercise

1. The seabed resources are declared common heritage of mankind. Discuss.
2. Enumerate the roles of the International Seabed Authority

2.3.1 Exploitation of Economic Resources of the Seabed

The amount of natural resources on and beneath the high seas is quite enormous. The guideline for the exploitation of the living resources on the high seas has been explained during our examination of the jurisdiction of the high seas. The degree of the rich resources lying beneath the high seas has become more and more apparent in the recent years due to scientific and technological advances. Such scientific advances in the past few decades have actually revolutionalized the international community's knowledge and ability to search for marine mineral resources. In some cases, applied science has found ways to make some of these resources available to mankind through the development of new technologies or the adaptation of existing ones for mining the mineral deposits concerned and processing them to recover the valuable products that they contain. For mineral resources found in the international seabed area the 'Area', a legal framework has been provided by the Convention. For polymetallic nodules, this framework and the Agreement relating to its implementation have been used to develop a prospecting and exploration code. For further development of this code, applied science (engineering) will have to provide a solution to the problem of economically viable mining and processing technologies (F. O. Agama, 2016) p. 147.

One important attribute of the mineral resources in the seabed is that they may occur both in maritime areas under the jurisdiction of coastal States or in the international seabed Area beyond the limits of national jurisdiction. It seems however that none of these minerals are commercially mined yet, but a considerable amount of commercial interest has been indicated in some of the deposits. What is essential before commercial exploration of these minerals could actually commence is that the profitability of a mining operation is

established. The profitability will further depend upon a number of interrelated factors such as:

a. the characteristics of the mineral deposits,
b. suitable technology to mine it,
c. technology for processing the ore obtained from the deposit to extract the products of economic value,
d. market conditions, and
e. environmental considerations.

2.4 The International Seabed Authority

This was established under the Convention to organize, regulate and control all mineral-related activities in the international seabed area beyond the limits of national jurisdiction. The United Nations Convention on the Law of the Sea 1982 under its **Part XI** has declared the seabed and its resources to be the common heritage of mankind as a whole. Thus no State or natural or juridical person shall, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with **Part XI** of the Convention (**Art. 137 para 3 of the Convention**). Pursuant to the relevant provisions of the Convention, activities in the seabed (Area) including exploitation of the mineral resources are carried out for the benefit of mankind as a whole on whose behalf the International Seabed Authority (the Authority) established under the Convention shall act. The Authority is to provide for the equitable sharing of such benefits (**Art. 40 of the Convention**). In order to control the activities of States and manage the resources in the 'Area' the United Nations Convention on the Law of the Sea confers exclusive rights on the International Seabed Authority (ISA), a body established under **Section 4, *Article 156* of the Convention** for that purpose. All States Parties to the Convention are *ipso facto* Members of the (ISA). Exploitation of the seabed resources including every other activity in the Area are to be carried out in accordance with the provisions of ***Article 153*** by the Enterprise (i.e. the Organ of the Authority established as its operating arm) and by State Parties or State Enterprises, or persons possessing the nationality of States Parties or effectively controlled by them, acting in association with the Authority.

2.5 Functions of the International Seabed Authority

The following are some of the numerous roles/functions of the Authority:

a. To protect and conserve the natural resources of the Area
b. To prevent damage to the flora and fauna of the marine environment.

c. Determination of area for exploration and making the exploration and ascertain that the exploration is commercially viable.
d. To provide Information and data relating to International Seabed Area
e. General administration of the mineral resources of the International Seabed Area which is the common heritage of mankind.
f. Adopt rules, regulations as well as procedures for the conduct of activities in the Area.
g. To promote and encourage marine scientific research in the Area.

2.6 Summary

The seas are great reservoir of natural resources-living and non-living. Some of them include but not limited to salt, potassium, magnesium, sand and gravel, limestone and gypsum, manganese nodule, phosphorites, metal deposit associated with volcanism and seafloor vents, place gold, tin, titanium, and diamond. All these are in addition the numerous living resources of the sea. Many of these mineral resources lye right beneath the high seas and can amount to quite enormous economic fortune for the entire world when the full scale exploitation commences. In this unit, we discussed: The resources of the sea, exploitation of these resources and the International Seabed Authority in relation to seabed activities

2.7 References/Further Readings

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2.8 Possible Answer to Self-Assessment Exercise

1. The UNCLOS under its ***Part XI*** declares the seabed and its resources to be the common heritage of mankind as a whole. Consequently, no State or natural or juridical person shall, acquire or exercise rights with respect to the minerals

recovered from the Area except in accordance with ***Part XI*** of the Convention. Read *article 137* of the UNCLOS.

2. Roles of the International Seabed Authority include but not limited:

i. To protect and conserve the natural resources of the Area
ii. To prevent damage to the flora and fauna of the marine environment.
iii. Determination of area for exploration and making the exploration and ascertain that the exploration is commercially viable.
iv. To provide Information and data relating to International Seabed Area
v. General administration of the mineral resources of the International Seabed Area which is the common heritage of mankind.
vi. Adopt rules, regulations as well as procedures for the conduct of activities in the Area.
vii. To promote and encourage marine scientific research in the Area.

Unit 3: The Concept of Scientific Research and Experiments in the High seas

3.1 Introduction

From our discussions in this course, we found out that the 1982 United Nations Convention on the Law of the Sea provides the legal framework within which all activities in the seas must be carried out, marine scientific research inclusive. In its Preamble the 1982 Convention recognizes the desirability of establishing a legal order for the oceans and seas which will among other things promote the study of the marine environment. Part XIII of the Convention is entirely concerned with the subject of marine scientific research. In fact, the General Assembly of the United Nations has in several occasions emphasised the importance of marine science for eradicating poverty, contributing to food security, conserving the world's marine environment and resources, helping to understand, predict and accurately respond to natural events and promoting the sustainable development of the sea environment.

3.2 Learning Outcomes

At the completion of topic, you are expected to be able to:

i. Effectively discuss scientific marine research
ii. Appreciate the need for scientific marine research

3.3 Marine Scientific Research

The Convention did not provide any definite definition of marine scientific research. We should note however that "survey activities, "prospecting" and "exploration and exploitation" are primarily dealt with in Parts II, III, XI, Annex III to the Convention, and in the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. The Convention contains general guides and principles for the conduct of marine scientific research under its *Article 240*. It stipulates that, marine scientific research shall:

(a) Be conducted exclusively for peaceful purposes (this is in keeping with the general spirit of the Convention to promote the peaceful uses of the seas, as provided for in the preamble of the Convention and reiterated in its various articles, including arts. 88, 143 and 301);

(b) Be conducted with appropriate scientific methods and means compatible with the Convention;
(c) Not unjustifiably interfere with other legitimate uses of the sea compatible with the Convention and shall be duly respected in the course of such uses; and
(d) Be conducted in compliance with all relevant regulations adopted in conformity with the Convention including those for the protection and preservation of the marine environment.

The concept of marine scientific research prohibits States from using marine scientific research activities as constituting the legal basis to appropriate or lay any claim to any portion of the marine environment or its resources (Art. 241 of the UNCLOS). This is in line with the intent of similar provisions of the Convention regarding the non-appropriation of the high seas (Arts. 89 and 90 of the UNCLOS) and the Area (Art. 137, paragraphs 1 and 3 of the UNCLOS).

Self-Assessment Exercise

Summarily discuss the duties imposed on States and international organizations while conducting marine scientific research

3.3.1 Who can Conduct Scientific Marine Research?

All States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research, subject to the rights and duties of other States as provided for in the Convention (Art. 238 of the Convention). The reference to *"all States, irrespective of their geographical location" ensures that not only coastal States, but also landlocked and other geographically disadvantaged States, have the right to conduct marine scientific research in the high seas". Article 239* of the Convention provides that States and competent international organizations shall promote and facilitate the development and conduct of marine scientific research inaccordance with this Convention. Freedom of scientific research is expressly referred to in the Convention as a freedom of the high seas (Art. 87 of the Convention). It should be noted however that the right to conduct marine scientific research is not an absolute right since it is qualified

by the rights and duties of other States. Although the term "competent international organizations" was not defined in the Convention, it can be generally considered to include inter-governmental organizations which are empowered by their constituting instruments or other rules to undertake, coordinate, or promote and facilitate the development and conduct of marine scientific research. Annex VIII to the Convention, particularly Article 2 provides an indicative list of such organizations.

3.4 International co-operation for Scientific Research

It is the requirement of the Convention that there should be cooperation in marine scientific research between and among States and international organizations permitted to carry out such activities on the high seas. See generally *Articles 242 and 278* of the Convention. In accordance with the convention, States and competent international organizations should endeavour to promote international cooperation in marine scientific research for peaceful purposes in accordance with the principle of respect for sovereignty and jurisdiction and on the basis of mutual benefit. States are required under this principle to provide, as appropriate, each other with a reasonable opportunity to obtain from them, or with their cooperation, information necessary to prevent and control damage to the health and safety of persons and to the marine environment.

Article 43 stipulates to the effect that 'States and competent international organizations are also required to cooperate through the conclusion of bilateral and multilateral agreements, to create favourable conditions for the conduct of marine scientific research in the marine environment and to integrate the efforts of scientists in studying the essence of phenomena and processes occurring in the marine environment and interrelations between them'. The Convention also requires that State should promote through competent international organizations the establishment of general criteria and guidelines to assist in ascertaining the nature and implications of marine scientific research and to adopt reasonable rules, regulations and procedures to promote and facilitate marine scientific research beyond their territorial sea and facilitate, subject to the provisions of their laws and regulations, access to their harbours and promote assistance for marine scientific research vessels (**Arts. 251 and 255 of the Convention**)

3.5 Importance of Marine Scientific Research

Knowledge about the seas is still very limited despite the fact that the development of States particularly those with coastline, often depends on the potential to exploit marine resources. Marine research is therefore important in the following ways:

a. Improvement in the knowledge and understanding of marine and coastal processes,
b. The improved knowledge is a prerequisite for protecting the marine environment and ecosystems in a more precautionary manner and for supporting sustainable economic opportunities from sea resources.
c. 'Results from marine scientific research provide input for policy makers in pursuing developmental options and also benefit society in terms of weather forecasting and prevention of natural disasters'.
d. Marine scientific research contributes to the improvement in marine technologies
e. Discoveries from the marine scientific research provide veritable ground for improvement on the scientific requirement and skill for the exploitation of the seabed resources.

3.6 Summary

Marine scientific research is one aspect of the concept of the freedom of the seas as articulated by the Convention under its article 87. Every state whether coastal or land-locked enjoys this right to conduct marine scientific research in the high seas though subject to certain conditions laid down in the Convention. Marine scientific research is important for various ocean activities that require some deep skill and scientific knowledge to undertake. In this unit, we discussed: Marine scientific research and Importance of marine scientific research in the development of the seabed resources

3.7 References/Further Readings/Web Resources

Law of the Sea 1996, Bulletin No. 31, pp. 93-95 (United Nations publication).

3.8 Possible Answer to Self-Assessment Exercise

i. The UNCLOS requires that there should be cooperation in marine scientific research between and among States and international organizations permitted to carry out such activities on the high seas. Read *articles 242 and 278.*
ii. States and competent international organizations should make efforts to promote international cooperation in marine scientific research for peaceful purposes.
iii. The above should be done in accordance with the principle of respect for sovereignty and jurisdiction and on the basis of mutual benefit.
iv. States are encouraged under the principle to provide, as appropriate, each other with a reasonable opportunity to obtain from them, or with their cooperation,

information necessary to prevent and control damage to the health and safety of persons and to the marine environment. Read also *article 43* of the UNCLOS

Unit 4: Disposal of Radioactive waste

4.1 Introduction

For several centuries now, the seas have been used as a place to dispose of wastes resulting from human activities. Considerable amounts of packaged low-level radioactive waste (LLW) have been dumped at more than 50 sites in the seas particularly the northern part of the Atlantic and Pacific Oceans. Low-level waste is defined as waste which, due to its low radionuclide content, does not require shielding during normal handling and transportation (*D. O. Calmet, Ocean disposal of radioactive: Status Report*). In 1946, the first sea dumping operation took place at a site in the North East Pacific Ocean, about 80 kilometers off the coast of California. The last known dumping operation was in1982, at a site about 550 kilometers off the European continental shelf in the Atlantic Ocean. However, the possibility of undesirable contamination of the sea from disposal of radioactive wastes has of recent become a matter of growing international concern.

4.2 Learning Outcomes

At the completion of the unit, you are expected to be able to:

i. Explain the term ‘radioactive waste’
ii. Appreciate the position of the law on radioactive disposal in the high seas

4.3 Radioactive Waste

Radioactive waste is a type of hazardous waste that contains radioactive material. It is a by-product of various nuclear technology processes. Industries generating radioactive waste include nuclear medicine, nuclear research, nuclear power, manufacturing, construction, coal and rare-earth mining and nuclear weapons reprocessing. Radioactive waste is regulated by government agencies in order to protect human health and the environment.

Self-Assessment Exercise

1. The high seas are open place, accessible by all and belonging to no nation. It is therefore the most appropriate site for disposal of radioactive waste. Discuss.
2. What are the sources and types of radioactive waste?

4.4 Sources and types of Radioactive Waste

Radioactive waste comes from a number of sources. In countries with nuclear power plants, nuclear armament, or nuclear fuel treatment plants, the majority of waste comes from the nuclear fuel cycle and nuclear weapons reprocessing. There other sources which include medical and industrial wastes, as well as naturally occurring radioactive materials (NORM) that can be concentrated as a result of the processing or consumption of coal, oil and gas, and some minerals. Radioactive wastes are of three types namely;

a. *Low-level waste* (LLW) which is generated from hospitals and industry, as well as the nuclear fuel cycle,
b. *Intermediate-level waste* (ILW) contains higher amounts of radioactivity compared to low-level waste. It generally requires shielding, but not cooling, and
c. *High-level waste* (HLW) which is produced by nuclear reactors and constitutes a greater concern to the international community.

4.5 Disposal of Radioactive Waste in the High seas

As wastes from nuclear power plants, government projects, and several other fields of science continue to stockpile, attention is being drawn on the world's oceans as a potentially viable sink for these wastes (D. G. Spak, 1986). While other alternatives, such as burial in deep geological salt formations, are currently being developed, the full ramifications of these plans remain unknown. The problems presented by radioactive waste disposal are compounded because much of the radioactive waste currently created will remain a hazard, not just for a few generations, but for centuries. Whatever options industry and the international community adopt, such alternatives must be safe for the human population and the environment.

Some writers still argue that 'not enough is known about the possible effects on ocean ecosystems and our relationship to them to conclude that the ocean is a viable disposal site for radioactive wastes' (D. G Spak, 1986) pp. 804-805. While those who support the adoption of disposal of radioactive waste in the sea argue that the sea has large amounts of naturally occurring radioactivity, they have been unable to answer the central question of what effect additional man-made radioactive materials will have on the ocean environment. It is however important to note that radioactive waste would constitute a serious source of pollution to the marine environment which the present legal regime of the sea seeks to prevent. The Convention imposes a general obligation on States to protect and preserve the marine environment and requires States to take individually or jointly all measures necessary to prevent, reduce, or control pollution using the best practicable means at their

disposal and in accordance with their capabilities. It defines 'pollution to mean *'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities'* (Art.194 UNCLOS). The Convention was created to regulate all uses of the sea, containing provisions governing all aspects of sea space, such as delimitation, marine scientific research, economic and commercial activities, environmental control, transfer of technology, and the settlement of disputes relating to ocean affairs. In effect however, the Convention did not specifically prohibit or even refer to the legality of disposing of radioactive waste. Neither did it classify which wastes can and cannot be disposed of in the seas. It seems the provisions of *Article 194* (duty to prevent, reduce or control pollution) will apply if the proposed activity is determined to be 'pollution'. But from the definition of pollution above, it may be right to argue that radioactive waste will be considered to be pollution, although this will depend on how it is stored in the seabed and its likelihood of escape and to cause harm to living marine resources (R Macrory and R Purdy, 2005).

4.6 Summary

Although the seas are considered by many as potentially viable site for disposal of radioactive waste, it is not quite certain if that would not constitute 'pollution' within the definition of the term by the Convention. The issue of disposal of radioactive waste in the seas was not specifically provided for by the United Nations Convention on the Law of the Sea. However, the provision of Article 194 of the Convention seems to be far-reaching to affect the legality disposal of radioactive waste in the seas. In this unit, we discussed: Meaning and sources of radioactive waste and disposal of radioactive waste in the seas.

4.7 References/Further Readings/Web Resources

1. David G. Spak, 'The need for Ban on all Radioactive Disposal in the Ocean', (1986) *Northwestern Journal on International Law and Business* Vol 7, p. 804.
2. Richard Macrory and Ray Purdy, 'Sub Seabed Disposal of Radioactive Waste-Legal Considerations', (2005) *rwm.nda.gov.uk › publication › nirex-review-of-corw*

4.8 Possible Answer to Self-Assessment Exercise

1. There is a genuine fear that disposal of radioactive waste in the high seas might constitute a serious source of pollution to the marine environment within the contemplation of the UNCLOS. The UNCLOS under *article 194* defines 'pollution as *'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities'*. Although the Convention did not specifically prohibit or even refer to the legality of disposing of radioactive waste in the sea, it is proper to argue that the provisions of *article 194* which impose duty to prevent, reduce or control pollution will apply if radioactive disposal is determined to constitute 'pollution' which might likely be the case from the above definition.

2. **Sources and types of radioactive wastes are:**
   i. *Low-level waste* (LLW) which is generated from hospitals and industry, as well as the nuclear fuel cycle,
   ii. *Intermediate-level waste* (ILW) contains higher amounts of radioactivity compared to low-level waste. It generally requires shielding, but not cooling, and
   iii. *High-level waste* (HLW) which is produced by nuclear reactors and constitutes a greater concern to the international community.

Unit 5: Freedom to Submarine Cables & Pipelines, and Mechanical Installations

5.1 Introduction

In this unit we intend to explore the rights and duties of States regarding the laying and operation of the underwater/submarine cables and pipelines. The freedom to lay submarine cables and pipelines is indeed one of the most venerated high seas freedoms under the 1982 United Nations Convention on the Law of the Sea (UNCLOS). This freedom was particularly created by *Article 87 paragraph 1 (c)* of the Convention. There are two main types of submarine cables:

a. Communications cables used to transmit data communications, and
b. Power cables used to transmit electrical power.

Submarine pipelines are used to transport oil and gas resources. All are designed for underwater use and are laid on or buried under the seabed as allowed by the Convention.

5.2 Learning Outcomes

At the completion of the unit, you are expected to be able to:

i. Appreciate the rights and duties of States regarding laying of submarine cables and pipelines and other installations
ii. Understand the freedom in relation to the above

5.3 Freedom of Laying Submarine Cables and Pipelines in the High Seas

Beyond the limits of national jurisdiction in the high seas, every State is entitled to lay submarine cables and pipeline on the bed of the high seas beyond the continental shelf. However, in exercising this right, States shall have due regard to cables or pipelines already in position while the possibilities of repairing existing cables shall not be prejudiced. *Article 112* of the Convention provides that, *All States are entitled to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf.*

It should be noted that the Convention also grants the States the freedom to construct artificial islands and other installations in the high seas. See *Article 87 (d)* of the Convention.

Self-Assessment Exercise

1. With the aid of the law discuss the obligation of State in the exercise of the freedom of laying submarine cables and pipelines in the high sea.
2. Discuss briefly the position of territorial waters in connection with submarine cable and pipelines

5.4 Obligation of States

The 1982 United Nations Convention on the Law of the Sea has recognized the freedom to lay submarine cables and pipeline and perform associated operations. The Convention also places certain obligations on States regarding the protection of submarine cables and pipeline and safety of other users.

Pursuant to *Article 113* of the Convention **'**Every State shall adopt the laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done willfully or through culpable negligence shall be a punishable offence'.

Article 114 requires that 'Every State shall adopt the laws and regulations necessary to provide that, if persons subject to its jurisdiction who are the owners of a submarine cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the repairs'.

Article 115 provides to the effect that 'Every State shall adopt the laws and regulations necessary to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable, shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand'.

5.5 Submarine Cables and Pipelines in the Territorial Sea

It is trite already that the territorial sea of each Coastal State falls under the full sovereignty of the State. Laying of submarine cables and pipelines in territorial waters are therefore governed by the same legal regime applicable for land cables and pipelines. In other maritime zones, the provisions of the Law of the Sea Convention regulate the rights of

laying and operation of submarine cables and pipelines. The Energy Charter Treaty defines the nature and principles of the energy materials trade and transit. These two Treaties, in conjunction with national legislation, are sufficient for the successful regulation and operation of cross-border land and submarine cables and pipelines. The usual case is that participating States and companies would sign special international treaties and agreements, defining contractual terms, conditions and the applicable law (Mudric, 2010).

Article 2 of the Convention already provides that the sovereignty of the coastal State extends to its territorial and archipelagic waters in case of archipelagic State. A permission and consent of the coastal State must therefore be sought and obtained before laying a submarine cable or a pipeline in its territorial waters. In granting the consent, the coastal State may set conditions regarding the track of the cable and its dimensions. What this tend to explain is that, the laying of the submarine cables and the pipelines in the territorial sea and archipelagic waters is completely within the regulation of the national law of the coastal State. Accordingly, the right of "innocent passage" as contemplated by *Article 21(1)(c)* of the Convention may be restricted in order to protect submarine cables. However, *there is in existence international law and practice that regulates such undertakings, and/or instructs national regulation on what type of norms to adopt, and what sort of a legal and political framework to promote* (Mudric, 2010).

5.6 Summary

The United Nations Convention on the Law of the Sea provides a number of rules with regard to laying and operation of the submarine cables and pipelines. The Convention also defines conditions necessary to be met by States in order to obtain the right to lay submarine cables and pipelines, and requires Member States to adopt national legislation that imposes sanctions on those not respecting the rules. In this unit, we discussed: Freedom of laying submarine cables and pipelines and States rights and obligations

5.7 References/Further Readings

1. R Lagoni, "Legal Aspects of High Voltage Direct Current (Hvdc) Cables", (1999) *LIT Verlag Berlin-Hamburg-Münster*
2. J Crowley, "International Law and Coastal State Control over the Laying of Submarine Pipelines on the Continental Shelf – The Ekofisk-Emden Gas Pipeline," (1987) *56 Nordic J Int'l L 40*
3. S Kaye, "International Measures to Protect Oil Platforms, Pipelines, and Submarine Cables from Attack", 92006-2007) *31 Tul Mar LJ 377*, at 398-403

4. R Beckman and T Davenport, “Workshop Report – Workshop on Submarine Cables and Law of the Sea”, (2009) *Centre for International Law (CIL)*

5. A R Börner, “Private Law Aspects of the Nord Stream Pipeline”, (2009) *Nord Stream Pipeline Conference, CAU Kiel*

6. Mišo Mudrić, “Rights of States Regarding Underwater Cables and Pipelines”, (2010) <www.researchgate.net › publication › 265194864_RIGHT>

5.8 Possible Answer to Self-Assessment Exercise

1. The UNCLOS places certain obligations on States regarding the protection of submarine cables and pipeline and safety of other users. For instance,
    i. *Article 113* of the UNCLOS **‘**requires States to adopt laws and regulations that would punish the offence of willful or negligent breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas.
    ii. *Article 114* requires that States should adopt laws and regulations to provide that, if persons subject to its jurisdiction and are owners of a submarine cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the repairs’.

    iii. *Article 115* requires that State should adopt laws and regulations to ensure the indemnification of owners of ships in case of any injury to the ship by submarine cables provided they have taken all necessary precautions.

2. Pursuant to *article 2* of the UNCLOS, the territorial sea of each coastal State falls under the full sovereignty of the State. Therefore, laying of submarine cables and pipelines in territorial waters are governed by the same legal regime applicable for land cables and pipelines of the State. Consent of the coastal State must therefore be sought and obtained before laying a submarine cable or a pipeline in its territorial waters.

MODULE 4: JURISDICTION OVER MARITIME ZONE ADJACENT TO THE COAST

Unit 1: The Regime of Ports and Internal Waters

1.1 Introduction

The rights of coastal States to regulate and exploit areas of the ocean within their national jurisdiction are one of the foundations of the present legal regime of the sea. Jurisdiction over these maritime zones must however be balanced with the freedom of navigation and access to resources within the international zone in keeping with the concept of the freedom of the seas. The Convention permits coastal States to establish several different maritime zones and exercise various degrees of jurisdictional rights over them. In general, coastal States can only exercise full sovereignty over the maritime zones near to their coastline than those zones that are further into the ocean. The jurisdictional nature of various zones of the sea even to the high seas has been explored earlier. So, we will not go over them again other than examining the nature of ports and internal waters and the review more the nature of States Continental Shelf.

It has been generally admitted principle of international law that States have the same sovereign jurisdiction over their internal waters as they do over their land territory. The implication of this understanding is that the general rules of international law regarding the legal order of the seas do not apply to the internal waters of coastal States. Thus, there is no right of innocent passage through internal waters safe as provided by *Article 8 paragraph 2* of the Convention.

1.2 Learning Outcomes

At the completion of the unit, you are expected to be able to:

i. Discuss the rights a coastal has over foreign ships in its ports
ii. Appreciate the what is the right of access to internal waters

1.3 Internal waters

Pursuant to the relevant provisions of the United Nations Convention on the Law of the Sea, a country's internal waters are those waters on the side of the baseline of a nation's territorial waters that is facing toward the land, except in archipelagic states. Internal waters

therefore include all the waters that fall landward of the baseline from which the territorial sea and other maritimes zones are measured such as bay, gulf, habour, port, lakes, rivers, and tidewaters. See *Article 8 (1)* of the Convention.

Self-Assessment Exercise

1. Succinctly examine a state jurisdiction over its internal waters
2. How are internal waters differentiated from territorial sea?
3. Briefly discuss the jurisdiction of a State over its port

1.4 States Jurisdiction over Internal Waters

In inland or internal waters, sovereign rights of a coastal state are equal to that which it exercises on their land territory. The coastal state is free to make laws relating to its internal waters, regulate any use, and use any resource. In the absence of agreements to the contrary, foreign vessels have no right of passage within internal waters, and this lack of right to innocent passage is the key difference between internal waters and territorial waters (Art. 2, UNCLOS). The "archipelagic waters" within the outermost islands of archipelagic states are also treated as internal waters with although in this case, innocent passage must be allowed. However, the archipelagic state is allowed to designate certain sea lanes in these waters.

When a foreign vessel is authorized to enter inland waters, it is subject to the domestic laws of the coastal state but the crew of the ship is subject to the law of the flag state.

1.5 Seaports

A port is a maritime facility usually situated on a sea coast, and which may comprise one or more wharves where ships may dock to load and discharge passengers and cargo. The Convention defined port as the outermost permanent harbour works which form an integral part of the harbour system regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works. The definition given above is for the purpose of delimiting the territorial sea (Article 11 of the UNCLOS).

The United Nations Law of the Sea Convention of 1982 creates a new and comprehensive legal regime of the world's seas. The Convention encompasses nearly every use of the

oceans resources. The present legal regime of the sea codifies the existing concepts of the ocean law such as the territorial sea and contiguous zone and in addition creates radically new maritime zones including the exclusive economic zone, archipelagic waters, and international straits. Accordingly, the Convention provides detailed articles regarding the rights and duties of the coastal State, as well as the freedoms and restrictions of ocean-going vessels in respective maritime zones

However, notwithstanding the innovative provisions by the Convention, it has only superficially dealt with the issues of navigational rights in inland waters and ports. Apart from the provision on the right of innocent passage in internal waters, once considered part of a coastal State's territorial sea, the relevant articles of the Convention provide only definition of port and internal waters. *Article 8* paragraph 1 defines internal waters as "….waters on the landward side of the baseline of the territorial sea," and ports is defined as "the outermost permanent harbour works which form an integral part of the harbour system, regarded as forming part of the coast." The understanding here is that the extent of the Convention is just to delineate internal waters and ports from the territorial sea.

1.6 Nature of Port State Jurisdiction

What seems to be an accepted norm is that ports are part of a state's territory, and as a result, that port states have the right to deny entry to foreign vessels. Port states can place conditions for foreign vessels accessing their ports, can carry out inspections and possibly institute proceedings against any such vessels suspected to have breached their law. Foreign-flagged vessels indeed have no right of entry into port (unless specific international law obligations provide otherwise), and in port they need to comply with port state law, just like any foreign person needs to comply with the law of the visited territory (C Ryngaert, and H Ringbom, 2016). Also, because a state exercises territorial sovereignty over its ports, port states have *residual* territorial jurisdiction under customary international law, meaning that international law permits port states to take more stringent measures than provided in international agreements, unless the agreements specifically prohibits such additional measures, which is normally not the case (C Ryngaert, and H Ringbom, 2016). In fact, international agreements have increasingly affirmed the existence of such residual jurisdiction; notably international agreements on fishing, both binding and non-binding, have emphasized port states' *right* to exercise jurisdiction over visiting vessels in rather explicit terms. See *Preamble of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Rome, 22 November 2009, in force 5 June 2016.*

It is logical to argue therefore that the omission of any regime of port or inland water in the 1982 Convention is intentional. Internal waters and port access seem to be two legal constructs not within the limit and remit of international law of the sea. As noted earlier, *Article 2* of the Convention conveys the sovereignty of a State to encompass both its territory and its inland waters. Accordingly, therefore, the legal regime for inland waters, of which ports are part, would logically be governed by national legal regime rather than international law of the sea. Despite the Convention's apparent omission of inland transit rights, there is however a great body of international law regarding the scope and right of port access.

1.7 Summary

Both internal waters and ports are within the territorial sovereignty of coastal States. Foreign vessels authorized to enter internal waters of a coastal states must in every ramification endeavour to comply with the law of the coastal state, likewise the port state which under the customary international law is permitted to exercise certain measure of jurisdiction over visiting vessels in its port. In this unit, we discussed: Internal waters and

1.8 References/Further Readings/Web Resources

1. Cedric Ryngaert and Henrik Ringbom, ‘Introduction: State Jurisdiction: Challenges and Potential’ (2016) *International Journal of Marine and Coastal Law* Vol. 31

2. Tasikas, Vasilios. "The regime of maritime port access: a relook at contemporary international and United States law." (2007) *Loyola Maritime Law Journal*, vol. 7

1.9 Possible Answer to Self-Assessment Exercise

1. The sovereign rights of a coastal state over its internal waters are equal to that which it assets on its land territory. The coastal state is therefore free to make laws relating to its internal waters, regulate any use, and use any resource as it pleases and in the absence of agreements to the contrary, foreign vessels have no rights whatsoever in internal waters, not even the right of passage.

2. Just like internal waters, coastal states assert full sovereign right over their territorial sea. Read *article 2* of the UNCLOS. The only difference between the two is that, while foreign vessels under international law has the right of innocent passage in the territorial sea, there is no such right in the internal waters.

3. In customary international law, port situates in the internal waters and so is part of a State’s territory. Thus Port-States have the right to deny entry to foreign vessels or place conditions for foreign vessels accessing their ports, can carry out inspections for punishment in case of any breach of the law

Unit 2: The Regime of the Continental Shelf

2.1 Introduction

The continental shelf has been defined as *a geological expression referring to the ledges that project from the continental landmass into seas and which are covered with only a relatively shallow layer of water (some 150- 200 meters) and which eventually fall away into the ocean depths some thousands of meters deep.* The ledges or shelves take up some 7 to 8 percent of total area of ocean and their extent varies considerably from place to place. Continental shelves are known for their rich oil and gas deposits which often make them host to expensive fishing grounds. This fact however, stimulated a round of appropriations by coastal States in the years following the Second World War, which gradually altered the existing legal position/status of the continental shelf from being part of the high sea and free for exploitation by all States until its current recognition as exclusive to the coastal States (M N Shaw, 2004) p.521. But there is serious issue with the implementation of *Article 76* of UNCLOS to entitle coastal state claim the resources found in their outer continental shelves.

2.2 Learning Outcomes

At the completion of this unit, you are expected to be able to:

i. Explain the jurisdictional issues with the Continental Shelf
ii. Appreciate the difficulties associated with the implementation of Article 76 of the UNCLOS

2.3 Jurisdictional issue with the Continental Shelf

Under the 1982 Convention, the coastal State may exercise sovereign rights over the continental shelf for the purposes of exploring and exploiting its natural resources. Such rights are exclusive in that no other State may undertake such activities without prior and express authorization from the coastal State. See *Article 77* of the Convention. It has been suggested that the sovereign rights recognized as part of the continental shelf regime specifically relate to natural resources, so that, for example, wrecks lying on the shelf are not part of the contemplation of the provision (M N Shaw, 2004) p.521. Furthermore, the rights of coastal State over the continental shelf do not depend on occupation, effective/notional or any express proclamation. It has been indicated also that the exercise of the rights by coastal State over the continental shelf shall not infringe on the freedom of

navigation, or on other rights and freedom of foreign ships as the legal status of the superjacent waters as part of the High Seas remains unaffected (UNCLOS, Art. 78 (1) & (2)).

States jurisdiction over their continental shelf is however automatic, but problem arises with the shelf is of the nature that would entitle the state to a claim over the resources in the outer continental shelf. In this case, the jurisdiction is not automatic but would require some complex procedure to come by, a situation which many States detest. See generally *Article 76* of the Convention.

Self-Assessment Exercise

1. What is *continental shelf*

2. For a successful claim to the resources of outer continental shelf, a coastal State has some hurdle to cross. Discuss.

2.4 Outer Continental Shelf

The term outer Continental Shelf refers to all submerged land, its subsoil and seabed that belong to the United States and are lying seaward and outside the states' jurisdiction, the latter defined as the "lands beneath navigable waters" in Title 43, Chapter 29, Subchapter I, Section 1301. See also Article 76 of the Convention.

2.5 Claims to Outer Continental Shelf

While the United Nations Convention on the Law of the Sea grants coastal States jurisdiction to extended/outer continental shelf adjacent to their coastlines, the problem lies on the inability of many states especially developing States to exercise this jurisdiction owing to the legal, financial and technical hurdle they must pass before successfully establish their claims to the resources found in their extended continental shelves. *Article 76* of the Convention under certain geological conditions gives coastal States right of claims up to 350 nautical miles the area referred to as the Outer Continental Shelf. Effectively, Outer Continental Shelf only comes into existence if it is properly claimed by a Coastal State. The definition of Continental Shelf as offered by *Article 76* of the Convention in itself presents some difficulty, complexity and somewhat contradictory so

that it further requires a great deal of data and scientific analysis. Coastal States therefore find it extremely difficult to successfully establish their claim and exercise their jurisdiction over the resources within the outer continental shelves as a result of the stringent provision of the relevant article. For a successful implementation of *Article 76* of the Convention and subsequent claim to the outer continental shelf input from coastal States would include:

i. Elaborate and tortuous legal, scientific and technical capabilities,
ii. High national research facilities
iii. Adequate external advice and assistance.

All these will require the availability of experts in various fields and capacity, constant training and retraining of nationals in the above fields which most coastal States at present cannot afford. The article therefore requires further review.

2.6 Summary

Although, the Convention grants automatic jurisdiction to coastal over the resources found in their continental shelf, the stringent requirements for scientific evidence to substantiate outer continental shelf (OCS) entitlement presents serious hurdles to the States concerned. *Article 76* of the Convention requires States to submit information to the Commission on the Limits of the Continental Shelf (CLCS) in a costly and complex process which most States find extremely difficult to comply with. In this unit, we discussed: Jurisdiction over

2.7 References/Further Readings/Web Resources

M.Sc.E Thesis presented to the Department of Geodesy and Geomatics Engineering, University of New Brunswick Canada in October 2002.

1.8 Possible Answer to Self-Assessment Exercise

1. *Article 76* of the UNCLOS rather explains continental shelf than define it. Paragraph I states that *the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.* It consists of the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the

slope and the rise but does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

2. The right of coastal States over the resources found in the continental shelf is automatic. What presents some difficulties is when the State shelf projects beyond the normal limits of continental shelf amounting to what is known as outer continental shelf. Title over the resources found in this zone is not automatic. *Article 76* of the UNCLOS outlines conditions to be fulfilled for a successful claim. But, the implementation of *article 76* involves, technical, technological, financial as well as legal input which several States, especially developing States cannot afford at present.

Unit 3: Doctrine of Maritime Hot Pursuit and Ship in Distress

3.1 Introduction

In customary international law, the doctrine of maritime hot pursuit recognizes the right of a coastal state to pursue onto the high seas and seize a visiting/foreign vessel that violated its laws while within its territorial waters. This right vested on the coastal States to pursue a vessel and seize it on the high seas constitutes an exception to two fundamental principles of international law of the sea- first, the concept of the freedom of navigation upon the high seas, and secondly, the principle that a ship is subject to the exclusive jurisdiction of the state whose flag it flies. For ships in distress, there is a traditional and recognized right of access to port for purpose of refuge. However, the recent rise in marine pollution incidents seems to have jeopardized the traditional right enjoyed by ships in distress. Although numerous maritime conventions contain provision to this effect, the nature of the right remains controversial.

3.2 Learning Outcomes

At the completion of this unit, it is expected that you will be able to:

i. Understand and discuss the doctrine of hot pursuit, and
ii. Ship in distress and its access to ports

3.3 Basis for the doctrine of Maritime Hot Pursuit

The origin and legitimacy of the doctrine of hot pursuit can be traced to over 100 years of state practice and can be described as a reflection of customary international law (E J Molenaar, 2004). Maritime hot pursuit evolved as a customary international law doctrine (N M Poulantzas, 2002), before being first codified into an international treaty by *Article 23* of the 1958 Geneva Convention on the High Seas (the High Seas Convention). The doctrine of hot pursuit retained its exact meaning under *Article 111* of UNCLOS as it had in the *1958*. Hence, the doctrine enjoys "all the sanction of modern State practice and opinion"(R C Reuland, 1993). The right of hot pursuit as earlier noted is an exception to exclusive flag state jurisdiction, and the basis for the doctrine is that the high seas should not be a safe haven for those who attempt to escape the lawful jurisdiction of another state (R C Reuland, 1993) p. 559. In fact, while supporting the rationale for this doctrine, Reuland argued in the following words:

> Limiting a state's enforcement jurisdiction to its marginal seas would needlessly foil the state's interest in the enforcement of its laws. There is simply no good reason to throw up a barrier to pursuit at the line dividing the state's territorial waters from the high seas. Pursuit onto the high seas offends the territorial sovereignty of no state. Nor does hot pursuit unduly offend the principle that ships on the high seas are subject to the exclusive jurisdiction of their flag state. Only escaping ships that at one time properly fell within a state's territorial jurisdiction are exempted from the exclusivity rule.

Under the customary of international law, States are granted the right of hot pursuit. This right constitutes an exception to the principle of exclusive flag jurisdiction on the high seas. The doctrine also represents a transgression upon the sovereignty of the flag of a foreign state as the offending foreign vessel can be pursued even beyond the limits of maritime zones.

The rationale behind this right as provided by the doctrine of hot pursuit is necessary to maintain the balance between the principles of free navigation on the high seas and the interest of the coastal States in the effective governance of their coastal borders (Poulantzas, 2002). The right given by the doctrine encourages the promotion of public order by minimizing conflicts. Although the exercise of the right of hot pursuit interferes with the principle of freedom of navigation, it is only exercised against a vessel which has violated the laws of the coastal State when there is a reasonable ground to believe that there has indeed been a violation. In the long term, hot pursuit does not pose any great threat to the principle of free navigation as it is not often used by the States.

It should be noted however, that the right of hot pursuit ceases once the fleeing vessel enters the territorial waters of its flag state or those of a third state. In these circumstances, pursuing a vessel into another state's territorial waters have traditionally been considered as a violation of that state's sovereignty. *Thus, the right of hot pursuit is seen as a pragmatic balance between the coastal state's interest in enforcing its laws and the interests of the international community in the freedom of the oceans and the integrity of territorial jurisdiction* (*R Walker*).

Self-Assessment Exercise

1. How is the doctrine of hot pursuit an exception to the principle of exclusive jurisdiction of the flag-state?
2. Discuss the various conditions or principles that guide the exercise of right of hot pursuit
3. The general rule of international law is that ships do not have right to enter the port of foreign nations. Discuss

3.4 Conditions for the Exercise of the Right of Hot Pursuit

Some conditions should be fulfilled in accordance with the norms of international law to be able to justify hot pursuit. One of the basic requirements is that the pursuit should be immediate. The phrase implies that the pursuit should be commenced as soon as possible after the offence is committed by the foreign vessel (Baird, 2002). *Article 111* of the Convention also lays down certain conditions which should be fulfilled for the exercise the right to be justified. These conditions are discussed below:

i. **Good Reason**

The State which is exercising its right under the doctrine of hot pursuit must have reasonable ground to believe that the foreign vessel has transgressed the law of the State. The leading guideline contained in the UNCLOS is the requirement that there should be *a good reason* to believe that the foreign vessel violated the law and regulation of the state within its territorial waters. The phrase 'good reason' suggests that there should be more than a mere suspicion that an offence has been committed by the vessel. The reason should be based on a strong sign or indication. The right of hot pursuit is limited not only to a committed offence. The right can also be exercised in the case of attempted offence by a foreign vessel.

ii. **Pursuit must commence within the maritime Jurisdiction of the pursuing State**

A foreign vessel may be pursued when it commits any wrong either physically or constructively while it is under the jurisdiction of the law enforcing state. The issue is that the pursuit must commence when the foreign vessel is still within the internal waters, territorial sea, archipelagic waters, contiguous zone or Exclusive Economic Zone of the pursuing State.

iii. **Signal to Stop**

The pursuit can be commenced only after the foreign vessel has been given an auditory or visual signal to stop, which has been heard or seen by the foreign vessel. The requirement here is that the order or signal to stop must be auditory or visual and it must be given from such a distance that the foreign vessel is able to hear or see the signal given by the enforcement vessel. Giving a signal to stop through a radio broadcast can be confusing. That was why when the 1958 Convention was drafted, it excluded radio signal. The reason for excluding radio signal was that there may be no limit on the distance from which a radio signal may be given (Tasikas, 2004).

iv. **Authorised Vessel**

The right of hot pursuit can be exercised only by authorized government vessels or warships which are identifiable and clearly marked. In addition, such vessels should be under the service of the government. It means that enforcement vessels, naval submarines, coast guard vessels and ministry or defense or military vessels can exercise the right of hot pursuit. If the government especially authorizes any other vessel or aircraft to enforce law and order of the State, they can also exercise the right of hot pursuit provided that they are clearly marked as being under government service.

v. **Continuous and uninterrupted Pursuit**

The law requires that there should be no interruption during the course of the pursuit. That is to say, the pursuit must be continuous. The law requires that that the first vessel or craft should continue pursuing the foreign vessel until some other vessel or craft which has been sent for by the coastal authorities or has been summoned by the pursuing vessel arrives at the spot and continue the pursue. There may be some reasons for interruptions. For example, where the pursuing vessel develops some mechanical or technical failure it may be compelled to discontinue the hot pursuit, or due to any natural causes like darkness or bad climatic and weather conditions the pursuing vessel is forced to give up the chase or for any other reason like stopping to study evidence left by the fleeing vessel or arrest any other small boats which are accompanying the foreign vessel.

vi. **Termination of Hot Pursuit**

The right to pursue terminates immediately the offending vessel enters the territorial sea of its own jurisdiction or any third State. A hot pursuit also terminates when it is abandoned or is interrupted. This restriction is important due to the fundamental rule of the sovereignty of the other state. Under the Convention on the Law of Sea and High Seas, the hot pursuit must not be resumed when the fleeing vessel enters its own territorial jurisdiction or the territorial jurisdiction of a third state and subsequently returns to the high seas. a times foreign vessels take advantage of this provisions to used it intentionally to evade arrest during hot pursuit.

3.5 Ships in Distress

The right of access to ships in distress in ports has been long recognized in customary international law. This right has been explicitly recognized in respect of preservation of human life and is exercised in accordance with *Articles 18(2), 39(1) (c) and 98* of the Convention. However, there is as yet no legal consensus as regards its conflict with the interests of the coastal State. The debate on the right of ships in distress to enter a port of refuge or the right of a coastal State to refuse entry is of great importance in both public and private maritime law. Under customary international law, there exists no right of entry into ports for foreign ships unless there is a treaty conferring such right to the ships of the flag state concerned (A. V. Lowe, 1977). The right of a foreign ship in distress to seek refuge in port is not explicitly governed by any international regime, including the UNCLOS. Therefore, the customary right of ships in distress to enter any port or place of refuge constitutes an exception to this general rule. This customary right has not been codified in any international convention but has been widely acknowledged and defended especially by maritime States. According to this exception, ships are entitled to certain "humanitarian considerations and jurisdictional exemptions when they are forced into a foreign jurisdiction as a result of force majeure" (A. Chircop, 2002).

Although the United Nations Convention on the Law of the Sea has no explicit provisions regarding the right of ships in distress to enter any port, the Convention has several provisions that implied this right. They include the provisions on:

a. the duty to render assistance to persons at sea (Art. 98).
b. the privileges and immunities granted to foreign ships in case of force majeure
c. the exercise of the authority by coastal or port States over foreign ships conditional upon the fact that the ships must have entered their waters voluntarily

d. passage in the territorial sea includes stopping and anchoring when they are rendered necessary by force majeure or distress (Art. 8 UNCLOS).

The foregoing shows the fact that distress or force majeure validly constitute an exception to the absence of a right of entry into ports. Thus, the recognition of the right of access by a ship in distress to port is not in question. What is in question, however, is the absolute or conditional nature of this right.

3.6 Summary

The customary international law principle is that a ship in distress can seek refuge in any port as a safe haven. This is just an exception to the general rule that ships do not have automatic and absolute the right of entry to port of other State under normal circumstances. In this unit, we discussed: The right of hot pursuit as an exception to the principle of the freedom of the seas and that of the exclusive jurisdiction of the flag-state and the conditions for the exercise of this right and right of access to port by ship in distress as exception the general international law rule that ships do not have right of entry to foreign ports except on agreed treaty.

3.7 References/Further Readings/Web Resources

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2. A. Chircop, 'Ships in Distress, Environmental Threats to Coastal States, a Place of Refuge: New Directions for an Ancien Regime? (2002) *33 ODIL 207, 212.*

3. *United States v. Mexico (Rebecca case),* (1929) *33 AJIL 860, ECJ Case C-286/90, Poulsen (1992) ECR I-6019, para. 35.*

4. A.V. Lowe, 'The Right of Entry into Maritime Ports in International Law', (1977) *14 San Diego Law Review 597.*

5. A. Chircop, O. Linden and D. Nielsen, 'Characterising the Problem of Places of Refuge for Ships', *in: A. Chirop and O. Linden, Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom, (Martinus Nijhoff – Leiden, 2006) pp 9-11.*

6. R Walker, 'International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century' *available at<www.nzlii.org › journals › AukULawRw › 9.pdf>.*

7. Robert C Reuland "The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention" *(1993) 33 Va J Intl L 557 at 557.*

8. Nicholas M Poulantzas *the Right of Hot Pursuit in International Law* (2nd ed, Martinus Nijhoff, The Hague, 2002) at 39*;*

9. D P O'Connell, *The International Law of the Sea* (Oxford University Press, Oxford, 1982-1984) vol2 at 1076.

3.8 Possible Answer to Self-Assessment Exercise

1. The right of hot pursuit is an exception to exclusive flag state jurisdiction. The rationale behind this doctrine is that the high seas should not serve as a safe haven for those who attempt to escape the lawful jurisdiction of another State. The doctrine is an exception to the principle of exclusive jurisdiction of the flag-state because it transgresses upon the sovereignty of foreign state as the offending foreign vessel can be pursued even beyond the limits of maritime zones into the high sea.

2. The exercise of the right of hot pursuit is guided by series of principles and conditions in accordance with the norm of international law:

   i. Good reason: Pursuing State must have reasonable ground to believe that the foreign vessel has transgressed its law.
   ii. Immediate: The pursuit should be commenced as soon as possible after the offence is committed.
   iii. Maritime Jurisdiction: The pursuit must commence within any of the maritime zones of the enforcing State.
   iv. Signal to stop: The pursuit can be commenced only after the foreign vessel has been given an auditory or visual signal to stop which it has heard or seen.
   v. Type of vessels: The right of hot pursuit can be exercised only by authorized government vessels or warships which are clearly marked as such.
   vi. Continuity: The pursuit must be continuous and uninterrupted. Read *Article 111*of the UNCLOS

3. Under customary international law, there is no right of entry into ports for foreign ships unless there is a treaty conferring such right to the ships of the flag state concerned (A. V. Lowe, 1977). The right of a foreign ship in distress to seek refuge in

port is not explicitly governed by any international regime, including the UNCLOS although such customary right may under state practice constitute an exception to the general rule.

MODULE 5: THE REGIME OF THE HIGH SEAS

Introduction

The primary legal regime of the seas is the ***Convention on the High Seas*** which is an international treaty that codifies the rules of international law relating to the high seas, otherwise referred to as international waters. The Convention was one of four treaties created at the United Nations Convention on the Law of the Sea (UNCLOS I). The four treaties were signed on 29 April 1958 and entered into force on 30 September 1962. The Convention on the High Seas has been replaced by the 1982 United Nations Convention on the Law of the Sea (UNCLOS III), which introduced several new concepts to the law of maritime boundaries with specific provisions.

Unit 1: The Commonage Concept of the High Seas and Seabed

1.1 Introduction

By "high seas", *Article 1* of the Convention on the High Seas means, *all parts of the sea those are not included in the territorial sea or in the internal waters of a State.* The history of the law of the sea characterises a constant struggle between states that asserted special rights to vast areas of the sea and other states that insisted on the freedom to navigate and fish in all the ocean spaces. Today, the high seas and the seabed are open for exploration and use by all states subject to the provisions of the present legal regime of the sea to that effect.

The *common heritage of mankind* is a general concept of international law which establishes that some localities belong to all humanity and that their resources are available for everyone's use and benefit, taking into special account future generations and the needs of developing countries. It is a principle of international law that states that certain defined territorial areas and elements of humanity's common heritage should be held in trust for future generations and be protected from exploitation by individual states or corporations. The 1967 World Peace through Law Conference referred to the high seas as "the common heritage of mankind" and stated that the seabed should be subject to United Nations′ control and jurisdiction. It is intended to achieve aspects of the sustainable development of common spaces and their resources.

1.2 Learning Outcomes

At the completion of this unit, you are expected to be able to:

i. Have a good grip of the concept of common heritage of mankind as it relates to the seabed and its resources
ii. The legal status of the Area and its resources, and
iii. The international legal framework for the activities therein.

1.3 Deep Seabed of the High Seas, as Common Heritage of Mankind

The concept of the common heritage of mankind affirms that the natural resources of certain region such as the deep seabed and of outer space are held in common by all nations, and should be exploited and distributed equitably for the benefit of mankind. In 1970, United Nations General Assembly Resolution 2749, the *Declaration of Principles Governing the Seabed and Ocean Floor*, was adopted by 108 states which held that the deep seabed should be preserved for peaceful purposes and is the Common Heritage of Mankind. Meanwhile, the United Nations Convention on the Law of the Sea (UNCLOS) under its *Article 136* on the Common Heritage of Mankind concept was stated to relate to "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

Self-Assessment Exercise

1. **Enumerate** the reasons for which **the** Authority is required to adopt appropriate rules, regulations and procedures with regard to activities in the Area
2. Briefly discuss the legal status of the Area
3. Explain the term ***Due Diligence*** as espoused by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea

1.3.1 Legal Status of the Seabed (Area) and its Resources

As a way of radical departure from the tradition of open access and freedom of the high seas, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) under its *Article 136* declared the seabed area beyond the limit of national jurisdiction (the Area) and its mineral resources as the *common heritage of mankind.* According to the above article, *the Area and its resources are the common heritage of mankind.* The implication of this declaration is that the Area must be controlled and administered by the International Seabed Authority (the Authority) for the benefit of mankind as a whole. All mineral exploration and exploitation activities within the zone must therefore be sponsored by a

State Party to UNCLOS and approved by the Authority. The Authority has adopted and approved regulations and guidance for exploration activities in the Area and in 2013 commenced the development of regulations to govern the future exploitation of seabed minerals, using polymetallic nodules to test run the new venture.

1.4 International Legal Framework for Activities in the Seabed

United Nations Convention on Law of the Sea under Part XI, in conjunction with its 1994 Implementation Agreement relating to Part XI, defines the legal status of the seabed and sets forth the international legal framework for activities regarding the deep seabed mining and marine scientific research within the Area. The guiding principle of the common heritage of mankind clearly manifests in several ways such as the following:

a. all rights in the resources of the Area are conferred on humankind as a whole, on whose behalf the Authority shall act,
b. no State or natural or juridical persons can claim, acquire or exercise rights with respect to resources in the Area except in accordance with Part XI,
c. all mining and any minerals recovered may only be alienated in accordance with UNCLOS and the rules adopted by the Authority,
d. States are enjoined to ensure that they exercise “effective control” over any activities by their state enterprises and other natural or juridical persons they sponsor,
e. activities in the Area, including marine scientific research, are to be conducted for the benefit of mankind as a whole, and
f. financial and other economic benefits from seabed mining are subject to equitable sharing under rules to be developed by the Authority. See generally, *UNCLOS articles 137-143.*

It is the requirement of the Convention that necessary measures should be taken to ensure effective protection for the marine environment from harmful effects which may arise from mining-related activities. The Authority shall therefore adopt appropriate rules, regulations and procedures for the following purposes among others for:

a. the reduction, prevention and control of pollution and other hazards to the marine environment, and
b. the protection and conservation of the natural resources of the seabed and the prevention of damage to the flora and fauna of the marine environment (Art. 45 UNCLOS). It is also the requirement of the Convention in Part XII that national

rules for pollution from seabed activities in the Area and those within national jurisdiction should not be less effective than international rules, standards and recommended practices and procedures (Arts. 208-209 UNCLOS). The law provides furthermore that all States share a common obligation to protect and preserve the marine environment, including rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life (Arts. 192 & 194.5 UNCLOS).

1.5 The Obligations and Responsibilities of sponsoring States

In a special advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in 2011, the legal requirements of States sponsoring mining entities under the Convention were elaborately explained. The Chamber advised that sponsoring States were expected to exercise a high degree of "due diligence" to ensure that an entity they sponsor whether natural or juridical persons complied with the relevant provisions of the Convention and the regulations adopted by the Authority.

While interpreting what is meant by "due diligence", the Chamber determined that a State has the obligation to adopt and enforce laws, regulations and administrative measures at all times that it is acting as a sponsor of an entity. Such measures must be at least as stern as those adopted by the Authority and no less effective than any other relevant international rules, regulations and procedures for environmental protection. Such rules and standards must give effect to following:

a. the precautionary approach based on Principle 15 of the *Rio Declaration*, requiring actions where scientific evidence is insufficient but "where there are plausible indications of potential risk",
b. best environmental practice,
c. technical and financial guarantees by a contractor,
d. provision should be made for recourse for compensation, and
e. conduct of an environmental impact assessment.

To circumvent the possibility of the rise of "sponsoring States of convenience" with varying regulatory requirements, the Chamber determined that the due diligence obligation was the same for both developed and developing countries.

1.6 Summary

The principle of the common heritage of mankind over the seabed of the high seas became imperative due to the growing concern among the international community regarding the problems of jurisdictional control over the ocean floor and its resources. Further to the traditional conflicts over fishing rights on the seas, the advancement in technology has created additional problem regarding the exploitation of the mineral resources of the seabed. The adoption of the commonage principle was therefore to assuage the fear of developing States that advance nations would soon expose the seabed and its resources to competitive national appropriation and use. In this unit, we discussed: Concept of common heritage of mankind as it relates to the seabed and Legal Status of the seabed and international framework governing the activities therein.

1.7 References/Further Reading/Web Resources

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7. Baslar, Kemal, *The Concept of the Common Heritage of Mankind in International Law*, (The Hague, The Netherlands. Kluwer Law International, 1997).

1.7 Possible Answers to Self-Assessment Exercise

1. The Authority adopts rules, regulations and procedures in relation to the Area in order to:

   i. reduces, prevent and control of pollution in the marine environment
   ii. protect and conserve the natural resources of the seabed

iii. prevent damage to the flora and fauna of the marine environment. Read article 45 of the UNCLOS.

2. Pursuant to *article 136* of the UNCLOS, the seabed area is beyond the limit of national jurisdiction and its mineral resources are declared the *common heritage of mankind*. The implication of the declaration is that the Area must be controlled and administered by the International Seabed Authority (the Authority) for the benefit of mankind as a whole

3. The term *Due Diligence* as used in this context depicts a situation by which a State has the obligation to adopt and enforce laws, regulations and administrative measures at all times that it is acting as a sponsor of an entity. Such measures must also be at least as stern as those adopted by the Authority and no less effective than any other relevant international rules, regulations and procedures for environmental protection.

Unit 2: Fishing Rights and Pollution Regulations

2.1 Introduction

In customary international law, living resources of the areas beyond the limit of national jurisdiction have been traditionally regarded as common property or common resources. The doctrine of common resources states that no State can have exclusive rights over them, or the right to prevent others from joining in their exploitation (Christy and Scott, 1992). The freedoms of the high seas, and the attendant freedom to fish, well recognized in international customary law, is a consequence of the doctrine of the common property applied to fisheries resources in the area beyond national jurisdiction (M. C. Engler, 2007).

2.2 Learning Outcomes

At the completion of this unit, you are expected to be able to:

i. Explain the rights of States to fish in the high seas
ii. Explain how pollution/environmental impact by fishing activities are regulated.

2.3 Fishing rights in the high seas

The freedom of the high seas is one of the notable principles of the 1982 United Nations Convention on the Law of the Sea as set out under *Article 87*. However, it is very important to note that this freedom is a limited one and so is not absolute. The Convention provides that, *the high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States.* This freedom comprises among others, the freedom of fishing, subject to the conditions laid down in section 2 of the Convention. Unlike maritime zones under full sovereignty of the coastal States, the UNCLOS imposes specific conservation and utilisation obligations on States respecting conservation, utilisation and enforcement in their exclusive economic zones and on the high seas (M Tsamenyi and Q Hanich, 2012). *Article 116* of UNCLOS provides that *All States have the right for their nationals to engage in fishing on the high seas subject to:*

(a) their treaty obligations;
(b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and
(c) the provisions of this section

Having learnt much of the rights that States have to fish on the high seas and the attendant duties and obligation, we do not intend to delve deep into the discourse here. Our objective is to see how this and the fishing activities impact marine environment and the way they are regulated.

Self-Assessment Exercise

1. Briefly discuss fishing rights in the high seas
2. Pollution is one way by which fishing activities can impact marine environment. In concise form, discuss the legal provisions towards checking this problem

2.4 Pollution/Environmental Impacts of Fishing on the High Seas and their Regulations

Fishing activities can impact on the marine environment. This may occur in several ways including pollution from fish processing plants which can lead to the alteration of marine habitat. Fisheries deeply modify the trophic chain and the flows of biomass and energy across the ecosystem. They can also alter habitats, especially by destroying and disturbing bottom topography and the associated habitats. Fishing gear can affect the living and non-living environment within which the target and other related resources live. Environmental damage can also result from the very nature of the fishing technology such as the use of dynamite or poison or from the inappropriate use of an otherwise acceptable gear like using trawls in coral reefs or sea grass beds.

The 1982United Nations Convention on the Law of the Seas imposes an obligation on States to ensure that efforts are made towards the conservation of the marine environment in every fishing process. *Article 117* states that *All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.* These must include the measure to minimise and prevent marine pollution resulting from oil and garbage pollution from fishing vessels. The States therefore have a responsibility not to pollute the sea, and take into due cognizance the laws about oil and garbage pollution from vessels, including fishing vessels. Pollution of the marine environment by ships, including fishing vessels, is strictly controlled by the *International Convention for the Prevention of Pollution from Ships (MARPOL Convention) 1973.* See *Annex IV Prevention of Pollution*

by Sewage from Ships (entered into force 27 September 2003) which "Contains requirements to control pollution of the sea by sewage; the discharge of sewage into the sea is prohibited, except when the ship has in operation an approved sewage treatment plant or when the ship is discharging comminuted and disinfected sewage using an approved system at a distance of more than three nautical miles from the nearest land; sewage which is not comminuted or disinfected has to be discharged at a distance of more than 12 nautical miles from the nearest land".

Therefore, under the United Nations Convention on the Law of the Sea, particularly in *Article116,* States are under obligation to make provision for the protection and conservation of marine resources and the marine environment in every maritime zone within their jurisdiction and subject to their regulations as well in the high seas. Thus, while UNCLOS expressly recognises the right of nationals of States to fish in the high seas it also places states under an obligation to adopt living resource conservation measures based on the best scientific research available to states as prescribed by UNCLOS *(Art.* 119*)* in respect of their nationals engaging in fishing or harvesting activities in the high seas *(Art.* 117*).*

*Article 1*of the *Convention on Fishing and Conservation of the Living Resources of the High seas, 1958* affirms that all the States had the duty to adopt or co-operate with other States in adopting such measures as may be necessary for the conservation of the living resources of the high seas. In addition, there have been other agreements concerning the environmental protection of the high seas such as the *International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969 effective from 1975*(M. N. Shaw, 2**004**) p.553-554.

2.5 Types of sea pollution

i. Garbage

Garbage and plastic debris (bags, straws, cutlery, six-pack rings, water bottles, etc.) is a huge threat to the survival of marine fauna. Trash is ingested, causes entanglement, and suffocates our ocean friends.

ii. Sunscreen and Other Topicals

Sunscreen, body lotion, insect repellents, essential oils, hair products, and makeup can all make their way into the water via the bodies of swimmers. These substances negatively affect algae, sea urchins, fish, and mammals in the ocean as well as coral reefs.

iii. Oil Seepage

While oil seepage from highly pressurized seafloor rock does occur naturally in some areas around the world, there are plenty of other ways humans are adding to the problem. Oil from vehicles on the road wash off and trickle into the ocean. Boats sometimes spill oil directly into the water. Of course, there are also occasional catastrophic oil spills. No matter how the oil seeps, it's harmful to marine life.

iv. Sewage

Sometimes our sewer and septic systems don't operate properly or do not remove enough nitrogen and phosphorus before discharging our gray water into the waterways. The EPA estimates that 10-20% of septic systems fail at some point in their operational lifetimes. This can happen due to aging infrastructure, inappropriate design, overloaded systems, and poor maintenance. The resulting pollution comes from soaps and detergents, human wastewater, and solid sludge.

v. Agricultural and Aquaculture Runoff

Nitrogen-rich fertilizers and pesticides applied by inland farmers run off into the ocean through rivers after a rainstorm. Also, the aquaculture industry has been known to release uneaten food, antibiotics, and parasites from fish farms into nearby waters.

vi. Industrial Waste

Industrial waste is a huge issue when it comes to ocean dumping. Dangerous toxins that accumulate include radioactive waste, arsenic, lead, fluoride, cyanide, and many other high contaminants. This waste infects the water and sea life…including the ones that we humans eat.

2.6 Prevention/Reduction of marine pollution

The Oceans are massive, pulsing, vibrant bodies of water that serve humanity in countless ways from providing food to enabling commerce to simply being beautiful. But these powerful expanses of sea are not invincible. Each year, human activity erodes marine life in some way, essentially polluting the oceans. It becomes complicated to ignore the gravity of ocean pollution, even for the most skeptical! By simply changing a few habits in your daily life, you can make a difference it helps reduce plastic waste more than you think. Here are some solutions to reduce the Ocean pollution

i. Refuse disposable utensils: Straws, cutlery, tumblers and plastic bags

Plastic forks, knives and spoons may be convenient, but they're wreaking havoc on our oceans. In fact, six million tons of non-durable plastics are discarded every year. "Non-durable" means that the plastic has a useful life of less than three years. Other examples of non-durable plastics include plastic packaging, trash bags, cups, and more.

Plastic bottles are present in very (very) large quantities in our oceans, they are ingested by marine mammals or accumulate in nature and on our beaches. Different kinds of plastic can degrade at different times, but the **average time for a plastic bottle to completely degrade is at least 450 years.** It can even take some bottles 1000 years to biodegrade. The **Great Pacific Garbage Patch is a colossal floating mass of plastic** that currently measures three times the size of France.

ii. Recycle Properly

Recycling is an important factor in conserving natural resources and greatly contributes towards improving the environment. Below are some helpful hints about recycling in and around the home.

iii. **Reduce energy use**

Drastic reductions will help reduce Oceans' temperatures. Current increases in temperatures are threatening marine life and starving it with scarce levels of oxygen. Carbon dioxide from burning fossil fuels is making our oceans more acidic. One consequence could be the loss of corals on a global scale, as their calcium skeletons are weakened by the increasing acidity of the water. There are **many simple ways you can reduce your energy use.**

2.7 Summary

Under the United Nations Convention on the Law of the Sea, 1982 States have the right to fish on the high seas and every state retains the competence make laws for their ships although certain minimum standard are imposed on them. Fishing activities have some level of marine impact including pollution, hence the need for the regulation of fisheries in the marine zone especially the high seas. In this unit, we discussed: Rights to fish on the high seas and Environmental impact of fishing on the seas and their regulations.

2.8 References/Further Readings/Web Resources

1. Martin Tsamenyi and Quentin Hanich, *Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States*, (University of Wollongong, 2012).
2. M.N. Shaw, *International Law, 5th edn* (Cambridge: University of Cambridge Press, 2004) pp. 49-571.
3. Christy and Scott, *The Commonwealth in Ocean Fisheries (2nd ed., Baltimore, 1972), ch. 2, as cited by Birnie and Boyle, International Law and the Environment (Oxford, 1992).*
4. M Cecilia Engler, *Establishment and Implementation of a Conservation and Management for the High Seas Fisheries, with focus on the Southeast Pacific and Chile, (2007*) at www.un.org *› los › fellows_papers › engler_0607_chile.*

2.9. Possible Answer to Self-Assessment Exercise

1. The freedom of the high seas is widely provided for under *article 87* of the UNCLOS and this includes the right to free fishing in the high sea. The fishing right is however made subject to the conditions laid down in *section 2* of the UNCLOS.

Article 116 of UNCLOS specifically empowers and grants all States the right for their nationals to engage in fishing on the high seas although subject to certain conditions specified therein. The deduction here is that the freedom to fish in the high sea, like all other rights outlined in article 87 of the UNCLOS is not an absolute one.

2. Fishing activities can result in pollution and negatively impact the marine environment. The UNCLOS therefore charges States to ensure that efforts are made towards the conservation of the marine environment in every fishing process. Read article *117* of the UNCLOS. While recognising the right of nationals of States to fish in the high seas UNCLOS places states under an obligation to adopt living resource conservation measures based on the best scientific research available to them. See *article 119* of UNCLOS. Pollution of the marine environment by ships, including fishing vessels, is also strictly controlled by the *International Convention for the Prevention of Pollution from Ships (MARPOL Convention) 1973* under *Annex IV*