



Limitations of Freedom of Navigation on the High Seas

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Abstract: High seas belong to all humanity. As a result it is not under qualification of any government and is free. International navigation and commerce also with the use of this principle is developing. This case is of basic importance especially for international commerce and trade. So any interference and applying prohibition is out of international rules. The owner of that flag state could stop and investigate every ship and provided that other governments have reasonable reasons to suspect a ship and those reasons to be in a way that which worth to stop and enter the ship is feasible. But if it becomes clear after investigation of the ship that it was unreasonable to suspect the ship, this issue would be pursuable in the international courts or the government which owns the flag state could retaliate with governmental ships which entered the ship possessing the flag that is harmful for international sailing totally. The flag state, has exclusive qualifications over the ship, its cargo and people. But there are some exceptions to the flag state rule. Right of visiting and searching martial ships in high seas in order to perform rules of international laws when it has acceptable reasons which a (non warship and non-governmental) has committed bellow actions, could be stopped and investigated.

Key words: Limitations, Freedom of Navigation, High Seas

Introduction

State sovereignty develops to their coastal seas and based on UN Convention on the Law of the Sea in 1982. Different degrees of applying states sovereignty on coastal waters and seas appointed so as a result, rights and duties of interactive sides to be specified and least problems not to be existed.

After that contiguous zone or observation begins in which state qualification decreased and states have power in cases such as applying customs, fiscal, immigration or sanitary laws. Territorial sea and contiguous zone have distance 24 sea miles from coastal baseline of coastal states. After these regions there is exclusive-economic zone which sovereignty applying right and coastal state qualification limited to sea sources and have no qualification about sailing.

So in UN Convention on the Law of the Sea, that took lots of years till different states could agree on, for ease of different regions interactions designated beginning of states qualification from territorial waters or territorial sea. Territorial sea of every state in 12 miles sea attached to land and land of the state which begins from start of coastal line. Every coastal state in this region possesses total sovereignty in order to supply their security and stability.

High seas mentions to all marine areas and world oceans which are out of internal waters range and territorial seas of coastal states and are open to all governments and no government could legally apply rule and qualification.

The idea of freedom of the seas in low weight thesis in which Hugo Grotius in order to defend Netherland sailing right against Portugal published, brought up in a written way and Britain supported that in 20th century implicitly Treaty of Versailles, Covenant of the League of Nations, Atlantic charter, UN charter, and explicitly Law of the Sea Conventions confirmed principle of freedom of the seas. The fact that high seas are joint property of all states or have no possession has special legal effects which increase importance of high seas legal nature. Of course freedom of the seas and commercial shipping were not absolute and also limitations applied to which in every age and period these limitations based on dominant time power and its interest applies some changes to it.

Freedom of Navigation

High seas belong to all humanity. As a result it is not under qualification of any government and is free. International navigation and commerce also with the use of this principle is developing. This case is of basic importance especially for international commerce and trade.

But freedom of high seas does not mean that every action is feasible and does not have consequences. Ships whether commercial or martial are under governmental qualification which have been registered in that government and that government has issued that ship's documents and the ship is allowed to raise that government's flag.

So any interference and applying prohibition is out of international rules. The owner of that flag state could stop and investigate every ship and provided that other governments have reasonable reasons to suspect a ship and those reasons to be in a way that which worth to stop and enter the ship is feasible. But if it becomes clear after investigation of the ship that it was unreasonable to suspect the ship, this issue would be pursuable in the international courts or the government which owns the flag state could retaliate with governmental ships which entered the ship possessing the flag that is harmful for international sailing totally.

Every government's ship whether governmental martial or commercial, the right of sea going in high seas and no government could ask foreign commercial ships to respect martial ships, freedom flight, freedom of inputting cable, and submarine tubes, to free artificial islands and other allowed facilities, freedom of fishing and scientific research are examples of freedom in high seas.

The flag state, has exclusive qualifications over the ship, its cargo and people. But there are some exceptions to the flag state rule. Right of visiting and searching martial ships in high seas in order to perform rules of international laws when it has acceptable reasons which a (non warship and non-governmental) has committed bellow actions, could be stopped and investigated. Also in a case that other reasons of visiting and searching based on arrangements especially for treaties to be acceptable for him. In cases which a foreign commercial ship violates coastal government rules and to avoid lockup, they escape to high seas or suspected to violate coastal government rules, the coastal government has the right to chase the ship in the high seas. Provided that the pursuit began when foreign ship or one of its boats is in one of the areas such as internal waters, territorial sea, contiguous zone or exclusive economic zone of coastal state. Pursuit has to be steady and non-stop.

Every country whether coastal or non-coastal state, has the right to navigation in high seas with ships carrying its own flag (article 90, convention 1982). The mentioned principle, in addition the recognition of freedom of seas, all countries has the right to navigation in high seas and it has put the right in the hands of the government which owns the flag to apply the qualification. "The freedom of navigation relies on this concept that the ships which sail under the flag of a government have the right to sail in the high seas, without the interference of another government."(Sohn & et al., 2011, p15)

Some limitations, prohibitions or options of these jurisdictions are enforceable in order to peaceful use of high seas and freedom navigation including right to visit to make effort to prevent exercise of unlawful action by the seas such as transportation of weapons and materials related to mass destruction, drug dealing and environmental pollutions.

Limitation of Freedom of Navigation

Development of maritime transportation has provided context for misuse of this cycle in spite of economic progress and development of commercial transactions. Due to their physical nature, the seas have benefitted less surveillance and control relative to the parts of the world. Easiness of transportation, high safety, less supervision, low cost and other factors have led to occurrence of international various crimes in the high seas. Crimes including maritime piracy, maritime terrorism, slave trade, human trade and immigrants and drug dealing and mass destruction weapons etc which clarify necessity of combating such actions. What is important is that exercise of limitations by countermeasures in high seas and international navigation should be based on conventions, treaties and other United Nations arrangements. To what extent these measures are in contrary to this jurisdiction? Maritime security obligates observation of international rules to reduce the exclusive jurisdiction of the flag state concerning to some issues. Although freedom of navigation governs on the high seas and the ships shall navigate on the light of the jurisdiction of the flag state, but technology progress and emergence of some new issues in seas have led to absoluteness of jurisdictions in preserving peace and maritime security.

On October 2003, a plan was proposed for ending bilateral agreements on inspection of ships by the USA in London Meeting for establishing security. This plan was welcomed by the members of Proliferation Security Initiative (PSI) and they proposed their opinions on drafting and agreed upon implementing bilaterally (Roach, 2005, p.7). These agreements create bilateral procedures for inspection, investigation and arresting the suspected ships to mass destruction weapons or related materials in high seas.

According to these agreements, if security authorities of one party or a suspected ship claiming nationality of the other party encounter with sea of other country in near seas and the flag state confirms inspection of the ship such conduct shall be enforceable and if the witnesses of unlawful act are proofed the state has the permit of stoppage of the ship and if the nationality of the ship is confirmed the flag state shall:

1. Decide on inspection and investigation
2. Permit the inspection and investigation by the demanding country
3. Decide on joint inspection and investigation
4. Not issue the permit of the inspection and investigation

If after obtaining witnesses, the ship is stopped and arrested, the flag state has the right to exercise jurisdiction on the ship and its crews and shipments. It might be the state ignore its right and accept other party legal acts on the ship and its crews and shipments.

Most of the inspection agreements include sufferance conditions. It means that if the flag state shall not respond in the due time, the applicant party considers it as the permit for suspected ship inspection.

State jurisdiction on the high seas

The general principle is that excreting jurisdiction on the ships in the high seas is done by the flag state. International Permanent Court of Justice in the Lotus case stipulated on this issue and in the maritime incident between the French ship and Turkish ship that caused to killing of some Turkish sailors although it happened in high seas but the court issued verdict on punishment of the French ship captain following the mentioned law based on this fact that the ship had the flag of Turkey and due to lack of rule on international law observing prohibition of Turkey action against exercising jurisdiction on the crews in its ship in high seas.

The followed jurisdiction was resultant from the principle of freedom of the seas and its philosophy was that high seas is not under supervision of any state and the ships are dependent on the flag state.

However, the International Law Commission amended the mentioned principle. In the first paragraph of article 6 of the Convention 1958 of High seas and paragraph 1 of the article 92 of the Convention 1982 stipulated on this issue, therefore, this international instrument has exceptions including piracy, slave trade, suspected ships inspection and other unlawful acts and it has provided that the states have right to inspect the ships of the pirates.

According to the articles 19 and 21 in the cases that a ship is suspected to piracy absconds from a high seas to territory of coastal state or commits piracy in the territory of a state and the pursuer ship or pursued ship has the same flag, according to the obligation of the article 100 of the Convention 1982 based on the collaboration of the governments in suppressing the piracy, the coastal state shall pursuit pirates by the warship.

Therefore, out of the mentioned issues according to the sovereignty of the coastal state in the territory seas, domestic seas and even adjacent seas any interference in suppression of piracy is considered as interference in

Other than bilateral treaties, other intuitive has agreed according to the inspection right and in order to amendment the Convention for Suppression of Unlawful Acts against Safety of Maritime Navigation in 1988 was proposed.

SUA Convention 1988, article 8 approved an amendment which is necessary for inspection of the ships by the states other than flag states and collaboration of the flag state. According to the amendment 2005 it is stipulated that if the flag state shall not respond during four hours after inspection request in that case it is considered as its content. The requesting state shall report the International Maritime Organization Secretariat. If the flag state accepts the request for inspection of the ship, crews and shipments, the interrogation shall be begun from the crew based on committing crime.

Excreting force is prohibited in research and investigation procedure unless it is necessary for protecting the individuals on the deck or the crews do not permit inspection.

The treaties shall not provide rights or obligations for non member states. However, if a rule is accepted by the parties of the treaties it shall be converted into enforceable rule for all states and it should be noted that even in the mentioned treaties it might be such consequences are seen.

Expansion of the bilateral agreements, granting the right of approaching and inspection of the ships in the high seas in order to investigating mass destruction weapons have added on the countries accepting such measures and have led to international norms and then as a duty and conventional article of international law.

Suspicion on a ship carrying mass destruction weapons or related materials is one of the limitations of the free navigation in high seas (Doolin, 2006, p. 52).

However, the above mentioned issues on the bilateral agreements on the inspection of mass destruction weapons have led to common international law and the principle of the jurisdiction of the flag state will be worn out gradually that deserves to hesitation. As mentioned above, the flag state jurisdiction principle is foreseeable according to the bilateral agreements and protocol 2005. Permitting inspection, investigation, arrest and even ignoring jurisdiction is indeed the issue of facilitation of the law enforcement.

It is obvious that such common principles is not shaping and it should be pointed that according to most bilateral agreements if the nationality claim is not confirmed. The requesting country shall permit inspection by the party or reject it, the requesting country has no right to inspection particularly investigation so, it does not have the authority of the flag state.

On unlawful transportation of the drugs by high seas that is breaching the international Maritime Convention 1982 and threat against maritime security (Naliaye and Wolfrum, 2007, p. 441), the Convention article 108 obligates the states for combating drug dealing in high seas and any state shall adopt required measures for combating with the breaching ship carrying its flag and in case of impossibility of rapid counteraction it can request other country to aid it.(Paragraph 2 article 108).

However, such international collaboration shall not limit the flag state exclusive rights observing pursuing the individuals inside the ship and suspected individuals for such conducts (Momtaz, 2002, p. 442).

governance of that state and according to the Security Council, piracy in the Somalia shores due to threatening altruistic aids has worsen the maritime security and encountered the passengers and crews with

dangers resulting to threatening international security (Taghizadeh, 2012, p. 207). However, the Security Council in Resolution 1816 announced that navy and air forces shall combat piracy and enter to the Somalia coasts by written content of the Somali that this resolution shall be forced in maritime crimes and the council has emphasized on it including:

- 1) Emphasis on the international law as a legal framework for fighting with piracy reflected in the convention 1982 of the Law of Seas
- 2) Adopted measures are limited to the Somali shores and shall not be exercised in other regions (location limitation)
- 3) The resolutions have temporary nature (time limitation) and should not be considered as conventional rule or as permit for denial of the states' rights according to convention 1982 of the Law of Seas.

Entrance and inspection of a ship might be accompanied by warning such as fire. In the Susan incident the waters in front of the ship were fired and it was continued until Spain force was approaching to the ship and when the Korean captain did not pay attention to the fire and moved rapidly, the Spain snipers fired on the cable that was holding the shipment to interrupt in the cable connecting the central deck and land the Spain Navy force helicopter on the deck so seven soldiers entered to the ship (Tremlett, Gittings, 2002).

Such acts might be considered as threat and using force that are prohibited according to the paragraph 4 of article 2 of the UN Charter. However, in inspection and even seizure with force or request of the flag state shall be void. In some cases of the bilateral agreements on inspection using force in case of necessity is permitted.

All member states shall prohibit threat or using force against territorial integrity and political independence in their international relations. Adding the "territorial integrity and political independence" phrase by the Australia during writing the charter assures the nature of all interventions and prohibitions not exception (Bruno, Erasmus Khan, Nolte and Paulus, 2002, p. 124).

Therefore, such prohibition by international law in the form of threat or using force is consistent to the rulings of self-defense. According to the article 51 of the Charter the self-defense has been accepted widely by the ships of the flag states against military attacks. The measures prohibited in the paragraph 4 of the article 2 of the charter include military attack. In history, getting on the ship, entrance, inspection of other state ship without legal justification is considered as a military act. For example, the Rebecca British ship in 1731 caused to a war in Europe and Napoleon sanctions by Britain in 1800 caused to dissatisfaction and joining The USA in the war for defense on the law of sea freedom (Shulman, 2006, p. 803).

Jurisdictions include the power of a state according to the international law, governance on the people and properties by citizenship law. This power includes exercising of rules and enforcing power. The law enforcement power covers two executive and judiciary powers.

The normative jurisdiction in general refers to the power of the state for enacting and enforcement of the laws relative to different individuals and conditions and jurisdiction of enforcement of the laws covers enforcing of the laws by arresting, measuring, pursuing, condemning and punishment of the different individuals. The rulings on the judiciary power of maritime activities as mentioned in the UN Convention on the Law of the Sea and customary international law involve any action under jurisdiction of the states or out of this limit.

In sea area under sovereignty of the coastal state including domestic waters, waters around islands under the ownership of other state, the coastal state has right to enact rules. No state shall have jurisdiction for enforcement of law in the territory of other country with the ruling state consent . In the sea regions out of the coastal states sovereignty, free economic zone, free waters, and the coastal states are allowed to exercise their rules in these zones . No authorities of the state shall get on the ship and inspect without written consent of the flag state and there are notes and exception on the states actions with jurisdictions in the economic areas and high seas :

At first the warships under the service of the government shall interfere or seizure the pirates ships in the regions out of the other states territory including free economic zone and free waters. Any ship used under the control of a person or persons by the aim of piracy is considered as pirate according to article 101 of the UNCLOS .

Any warship shall interfere in the other state ship, if it has required reasons depicting suspecting on piracy, transportation of drugs and spreading unallowable waves or the ship is without nationality or it has the nationality of that warship. This action has been recognized as right to inspection in the UN Convention on the Law of the Sea.

UN Convention on the Law of the Sea (1982) has stipulated the right to interference for warships in the foreign ships according to the treaties recognized this action.

It should be pointed that the states have enforcement jurisdiction in some specific cases under UN Convention on the Law of the Sea.

There are exceptions related to jurisdiction of the international ships out of the sovereignty regions which are not exercised on warships and governmental and service providing ships, except commercial and governmental ships which have no complete impunity in all states jurisdictions .

Conclusion

In relation to qualification of the state flag in sailing freedom limitation, sea law accepts a powerful place and this place has caused disjointed and limited qualification for other governments. Especially the fact that there is a significant gap between state flag qualification and government's real and effective abilities in control and supervision on their ships in the sea. Because of that some governments have acted by offering consonant satisfactory plans between state flag through concluding inspection agreements for accession to ships deck, in order to overcome to these disconnections in qualification areas.

There is no international rule which prescribe restriction, intervention and inspection of foreign ships to merely unfounded doubt in associating in marine crimes. On the other hand, nothing can beware the authority of state flag from consent on inspection and access to its ship deck by foreign state. In fact, neither in NPT nor in convention against unlawful acts against the safety of maritime navigation, conventions related to drug dealing, human and refugee, and most of all sea right conventions. Resolutions of security council is not there such a regulation and even not deduced. In other words in the case of explicit permit of flag state, limitation on freedom of navigation for mentioned cases will not be problematic. In fact the problem comes when the state flag rejects such permission.

On the other hand, some has pointed to concluding new international conventions or at least correction of existing conventions and some other has emphasized on resolution issuance by UN Security Council for citation on legal authority out of them, or resorted to regional organizations' solutions. On the other hand Article 51 of the UN charter, was a pretext by which citing to self - defense, some action take place in this area. However, abovementioned situation has caused some ignore existing international law's rules regarding to their technical ability or international credibility, and in fact for earning more interests. It's essential that government's regulatory limits determined in this regard and also the legitimacy of actions apparently taking place against for real and common worry by governments or international organizations get evaluated from the perspective of international law. For an example big part of international trade, which flowing through high seas, has been affected negatively and as a result this has increased transportation costs that leads to increasing goods price when reaches to the buyer. So we should not ignore sailing freedom and shipping and its risk.

Developing balance and equivalence between high seas security and the principle of freedom of navigation should be the first in governments and international organizations actions. Refuse from principle of freedom of navigation to the benefit of maritime security will put world economic in disorder, for dependency of world transportation to this big trade highway, on the other hand neglect to protection of seas peace and security will have bad experience like appearance of pirates, due to freedom of international shipping.

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