Chapter 12

Freedoms of the High Seas in the Modern Law of the Sea*

I Preface

Many significant developments in the law relating to the high seas have been witnessed during the past century. Indeed, the rate of change has accelerated, if anything, during the period starting in 1973 during which the writer has been directly involved, in different capacities, in several of the developments. The chapter reviews, from a personal perspective, some of the more noteworthy developments in the law, making particular reference to navigational issues.

II Introduction

A century ago, in 1905, the law relating to the high seas consisted almost entirely of customary law,¹ based on the fundamental concepts of freedoms and exclusive flag State jurisdiction² over ships on the high seas. There were many important decisions


² Ships were seen by some (but not all) authorities as pieces of floating territory. The decision of the Permanent Court of International Justice in the SS Lotus case was influenced
by international tribunals, much academic doctrine and just a very few international conventions on matters such as submarine telegraph cables.\(^3\) Over the last hundred years, the regime of the high seas has seen four types of development. The first has been the significant reduction in the area of the high seas. The permissible limits of coastal State jurisdiction have been gradually extended away from the coast, and as a result the area of the high seas has been correspondingly reduced. The second was codification of much of customary law of the high seas in the form of the Geneva Convention on the High Seas.\(^4\) This instrument brought greater clarity and certainty to the law, even though there were significant omissions in the overall Geneva regime concerning the limits of national jurisdiction.\(^5\) The third development has been the growth of detailed regulation of activities on the high seas through the adoption of international conventions, especially during the past 30 years. Finally, in the late 1960s processes of questioning and fundamental review of the entire law of the sea were set in train that led, in effect, to the revision of the Convention on the High Seas\(^6\) by the Third UN Conference on the Law of the Sea. As a result, the UN Convention on the Law of the Sea ("the Convention") contains many important provisions directly concerning or indirectly affecting the high seas. The main provisions are to be found, of course, in Parts VII and XI\(^7\) of the Convention, the latter articulating the concept of the Common Heritage of Mankind. Important provisions are to be found in other Parts such as Part XII\(^8\) concerning the protection and preservation of the marine environment and Part XIII concerning marine scientific research. The entry into force of the Convention in November 1994 must stand out as the most significant event during the second half of the last century in the law of the sea, including the high seas.

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\(^3\) International Convention for the Protection of Submarine Telegraph Cables, Paris, 14 March 1884. SOLAS, the Collision Regulations and the Radio Regulations all date from the early part of the twentieth century.

\(^4\) The Convention also developed the law in certain respects.

\(^5\) The law was simultaneously developed significantly by the Convention on Fishing and Conservation of the Living Resources of the High Seas of 1958.

\(^6\) Together with most other parts of the law of the sea.

\(^7\) Part XI, the regime for mineral recovery operations from the seabed of the International Seabed Area, has to be read together with the terms of the Implementation Agreement of 1994.

\(^8\) As the Report of the (UK) Royal Commission on Environmental Pollution points out, the duty to "protect and preserve the marine environment" in article 192 of the Convention is applicable to the high seas: "Turning the Tide" Cm 6392, 2004.