The principle of self-determination as applicable to a recognised British non-self-governing territory has recently been much relied upon by the UK government,[256] but something of a problem is posed by the very small size of the territory's population (some 1,800) although this may not be decisive.

It would appear that conquest formed the original basis of title, irrespective of the British employment of other principles. This, coupled with the widespread recognition by the international community, including the United Nations, of the status of the territory as a British Colony would appear to resolve the legal issues, although the matter is not uncontroversial.

'The common heritage of mankind'

The proclamation of certain areas as the common heritage of mankind has raised the question as to whether a new form of territorial regime has been, or is, in process of being created.[257] In 1970, the UN General Assembly adopted a Declaration of Principles Governing the Seabed and Ocean Floor in which it was noted that the area in question and its resources were the common heritage of mankind. This was reiterated in articles 136 and 137 of the 1982 Convention on the Law of the Sea, in which it was provided that no sovereign or other rights would be recognised with regard to the area (except in the case of minerals recovered in accordance with the Convention) and that exploitation could only take place in accordance with the rules and structures established by the Convention.[258] Article XI of the 1979 Moon Treaty emphasises that the moon and its natural resources are the common heritage of mankind, and thus incapable of national appropriation and subject to a particular regime of exploitation.[259] As is noted in the next section, attempts were being made to establish a common heritage regime over the Antarctic. There are certain common characteristics relating to the concept. Like *res communis*,

[256] See e.g. the Prime Minister, HC Deb., col. 946, 13 May 1982.

[257] See e.g. K. Baslar, *The Concept of the Common Heritage of Mankind in International Law*, The Hague, 1998; Brownlie, *Principles*, chapter 12; A. Cassese, *International Law*, 2nd edn, Oxford, 2005, pp. 92 ff.; B. Larschan and B. C. Brennan, 'The Common Heritage of Mankind Principle in International Law', 21 *Columbia Journal of International Law*, 1983, p. 305; R. Wolfrum, 'The Principle of the Common Heritage of Mankind', 43 ZaöRV, 1983, p. 312; S. Gorove, 'The Concept of "Common Heritage of Mankind"', 9 *San Diego Law Review*, 1972, p. 390, and C. Joyner, 'Legal Implications of the Common Heritage of Mankind', 35 ICLQ, 1986, p. 190.

[258] See further below, chapter 11, p. 628.

[259] See further below, p. 548.

the areas in question are incapable of national appropriation. Sovereignty is not an applicable principle and the areas in question would not be 'owned', nor would any jurisdictional rights exist outside the framework of the appropriate common heritage regime institutional arrangements. However, while a *res communis* regime permits freedom of access, exploration and exploitation, a common heritage regime as envisaged in the examples noted above would strictly regulate exploration and exploitation, would establish management mechanisms and would employ the criterion of equity in distributing the benefits of such activity.

It is too early to predict the success or failure of this concept. The 1982 Law of the Sea Convention entered into force in 1994, while the Moon Treaty has the bare minimum number of ratifications and its exploitation provisions are not yet operative. As a legal concept within the framework of the specific treaties concerned, it provides an interesting contrast to traditional *jus communis* rules, although the extent of the management structures required to operate the regime may pose considerable problems.[260]

The polar regions[261]

The Arctic region is of some strategic importance, constituting as it does a vast expanse of inhospitable territory between North America and Russia.

[260] Questions have arisen as to whether the global climate could be regarded as part of the common heritage of mankind. However, international environmental treaties have not used such terminology, but have rather used the phrase 'common concern of mankind', which is weaker and more ambiguous: see e.g. the Convention on Biological Diversity, 1992. See A. Boyle, 'International Law and the Protection of the Global Atmosphere' in *International Law and Global Climate Change* (eds. D. Freestone and R. Churchill), London, 1991, chapter 1, and P. Birnie and A. Boyle, *International Law and the Environment*, 2nd edn, Oxford, 2002, p. 143. See also below, chapter 15.

[261] See e.g. D. R. Rothwell, *The Polar Regions and the Development of International Law*, Cambridge, 1996; O'Connell, *International Law*, pp. 448–50; T. W. Balch, 'The Arctic and Antarctic Regions and the Law of Nations', 4 AJIL, 1910, p. 265; G. Triggs, *International Law and Australian Sovereignty in Antarctica*, Sydney, 1986; R. D. Hayton, 'Polar Problems and International Law', 52 AJIL, 1958, p. 746, and M. Whiteman, *Digest of International Law*, Washington, 1962, vol. II, pp. 1051–61. See also W. Lakhtine, 'Rights over the Arctic', 24 AJIL, 1930, p. 703; Mouton, 'The International Regime of the Polar Regions', 101 HR, 1960, p. 169; F. Auburn, *Antarctic Law and Politics*, Bloomington, 1982; *International Law for Antarctica* (eds. F. Francioni and T. Scovazzi), 2nd edn, The Hague, 1997; A. D. Watts, *International Law and the Antarctic Treaty System*, Cambridge, 1992; E. J. Sahurie, *The International Law of Antarctica*, 1992; C. Joyner, *Antarctica and the Law of the Sea*, The Hague, 1992; *The Antarctic Legal Regime* (eds. C. Joyner and S. Chopra), Dordrecht, 1988; *The Antarctic Environment and International Law* (eds. P. Sands, J. Verhoeven and M. Bruce), London, 1992, and E. Franckx, *Maritime Claims in the Arctic*, The Hague, 1993.

It consists to a large extent of ice packs beneath which submarines may operate.

Denmark possesses Greenland and its associated islands within the region,[262] while Norway has asserted sovereign rights over Spitzbergen and other islands. The Norwegian title is based on occupation and long exploitation of mineral resources and its sovereignty was recognised by nine nations in 1920, although the Soviet Union had protested.[263]

More controversial are the respective claims made by Canada[264] and the former USSR.[265] Use has been made of the concept of contiguity to assert claims over areas forming geographical units with those already occupied, in the form of the so-called sector principle. This is based on meridians of longitude as they converge at the North Pole and as they are placed on the coastlines of the particular nations, thus producing a series of triangular sectors with the coasts of the Arctic states as their baselines.

The other Arctic states of Norway, Finland, Denmark and the United States have abstained from such assertions. Accordingly, it is exceedingly doubtful whether the sector principle can be regarded as other than a political proposition.[266] Part of the problem is that such a large part of this region consists of moving packs of ice. The former USSR made some claims to relatively immovable ice formations as being subject to its national sovereignty,[267] but the overall opinion remains that these are to be treated as part of the high seas open to all.[268]

Occupation of the land areas of the Arctic region may be effected by states by relatively little activity in view of the decision in the *Eastern Greenland* case[269] and the nature of the territory involved.

Claims have been made by seven nations (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom) to the Antarctic

[262] See G. H. Hackworth, *Digest of International Law*, Washington, DC, 1940, vol. I.

[263] *Ibid*., pp. 465 ff. See also O'Connell, *International Law*, p. 499.

[264] Hackworth, *Digest*, vol. I, p. 463. But note Canadian government statements denying that the sector principle applies to the ice: see e.g. 9 ILM, 1970, pp. 607, 613. See also I. Head, 'Canadian Claims to Territorial Sovereignty in the Arctic Regions', 9 *McGill Law Journal*, 1962–3, p. 200.

[265] Hackworth, *Digest*, vol. I, p. 461. Such claims have been maintained by Russia: see e.g. http://news.nationalgeographic.com/news/2007/09/070921-arctic-russia.html and see below, chapter 11, p. 588.

[266] See e.g. *Oppenheim's International Law*, p. 693.

[267] See e.g. Lakhtine, 'Rights over the Arctic', p. 461.

[268] See e.g. Balch, 'Arctic and Antarctic Regions', pp. 265–6.

[269] PCIJ, Series A/B, No. 53, 1933, p. 46; 6 AD, p. 95.

region, which is an ice-covered landmass in the form of an island.[270] Such claims have been based on a variety of grounds, ranging from mere discovery to the sector principle employed by the South American states, and most of these are of rather dubious quality. Significantly, the United States of America has refused to recognise any claims at all to Antarctica, and although the American Admiral Byrd discovered and claimed Marie Byrd Land for his country, the United States refrained from adopting the claim.[271] Several states have recognised the territorial aspirations of each other in the area, but one should note that the British, Chilean and Argentinian claims overlap.[272]

However, in 1959 the Antarctic Treaty was signed by all states concerned with territorial claims or scientific exploration in the region.[273] Its major effect, apart from the demilitarisation of Antarctica, is to suspend, although not to eliminate, territorial claims during the life of the treaty. Article IV(2) declares that:

> no acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the present treaty is in force.

Since the treaty does not provide for termination, an ongoing regime has been created which, because of its inclusion of all interested parties, appears to have established an international regime binding on all.[274] Subsequent meetings of the parties have resulted in a number of recommendations, including proposals for the protection of

[270] See e.g. O'Connell, *International Law*, pp. 450–3; Mouton, 'International Regime', and G. Triggs, 'Australian Sovereignty in Antarctica – Part I', 13 *Melbourne University Law Review*, 1981, p. 123, and Triggs, *International Law and Australian Sovereignty in Antarctica*. See also UKMIL, 54 BYIL, 1983, pp. 488 ff.

[271] See Hackworth, *Digest*, vol. I, p. 457. See also DUSPIL, 1975, pp. 107–11, and Whiteman, *Digest*, vol. II, pp. 250–4, 1254–6 and 1262.

[272] See e.g. Cmd 5900.

[273] See *Handbook of the Antarctic Treaty System*, US Department of State, 9th edn, 2002, also available at www.state.gov/g/oes/rls/rpts/ant/.

[274] Note that the Federal Fiscal Court of Germany stated in the *Antarctica Legal Status* case that Antarctica was not part of the sovereign territory of any state, 108 ILR, p. 654. See, as to the UK view that the British Antarctic Territory is the oldest territorial claim to a part of the continent, although most of it was counter-claimed by either Chile or Argentina, UKMIL, 71 BYIL, 2000, p. 603. Nevertheless, it was accepted that the effect of the Antarctic Treaty was to set aside disputes over territorial sovereignty, *ibid.*

flora and fauna in the region, and other environmental preservation measures.[275]

Of the current forty-three parties to the treaty, twenty-eight have consultative status. Full participation in the work of the consultative meetings of the parties is reserved to the original parties to the treaty and those contracting parties which demonstrate substantial scientific research activity in the area. Antarctic treaty consultative meetings take place annually.[276]

The issue of a mineral resources regime has been under discussion since 1979 by the consultative parties and a series of special meetings on the subject held.[277] This resulted in the signing in June 1988 of the Convention on the Regulation of Antarctic Minerals Resource Activities.[278] The Convention provided for three stages of mineral activity, being defined as prospecting, exploration and development. Four institutions were to be established, once the treaty came into force (following sixteen ratifications or accessions, including the US, the former USSR and claimant states). The Commission was to consist of the consultative parties, any other party to the Convention engaged in substantive and relevant research in the area and any other party sponsoring mineral resource activity. A Scientific, Technical and Environmental Advisory Committee consisting of all parties to the Convention was to be established, as were Regulatory Committees, in order to regulate exploration and development activity in a specific area. Such committees would consist of ten members of the Commission, including the relevant claimant and additional claimants up to a maximum of four, the US, the former USSR and representation of developing countries. A system for Special Meetings of Parties, consisting of all parties to the Convention, was also provided for. Several countries signed the Convention.[279] However, opposition to the Convention began to grow. The signing of the 1988 Convention on mineral resource activities stimulated opposition and in resolution 43/83, adopted by the General Assembly that year, 'deep regret' was expressed that such a convention should have been signed despite earlier resolutions calling for a

[275] See e.g. the 1980 Convention on the Conservation of Antarctic Marine Living Resources. See also M. Howard, 'The Convention on the Conservation of Antarctic Marine Living Resources: A Five Year Review', 38 ICLQ, 1989, p. 104.

[276] The most recent being in New Delhi in 2007 and Kiev in 2008: see e.g. www.scar.org/Treaty/ATCM%20meeting%20list.

[277] See e.g. *Keesing's Contemporary Archives*, p. 32834 and 21(9) *UN Chronicle*, 1984, p. 45.

[278] See e.g. C. Joyner, 'The Antarctic Minerals Negotiating Process', 81 AJIL, 1987, p. 888.

[279] See e.g. the Antarctic Minerals Act 1989, which provided for a UK licensing system for exploration and exploitation activities in Antarctica.

moratorium on negotiations to create a minerals regime in the Antarctic. France and Australia proposed at the October 1989 meeting of the signatories of the Antarctic Treaty that all mining be banned in the area, which should be designated a global 'wilderness reserve'.[280]

At a meeting of the consultative parties to the Antarctic Treaty in April 1991 the Protocol on Environmental Protection to the Antarctic Treaty was adopted, article 7 of which prohibited any activity relating to mineral resources other than scientific research. This prohibition is to continue unless there is in force a binding legal regime on Antarctic mineral resource activities that includes an agreed means of determining whether and, if so, under which conditions any such activities would be acceptable. A review conference with regard to the operation of the Protocol may be held after it has been in force for fifty years if so requested.[281] In addition, a Committee for Environmental Protection was established.[282] This effectively marked the end of the limited mining approach, which had led to the signing of the Convention on the Regulation of Antarctic Mineral Resource Activities. The Protocol came into force in 1998 and may be seen as establishing a comprehensive integrated environmental regime for the area.[283]

Leases and servitudes[284]

Various legal rights exercisable by states over the territory of other states, which fall short of absolute sovereignty, may exist. Such rights are attached to the land and so may be enforced even though the ownership of the particular territory subject to the rights has passed to another sovereign. They are in legal terminology formulated as rights *in rem*.

[280] See *Keesing's Record of World Events*, p. 36989, 1989. [281] Article 25.

[282] *Guardian*, 30 April 1991, p. 20. See also C. Redgwell, 'Environmental Protection in Antarctica: The 1991 Protocol', 43 ICLQ, 1994, p. 599.

[283] See e.g. D. R. Rothwell, 'Polar Environmental Protection and International Law: The 1991 Antarctic Protocol', 11 EJIL, 2000, p. 591. Four of the annexes (on environmental impact assessment, conservation of flora and fauna, waste disposal and marine pollution) to the Protocol came into force in 1998 and the fifth (on the Antarctic protected area system) in 2002. A Malaysian initiative at the UN to consider making Antarctica a 'common heritage of mankind' appears to have foundered: see e.g. Redgwell, 'Environmental Protection', and General Assembly resolutions 38/77 and 39/152, and A/39/583.

[284] See e.g. *Oppenheim's International Law*, pp. 670 ff.; H. Reid, *International Servitudes*, Chicago, 1932, and F. A. Vali, *Servitudes in International Law*, 2nd edn, London, 1958. See also Parry, *Digest*, vol. IIB, 1967, pp. 373 ff., and article 12, Vienna Convention on Succession of States in Respect of Treaties, 1978.

Leases of land rose into prominence in the nineteenth century as a way of obtaining control of usually strategic points without the necessity of actually annexing the territory. Leases were used extensively in the Far East, as for example Britain's rights over the New Territories amalgamated with Hong Kong,[285] and sovereignty was regarded as having passed to the lessee for the duration of the lease, upon which event it would revert to the original sovereign who made the grant.

An exception to this usual construction of a lease in international law as limited to a defined period occurred with regard to the Panama Canal, with the strip of land through which it was constructed being leased to the United States in 1903 'in perpetuity'. However, by the 1977 Panama Canal Treaty, sovereignty over the Canal Zone was transferred to Panama. The United States had certain operating and defensive rights until the treaty ended in 1999.[286]

A servitude exists where the territory of one state is under a particular restriction in the interests of the territory of another state. Such limitations are bound to the land as rights *in rem* and thus restrict the sovereignty of the state concerned, even if there is a change in control of the relevant territory, for instance upon merger with another state or upon decolonisation.[287]

Examples of servitudes would include the right to use ports or rivers in, or a right of way across, the territory so bound, or alternatively an obligation not to fortify particular towns or areas in the territory.[288]

Servitudes may exist for the benefit of the international community or a large number of states. To give an example, in the *Aaland Islands* case in 1920, a Commission of Jurists appointed by the Council of the League of Nations declared that Finland since its independence in 1918 had succeeded to Russia's obligations under the 1856 treaty not to fortify the islands. And since Sweden was an interested state in that the islands are situated near Stockholm, it could enforce the obligation although not a party to the 1856 treaty. This was because the treaty provisions had established a special international regime with obligations enforceable

[285] See 50 BFSP, 1860, p. 10 and 90 BFSP, 1898, p. 17. See now 23 ILM, 1984, pp. 1366 ff. for the UK–China agreement on Hong Kong. See also Cmnd 9543 (1985) and the 1985 Hong Kong Act, providing for the termination of British sovereignty and jurisdiction over the territory as from 1 July 1997.

[286] See e.g. 72 AJIL, 1978, p. 225. This superseded treaties of 1901, 1903, 1936 and 1955 governing the Canal. See also A. Rubin, 'The Panama Canal Treaties', YBWA, 1981, p. 181.

[287] See the *Right of Passage* case, ICJ Reports, 1960, p. 6; 31 ILR, p. 23.

[288] See e.g. J. B. Brierly, *The Law of Nations*, 6th edn, Oxford, 1963, p. 191.

by interested states and binding upon any state in possession of the islands.[289] Further, the Tribunal in *Eritrea/Yemen* noted that the traditional open fishing regime in the southern Red Sea together with the common use of the islands in the area by the populations of both coasts was capable of creating historic rights accruing to the two states in dispute in the form of an international servitude.[290] The award in this case emphasised that the findings of sovereignty over various islands in the Red Sea entailed 'the perpetuation of the traditional fishing regime in the region'.[291]

The situation of the creation of an international status by treaty, which is to be binding upon all and not merely upon the parties to the treaty, is a complex one and it is not always clear when it is to be presumed. However, rights attached to territory for the benefit of the world community were created with respect to the Suez and Panama Canals. Article 1 of the Constantinople Convention of 1888[292] declared that 'the Suez Maritime Canal shall always be free and open in time of war as in time of peace, to every vessel of commerce or of war without distinction of flag' and this international status was in no way affected by the Egyptian nationalisation of the Canal Company in 1956. Egypt stressed in 1957 that it was willing to respect and implement the terms of the Convention, although in fact it consistently denied use of the canal to Israeli ships and vessels bound for its shores or carrying its goods.[293] The canal was reopened in 1975 following the disengagement agreement with Israel, after a gap of eight years.[294] Under article V of the 1979 Peace Treaty between Israel and Egypt, it was provided that ships of Israel and cargoes destined for or coming from Israel were to enjoy 'the right of free passage through the Suez Canal . . . on the basis of the Constantinople Convention of 1888, applying to all nations'.

In the *Wimbledon* case,[295] the Permanent Court of International Justice declared that the effect of article 380 of the Treaty of Versailles, 1919 maintaining that the Kiel Canal was to be open to all the ships of all countries at peace with Germany was to convert the canal from an internal to an international waterway 'intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world'.

[289] LNOJ, Sp. Supp. no. 3, 1920, pp. 3, 16–19. [290] 114 ILR, pp. 1, 40–1.
[291] *Ibid.*, p. 137. [292] See e.g. O'Connell, *International Law*, pp. 582–7.
[293] See Security Council Doc. S/3818, 51 AJIL, 1957, p. 673.
[294] See DUSPIL, 1974, pp. 352–4 and 760.
[295] PCIJ, Series A, No. 1, 1923, p. 24; 2 AD, p. 99. See generally Baxter, *Law of International Waterways*.

Some of the problems relating to the existence of servitudes have arisen by virtue of the *North Atlantic Fisheries* arbitration.[296] This followed a treaty signed in 1818 between the United Kingdom and the United States, awarding the inhabitants of the latter country 'forever . . . the liberty to take fish of every kind' from the southern coast of Newfoundland. The argument arose as to Britain's capacity under the treaty to issue fishing regulations binding American nationals. The arbitration tribunal decided that the relevant provision of the treaty did not create a servitude, partly because such a concept was unknown by American and British statesmen at the relevant time (i.e. 1818). However, the terms of the award do leave open the possibility of the existence of servitudes, especially since the tribunal did draw a distinction between economic rights (as in the case) and a grant of sovereign rights which could amount to a servitude in international law.[297]

The law of outer space[298]

There were a variety of theories prior to the First World War with regard to the status of the airspace above states and territorial waters[299] but the outbreak of that conflict, with its recognition of the security implications

[296] 11 RIAA, p. 167 (1910). [297] See, as to landlocked states, below, chapter 11, p. 607.

[298] See e.g. C. Q. Christol, *The Modern International Law of Outer Space*, New York, 1982, and Christol, *Space Law*, Deventer, 1991; *Space Law* (ed. P. S. Dempsey), Oxford, 2004; F. Lyall and P. B. Larsen, *Space Law*, Aldershot, 2007; J. E. S. Fawcett, *Outer Space*, Oxford, 1984; S. Gorove, 'International Space Law in Perspective', 181 HR, 1983, p. 349, and Gorove, *Developments in Space Law*, Dordrecht, 1991; M. Marcoff, *Traité de Droit International Public de l'Espace*, Fribourg, 1973, and Marcoff, 'Sources du Droit International de l'Espace', 168 HR, p. 9; N. Matte, *Aerospace Law*, Montreal, 1969; *Le Droit de l'Espace* (ed. J. Dutheil de la Rochère), Paris, 1988; P. M. Martin, *Droit International des Activités Spatiales*, Masson, 1992; B. Cheng, 'The 1967 Space Treaty', *Journal de Droit International*, 1968, p. 532, Cheng, 'The Moon Treaty', 33 *Current Legal Problems*, 1980, p. 213, Cheng, 'The Legal Status of Outer Space', *Journal of Space Law*, 1983, p. 89, Cheng, 'The UN and the Development of International Law Relating to Outer Space', 16 *Thesaurus Acroasium*, Thessaloniki, 1990, p. 49, and Cheng, *Studies in International Space Law*, Oxford, 1997. See also *Oppenheim's International Law*, chapter 7; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 1254; R. G. Steinhardt, 'Outer Space' in *United Nations Legal Order* (eds. O. Schachter and C. C. Joyner), Cambridge, 1995, vol. II, p. 753; *Manual on Space Law* (eds. N. Jasentulajana and R. Lee), New York, 4 vols., 1979; *Space Law – Basic Documents* (eds. K. H. Böckstiegel and M. Berkö), Dordrecht, 1991; *Outlook on Space Law* (eds. S. G. Lafferanderie and D. Crowther), The Hague, 1997; G. H. Reynolds and R. P. Merges, *Outer Space*, 2nd edn, Boulder, CO, 1997.

[299] See e.g. *Oppenheim's International Law*, pp. 650–1, and N. Matte, *Treatise on Air–Aeronautical Law*, Montreal, 1981, chapters 4 and 5.

of use of the air, changed this and the approach that then prevailed, with little dissension, was based upon the extension of state sovereignty upwards into airspace. This was acceptable both from the defence point of view and in the light of evolving state practice regulating flights over national territory.[300] It was reflected in the 1919 Paris Convention for the Regulation of Aerial Navigation, which recognised the full sovereignty of states over the airspace above their land and territorial sea.[301] Accordingly, the international law rules protecting sovereignty of states apply to the airspace as they do to the land below. As the International Court noted in the *Nicaragua* case, 'The principle of respect for territorial sovereignty is also directly infringed by the unauthorised overflight of a state's territory by aircraft belonging to or under the control of the government of another state.'[302] The Court noted in the *Benin/Niger* case that 'a boundary represents the line of separation between areas of state sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air'.[303]

There is no right of innocent passage through the airspace of a state.[304] Aircraft may only traverse the airspace of states with the agreement of those states, and where that has not been obtained an illegal intrusion will be involved which will justify interception, though not (save in very exceptional cases) actual attack.[305] However, the principle of the complete sovereignty of the subjacent state is qualified not only by the various multilateral and bilateral conventions which permit airliners to cross and land in the territories of the contracting states under recognised conditions

[300] Matte, *Treatise*, pp. 91–6.

[301] Article 1. Each party also undertook to accord in peacetime freedom of innocent passage to the private aircraft of other parties so long as they complied with the rules made by or under the authority of the Convention. Articles 5–10 provided that the nationality of aircraft would be based upon registration and that registration would take place in the state of which their owners were nationals. An International Commission for Air Navigation was established. See also the 1928 American Convention on Commercial Aviation.

[302] ICJ Reports, 1986, pp. 14, 128; 76 ILR, p. 1. [303] ICJ Reports, 2005, p. 142.

[304] See e.g. *Oppenheim's International Law*, p. 652. It should, however, be noted that articles 38 and 39 of the Convention on the Law of the Sea, 1982 provide for a right of transit passage through straits 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 zone for aircraft as well as ships. Note also that under article 53 of this Convention, aircraft have a right of overflight with regard to designated air routes above archipelagic waters.

[305] See also *Pan Am Airways* v. *The Queen* (1981) 2 SCR 565; 90 ILR, p. 213, with regard to the exercise of sovereignty over the airspace above the high seas.

and in the light of the accepted regulations, but also by the development of the law of outer space.

Ever since the USSR launched the first earth satellite in 1957, space exploration has developed at an ever-increasing rate.[306] Satellites now control communications and observation networks, while landings have been made on the moon and information-seeking space probes dispatched to survey planets like Venus and Saturn. The research material gathered upon such diverse matters as earth resources, ionospheric activities, solar radiation, cosmic rays and the general structure of space and planet formations has stimulated further efforts to understand the nature of space and the cosmos.[307] This immense increase in available information has also led to the development of the law of outer space, formulating generally accepted principles to regulate the interests of the various states involved as well as taking into account the concern of the international community as a whole.

The definition and delimitation of outer space

It soon became apparent that the *usque ad coelum* rule, providing for state sovereignty over territorial airspace to an unrestricted extent, was not viable where space exploration was concerned. To obtain the individual consents of countries to the passage of satellites and other vehicles orbiting more than 100 miles above their surface would prove cumbersome in the extreme and in practice states have acquiesced in such traversing. This means that the sovereignty of states over their airspace is limited in height at most to the point where the airspace meets space itself. Precisely where this boundary lies is difficult to say and will depend upon technological and other factors, but figures between 50 and 100 miles have been put forward.[308]

As conventional aircraft are developed to attain greater heights, so states will wish to see their sovereignty extend to those heights and, as well as genuine uncertainty, this fear of surrendering what may prove to be in

[306] Note the role played by the UN Committee on the Peaceful Uses of Outer Space established in 1958 and consisting currently of sixty-nine states. The Committee has a Legal Sub-Committee and a Scientific and Technical Sub-Committee: see, in particular, Christol, *Modern International Law*, pp. 13–20, and www.unoosa.org/oosa/COPUOS/copuos.html.

[307] See e.g. Fawcett, *Outer Space*, chapter 7.

[308] The UK has noted, for example, that, 'for practical purposes the limit [between airspace and outer space] is considered to be as high as any aircraft can fly', 70 BYIL, 1999, p. 520.

the future valuable sovereign rights has prevented any agreement on the delimitation of this particular frontier.[309]

The regime of outer space

Beyond the point separating air from space, states have agreed to apply the international law principles of *res communis*, so that no portion of outer space may be appropriated to the sovereignty of individual states. This was made clear in a number of General Assembly resolutions following the advent of the satellite era in the late 1950s. For instance, UN General Assembly resolution 1962 (XVII), adopted in 1963 and entitled the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, lays down a series of applicable legal principles which include the provisions that outer space and celestial bodies were free for exploration and use by all states on a basis of equality and in accordance with international law, and that outer space and celestial bodies were not subject to national appropriation by any means.[310] In addition, the Declaration on International Co-operation in the Exploration and Use of Outer Space adopted in resolution 51/126, 1996, called for further international co-operation, with particular attention being given to the benefit for and the interests of developing countries and countries with incipient space programmes stemming from such international co-operation conducted with countries with more advanced space capabilities.[311] Such resolutions constituted in many cases and in the circumstances expressions of state practice and *opinio juris* and were thus part of customary law.[312]

[309] See generally Christol, *Modern International Law*, chapter 10, and see also e.g. UKMIL, 64 BYIL, 1993, p. 689. A variety of suggestions have been put forward regarding the method of delimitation, ranging from the properties of the atmosphere to the lowest possible orbit of satellites. They appear to fall within either a spatial or a functional category: see *ibid.*, and UN Doc. A/AC.105/C.2/7/Add.1, 21 January 1977. Some states have argued for a 110 km boundary: see e.g. USSR, 21(4) *UN Chronicle*, 1984, p. 37; others feel it is premature to establish such a fixed delimitation, e.g. USA and UK, *ibid.* See also 216 HL Deb., col. 975, 1958–9, and D. Goedhuis, 'The Problems of the Frontiers of Outer Space and Airspace', 174 HR, 1982, p. 367.

[310] See also General Assembly resolutions 1721 (XVI) and 1884 (XVIII).

[311] See also 'The Space Millennium: The Vienna Declaration on Space and Human Development' adopted by the Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE III), Vienna, 1999: see www.oosa.unvienna.org/unisp-3/.

[312] See above, chapter 3, and B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 IJIL, 1965, p. 23.

The legal regime of outer space was clarified by the signature in 1967 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. This reiterates that outer space, including the moon and other celestial bodies, is not subject to national appropriation by any means and emphasises that the exploration and use of outer space must be carried out for the benefit of all countries. The Treaty does not establish as such a precise boundary between airspace and outer space but it provides the framework for the international law of outer space.[313] Article 4 provides that states parties to the Treaty agree:

> not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

There are, however, disagreements as to the meaning of this provision.[314] The article bans only nuclear weapons and weapons of mass destruction from outer space, the celestial bodies and from orbit around the earth, but article 1 does emphasise that the exploration and use of outer space 'shall be carried out for the benefit and in the interests of all countries' and it has been argued that this can be interpreted to mean that any military activity in space contravenes the Treaty.[315]

Under article 4, only the moon and other celestial bodies must be used exclusively for peaceful purposes, although the use of military personnel for scientific and other peaceful purposes is not prohibited. There are minimalist and maximalist interpretations as to how these provisions are to be understood. The former, for example, would argue that only aggressive military activity is banned, while the latter would prohibit all military behaviour.[316] Article 6 provides for international responsibility

[313] See e.g. Christol, *Modern International Law*, chapter 2. See also *Oppenheim's International Law*, p. 828.

[314] The issue became particularly controversial in the light of the US Strategic Defence Initiative ('Star Wars'), which aimed to develop a range of anti-satellite and anti-missile weapons based in space. The UN Committee on the Peaceful Uses of Outer Space considered the issue, although without the participation of the US, which objected to the matter being considered: see e.g. 21(6) *UN Chronicle*, 1984, p. 18.

[315] See e.g. Marcoff, *Traité*, pp. 361 ff.

[316] See e.g. Christol, *Modern International Law*, pp. 25–6. See also Goedhuis, 'Legal Issues Involved in the Potential Military Uses of Space Stations' in *Liber Amicorum for Rt Hon. Richard Wilberforce* (eds. M. Bos and I. Brownlie), Oxford, 1987, p. 23, and Gorove, *Developments*, part VI.

for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, require authorisation and continuing supervision by the appropriate state party to the Treaty. When activities are carried on in outer space, including the moon and other celestial bodies, by an international organisation, responsibility for compliance with the Treaty is to be borne both by the international organisation and by the states parties to the Treaty participating in such organisation.[317]

Under article 8, states retain jurisdiction and control over personnel and vehicles launched by them into space and under article 7 they remain responsible for any damage caused to other parties to the Treaty by their space objects.[318]

This aspect of space law was further developed by the Convention on International Liability for Damage Caused by Space Objects signed in 1972, article XII of which provides for the payment of compensation in accordance with international law and the principles of justice and equity for any damage caused by space objects. Article II provides for absolute liability to pay such compensation for damage caused by a space object on the surface of the earth or to aircraft in flight, whereas article III provides for fault liability for damage caused elsewhere or to persons or property on board a space object.[319] This Convention was invoked by Canada in 1979 following the damage allegedly caused by Soviet Cosmos 954.[320] As

[317] See e.g. B. Cheng, 'Article VI of the 1967 Treaty Revisited', 1 *Journal of Space Law*, 1998, p. 7.

[318] See further Cheng, *Studies in Space Law*, chapters 17 and 18.

[319] See e.g. the Exchange of Notes between the UK and Chinese governments with regard to liability for damages arising during the launch phase of the Asiasat Satellite in 1990 in accordance with *inter alia* the 1967 and 1972 Conventions, UKMIL, 64 BYIL, 1993, p. 689.

[320] The claim was for $6,401,174.70. See 18 ILM, 1979, pp. 899 ff. See also Christol, *Modern International Law*, pp. 59 ff., and Christol, 'International Liability for Damage Caused by Space Objects', 74 AJIL, 1980, p. 346. B. Cheng has drawn attention to difficulties concerning the notion of damage here as including environmental damage: see International Law Association, Report of the Sixty-ninth Conference, London, 2000, p. 581. Note also that under article 3 of the 1967 Treaty, all states parties to the Treaty agree to carry on activities 'in accordance with international law', which clearly includes rules relating to state responsibility. See also Gorove, *Developments*, part V, and B. Hurwitz, *State Liability for Outer Space Activities in Accordance with the 1972 Convention on International Liability for Damage Caused by Space Objects*, Dordrecht, 1992.

a reinforcement to this evolving system of state responsibility, the Convention on the Registration of Objects Launched into Outer Space was opened for signature in 1975, coming into force in 1976. This laid down a series of stipulations for the registration of information regarding space objects, such as, for example, their purpose, location and parameters, with the United Nations Secretary-General.[321] In 1993, the UN General Assembly adopted Principles Relevant to the Use of Nuclear Power Sources in Outer Space.[322] Under these Principles, the launching state is, prior to the launch, to ensure that a thorough and comprehensive safety assessment is conducted and made publicly available. Where a space object appears to malfunction with a risk of re-entry of radioactive materials to the earth, the launching state is to inform states concerned and the UN Secretary-General and respond promptly to requests for further information or consultations sought by other states. Principle 8 provides that states shall bear international responsibility for national activities involving the use of nuclear power sources in outer space, whether such activities are carried out by governmental agencies or by non-governmental agencies. Principle 9 provides that each state which launches or procures the launching of a space object and each state from whose territory or facility a space object is launched shall be internationally liable for damage caused by such space object or its component parts.

The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space was signed in 1968 and sets out the legal framework for the provision of emergency assistance to astronauts. It provides for immediate notification of the launching authority or, if that is not immediately possible, a public announcement regarding space personnel in distress as well as the immediate provision of assistance. It also covers search and rescue operations as well as a guarantee of prompt return. The Convention also provides for recovery of space objects.[323]

[321] The International Law Association adopted in 1994 the 'Buenos Aires International Instrument on the Protection of the Environment from Damage Caused by Space Debris'. This provides that each state or international organisation party to the Instrument that launches or procures the launching of a space object is internationally liable for damage arising therefrom to another state, persons or objects, or international organisation party to the Instrument as a consequence of space debris produced by any such object: see Report of the Sixty-sixth Conference at Buenos Aires, London, 1994, p. 7.

[322] Resolution 47/68.

[323] The UK Outer Space Act 1986, for example, provides a framework for private sector space enterprises by creating a licensing system for outer space activities and by establishing a system for indemnification for damage suffered by third parties or elsewhere. The Act also

In 1979, the Agreement Governing the Activities of States on the Moon and other Celestial Bodies was adopted.[324] This provides for the demilitarisation of the moon and other celestial bodies, although military personnel may be used for peaceful purposes, and reiterates the principle established in the 1967 Outer Space Treaty. Under article IV, the exploration and the use of the moon shall be the province of all mankind and should be carried out for the benefit of all. Article XI emphasises that the moon and its natural resources are the common heritage of mankind and are not subject to national appropriation by any means. That important article emphasises that no private rights of ownership over the moon or any part of it or its natural resources in place may be created, although all states parties have the right to exploration and use of the moon. The states parties also agreed under article XI(5) and (7) to establish an international regime to govern the exploitation of the resources of the moon, when this becomes feasible.[325] The main purposes of the international regime to be established are to include:

a. the orderly and safe development of the natural resources of the moon;
b. the rational management of those resources;
c. the expansion of opportunities in the use of those resources; and
d. an equitable sharing by all states parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have

establishes a statutory register of the launch of space objects. Note also that the US has signed a number of agreements with other states providing for assistance abroad in the event of an emergency landing of the space shuttle. These agreements also provide for US liability to compensate for damage and loss caused as a result of an emergency landing, in accordance with the 1972 Treaty: see Cumulative DUSPIL 1981–8, vol. II, p. 2269. In 1988 an Agreement on Space Stations was signed between the US, the governments of the member states of the European Space Agency, Japan and Canada. This provides *inter alia* for registration of flight elements as space objects under the Registration Convention of 1975, each state retaining jurisdiction over the elements it so registers and personnel in or on the space station who are its nationals. There is also an interesting provision (article 22) permitting the US to exercise criminal jurisdiction over misconduct committed by a non-US national in or on a non-US element of the manned base or attached to the manned base, which endangers the safety of the manned base or the crew members thereon. Before proceeding to trial with such a prosecution, the US shall consult with the partner state whose nationality the alleged perpetrator holds, and shall either have received the agreement of that partner to the prosecution or failed to have received an assurance that the partner state intends to prosecute.

[324] This came into force in July 1984: see C. Q. Christol, 'The Moon Treaty Enters into Force', 79 AJIL, 1985, p. 163.

[325] See e.g. Cheng, 'Moon Treaty', pp. 231–2, and Christol, *Modern International Law*, chapters 7 and 8.

contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.

Several points are worth noting. First, the proposed international regime is only to be established when exploitation becomes feasible. Secondly, it appears that until the regime is set up, there is a moratorium on exploitation, although not on 'exploration and use', as recognised by articles XI(4) and VI(2). This would permit the collection of samples and their removal from the moon for scientific purposes. Thirdly, it is to be noted that private ownership rights of minerals or natural resources not in place are permissible under the Treaty.[326]

Telecommunications[327]

Arguably the most useful application of space exploitation techniques has been the creation of telecommunications networks. This has revolutionised communications and has an enormous educational as well as entertainment potential.[328]

The legal framework for the use of space in the field of telecommunications is provided by the various INTELSAT (international telecommunications satellites) agreements which enable the member states of the International Telecommunications Union to help develop and establish the system, although much of the work is in fact carried out by American corporations, particularly COMSAT. In 1971 the communist countries established their own network of telecommunications satellites, called INTER-SPUTNIK. The international regime for the exploitation of the orbit/spectrum resource[329] has built upon the 1967 Treaty, the 1973 Telecommunications Convention and Protocol and various International Telecommunication Union Radio Regulations. Regulation of the radio spectrum is undertaken at the World Administrative Radio Conferences and by the principal organs of the ITU.

[326] See below, chapter 11, p. 628, regarding the 'common heritage' regime envisaged for the deep seabed under the 1982 Convention on the Law of the Sea.

[327] See e.g. A. Matteesco-Matté, *Les Télécommunications par Satellites*, Paris, 1982; M. L. Smith, *International Regulation of Satellite Communications*, Dordrecht, 1990, and J. M. Smits, *Legal Aspects of Implementing International Telecommunications Links*, Dordrecht, 1992.

[328] See e.g. the use by India of US satellites to beam educational television programmes to many thousands of isolated settlements that would otherwise not have been reached, DUSPIL, 1976, pp. 427–8.

[329] See Christol, *Space Law*, chapter 11.

However, there are a number of problems associated with these ventures, ranging from the allocation of radio wave frequencies to the dangers inherent in direct broadcasting via satellites to willing and unwilling states alike. Questions about the control of material broadcast by such satellites and the protection of minority cultures from 'swamping' have yet to be answered, but are being discussed in various UN organs, for instance UNESCO and the Committee on the Peaceful Uses of Outer Space.[330]

Two principles are relevant in this context: freedom of information, which is a right enshrined in many international instruments,[331] and state sovereignty. A number of attempts have been made to reconcile the two.

In 1972, UNESCO adopted a Declaration of Guiding Principles on the Use of Satellite Broadcasting, in which it was provided that all states had the right to decide on the content of educational programmes broadcast to their own peoples, while article IX declared that prior agreement was required for direct satellite broadcasting to the population of countries other than the country of origin of the transmission. Within the UN support for the consent principle was clear, but there were calls for a proper regulatory regime, in addition.[332]

In 1983, the General Assembly adopted resolution 37/92 entitled 'Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting'. This provides that a state intending to establish or authorise the establishment of a direct television broadcasting satellite service must first notify the proposed receiving state or states and then consult with them. A service may only be established after this and on the basis of agreements and/or arrangements in conformity with the relevant instruments of the International Telecommunications Union. However, the value of these principles is significantly reduced in the light of the fact that nearly all the Western states voted against the resolution.[333]

ITU regulations call for technical co-ordination between the sending and receiving states as to frequency and orbital positioning before any

[330] See Christol, *Modern International Law*, chapter 12, and N. Matte, 'Aerospace Law: Telecommunications Satellites', 166 HR, 1980, p. 119. See also the study requested by the 1982 Conference, A/AC.107/341, and the European Convention on Transfrontier Television, 1988 and EEC Directive 89/552 on the Pursuit of Television Broadcasting Activities. See also Gorove, *Developments*, part II, chapter 5.

[331] See e.g. article 19, International Covenant on Civil and Political Rights, 1966; article 10, Universal Declaration of Human Rights, 1948, and article 10, European Convention on Human Rights, 1950.

[332] See e.g. N. M. Matte, *Space Activities and Emerging International Law*, London, 1985, p. 438. See also A/8771 (1972).

[333] These included France, West Germany, the UK, USA and Japan.

direct broadcasting by satellite can be carried out and thus do not affect regulation of the conduct of the broadcast activity as such, although the two elements are clearly connected.[334]

The question of remote sensing has also been under consideration for many years by several bodies, including the UN Committee on the Peaceful Uses of Outer Space. Remote sensing refers to the detection and analysis of the earth's resources by sensors carried in aircraft and spacecraft and covers, for example, meteorological sensing, ocean observation, military surveillance and land observation. It clearly has tremendous potential, but the question of the uses of the information received is highly controversial.[335] In 1986, the General Assembly adopted fifteen principles relating to remote sensing.[336] These range from the statement that such activity is to be carried out for the benefit and in the interests of all countries, taking into particular account the needs of developing countries, to the provision that sensing states should promote international co-operation and environmental protection on earth. There is, however, no requirement of prior consent from states that are being sensed,[337] although consultations in order to enhance participation are called for there. One key issue relates to control over the dissemination of information gathered by satellite. Some have called for the creation of an equitable regime for the sharing of information[338] and there is concern over the question of access to data about states by those, and other, states. The USSR and France, for example, jointly proposed the concept of the inalienable right of states to dispose of their natural resources and of information concerning those resources,[339] while the US in particular pointed to the practical problems this would cause and the possible infringement of freedom of information. The UN Committee on the Peaceful Uses of Outer Space

[334] See Matte, *Space Activities and Emerging International Law*, pp. 453 ff. See also J. Chapman and G. I. Warren, 'Direct Broadcasting Satellites: The ITU, UN and the Real World', 4 *Annals of Air and Space Law*, 1979, p. 413.

[335] See e.g. Christol, *Modern International Law*, chapter 13, and 21(4) *UN Chronicle*, 1984, p. 32. See also the Study on Remote Sensing, A/AC.105/339 and Add.1, 1985, and Gorove, *Developments*, part VII.

[336] General Assembly resolution 41/65.

[337] Note that the 1967 Outer Space Treaty provides for freedom of exploration and use, although arguments based *inter alia* on permanent sovereignty over natural resources and exclusive sovereignty over airspace have been put forward: see e.g. A/AC.105/171, Annex IV (1976) and A/AC.105/C.2/SR.220 (1984).

[338] See e.g. A. E. Gotlieb, 'The Impact of Technology on the Development of Contemporary International Law', 170 HR, p. 115.

[339] A/AC.105/C.2/L.99 (1974).

has been considering the problem for many years and general agreement has proved elusive.[340] The Principles on Remote Sensing provide that the sensed state shall have access to the primary and processed data produced upon a non-discriminatory basis and on reasonable cost terms. States conducting such remote sensing are to bear international responsibility for their activities.

The increase in the use of satellites for all of the above purposes has put pressure upon the geostationary orbit. This is the orbit 22,300 miles directly above the equator, where satellites circle at the same speed as the earth rotates. It is the only orbit capable of providing continuous contact with ground stations via a single satellite. The orbit is thus a finite resource.[341] However, in 1976, Brazil, Colombia, the Congo, Ecuador, Indonesia, Kenya, Uganda and Zaire signed the Bogotá Declaration under which they stated that 'the segments of geostationary synchronous orbit are part of the territory over which equatorial states exercise their sovereignty'.[342]

Other states have vigorously protested against this and it therefore cannot be taken as other than an assertion and a bargaining counter.[343] Nevertheless, the increase in satellite launches and the limited nature of the geostationary orbit facility call for urgent action to produce an acceptable series of principles governing its use.[344]

Suggestions for further reading

A. Cassese, *Self-Determination of Peoples*, Cambridge, 1995

B. Cheng, *Studies in International Space Law*, Oxford, 1997

J. Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006

J. Crawford, 'State Practice and International Law in Relation to Secession', 69 BYIL, 1998, p. 85

R. Y. Jennings, *The Acquisition of Territory in International Law*, Manchester, 1963

F. Lyall and P. B. Larsen, *Space Law*, Aldershot, 2007

M. N. Shaw, *Title to Territory in Africa*, Oxford, 1986

[340] See e.g. A/AC.105/320, Annex IV (1983).

[341] See e.g. article 33 of the 1973 International Telecommunications Convention, and Christol, *Modern International Law*, pp. 451 ff. See also the Study on the Feasibility of Closer Spacing of Satellites in the Geostationary Orbit, A/AC.105/340 (1985) and A/AC105/404 (1988). See also Gorove, *Developments*, part II, chapters 3 and 4.

[342] Gorove, *Developments*, pp. 891–5. See also ITU Doc. WARC-155 (1977) 81-E.

[343] See e.g. DUSPIL, 1979, pp. 1187–8.

[344] Note also the Convention on International Interests in Mobile Equipment, 2001 and the draft protocol on matters specific to space property.

11

The law of the sea

The seas have historically performed two important functions: first, as a medium of communication, and secondly as a vast reservoir of resources, both living and non-living. Both of these functions have stimulated the development of legal rules.[1] The fundamental principle governing the law of the sea is that 'the land dominates the sea' so that the land territorial situation constitutes the starting point for the determination of the maritime rights of a coastal state.[2]

The seas were at one time thought capable of subjection to national sovereignties. The Portuguese in particular in the seventeenth century proclaimed huge tracts of the high seas as part of their territorial domain, but these claims stimulated a response by Grotius who elaborated the doctrine of the open seas, whereby the oceans as *res communis*

[1] See e.g. *UN Convention on the Law of the Sea 1982* (eds. M. Nordquist *et al.*), The Hague, 6 vols., 1985–2003; D. Anderson, *Modern Law of the Sea: Selected Essays*, The Hague, 2007; *Law of the Sea, Environmental Law and Settlement of Disputes* (eds. T. M. Ndiaye and R. Wolfrum), The Hague, 2007; *Law of the Sea: Progress and Prospects* (eds. D. Freestone, R. Barnes and D. Ong), Oxford, 2006; L. B. Sohn and J. E. Noyes, *Cases and Materials on the Law of the Sea*, Ardsley, 2004; E. D. Brown, *The International Law of the Sea*, Aldershot, 2 vols., 1994; *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, chapter 6; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 1139; T. Treves, 'Codification du Droit International et Pratique des États dans le Droit de la Mer', 223 HR, 1990 IV, p. 9; R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd edn, Manchester, 1999; R. J. Dupuy and D. Vignes, *Traité du Nouveau Droit de la Mer*, Brussels, 1985; *Le Nouveau Droit International de la Mer* (eds. D. Bardonnet and M. Virally), Paris, 1983; D. P. O'Connell, *The International Law of the Sea*, Oxford, 2 vols., 1982–4; *New Directions in the Law of the Sea*, Dobbs Ferry, vols. I–VI (eds. R. Churchill, M. Nordquist and S. H. Lay), 1973–7; *ibid.*, VII–XI (eds. M. Nordquist and K. Simmons), 1980–1, and S. Oda, *The Law of the Sea in Our Time*, Leiden, 2 vols., 1977. See also the series *Limits in the Seas*, published by the Geographer of the US State Department.

[2] See e.g. *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 97; *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 51 and *Nicaragua* v. *Honduras*, ICJ Reports, 2007, paras. 113 and 126.

were to be accessible to all nations but incapable of appropriation.[3] This view prevailed, partly because it accorded with the interests of the North European states, which demanded freedom of the seas for the purposes of exploration and expanding commercial intercourse with the East.

The freedom of the high seas rapidly became a basic principle of international law, but not all the seas were so characterised. It was permissible for a coastal state to appropriate a maritime belt around its coastline as territorial waters, or territorial sea, and treat it as an indivisible part of its domain. Much of the history of the law of the sea has centred on the extent of the territorial sea or the precise location of the dividing line between it and the high seas and other recognised zones. The original stipulation linked the width of the territorial sea to the ability of the coastal state to dominate it by military means from the confines of its own shore. But the present century has witnessed continual pressure by states to enlarge the maritime belt and thus subject more of the oceans to their exclusive jurisdiction.

Beyond the territorial sea, other jurisdictional zones have been in process of development. Coastal states may now exercise particular jurisdictional functions in the contiguous zone, and the trend of international law today is moving rapidly in favour of even larger zones in which the coastal state may enjoy certain rights to the exclusion of other nations, such as fishery zones, continental shelves and, more recently, exclusive economic zones. However, in each case whether a state is entitled to a territorial sea, continental shelf or exclusive economic zone is a question to be decided by the law of the sea.[4]

This gradual shift in the law of the sea towards the enlargement of the territorial sea (the accepted maximum limit is now a width of 12 nautical miles in contrast to 3 nautical miles some forty years ago), coupled with the continual assertion of jurisdictional rights over portions of what were regarded as high seas, reflects a basic change in emphasis in the attitude of states to the sea.

The predominance of the concept of the freedom of the high seas has been modified by the realisation of resources present in the seas and seabed beyond the territorial seas. Parallel with the developing tendency to assert ever greater claims over the high seas, however, has been the move towards

[3] *Mare Liberum*, 1609. See also O'Connell, *International Law of the Sea*, vol. I, pp. 9 ff. The closed seas approach was put by e.g. J. Selden, *Mare Clausum*, 1635.

[4] *El Salvador/Honduras (Nicaragua Intervening)*, ICJ Reports, 1990, pp. 92, 126; 97 ILR, p. 214.

proclaiming a 'common heritage of mankind' regime over the seabed of the high seas. The law relating to the seas, therefore, has been in a state of flux for several decades as the conflicting principles have manifested themselves.

A series of conferences have been held, which led to the four 1958 Conventions on the Law of the Sea and then to the 1982 Convention on the Law of the Sea.[5] The 1958 Convention on the High Seas was stated in its preamble to be 'generally declaratory of established principles of international law', while the other three 1958 instruments can be generally accepted as containing both reiterations of existing rules and new rules.

The pressures leading to the Law of the Sea Conference, which lasted between 1974 and 1982 and involved a very wide range of states and international organisations, included a variety of economic, political and strategic factors. Many Third World states wished to develop the exclusive economic zone idea, by which coastal states would have extensive rights over a 200-mile zone beyond the territorial sea, and were keen to establish international control over the deep seabed, so as to prevent the technologically advanced states from being able to extract minerals from this vital and vast source freely and without political constraint. Western states were desirous of protecting their navigation routes by opposing any weakening of the freedom of passage through international straits particularly, and wished to protect their economic interests through free exploitation of the resources of the high seas and the deep seabed. Other states and groups of states sought protection of their particular interests.[6] Examples here would include the landlocked and geographically disadvantaged states, archipelagic states and coastal states. The effect of this kaleidoscopic range of interests was very marked and led to the 'package deal' concept of the final draft. According to this approach, for example, the Third World accepted passage through straits and enhanced continental shelf rights beyond the 200-mile limit from the coasts in return for the internationalisation of deep sea mining.[7]

The 1982 Convention contains 320 articles and 9 Annexes. It was adopted by 130 votes to 4, with 17 abstentions. The Convention entered

[5] The 1958 Convention on the Territorial Sea and the Contiguous Zone came into force in 1964; the 1958 Convention on the High Seas came into force in 1962; the 1958 Convention on Fishing and Conservation of Living Resources came into force in 1966 and the 1958 Convention on the Continental Shelf came into force in 1964.

[6] See Churchill and Lowe, *Law of the Sea*, pp. 15 ff.

[7] See e.g. H. Caminos and M. R. Molitor, 'Progressive Development of International Law and the Package Deal', 79 AJIL, 1985, p. 871.

into force on 16 November 1994, twelve months after the required 60 ratifications. In order primarily to meet Western concerns with regard to the International Seabed Area (Part XI of the Convention), an Agreement relating to the Implementation of Part XI of the 1982 Convention was adopted on 29 July 1994.[8]

Many of the provisions in the 1982 Convention repeat principles enshrined in the earlier instruments and others have since become customary rules, but many new rules were proposed. Accordingly, a complicated series of relationships between the various states exists in this field, based on customary rules and treaty rules.[9] All states are *prima facie* bound by the accepted customary rules, while only the parties to the five treaties involved will be bound by the new rules contained therein, and since one must envisage some states not adhering to the 1982 Conventions, the 1958 rules will continue to be of importance.[10] During the twelve-year period between the signing of the Convention and its coming into force, the influence of its provisions was clear in the process of law creation by state practice.[11]

The territorial sea

Internal waters[12]

Internal waters are deemed to be such parts of the seas as are not either the high seas or relevant zones or the territorial sea, and are accordingly classed as appertaining to the land territory of the coastal state. Internal waters, whether harbours, lakes or rivers, are such waters as are to be found on the landward side of the baselines from which the width of the territorial and other zones is measured,[13] and are assimilated with the territory of

[8] See further below, p. 632.

[9] See the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 39; 41 ILR, pp. 29, 68; the *Fisheries Jurisdiction (UK* v. *Iceland)* case, ICJ Reports, 1974, p. 1; 55 ILR, p. 238 and the *Anglo-French Continental Shelf* case, Cmnd 7438, 1978; 54 ILR, p. 6. See also above, chapter 3, p. 77.

[10] Note that by article 311(1) of the 1982 Convention, the provisions of this Convention will prevail as between the states parties over the 1958 Conventions.

[11] See e.g. J. R. Stevenson and B. H. Oxman, 'The Future of the UN Convention on the Law of the Sea', 88 AJIL, 1994, p. 488.

[12] See e.g. Brown, *International Law of the Sea*, vol. I, chapter 5; O'Connell, *International Law of the Sea*, vol. I, chapter 9; V. D. Degan, 'Internal Waters', Netherlands YIL, 1986, p. 1 and Churchill and Lowe, *Law of the Sea*, chapter 3.

[13] Article 5(1) of the 1958 Convention on the Territorial Sea and article 8(1) of the 1982 Convention. Note the exception in the latter provision with regard to archipelagic states, below, p. 565. See also *Regina* v. *Farnquist* (1981) 54 CCC (2d) 417; 94 ILR, p. 238.

the state. They differ from the territorial sea primarily in that there does not exist any right of innocent passage from which the shipping of other states may benefit. There is an exception to this rule where the straight baselines enclose as internal waters what had been territorial waters.[14]

In general, a coastal state may exercise its jurisdiction over foreign ships within its internal waters to enforce its laws, although the judicial authorities of the flag state (i.e. the state whose flag the particular ship flies) may also act where crimes have occurred on board ship. This concurrent jurisdiction may be seen in two cases.

In *R* v. *Anderson*,[15] in 1868, the Court of Criminal Appeal in the UK declared that an American national who had committed manslaughter on board a British vessel in French internal waters was subject to the jurisdiction of the British courts, even though he was also within the sovereignty of French justice (and American justice by reason of his nationality), and thus could be correctly convicted under English law. The US Supreme Court held in *Wildenhus*' case[16] that the American courts had jurisdiction to try a crew member of a Belgian vessel for the murder of another Belgian national when the ship was docked in the port of Jersey City in New York.[17]

A merchant ship in a foreign port or in foreign internal waters is automatically subject to the local jurisdiction (unless there is an express agreement to the contrary), although where purely disciplinarian issues related to the ship's crew are involved, which do not concern the maintenance of peace within the territory of the coastal state, then such matters would by courtesy be left to the authorities of the flag state to regulate.[18] Although some writers have pointed to theoretical differences between the common law and French approaches, in practice the same fundamental proposition applies.[19]

[14] Article 5(2) of the 1958 Convention on the Territorial Sea and article 8(2) of the 1982 Convention. See below, p. 559.

[15] 1 Cox's Criminal Cases 198.

[16] 120 US 1 (1887). See also *Armament Dieppe SA* v. *US* 399 F.2d 794 (1968).

[17] See the Madrid incident, where US officials asserted the right to interview a potential defector from a Soviet ship in New Orleans, 80 AJIL, 1986, p. 622.

[18] See e.g. *NNB* v. *Ocean Trade Company* 87 ILR, p. 96, where the Court of Appeal of The Hague held that a coastal state had jurisdiction over a foreign vessel where the vessel was within the territory of the coastal state and a dispute arose affecting not only the internal order of the ship but also the legal order of the coastal state concerned. The dispute concerned a strike on board ship taken on the advice of the International Transport Workers' Federation.

[19] See e.g. Churchill and Lowe, *Law of the Sea*, pp. 65 ff. See also J. L. Lenoir, 'Criminal Jurisdiction over Foreign Merchant Ships', 10 *Tulane Law Review*, 1935, p. 13. See, with regard to the right of access to ports and other internal waters, A. V. Lowe, 'The Right of

However, a completely different situation operates where the foreign vessel involved is a warship. In such cases, the authorisation of the captain or of the flag state is necessary before the coastal state may exercise its jurisdiction over the ship and its crew. This is due to the status of the warship as a direct arm of the sovereign of the flag state.[20]

Baselines[21]

The width of the territorial sea is defined from the low-water mark around the coasts of the state. This is the traditional principle under customary international law and was reiterated in article 3 of the Geneva Convention on the Territorial Sea and the Contiguous Zone in 1958 and article 5 of the 1982 Convention, and the low-water line along the coast is defined 'as marked on large-scale charts officially recognised by the coastal state'.[22]

In the majority of cases, it will not be very difficult to locate the low-water line which is to act as the baseline for measuring the width of the territorial sea.[23] By virtue of the 1958 Convention on the Territorial Sea and the 1982 Law of the Sea Convention, the low-water line of a low-tide elevation[24] may now be used as a baseline for measuring the breadth of the territorial sea if it is situated wholly or partly within the the territorial sea

Entry into Maritime Ports in International Law', 14 *San Diego Law Review*, 1977, p. 597, and O'Connell, *International Law of the Sea*, vol. II, chapter 22. See also the Dangerous Vessels Act 1985.

20 See *The Schooner Exchange* v. *McFaddon* 7 Cranch 116 (1812). See also 930 HC Deb., col. 450, Written Answers, 29 April 1977.

21 See e.g. W. M. Reisman and G. S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation*, New York, 1992; J. A. Roach and R. W. Smith, *United States Responses to Excessive Maritime Claims*, 2nd edn, The Hague, 1996, and L. Sohn, 'Baseline Considerations' in *International Maritime Boundaries* (eds. J. I. Charney and L. M. Alexander), Dordrecht, 1993, vol. I, p. 153.

22 See *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 97 and *Eritrea/Yemen (Phase Two: Maritime Delimitation)*, 119 ILR, pp. 417, 458. See also Churchill and Lowe, *Law of the Sea*, chapter 2; O'Connell, *International Law of the Sea*, vol. I, chapter 5; *Oppenheim's International Law*, p. 607, and M. Mendelson, 'The Curious Case of *Qatar* v. *Bahrain* in the International Court of Justice', 72 BYIL, 2001, p. 183.

23 See the *Dubai/Sharjah Border Award* 91 ILR, pp. 543, 660–3, where the Arbitral Tribunal took into account the outermost permanent harbour works of the two states as part of the coast for the purpose of drawing the baselines.

24 See article 11(1), Convention on the Territorial Sea, 1958 and article 13(1), Law of the Sea Convention, 1982. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide, but submerged at high tide. See e.g. G. Marston, 'Low-Tide Elevations and Straight Baselines', 46 BYIL, 1972–3, p. 405, and D. Bowett, 'Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations' in Charney and Alexander, *International Maritime Boundaries*, vol. I, p. 131.

measured from the mainland or an island. However, a low-tide elevation wholly situated beyond the territorial sea will generate no territorial sea of its own.[25] When a low-tide elevation is situated in the overlapping area of the territorial sea of two states, both are in principle entitled to use this as part of the relevant low-water line in measuring their respective territorial sea.[26] However, the International Court has taken the view that low-tide elevations may not be regarded as part of the territory of the state concerned and thus cannot be fully assimilated with islands.[27] A low-tide elevation with a lighthouse or similar installation built upon it may be used for the purpose of drawing a straight baseline.[28]

Sometimes, however, the geography of the state's coasts will be such as to cause certain problems: for instance, where the coastline is deeply indented or there are numerous islands running parallel to the coasts, or where there exist bays cutting into the coastlines. Special rules have evolved to deal with this issue, which is of importance to coastal states, particularly where foreign vessels regularly fish close to the limits of the territorial sea. A more rational method of drawing baselines might have the effect of enclosing larger areas of the sea within the state's internal waters, and thus extend the boundaries of the territorial sea further than the traditional method might envisage.

This point was raised in the *Anglo-Norwegian Fisheries* case,[29] before the International Court of Justice. The case concerned a Norwegian decree delimiting its territorial sea along some 1,000 miles of its coastline. However, instead of measuring the territorial sea from the low-water line, the Norwegians constructed a series of straight baselines linking the outermost parts of the land running along the skjaergaard (or fringe of islands and rocks) which parallels the Norwegian coastline. This had the effect of enclosing within its territorial limits parts of what would normally have been the high seas if the traditional method had been utilised. As a result, certain disputes involving British fishing boats arose, and the United

[25] Article 13(2) of the Law of the Sea Convention, 1982. Further, low-tide elevations situated within 12 miles of another such elevation but beyond the territorial sea of the state may not themselves be used for the determination of the breadth of the territorial sea, the so-called 'leap-frogging method', *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 102. See also *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 141, but see *Eritrea/Yemen*, 114 ILR, pp. 1, 138.

[26] *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 101.

[27] *Ibid.*, pp. 40, 102 and *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 141.

[28] See article 7(4) of the Law of the Sea Convention, 1982. See also article 47(4) with regard to archipelagic baselines.

[29] ICJ Reports, 1951, p. 116; 18 ILR, p. 86.

Kingdom challenged the legality of the Norwegian method of baselines under international law. The Court held that it was the outer line of the skjaergaard that was relevant in establishing the baselines, and not the low-water line of the mainland. This was dictated by geographic realities. The Court noted that the normal method of drawing baselines that are parallel to the coast (the *tracé parallèle*) was not applicable in this case because it would necessitate complex geometrical constructions in view of the extreme indentations of the coastline and the existence of the series of islands fringing the coasts.[30]

Since the usual methods did not apply, and taking into account the principle that the territorial sea must follow the general direction of the coasts, the concept of straight baselines drawn from the outer rocks could be considered.[31] The Court also made the point that the Norwegian system had been applied consistently over many years and had met no objections from other states, and that the UK had not protested until many years after it had first been introduced.[32] In other words, the method of straight baselines operated by Norway:

> had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.[33]

Thus, although noting that Norwegian rights had been established through actual practice coupled with acquiescence, the Court regarded the straight baseline system itself as a valid principle of international law in view of the special geographic conditions of the area. The Court provided criteria for determining the acceptability of any such delimitations. The drawing of the baselines had not to depart from the general direction of the coast, in view of the close dependence of the territorial sea upon the land domain; the baselines had to be drawn so that the sea area lying within them had to be sufficiently closely linked to the land domain to be subject to the regime of internal waters, and it was permissible to consider

[30] ICJ Reports, 1951, p. 128; 18 ILR, p. 91. Note also the Court's mention of the *courbe tangente* method of drawing arcs of circles from points along the low-water line, *ibid.*

[31] ICJ Reports, 1951, p. 129; 18 ILR, p. 92. Other states had already used such a system: see e.g. H. Waldock, 'The Anglo-Norwegian Fisheries Case', 28 BYIL, 1951, pp. 114, 148. See also I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, pp. 176 ff.

[32] ICJ Reports, 1951, p. 138; 18 ILR, p. 101. Cf. Judge McNair, ICJ Reports, 1951, pp. 171–80; 18 ILR, p. 123.

[33] ICJ Reports, 1951, p. 139; 18 ILR, p. 102.

in the process 'certain economic interests peculiar to a region, the reality and importance of which are evidenced by long usage'.[34]

These principles emerging from the *Fisheries* case were accepted by states as part of international law within a comparatively short period.

Article 4 of the Geneva Convention on the Territorial Sea, 1958 declared that the straight baseline system could be used in cases of indented coastlines or where there existed a skjaergaard, provided that the general direction of the coast was followed and that there were sufficiently close links between the sea areas within the lines and the land domain to be subject to the regime of internal waters. In addition, particular regional economic interests of long standing may be considered where necessary.[35]

A number of states now use the system, including, it should be mentioned, the United Kingdom as regards areas on the west coast of Scotland.[36] However, there is evidence that, perhaps in view of the broad criteria laid down, many states have used this system in circumstances that are not strictly justifiable in law.[37] However, the Court made it clear in *Qatar* v. *Bahrain* that

> the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.[38]

Further, the Court emphasised that the fact that a state considers itself a multiple-island state or a *de facto* archipelago does not allow it to

[34] ICJ Reports, 1951, p. 133; 18 ILR, p. 95.

[35] See also article 7 of the 1982 Convention. Note that straight baselines may not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them: see article 4(3), 1958 Convention on the Territorial Sea and article 7(4), 1982 Convention on the Law of the Sea. See also *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 100–1 and 102.

[36] Territorial Waters Order in Council, 1964, article 3, s. 1, 1965, Part III, s. 2, p. 6452A. See also the Territorial Sea (Limits) Order 1989 regarding the Straits of Dover. See generally, as regards state practice, Churchill and Lowe, *Law of the Sea*, pp. 38–41, who note that some fifty-five to sixty-five states have used straight baselines, and M. Whiteman, *Digest of International Law*, Washington, vol. IV, pp. 21–35.

[37] See Churchill and Lowe, *Law of the Sea*, p. 39. See also the objection of the European Union to the use by Iran and Thailand of straight baselines along practically their entire coastlines, UKMIL, 69 BYIL, 1998, pp. 540–2, and US objections to the use of straight baselines by Thailand, DUSPIL, 2000, p. 703.

[38] ICJ Reports, 2001, pp. 40, 103.

deviate from the normal rules for the determination of baselines unless the relevant conditions are met.[39]

Where the result of the straight baseline method is to enclose as internal waters areas previously regarded as part of the territorial sea or high seas, a right of innocent passage shall be deemed to exist in such waters by virtue of article 5(2) of the 1958 Convention.[40]

Bays[41]

Problems also arise as to the approach to be adopted with regard to bays, in particular whether the waters of wide-mouthed bays ought to be treated as other areas of the sea adjacent to the coast, so that the baseline of the territorial sea would be measured from the low-water mark of the coast of the bay, or whether the device of the straight baseline could be used to 'close off' the mouth of the bay of any width and the territorial limit measured from that line.

It was long accepted that a straight closing line could be used across the mouths of bays, but there was considerable disagreement as to the permitted width of the bay beyond which this would not operate.[42] The point was settled in article 7 of the 1958 Convention on the Territorial Sea. This declared that:

> if the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters,

otherwise a straight baseline of 24 miles may be drawn.[43]

This provision, however, does not apply to historic bays. These are bays the waters of which are treated by the coastal state as internal in view of historic rights supported by general acquiescence rather than any specific

[39] *Ibid.* The Court rejected Bahrain's claim that certain maritime features east of its main islands constituted a fringe of islands: *ibid.*

[40] See also article 8(2) of the 1982 Convention.

[41] See e.g. Brown, *International Law of the Sea*, vol. I, p. 28; Churchill and Lowe, *Law of the Sea*, pp. 41 ff., and O'Connell, *International Law of the Sea*, vol. I, p. 209. See also G. Westerman, *The Juridical Bay*, Oxford, 1987.

[42] See e.g. the *North Atlantic Coast Fisheries* case, 11 RIAA, p. 167 (1910) and the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, p. 116; 18 ILR, p. 86, to the effect that no general rules of international law had been uniformly accepted.

[43] See also article 10 of the 1982 Convention.

principle of international law.[44] A number of states have claimed historic bays: for example, Canada with respect to Hudson Bay (although the US has opposed this)[45] and certain American states as regards the Gulf of Fonseca.[46] The question of this Gulf came before the International Court in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*.[47] The Court noted that the states concerned and commentators were agreed that the Gulf was a historic bay, but this was defined in terms of the particular historical situation of that Gulf, especially as it constituted a pluri-state bay, for which there were no agreed and codified general rules of the kind well established for single-state bays.[48] In the light of the particular historical circumstances and taking particular note of the 1917 decision, the Court found that the Gulf, beyond a long-accepted 3-mile maritime belt for the coastal states, constituted historic waters subject to the co-ownership or a condominium of the three coastal states.[49] The Court continued by noting that the vessels of other states would enjoy a right of innocent passage in the waters beyond the coastal belt in order to ensure access to any one of the three coastal states.[50] Having decided that the three states enjoyed a condominium within the Gulf, the Court concluded that there was a tripartite presence at the closing line of the Gulf.[51]

The United States Supreme Court has taken the view that where waters are outside the statutory limits for inland waters, the exercise of sovereignty required to establish title to a historic bay amounted to the exclusion of all foreign vessels and navigation from the area claimed. The continuous authority exercised in this fashion had to be coupled with the acquiescence of states. This was the approach in the *US* v. *State*

[44] See the *Tunisia/Libya Continental Shelf* case, ICJ Reports, 1982, pp. 18, 74; 67 ILR, pp. 4, 67.

[45] See Whiteman, *Digest*, vol. IV, pp. 250–7.

[46] See *El Salvador* v. *Nicaragua* 11 AJIL, 1917, p. 674.

[47] ICJ Reports, 1992, p. 351; 97 ILR, p. 266.

[48] ICJ Reports, 1992, p. 589; 97 ILR, p. 505. But cf. the Dissenting Opinion of Judge Oda, ICJ Reports, 1992, p. 745; 97 ILR, p. 661.

[49] ICJ Reports, 1992, p. 601; 97 ILR, p. 517. See also generally C. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-appraisal*, The Hague, 2007.

[50] ICJ Reports, 1992, p. 605; 97 ILR, p. 521.

[51] ICJ Reports, 1992, pp. 608–9; 97 ILR, pp. 524–5. See also M. N. Shaw, 'Case Concerning the Land, Island and Maritime Frontier Dispute (*El Salvador/Honduras: Nicaragua Intervening*), Judgment of 11 September 1992', 42 ICLQ, 1993, p. 929, and A. Gioia, 'The Law of Multinational Bays and the Case of the Gulf of Fonseca', Netherlands YIL, 1993, p. 81.

of Alaska case[52] concerning the waters of Cook Inlet. The Supreme Court held that Alaska had not satisfied the terms and that the Inlet had not been regarded as a historic bay under Soviet, American or Alaskan sovereignty. Accordingly, it was the federal state and not Alaska which was entitled to the subsurface of Cook Inlet.[53]

In response to the Libyan claim to the Gulf of Sirte (Sidra) as a historic bay and the consequent drawing of a closing line of nearly 300 miles in length in 1973, several states immediately protested, including the US and the states of the European Community.[54] The US in a note to Libya in 1974 referred to 'the international law standards of past open, notorious and effective exercise of authority, and the acquiescence of foreign nations'[55] and has on several occasions sent naval and air forces into the Gulf in order to maintain its opposition to the Libyan claim and to assert that the waters of the Gulf constitute high seas.[56] Little evidence appears, in fact, to support the Libyan contention.

Islands[57]

As far as islands are concerned, the general provisions noted above regarding the measurement of the territorial sea apply. Islands are defined in the 1958 Convention on the Territorial Sea as consisting of 'a naturally-formed area of land, surrounded by water, which is above water at high tide',[58] and they can generate a territorial sea, contiguous zone, exclusive

[52] 422 US 184 (1975). See also L. J. Bouchez, *The Regime of Bays in International Law*, Leiden, 1963, and the *Tunisia–Libya Continental Shelf* case, ICJ Reports, 1982, pp. 18, 74; 67 ILR, pp. 4, 67.

[53] See also *United States* v. *California* 381 US 139 (1965); *United States* v. *Louisiana* (*Louisiana Boundary Case*) 394 US 11 (1969); *United States* v. *Maine* (*Rhode Island and New York Boundary Case*) 471 US 375 (1985) and *Alabama and Mississippi Boundary Case, United States* v. *Louisiana* 470 US 93 (1985).

[54] See Churchill and Lowe, *Law of the Sea*, p. 45, and UKMIL, 57 BYIL, 1986, pp. 579–80. See also F. Francioni, 'The Gulf of Sidra Incident (*United States* v. *Libya*) and International Law', 5 *Italian Yearbook of International Law*, 1980–1, p. 85.

[55] See 68 AJIL, 1974, p. 510. See also Cumulative DUSPIL 1981–8, Washington, 1994, vol. II, p. 1810.

[56] See e.g. UKMIL, 57 BYIL, 1986, pp. 581–2.

[57] See e.g. H. W. Jayewardene, *The Regime of Islands in International Law*, Dordrecht, 1990; D. W. Bowett, *The Legal Regime of Islands in International Law*, New York, 1979; C. Symmons, *The Maritime Zone of Islands in International Law*, The Hague, 1979; J. Simonides, 'The Legal Status of Islands in the New Law of the Sea', 65 *Revue de Droit International*, 1987, p. 161, and R. O'Keefe, 'Palm-Fringed Benefits: Island Dependencies in the New Law of the Sea', 45 ICLQ, 1996, p. 408.

[58] Article 10(1). See also article 121(1) of the 1982 Convention.

economic zone and continental shelf where relevant.[59] Where there exists a chain of islands which are less than 24 miles apart, a continuous band of territorial sea may be generated.[60] However, article 121(3) of the 1982 Convention provides that 'rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'.[61] Article 121(3) begs a series of questions, such as the precise dividing line between rocks and islands and as to the actual meaning of an 'economic life of their own', and a number of states have made controversial claims.[62] Whether this provision over and above its appearance in the Law of the Sea Convention is a rule of customary law is unclear.[63]

Archipelagic states[64]

Problems have arisen as a result of efforts by states comprising a number of islands to draw straight baselines around the outer limits of their islands,

[59] Article 121(2) of the 1982 Convention. See also the *Jan Mayen (Denmark* v. *Norway)* case, ICJ Reports, 1993, pp. 37, 64–5; 99 ILR, pp. 395, 432–3. Article 10(2) of the 1958 Convention on the Territorial Sea referred only to the territorial sea of islands.

[60] See *Eritrea/Yemen (Phase Two: Maritime Delimitation)*, 119 ILR, pp. 417, 463.

[61] See the *Jan Mayen* report, 20 ILM, 1981, pp. 797, 803; 62 ILR, pp. 108, 114, and the Declaration by Judge Evensen in the *Jan Mayen (Denmark* v. *Norway)* case, ICJ Reports, 1993, pp. 37, 84–5; 99 ILR, pp. 395, 452–3. Note, as regards Rockall and the conflicting UK, Irish, Danish and Icelandic views, Symmons, *Maritime Zone*, pp. 117–18, 126; E. D. Brown, 'Rockall and the Limits of National Jurisdiction of the United Kingdom', 2 *Marine Policy*, 1978, pp. 181–211 and 275–303, and O'Keefe, 'Palm-Fringed Benefits'. See also 878 HC Deb., col. 82, Written Answers, and *The Times*, 8 May 1985, p. 6 (Danish claims) and the *Guardian*, 1 May 1985, p. 30 (Icelandic claims). UK sovereignty over the uninhabited island of Rockall was proclaimed in 1955 and confirmed by the Island of Rockall Act 1972, UKMIL, 68 BYIL, 1997, p. 589. The UK Minister of State declared that the 12-mile territorial sea around Rockall was consistent with the terms of the 1982 Convention and that there was no reason to believe that this was not accepted by the international community, apart from the Republic of Ireland, UKMIL, 60 BYIL, 1989, p. 666. The UK claim to a 200-mile fishing zone around Rockall made in the Fishery Limits Act 1976 was withdrawn in 1997 consequent upon accession to the Law of the Sea Convention, 1982 and the 12-mile territorial sea confirmed: see UKMIL, 68 BYIL, 1997, pp. 599–600 and UKMIL, 71 BYIL, 2000, p. 601.

[62] See e.g. Churchill and Lowe, *Law of the Sea*, pp. 163–4, and J. I. Charney, 'Rocks that Cannot Sustain Human Habitation', 93 AJIL, 1999, p. 873.

[63] Churchill and Lowe, *Law of the Sea*, p. 164.

[64] See e.g. Brown, *International Law of the Sea*, vol. I, chapter 8; Churchill and Lowe, *Law of the Sea*, chapter 6; O'Connell, *International Law of the Sea*, vol. I, chapter 6; Bowett, *Legal Regime*, chapter 4; C. F. Amerasinghe, 'The Problem of Archipelagos in the International Law of the Sea', 23 ICLQ, 1974, p. 539, and D. P. O'Connell, 'Mid-Ocean Archipelagos in International Law', 45 BYIL, 1971, p. 1.

thus 'boxing in' the whole territory. Indonesia in particular has resorted to this method, against the protests of a number of states since it tends to reduce previously considered areas of the high seas extensively used as shipping lanes to the sovereignty of the archipelago state concerned.[65]

There has been a great deal of controversy as to which international law principles apply in the case of archipelagos and the subject was not expressly dealt with in the 1958 Geneva Convention.[66] Article 46(a) defines an archipelagic state as 'a state constituted wholly by one or more archipelagos and may include other islands', while article 46(b) defines archipelagos as 'a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such'. This raises questions as to whether states that objectively fall within the definition are therefore automatically to be regarded as archipelagic states. The list of states that have not declared that they constitute archipelagic states, although they would appear to conform with the definition, would include the UK and Japan.[67] Bahrain contended in *Qatar* v. *Bahrain* that it constituted a '*de facto* archipelago or multiple island state' and that it could declare itself an archipelagic state under the Law of the Sea Convention, 1982, enabling it to take advantage of the straight baselines rule contained in article 47. The Court, however, noted that such a claim did not fall within Bahrain's formal submissions and thus it did not need to take a position on the issue.[68] Article 47 provides that an archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago, which would then serve as the relevant baselines for other purposes. There are a number of conditions before this may be done, however, and article 47 provides as follows:

[65] O'Connell, 'Mid-Ocean Archipelagos', pp. 23–4, 45–7 and 51, and Whiteman, *Digest*, vol. IV, p. 284. See also the Indonesian Act No. 4 of 18 February 1960 Concerning Indonesian Waters, extracted in Brown, *International Law of the Sea*, vol. II, p. 98; the Philippines Act to Define the Baselines of the Territorial Sea of the Philippines, Act No. 3046 of 17 June 1961, and the Philippines Declaration with respect to the 1982 Convention, *ibid.*, pp. 100–1 (with objections from the USSR and Australia, *ibid.*, pp. 101–2). See, as to the US objection to the Philippines Declaration, Cumulative DUSPIL 1981–8, vol. II, p. 1066, and to claims relating to the Faroes, Galapagos, Portugal and Sudan, Roach and Smith, *United States Responses*, pp. 112 ff.

[66] But see, as regards 'coastal archipelagos', article 4 of the 1958 Convention on the Territorial Sea.

[67] See e.g. Churchill and Lowe, *Law of the Sea*, p. 121.

[68] ICJ Reports, 2001, paras. 181–3.

1. An archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and in areas in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.
2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.
3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.
4. Such baselines shall not be drawn from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.
5. The system of such baselines shall not be applied by an archipelagic state in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another state.
6. If a part of the archipelagic waters of an archipelagic state lies between two parts of an immediately adjacent neighbouring state, existing rights and all other legitimate interests which the latter state has traditionally exercised in such waters and all rights stipulated by agreement between those states shall continue and be respected.
7. For the purpose of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.
8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographic co-ordinates of points, specifying the geodetic datum, may be substituted.
9. The archipelagic states shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

All the waters within such baselines are archipelagic waters[69] over which the state has sovereignty,[70] but existing agreements, traditional fishing

[69] Article 50 provides that within its archipelagic waters, the archipelagic state may draw closing lines for the delimitation of internal waters.

[70] Article 49.

rights and existing submarine cables must be respected.[71] In addition, ships of all states shall enjoy the rights of innocent passage through archipelagic waters[72] and all the ships and aircraft are to enjoy a right of archipelagic sea lanes passage through such lanes and air routes designated by the archipelagic state for 'continuous and expeditious passage'.[73]

In response to a reported closure in 1988 of the Straits of Sunda and Lombok by Indonesia, the US stressed that the archipelagic provisions of the 1982 Convention reflected customary international law and that those straits were subject to the regime of archipelagic sea lanes passage. Accordingly, it was pointed out that any interference with such passage would violate international law.[74]

The width of the territorial sea[75]

There has historically been considerable disagreement as to how far the territorial sea may extend from the baselines. Originally, the 'cannon-shot' rule defined the width required in terms of the range of shore-based artillery, but at the turn of the nineteenth century, this was transmuted into the 3-mile rule. This was especially supported by the United States and the United Kingdom, and any detraction had to be justified by virtue of historic rights and general acquiescence as, for example, the Scandinavian claim to 4 miles.[76]

However, the issue was much confused by the claims of many coastal states to exercise certain jurisdictional rights for particular purposes: for example, fisheries, customs and immigration controls. It was not until after the First World War that a clear distinction was made between claims to enlarge the width of the territorial sea and claims over particular zones.

Recently the 3-mile rule has been discarded as a rule of general application to be superseded by contending assertions. The 1958 Geneva Convention on the Territorial Sea did not include an article on the subject because of disagreements among the states, while the 1960 Geneva Conference failed to accept a United States–Canadian proposal for a

[71] Article 51. [72] Article 52.

[73] Article 53. For recent state practice, see Churchill and Lowe, *Law of the Sea*, pp. 125 ff.

[74] 83 AJIL, 1989, pp. 559–61. See also Cumulative DUSPIL 1981–8, vol. II, p. 2060.

[75] See e.g. Brown, *International Law of the Sea*, vol. I, p. 43; Churchill and Lowe, *Law of the Sea*, pp. 71 ff., and O'Connell, *International Law of the Sea*, vol. I, chapter 4. See also *Oppenheim's International Law*, p. 611.

[76] See e.g. H. S. K. Kent, 'Historical Origins of the Three-mile Limit', 48 AJIL, 1954, p. 537, and *The Anna* (1805) 165 ER 809. See also *US* v. *Kessler* 1 Baldwin's C C Rep. 15 (1829).

6-mile territorial sea coupled with an exclusive fisheries zone for a further 6 miles by only one vote.[77]

Article 3 of the 1982 Convention, however, notes that all states have the right to establish the breadth of the territorial sea up to a limit not exceeding 12 nautical miles from the baselines. This clearly accords with the evolving practice of states.[78] The UK adopted a 12-mile limit in the Territorial Sea Act 1987, for instance, as did the US by virtue of Proclamation No. 5928 in December 1988.[79]

The juridical nature of the territorial sea[80]

The territorial sea appertains to the territorial sovereignty of the coastal state and thus belongs to it automatically. For example, all newly independent states (with a coast) come to independence with an entitlement to a territorial sea.[81] There have been a number of theories as to the precise legal character of the territorial sea of the coastal state, ranging from treating the territorial sea as part of the *res communis*, but subject to certain rights exercisable by the coastal state, to regarding the territorial sea as part of the coastal state's territorial domain subject to a right of innocent passage by foreign vessels.[82] Nevertheless, it cannot be disputed that the coastal state enjoys sovereign rights over its maritime belt and extensive jurisdictional control, having regard to the relevant rules of international law. The fundamental restriction upon the sovereignty of the coastal state is the right of other nations to innocent passage through the territorial sea, and this distinguishes the territorial sea from the internal waters of the state, which are fully within the unrestricted jurisdiction of the coastal nation.

[77] See O'Connell, *International Law of the Sea*, vol. I, pp. 163–4.

[78] The notice issued by the Hydrographic Department of the Royal Navy on 1 January 2008 shows that 156 states or territories claim a 12-mile territorial sea, with 16 states or territories claiming less than this and only 7 states claiming more than 12 miles: see www.ukho.gov.uk/content/amdAttachments/2008/annual_nms/12.pdf. A table of National Maritime Claims issued by the UN shows that, as of 24 October 2007, 141 states claimed a territorial sea of 12 miles or under, with 8 states claiming a larger territorial sea: see A/56/58 and www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/.

[79] As to delimitation of the territorial sea, see below, p. 591.

[80] See Brown, *International Law of the Sea*, vol. I, chapter 6; O'Connell, *International Law of the Sea*, vol. I, chapter 3. See also Brownlie, *Principles*, pp. 186 ff., and Churchill and Lowe, *Law of the Sea*, chapter 4.

[81] *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 234.

[82] O'Connell, *International Law of the Sea*, vol. I, pp. 60–7.

Articles 1 and 2 of the Convention on the Territorial Sea, 1958[83] provide that the coastal state's sovereignty extends over its territorial sea and to the airspace and seabed and subsoil thereof, subject to the provisions of the Convention and of international law. The territorial sea forms an undeniable part of the land territory to which it is bound, so that a cession of land will automatically include any band of territorial waters.[84]

The coastal state may, if it so desires, exclude foreign nationals and vessels from fishing within its territorial sea and (subject to agreements to the contrary) from coastal trading (known as cabotage), and reserve these activities for its own citizens.

Similarly the coastal state has extensive powers of control relating to, amongst others, security and customs matters. It should be noted, however, that how far a state chooses to exercise the jurisdiction and sovereignty to which it may lay claim under the principles of international law will depend upon the terms of its own municipal legislation, and some states will not wish to take advantage of the full extent of the powers permitted them within the international legal system.[85]

The right of innocent passage

The right of foreign merchant ships (as distinct from warships) to pass unhindered through the territorial sea of a coast has long been an accepted principle in customary international law, the sovereignty of the coast state notwithstanding. However, the precise extent of the doctrine is blurred and open to contrary interpretation, particularly with respect to the requirement that the passage must be 'innocent'.[86] Article 17 of the 1982 Convention lays down the following principle: 'ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea'.

The doctrine was elaborated in article 14 of the Convention on the Territorial Sea, 1958, which emphasised that the coastal state must not

[83] See also article 2 of the 1982 Convention.

[84] See the *Grisbadarna* case, 11 RIAA, p. 147 (1909) and the *Beagle Channel* case, HMSO, 1977; 52 ILR, p. 93. See also Judge McNair, *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, pp. 116, 160; 18 ILR, pp. 86, 113.

[85] See also *R* v. *Keyn* (1876) 2 Ex.D. 63 and the consequential Territorial Waters Jurisdiction Act 1878.

[86] See Brown, *International Law of the Sea*, vol. I, pp. 53 ff.; Churchill and Lowe, *Law of the Sea*, pp. 82 ff., and O'Connell, *International Law of the Sea*, vol. I, chapter 7. See also *Oppenheim's International Law*, p. 615.

hamper innocent passage and must publicise any dangers to navigation in the territorial sea of which it is aware. Passage is defined as navigation through the territorial sea for the purpose of crossing that sea without entering internal waters or of proceeding to or from that sea without entering internal waters or of proceeding to or from internal waters. It may include temporary stoppages, but only if they are incidental to ordinary navigation or necessitated by distress or *force majeure*.[87]

The coastal state may not impose charges for such passage unless they are in payment for specific services,[88] and ships engaged in passage are required to comply with the coastal state's regulations covering, for example, navigation in so far as they are consistent with international law.[89]

Passage ceases to be innocent under article 14(4) of the 1958 Convention where it is 'prejudicial to the peace, good order or security of the coastal state' and in the case of foreign fishing vessels when they do not observe such laws and regulations as the coastal state may make and publish to prevent these ships from fishing in the territorial sea. In addition, submarines must navigate on the surface and show their flag.

Where passage is not innocent, the coastal state may take steps to prevent it in its territorial sea and, where ships are proceeding to internal waters, it may act to forestall any breach of the conditions to which admission of such ships to internal waters is subject. Coastal states have the power temporarily to suspend innocent passage of foreign vessels where it is essential for security reasons, provided such suspension has been published and provided it does not cover international straits.

Article 19(2) of the 1982 Convention has developed the notion of innocent passage contained in article 14(4) of the 1958 Convention by the provision of examples of prejudicial passage such as the threat or use of force; weapons practice; spying; propaganda; breach of customs, fiscal, immigration or sanitary regulations; wilful and serious pollution; fishing; research or survey activities and interference with coastal communications or other facilities. In addition, a wide-ranging clause includes 'any activity not having a direct bearing on passage'. This would appear to have altered the burden of proof from the coastal state to the other party with regard to innocent passage, as well as being somewhat difficult to define. By virtue of article 24 of the 1982 Convention, coastal states must not hamper the

[87] See article 18 of the 1982 Convention. Passage includes crossing the territorial sea in order to call at roadsteads or port facilities outside internal waters: article 18(1) and see the *Nicaragua* case, ICJ Reports, 1986, pp. 12, 111; 76 ILR, p. 1.

[88] Article 26 of the 1982 Convention.

[89] See article 21(4) of the 1982 Convention.

innocent passage of foreign ships, either by imposing requirements upon them which would have the practical effect of denying or impairing the right or by discrimination. Article 17 of the Geneva Convention on the Territorial Sea, 1958 provided that foreign ships exercising the right of innocent passage were to comply with the laws and regulations enacted by the coastal state, in particular those relating to transport and navigation. This was developed in article 21(1) of the 1982 Convention, which expressly provided that the coastal state could adopt laws and regulations concerning innocent passage with regard to:

(a) the safety of navigation and the regulation of maritime traffic;
(b) the protection of navigational aids and facilities and other facilities or installations;
(c) the protection of cables and pipelines;
(d) the conservation of the living resources of the sea;
(e) the prevention of infringement of the fisheries laws and regulations of the coastal state;
(f) the preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof;
(g) marine scientific research and hydrographic surveys;
(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal state.

Breach of such laws and regulations will render the offender liable to prosecution, but will not make the passage non-innocent as such, unless article 19 has been infringed.[90]

One major controversy of considerable importance revolves around the issue of whether the passage of warships in peacetime is or is not innocent.[91] The question was further complicated by the omission of an article on the problem in the 1958 Convention on the Territorial Sea, and the discussion of innocent passage in a series of articles headed 'Rules applicable to all ships'. This has led some writers to assert that this includes warships by inference, but other authorities maintain that such an important issue could not be resolved purely by omission and inference, especially in view of the reservations by many states to the Convention rejecting the principle of innocent passage for warships and in the light

[90] Under article 22 of the 1982 Convention, the coastal state may establish designated sea lanes and traffic separation schemes in its territorial sea. See UKMIL, 64 BYIL, 1993, p. 688 for details of traffic separation schemes around the UK.

[91] See e.g. O'Connell, *International Law of the Sea*, vol. I, pp. 274–97. See also *Oppenheim's International Law*, p. 618.

of comments in the various preparatory materials to the 1958 Geneva Convention.[92]

It was primarily the Western states, with their preponderant naval power, that historically maintained the existence of a right of innocent passage for warships, to the opposition of the then communist and Third World nations. However, having regard to the rapid growth in their naval capacity and the ending of the Cold War, Soviet attitudes underwent a change.[93]

In September 1989, the US and the USSR issued a joint 'Uniform Interpretation of the Rules of International Law Governing Innocent Passage'.[94] This reaffirmed that the relevant rules of international law were stated in the 1982 Convention. It then provided that:

> [a]ll ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorisation is required.

The statement noted that where a ship in passage through the territorial sea was not engaged in any of the activities laid down in article 19(2), it was 'in innocent passage' since that provision was exhaustive. Ships in passage were under an obligation to comply with the laws and regulations of the coastal state adopted in conformity with articles 21, 22, 23 and 25 of the 1982 Convention, provided such laws and regulations did not have the effect of denying or impairing the exercise of the right of innocent passage.

This important statement underlines the view that the list of activities laid down in article 19(2) is exhaustive so that a ship passing through the territorial sea not engaging in any of these activities is in innocent passage. It also lends considerable weight to the view that warships have indeed

[92] O'Connell, *International Law of the Sea*, vol. I, pp. 290–2. See also Brownlie, *Principles*, pp. 188–9.

[93] See also Churchill and Lowe, *Law of the Sea*, pp. 54–6. The issue was left open at the Third UN Conference on the Law of the Sea and does not therefore appear in the 1982 Convention. Note, however, that Western and communist states both proposed including a reference to warships in early sessions of the Conference: see UNCLOS III, Official Records, vol. III, pp. 183, 203, 192 and 196. See also article 29(2) of the 1975 Informal Single Negotiating Text. The right of warships to innocent passage was maintained by the US following an incident during which four US warships sailed through Soviet territorial waters off the Crimean coast: see *The Times*, 19 March 1986, p. 5.

[94] See 84 AJIL, 1990, p. 239.

a right of innocent passage through the territorial sea and one that does not necessitate prior notification or authorisation.[95]

Jurisdiction over foreign ships[96]

Where foreign ships are in passage through the territorial sea, the coastal state may only exercise its criminal jurisdiction as regards the arrest of any person or the investigation of any matter connected with a crime committed on board ship in defined situations. These are enumerated in article 27(1) of the 1982 Convention, reaffirming article 19(1) of the 1958 Convention on the Territorial Sea, as follows:

> (a) if the consequences of the crime extend to the coastal state; or (b) if the crime is of a kind likely to disturb the peace of the country or the good order of the territorial sea; or (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the country of the flag state; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or pyschotropic substances.[97]

However, if the ship is passing through the territorial sea having left the internal waters of the coastal state, then the coastal state may act in any manner prescribed by its laws as regards arrest or investigation on board ship and is not restricted by the terms of article 27(1). But the authorities of the coastal state cannot act where the crime was committed before the ship entered the territorial sea, providing the ship is not entering or has not entered internal waters.

Under article 28 of the 1982 Convention, the coastal state should not stop or divert a foreign ship passing through its territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board ship, nor levy execution against or arrest the ship, unless obligations are involved which were assumed by the ship itself in the course of, or for the

[95] See also Cumulative DUSPIL 1981–8, vol. II, pp. 1844 ff., and UKMIL, 65 BYIL, 1994, pp. 642–7. See also Cumulative DUSPIL 1981–8, vol. II, p. 1854 with regard to the claim by some states that the passage of nuclear-powered ships or ships carrying nuclear substances through territorial waters requires prior authorisation or prior consent. See also UKMIL, 62 BYIL, 1991, pp. 632–3 with regard to UK views on claims concerning prior authorisation or consent with regard to the passage of ships carrying hazardous wastes.

[96] See e.g. O'Connell, *International Law of the Sea*, vol. I, chapters 23 and 24. See also *Oppenheim's International Law*, p. 620, and Brown, *International Law of the Sea*, vol. I, p. 62. Note that these rules are applicable to foreign ships and government commercial ships.

[97] The latter phrase was added by article 27(1) of the 1982 Convention.

purpose of, its voyage through waters of the coastal state, or unless the ship is passing through the territorial sea on its way from internal waters. The above rules do not, however, prejudice the right of a state to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea or passing through the territorial sea after leaving internal waters.[98]

Warships and other government ships operated for non-commercial purposes are immune from the jurisdiction of the coastal state, although they may be required to leave the territorial sea immediately for breach of rules governing passage and the flag state will bear international responsibility in cases of loss or damage suffered as a result.[99]

International straits[100]

Article 16(4) of the 1958 Convention on the Territorial Sea declares that:

> there shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.

This provision should be read in conjunction with the decision in the *Corfu Channel* case.[101] In this case, British warships passing through the straits were fired upon by Albanian guns. Several months later, an augmented force of cruisers and destroyers sailed through the North Corfu Channel and two of them were badly damaged after striking mines. This impelled the British authorities to sweep the Channel three weeks later,

[98] See also article 20 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.

[99] Articles 29–32 of the 1982 Convention. See also articles 21–3 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.

[100] See e.g. Brown, *International Law of the Sea*, vol. I, chapter 7; Churchill and Lowe, *Law of the Sea*, chapter 5; O'Connell, *International Law of the Sea*, vol. I, chapter 8; R. Lapidoth, *Les Détroits en Droit International*, Paris, 1972; T. L. Koh, *Straits in International Navigation*, London, 1982; J. N. Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea', 74 AJIL, 1980, p. 77; W. M. Reisman, 'The Regime of Straits and National Security', *ibid.*, p. 48; H. Caminos, 'Le Régime des Détroits dans la Convention des Nations Unies de 1982 sur le Droit de la Mer', 205 HR, 1987 V, p. 9; S. N. Nandan and D. H. Anderson, 'Straits Used for International Navigation: A Commentary on Part III of the UN Convention on the Law of the Sea 1982', 60 BYIL, 1989, p. 159; *Oppenheim's International Law*, p. 633; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 1168, and B. B. Jia, *The Regime of Straits in International Law*, Oxford, 1998.

[101] ICJ Reports, 1949, p. 4; 16 AD, p. 155.

and to clear it of some twenty mines of German manufacture. The Court, in a much-quoted passage, emphasised that:

> states in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal state, provided that the passage is innocent.[102]

It was also noted that the minesweeping operation was in no way 'innocent' and was indeed a violation of Albania's sovereignty, although the earlier passages by British naval vessels were legal.[103]

The 1982 Convention established a new regime for straits used for international navigation. The principle is reaffirmed that the legal status of the waters of the straits in question is unaffected by the provisions dealing with passage.[104]

A new right of transit passage is posited with respect to straits 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 zone.[105] It involves the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait and does not preclude passage through the strait to enter or leave a state bordering that strait.[106] States bordering the straits in question are not to hamper or suspend transit passage.[107]

There are three exceptions to the right: under article 36 where a route exists through the strait through the high seas or economic zone of similar navigational convenience; under article 38(1) in the case of a strait formed by an island of a state bordering the strait and its mainland, where there exists seaward of the island a route through the high seas or economic zone of similar navigational convenience; and under article 45 where straits connect an area of the high seas or economic zone with the territorial

[102] *Ibid.*, p. 28; 16 AD, p. 161. The Court emphasised that the decisive criterion regarding the definition of 'strait' was the geographical situation of the strait as connecting two parts of the high seas, coupled with the fact that it was actually used for international navigation, *ibid.* Note that article 16(4) added to the customary rights the right of innocent passage from the high seas to the territorial sea of a state. This was of particular importance to the question of access through the straits of Tiran to the Israeli port of Eilat: see further below, note 115.

[103] *Ibid.*, pp. 30–1, 33; 16 AD, pp. 163, 166. Note the final settlement of the case, UKMIL, 63 BYIL, 1992, p. 781.

[104] Articles 34 and 35.

[105] Article 37. See also R. P. Anand, 'Transit Passage and Overflight in International Straits', 26 IJIL, 1986, p. 72, and *Oppenheim's International Law*, p. 636.

[106] Article 38. [107] Article 44.

sea of a third state. Ships and aircraft in transit must observe the relevant international regulations and refrain from all activities other than those incidental to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure* or by distress.[108] Thus, although there is no formal requirement for 'innocent' transit passage, the effect of articles 38 and 39 would appear to be to render transit passage subject to the same constraints. Under article 45, the regime of innocent passage will apply with regard to straits used for international navigation excluded from the transit passage provisions by article 38(1) and to international straits between a part of the high seas or economic zone and the territorial sea of a foreign state. In such cases, there shall be no suspension of the right to innocent passage.[109] The regime of transit passage specifically allows for the passage of aircraft and probably for underwater submarines, while there are fewer constraints on conduct during passage and less power for the coastal state to control passage than in the case of innocent passage.[110] Transit passage cannot be suspended for security or indeed any other reasons.[111]

It is unclear whether the right of transit passage has passed into customary law. Practice is as yet ambiguous.[112] Some states have provided explicitly for rights of passage through international straits. When the UK extended its territorial sea in 1987 to 12 miles, one of the consequences was that the high sea corridor through the Straits of Dover disappeared. The following year an agreement was signed with France which related to the delimitation of the territorial sea in the Straits of Dover and a joint declaration was issued in which both governments recognised:

> rights of unimpeded transit passage for merchant vessels, state vessels and, in particular, warships following their normal mode of navigation, as well as the right of overflight for aircraft, in the Straits of Dover. It is understood that, in accordance with the principles governing this regime under the rules of international law, such passage will be exercised in a continuous and expeditious manner.[113]

[108] Article 39. Under articles 41 and 42, the coastal state may designate sea lanes and traffic separation schemes through international straits.

[109] Article 45(2).

[110] See articles 38–42. See also, as to the differences between the regimes of innocent passage through the territorial sea, transit passage and archipelagic sea lanes passage, Nandan and Anderson, 'Straits', p. 169.

[111] Article 44.

[112] See Churchill and Lowe, *Law of the Sea*, p. 113, but cf. O. Schachter, 'International Law in Theory and Practice', 178 HR, 1982, pp. 9, 281.

[113] Cmnd 557. See also 38 ICLQ, 1989, pp. 416–17 and AFDI, 1988, p. 727.

A number of straits are subject to special regimes, which are unaffected by the above provisions.[114] One important example is the Montreux Convention of 1936 governing the Bosphorus and Dardanelles Straits. This provides for complete freedom of transit or navigation for merchant vessels during peacetime and for freedom of transit during daylight hours for some warships giving prior notification to Turkey.[115]

The contiguous zone[116]

Historically some states have claimed to exercise certain rights over particular zones of the high seas. This has involved some diminution of the principle of the freedom of the high seas as the jurisdiction of the coastal state has been extended into areas of the high seas contiguous to the territorial sea, albeit for defined purposes only. Such restricted jurisdiction zones have been established or asserted for a number of reasons: for instance, to prevent infringement of customs, immigration or sanitary laws of the coastal state, or to conserve fishing stocks in a particular area, or to enable the coastal state to have exclusive or principal rights to the resources of the proclaimed zone.

In each case they enable the coastal state to protect what it regards as its vital or important interests without having to extend the boundaries of its territorial sea further into the high seas. It is thus a compromise between the interests of the coastal state and the interests of other maritime nations

[114] Article 35(c).

[115] See e.g. Churchill and Lowe, *Law of the Sea*, pp. 114 ff. See also UKMIL, 57 BYIL, 1986, p. 581, and F. A. Vali, *The Turkish Straits and NATO*, Stanford, 1972. Note that the dispute as to the status of the Strait of Tiran and the Gulf of Aqaba between Israel and its Arab neighbours was specifically dealt with in the treaties of peace. Article 5(2) of the Israel–Egypt Treaty of Peace, 1979 and article 14(3) of the Israel–Jordan Treaty of Peace, 1994 both affirm that the Strait and Gulf are international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. As to the US–USSR Agreement on the Bering Straits Region, see 28 ILM, 1989, p. 1429. See also, as to the Great Belt dispute between Finland and Denmark, M. Koskenniemi, 'L'Affaire du Passage par le Grand-Belt', AFDI, 1992, p. 905. See, as to other particular straits, e.g. S. C. Truver, *Gibraltar and the Mediterranean*, Alphen, 1982; M. A. Morris, *The Strait of Magellan*, Dordrecht, 1989; G. Alexander, *The Baltic Straits*, Alphen, 1982, and M. Leiffer, *Malacca, Singapore and Indonesia*, Alphen, 1978.

[116] See A. V. Lowe, 'The Development of the Concept of the Contiguous Zone', 52 BYIL, 1981, p. 109; Brown, *International Law of the Sea*, vol. I, chapter 9; Churchill and Lowe, *Law of the Sea*, chapter 7, and O'Connell, *International Law of the Sea*, vol. II, chapter 27. See also S. Oda, 'The Concept of the Contiguous Zone', ICLQ, 1962, p. 131; *Oppenheim's International Law*, p. 625, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 1174.

seeking to maintain the status of the high seas, and it marks a balance of competing claims. The extension of rights beyond the territorial sea has, however, been seen not only in the context of preventing the infringement of particular domestic laws, but also increasingly as a method of maintaining and developing the economic interests of the coastal state regarding maritime resources. The idea of a contiguous zone (i.e. a zone bordering upon the territorial sea) was virtually formulated as an authoritative and consistent doctrine in the 1930s by the French writer Gidel,[117] and it appeared in the Convention on the Territorial Sea. Article 24 declared that:

> In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to:
>
> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.

Thus, such contiguous zones were clearly differentiated from claims to full sovereignty as parts of the territorial sea, by being referred to as part of the high seas over which the coastal state may exercise particular rights. Unlike the territorial sea, which is automatically attached to the land territory of the state, contiguous zones have to be specifically claimed.

While sanitary and immigration laws are relatively recent additions to the rights enforceable over zones of the high seas and may be regarded as stemming by analogy from customs regulations, in practice they are really only justifiable since the 1958 Convention. On the other hand, customs zones have a long history and are recognised in customary international law as well. Many states, including the UK and the USA, have enacted legislation to enforce customs regulations over many years, outside their territorial waters and within certain areas, in order to suppress smuggling which appeared to thrive when faced only with territorial limits of 3 or 4 miles.[118]

Contiguous zones, however, were limited to a maximum of 12 miles from the baselines from which the territorial sea is measured. So if the

[117] A. Gidel, 'La Mer Territoriale et la Zone Contigue', 48 HR, 1934, pp. 137, 241.

[118] E.g. the British Hovering Acts of the eighteenth and nineteenth centuries. See O'Connell, *International Law of the Sea*, vol. II, pp. 1034–8, and the similar US legislation, *ibid.*, pp. 1038 ff.

coastal state already claimed a territorial sea of 12 miles, the question of contiguous zones would not arise.

This limitation, plus the restriction of jurisdiction to customs, sanitary and immigration matters, is the reason for the decline in the relevance of contiguous zones in international affairs in recent years. Under article 33 of the 1982 Convention, however, a coastal state may claim a contiguous zone (for the same purpose as the 1958 provisions) up to 24 nautical miles from the baselines. In view of the accepted 12 miles territorial sea limit, such an extension was required in order to preserve the concept. One crucial difference is that while under the 1958 system the contiguous zone was part of the high seas, under the 1982 Convention it would form part of the exclusive economic zone complex.[119] This will clearly have an impact upon the nature of the zone.

The exclusive economic zone[120]

This zone has developed out of earlier, more tentative claims, particularly relating to fishing zones,[121] and as a result of developments in the negotiating processes leading to the 1982 Convention.[122] It marks a compromise between those states seeking a 200-mile territorial sea and those wishing a more restricted system of coastal state power.

One of the major reasons for the call for a 200-mile exclusive economic zone has been the controversy over fishing zones. The 1958 Geneva Convention on the Territorial Sea did not reach agreement on the creation of fishing zones and article 24 of the Convention does not give exclusive

[119] See article 55, which states that the exclusive economic zone is 'an area beyond and adjacent to the territorial seas'. The notice issued by the Hydrographic Department of the Royal Navy on 1 January 2008 shows that eighty-one states or territories claim a contiguous zone: see www.ukho.gov.uk/content/amdAttachments/2008/annual_nms/12.pdf.

[120] See e.g. *The Exclusive Economic Zone and the United Nations Law of the Sea Convention, 1982–2000* (eds. E. Franckx and P. Gautier), Brussels, 2003; Brown, *International Law of the Sea*, vol. I, chapters 10 and 11; Churchill and Lowe, *Law of the Sea*, chapter 9; D. J. Attard, *The Exclusive Economic Zone in International Law*, Oxford, 1986; O'Connell, *International Law of the Sea*, vol. I, chapter 15; *Oppenheim's International Law*, p. 782, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 1175. See also F. Orrego Vicuña, 'La Zone Économique Exclusive', 199 HR, 1986 IV, p. 9; Orrego Vicuña, *The Exclusive Economic Zone, Regime and Legal Nature under International Law*, Cambridge, 1989; B. Kwiatowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, Dordrecht, 1989; R. W. Smith, *Exclusive Economic Zone Claims. An Analysis and Primary Documents*, Dordrecht, 1986, and F. Rigaldies, 'La Zone Économique Exclusive dans la Pratique des États', Canadian YIL, 1997, p. 3.

[121] O'Connell, *International Law of the Sea*, vol. I, chapter 14.

[122] *Ibid.*, pp. 559 ff.

fishing rights in the contiguous zone. However, increasing numbers of states have claimed fishing zones of widely varying widths. The European Fisheries Convention, 1964, which was implemented in the UK by the Fishing Limits Act 1964, provided that the coastal state has the exclusive right to fish and exclusive jurisdiction in matters of fisheries in a 6-mile belt from the baseline of the territorial sea; while within the belt between 6 and 12 miles from the baseline, other parties to the Convention have the right to fish, provided they had habitually fished in that belt between January 1953 and December 1962. This was an attempt to reconcile the interests of the coastal state with those of other states who could prove customary fishing operations in the relevant area. In view of the practice of many states in accepting at one time or another a 12-mile exclusive fishing zone, either for themselves or for some other states, it seems clear that there has already emerged an international rule to that effect. Indeed, the International Court in the *Fisheries Jurisdiction* cases[123] stated that the concept of the fishing zone, the area in which a state may claim exclusive jurisdiction independently of its territorial sea for this purpose, had crystallised as customary law in recent years and especially since the 1960 Geneva Conference, and that 'the extension of that fishing zone up to a twelve mile limit from the baselines appears now to be generally accepted'. That much is clear, but the question was whether international law recognised such a zone in excess of 12 miles.

In 1972, concerned at the proposals regarding the long-term effects of the depletion of fishing stocks around her coasts, Iceland proclaimed unilaterally a 50-mile exclusive fishing zone. The UK and the Federal Republic of Germany referred the issue to the ICJ and specifically requested the Court to decide whether or not Iceland's claim was contrary to international law.

The Court did not answer that question, but rather held that Iceland's fishing regulations extending the zone were not binding upon the UK and West Germany, since they had in no way acquiesced in them. However, by implication the ICJ based its judgment on the fact that there did not exist any rule of international law permitting the establishment of a 50-mile fishing zone. Similarly, it appeared that there was no rule prohibiting claims beyond 12 miles and that the validity of such claims would depend upon all relevant facts of the case and the degree of recognition by other states.

[123] ICJ Reports, 1974, pp. 8, 175; 55 ILR, p. 238.

The Court emphasised instead the notion of preferential rights, which it regarded as a principle of customary international law. Such rights arose where the coastal state was 'in a situation of special dependence on coastal fisheries'.[124] However, this concept was overtaken by developments at the UN Conference and the 1982 Convention. Article 55 of the 1982 Convention provides that the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established under the Convention.

Under article 56, the coastal state in the economic zone has *inter alia*:

> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living[125] or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
> (b) jurisdiction with regard to (i) the architecture and use of artificial islands, installations and structures;[126] (ii) marine scientific research;[127] (iii) the protection and preservation of the marine environment.[128]

Article 55 provides that the zone starts from the outer limit of the territorial sea, but by article 57 shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Accordingly, in reality, the zone itself would be no more than 188 nautical miles where the territorial sea was 12 nautical miles, but rather more where the territorial sea of the coastal state was less than 12 miles. Where the relevant waters between neighouring states are less than 400 miles, delimitation becomes necessary.[129] Islands generate economic zones, unless they consist of no more than rocks which cannot sustain human habitation.[130]

Article 58 lays down the rights and duties of other states in the exclusive economic zone. These are basically the high seas freedom of navigation, overflight and laying of submarine cables and pipelines. It is also provided that in exercising their rights and performing their duties, states should have due regard to the rights, duties and laws of the coastal state.

[124] ICJ Reports, 1974, pp. 23–9; 55 ILR, p. 258.
[125] See also articles 61–9. [126] See also article 60.
[127] See further Part XIII of the Convention and see Churchill and Lowe, *Law of the Sea*, chapter 15.
[128] See further Part XII of the Convention and see Churchill and Lowe, *Law of the Sea*, chapter 14.
[129] See further below, p. 590.
[130] Article 121(3). See also *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 97 and above, p. 565.