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Territorial Sea

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A. Notion

1 The territorial sea (also called territorial waters) is a maritime area beyond and adjacent to the → *internal waters*, and shall not extend beyond twelve nautical miles ('nm') from the → *baselines*. In the territorial sea the coastal State exercises → *sovereignty* extending to the air space over the territorial sea as well as to its bed and subsoil (Art. 2 UN Convention on the Law of the Sea; Arts 1–2 UN Convention on the Territorial Sea and the Contiguous Zone ['Territorial Sea Convention']). In principle, the coastal State exercises complete legislative and enforcement jurisdiction, subject to the provisions of → *law of the sea* conventions (especially the UN Convention on the Law of the Sea and the Territorial Sea Convention) and other rules of international law (see also → *Maritime Jurisdiction*). Coastal States' sovereignty in the territorial sea is a priori restricted by the right of → *innocent passage* that all States, whether → *land-locked States* or coastal States, enjoy in the territorial sea (Art. 17 UN Convention on the Law of the Sea; Art. 14 (1) Territorial Sea Convention).

2 In internal waters, in the territorial sea and in → *archipelagic waters* the coastal State exercises sovereignty which is derived from its territorial sovereignty and the proximity to its coast; these zones therefore form the maritime part of the coastal State's territory (Graf Vitzthum calls these waters 'maritimes Aquitorium'; *Hand buch des Seerechts* [2006] at 69, 118–21). In contrast thereto, other maritime zones do not form part of the coastal State's territory and the coastal State only exercises functional limited competences and is not granted sovereignty. Examples for such functional maritime zones are the → *contiguous zone* (Art. 33 UN Convention on the Law of the Sea; Art. 24 Territorial Sea Convention; see also → *Hovering Acts*) the → *exclusive economic zone* ('EEZ'; Arts 55–75 UN Convention on the Law of the Sea) and the → *continental shelf* (Arts 76–77 UN Convention on the Law of the Sea; see also the Convention on the Continental Shelf [done 29 April 1958, entered into force 10 June 1964] 499 UNTS 311; see also → *Continental Shelf, Commission on the Limits of the*).

B. Historical Evolution of Legal Rules

3 Since its entry into force in 1994, the UN Convention on the Law of the Sea sets the legal framework for all ocean activities, the jurisdictional rights States exercise over their own and foreign ships and the system of coastal States' maritime zones; this framework forms part of → *customary international law*. Before, the juridical character of the territorial sea, its extension and the rights and duties of the respective coastal State and other States had been controversial for a long period. As a reaction to claims of States, especially of Spain, Portugal, and England, to territorial sovereignty over vast areas of the oceans in the 16th and 17th centuries with the aim of monopolizing particularly fisheries and commerce, Hugo Grotius elaborated in 1609 the principle of the freedom of the → *high seas* which encompasses as main principles the freedom of fishing and navigation (→ *Fisheries, High Seas*; → *Law of the Sea, History of*; → *Navigation, Freedom of*). However, already at that time, the authority of the coastal State over an area adjacent to its coast in which the freedoms of the high seas are restricted for its protection and security, especially for the suppression of → *piracy*, had been widely accepted. Since the 1930s, coastal States, besides protective and security purposes, increasingly relied upon economic interests such as exploitation and access to fisheries, and upon the protection of the coastal marine environment (→ *Fisheries, Coastal*; → *Marine Environment, International Protection*).

1. Breadth of the Territorial Sea

4 According to Art. 3 UN Convention on the Law of the Sea every State has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nm. The breadth of the territorial sea of twelve nm is now recognized by customary international law but has been for a long period the main controversy with regard to coastal States' maritime zones. During the 18th century → *State practice* evolved towards a three nm territorial sea, accompanied by scientific-juridical justifications; the most prominent one was the so-called 'cannon shot rule' put forward by van Bijnkershoek (see Trümpler 180). At the beginning of the 19th century, the three nm territorial sea was accepted particularly by the Anglo-American States (United States, United Kingdom, and Canada) and was by some considered at that time as a rule of customary international law. However, increasingly since the beginning of the 20th century many coastal States claimed more than three nm as territorial sea (eg Scandinavian States four nm). During the 1930 Hague Conference for the Codification of International Law no agreement was reached on the breadth of the territorial sea, this being the main reason for failure of the conference (see also → *Codification and Progressive Development of International Law*).

5 By 1958 when the Geneva conventions on the law of the sea were concluded (First United Nations Conference on the Law of the Sea [1956]; 'UNCLOS I'; → *Conferences on the Law of the Sea*), State practice on the breadth of the territorial sea ranged from three to 200 nm. Traditional maritime States such as the United States argued that the breadth should be no more than three nm; other States favoured a broader territorial sea motivated by a desire to control and have exclusive access to fisheries off their coast. As State practice was not uniform at that time, UNCLOS I failed to resolve the question of the breadth of the territorial sea; a provision in this regard is therefore missing in the 1958 Territorial Sea Convention.

6 UNCLOS II of 1960 also failed to determine the breadth of the territorial sea although this was one of the main purposes for conveying the Conference. Compromise proposals made during UNCLOS I and UNCLOS II to extend the territorial sea to six nm with an exclusive fishery zone of further six nm with preferential or exclusive fishing rights of the coastal State did not reach consensus (→ *Fishery Zones and Limits*; → *Fisheries Jurisdiction Cases [United Kingdom v Iceland; Federal Republic of Germany v Iceland]*, 1972-74). In the 1960s, an increasing number of States extended their territorial seas to twelve nm. At the beginning of UNCLOS III in 1973, it became evident that States were willing to accept a twelve nm territorial sea, subject to the right of innocent passage of foreign ships through the territorial sea and the right of → *transit passage* through straits used for international navigation (→ *Straits, International*; see paras 22-26 below).

2. Juridical Character

7 The juridical character of the territorial sea has also been controversial for a long time: some States held the view that the territorial sea remained part of the high seas and that the coastal State only exercised certain jurisdictional rights but was not granted sovereignty. Others were of the opinion that coastal waters were assimilated to the coastal land territory and that the coastal State was therefore free to exclude nationals and vessels. An intermediate view was that the coastal State should exercise full sovereignty over the territorial sea with the exception of a right to passage granted to foreign ships. At the 1930 Hague Conference for the Codification of International Law broad agreement was reached that the coastal States exercise sovereignty over the territorial sea, subject to the provisions of international law, especially the right to innocent passage; this was reflected

in Arts 1–2 Territorial Sea Convention and Art. 2 UN Convention on the Law of the Sea and is recognized as customary international law (see paras 21–43 below).

C. Geographical Extension and Delimitation

1. Breadth of the Territorial Sea (Horizontal and Vertical Extension)

8 According to Art. 3 UN Convention on the Law of the Sea every State has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nm, measured from baselines determined in accordance with the international law of the sea (see paras 11–14 below). The waters on the landward side of the baseline of the territorial sea form part of the internal waters of the coastal State (Art. 8 (1) UN Convention on the Law of the Sea; Art. 5 (1) Territorial Sea Convention). The outer limit of the territorial sea is the line every point of which is at distance from the nearest point of the baseline equal to the breadth of the territorial sea (see Art. 4 UN Convention on the Law of the Sea; Art. 6 Territorial Sea Convention). The coastal State establishes the baselines and the outer limit of its territorial sea unilaterally in accordance with international law and may combine different methods for determining baselines (Art. 14 UN Convention on the Law of the Sea). According to Art. 16 UN Convention on the Law of the Sea the coastal State shall give due publicity to charts or lists of geographical coordinates with respect to the baselines or limits derived therefrom and the lines of delimitation, and shall deposit a copy with the Secretary-General of the UN (→ *United Nations, Secretary-General*). An issue closely related to the breadth of the territorial sea is that of delimitation of opposite or adjacent territorial seas of two or more States (see paras 15–20 below).

9 Nowadays, more than 130 States claim a territorial sea of twelve nm, fewer than 10 States of less than twelve nm. Fewer than 10 States have established a territorial sea broader than twelve nm, amongst them UN Convention on the Law of the Sea signatories Somalia and Benin as well as non-signatory El Salvador, all of which claim 200 nm, and Togo which claims 30 nm (see Table of Claims to Maritime Jurisdiction [as at 15 July 2011]). In 1979 the US still not party to the UN Convention on the Law of the Sea but in process of ratification, started the so-called Freedom of Navigation Program, protesting against, in their view, excessive maritime claims of other States by way of diplomatic protests or assertion of rights (see also → *Persistent Objector*; → *Protest*).

10 With regard to the vertical extension of the territorial sea regime, the sovereignty of the coastal State extends to the → *airspace* over the territorial sea as well as to its bed and subsoil (Art. 2 (2) UN Convention on the Law of the Sea; Art. 2 Territorial Sea Convention). Also with regard to the airspace and seabed of the territorial sea, the coastal States principally exercise complete legislative and enforcement jurisdiction, subject to the provisions of international law. As the factual and legal characteristics may be different to the water column, there may be divergent rights and duties of the coastal State and third States in the water column of the territorial sea, its airspace and seabed (see paras 21–43, especially 22 below).

2. Baselines

(a) Normal Baselines

11 As a matter of principle, the juridical baseline for measuring the width of the territorial sea follows the natural configuration and curvatures of the coast. Art. 5 UN Convention on the Law of the Sea and Art. 3 Territorial Sea Convention determine that the normal baseline for measuring the breadth of the territorial sea, except where otherwise provided, is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State. The → *International Court of Justice (ICJ)* has stated in the → *Fisheries Case (United Kingdom v Norway)* that this low-water mark as opposed to the high-water mark

has generally been adopted in the practice of States (at 128). In the case of → *islands* situated on atolls or of islands having fringed reefs, the baseline for measuring the breadth is the low-water line of the reef (Art. 6 UN Convention on the Law of the Sea).

(b) Special Cases

12 There are several exceptions to the rule that the normal baseline follows the natural coastline. Art. 9 UN Convention on the Law of the Sea contains a special provision for mouths of rivers (see also Art. 13 Territorial Sea Convention; → *River Deltas*), and Art. 10 UN Convention on the Law of the Sea for bays, the coasts of which belong to a single State (see also Art. 7 Territorial Sea Convention; → *Bays and Gulfs*). Art. 11 UN Convention on the Law of the Sea states that the outermost permanent harbour works, such as → *ports*, docks, and piers, are regarded as forming part of the coast (see Art. 12 UN Convention on the Law of the Sea for → *roadsteads*; see also different wording of Arts 8–9 Territorial Sea Convention); this exceptional provision neither applies to offshore installations, nor to artificial islands, nor to other artificial structures along the coast which serve a different purpose (→ *Artificial Islands, Installations and Structures*). Ice-covered coasts, especially in the → *Arctic Region*, pose special problems for the drawing of baselines, such as the fact that ice is often in motion.

(c) Straight Baselines

13 Straight baselines are drawn on the basis of an artificial method joining appropriate points and can be used by the coastal State only in exceptional cases and must be applied restrictively: in the case of deeply indented coasts or fringes of islands (Art. 7 UN Convention on the Law of the Sea; Art. 4 Territorial Sea Convention) and with regard to archipelagos, called then the straight archipelagic baseline method (see Arts 47–48 UN Convention on the Law of the Sea). The wording of Art. 7 UN Convention on the Law of the Sea and Art. 4 Territorial Sea Convention was strongly influenced by parts of the judgment the ICJ rendered in the *Fisheries Case (United Kingdom v Norway)* (at 131–32).

14 About 80 coastal States have established straight baselines: some States have interpreted and very liberally applied, in particular, Art. 7 UN Convention on the Law of the Sea. Art. 7 (1) UN Convention on the Law of the Sea provides for an optional (‘may’) straight baseline method where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity (Art. 4 (1) Territorial Sea Convention; see for deltas Art. 7 (2) UN Convention on the Law of the Sea). However, the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast (Art. 7 (3) UN Convention on the Law of the Sea; Art. 4 (2) Territorial Sea Convention). According to Art. 7 (4) UN Convention on the Law of the Sea, straight baselines shall not be drawn to and from low-tide elevations (see Art. 13 UN Convention on the Law of the Sea; Art. 11 Territorial Sea Convention), unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition (see Art. 4 (3) Territorial Sea Convention; → *Lighthouses and Lightships*). In determining straight baselines, account must be taken of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage (Art. 7 (5) UN Convention on the Law of the Sea; Art. 4 (4) Territorial Sea Convention). Such economic interests may include, as the ICJ ruled in the *Fisheries Case (United Kingdom v Norway)*, coastal fisheries (at 142). Under Art. 7 (6) UN Convention on the Law of the Sea, the system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an EEZ

(similar Art. 4 (5) Territorial Sea Convention). Economic factors play a subordinate role for determining straight baselines, the important factors are geographical ones.

3. Delimitation

15 Closely linked to the determination of the outer limit of the territorial sea is the issue of delimitation of maritime borders if there are competing claims of neighbouring coastal States to territorial seas. Prior to 1958, territorial seas were delimited by applying either the median line, or by following the so-called 'Thalweg' (derived from the regime of international rivers), or by drawing a line perpendicular to the general direction of the coast (*Affaires des Grisbadarna [Norway v Sweden]* 160; → *Grisbadarna Case*; see also → *Permanent Court of Arbitration [PCA]*). Art. 15 UN Convention on the Law of the Sea which is virtually identical to Art. 12 (1) Territorial Sea Convention stipulates that, 'where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured'. Art. 15 UN Convention on the Law of the Sea is regarded as having a customary character (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain [Qatar v Bahrain] [Merits]* para. 176 ; → *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*).

16 When concluding delimitation agreements, States are free in choosing either the equidistance principle or another method, such as connecting two lines of latitude. In the case of unilateral delimitation by one coastal State (if agreement cannot be reached), the 'median line' (coasts facing each other) or 'equidistant line' (adjacent coasts) is the outer limit of the maritime border, and the coastal State is not entitled to unilaterally extend the outer limit of the territorial sea beyond this line. This restriction on coastal States' unilateral delimitation competences does not apply, however, where it is necessary by reason of → *historic titles* or other special circumstances to delimit the territorial seas of two States in a different way (Art. 15 sentence 2 UN Convention on the Law of the Sea; Art. 12 (1) sentence 2 Territorial Sea Convention). The term 'other special circumstances' is applied restrictively: special circumstances are only those essential for the respective coastal State which has to prove their existence, examples are access to the sea or navigable channels (more controversial are circumstances like the exceptional configuration of the coast or the presence of islands).

17 If a dispute between two or more States on the delimitation of their territorial seas arises, the UN Convention on the Law of the Sea dispute settlement system applies (see Part XV UN Convention on the Law of the Sea; → *International Tribunal for the Law of the Sea [ITLOS]*; → *Law of the Sea, Settlement of Disputes*). Regarding disputes on maritime boundaries delimitation, this system is optional in the sense that a State may exclude the application or interpretation of, inter alia, Art. 15 UN Convention on the Law of the Sea (Art. 298 (1) (a) UN Convention on the Law of the Sea). When such dispute arises subsequent to the entry into force of the UN Convention on the Law of the Sea and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, the → *conciliation* procedure under Sec. 2 Annex V UN Convention on the Law of the Sea applies which ends either in an agreement between the parties on the basis of the report of the conciliation commission or with a binding decision under the UN Convention on the Law of the Sea dispute settlement system (Art. 298 (1) (a) (ii) UN Convention on the Law of the Sea).

18 Disputes and judgments concerning the delimitation of territorial seas seldom arise, compared to those on EEZ or continental shelf delimitation since the landmark decision of the ICJ in the → *North Sea Continental Shelf Cases* of 1969 (→ *Maritime Delimitation Cases before International Courts and Tribunals*). The ICJ for the first time ruled on the delimitation of territorial seas in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*. Another important recent ICJ decision on the delimitation of territorial seas is the → *Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v Nigeria)* of 10 October 2002. On 19 November 2012 the ICJ rendered its judgment in the *Territorial and Maritime Dispute (Nicaragua v Colombia)*. Before these ICJ decisions → arbitration tribunals have ruled on the delimitation of territorial seas on several occasions, to mention here the *Dubai Sharjah Border Arbitration (Dubai v Sharjah)* (Award of 19 October 1981) (91 ILR 543) and the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Award)* (Arbitration Tribunal, 14 February 1985 (1986) 25 ILM 252; → *Maritime Boundary between Guinea and Guinea-Bissau Arbitration [Guinea v Guinea-Bissau]*).

19 The delimitation of territorial seas is different from the delimitation of EEZs or continental shelves. In respect of the EEZ, Art. 74 UN Convention on the Law of the Sea states that the delimitation of EEZs between States with opposite or adjacent coasts shall be affected by agreement on the basis of international law, in order to achieve an equitable solution. Art. 83 UN Convention on the Law of the Sea stipulates the same for continental shelves. For delimiting functional zones like EEZs or continental shelves, the emphasis lies on an 'equitable solution' (see also → *Equity in International Law*). The ICJ and other international tribunals (→ *International Courts and Tribunals*) have developed a special jurisprudence on the delimitation of continental shelves and EEZs, the so-called 'equitable principles/relevant circumstances rule'.

20 The main reasons for treating functional zones and the territorial sea differently with regard to delimitation are the different character of coastal States' rights in these zones and the fact that the delimitation of territorial sea boundaries touches upon the concept of sovereign equality of States (→ *States, Sovereign Equality*). However, during the last decades, the jurisprudence developed on the delimitation of continental shelves and EEZ has influenced the awards and judgments on the delimitation of territorial seas. Both delimitation issues are now closely interlinked or even mixed up. The ICJ has now developed an 'equidistance/special circumstances' rule also for territorial seas' delimitation stating that first an equidistance line is drawn which is then adjusted in the light of special circumstances (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain [Qatar v Bahrain] [Merits]* paras 176 and 231). Although this has been criticized for confusing the two concepts and deviating from the wording of Art. 15 UN Convention on the Law of the Sea (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Merits) (Separate Opinion of Judge Oda)* [2001] ICJ Rep 119 para. 17; Trümpler 208-15), and as shifting the balance from equidistance to equity (Graf Vitzthum *Hand buch des Seerechts* (2006) 112), this development has been welcomed in the light of predictability, reliability, legal certainty, and clarity in maritime boundary delimitation (Trümpler 215-16).

D. Authority of the Coastal State

21 As mentioned above (see para. 7), the coastal State has sovereignty over the territorial sea which is a priori restricted by the right of innocent passage (see paras 22-39 below). Beyond this restriction, the coastal State exercises in the territorial sea, in principle, complete legislative and enforcement jurisdiction subject to the rules of international law. The coastal State has the right to prescribe, regulate, and control practically all activities, especially fishing, and to exclusively exploit the natural resources of the territorial sea. For

most activities of third States in foreign territorial seas the consent of the coastal State is required (see paras 40–43 below). The freedoms of the high seas do not apply to the territorial sea (see Arts 86–87 UN Convention on the Law of the Sea). As coastal State’s jurisdiction to regulate and to enforce applies not only to its nationals and to ships flying its own flag, but also to ships flying the flag of third States, there exists concurrent jurisdiction in the territorial sea between the flag State concerned and the coastal State (→ *Flag of Ships*).

1. The Right of Innocent Passage

22 The most far reaching restriction of coastal States’ competences in the territorial sea is the right of innocent passage, which ships of *all States*—and not only of States Parties to the UN Convention on the Law of the Sea—enjoy in the territorial sea. The determination whether a passage is innocent or non-innocent is of utmost importance as the competences of the coastal State vary regarding innocent and non-innocent passage of foreign ships (see paras 27–30 below). The right of innocent passage does not apply to → *overflight* by aircraft which is governed by international → *air law*, especially by the Convention on International Civil Aviation ([signed 7 December 1944, entered into force 4 April 1947] 15 UNTS 295; → *Chicago Convention [1944]*). In internal waters other States do not enjoy the right of innocent passage except in the following case: where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had previously not been considered as such, a right of innocent passage shall exist in those waters (Art. 8 (2) UN Convention on the Law of the Sea; Art. 5 (2) Territorial Sea Convention). According to Art. 49 (1) UN Convention on the Law of the Sea, the sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with Art. 47 UN Convention on the Law of the Sea, described as archipelagic waters, regardless of their depth or distance from the coast. All States enjoy the right of innocent passage through archipelagic waters (see Art. 52 UN Convention on the Law of the Sea); furthermore, there exists the right of archipelagic sea lane passage as specified in Art. 53 UN Convention on the Law of the Sea (see also → *Sea Lanes*).

23 The right of innocent passage as laid down in Art. 17 UN Convention on the Law of the Sea and Art. 14 (1) Territorial Sea Convention leads back to the 17th century and is part of customary international law. Whereas the provisions of the Territorial Sea Convention with regard to the right of innocent passage (Arts 14–23) were considered too general and left a large area of discretion to the coastal State in determining what kind of passage is non-innocent, the UN Convention on the Law of the Sea specified in particular the concept of innocent passage (Arts 17–26). First and foremost, the meaning of passage has to be clarified: passage means navigation through the territorial sea for the purpose of traversing the sea without entering internal waters, or proceeding to or from internal waters (Art. 18 (1) UN Convention on the Law of the Sea; similar Art. 14 (2) Territorial Sea Convention). Passage shall be continuous and expeditious, but includes stopping and anchoring, but only in so far as identical to ordinary navigation or if rendered necessary by → *force majeure* or for the purpose of rendering assistance to → *ships in distress* (Art. 18 (2) UN Convention on the Law of the Sea; similar Art. 14 (3) Territorial Sea Convention).

24 One of the major achievements of the UN Convention on the Law of the Sea—compared to the 1958 Territorial Sea Convention—was clarifying and objectifying the notion of innocent passage and the rights and duties of the coastal State against ships exercising such right. The question of innocent passage was discussed by the ICJ in the → *Corfu Channel Case* of 1949, which concerned the denial of passage through the Corfu Channel to British → *warships*. Under Art. 19 (1) UN Convention on the Law of the Sea and Art. 14 (4) Territorial Sea Convention, passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State. This general phrase was criticized for leaving

the coastal State a great scope of interpretation (see also → *Interpretation in International Law*). Therefore, Art. 19 (2) UN Convention on the Law of the Sea now contains a list of activities which render a passage non-innocent limiting the coastal State's margin of appreciation by providing for more objective criteria. The list mentions activities such as those related to sovereignty, territorial integrity, political independence, defence or security of the coastal State, weapons exercises, acts of wilful and serious pollution, fishing activities, research or survey activities, or any other activity not having a direct bearing on passage.

25 Although Art. 19 (2) UN Convention on the Law of the Sea helped in clarifying the notion of innocent passage, some issues are still controversial. First and foremost, it is controversial whether this list is exhaustive or not; the wording of Art. 19 (2) UN Convention on the Law of the Sea tends towards an exclusive list as an 'inter alia-clause' is missing. This controversy is, however, of minor relevance because the last activity mentioned in Art. 19 (2) (1) UN Convention on the Law of the Sea 'any other activity not having a direct bearing on passage' serves as a 'catch-all clause' and leaves broad room for interpretation. Secondly, it is important to emphasize that the list only refers to *activities* and not to qualities or instances such as the poor condition of a vessel or lacking equipment. As Art. 14 (4) Territorial Sea Convention did not include a list, a broader interpretation was possible under the Territorial Sea Convention to the effect that at least a major deficiency in the ship's condition or equipment could be taken into account (see paras 31-34 below).

26 The extension of the territorial sea to twelve nm placed numerous important straits used for international navigation under the territorial sea regime. A compromise was reached at UNCLOS III between the need for free and unhindered passage claimed by maritime nations and the security and environmental interests of States bordering the strait in the form of the concept of transit passage (Arts 37-44 UN Convention on the Law of the Sea). This regime is comparable to the one of innocent passage, but it is more favourable to the States exercising the right of transit passage, applies also to aircraft (see especially Art. 38 UN Convention on the Law of the Sea) and includes, debatably, the right of submerged passage. In straits used for international navigation which are formed by an island of a State bordering the strait and its mainland, the regime of transit passage shall not apply if there exists seaward of the island a route of similar convenience with respect to navigational and hydrographical characteristics (Art. 38 (1) UN Convention on the Law of the Sea, so called 'Messina Exception'; see Spadi 412). In such straits, foreign States enjoy a non-suspendable right of innocent passage (Art. 45 UN Convention on the Law of the Sea).

2. Rights and Duties of the Coastal State with Regard to Navigation

(a) Legislative and Enforcement Competences of the Coastal State

27 As mentioned above (see para. 22), the competences of the coastal State vary regarding innocent and non-innocent passage of foreign ships in its territorial sea. First and foremost, the coastal State shall not hamper the innocent passage of foreign ships; in particular, the coastal State shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage, or discriminate in form or in fact against the ships of any State (Art. 24 (1) UN Convention on the Law of the Sea). The coastal State shall also give appropriate publicity to any danger of navigation in the territorial sea (Art. 24 (2) UN Convention on the Law of the Sea). Furthermore, no charges may be levied upon ships for their passage through the territorial sea, except non-discriminatory payment for specific services rendered to the ship like pilotage (Art. 26 UN Convention on the Law of the Sea). The issue of mandatory pilotage, other mandatory vessel traffic services or mandatory ship reporting systems in the territorial sea or in straits

used for international navigation neither of which is provided for in the UN Convention on the Law of the Sea has been controversially discussed in recent times (see the → *International Law Association [ILA] Committee on Coastal State Jurisdiction relating to Marine Pollution Final Report 450–54 and 496–97*; see also → *International Maritime Organization [IMO]*; → *Torres Strait*).

28 While the coastal State shall not hamper innocent passage, it may, to a certain extent, prescribe over such passage or even interfere with it. According to Art. 21 (1) UN Convention on the Law of the Sea, the coastal State may adopt regulations relating to innocent passage in respect of, for instance, the safety of navigation, the regulation of maritime traffic (see also → *Maritime Safety Regulations*), the conservation of the living resources of the sea (→ *Marine Living Resources, International Protection*), the preservation of the environment and the prevention, reduction and control of marine pollution (see paras 31–34 below). Foreign ships exercising the right of innocent passage through the territorial sea shall comply with such regulations set by the coastal State in conformity with international law (Art. 21 (4) UN Convention on the Law of the Sea). Under Art. 22 UN Convention on the Law of the Sea, the coastal State may, where necessary having regard to the safety of navigation, designate sea lanes and prescribe traffic separation schemes in its territorial sea, especially for tankers or → *nuclear powered ships* (see paras 37–39 below).

29 In addition, the coastal State may interfere with passage if necessary to prevent any breach of the conditions set for the admission of ships to the coastal State's internal waters or to a port facility (Art. 25 (2) UN Convention on the Law of the Sea; see also → *Port State Jurisdiction*). The coastal State may also suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises (Art. 25 (3) UN Convention on the Law of the Sea).

30 The Coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent (Art. 25 (1) UN Convention on the Law of the Sea). The coastal State has, in general, a broad range of enforcement powers against foreign vessels in non-innocent passage and may, for instance, stop, inspect, or detain such vessels, divert them from its territorial sea, or force them to a port for instituting legal proceedings. It is controversial whether the coastal State has the right to deny a foreign ship entry into the territorial sea or to expel it therefrom only in cases of non-innocent passage or also if the passage of the ship is innocent but endangers for instance the coastal State's marine environment (see ILA Committee Final Report 454–57). The ILA Committee on Coastal State Jurisdiction relating to Marine Pollution has concluded that the enforcement powers against foreign vessels in innocent passage 'do not include expulsion from the territorial sea' (see ILA Committee Final Report 497). Any type of enforcement action of the coastal State, whether against ships in innocent or non-innocent passage, must stand the test of reasonableness, requiring, inter alia, taking account of general principles such as necessity and → *proportionality* (see ILA Committee Final Report 454–57 and 497; see also → *Reasonableness in International Law*).

(b) Coastal State's Competences Regarding Vessel-Source Pollution

31 The operation of vessels often entails marine pollution caused by operational discharges, ballast water or maritime casualties (→ *Collisions at Sea*; → *Marine Pollution from Ships, Prevention of and Responses to*). All States are under a general obligation to protect and preserve the marine environment and shall take the necessary measures to prevent, reduce and control pollution of the marine environment from any source (see Arts 192 and 194 UN Convention on the Law of the Sea; → *Precautionary Approach/Principle*). In its territorial sea, the coastal State must balance these environmental concerns and obligations with the right of innocent passage; this balance is especially problematic in

ecologically sensitive → *marine protected areas*. The coastal States' competences with regard to vessel-source pollution differ, depending on the nature and seriousness of pollution.

32 A pollution caused by the operation of a vessel which is wilful and serious falls under Art. 19 (2) (h) UN Convention on the Law of the Sea and is, therefore, non-innocent passage. The ILA Committee on Coastal State Jurisdiction relating to Marine Pollution interprets the criterion of seriousness broad: It 'may in certain situations also be met by relatively limited operational discharges if taking place, for instance, in already heavily polluted enclosed areas or areas which are highly sensitive to pollution and are recognized as such at the international level' (see ILA Committee Final Report 493 [with explanatory note]; see also → *Enclosed or Semi-Enclosed Seas*). As an exception to the rule that only activities and not the mere condition of ships may amount to non-innocent passage under Art. 19 (2) UN Convention on the Law of the Sea, the mentioned ILA Committee concludes that a foreign vessel which 'can be categorized as a ship whose condition is so utterly deplorable that it is extremely likely to cause a serious incident with major harmful consequences, including to the marine environment' (ILA Committee Final Report 493), loses its right to innocent passage under Art. 19 (2) UN Convention on the Law of the Sea. As such ships are in non-innocent passage, coastal States may in principle use the full range of enforcement powers, including expulsion from the territorial sea (see para. 30 above; Art. 25 (1) UN Convention on the Law of the Sea; ILA Committee Final Report 497).

33 Acts of pollution caused by a vessel which are not of a serious nature or which are below the level of intent required by the notion 'wilful', especially most accidental discharges, or a mere threat of pollution are not covered by Art. 19 UN Convention on the Law of the Sea and the concept of non-innocent passage. Art. 21 (1) (f) UN Convention on the Law of the Sea gives the coastal State the competence to adopt regulations in respect of the preservation of the marine environment of the coastal State and the prevention, reduction, and pollution thereof. This competence is limited in one particular aspect: Coastal States' regulations shall not apply to design, construction, manning, or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards ('GAIRS'), a term referring in particular to IMO regulations on vessel-source pollution (Art. 21 (2) UN Convention on the Law of the Sea). In the specific case of ice-covered areas the coastal State can adopt and enforce regulations for vessel-source pollution in its territorial sea that could go beyond such GAIRS: This is the case in ice-covered areas where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance (Art. 234 UN Convention on the Law of the Sea). The wording of Art. 234 UN Convention on the Law of the Sea only refers to the EEZ, but the norm has to be interpreted as encompassing also the territorial sea. Otherwise the coastal State would have broader competences in ice-covered areas of its EEZ than of its territorial sea; this would be contradictory to the UN Convention on the Law of the Sea regime of coastal zones and of coastal States' competences.

34 Art. 21 UN Convention on the Law of the Sea is complemented by Art. 211 (4) UN Convention on the Law of the Sea which gives coastal States the right to adopt regulations not hampering innocent passage for the prevention, reduction, and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. In the case of vessel-source pollution, the enforcement powers of Arts 24 (1) and 27 UN Convention on the Law of the Sea (see paras 35–36 below) are complemented by Art. 220 (2) UN Convention on the Law of the Sea which is regarded as *lex specialis*. Art. 220 (2) UN Convention on the Law of the Sea stipulates that where there are clear grounds for believing that a vessel navigating in the territorial sea has, during its passage, violated

coastal regulations or applicable rules and standards relating to vessel-source pollution, the coastal State may undertake physical inspection of the vessel or may institute proceedings, including detention of the vessel (see Art. 220 (3)–(8) UN Convention on the Law of the Sea for violations committed in the EEZ). Arts 223–33 UN Convention on the Law of the Sea contain flag State safeguards, for instance with regard to the investigation of foreign vessels (Art. 226 UN Convention on the Law of the Sea). Art. 221 UN Convention on the Law of the Sea refers to maritime casualties and to the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties ([adopted 29 November 1969, entered into force 6 May 1975] 970 UNTS 211).

(c) Criminal and Civil Jurisdiction

35 The criminal jurisdiction of the coastal State against foreign ships passing through the territorial sea has been controversial since the beginning of the 20th century. According to Art. 27 UN Convention on the Law of the Sea (see also Art. 19 Territorial Sea Convention), the coastal State should exercise its criminal jurisdiction on board a ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with a crime committed on board the ship during its passage only in four exceptional circumstances and in a restrictive manner, having due regard to the interest of navigation (see for *lex specialis* Art. 220 (2) UN Convention on the Law of the Sea para. 34 above). The four cases enumerated in Art. 27 (1) UN Convention on the Law of the Sea are: (a) if the consequences of the crime extend to the coastal State; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by especially the master; or (d) if such measures are necessary for the suppression of illicit traffic in → *narcotic drugs and psychotropic substances*. These provisions do not affect the right of the coastal State to take any steps for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters (Art. 27 (2) UN Convention on the Law of the Sea). An important safeguard with regard to criminal jurisdiction is laid down in Art. 27 (5) UN Convention on the Law of the Sea: The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed *before* the ship entered the territorial sea if it is passing only through the territorial sea without entering internal waters (see for exceptions especially Part XII UN Convention on the Law of the Sea on the protection of the marine environment).

36 As regards civil jurisdiction of the coastal State, Art. 28 UN Convention on the Law of the Sea and Art. 20 Territorial Sea Convention differentiate between the exercise of civil jurisdiction over the persons on board a ship and over the vessel itself. With respect to persons on board a vessel, a foreign ship passing through the territorial sea should not be stopped or diverted by the coastal State for the purpose of exercising civil jurisdiction in relation to a person on board the ship (Art. 28 (1) UN Convention on the Law of the Sea). As to the exercise of civil jurisdiction over the vessel, the coastal State may levy execution against or arrest such a ship only—as an exception—in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State (Art. 28 (2) UN Convention on the Law of the Sea). The coastal State may, however, levy execution against or arrest a foreign ship, for the purpose of civil proceedings, where the foreign ship is lying in the territorial sea or passing through it after leaving internal waters (Art. 28 (3) UN Convention on the Law of the Sea).

(d) Special Cases (Warships and Transport of Radioactive Material)

37 In principle, the right of innocent passage applies to all ships because Arts 17–26 UN Convention on the Law of the Sea and Arts 14–17 Territorial Sea Convention are ‘applicable to all ships’ (see heading of subsection). This suggests that also warships (see definition of Art. 29 UN Convention on the Law of the Sea) and other government ships, whether operated for commercial or non-commercial purposes, enjoy the right of innocent passage (→ *State Ships*). → *Submarines* and other underwater vehicles are required to navigate on the surface and show their flag (Art. 20 UN Convention on the Law of the Sea; Art. 14 (6) Territorial Sea Convention). Art. 21 Territorial Sea Convention states explicitly that government ships operated for commercial purposes are treated like private ships (→ *Merchant Ships*). Warships and other governmental non-commercial ships are treated in a special way because of the sovereign → *immunities* such ships enjoy (see Arts 30–32 UN Convention on the Law of the Sea; Arts 22–23 Territorial Sea Convention). The coastal State may only require a foreign warship to leave the territorial sea immediately if it does not comply with its regulations concerning passage through the territorial sea, but it cannot be subjected to the coastal State’s enforcement jurisdiction such as inspection or detention. The warship may, however, be deprived of its immunity if it engages in hostile acts against the coastal State.

38 Many coastal States claim the right to demand prior authorization or permission or at least prior notification of the entry of foreign warships into their territorial seas, especially many → *developing countries*. Such claims are contested, particularly by the US and Russia. The issue was also discussed intensively at UNCLOS III. Although the UN Convention on the Law of the Sea is interpreted in both ways by States and scholars (see Graf Vitzthum *Hand buch des Seerechts* [2006] 126–28), the requirement of notification or permission before warships or other ships may exercise the right of innocent passage seems to be contrary to international law (see UNGA ‘Oceans and the Law of the Sea: Report of the Secretary-General’ [4 March 2004] UN Doc A/59/62 para. 12).

39 Under Art. 23 UN Convention on the Law of the Sea, foreign nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements. Proposals to require ships carrying hazardous cargoes to give prior notification of their passage through the territorial sea were discussed at UNCLOS III but were rejected by the majority of States. However, a number of coastal States have established national legislation prohibiting such carriage in the territorial sea or requiring prior notification or even authorization. The issue of maritime transport of radioactive material and → *weapons of mass destruction* has raised concerns, not only because of the dangers to the marine environment, but also because of the increasing threat of maritime → *terrorism* (see → *Proliferation Security Initiative [PSI]*; → *Weapons of Mass Destruction, Counter-Proliferation*).

3. Other Rights and Duties of the Coastal State

40 As mentioned above (see para. 21), the coastal State has the exclusive right to explore and exploit, to conserve and manage the natural resources of the territorial sea, whether living or non-living, especially fisheries and natural oil and gas. The coastal State may consent to other States’ fishing in its territorial sea and may regulate the amount and conditions thereof and enforce such regulations against foreign → *fishing boats*. Likewise, the coastal State has exclusive control over other activities for the economic exploration and exploitation of its territorial sea, such as production of energy from water, currents, and winds, and over the establishment and use of artificial islands, installations and structures, such as offshore platforms or wind parks. There is no right of passage of other

States' submarine cables or → *pipelines* in the territorial sea, the coastal State has to consent to their laying and operation. Coastal States are also vested with an exclusive right to regulate, authorize, and conduct → *marine scientific research* in their territorial seas; other States shall conduct marine scientific research only with the express consent of and under the conditions set forth by the coastal State (Art. 245 UN Convention on the Law of the Sea). Furthermore, coastal States authorities have the right of → *hot pursuit* outside the territorial sea when they have good reason to believe that a ship has violated coastal State's regulations (Art. 111 UN Convention on the Law of the Sea).

41 Besides the rights and duties with regard to vessel-source pollution (see paras 31-34 above), the coastal State also has rights and duties regarding other sources of marine pollution in its territorial sea. The coastal State has the duty to prevent, reduce, and control the pollution from land-based sources, including pipelines (Arts 207 and 213 UN Convention on the Law of the Sea); the pollution from sea-bed activities subject to its jurisdiction (Arts 208 and 214 UN Convention on the Law of the Sea); and the pollution of the marine environment by dumping. Dumping within the territorial sea shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate, and control such dumping and enforce the relevant rules; coastal States' measures shall be no less effective than global rules and standards on dumping, which set a minimum level for coastal State regulations (Arts 210 (5)-(6) and 216 (1) (a) UN Convention on the Law of the Sea). Again, it is important to note that acts of pollution, for instance dumping activities, which are wilful and serious (Art. 19 (2) (h) UN Convention on the Law of the Sea) or which do not have a direct bearing on passage (Art. 19 (2) (l) UN Convention on the Law of the Sea) may amount to non-innocent passage.

42 By carrying out activities and in exercising its regulatory and enforcement competences, the coastal State has to comply with the international law of the sea and other rules of international law. All States have the general obligations to protect and preserve their marine environment and to cooperate on a global or regional basis in this regard (see Part XII UN Convention on the Law of the Sea). In particular, they have to exercise the sovereign right to exploit their natural resources in accordance with their duty to protect the marine environment (Art. 193 UN Convention on the Law of the Sea). In many cases, especially with regard to fisheries or environmental protection, regional organizations adopt specific regulations for the States Parties concerned which have to be respected and implemented (see also → *Fisheries Agreements*; → *Fisheries, Commissions and Organizations*; → *Regional International Law*; → *Regional Seas, Environmental Protection*).

43 Military operations in a coastal States' territorial sea carried out by third States in peacetime (for special rules applicable during times of war see → *naval warfare*) highly infringe upon the sovereignty and territorial integrity of the coastal State and may amount to non-innocent passage (see especially Arts 19 (2) (a) and (b) UN Convention on the Law of the Sea; see also → *Naval Demonstration and Manoeuvres*). The coastal State may, however, consent to such military operations and set forth their conditions. Recently, the UN Security Council (→ *United Nations, Security Council*; 'UNSC') has expressly emphasized the importance of the coastal State's consent with regard to the fight against piracy off the coast of Somalia by third States (UNSC Res 1816 [2 June 2008] SCOR [1 August 2007-31 July 2008] 60). The UNSC has authorized, for six months from the date of the resolution, third States to enter the territorial sea of Somalia and to use all necessary means to repress piracy therein; in doing so, the UNSC has referred to actions which are permitted in the fight against piracy on the high seas against foreign vessels as an exception to exclusive flag States jurisdiction, especially boarding, arrest and seizure (Arts 101, 105, and 110 UN Convention on the Law of the Sea), and has expressly underlined the consent and cooperation of the Transitional Federal Government of Somalia (UNSC Res 1816 paras 7

and 9). The mandate has been renewed several times, most recently in 2012 until November 2013 (UNSC Res 2077 [21 November 2012] para. 12 referring to former UNSC Resolutions).

E. Evaluation

44 Having been controversial in State practice as well as in literature for a long period of time, the geographical extension of the territorial sea of twelve nm is now widely accepted and part of customary international law as is the baseline system for measuring the breadth of the territorial sea. The delimitation of maritime boundaries has become one of the major and serious issues of the law of the sea, in particular with respect to the extension and economic potential of EEZs and continental shelves. The delimitation of overlapping claims to territorial seas is highly sensitive as it concerns coastal States' sovereignty. Furthermore, security, as well as the economic and environmental interests of coastal States, have all increased. One recent and prominent example in this respect was the approval of the offshore windpark 'Riffgatt' close to the German island Borkum (within 12 nautical miles off the coast) which caused, in 2011, tensions between Germany and the Netherlands, both EU Member States.

45 The regime of innocent passage through the territorial sea as well as the transit passage regime through international straits are two important cornerstones of the international law of the sea. The UN Convention on the Law of the Sea strikes a reasonable balance between, on the one hand, the security, economic and environmental interests and concerns of coastal States and, on the other hand, the needs for international navigation and the economic interests of other States, especially their right of innocent passage. This territorial sea regime was an important part of the package deal reached during UNCLOS III in 1982.

46 Especially where environmental issues and the prevention of vessel-source pollution are concerned, there is a trend towards the extension of coastal States' rights in the territorial sea (and even more in the EEZ). Some coastal States extend their competences unilaterally, contributing to the 'territorialization' of the oceans ('creeping jurisdiction'; → *Unilateralism/Multilateralism*). However, most States only apply and enforce multilaterally set standards, and respect the interplay between national and international regulations regarding prevention of marine pollution as set out in the UN Convention on the Law of the Sea maritime zones regime. Those internationally accepted standards (GAIRS) have been further developed at the international and regional level, the IMO thereby playing the crucial role in enhancing environmental and safety standards and contributing to their effective enforcement. Against the background of lax enforcement of environmental and ship safety matters by flag States, this shift towards coastal and port States' jurisdiction has to be welcomed, if taking place in the framework of IMO and if in accordance with international law (see also → *Flags of Convenience*).

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