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## Maritime Jurisdiction

**Dolliver Nelson**

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## A. Definition

1 For present purposes the term ‘maritime jurisdiction’ may be defined as the exercise—in conformity with international law—of legislative, executive, and judicial functions over the sea and over persons and things on or under the sea. An important distinction is to be drawn between prescriptive and enforcement jurisdiction. Prescriptive jurisdiction means a State’s power—in conformity with international law—to apply its municipal laws to the sea and to persons and things thereon; enforcement jurisdiction, on the other hand, means a State’s power—in conformity with international law—to enforce such laws, either by executive measures such as boarding, search, or arrest (→ *Ships, Visit and Search*); or by judicial measures such as fines and imprisonment imposed by courts.

2 The zones where a coastal State can exercise its maritime jurisdiction in the modern law of the sea can be classified in the following order: → *internal waters*, → *territorial sea*, → *contiguous zone*, → *exclusive economic zone*, → *continental shelf*, and → *high seas*.

## B. Internal Waters

3 The waters on the landward side of the baseline from which the territorial sea is measured constitute the internal waters of the State, except in the case of archipelagic → *baselines* (see paras 30-32 below). There is no right of → *innocent passage* in the internal waters of a State. The UN Convention on the Law of the Sea (the ‘Convention’) stipulates that ‘[w]here the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters’ (Art. 8 (2) UN Convention on the Law of the Sea).

4 By virtue of its → *sovereignty* the coastal State may regulate access to its → *ports* (*Military and Paramilitary Activities in and against Nicaragua [Nicaragua v United States of America] [Merits]* [1986] ICJ Rep 14). However, by the customary law of the sea → *ships in distress* have the right to enter the ports of foreign States.

## C. Territorial Sea

5 The territorial sea whose breadth may not exceed 12 nautical miles forms part of the territory of a coastal State. In the words of the Convention ‘The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea’ (Art. 2 (1) UN Convention on the Law of the Sea). The Convention goes on to state that ‘This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil’ (Art. 2 (2) UN Convention on the Law of the Sea).

6 This sovereignty is not, however, absolute. It is subject to the rules contained in the Convention—most notably innocent passage, → *transit passage*, and archipelagic sea lanes passage—and to ‘other rules of international law’. With respect to the reference to ‘other rules of international law’ the → *International Law Commission (ILC) Commentary to the Articles concerning the Law of the Sea* (‘ILC Commentary’) noted that ‘incidents in the territorial sea raising legal questions are also governed by general rules of international law’ (ILC Commentary at 265).

## 1. Innocent Passage

7 It is one of the cardinal tenets of the international law of the sea that ships of all States enjoy the right of innocent passage through the territorial sea of a coastal State (Art. 17 UN Convention on the Law of the Sea). Article 18 (1) UN Convention on the Law of the Sea defines 'passage' as meaning 'navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility'. Passage must be continuous and expeditious. However, Art. 18 (2) UN Convention on the Law of the Sea makes clear that passage 'includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress' (→ *Force majeure*).

8 The UN Convention on the Law of the Sea reiterates the fundamental rule that passage is innocent as long as it is not prejudicial to the peace, good order, or security of the coastal State, which is in fact based on Art. 14 (4) Convention on the Territorial Sea and the Contiguous Zone ('1958 Geneva Convention').

9 The Convention on the Law of the Sea sets out a series of activities which are deemed to render passage non-innocent—a significant contribution as it represents a valuable clarification of the law concerning innocent passage. The list in Art. 19 (2) UN Convention on the Law of the Sea, which is exhaustive, reads as follows:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;

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

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

**10** It is important to note that innocent passage does not include the right of → *overflight* or the submerged passage of submarines or other underwater vehicles (Art. 20 UN Convention on the Law of the Sea).

**11** Coastal States are entitled to adopt laws and regulations relating to innocent passage through the territorial sea with respect to such matters as the conservation of living resources (→ *Marine Living Resources, International Protection*); the protection of the marine environment (→ *Marine Environment, International Protection*), and navigational safety (Art. 21 (1) UN Convention on the Law of the Sea). However, such laws and regulations must not apply 'to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards' (Art. 21 (2) UN Convention on the Law of the Sea), in order to avoid a plethora of conflicting coastal State legislation which could hamper the freedom of navigation (→ *Navigation, Freedom of*; see also Art. 211 (4) UN Convention on the Law of the Sea).

**12** Foreign ships exercising the right of innocent passage are under an obligation to comply with all such laws and regulations.

**13** The coastal State may require ships exercising the right of innocent passage to use designated sea lanes or traffic separation schemes where needed to protect safety of navigation (Art. 22 (1) UN Convention on the Law of the Sea). The requirement to utilize designated sea lanes applies particularly to 'tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials' (Art. 22 (2) UN Convention on the Law of the Sea; see → *Nuclear Powered Ships*). Such ships are enjoined to carry documents and observe special precautionary measures established for such ships by international agreements (Art. 23 UN Convention on the Law of the Sea).

**14** The Convention sets out some important coastal State duties with regard to innocent passage of foreign ships. The coastal State is under a duty not to 'hamper the innocent passage of foreign ships'. In particular it must 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) (a) UN Convention on the Law of the Sea). The coastal State also has the duty 'to give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea' (Art. 24 (2) UN Convention on the Law of the Sea).

**15** The Convention gives coastal States the competence to take the necessary steps to prevent non-innocent passage. In accordance with Art. 25 (2) UN Convention on the Law of the Sea '[i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject' (see Art. 211 (3) UN Convention on the Law of the Sea).

## **2. Suspension of Innocent Passage**

**16** The Convention in clear terms grants coastal States the right to suspend innocent passage of foreign ships in the territorial sea. In the words of the Convention '[t]he coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises'

(Art. 25 (3) UN Convention on the Law of the Sea). Such suspension must be duly published.

**17** Article 27 UN Convention on the Law of the Sea enumerates the cases where a coastal State may stop a foreign ship passing through the territorial sea for the purpose of an arrest or investigation aboard a foreign ship lying in its territorial sea. In this connection the ILC Commentary stated '[i]n such a case a conflict of interests occurs; on the one hand, there are the interests of shipping, which should suffer as little interference as possible; on the other hand there are the interests of the coastal State, which wishes to enforce its criminal law throughout its territory. The coastal State's authority to bring the offenders before its courts (if it can arrest them) remains undiminished, but its power to arrest persons on board ships which are merely passing through the territorial sea is limited to the cases enumerated in the article' (ILC Commentary 275).

### **3. Innocent Passage of Warships**

**18** The innocent passage of → *warships* has been, and continues to be, one of the more controversial questions in the law of the sea. The Convention does not contain any provision which on the face of it empowers a coastal State to require either prior authorization or notification for the passage of foreign warships in its territorial sea. Article 17 UN Convention on the Law of the Sea states, inter alia, that ships of all States enjoy the right of innocent passage through the territorial sea. This provision is applicable to all ships. Foreign ships exercising the right of innocent passage are under an obligation to comply with the laws and regulations of the coastal State relating to innocent passage. The coastal State is entitled to require a warship to leave the territorial sea immediately if it 'does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance herewith which is made to it' (Art. 30 UN Convention on the Law of the Sea). This is the sole recourse for non-compliance, given the immunity status enjoyed by warships in the law of the sea (Arts 29-32 UN Convention on the Law of the Sea).

**19** However, given the fact that a warship is already under an obligation to comply with the laws and regulations of the coastal State, the laws and regulations referred to in Art. 30 UN Convention on the Law of the Sea are viewed in some quarters as including the right of the coastal State to require prior notification or authorization for the passage of foreign warships in its territorial sea.

**20** To a certain extent, the conflict of interpretation regarding this issue reflects the history of these provisions. The draft Art. 24 prepared by the International Law Commission, which came before the 1958 United Nations Conference on the Law of the Sea did in fact give the coastal State the right to require 'previous authorisation or notification' for the passage of warships through the territorial sea (UN ILC, 'Commentaries to the Articles concerning the Law of the Sea' 276). At the Geneva Conference this draft article was adopted by the First Committee, but in an amended version—the words 'authorisation of' having been deleted—it failed to gain the required majority in the plenary of the conference. As Verzijl has observed, it failed 'as a result of a combination of opposing negative votes, made up partly by the votes of those delegations which were against any restriction of the freedom of passage, and partly, primarily, of those unable to conceal their mortification over the cancellation of the admissibility of the requirement of previous authorisation. The whole article failed to obtain the qualified majority' (Verzijl 87). Thus there was no provision in the 1958 Geneva Convention nor indeed in the 1982 UN Convention on the Law of the Sea dealing specifically with the question of whether a coastal State is entitled to require previous authorization or notification for the passage of foreign warships through its territorial seas. The important Joint Statement by the United States of America and the Union of Soviet Social Republics 'Uniform Interpretation of Norms of International Law

Governing Innocent Passage' of 1989 unequivocally declared, inter alia, '[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 authorization is required'. However, several coastal States have made declarations subjecting the innocent passage of warships to prior notification or authorization.

#### **4. Transit Passage**

**21** With the general acceptance of a territorial sea of 12 nautical miles a large number of straits forming essential links for international navigation, both by sea and air, ceased to have a strip of high seas down the middle where ships of all States could enjoy the freedom of navigation. It was the need to ensure that unrestricted navigation through these vital links in the world network of communication should remain available for use by the international community which gave birth, at the Third Conference on the Law of the Sea, to the concept of transit passage in straits used for international navigation. Transit passage, which is in fact a compromise—a 'halfway house' between innocent passage and the freedom of navigation, is defined in Art. 38(2) UN Convention on the Law of the Sea as meaning

the exercise ... of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

Thesecond sentence of this provision was inserted to protect ships entering or leaving Singapore—the so-called 'Singapore clause'.

**22** Among the duties imposed on ships and aircraft in transit passage is to 'refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait' (Art. 39 (1) (b) UN Convention on the Law of the Sea). In particular such ships and aircraft must refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress (Art. 39 (1) (c) UN Convention on the Law of the Sea). The words 'other than those incident to their normal modes of continuous and expeditious transit' have been thus interpreted: 'For example, submarines may transit submerged and military aircraft may overfly in combat formation and with normal equipment operation; surface warships may transit in a manner necessary for their security, including formation steaming and the launching and recovery of aircraft, where consistent with sound navigational practices' (US Transmittal Letter 19). This interpretation clearly reveals the strategic importance of the concept of transit passage.

**23** Pursuant to Art. 39 (2) UN Convention on the Law of the Sea, ships in transit passage are required to comply with generally accepted international regulations, procedures, and practices for safety at sea, including the Convention on the International Regulations for Preventing Collisions at Sea ([signed 20 October 1972, entered into force 15 July 1977] 1050 UNTS 17); and the generally accepted international regulations, procedures, and practices for the prevention, reduction, and control of pollution from ships.

**24** Aircraft are required to observe the Rules of the Air established by the → *International Civil Aviation Organization (ICAO)* (ICAO (ed), *Annex 2 to the Convention on International Civil Aviation: International Standards and Recommended Practices—Rules of the Air* [10th ed ICAO Montreal 2005]); state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation; and will at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency (Art. 39 (3) UN Convention on the Law of the Sea). It may be noted that a formal amendment by Spain to delete the word ‘normally’ was rejected by the Conference.

**25** Transit passage may not be suspended.

**26** There are certain categories of straits which are not subject to the regime of transit passage:

**27 a)** Straits where passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits (Art. 35 (c) UN Convention on the Law of the Sea). Instances of such straits are the Turkish, Bosphorus, and Dardanelles Straits governed by the Convention regarding the Regime of the Straits (with Annexes and Protocol) ([signed 20 July 1936, entered into force 9 November 1936] 173 LNTS 213; ‘1936 Montreux Convention’) and the Straits of Magellan governed by Art. V Boundary Treaty between the Argentine Republic and Chile ([signed 23 July 1881, entered into force 22 October 1881] [1881] 159 CTS 45) and confirmed in Art. 10 Treaty of Peace and Friendship between Chile and Argentina ([signed 29 November 1984, entered into force 2 May 1985] [1985] 24 ILM 11).

**28 b)** The regime of transit passage does not apply to a strait used for international navigation ‘if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics’ (Art. 36 UN Convention on the Law of the Sea). It has been usefully remarked that the factors to be taken into account in such assessment include ‘distance, safety, the state of the sea, visibility, depth of water—including the presence of shallows or shoals—and ease of fixing a ship’s position. The balance may vary between, say, a very large crude carrier and smaller coasters’ (Anderson 136).

**29 c)** Pursuant to Art. 38 (2) UN Convention on the Law of the Sea there is no right of transit passage through a strait used for international navigation if there exists seaward of the island a route through the high seas or the exclusive economic zone of similar convenience with regard to navigation and hydrographical characteristics. Examples which are usually cited are the Strait of Messina between Sicily and Italy, and the Pemba Channel of Tanzania.

## **5. Archipelagic Sea Lanes Passage**

**30** The Convention recognizes the concept of an archipelagic State—that is a state ‘constituted wholly by one or more archipelagos and may include other islands’ (Art. 46 (a) UN Convention on the Law of the Sea; see → *Archipelagic Waters*). Such States may draw straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines, described as archipelagic waters. These baselines referred to as ‘archipelagic baselines’ are utilized to measure the breadth of the State’s territorial sea, contiguous zone, exclusive economic zone, and continental shelf (Arts 2 and 49 UN Convention on the Law of the Sea). It is to be noted that within its archipelagic waters the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with Arts 9 (mouths of rivers), 10 (bays), and 11 (ports) UN Convention on the

Law of the Sea. Ships of all States enjoy the right of innocent passage through the archipelagic waters. The archipelagic State has the right, without discrimination in form or in fact among foreign ships, to suspend temporarily the innocent passage of foreign ships for the protection of its security (Art. 52 UN Convention on the Law of the Sea).

**31** An archipelagic State may designate sea lanes and air routes through or over its archipelagic waters for the passage of foreign ships or aircraft. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes. In Art. 53 (3) the Convention defines archipelagic sea lanes passage as meaning ‘the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone’—similar language to the definition of transit passage since it was designed to serve the same purpose. Sea lanes and air routes must conform to international regulations and must be referred to the competent international organization—in this case the → *International Maritime Organization (IMO)*—with a view to their adoption.

**32** The Convention stipulates that if an archipelagic State does not designate sea lanes and air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation. The right of archipelagic sea lanes passage is non-suspendable.

## **D. Contiguous Zone**

**33** Article 33 UN Convention on the Law of the Sea states that

(1) In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

(2) The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

**34** In the first place it should be noted that the contiguous zone now in the majority of cases forms part of the exclusive economic zone of the coastal State, and hence, the need to omit the phrase ‘of the high seas’ which appears in the first line of Art. 24 1958 Geneva Convention on which Art. 33 UN Convention on the Law of the Sea is modelled.

**35** The view has been put forward by some commentators that the first limb—Art. 33 (a) UN Convention on the Law of the Sea—applies to inward-bound ships and is preventative in nature. Since the laws and regulations relating to customs, fiscal, immigration, or sanitary laws cannot apply to the contiguous zone, the competence of the coastal State must be limited to inspection and warnings, and cannot include arrest or forcible taking into port. The second limb—Art. 33 (b) UN Convention on the Law of the Sea—grants the coastal State wide powers and is akin to hot pursuit. Others have taken a more liberal approach giving the coastal State the power to use all kinds of restraint such as arresting the ship,



escorting it to the ports of the coastal State, the carrying out of legal measures, seizure, and so on. This approach seems to be more consonant with current state practice.

## **E. Exclusive Economic Zone**

**36** The UN Convention on the Law of the Sea introduced the concept of the exclusive economic zone into the international law of the sea. The exclusive economic zone is a maritime area extending 200 nautical miles from the territorial sea baselines and adjacent to the territorial sea which enjoys a specific legal regime and which seeks to ensure an equilibrium between 'the rights and jurisdiction of the coastal State and the rights and freedom of other States' (Art. 55 UN Convention on the Law of the Sea). The Convention grants the coastal State 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed 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' (Art. 56 (1) (a) UN Convention on the Law of the Sea). The coastal State is enjoined to exercise its rights with due regard to the rights and duties of other States. It must be remarked that the coastal State possesses a resource-oriented functional competence in the exclusive economic zone.

**37** Other States enjoy in the exclusive economic zone

the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention. (Art. 58 (1) UN Convention on the Law of the Sea)

Thus on the one hand the coastal State has sovereign rights over the living and non-living resources of the superjacent waters and its seabed and subsoil—rights of an essentially economic nature—and on the other hand other States enjoy the freedom of navigation and overflight. Other States while exercising their rights and duties in the exclusive economic zone also must have due regard to the rights and duties of the coastal State.

**38** Where the Convention has, in the exclusive economic zone, assigned rights or jurisdiction neither to the coastal State nor to other States, and a conflict arises between the interests of the coastal State and any other State or States 'the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole' (Art. 59 UN Convention on the Law of the Sea). This so-called 'Castañeda formula' was designed to deal with residual rights, ie rights which have not been expressly attributed either to the coastal State or the international community. This issue still remains very much alive, especially as it relates, inter alia, to military activities in the exclusive economic zone. It has been suggested that the resolution of this difficult issue may lie with evolving State practice as well as the jurisprudence of international courts and tribunals.

**39** The coastal State has 'jurisdiction in the exclusive economic zone with respect to (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment' (Art. 56 (1) (b) UN Convention on the Law of the Sea).

## 1. Artificial Islands, Installations, and Structures

**40** The coastal State has exclusive jurisdiction over → *artificial islands, installations, and structures* established for the purposes provided for in Art. 56 UN Convention on the Law of the Sea and other economic purposes. Such devices which are not established for economic purposes remain outside the competence of the coastal State. This limitation reflects the resource oriented competence of the coastal State in the exclusive economic zone. Some coastal States, it may be noted, have claimed exclusive jurisdiction over all types of installations and structures. The Convention expressly allows the coastal State to apply its customs, fiscal, health, safety, and immigration laws and regulations in respect of artificial islands, installations, and structures (Art. 60 (2) UN Convention on the Law of the Sea).

## 2. Marine Scientific Research

**41** → *Marine scientific research* in the exclusive economic zone and on the continental shelf must be conducted with the consent of the coastal State. Such consent must in normal circumstances be granted when such research is carried out exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all humankind. Coastal States are required to establish rules and procedures to ensure that consent shall not be denied or delayed unreasonably (Art. 246 (3) UN Convention on the Law of the Sea). However, according to Art. 246 (5) UN Convention on the Law of the Sea the coastal State may withhold its consent if the marine scientific research

- (a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;
- (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
- (c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80;
- (d) contains information communicated pursuant to article 248 regarding the nature and objectives of the project which is inaccurate or if the researching State or competent international organization has outstanding obligations to the coastal State from a prior research project.

**42** Coastal States may not exercise their discretion to withhold consent in respect of projects to be undertaken beyond the 200-nautical-mile limit, ie on the outer continental shelf outside specific areas publicly designated for development by the coastal State (Art. 246 (6) UN Convention on the Law of the Sea).

**43** The consent of the coastal State shall be implied unless the coastal State within four months of the receipt of the communication containing information about a research project, informs the researching State that it is withholding its consent or that the information given by the researching State does not conform to the manifestly evident facts, or that it requires supplementary information or outstanding objections exist in respect to a previous research project.

**44** The UN Convention on the Law of the Sea sets out specific conditions with which States and international organizations, when undertaking marine scientific research in the

exclusive economic zone and on the continental shelf, must comply. These conditions are contained in Art. 249 (1) UN Convention on the Law of the Sea.

**45** It is provided that States and competent international organizations shall be responsible and liable for the measures they take in contravention of the UN Convention on the Law of the Sea in respect of marine scientific research conducted by other States, their natural or juridical persons, or by competent international organizations, and shall provide compensation for damage resulting from such measures (Art. 263 (2) UN Convention on the Law of the Sea).

**46** The UN Convention on the Law of the Sea also contains provisions regarding suspension or cessation of research activities, the rights of neighbouring land-locked and geographically disadvantaged States, measures to facilitate marine scientific research, and assistance to research vessels.

### **3. Marine Pollution**

#### **(a) Dumping**

**47** Coastal States have the right to adopt laws and regulations to prevent, reduce, and combat pollution of the marine environment by dumping (Art. 210 (1) UN Convention on the Law of the Sea). In particular, dumping within the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State (Art. 210 (5) UN Convention on the Law of the Sea). The coastal State may enforce its laws and regulations with regard to dumping within the territorial sea or its exclusive economic zone or onto its continental shelf (Art. 216 (1) (a) UN Convention on the Law of the Sea).

#### **(b) Vessel-Source Pollution**

**48** Coastal States have, for enforcement purposes, the right to adopt laws and regulations with respect to pollution from foreign vessels in their economic zones 'conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference' (Art. 211 (5) UN Convention on the Law of the Sea; → *Marine Pollution from Ships, Prevention of and Responses to*). It is generally agreed that the international organization referred to here is the International Maritime Organization. This requirement ensures that national legislation embodying national standards should not exceed or be at variance with international standards (Art. 211 (5) UN Convention on the Law of the Sea).

**49** A coastal State may adopt 'special mandatory measures for the prevention of pollution from vessels' in certain 'special areas' of its exclusive economic zone where there exist, inter alia, certain 'oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic' (Art. 211 (6) (a) UN Convention on the Law of the Sea). Such measures require IMO's approval.

**50** In accordance with Art. 220 UN Convention on the Law of the Sea the coastal State may take a series of enforcement measures to combat vessel-source pollution in the exclusive economic zone culminating in the institution of proceedings 'including detention of the vessel', a graduated response reflecting the specific circumstances.

**51** The UN Convention on the Law of the Sea contains a set of safeguards designed to preserve the rights of flag States. These safeguards have as their objective the prevention of any abuse in the exercise of enforcement power by the coastal State. These safeguards relate, inter alia, to measures to facilitate proceedings involving foreign witnesses and admission of evidence submitted by another State (Art. 223 UN Convention on the Law of the Sea); the investigation of foreign vessels (Art. 222 UN Convention on the Law of the

Sea); non-discrimination with respect to foreign vessels (Art. 229 UN Convention on the Law of the Sea); and the suspension and restrictions on institution of proceedings (Art. 228 UN Convention on the Law of the Sea), when the flag State can under certain specific circumstances pre-empt prosecution for violation beyond the territorial sea (Art. 228 UN Convention on the Law of the Sea).

#### **4. Enforcement of Fisheries Laws and Regulations**

**52** The coastal State is entitled to take a broad range of measures to enforce its fisheries laws and regulations in the exclusive economic zone. They may include 'boarding, inspection, arrest and judicial proceedings' (Art. 73 UN Convention on the Law of the Sea). The Convention requires that arrested vessels and their crews must be released upon the posting of a reasonable bond or other security; and that penalties for violation of fisheries laws and regulations may not include, in the absence of agreement, imprisonment, or any other form of corporal punishment. The coastal State is also under a duty to notify the flag State of any action taken or penalty imposed in this matter.

**53** It may be mentioned that no such enforcement measures with respect to the continental shelf are expressly contained in the Convention.

#### **F. Continental Shelf**

**54** The rights of the coastal State over the seabed and subsoil of the exclusive economic zone are to be exercised in accordance with Part VI UN Convention on the Law of the Sea, which deals with the regime of the continental shelf. There are some consequences arising from this separation of the two regimes. Sedentary species, whether within the exclusive economic zone or outside it, fall under the regime of the continental shelf which means that they are not regulated by the fisheries regime established for the exclusive economic zone (→ *Fisheries, Sedentary*). The laying of submarine cables and pipelines on the seabed and subsoil of the exclusive economic zone is also largely governed by the regime of the continental shelf. In particular the consent of the coastal State is necessary for the delineation of the course of pipelines in the zone (Art. 79 UN Convention on the Law of the Sea). The Convention preserves the legal status of the waters superjacent to the continental shelf whether it be contiguous zone, exclusive economic zone, or high seas (Art. 78 UN Convention on the Law of the Sea).

#### **G. High Seas**

**55** No State may claim sovereignty over the high seas. All States, whether coastal or landlocked, enjoy the freedom of the high seas. According to both customary and conventional international law this freedom comprises, inter alia, for all States freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, and freedom of scientific research.

**56** Every State has the right to sail ships under its flag (→ *Flag of Ships*) and 'save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas' (Art. 92 UN Convention on the Law of the Sea). This principle of non-interference has been highlighted in this celebrated dictum:

It is certainly true that—apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying

its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law (*The 'Lotus' [France v Turkey]* PCIJ Series A No 10, 25; → *Lotus, The*).

**57** Article 110 (1) UN Convention on the Law of the Sea contains a list of exceptions to the exclusiveness of flag state jurisdiction when a warship may board a foreign ship on the high seas where there is reasonable ground to suspect that

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

**58** It may be noted that the right to board a foreign vessel may have been granted by treaty—hence the introductory phrase of Art. 110 (1) UN Convention on the Law of the Sea: 'except where acts of interference derive from powers conferred by treaty'. Some examples of such treaties are Art. X Convention for the Protection of Submarine Telegraph Cables ([signed and entered into force 14 March 1884] 163 CTS 391), Art. 17 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ([adopted 19 December 1988, entered into force 11 November 1990] 28 ILM 497), and Art. 21 Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks ('Fish Stocks Agreement').

## **1. Hot Pursuit**

**59** → *Hot pursuit* constitutes yet another exception to the exclusiveness of flag State jurisdiction. The hot pursuit of a foreign ship may be undertaken when the coastal State has 'good reason to believe that the ship has violated the laws and regulations of that State' (Art. 111 (1) UN Convention on the Law of the Sea). The pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing State. Such pursuit must be continuous and uninterrupted and must cease when the ship pursued enters the territorial sea of its own State or of another State.

**60** The right of hot pursuit can only apply to violations of the rights for the protection of which the zone was established: be it contiguous zone, exclusive economic zone, or continental shelf. The pursuit may only be commenced after a visual or auditory signal is given. It has been noted that 'the conditions for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention' (*M/V 'SAIGA' [No 2] [Saint Vincent and the Grenadines v Guinea] [Merits] [Judgement]* ITLOS Case No 2 [1 July 1999] 1999 ITLOS Reports 10, 146).

## 2. Port State Jurisdiction

**61** The concept of → *port State jurisdiction* was developed during the negotiations in the Third UN Conference on the Law of the Sea. It was designed to complement flag State jurisdiction in the war against pollution of the marine environment. Article 218 UN Convention on the Law of the Sea now embodies this novel concept. Paragraph 1 of this provision reads as follows:

When a vessel is voluntarily within a port or at an offshore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.

**62** If a port State is requested to take proceedings with respect to a discharge violation in the internal waters, territorial sea, or exclusive economic zone of another State, it can only do so at the request of that other State, or of the flag State, or of a State damaged or threatened by the discharge violation. The safeguards contained in Arts 223 to 233 UN Convention on the Law of the Sea apply to this exercise of port State jurisdiction.

**63** It is useful to mention the Memorandum of Understanding on Port State Control, which commits each State to maintain an effective system of port State control with a view to ensuring that, without discrimination as to flag foreign merchant ships calling at a port of the State or anchored off such a port comply with the standards laid down in certain relevant instruments. It has been treated as the prototype for other regional memoranda of understanding which have been established in other parts of the world.

**64** The application of this concept has been expanded to deal with the problem of illegal fishing. Article 23 Fish Stocks Agreement not only gives port States the right but also imposes the duty on port States

to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.

This provision also gives States the power, inter alia, to 'inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals'. In line with this development is a new international treaty: the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, agreed on 1 September 2009 under the aegis of IMO.

**65** Thus the concept has seen an important development in that it may be used to serve the interests of the international community in the conservation and management of the living resources of the seas.

## H. Concluding Observations

**66** Maritime jurisdiction reflects the balance the Convention has sought to establish between the sovereign rights and jurisdiction of coastal States and the freedom of navigation granted to other States. This balance is shown especially in the regimes created for innocent passage, transit passage, and archipelagic sea lanes passage. It also reflects

the balance between the necessity to preserve the marine environment and the need to maintain the freedom of navigation (*ius communicationis*).

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