

THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW

Volume I: The Law of the Sea

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TERRITORIAL SEA AND THE CONTIGUOUS ZONE

Kevin Aquilina

2.1 Introduction

The territorial sea and the contiguous zone are two maritime zones which overlap with each other. They are both measured from the same baselines and in both maritime zones the coastal State exercises an element of sovereignty or control. The contiguous zone is an extension of the coastal State's powers over the territorial sea because when the coastal State enforces its customs, fiscal, immigration, or sanitary laws or regulations, it does so with regard to infringements of these laws carried out within the coastal State's territory or territorial sea. Both regimes, although *stricto jure* separate and distinct from each other, are yet very much linked to each other. Perhaps there are no two other maritime zones in the international law of the sea that are so interrelated. While the territorial sea has an existence in its own right, the same statement cannot be asserted with regard to the contiguous zone, which is dependant for its continued existence on the territorial sea of the coastal State in question. This Chapter investigates the provisions of the international law of the sea regulating these two maritime regimes, with a special focus on the United Nations Law of the Sea Convention 1982. In doing so, it compares and contrasts how this Convention has developed when compared to the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 ("Territorial Sea Convention").¹ It also identifies uncertain provisions that need to be clarified and proposes how this can be done through a review of the 1982 Convention.

¹ Convention on the Territorial Sea and the Contiguous Zone (Geneva, adopted 29 Apr. 1958, entered into force 10 Sept. 1964) 516 UNTS 205 (Territorial Sea Convention).

2.2 The Territorial Sea Maritime Zone

The territorial sea (also known as ‘territorial waters’,² ‘maritime belt’, and ‘marginal sea’)³ was first regulated by conventional law through the Territorial Sea Convention.⁴ This Convention consists of 32 Articles and is the forerunner of the United Nations Convention on the Law of the Sea 1982 (UNCLOS). As evidenced throughout this Chapter, the UNCLOS is greatly inspired by, and builds upon, the Territorial Sea Convention. To a certain extent, the UNCLOS is codifying customary international law, particularly those provisions of the Territorial Sea Convention which are identical to those contained in the UNCLOS. To another extent, the UNCLOS progressively develops the law of the sea and, at least when the UNCLOS was concluded, those new provisions did not yet codify customary international law. Such is the case with the 12-nautical-mile breadth of the territorial sea. But since then more than twenty years have elapsed and some of the UNCLOS provisions now form part of customary international law. The UNCLOS has been extensively adhered to and although, as a matter of law, it does not bind third parties, those provisions which are reflective of customary international law *de facto* do bind third parties through the nature of their customary law.⁵

Part II of the UNCLOS is entitled ‘Territorial Sea and Contiguous Zone’.⁶ It is divided into four sections as follows: (a) section 1—General Provisions—Article 2; (b) section

² CJ Colombos refers to the territorial sea as ‘territorial waters’. See CJ Colombos, *The International Law of the Sea* (5th edn, Longmans, Green & Co Ltd, 1962) ch. 3, 78–161. Ian Brownlie states that at times ‘territorial waters’ means internal waters and at other times internal waters and territorial waters combined. I Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press, 2008) 173.

³ Brownlie (n 2) 173.

⁴ For a discussion on the historical evolution of the territorial sea, see JS Reeves, ‘The Codification of the Law of Territorial Waters’ (1930) 23(3) *AJIL* 486–99; DW Bowett, ‘The Second United Nations Conference on the Law of the Sea’ (1960) 9(3) *ICLQ* 415–35; J Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, 2011) 27–61; Y Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 20–38; RR Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press, 1999) 71–5; DR Rothwell and T Stephens, *The International Law of the Sea* (Hart Publishing Limited, 2010) 58–71; DP O’Connell and IA Shearer (ed.), *The International Law of the Sea* (Clarendon Press, 1982) vol. 1, 124–69.

⁵ United Nations Convention on the Law of the Sea (Montego Bay, opened for signature 10 Dec. 1982, entered into force 16 Nov. 1994) 1833 UNTS 3 (UNCLOS). At the moment of writing, 162 States are parties to the UNCLOS. See <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed on 7 May 2014.

⁶ For a discussion on Part II of UNCLOS, see DL Ganz, ‘The United Nations and the Law of the Sea’ (1977) 26(1) *ICLQ* 1–53; RR Baxter, MM Whiteman, and HW Briggs, ‘The Territorial Sea: Proceedings of the American Society of International Law at its Annual Meeting (1921–1969)’ (25–28 April 1956) 50 *Evolution of International Law in the 20th Century* 116–36; PW Birnie, ‘The Law of the Sea Before and After LOSC I and LOSC II’ in RP Barston and Patricia Birnie, *The Maritime Dimension* (George Allen & Unwin, 1980) 8, 9.

2—Limits of the Territorial Sea—Articles 3 to 16; (c) section 3—Innocent Passage in the Territorial Sea—Articles 17 to 32; and (d) section 4—Contiguous Zone—Article 33. Each section will be discussed in this Chapter except for the provisions dealing with internal waters and baselines, which were considered in Chapter 1.

2.2.1 The territorial sea and State sovereignty

Ingrid Detter is of the view that: ‘The notion of a territorial sea has its origins in the need to protect a coastal State from attacks and to provide a coastal buffer zone’.⁷ Therefore, the legal status of the territorial sea resembles, but also differs from, that of other maritime zones. Article 2 paragraph 1 UNCLOS states that: ‘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.’ This provision is modelled on Article 1 paragraph 1 of the Territorial Sea Convention which states that: ‘The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.’ When both conventional provisions are compared, the result is that the main difference lies in the addition, in the UNCLOS, of archipelagic waters; a concept which had not emerged in 1958 in conventional law. Within its land territory, internal waters, archipelagic waters, and the territorial sea, the coastal State enjoys sovereignty. In terms of Article 2 paragraph 2 UNCLOS: ‘This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.’ Even this provision finds an identical counterpart in Article 2 of the Territorial Sea Convention, which represents customary international law.⁸

In the case of archipelagic waters, the archipelagic State—in terms of Article 49 UNCLOS—enjoys the same sovereignty that the coastal State does. In the contiguous zone, the coastal State does not enjoy sovereignty but has the control necessary to prevent and punish infringements of a coastal State’s customs, fiscal, immigration, or sanitary laws and regulations as per Article 33 paragraph 1 UNCLOS. Insofar as the exclusive economic zone (EEZ)⁹ and the continental shelf¹⁰ are concerned, the coastal State enjoys a limited type of sovereignty, known as ‘sovereign rights’. In the high seas, the coastal State does not enjoy sovereignty, sovereign rights, or control.¹¹ These seas are regulated by the principle of freedom

⁷ I Detter, *The International Legal Order* (Dartmouth Publishing Company, 1994) 360.

⁸ For a study of the air space of a coastal State, see Detter (n 7) 377–84. For the historical evolution of this concept, see Churchill and Lowe (n 4) 75–7. This right was first recognized in Art. 1 of the Paris Conference on a Convention for the Regulation of Aerial Navigation: ‘The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory’ (Churchill and Lowe (n 4) 76).

⁹ UNCLOS, Art. 56.

¹⁰ UNCLOS, Art. 77.

¹¹ UNCLOS, Art. 87.

of the high seas. The same applies to the International Seabed Area whereby the seas enclosed by that area are high seas.¹²

All coastal States exercise sovereignty over their territorial sea, the seabed beneath their territorial sea, and the airspace above the territorial sea.¹³ Both the Territorial Sea Convention and the UNCLOS specifically have recourse to the term 'sovereignty'. The use of this term is deliberate and connotes the bestowal of plenary powers upon the coastal State to regulate whatever happens in its territorial sea. No other State can exercise acts of dominion there.¹⁴ Sovereignty means that the coastal State exercises control over the territorial sea and no other State can exercise a concurrent sovereignty over its territorial sea unless and until the UNCLOS or other rules of international law so prescribe. The coastal State can therefore exercise the same powers in its territorial sea as it has over its land territory. Because the coastal State is sovereign in its territorial sea, its ships have the exclusive right, referred to as 'cabotage', to traverse the territorial sea without any limitations except one, contrary to the position of foreign ships.¹⁵ Yoshifumi Tanaka asserts that: 'There is no doubt that the territorial sea is under the territorial sovereignty of the coastal State... territorial sovereignty in international law is characterised by completeness and exclusiveness. Accordingly, the coastal State can exercise complete legislative and enforcement jurisdiction over all matters and all people in an exclusive manner unless international law provides otherwise.'¹⁶ The rights of the coastal State over its territorial sea have been summed up by Robert MacLean as follows:

1. The exclusive right over fisheries and the exploitation of the living and non-living resources of the seabed and subsoil.
2. The right to exclude foreign vessels from trading along its coast (cabotage).
3. The right to impose regulations concerning navigation, customs, fiscal, sanitary health, and immigration.
4. The exclusive enjoyment of the airspace above the territorial sea.
5. The duty of belligerents in time of war to respect the neutral States' territorial sea and refrain from belligerent activities therein.¹⁷

¹² UNCLOS, Art. 137.

¹³ UNCLOS, Art. 2.

¹⁴ The Italian civil lawyer Baldus distinguished between dominion (*dominium*) and jurisdiction or control (*imperium*). See Churchill and Lowe (n 4) 71. This distinction between 'rights of property' and 'rights of jurisdiction or control' is still valid today in distinguishing between the territorial sea (where the coastal State exercises dominion) and the contiguous zone (where the coastal State exercises control) with the sole caveat that the coastal State has to respect the right of innocent passage of foreign ships in its territorial sea—a sort of maritime servitude, as judge Sir Gerald Fitzmaurice considers it: see G Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea. Part I: The Territorial Sea and the Contiguous Zone and Related Topics' (1959) 8 *ICLQ* 73–121.

¹⁵ This is subject to the right of innocent passage. See UNCLOS, Arts 17–26, in particular Art. 17.

¹⁶ Tanaka (n 4) 84.

¹⁷ R MacLean (ed.), *Public International Law Textbook* (16th edn, HLT Publications, 1994) 250.

To this list of coastal State rights, Peter Malanczuk has added the following: '(6) The coastal State has certain powers of arrest over merchant ships exercising a right of innocent passage, and over persons on board such ships'.¹⁸

Article 2 paragraph 3 UNCLOS allows a restriction upon a State's sovereignty when it provides that: 'The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.' Article 1 paragraph 2 of the Territorial Sea Convention contains a very similar provision. Examples of restrictions to the coastal State's sovereignty are recognized by the UNCLOS. Such is the case, for instance, of the right of innocent passage through the territorial sea—Article 17 UNCLOS. The words 'other rules of international law' are explained by DJ Harris to include 'both customary rules (e.g. concerning the treatment of aliens) and treaty obligations (e.g. concerning navigation at sea)'.¹⁹ Sovereignty extends not only to the territorial sea but even to the 'air space over the territorial sea as well as to its sea-bed and subsoil'.²⁰ The same principle applies to archipelagic waters²¹ but not to the EEZ. Other States have the right of overflight in this zone,²² whereas in the continental shelf other States have the right of overflight over the superjacent waters above the continental shelf.²³

(a) Internal waters and baselines

Article 8 UNCLOS defines 'internal waters' as 'waters on the landward side of the baselines of the territorial sea'. This provision is influenced by Article 5 paragraph 1 of the Territorial Sea Convention. This definition applies to internal waters of a coastal State which generates a territorial sea but not to archipelagic waters. Indeed, an archipelagic State may, 'within its archipelagic waters... draw closing lines for the delimitation of internal waters, in accordance with articles 9, 10 and 11'.²⁴ The key words in Article 8 are 'baselines of the territorial sea'. The waters which are on the landward side of the territorial sea are internal waters but the waters which are on the seaward side of the territorial sea are territorial waters. That said, the internal waters and territorial waters, for the purposes of the UNCLOS, are regulated by the provisions on the territorial sea as contained in Part II of the UNCLOS. What makes or breaks the internal waters and divides them from the territorial waters are baselines. The territorial sea is measured from baselines

¹⁸ P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge, 1997) 177–8.

¹⁹ DJ Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell, 2010) 325.

²⁰ UNCLOS, Art. 2(2).

²¹ UNCLOS, Art. 49.

²² UNCLOS, Art. 58(1).

²³ UNCLOS, Art. 78(1).

²⁴ UNCLOS, Art. 50.

'determined in accordance with this Convention'. The natural questions which arise at this juncture are: (a) what are 'baselines'? and (b) how are they measured?

Although the UNCLOS does not define the term 'baselines' it gives the reader sufficient information to understand its meaning. In Article 5 UNCLOS, it is stated that a baseline 'is the low-water line along the coast as marked on large-scale charts officially recognised by the coastal State.'²⁵ This provision raises an important issue: the baseline is established by the coastal State. This implies that there might be cases, especially where there is a dispute as to the delimitation of the territorial sea, as to whether these baselines have been established correctly since the measurement of maritime zones hinges on such measurement. Article 5 premises the definition of a baseline with the words 'the normal baseline for measuring the breadth of the territorial sea'. However, it must be pointed out that a baseline is used not only to measure the territorial sea but, essentially, to measure a number of maritime zones seaward of the territorial sea, such as the contiguous zone, the EEZ, the exclusive fishing zone, and sometimes the continental shelf; hence the importance of correctly calculating these baselines.²⁶

(b) The breadth of the territorial sea

A contentious issue concerning the territorial sea before the advent of the UNCLOS was the breadth of the territorial sea. Although it was agreed that States exercised sovereignty over the territorial sea, it was not at all clear prior to the UNCLOS what the actual span of the territorial sea was. The Territorial Sea Convention referred to the territorial sea in Article 1 paragraph 1 but conveniently shied away from defining its breadth: 'The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.' The Territorial Sea Convention did, however, establish a maximum of 12 nautical miles (nm) for the contiguous zone in Article 24 paragraph 2. The UNCLOS has definitively settled this *vexata questio* in Article 3: 'Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical²⁷ miles, measured from baselines determined in accordance with this Convention.' ED Brown sums it up very neatly: 'This article goes a considerable way towards providing a solution to one of the most intractable problems of the international law of the sea.'²⁸

²⁵ A similar provision is found in Territorial Sea Convention, Art. 3. The 'low-water line along the coast' is 'the line on the shore reached by the sea at low tide' (Malanczuk (n 18) 180).

²⁶ For a more detailed study of internal waters and baselines, see Chapter 1.

²⁷ A nautical mile (nm) is 1.1508 statute miles (Harris (n 19) 287, n 24). It is 'equivalent to 1,000 fathoms, 6,080 feet, 1,853 metres' (Malanczuk (n 18) 178).

²⁸ ED Brown, *The International Law of the Sea. Vol. I: Introductory Manual* (Dartmouth, 1994) 43.

The breadth of the territorial sea has fluctuated over time.²⁹ C van Byhershoek adopted the rule that territorial sovereignty extended as far as the power of arms.³⁰ In the eighteenth century, the width of the territorial sea was calculated in terms of the so-called 'cannon-shot rule'.³¹ In other words, the width of the territorial sea was calculated seaward from the coast up to a point to which a cannon-shot could reach. Such a distance or range was, however, extended in the nineteenth century to 3 nm which, in customary international law, was recognized as the width of the territorial sea until it was altered by the UNCLOS. Robert MacLean holds that maritime States advocated a 3-nm territorial sea not to:

1. restrict the freedom of movement of their naval fleets, particularly submarines which in exercising the right of innocent passage through the territorial sea must navigate on the surface and show their flag;
2. restrict the operations of their distant water fishing fleets which would be excluded from fishing in rich coastal waters;
3. restrict the operations of aircraft, which have no right of innocent passage over the territorial sea;
4. restrict the right of passage through many of the most important international straits which would become the territorial seas of the coastal States.

They also argued that:

1. the safety of shipping would be affected as most landmarks and lighthouses are not visible at a range of 12 miles;
2. ships could not anchor in the deep water outside a 12-mile limit;
3. the cost of patrolling the territorial sea would be increased and would prove impossible for many Third World States;
4. defence of the territorial sea would be difficult; in particular neutral States would have difficulty enforcing their neutrality against incursion of their territorial sea by belligerent ships. Belligerent submarines could also use the extended territorial sea to hide and take sanctuary.³²

Patricia W Birnie refers to the doctrinal debate that evolved with regard to the breadth of the territorial sea: "The great doctrinal battle between John Selden³³ in

²⁹ For the history of how the breadth of the territorial sea has changed over time, see Barston and Birnie (n 6) 8–14; Malanczuk (n 18) 178–80; Detter (n 7) 360–5; Colombos (n 2) 83–102; ED Brown (n 28) 43–51; and Churchill and Lowe (n 4) 77–81.

³⁰ C van Bynkershoek, *De Dominio Maris Dissertatio* [Leyden, 1744], trans. RVD Magoffin (New York, 1923).

³¹ For the history of the cannon-shot rule, see W Walker, 'The Cannon Shot Rule' (1945) 22 *BYIL*, 210; DP O'Connell, 'The Juridical Nature of the Territorial Sea' (1971) *BYIL* 303; HSK Kent, 'The Historical Origins of the Three-Mile Limit' (1954) 48 *AJIL* 537; Baxter et al. (n 6) 116–36.

³² MacLean (n 17) 245–6.

³³ J Selden, *Of the Dominions, Or, Ownership of the Sea* (Arno Press, 1972). Selden states three arguments that are put in favour of the ownership of the sea, based on: (1) freedom of commerce, passage, and travel; (2) the nature of the sea; and (3) the writings and testimonies of learned men

Britain, who argued in favour of the *mare clausum* (closed sea), and Hugo Grotius,³⁴ who supported the *mare liberum* (free sea), which favoured the Dutch trade with the East Indies . . . was resolved in the seventeenth century in favour of the latter doctrine and therefore for about 350 years the doctrine of a narrow territorial sea and wide areas of high seas beyond prevailed.³⁵ In the twentieth century—prior to the UNCLOS—a number of States began to claim a territorial sea breadth which went beyond the 3-nm limit, ranging from 4 nm to 12 nm even though a 200-nm territorial sea was not uncommon. The Territorial Sea Convention skirted this issue through its deafening silence. This contentious issue was solved by the UNCLOS Article 3 which provides that: ‘Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.’ On this point, Rebecca MM Wallace³⁶ states that: ‘The 12-mile maximum which has been widely reflected in state practice, . . . is now accepted as customary international law—see the *Guinea/Guinea-Bissau Maritime Delimitation Case*.’³⁷

First, the UNCLOS does not provide a minimum breadth of the territorial sea but sets out a maximum breadth.³⁸ It therefore stands to reason that each coastal State has to establish the breadth of its territorial sea, provided it does not exceed 12 nm. Second, ‘every State has the right’ to a territorial sea. So a territorial sea need not be claimed as it belongs to every coastal State as of right. Malcolm Shaw observes that ‘all newly independent states (with a coast) come to independence with an entitlement to a territorial sea’.³⁹ According to Yoshifumi Tanaka, ‘the Court of

(Book I, ch. II, 3). His main contention was that the coastal State should enjoy some rights to regulate activities in its own interest in the sea adjoining its coast.

³⁴ Hugo Grotius articulated the doctrine of freedom of the seas in H Grotius, *The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade* (Oxford University Press, 1916) 7. In terms of this doctrine, the sea could not be appropriated.

³⁵ Birnie (n 6) 9.

³⁶ RMM Wallace, *International Law* (2nd edn, Sweet & Maxwell, 1992) 130–1.

³⁷ *Guinea/Guinea-Bissau Maritime Delimitation Case* 77 ILR 636, 638; (1988) 25 ILM 251, 272, para 43. Donald R Rothwell and Tim Stephens hold that State practice in favour of a 12-nm territorial sea although not unanimous is substantial. For State practice not in conformity with the 12-nm territorial sea, see Rothwell and Stephens (n 4) 71–3.

³⁸ Churchill and Lowe (n 4) 81, on this point of a minimum breadth of the territorial sea state that:

[I]nternational law should lay down a *minimum* breadth for the territorial sea within which coastal States must fulfil their duties towards foreign shipping. While the theoretical basis of this view has not been adequately explored, it is evident that the many jurists who subscribe to it regard three miles as the minimum breadth, that distance being the smallest claimed for the territorial sea during modern times. The time may soon come, however, when customary international law moves beyond the Law of the Sea Convention and regards twelve miles not merely as the maximum, but as the minimum, mandatory limit for the territorial sea.

³⁹ MN Shaw, *International Law* (6th edn, Cambridge University Press, 2008) 569, while referring to the International Court of Justice case of *Nicaragua v Honduras* [2007] ICJ Rep, para 234.

Arbitration, in the 1909 *Grisbadarna Case* between Norway and Sweden, stated that “the maritime territory is an essential appurtenance of land territory”, and was ‘an inseparable appurtenance of this land territory’.⁴⁰ As Judge Sir Arnold McNair put it in his dissenting opinion in the *Anglo-Norwegian Fisheries Case*:⁴¹

To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters . . . International law does not say to a State: ‘You are entitled to claim territorial waters if you want them.’ No maritime States can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.⁴²

Third, although Article 3 refers to every ‘State’ and not ‘coastal State’, those States which are not surrounded by or abound upon a sea cannot claim a territorial sea. As the Latin maxim runs *nemo tenetur ad impossibilia*. No landlocked State can do the impossible to claim a territorial sea since because of its geographic nature it cannot claim a sea where there is no sea. This does not, however, mean that landlocked States have no rights at sea, even in the territorial sea of coastal States. This is because the UNCLOS grants rights of access to landlocked States to and from the sea and freedom of transit—see Articles 124 to 132 UNCLOS. A landlocked State is defined in terms of Article 124 paragraph 1(a) UNCLOS as ‘a State which has no sea-coast’. Hence a landlocked State can neither be a coastal State nor a port State but only a flag State. Fourth, the breadth of the territorial sea is measured not in miles as on land territory but in nautical miles. Fifth, the territorial sea is measured from baselines. These baselines have to be ‘determined in accordance with this Convention’. This means that a coastal State cannot adopt its own system of establishing baselines. Such baselines have to be established in terms of the UNCLOS. However, it is the coastal State which has to establish its own baselines according to the International Law of the Sea as embodied in the UNCLOS. This means that if a coastal State establishes baselines not in conformity with the Convention and to the prejudice of opposite or adjacent States, these States may have a valid claim in challenging those irregular baselines, especially if the State which has established the baselines and the opposing or adjacent State/s are in the process of delimitating their respective territorial sea in terms of Article 15 UNCLOS.

⁴⁰ Tanaka (n 4) 84.

⁴¹ *Anglo-Norwegian Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116. For a study of this judgment, see E Lauterpacht (ed.), *International Law Being The Collected Papers of Hersch Lauterpacht. Vol. 3: The Law of Peace* (Cambridge University Press, 1977) 213–17; G Schwarzenberger, *International Law. Vol. I, International Law As Applied by International Courts and Tribunals* (3rd edn, Stevens & Sons Limited, 1957) 319–23; and O’Connell and Shearer (n 4) vol. 2, 199–206.

⁴² *Anglo-Norwegian Fisheries Case* [1951] ICJ Rep 160.

Article 4 UNCLOS provides that: 'The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.' This provision is identical both in Article 6 of the Territorial Sea Convention and Article 4 UNCLOS. This provision sets out the rules which have to be followed in establishing the outer limit of the territorial sea. This is done through drawing a line from every point from where a baseline is established to another point which equals the breadth of the territorial sea as established by the coastal State. The main question which this provision poses is that it does not state how baselines are established. According to Georg Schwarzenberger and ED Brown, in maritime practice, 'two methods have been used . . . the arcs of circles method' and 'the common tangent method'.⁴³ The International Court of Justice, in its *Anglo-Norwegian Fisheries Case* held that there were three methods to effect the application of the low-water mark rule: the *trace parallèle*, the *courbe tangente*, and the straight baselines, thereby adding a third permissible method;⁴⁴ that of straight baselines which has been codified in Article 7 UNCLOS.

(c) Delimitation of the territorial sea

The UNCLOS provides for the delimitation of a number of maritime zones between States with opposite or adjacent coasts.⁴⁵ First, such delimitation applies to the territorial sea,⁴⁶ archipelagic internal waters,⁴⁷ the EEZ,⁴⁸ and the continental shelf.⁴⁹ No delimitation is, however, envisaged by the Convention for the contiguous zone.⁵⁰ Second, the method of delimitation varies from one maritime zone to another, so much so that it cannot be stated that there is only one general rule for delimitation applicable to all maritime zones. For instance, apart from the case where an agreement is reached between all States involved, in the case of the territorial sea normally it is the median line which should apply. In the case of the EEZ and the continental shelf, in the absence of an agreement, both the EEZ and the continental shelf are delimited in terms of the procedures set out in Part XV of the UNCLOS regulating peaceful settlement of disputes. Hence, in these two maritime zones the median line criterion does not automatically apply by default where no agreement is reached by the States in question. Insofar as archipelagic States are concerned, it is the internal waters which are delimited but in this instance there is no case of a conflict arising between two or more States because

⁴³ G Schwarzenberger and ED Brown, *A Manual of International Law* (6th edn, Professional Books Limited, 1976) 105.

⁴⁴ *Anglo-Norwegian Fisheries Case* [1951] ICJ Rep 116.

⁴⁵ See O'Connell and Shearer (n 4) vol. 2, 658-83.

⁴⁶ UNCLOS, Art. 15.

⁴⁷ UNCLOS, Art. 50.

⁴⁸ UNCLOS, Art. 74.

⁴⁹ UNCLOS, Art. 83.

⁵⁰ This is not, however, the situation under the Territorial Sea Convention—see Art. 24(3).

the delimitation is an internal matter within the archipelagic waters of one and the same State.

The equidistance principle for the purpose of delimiting a maritime zone is found in the Territorial Sea Convention with regard to the territorial sea and the contiguous zone, and in Article 6 of the Territorial Sea Convention on the Continental Shelf with regard to the continental shelf.⁵¹ The UNCLOS applies the equidistance principle only with regard to the territorial sea. No procedure is established by the UNCLOS for the delimitation of the contiguous zone. With regard to the continental shelf, the UNCLOS scuttles the equidistance principle, in Article 83(1) UNCLOS, and fails to adopt it in the new maritime zone of the EEZ in Article 74 UNCLOS. It therefore appears that the equidistance principle as enshrined in the Territorial Sea Convention has lost much of its currency in the UNCLOS. The UNCLOS envisages two methods of delimitation—by agreement between the States involved or by recourse to the median line. Article 15 UNCLOS reads as follows:

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. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

This provision is lifted from Article 12 paragraph 1 of the Territorial Sea Convention. According to Edwin Egede: 'The International Court of Justice in the *Qatar v Bahrain* case clearly pointed out that the provisions of Article 15 had become part of customary international law.'⁵² Georg Schwarzenberger and ED Brown opine that: 'In delimiting the territorial sea, it is necessary to take into account (1) the baseline, (2) the width, and (3) the outer limit of the territorial sea'.⁵³ If coastal States agree among themselves, they can decide to extend each other's territorial sea beyond the median line. So the Convention leaves it up to the States concerned to decide as to how to delimit their territorial sea and it also gives them the possibility to depart from the median line concept. Nonetheless, if they do not manage to sort their dispute through mutual agreement, they are always open to have recourse to any of the peaceful methods of dispute settlement set out in Part XV of the UNCLOS.

The median line as a criterion for the delimitation of the territorial sea is set out in Article 15 UNCLOS which defines this concept as the middle of the road

⁵¹ See further O'Connell and Shearer (n 4) vol. 2, 699–705.

⁵² E Egede, 'The Nigerian Territorial Waters Legislation and the 1982 Law of the Sea Convention' (2004) 19(2) *IJMCL* 151–76, 163.

⁵³ Schwarzenberger and Brown (n 43) 100.

between the territorial seas of the two States in question or, better, 'every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two States is measured.' This concept of the median line was also enshrined in Article 12 of the Territorial Sea Convention. There may nonetheless be situations where it might not be appropriate to delimit the territorial sea on the basis of the median line. Two such instances are historic title and other special circumstances. These two instances find their counterpart in Article 12 paragraph 1 of the Territorial Sea Convention. Historic title constitutes a derogation from general international law because it is an exception to the delimitation rule set out in the first sentence of Article 15 UNCLOS, which evokes Article 7 paragraph 6 of the Territorial Sea Convention.⁵⁴ This is because although in terms of general international law a coastal State should not exercise jurisdiction over historic waters,⁵⁵ nonetheless, once the coastal State has exercised jurisdiction over those waters for a long period in an open way without opposition from other States, those waters are considered to have belonged to the coastal State by acquisitive prescription, 'a kind of *possessio longi temporis*'.⁵⁶ Georg Schwarzenberger defines the term 'historic waters' within a pre-UNCLOS context as:

the title on which the incorporation of proportions of the high seas into the territorial sea, or parts of the territorial sea into national waters, rests is based on open and uncontested usage. As time passes, the presumption increases that the silence of other States amounts to acquiescence and creates an estoppel against such a historically consolidated title being contested. By consent or recognition, this gradual process may be hastened. Whichever method is chosen, the result is that such *opposable* acts, including tolerance in circumstances in which other States might have been expected to voice their opposition in good time, justify situations which would otherwise be in conflict with international law.⁵⁷

A case where the 'special circumstances' criterion for delimitation—even if in a different context; that of the continental shelf—was applied instead of the median line was that in the arbitration between the United Kingdom and France. The arbitrators held that the Channel Islands and the Isles of Scilly constituted 'special circumstances'.⁵⁸

In terms of Article 16 paragraph 1 UNCLOS, coastal States have to draw up 'charts of a scale or scales adequate for ascertaining' the position of baselines. If this is not done, coastal States may instead draw up 'a list of geographical coordinates

⁵⁴ Territorial Sea Convention, Art. 7, para 6 reads as follows: 'The foregoing provisions shall not apply to so-called "historic" bays.'

⁵⁵ For a study of historic waters, see O'Connell and Shearer (n 4) vol. 1, 417–38.

⁵⁶ *Anglo-Norwegian Fisheries Case* [1951] ICJ Rep 116.

⁵⁷ Schwarzenberger (n 41) 326–7.

⁵⁸ MD Blecher, 'Equitable delimitation of the continental shelf' (1979) 73 *AJIL* 60. See also O'Connell and Shearer (n 4) vol. 2, 705–23.

of points, specifying the geodetic datum'.⁵⁹ Once such charts or lists have been compiled by the coastal State, they have to give them publicity and to 'deposit a copy . . . with the Secretary General of the United Nations'.⁶⁰

2.2.2 Innocent passage in the territorial sea

The right of innocent passage in the territorial sea is an exception to a coastal State's sovereignty when compared to the absolute reign which the coastal State exercises over its land territory. This is because, in the case of the territorial sea, the coastal State's sovereignty is limited by the right of innocent passage afforded to foreign ships. Nevertheless, although the right of innocent passage is an exception to coastal State sovereignty, even so exceptions are made to this right where, for instance, as will be examined, the coastal State may suspend, restrict, or refuse innocent passage.

(a) *The curtailment of a State's sovereignty*

Given that the territorial sea is part and parcel of a coastal State's territory, the coastal State is sovereign within its territorial sea and can exercise any act of sovereignty therein, including—if it wanted—closing off its territorial sea for maritime trade. Purposely, in order to prevent such an occurrence from materializing, the UNCLOS adopts a similar principle to that found in the high seas regime in the form of freedom of navigation,⁶¹ the right of transit passage in straits used for international navigation,⁶² or the right of innocent passage through territorial seas,⁶³ or through archipelagic waters.⁶⁴ Although this Chapter focuses primarily on the right of innocent passage through the territorial sea of a coastal State, it is good to note that this right is not only unique to the territorial sea. Even landlocked States enjoy a right of access to and from the sea and freedom of transit.⁶⁵ Sir Gerald Fitzmaurice is correct to consider the right of innocent passage as 'a sort of universal servitude imposed on all coastal States, in the interests both of themselves and of all other States, coastal and non-coastal, and to that extent as an acknowledged limitation on their complete sovereign freedoms'.⁶⁶

(b) *Right of innocent passage*

Customary law recognizes the right of innocent passage.⁶⁷ It was first enunciated by Emmerich De Vattel who declared that ships of all States enjoyed a right of

⁵⁹ Territorial Sea Convention, Art. 4 para 6.

⁶⁰ UNCLOS, Art. 16 para 2, and Territorial Sea Convention, Art 4 para 6.

⁶¹ UNCLOS, Art. 90.

⁶² UNCLOS, Art. 38.

⁶³ UNCLOS, Art. 17.

⁶⁴ UNCLOS, Art. 52.

⁶⁵ UNCLOS, Art. 125.

⁶⁶ Fitzmaurice (n 14) 91.

⁶⁷ Wallace (n 36) 137.

innocent passage through territorial waters.⁶⁸ This right—which has a rich historical origin⁶⁹—is codified in Article 14 paragraph 1 of the Territorial Sea Convention and in Article 17 UNCLOS, which reads as follows: ‘Subject to this Convention, ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea.’⁷⁰ ED Brown holds that the words ‘all States’ comprises non-State parties to the UNCLOS in view of the customary legal nature of this provision.⁷¹ The International Court of Justice considered this right in the *Corfu Channel Case (Merits): United Kingdom v Albania*, where it held that:

It is, in the opinion of the Court, generally recognised and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.⁷²

From an analysis of Article 17 UNCLOS the following observations may be made. First, the right of innocent passage is not absolute. Indeed, there may be instances as established by the UNCLOS where this right might not be exercised. Such passage, for instance, can be suspended in terms of Article 25 paragraph 3 UNCLOS or when passage is not innocent, according to Article 25 paragraph 1 UNCLOS. Unfortunately, the Convention does not set out these instances in a clear way through a cross-reference to other provisions of the Convention. Second, the right of innocent passage is enjoyed only in the territorial sea although other provisions of the Convention apply this right to other maritime zones (as with the case of innocent passage through archipelagic waters)⁷³ or provide comparable rights (such as those of navigation—Article 90—and transit passage).⁷⁴ Third, the right extends to any State, whether it is a coastal State or a landlocked State. Fourth, it applies to all ships. The Convention refers also to vessels but defines none of these terms; nor does it distinguish between a ‘ship’ and a ‘vessel’. Possibly ships and vessels are to be considered as having the same meaning even if in Part II of the UNCLOS the term ‘ship’ not ‘vessel’ is used.

⁶⁸ E de Vattel, *The Law of Nations or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and Sovereigns* [1758] trans. CG Fenwick in JB Scott (ed.), *The Classics of International Law* (Carnegie Institution, 1916) vol. III, 106–10.

⁶⁹ For the historical origin of the right of innocent passage, see G Cataldi, *Il Passaggio Delle Navi Straniere Nel Mare Territoriale* (Dott A Giuffrè Editore, 1990), 7–82; and Churchill and Lowe (n 4) 82–6. Tanaka (n 4) 85 states that: ‘In his book published in 1758, Vattel had already accepted the existence of such a right.’ See also O’Connell and Shearer (n 4) vol. 2, 260–74.

⁷⁰ This provision is modelled on Art. 14 para 1 of the Territorial Sea Convention.

⁷¹ Brown (n 28) 53 opines that: ‘it is clear from the *travaux préparatoires* that there was no intention to confine the right to parties and indeed any such attempt would have run counter to the well established right of innocent passage under international customary law’.

⁷² *Corfu Channel Case (Merits) (United Kingdom v Albania)* [1949] ICJ Rep 4.

⁷³ UNCLOS, Art. 52.

⁷⁴ UNCLOS, Art. 38.

Fifth, innocent passage does not apply to foreign aircraft as the right of innocent passage is restricted only to ships. Sixth, the UNCLOS distinguishes between innocence and passage so that a ship may still be expelled from the territorial sea of a coastal State if the foreign ship is not in passage.⁷⁵

(c) *Meaning of passage*

Yoshifumi Tanaka holds that innocent passage comprises both lateral passage and vertical passage. He explains these terms as follows: 'Lateral passage is the passage traversing the territorial sea without entering internal waters or calling at a roadstead or port facility outside internal waters. Vertical or inward/outward-bound passage concerns the passage proceeding to or from internal waters or a call at such roadstead or port facility.'⁷⁶ Furthermore, the right of innocent passage has two constitutive ingredients: (a) passage;⁷⁷ and (b) innocence. For a ship to enjoy the right of innocent passage, it has to satisfy both these criteria. Article 18 paragraph 1 UNCLOS defines passage as 'navigation through the territorial sea'. But not all forms of navigation fall under the definition of passage. This is because Article 18 considers only certain types of navigation as constituting passage. These are: (a) traversing the 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.⁷⁸ Passage need not necessarily mean that a ship traversing the territorial sea of a coastal sea has to call at that State's port.⁷⁹ The ship can simply pass through a coastal State's territorial sea without even stopping and anchoring. The faster the passage takes place the better: as the UNCLOS puts it: 'Passage shall be continuous and expeditious.'⁸⁰ Strictly speaking, it is not permitted that a ship stops when traversing the coastal State's territorial sea or carries out any activities once it is traversing the territorial sea. For instance, a ship cannot stop even though it might not be carrying out any activities in the territorial sea of a coastal State. The provision is quite clear on this—passage must be 'continuous'. This term excludes any stopping. Passage must be uninterrupted and for navigational purposes. Unnecessary manoeuvring,

⁷⁵ O'Connell and Shearer (n 4) vol. 1, 269–70.

⁷⁶ Tanaka (n 4) 85. G Gidel had already made this distinction between '*passage latéral*', '*passage d'entrée*', and '*passage de sortie*' in *Le droit international public de la mer* (Sirey, 1932–1934), vol. III, 204.

⁷⁷ For the historical development of UNCLOS, Art. 18, see Brown (n 28) 53–8.

⁷⁸ The Territorial Sea Convention adopted a slightly different wording in Art. 14(2): 'Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.'

⁷⁹ In the *Nicaragua Case (Merits)* [1986] ICJ Rep 101, para 214, the ICJ stated that 'in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph 1(b) ... does no more than codify customary international law on this point'.

⁸⁰ UNCLOS, Art. 18(2).

hovering, or engaging in any activity which does not constitute passage cannot be considered to be 'continuous' passage. This resembles Article 111 paragraph 1 UNCLOS which requires hot pursuit to be uninterrupted. Not only must passage be 'continuous' but also 'expeditious'. The sooner the ship traverses the territorial sea of a coastal State, the better, because the least inconvenience is caused to the coastal State's sovereignty. The longer a ship takes to traverse through a coastal State's territorial sea, the more the coastal State will regard that passage as a security threat to its well-being. 'Expeditious' means fast. But fast does not mean a lack of regard to international sea traffic regulations. Hence, the collision regulations and other safety of life at sea provisions, as well as marine pollution conventions, have to be followed. 'Expeditious' passage does not grant the ship traversing the territorial sea immunity from other applicable international safety of navigation standards.⁸¹

(d) Exceptions to a 'continuous and expeditious' passage

Article 18 paragraph 2 UNCLOS does recognize cases where passage cannot reach the criteria set out by the Convention of being 'continuous and expeditious'. So there are cases where passage includes 'stopping and anchoring, but only insofar 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.'⁸² There can therefore be cases where passage includes stopping and anchoring either because of some damage to the ship's engine or because it is necessary to provide assistance to another ship. Salvage operations will also fall under this exception. When in case of distress, the principle of comity exempts a foreign ship from the coastal State's laws and regulations. Nevertheless, distress has to be urgent. Lord Stowell has expounded on what constitutes 'distress' as follows:

It must be an urgent distress; it must be something of grave necessity; such as is spoken of in our books, where a ship is said to be driven in by stress of weather. It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man . . . Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or provisions for such a voyage, for there the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner.⁸³

⁸¹ See AJ Norris, 'The "Other" Law of the Sea' (2011) 64(3) *Naval War College Review* 78.

⁸² This provision is modelled on Art 14, para 3 of the Territorial Sea Convention, subject to the addition in the UNCLOS provision of a further exception not found in the Territorial Sea Convention where it is allowed to stop and anchor 'for the purpose of rendering assistance to persons, ships or aircraft in danger or distress'—a noble gesture indeed.

⁸³ *The Eleanor* (1809) Edw. 135.

A question which arises is whether a warship may enter the territorial sea of a coastal State simply to render assistance, as noted. According to Yoshifumi Tanaka, while the UNCLOS

contains no duty to render assistance to any person in distress in the territorial sea, the offer of such assistance would be consistent with the requirement of the consideration of humanity. Indeed, a temporary entrance of a foreign warship into the territorial sea for the purpose of rendering assistance to persons in distress would pose no threat to the coastal State. Hence there may be room for the view that a foreign warship can render assistance to persons in distress in the territorial sea without notification to the coastal State.⁸⁴

The view of Georg Schwarzenberger is that: 'Rules of this kind were considered so much in accordance with a constructive interpretation of the working principles of reciprocity behind international law and the courtesy of the sea that, since the nineteenth century, far-reaching immunities of ships in distress from local jurisdiction were taken much for granted in relations between civilised nations. At this stage they came to be treated as rules of customary international law.'⁸⁵

(e) Meaning of innocence

Once it is established that passage conforms to Article 18 UNCLOS, it is necessary to establish that such passage is innocent.⁸⁶ The Convention defines 'innocent passage' in Article 19 paragraph 1 UNCLOS as follows: 'Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with the Convention and with other rules of international law.'⁸⁷ Churchill and Lowe, in this respect, hold that: 'These developments are rapidly transforming Article 19 of the 1982 Convention into a rule of customary international law.'⁸⁸ Although the words 'peace', 'good order', and 'security' are not defined in their singularity, they are defined collectively in Article 19 paragraph 2 UNCLOS. A long list of 'activities' follows in subparagraphs (a) to (l) as to when passage is not considered to be innocent:

- (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 of practice with weapons of any kind;

⁸⁴ Tanaka (n 4) 92.

⁸⁵ Schwarzenberger (n 41) 198.

⁸⁶ For a historical evolution of 'innocence' in the right of innocent passage, see Churchill and Lowe (n 4) 82-7.

⁸⁷ This provision follows very closely the provisions of Art 14 para 4 of the Territorial Sea Convention.

⁸⁸ Churchill and Lowe (n 4) 87.

- (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;⁸⁹
- (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.

Noteworthy in Article 19 paragraph 2 UNCLOS is reference to 'the territorial sea'. These activities listed in paragraphs (a) to (l) have to be committed by the foreign ship in the territorial sea and not, for instance, in the contiguous zone of the coastal State. This has to be contrasted with Article 33 paragraph 1 UNCLOS which does not allow a coastal State, within its contiguous zone, to enforce customs, immigration, fiscal, and sanitary legislation for an offence committed in the contiguous zone because such control is only allowed if the offence has been committed in its territory or territorial sea (except in the case of Article 303 paragraph 2 UNCLOS).⁹⁰ RR Churchill and AV Lowe opine that these detailed provisions were intended to produce 'a more objective definition, allowing coastal States less scope for interpretation, and so less opportunity for abuse of their right to prevent non-innocent passage'.⁹¹ Yoshifumi Tanaka opines that the term 'activities' in Article 19 paragraph 2 UNCLOS 'seems to suggest that the prejudicial nature of innocent passage is judged on the basis of the *manner* in which the passage is carried out, not the type of ship'.⁹² This approach seemed to

⁸⁹ Of relevance in the study of this subpara is UNCLOS, Art. 211(4) which supplements with:

Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.

⁹⁰ See Section 2.3.11.

⁹¹ Churchill and Lowe (n 4) 85.

⁹² Churchill and Lowe (n 4) 85 take a different approach: '[T]he reference to *activities* suggests that the mere presence or passage of a ship could not, under the 1982 Convention, be characterised as prejudicial to the coastal State, unless it were to engage in some activity. This would, at least in theory, widen the scope of the right of innocent passage.'

be echoed by the ICJ in the 1949 *Corfu Channel Case*. In that case, the Court relied essentially on the criterion of 'whether the *manner* in which the passage was carried out was consistent with the principle of innocent passage'.⁹³

The activities, though specific, permit too wide a leeway to the coastal State in making regulations. At least, such is the case with subparagraphs (a) and (c). However, these provisions strike at the very heart of the coastal State's security and possibly hence have had to be drafted in such a wide language so as to protect the security interests of the coastal State in its territorial sea. Another point is whether the activities in paragraphs (a) to (l) go beyond the definition of innocence in Article 19 paragraph 1 UNCLOS. On this point Yoshifumi Tanaka opines that: 'Unlike the second paragraph, the first paragraph makes no explicit reference to "activities".' The first paragraph leaves it up to the coastal State to establish where passage is 'prejudicial to the peace, good order or security' while in the second paragraph the activities listed are more to show foreign ships what should be avoided when traversing the territorial sea of a coastal State. This list is only by way of exemplification once the coastal State can give a wide interpretation to the expression 'prejudicial to the peace, good order and security' of the coastal State, thereby going beyond the 'activities' listed in Article 19 paragraph 2 UNCLOS. Subparagraph (l) conveys a vague meaning and allows for a subjective interpretation by the coastal State. Contrary to the previous subparagraphs which are specific, subparagraph (l) is generic under which the coastal State can include various hostile passages by foreign ships within its territorial sea. The Territorial Sea Convention does not contain any such list of instances where passage is not considered innocent. Indeed, Article 14 paragraph 5 of the Territorial Sea Convention sets out only one such instance: 'Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.' According to Malanczuk, '[i]n the *Corfu Channel Case* (ICJ Reports, 1949, pp. 4, 29–30) the International Court of Justice held that warships have a right of passage through international straits, but did not decide the wider question of the territorial sea in general.'⁹⁴

⁹³ Tanaka (n 4) 87. In the Court's words: 'It is the opinion of the Court, generally recognised and in accordance with international custom, that States in time of peace have a right to... [transit]... without the previous authorization of coastal States [through straits], provided that passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage... in time of peace' (*Corfu Channel Case (Merits)* [1949] ICJ Rep 28). Schwarzenberger (n 41) 196 comments on this case as follows: 'In situations pertaining to a *status mixtus* between peace and war, the Court conceded to the coastal State the right of regulating the passage of warships, but short of prohibiting such passage or making it dependent on special authorisation.'

⁹⁴ Malanczuk (n 18) 177.

The final question to be asked is whether the list is exhaustive. Possibly it might be argued that a negative answer seems more plausible as there might be other instances not listed in Article 19 paragraph 2 UNCLOS where any activity may take place in the territorial sea which is 'prejudicial to the peace, good order or security of the coastal State'. Illegal broadcasting which is not aimed 'at affecting the defence or security of the coastal State' is one such instance.⁹⁵ Nevertheless, it has to be put on record that this interpretation has been discarded by the Joint Statement by the USA and the USSR on Uniform Interpretation of Rules of International Law Governing Innocent Passage of 23 September 1989. This Joint Statement states in paragraph 3 that the list in Article 19 paragraph 2 UNCLOS is exhaustive.⁹⁶ It is doubtful whether this agreement has crystallized into customary international law.

(f) Submarines and other underwater vehicles

Article 20 UNCLOS provides that in the territorial sea, 'submarines and other underwater vehicles are required to navigate on the surface and to show their flag'.⁹⁷ *A contrario sensu*, if a submarine or an underwater vehicle does not navigate on the surface and flies its flag, that passage is not considered to be innocent. Although this requirement is not specifically listed in Article 19 paragraph 2 UNCLOS as an activity, the fact that it follows Article 19 and is found under the heading of 'Innocent Passage In The Territorial Sea' indicates that failure to abide by Article 20 UNCLOS gives rise to a breach of innocent passage, especially when one considers that submarines tend to be more of a military rather than a civilian nature. The fact that Article 20 UNCLOS was not included among the list of activities in Article 19 paragraph 2 UNCLOS might be indicative of the fact that the Third United Nations Conference on the Law of the Sea wanted to emphasize this type of activity. Moreover, it must be observed that Article 20 UNCLOS is modelled on Article 14 paragraph 6 of the Territorial Sea Convention and, in the latter Convention, Article 14 paragraph 6 follows Article 14 paragraphs 4 and 5 dealing with the meaning of innocent passage. So the separation of Article 20 UNCLOS from Article 19 UNCLOS should not, in any way, be interpreted to mean that if a submarine fails to comply with Article 20 UNCLOS, its passage will be innocent. In this case, the coastal State may require the submarine, once detected, to leave its territorial sea. The provision here refers to 'submarines' and 'other underwater vehicles'. The question which arises at this juncture is whether the submarine or other underwater vehicle might be a

⁹⁵ Unauthorized broadcasting from the high seas is regulated by UNCLOS, Art. 109 but this provision applies to the high seas, not to the territorial sea.

⁹⁶ This is a bilateral agreement between the United States of America and the Soviet Union (inherited by Russia following the dissolution of the USSR) (1989) 28 ILM 1444.

⁹⁷ The Territorial Sea Convention in Art 14 para 6 makes a similar provision with the sole exception that no reference is made in the Territorial Sea Convention to 'other underwater vehicles'.

merchant submarine or a military submarine. Second, what constitutes an underwater vehicle? Can there be underwater vehicles that do not fly a flag? Insofar as the first question is concerned, there is nothing in Article 20 which excludes a military submarine from having to comply with the provisions of Article 20 UNCLOS. Indeed, Article 30 UNCLOS requires warships—and a military submarine is a warship in its own right—to comply with the laws and regulations of the coastal State concerning passage. Second, the Convention does not define an ‘underwater vehicle’. What seems to be clear from the wording of Article 20 is that the ‘underwater vehicle’ has to be a ‘vehicle’ that is a self-propelled submersible. Instances of such underwater vehicles that are not submarines include crewless autonomous underwater vehicles. The third point which has to be addressed is the legal situation of underwater submersibles that are not self-propelled. These do not fall under the term ‘vehicle’. In such cases it appears that there is no obligation for such underwater vehicles ‘to navigate on the surface and to show their flag’.

(g) Laws and regulations of the coastal State and their publicity

Article 21 UNCLOS allows a coastal State to ‘adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea’. Such laws and regulations, however, have to conform to the UNCLOS and other rules of international law. So a coastal State may not adopt laws and regulations which are more restrictive than the provisions of the Convention or of other rules of international law since otherwise each State might come up with its own rules which run counter to international law. Although Article 21 paragraph 2 UNCLOS refers to ‘generally accepted international rules or standards’ it ‘provides no guidance as to what such “generally accepted” standards are, nor does it purport to set or adopt any [as] these standards are set by other widely accepted multilateral maritime treaties—the “other” law of the sea’.⁹⁸ Rules made by the coastal State can create an obstacle to maritime trade and hence the UNCLOS attempts to ensure that there is a universality of standards adopted by coastal States since otherwise no ship would be able to traverse the territorial sea of another State. By way of guidance, the UNCLOS sets out the subject matter of the laws and regulations which may be adopted by the coastal State:

⁹⁸ Norris (n 81) 83–4. Commander Norris focuses on five international standards ‘that are particularly significant and wide-ranging: the International Convention for the Safety of Life at Sea (SOLAS Convention); the International Management Code for the Safe Operations of Ships and for Pollution Prevention (ISM Code); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention); the International Convention for the Prevention of Pollution from Ships (MARPOL Convention); and the International Ship and Port Facility Security Code (ISPS Code)’, at 84–9. Norris also refers to port-State control programmes, at 89–92.

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

In order to ensure that no State prescribes laws and regulations which run counter to the international norm, Article 21 paragraph 2 UNCLOS specifically states that: 'Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.' This restriction is essential in order to ensure that one and the same law is applied by coastal States because if the obverse were to be the case international navigation would come to naught and only the coastal State's ships would be able to traverse its territorial sea but would not be in a position to enter the territorial sea of any other State which imposes different standards; hence the need to adopt *international* standards. Normally these standards are those adopted by the International Maritime Organization (IMO). ED Brown writes that non-compliance with these laws and regulations 'will render the offender liable to punishment' but 'will not render the passage non-innocent and thus liable to whatever steps are necessary to prevent its passage, unless its conduct amounts to one of the acts specified as non-innocent in Article 19'.⁹⁹ In addition, a coastal State is duty bound in terms of Article 21 paragraph 3 UNCLOS to give due publicity to all the laws and regulations which it might adopt in relation to innocent passage. An obligation is then placed by Article 21 paragraph 4 UNCLOS on all foreign ships exercising their right of innocent passage to comply with the coastal State's laws and regulations and 'all generally accepted international regulations relating to the prevention of collisions at sea'. International law on prevention of collisions at sea is regulated by the 1972 Convention on the International Regulations for Preventing Collisions at Sea.¹⁰⁰

⁹⁹ Brown (n 28) 58-9.

¹⁰⁰ Convention on the International Regulations for Preventing Collisions at Sea (London, adopted 20 Oct. 1972, entered into force 15 July 1977, as amended 1981, 1987, 1989, and 2001) 1050 UNTS 16.

(h) Sea lanes and traffic separation schemes in the territorial sea

Contrary to the Territorial Sea Convention, which did not contain any provision on sea lanes and traffic separation schemes, the UNCLOS distinguishes between sea lanes and traffic separation schemes in Article 22. Sea lanes are established sea routes for common use by ships for regular navigation purposes. Traffic separation schemes are defined as a 'routing measure aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes'.¹⁰¹ The Convention on the International Regulations for Preventing Collisions at Sea contains a provision in Rule 10 of the Rules annexed to that Convention which requests ships to observe traffic separation schemes adopted by the IMO.¹⁰² Sea lanes and traffic separation schemes are designated or prescribed by coastal States but the traffic separation schemes are adopted by the IMO and coastal States thus have to follow these schemes. Like charts and lists of geographical coordinates in Article 16 UNCLOS, sea lanes and traffic separation schemes have to be clearly indicated on charts and due publicity has to be given to such charts.¹⁰³ It is up to the coastal State to decide whether 'tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes'. Finally, when the coastal State designates sea lanes or prescribes traffic separation schemes, it has to take account of: (a) the recommendations of the competent international organization; (b) any channels customarily used for international navigation; (c) the special characteristics of particular ships and channels; and (d) the density of traffic. The UNCLOS makes special provisions for two categories of ships namely: (a) foreign nuclear-powered ships; and (b) ships carrying nuclear or other inherently dangerous or noxious substances.

First, insofar as nuclear-powered ships are concerned, these have to be foreign. If they are flying the flag of the coastal State, this provision does not apply. The same applies to foreign ships carrying nuclear or other inherently dangerous or noxious substances. Second, the Convention distinguishes between nuclear-powered ships and conventionally powered ships that carry nuclear or other inherently dangerous or noxious substances. Article 23 UNCLOS, which also finds no counterpart in the Territorial Sea Convention, requires such nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to 'carry documents and observe special precautionary measures established for such ships by international agreements'. The difficulty with this provision is that no definition is afforded of the words 'international agreements'. To which

¹⁰¹ Office for Ocean Affairs and the Law of the Sea, United Nations, *The Law of the Sea Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations, 1989) Appendix I, 47.

¹⁰² Convention on the International Regulations for Preventing Collisions at Sea.

¹⁰³ UNCLOS, Art. 22(4).

agreements is reference being made? Does the term 'international' imply only a multilateral convention or does it include also a bilateral treaty? A bilateral treaty is an international treaty in its own right once it is signed between two sovereign States. Contrary, for instance, to Article 21 paragraph 2 UNCLOS, the international agreements referred to in Article 23 are not qualified by the terms 'generally accepted'. This seems to indicate that even bilateral agreements may be included for the purposes of Article 23. As to which 'international agreements' reference is being made, the provision is silent in this respect. However, the IMO has compiled a list of certificates and documents required to be carried on board ships.¹⁰⁴

(i) Duties and rights of protection of the coastal State

The coastal State does not only have rights in its territorial sea: it also has duties. The four duties of the coastal State, three negative and one positive, are: (a) not to 'hamper the innocent passage of foreign ships through the territorial sea except in accordance' with the UNCLOS;¹⁰⁵ (b) not to 'impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage'; (c) not to 'discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State'; (d) 'to give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea'.¹⁰⁶ Furthermore, according to Judge Sir Gerald Fitzmaurice, coastal States have duties to perform with regard to foreign ships, 'for example policing and maintaining order; buoying and marking channels and reefs, sandbanks and other obstacles; keeping navigable channels clear and giving notice of danger of navigation; providing rescue services; lighthouses, lightships, bell-buoys, etc.'¹⁰⁷

Article 25 UNCLOS—which is modelled on Article 16 paragraphs 1 to 3 of the Territorial Sea Convention—sets out those cases where the coastal State may take the necessary measures to prohibit passage through the territorial sea which it considers not to be innocent. An example of suspending a foreign ship's innocent passage is when a cargo ship collides into an offshore fish farm and causes an undesirable amount of damage. When the foreign ship's passage is no longer innocent, the coastal State may take certain enforcement proceedings, varying from exercising criminal jurisdiction on board the foreign ship in terms of

¹⁰⁴ IMO, Revised List of Certificates and Documents Required to be Carried on Board Ships (17 Dec. 2004), <<http://www.imo.org/publications/supplementsandcdds/documents/certificatesonboardships.pdf>> accessed 8 May 2014.

¹⁰⁵ A similar provision is found in Art. 15 para 1 of the Territorial Sea Convention which states that: 'The coastal State must not hamper innocent passage through the territorial sea'.

¹⁰⁶ This provision in UNCLOS, Art. 24(2) is lifted from Art. 15(2) of the Territorial Sea Convention which, in turn, 'follows the *dictum* in the *Corfu Channel* judgment' ([1949] ICJ Rep 22). It codifies a well-established rule of customary international law. See Brown (n 28) 61, and Churchill and Lowe (n 4) 100.

¹⁰⁷ Separate opinion of Judge Sir Gerald Fitzmaurice in the *Fisheries Jurisdiction Case* [1973] ICJ Rep 3, 27 n 8.

Article 27 UNCLOS, expelling such a foreign ship from its territorial sea, as well as stopping, arresting, and seizing the foreign ship. In these cases, the action taken has to be commensurate to the infringement concerned. Otherwise the coastal State's action risks being declared disproportionate and excessive. Whatever action is taken by the coastal State, it has to be in line with applicable international law respecting necessary and reasonable force for the purpose of arresting the foreign ship.¹⁰⁸ Moreover, it may well happen that a ship might be traversing the territorial sea to proceed to internal waters or to a call at a port facility situated outside internal waters. In this case, the coastal State enjoys 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'.¹⁰⁹ In the Territorial Sea Convention no reference was made to a 'port facility outside internal waters'.¹¹⁰

(j) Temporary suspension of innocent passage

In terms of Article 25 paragraph 3 UNCLOS a 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. Such suspension shall take effect only after having been duly published.' Suspension of innocent passage by the coastal State must, however, satisfy the following five conditions: (a) suspension must be essential for the protection of its security; (b) suspension must be temporal; (c) suspension must be limited to specific areas of its territorial sea; (d) suspension must be without discrimination; and (e) suspension shall take effect only after having been duly published.¹¹¹

This provision is modelled on Article 16 paragraph 2 of the Territorial Sea Convention where discrimination is not qualified by the words 'in form or in fact' as is the case with the counterpart provision in the UNCLOS, and the UNCLOS provision further refers to 'weapons exercises' which are not even mentioned in the 1958 formulation of this provision. Coastal States suspend innocent passage, for instance, because of military vessel exercises or weapons testing.

(k) Charges

Innocent passage is not subject to any charge by the coastal State. However, the UNCLOS—following the identical provision of Article 18 of the Territorial Sea Convention—does allow one case where a coastal State can levy a charge upon a foreign ship passing through its territorial sea as payment 'only for specific services

¹⁰⁸ In the *I'm Alone Case (Canada v United States)* (1935) 3 RIAA 1609, the Commissioners held that the United States did not use 'necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel'.

¹⁰⁹ UNCLOS, Art. 25(2).

¹¹⁰ Territorial Sea Convention, Art. 16(2) refers only to 'ships proceeding to internal waters'.

¹¹¹ Tanaka (n 4) 94.

rendered to the ship'. These charges include rescue, pilotage, and towage charges. Such charges have to be levied without discrimination. No reference is made here to discrimination as to form or fact as in Article 25 paragraph 3 UNCLOS. The UNCLOS then establishes rules to be observed by: (a) merchant ships and government ships operated for commercial purposes;¹¹² and (b) warships and other government ships operated for non-commercial purposes.¹¹³ ED Brown considers that: 'The purpose of the original Article 18, as explained by the International Law Commission, was 'to bar any charges in respect of general services to shipping (light or buoyage dues, etc.) and to allow payment to be demanded only for special services rendered to the ship (pilotage, towage, etc).'¹¹⁴ Nonetheless, although a coastal State is fully entitled to levy charges in its internal waters, 'a ship in distress is exempted from local jurisdiction' once the ship 'merely desires to take temporary shelter and does not intend to unload its cargo'.¹¹⁵

2.2.3 Rules of criminal and civil jurisdiction

Rules of criminal jurisdiction on board a foreign ship are set out in the UNCLOS Article 27 while rules of civil jurisdiction in relation to foreign ships are set out in Article 28. These rules apply to merchant ships and government ships operated for commercial purposes. Warships and other government ships operated for non-commercial purposes are regulated by the provisions of Articles 29 to 32 UNCLOS. The provision on criminal jurisdiction in Article 27 UNCLOS is lifted from Article 19 of the Territorial Sea Convention.¹¹⁶ The essence of both provisions is similar. The provision of civil jurisdiction in Article 28 UNCLOS is once again lifted from the Territorial Sea Convention, from Article 20.¹¹⁷

Article 27 paragraph 1 UNCLOS uses the term '*should* not be exercised' while Article 27 paragraph 5 UNCLOS uses the term '*may* not take any steps'. The same distinction is made in Article 28 paragraphs 1 and 2 UNCLOS. ED Brown explains this distinction as follows:

The different formulations reflect the different jurisdictional nature of the zones in which the alleged criminal offence or the cause of the civil action took place. Thus, where the alleged offence has taken place on board a vessel during its passage through the territorial sea, the coastal State, by virtue of its sovereignty over that area, would be entitled to exercise jurisdiction. However, as a matter of comity rather than legal obligation, the coastal State is urged in Article 27(1) not to exercise jurisdiction

¹¹² UNCLOS, Arts 27 and 28.

¹¹³ UNCLOS, Arts 29–32.

¹¹⁴ Brown (n 28) 62.

¹¹⁵ Schwarzenberger (n 41) 199.

¹¹⁶ For a study of the rules of criminal jurisdiction in respect of ships in passage, see Sir Gerald Fitzmaurice (n 14) 103–8; O'Connell and Shearer (n 4) vol. 2, 912–52; Churchill and Lowe (n 4) 95–100.

¹¹⁷ There are in fact two minor differences between Arts 19, 20, and 21 of the Territorial Sea Convention and Arts 27 and 28 UNCLOS. For further details, see Brown (n 28) 63–4.

except in the four cases specified. The underlying policy is to favour innocent passage in the interests of freedom of international trade and navigation unless there are significant reasons to displace it by the demands of criminal justice. In the situation envisaged in Article 27(5), on the other hand, the alleged offence will have taken place beyond the territorial sea, that is, beyond the reach of the coastal State's criminal law. In that case it is therefore proper that the mandatory phrase 'may not' should be employed to indicate a clear prohibition against exercise of the coastal State's criminal jurisdiction. Similar reasoning explains the distinction in Article 28.¹¹⁸

(a) Criminal jurisdiction

Criminal jurisdiction is bestowed upon the coastal State in Article 27 UNCLOS. On the one hand, in terms of Article 27 paragraph 1 UNCLOS, the coastal State does not enjoy criminal jurisdiction on board a foreign ship traversing its territorial sea to: (a) 'arrest any person'; or (b) 'conduct any investigation in connection with any crime committed on board the ship during its passage'. On the other hand, the same provision recognizes four exceptions to this rule where the coastal State enjoys criminal jurisdiction: (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 the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.¹¹⁹

If, however, the ship in question is not simply traversing the coastal State's territorial sea but has left the coastal State's internal waters to reach that State's territorial sea, the situation is different because in this case Article 27 paragraph 2 UNCLOS empowers the coastal State 'to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through its territorial sea'. The limitations on the coastal State envisaged in Article 27 paragraph 1 UNCLOS do not in any way restrict the coastal State's sovereignty when the ship in question has reached its territorial sea through its internal waters.

(b) Notification of diplomatic agent or consular officer of the flag State

In terms of Article 27 paragraph 3 UNCLOS when a coastal State exercises its criminal jurisdiction over a foreign ship passing through its territorial sea, the coastal State must, at the request of the foreign ship's master, 'notify a diplomatic agent or consular officer of the flag State'. This notification has to reach the agent or officer before any steps are taken but, in emergency situations, such notification

¹¹⁸ Brown (n 28) 64. See also Harris (n 19) 357–8.

¹¹⁹ The applicable international convention is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988, entered into force 11 Nov. 1990) 1582 UNTS 95.

may be given even while the coastal State has embarked upon the exercise of its criminal jurisdiction. Although this provision does not define the terms 'diplomatic agent' and 'consular officer', regard should be given to applicable international law. The expression 'diplomatic agent' is defined in Article 1 paragraph (e) of the Vienna Convention on Diplomatic Relations 1961¹²⁰ while the term 'consular officer' is defined in Article 1 paragraph 1(d) of the Vienna Convention on Consular Relations 1963.¹²¹ Furthermore, the coastal State is also obliged to facilitate contact between the diplomatic agent or consular officer, as the case may be, on the one hand, and the ship's crew, on the other.

Two further rules are made by Article 27 UNCLOS which further restrict the exercise of the coastal State's criminal jurisdiction over the territorial sea: (a) before an arrest is made, the coastal State 'shall have due regard to the interests of navigation';¹²² and (b) no action may be taken by a coastal State, except as provided in Part XII of UNCLOS regarding port State enforcement¹²³ or 'with respect to violations of laws and regulations adopted in accordance with Part V' of the UNCLOS against a ship traversing its territorial sea 'in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters'. Should the coastal State act in breach of Article 27 UNCLOS the ship can always request the flag State to espouse a claim on the ship's behalf against the coastal State.¹²⁴ The term 'waters', in this context, means both the internal waters and the territorial waters. Nevertheless, as with criminal jurisdiction, Article 27 paragraph 2 UNCLOS, the coastal State may still exercise civil jurisdiction over a foreign ship 'lying in the territorial sea, or passing through the territorial sea after leaving internal waters'.¹²⁵ In this case, it is possible 'to levy execution against or to arrest, for the purpose of any civil proceedings' such a ship.¹²⁶

(c) Civil jurisdiction over foreign ships

Contrary to the case of criminal jurisdiction over foreign ships traversing the territorial sea, the civil jurisdiction of a coastal State is limited.¹²⁷ In effect, the obtaining rule, in terms of Article 28 paragraphs 1 and 2 UNCLOS, is that the coastal State: (a) 'should not stop or divert a foreign ship passing through

¹²⁰ Vienna Convention on Diplomatic Relations (signed 18 Apr. 1961, entered into force 24 Apr. 1964) 500 UNTS 95.

¹²¹ Vienna Convention on Consular Relations (signed 24 Apr. 1963, entered into force 19 Mar. 1967) 596 UNTS 261.

¹²² UNCLOS, Art. 27(4).

¹²³ UNCLOS, Art. 218.

¹²⁴ See e.g. *La Grande Case (Germany v United States)* [2001] ICJ Rep, para 42.

¹²⁵ UNCLOS, Art. 28(3).

¹²⁶ UNCLOS, Art. 28(3).

¹²⁷ For a study of the rules of civil jurisdiction in respect of ships in passage, see O'Connell and Shearer (n 4) vol. 2, 859–918.

the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship';¹²⁸ and (b) 'may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only 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'.¹²⁹

While Article 27 paragraph 1 UNCLOS, refers to a 'person' on board a ship, Article 27 paragraph 2 UNCLOS refers to a 'ship'. Again, the first paragraph uses the words 'should not' and the second paragraph 'may not'. The words 'should not' indicate that the UNCLOS is not establishing a mandatory duty, as opposed to 'may not' which indicates a mandatory duty. Paragraph 2 does allow execution or arrest of a ship with regard to claims, for instance, related to pilotage, towage, collisions, and salvage operations. Furthermore, such obligation or liability must have arisen 'in the course or for the purpose of its voyage through the waters of the coastal State', that is, when the ship is in the internal waters or territorial waters of the coastal State. The words 'in the course of' the voyage mean that the foreign ship is traversing the territorial waters of a coastal State when these obligations or liabilities are assumed or incurred, while the words 'for the purpose of' its voyage mean that the foreign ship might assume or incur such obligations or liabilities even when the ship is still in the coastal State's port. That said, however, the UNCLOS contains an exception to the rule enunciated in paragraph 2 and allows a coastal State 'to levy execution against or to arrest a foreign ship' which is 'lying in the territorial sea, or passing through the territorial sea after leaving internal waters' provided that such power is granted by the laws of the coastal State. In other words, if the municipal law of a coastal State allows it to levy execution against or to arrest a ship within its internal/territorial waters, the UNCLOS recognizes such right. But there has to be a specific municipal law to that effect for paragraph 3 to come into operation. When paragraphs 2 and 3 are read together, the obligation or liability assumed or incurred may materialize when the ship is in passage through the territorial sea or when the ship was still at port.

(d) Warships and other non-commercial government ships

The Territorial Sea Convention contained a single provision in Article 23 on warships where it provided that: 'If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.' This provision is found in Article 30 UNCLOS. The UNCLOS attempts to secure freedom of navigation in the territorial sea for warships. Warships do not need, in terms of Article 30 UNCLOS, to give prior notice of their intentions to pass through the territorial sea

¹²⁸ UNCLOS, Art. 28(1).

¹²⁹ UNCLOS, Art. 28(2).

of a coastal State. Nor do they need to seek and obtain the consent of the coastal State to traverse the latter's territorial sea. However, a case could be made that the coastal State may require prior notification—as distinct from prior authorization—by a warship in terms of regulations made by the coastal State in terms of Article 21 paragraph 1(a) UNCLOS.¹³⁰ This is, however, a debatable point.¹³¹ Apart from Article 30, the UNCLOS has three other provisions regulating warships not found in the Territorial Sea Convention—Articles 29, 31, and 32—and two other provisions which regulate other non-government ships operated for non-commercial purposes (other than warships)—Articles 31 and 32. For the purpose of the UNCLOS, a warship means 'a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.'

In the case of a warship, the coastal State may require it to leave its territorial sea immediately. Whereas the same cannot be said for other foreign government ships operated for non-commercial purposes traversing the territorial sea. This puts warships in a privileged position because if they infringe the coastal State's laws and regulations, they are asked to leave. It must be borne in mind that warships enjoy sovereign immunity and hence are not in the same position as merchant ships. In the case of other government non-commercial ships further action can be taken against them. The UNCLOS further provides in Article 31 that: 'The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.'

While the flag State has to bear international responsibility for any loss or damage, there is no provision in the UNCLOS which obliges the coastal State to bear international responsibility when it acts in a manner contrary to the provisions of the UNCLOS, relating to innocent passage and loss or damage to a foreign ship exercising its right of innocent passage through the said coastal State's territorial sea.¹³² Finally, Article 32 UNCLOS states that: 'With such exceptions as are contained in subsection A and in Articles 30 and 31, nothing in this Convention

¹³⁰ See Tanaka (n 4) 91. For a historical development of this provision, see Brown (n 28) 64–72. For a historical development of the international law of the sea on warships, see O'Connell and Shearer (n 4) vol. 2, 274–97; and Churchill and Lowe (n 4) 88–92.

¹³¹ For instance ED Brown does not agree that prior notification is possible under the UNCLOS. See Brown (n 28) 72.

¹³² Brown (n 28) 61.

affects the immunities of warships and other government ships operated for non-commercial purposes.’

2.3 The Contiguous Zone

The next maritime regime to be considered is the contiguous zone. The contiguous zone is regulated primarily, though not exclusively, by Article 33 UNCLOS.¹³³ It provides as follows:

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.

This provision is found in Part II of the UNCLOS dealing with the territorial sea and the contiguous zone. It is section 4 of Part II which regulates the contiguous zone. However, the contiguous zone does not form part of the territorial sea, even though it is measured—in terms of Article 33 paragraph 1 UNCLOS—from the same baselines that the territorial sea is measured. Interestingly, the contiguous zone is not afforded—within the structure of the UNCLOS—a Part in its own right as is the case with other maritime zones. On the contrary, it is included—following the model of the Territorial Sea Convention—in Part II of the UNCLOS, which is nevertheless mainly devoted to the regulation of the territorial sea regime. According to Sir Gerald Fitzmaurice, contiguous zone rights are non-exclusive, involve no proprietary element, and ‘have a common element inasmuch as they all involve the protection of the *public* laws and interests of the coastal State in certain spheres’.¹³⁴ Yoshifumi Tanaka notes that the provision under study ‘contains no reference to internal waters’. However, it would be inconceivable that the drafters of this provision intended to exclude the internal waters since these waters are under the territorial sovereignty of the coastal State. Thus it appears to be reasonable to consider that internal waters are also included in the scope of its ‘territory or territorial sea’.¹³⁵ The conventional forerunner of

¹³³ See United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea* (United Nations, 1983).

¹³⁴ Fitzmaurice (n 14) 119–20.

¹³⁵ Tanaka (n 4) 122.

the UNCLOS is the Territorial Sea Convention. It provides in Article 24 as follows:

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
 - (a) prevent infringements of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
 - (b) punish infringements of the above regulations committed within its territory or territorial sea.
2. The contiguous zone may not extend beyond twelve nautical miles from the baseline from which the breadth of the territorial sea is measured.¹³⁶

Two differences between the Territorial Sea Convention and the UNCLOS are that in the 1982 Convention the contiguous zone 'can be used to control traffic in archaeological and historical objects found at sea' in terms of Article 303 paragraph 2 UNCLOS and that the contiguous zone in terms of Article 33 paragraph 2 UNCLOS may 'extend to 24 miles from the territorial sea baseline, instead of 12 miles which is the 1958 Convention limit'.¹³⁷

2.3.1 Control versus sovereignty with reference to the contiguous zone

The historical evolution of the contiguous zone has been discussed by various authors.¹³⁸ Yoshifumi Tanaka maintains that the origins of the contiguous zone date back to the time of the Hovering Acts of Great Britain, in the eighteenth century.¹³⁹ Peter Malanczuk, opines that:

At various periods of history different States have claimed limited rights in areas of the high seas adjacent to their territorial seas, or have claimed different widths of territorial sea for different purposes. Between the two world wars the French writer Gidel propounded the theory of the contiguous zone as a means of rationalising the conflicting practice of States. At that time the British government attacked the contiguous zone as a surreptitious means of extending the territorial sea, and failure to agree about the contiguous zone was one of the main reasons for the failure of the League of Nations Codification Conference in 1930. However . . . , opposition has faded away since then¹⁴⁰

¹³⁶ I have omitted para 3 as it is reproduced in conjunction with the discussion of the 'Delimitation of the Contiguous Zone' in Section 2.3.10.

¹³⁷ Harris (n 19) 385.

¹³⁸ See e.g. Churchill and Lowe (n 4) 132–5; AV Lowe, 'The development of the concept of the contiguous zone' (1981) 52 *BYIL* 109; S Oda, 'The Geneva Conventions on the Law of the Sea: Some Suggestions for their Revision' (1968) 1(2) *Natural Resources Lawyer* 103, 107–10; S Oda, 'The Concept of the Contiguous Zone' (1962) 11 *ICLQ* 131; Brown (n 28) 128–39; Colombos (n 2) ch. 3, 78–161; O'Connell and Shearer (n 4) vol. 2, 1034–61; Rothwell and Stephens (n 4) 77–80.

¹³⁹ Tanaka (n 4) 121.

¹⁴⁰ Malanczuk (n 18) 182.

On the other hand, Malcolm Shaw opines that 'such contiguous zones were clearly differentiated from claims to full sovereignty as parts of the territorial sea, by being referred to as part of the high seas over which the coastal State may exercise particular rights.' He further contends that the contiguous zone has to be specifically claimed, not as in the case of the territorial sea which is part and parcel of the coastal State's territory.¹⁴¹ The contiguous zone is justified by Georg Schwarzenberger and ED Brown, on the basis of the rules governing the principle of self-defence which can be summarized under three heads:

- (1) Measures of self-defence may be taken against (a) illegal acts or omissions which are attributable to another subject of international law; (b) acts of individuals, ships or aircraft which disentitle their home State from the grant of diplomatic protection, or any other subject of international law from the grant of functional protection; (c) similar acts of individuals, ships or aircraft lacking a subject of international law that is entitled to grant diplomatic or functional protection.
- (2) The need for self-defence must be compelling and instant.
- (3) Measures of self-defence comprise any action, including hot pursuit from territorial waters into the high seas, which is necessary to repel any imminent or present invasion of the rights of a subject of international law.¹⁴²

The coastal State exercises sovereignty over the territorial sea. This means that—subject to certain limitations imposed upon the coastal State by the UNCLOS, such as the right of innocent passage¹⁴³—the coastal State's jurisdiction over the territorial sea is absolute. Nevertheless, the same cannot be said for the contiguous zone, that is, that zone which is adjacent to the territorial sea. This is because, historically speaking, the sea enfolded in the contiguous zone is high seas and, following the UNCLOS, may be both high seas and EEZ seas. Hence a distinction has to be drawn between the legal status of the territorial sea, on the one hand, and that of the contiguous zone, on the other. In the former maritime zone, the coastal State has the right to enforce all its laws in the territorial sea (subject to the right of innocent passage); in the latter, it has only control rights. Lloyd C Fell states, on this point, that 'the term "contiguous zone" has now generally come to be applied to those areas in which the littoral state exercises limited competence for special purposes, as distinguished from the "territorial waters", over which it has sovereignty'.¹⁴⁴ RR Churchill and AV Lowe further distinguish between legislative jurisdiction—which a coastal State does not enjoy within its contiguous zone—and enforcement jurisdiction—which a coastal State does enjoy within its contiguous zone, though this is limited to the four branches of the law specifically

¹⁴¹ Shaw (n 39) 579.

¹⁴² Schwarzenberger and Brown (n 43) 106.

¹⁴³ See UNCLOS, Arts 17–26.

¹⁴⁴ LC Fell, 'Maritime Contiguous Zones' (1964) 62(5) *Michigan Law Review* 848, 849–50.

listed by Article 33 paragraph 1 UNCLOS (customs, fiscal, immigration, and sanitary laws).¹⁴⁵ But there are two other UNCLOS provisions—Article 303 paragraph 2 (laws regulating archaeological and historical objects) and Article 111 paragraphs 1 and 4 (right of hot pursuit)—which also refer to the contiguous zone and therefore have to be considered insofar as enforcement jurisdiction is concerned.

The control which the coastal State exercises is over the contiguous zone. But does the contiguous zone include the air space above it? The answer is ambiguous because Article 33 UNCLOS is silent on the matter and does not include a specific reference to the air space above the contiguous zone. However, the right to hot pursuit in Article 111 paragraphs 5 and 6 UNCLOS refers to 'aircraft'. This has to be contrasted to Article 2 paragraph 2 and Article 49 paragraph 2 UNCLOS which adopt a different approach. In both provisions it is expressly stated that State sovereignty in the territorial sea 'extends to the air space' over the territorial sea and the archipelagic waters, as the case may be, as well as to the respective 'bed and subsoil'. In the absence of a specific provision on the lines of Article 2 paragraph 2 and Article 49 paragraph 2 UNCLOS, it has to be understood that the air space above the contiguous zone is included in the measures of control exercised by the coastal State. This is stated in view of the canon of interpretation *ubi lex voluit dixit ubi noluit tacuit*. The same point can be made with regard to the seabed and its subsoil which are also excluded from the contiguous zone and hence the coastal State has no enforcement jurisdiction in the case of the airspace over the contiguous zone and on the seabed and subsoil beneath the waters of the contiguous zone. Moreover, the provisions of Article 33 UNCLOS refer only to the coastal State. It is the coastal State which therefore exercises the controls mentioned in that provision. Nevertheless, it must be reckoned that there might be situations where the coastal State is also a flag State or a port State or both. According to Yoshifumi Tanaka, 'Article 33 of the UNCLOS contains no duty corresponding to article 16, which obliges the coastal State to give due publicity to charts. It would seem to follow that there is no specific requirement concerning notice in the establishment of the contiguous zone.'¹⁴⁶

2.3.2 Enforcement jurisdiction of the coastal State in the contiguous zone

The contiguous zone falls under the high seas or the EEZ maritime regimes. This is because the contiguous zone is not part of a coastal State's territorial sea. Therefore the coastal State does not enjoy—within the contiguous zone—the same jurisdiction it enjoys in its own territorial sea. On the contrary, the coastal State in its contiguous zone enjoys only control rights as set out in Article 33 of the

¹⁴⁵ Churchill and Lowe (n 4) 137.

¹⁴⁶ Tanaka (n 4) 121.

UNCLOS as well as certain ancillary rights as envisaged by the UNCLOS in Articles 111 and 303, as will be explained. But control and ancillary rights are very much limited rights and cannot be compared to the jurisdiction exercised by a sovereign coastal State in its own territorial sea. Although the coastal State exercises control in its coastal zone, the jurisdictional rights which the coastal State exercises within its contiguous zone are exercised concurrently with the flag State, which still retains jurisdiction over its ships. As Commander Andrew J Norris puts it: 'Again, these coastal-state jurisdictional rights in its contiguous zone are exercised concurrently with those of the flag state, which retains exclusive jurisdiction over its vessels in all other respects (i.e. for all nonresource, non-FISC [fiscal, immigration, sanitary, or customs] violations) while its vessels are in foreign contiguous zones.'¹⁴⁷

2.3.3 Claiming a contiguous zone

The contiguous zone has to be claimed in order to become operational. This means that a coastal State may opt not to claim a contiguous zone as forming part of its maritime zones. Article 33 paragraph 2 UNCLOS states that the 'contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured'. The Convention does not stipulate that the contiguous zone has to be of 12 nm seaward beyond the outer limit of the territorial sea. Therefore, each coastal State is at liberty to establish the exact breadth of its contiguous zone (and, also, in turn, of its territorial sea). The contiguous zone can, as a matter of fact, be less than the stipulated 12 nm. Indeed, the UNCLOS does not allow for any exceptions where the breadth of the contiguous zone can be extended beyond what is envisaged in Article 33 paragraph 2 UNCLOS. ED Brown opines that 'if a State claimed no more than a 3-mile territorial sea it would be entitled to extend its contiguous zone for a further 21 miles'.¹⁴⁸ The contiguous zone is measured from the same baselines from which the territorial sea is measured.

The high seas have, over time, seen a drastic reduction of their breadth to the advantage of a number of other maritime zones. The territorial sea, which traditionally claimed a breadth of 3 nm, is today universally recognized as enjoying a maximum breadth of 12 nm. Further inroads to the breadth of the high seas came through a 200-nm EEZ and a further 12-nm contiguous zone. While in the past the high seas were only 3 nm away from the coast, today they have been pushed further back seawards up to 200 nm where an EEZ is claimed to its maximum possible breadth. This has meant that with the extension of the coastal State's powers over time, the freedom of the high seas has been correspondingly reduced. As Malcolm Shaw put it:

¹⁴⁷ Norris (n 81) 82.

¹⁴⁸ Brown (n 28) 129.

Historically some states have claimed to exercise certain rights over particular zones of the high seas. This has involved some diminution of the principle of the freedom of the high seas as the jurisdiction of the coastal State has been extended into areas of the high seas contiguous to the territorial sea, albeit for defined purposes only. Such restricted jurisdiction zones have been established or asserted for a number of reasons, for instance, to prevent infringement of customs, immigration or sanitary laws of the coastal State, or to conserve fishing stocks in a particular area, or to enable the coastal State to have exclusive or principal rights to the resources of the proclaimed zone.¹⁴⁹

2.3.4 Overlaps between the contiguous zone and other maritime regimes

The UNCLOS not only allows, but even specifically regulates, overlaps between different maritime zones. For instance, the territorial sea overlaps with the contiguous zone. Nonetheless, the contiguous zone may extend up to a maximum 12 nm further into the high seas where a 12-nm territorial sea is declared or, should an EEZ have been declared, into EEZ waters. In reality, the coastal State does not need to exercise the controls mentioned in Article 33 paragraph 1 UNCLOS in its own territorial sea, once the coastal State—in terms of Article 2 UNCLOS—enjoys sovereignty over the territorial sea. However, insofar as the high seas or EEZ are concerned—and the contiguous zone is part of one of these, not of the territorial sea—the coastal State may exercise the controls listed in Article 33 paragraph 1 UNCLOS, which it could not otherwise exercise were it not for the said provision.

Another example is where the contiguous zone overlaps with the EEZ. If a coastal State declares an EEZ, the high seas are shifted further seaward. In this case, the contiguous zone will overlap with the EEZ rather than with the high seas. The contiguous zone gives coastal States control over areas of the sea which the same coastal State may claim as falling within its EEZ. This is because Article 55 UNCLOS—which establishes the breadth of the EEZ—states that ‘the exclusive economic zone is an area beyond and adjacent to the territorial sea’. Article 86 UNCLOS—which establishes the breadth of the high seas more by exclusion than by inclusion—does so by excluding other maritime zones when it provides that the high seas are those parts of the sea ‘that are not included in the exclusive economic zone, [and] in the territorial sea’. Interestingly enough, the contiguous zone is not mentioned in this provision because the UNCLOS considers contiguous zone waters to be high seas where no EEZ is declared or exclusive economic zone waters when an exclusive economic zone is claimed. As Ian Brownlie states:

It is clear from the provisions of Article 55 of the Convention that the contiguous zone, if it is claimed, will be superimposed upon the exclusive economic zone (if such

¹⁴⁹ Shaw (n 39) 578.

a zone is claimed). In the absence of a claim to an exclusive economic zone, the areas concerned form part of the high seas (see Art. 86 of the Convention of 1982). It follows that the rights of the coastal State in such a zone do not amount to sovereignty, and thus other states have rights exercisable over the high seas except as they are qualified by the existence of jurisdictional zones.¹⁵⁰

2.3.5 Juridical nature of control measures in the contiguous zone

It is pertinent to note that—with one exception in Article 303 paragraph 2 UNCLOS—the control measures which a State may exercise in its own contiguous zone are not directed at the prevention of, or the punishment of, infringements occurring in the contiguous zone but of infringements occurring in the coastal State's territory or territorial sea. Hence, the power which a coastal State may exercise within its contiguous zone is in relation to infringements of laws and regulations committed in its territorial sea, even if the coastal State is given the power to enforce such infringements outside its territory or territorial sea.¹⁵¹ This brings to mind port State jurisdiction under Article 218 paragraph 1 of the UNCLOS where the port State may take action against a vessel for: 'any discharge from that vessel outside the internal waters, territorial sea or EEZ of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.' Indeed, not all the coastal State's laws or regulations which are infringed on its territory or territorial sea may be prevented or punished. This is because Article 33 paragraph 1 UNCLOS limits such laws and regulations only to: (a) customs; (b) fiscal; (c) immigration; and (d) sanitary. If the infringement does not fall under any of these categories—serious as it might be—it is still not lawful for the coastal State to exercise any form of control in the contiguous zone. In this regard Malcolm Shaw opines that:

While sanitary and immigration laws are relatively recent additions to the rights enforceable over zones of the high seas and may be regarded as stemming by analogy from customs regulations, in practice they are really only justifiable since the 1958 Convention. On the other hand customs zones have a long history and are recognised in customary international law as well. Many states, including the UK and the USA, have enacted legislation to enforce customs regulations over many years, outside their territorial waters and within certain areas, in order to suppress smuggling which appeared to thrive when faced with territorial limits of three or four miles.¹⁵²

2.3.6 Fourfold classification of enforceable laws

The laws whose infringement in the coastal State's territory or territorial sea may be enforced by the coastal State are fourfold: customs, fiscal, immigration, and

¹⁵⁰ Brownlie (n 2) 192–3.

¹⁵¹ For a discussion of this point, see Fell (n 144) 848–64.

¹⁵² Shaw (n 39) 579.

sanitary. This list is an exhaustive one and cannot be extended by the coastal State, for instance, by including fisheries and security laws and regulations. To do so would be repugnant of Article 33 paragraph 1 UNCLOS. Nevertheless, these four branches of the law are not defined by the Convention and hence it is up to the coastal State to determine in a reasonable manner what falls exactly under each one of these four categories of laws and, where appropriate, following international standards, where extant. State practice in this field might be indicative of how States have, in the past, applied and interpreted these terms. For instance, fiscal laws come in different shapes and guises. They can come in the form of direct or indirect taxation and even under various names, ranging from taxes to levies, charges to contributions, duties to fees, tariffs to dues, etc.; the term 'sanitary' may be given a restrictive interpretation to mean 'health' or an extensive interpretation to include therein 'pollution' or 'occupational health and safety', not to mention 'animal health or 'plant health'.

2.3.7 Typology of legislation

Article 33 paragraph 1 UNCLOS refers to both 'laws and regulations'. These terms are to be understood from a municipal rather than from an international law point of view. Laws are binding norms enacted by the highest authority of the land—usually a Legislature—while regulations would be those inferior norms which are not made by the Legislature but some other body or person who has been delegated with such law-making powers. It is more the business of domestic law to determine what is a 'law' and a 'regulation' in terms of a State's distribution of legislative authority. Moreover, the term 'regulation' does not apply only to regulations but to norms of a like nature such as rules, orders, bye-laws, warrants, schemes, etc. The *ejusdem generis* canon of interpretation has to be adopted in this case as the term 'regulation' by itself is not an exhaustive type. Hence all other forms—apart from regulations—of subsidiary legislation are included. The same applies for 'laws' where other different terms may be used in substitution therefore, such as ordinances, proclamations, decrees, etc.

2.3.8 Prevention and punishment

In the contiguous zone, the coastal State may only exercise two controls: one of prevention and the other of punishment. The first is proactive; the second is reactive. In the former case, the coastal State can take all preventive measures to ensure that customs, fiscal, immigration, and sanitary laws are not breached on its territory and in its territorial sea. Preventive measures may include border control officers taking 'enforcement action in relation to ships in the contiguous zone, including inspection of the vessels involved. They will also impose certain obligations on masters of these vessels, such as a duty to cooperate with the officials, to allow them upon request to conduct inspections on board and to hand over

passenger lists, as well as other relevant documentation and information.¹⁵³ On the other hand, the coastal State enjoys a reactive role consisting in apprehending, arresting, and bringing would-be violators before the competent organs of the coastal State so that they may be dealt with according to law. To punish 'effectively enables the Coast Guard to take enforcement action, such as the arrest of a vessel in the contiguous zone'.¹⁵⁴ Harm M Dotinga and Alex G Oude Elferink distinguish between prevention and punishment by stating that: 'Whereas prevention will ordinarily be aimed at inward-ships, punishment will be aimed at outward-bound ships.'¹⁵⁵

2.3.9 The extent of infringements

The Convention does not restrict coastal States as to what type of infringement they may resort. Hence, the infringement could be of a criminal provision, an administrative provision, an environmental provision, or any other provision which the coastal State might include in the four types of laws in question. The infringement need not necessarily be an infringement of the criminal law since it depends on the circumstances of each case and how the provisions are set out. For instance, an administrative infringement in the form of a pecuniary penalty may apply or else it might be that the provision in question allows the judicial authorities to seize property (including ships and vessels) or order the confiscation of property from the would-be offender. It is essentially up to the coastal State to decide what form to give to such infringement. For instance, if the infringement concerns a sanitary law, it could be that the coastal State, as a form of punishment, might require the transgressor to clean up the bay contaminated with toxic or noxious pollutants. The UNCLOS bestows considerable discretion upon coastal States in this respect.

2.3.10 Delimitation of the contiguous zone

A situation may arise where it is necessary to delimit the contiguous zone between States with opposite or adjacent coasts. The Territorial Sea Convention on the Territorial Sea and the Contiguous Zone 1958 contains a provision in Article 24 paragraph 3, which regulates the delimitation of the contiguous zone as follows: '3. 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 contiguous zone beyond the median line every point of which is

¹⁵³ HM Dotinga and AG Oude Elferink, 'Current Legal Developments: The Netherlands' (2007) 22(2) *IJMCL* 317, 322.

¹⁵⁴ Dotinga and Elferink (n 153) 322.

¹⁵⁵ Dotinga and Elferink (n 153) 321. The same point is made by Hugo Caminos, 'Contiguous Zone' in R Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012), <<http://opil.ouplaw.com/home/EPIL>> accessed 9 May 2014. See also Fitzmaurice (n 14) 113–15.

equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.’ This provision has not been included in the UNCLOS under the contiguous zone regime. The issue which arises at this juncture is whether the provisions of Article 15 UNCLOS—which currently apply to the delimitation of the territorial sea between States with opposite or adjacent coasts—apply also to the contiguous zone. The answer must be in the negative because the UNCLOS is silent on this matter. One must keep in mind two points: first, that the contiguous zone might overlap with an EEZ, when one has been declared. In such a case it is this EEZ which should be delimited and this should be done in terms of Article 74 UNCLOS. Second, where no EEZ is declared the contiguous zone overlaps with the high seas. The UNCLOS does not provide for the delimitation of the high seas as this would run counter to freedom of the high seas principle set out in Article 87 UNCLOS.

Although the UNCLOS does provide for the delimitation of the territorial sea in Article 15, of internal waters within archipelagic waters in Article 50, of the exclusive economic zone in Article 74, and of the continental shelf in Article 83, the conclusion which can be drawn from these provisions—*a contrario sensu*—is that States can exercise concurrent control within such a zone. As ED Brown maintains: ‘It is not in fact surprising that an overlapping contiguous zone would not normally give rise to conflict between the neighbouring States concerned. After all, the zone exists to enable the coastal State to give added protection to interests located in its territory and territorial sea and there would not normally be any connection between those interests and the corresponding interests of a neighbouring State.’¹⁵⁶

2.3.11 Archaeological and historical objects found at sea

Article 303 paragraph 2 UNCLOS, extends enforcement jurisdiction of the coastal State to archaeological and historical objects found at sea within the contiguous zone. This is done through a legal presumption. The provision reads as follows: ‘In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.’ A *juris et de jure* presumption is established in this provision as opposed to a *juris tantum* presumption. This is because the presumption in question is an irrebuttable one: it is a legal presumption which cannot in any way be negated by proof to the contrary; otherwise, the whole scope of this provision would come to naught. The presumption states that where archaeological and historical objects

¹⁵⁶ Brown (n 28) 137–8. Two problematic situations are envisaged by Professor Brown in his writings.

are found in the contiguous zone, those same objects—through a legal fiction—are considered to have been found in the territory or in the territorial sea of a coastal State and such coastal State has enforcement jurisdiction in its contiguous zone to control traffic in such objects. Yoshifumi Tanaka considers Article 303 paragraph 2 UNCLOS as relying on a 'dual legal fiction. First, the removal of archaeological and historical objects is to be regarded as an infringement of customs, fiscal, immigration, or sanitary laws and regulations of the coastal State. Second, the removal of archaeological and historical objects within the contiguous zone is to be considered as an act within the territory or the territorial sea.'¹⁵⁷

2.3.12 Hot pursuit through the contiguous zone

Hot pursuit cuts across maritime zones. It ensures that a foreign ship is arrested before it escapes to the high seas where the coastal State would have no jurisdiction over it. Article 111 UNCLOS regulates the 'right of hot pursuit'. Article 111 paragraphs 1 and 4 UNCLOS reads as follows:

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reasons to believe that the ship has violated the laws and regulations of that State. Such 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, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

...

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

Article 111 UNCLOS is based on Article 23 of the Geneva Convention on the High Seas 1958¹⁵⁸ which regulates hot pursuit. In so far as Article 111 paragraph 1 is concerned, this provision is identical to Article 23 paragraph 1 of the 1958 High Seas Convention with the sole exception that in Article 111 paragraph 1, there is a reference to 'archipelagic waters' which is of course not

¹⁵⁷ Tanaka (n 4) 123.

¹⁵⁸ Convention on the High Seas (Geneva, adopted 29 Apr. 1958, entered into force 30 Sept. 1962) 450 UNTS 82.

found in the 1958 Territorial Sea Convention. The same can be said for Article 111 paragraph 4, which is also identical to Article 23 paragraph 3 of the 1958 Geneva High Seas Convention, save for the addition of the terms 'exclusive economic zone and continental shelf' in the 1982 provision. Further observations can be made on hot pursuit. First, hot pursuit cannot start from the contiguous zone. On the contrary, it has to start from the territorial sea. Second, hot pursuit from the territorial sea into the contiguous zone has to be 'uninterrupted'. Third, the right of hot pursuit comes to an automatic end once the vessel enters the territorial sea of a third State or of its own flag State. Fourth, there has to be a violation of the laws and regulations of the coastal State. If the violation still has to take place, there is no right of hot pursuit. However, it need not necessarily be a completed offence: the violation could still consist of an attempted offence or of a conspiracy to commit an offence if the coastal State's laws allow such types of violation. This means that the violation must have already been committed so that the right of hot pursuit might be brought into action. Peter Malanczuk refers to the *I'm Alone* case¹⁵⁹ and states that 'the right of hot pursuit does not include the right to sink the pursued vessel deliberately; but accidental sinking in the course of arrest may be lawful'.¹⁶⁰ Another case concerning hot pursuit in the contiguous zone is the *M/V 'Saiga' (no. 2) (Saint Vincent and the Grenadines v Guinea)* case decided by the International Tribunal for the Law of the Sea (ITLOS).¹⁶¹ In this case, ITLOS held that once there was no infringement of the customs laws in the contiguous zone of Guinea 'the exercise of the right of hot pursuit, as required under Article 111 of the Convention', could not be exercised by Guinea.¹⁶²

2.3.13 Contiguous zones of islands and archipelagic States

Article 121 paragraph 2 UNCLOS, when dealing with islands, provides as follows: 'the territorial sea, the contiguous zone... of an island are determined in accordance with the provisions of this Convention applicable to other land territory'. This means that an island can generate its own territorial sea and contiguous zone and these two maritime zones are calculated respectively in terms of Article 3 and Article 33 paragraph 2 UNCLOS. The Convention does distinguish between natural islands and artificial islands. In terms of Article 11 UNCLOS, artificial islands do not generate a territorial sea and, by extension, a contiguous zone because artificial islands do not form part of the coast once the Convention does not consider them to be 'permanent harbour works'. Nonetheless, natural islands may generate their own territorial sea and contiguous zone provided that they satisfy the three criteria laid down in Article 121 paragraph 1

¹⁵⁹ *I'm Alone* (1935) 3 RIAA 1609, 1615.

¹⁶⁰ Malanczuk (n 18) 187.

¹⁶¹ *M/V 'Saiga' (No. 2) (St Vincent and the Grenadines v Guinea)* (1999) 38 ILM 1323.

¹⁶² *M/V 'Saiga' (No. 2)* (1999) 38 ILM 1323, para 152.

UNCLOS, namely: (a) 'a naturally formed area of land'; (b) 'surrounded by water'; (c) 'above water at high tide'. Moreover, it is pertinent to distinguish between a natural island and a rock. Article 121, paragraph 3 provides that: 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.' No reference is made in this provision to the territorial sea or contiguous zone. Jonathan I Charney argues that rocks that sustain human habitation or economic life are entitled to all four maritime zones—territorial sea, contiguous zone, exclusive economic zone, and continental shelf).¹⁶³ Finally, Article 48 UNCLOS regulates the measurement of the breadth of the contiguous zone of archipelagic States: 'The breadth of the territorial sea, the contiguous zone . . . shall be measured from archipelagic baselines drawn in accordance with article 47.' An archipelagic State enjoys a contiguous zone with the sole difference that its baselines are drawn from archipelagic baselines calculated in accordance with Article 47 UNCLOS.

2.4 Concluding Remarks on the Territorial Sea and the Contiguous Zone

Like any other international convention, questions can be asked with regard to the adequacy of the UNCLOS thirty years after its conclusion. Is the Convention in dire need of change? Has technology rendered it outdated? Do substantial amendments need to be made to it? Is the contiguous zone obsolete? These and other pertinent questions should be asked by the IMO with a view to establishing whether the time is ripe to reconsider the provisions in Part II of the UNCLOS regulating these two maritime regimes.

2.4.1 Clarifying certain contentious matters with regard to the territorial sea

The territorial sea has been the subject of regulation by conventional and customary law for hundreds of years. Yet some of its provisions remain obscure; others are underdeveloped and others unregulated. Notwithstanding that three United Nations Conferences on the Law of the Sea have been held during the last century, there is still ample room for improvement. The UNCLOS has contributed to a codification of customary international law of the sea and several of the UNCLOS's provisions have, in turn, moved into customary international law. There are still instances where State practice does not always tally with the provisions of the UNCLOS, so much so that in certain situations States have either departed from the provisions of the UNCLOS or have given the Convention their own particular interpretation. For the purposes of legal certainty, it would be worthwhile clarifying

¹⁶³ JI Charney, 'Rocks that Cannot Sustain Human Habitation' (1999) 93(4) *AJIL* 863, 866.

such matters, ideally through a Protocol to the UNCLOS. The Convention would benefit if such Protocol were, inter alia, to address at least the following issues:

- (a) establishing the delimitation process of the contiguous zone;
- (b) clarifying that the contiguous zone does not extend to the airspace above it nor to the seabed and subsoil beneath it;
- (c) empowering the IMO to define, list, or establish which are: the 'other rules of international law' enshrined in Article 19 paragraph 2 UNCLOS; the 'generally accepted international rules or standards' referred to in Article 21 paragraph 2 UNCLOS; the laws and regulations concerning 'design, construction, manning or equipment of foreign ships' mentioned in Article 21 paragraph 2 UNCLOS; the 'international agreements' considered in Article 23 UNCLOS; the 'generally accepted international regulations relating to the prevention of collisions at sea' acknowledged in Article 21 paragraph 4 UNCLOS; and the documents to be carried or the special precautionary measures which need to be observed by foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances in terms of Article 23 UNCLOS;
- (d) the rights and duties of the coastal State over its territorial sea need to be listed in two separate provisions in Part II of the UNCLOS;
- (e) defining 'historical title' and 'special circumstances' referred to in Article 15 UNCLOS;
- (f) establishing in an unambiguous manner that the right of innocent passage applies to warships;
- (g) including specific cross-references in those provisions of the UNCLOS which refer to other provisions in that Convention;
- (h) setting out the difference between a 'ship' and a 'vessel' through purposely added definitions of these terms in Article 1 UNCLOS. Definitions are also needed for the terms 'submarine' and 'other underwater vehicles' contained in Article 20 UNCLOS;
- (i) stipulating that the right of innocent passage does not apply to foreign aircraft flying over the territorial sea;
- (j) enshrining the rule that a ship may still be expelled from the territorial sea of a coastal State if it is not in passage;
- (k) consolidating State practice allowing warships to enter a coastal State's territorial sea to render assistance in terms of Article 18 paragraph 2 UNCLOS while defining key terms contained in that provision such as 'distress' and 'assistance';
- (l) removing the vagueness of the activities listed in Article 19 paragraphs 2(a) to (d) while narrowing down Article 19 paragraph 2(l) UNCLOS and establishing whether the list in Article 19 paragraph 2 is exhaustive or illustrative; and

- (m) defining with precision the words 'customs, fiscal, immigration or sanitary laws and regulations' in Article 33 paragraph 1(a) UNCLOS.

2.4.2 Is the contiguous zone obsolete?

Arguments can be made that, following the UNCLOS, the EEZ has rendered the contiguous zone obsolete. Indeed, during the Third Conference on the Law of the Sea, there was discourse to the effect that the contiguous zone should be fused together with the EEZ.¹⁶⁴ However, JC Phillips argues that the 'clearly expressed reason for the continued appearance of the contiguous zone is to make it quite clear that the 200-mile economic zone is a zone involving *economic* functions and to avoid any suggestion that the coastal State should be able to exercise within the economic zone the powers, for example, as to customs enforcement, that a State may exercise within the narrower belt of the contiguous zone.'¹⁶⁵

¹⁶⁴ JC Phillips, 'The Exclusive Economic Zone as a Concept in International Law' (1977) 26 *ICLQ*, 585, 613.

¹⁶⁵ Phillips (n 164) 613.