CHAPTER 11

INTERNATIONAL LAW OF THE SEA, AIR AND OUTER SPACE

TOPICS COVERED IN THIS CHAPTER

- The importance of the international law of the sea to all States, particularly Australia.
- Customary international law and the *Law of the Sea Convention*, 1982.
- The international legal rules regulating internal waters, territorial seas, contiguous zones, exclusive economic zones, continental shelves, archipelagic waters, international straits and the high seas.
- International legal rules applicable in relation to airspace and outer space.

KEY TERMS

- high seas freedoms
- common heritage of mankind
- flag State of a vessel
- innocent passage
- hot pursuit

INTRODUCTION

Our next topic links with the law of treaties and the international rules relating to the environment.[1] We are going to look briefly at the international legal rules governing the sea, airspace and outer space. The link with the law of treaties comes *via* the *Law of the Sea*

1 See DR Rothwell, S Kaye, A Akhtarkhavari, R Davis and I Saunders, *International Law: Cases and Materials with Australian Perspectives*, 3rd ed, Cambridge University Press, 2018, Chapter 10; MD Evans (ed), *International Law*, 5th ed, Oxford University Press, 2018, Chapter 21; LF Damrosch and SD Murphy, *International Law Cases and Materials*, 7th ed, West Publishing, 2019, Chapter 17; D Harris and S Sivakumaran, *Cases and Materials on International Law*, 9th ed, Sweet and Maxwell, 2020, Chapter 7; and Donald R Rothwell and Tim Stephens, *The International Law of the Sea*, 2nd ed, Hart Publishing, 2016.

Convention of 1982 and its predecessor conventions. The *Law of the Sea Convention*, 1982[2] is a complicated and long treaty (it has over 300 articles). Principles of treaty interpretation and other aspects of the law of treaties are critical to the understanding of this Convention and the law of the sea generally. There are also important linkages between the environment and the current topic.[3] As our consideration of environmental regulation illustrated in Chapter 10, environmental rules attempt to protect the sea and the atmosphere of the planet.

THE INTERNATIONAL LAW OF THE SEA

We turn first to the law of the sea.[4] At the outset, I would like to note the importance of this area of international law, especially for Australia. For this reason, we will be devoting more time to these rules of international law than to the rules dealing with airspace and outer space. We will then also briefly revisit the question of sources of international legal obligation in the context of the law of the sea.

After looking at the sources of legal obligation, I would like to consider the underlying principles which determine the content of the international law of the sea. We will see as we move from *terra firma* and head out to sea that international law moves from a principle of strict State 'sovereignty' towards principles of **freedom of the high seas** and common ownership (or non-ownership) of its resources. The international law of the sea involves a number of zones where coastal and other States' rights and responsibilities change the further out from the coastline you go. The further out, the fewer the rights and privileges of the coastal State. The further from the coast, the greater the rights and privileges of all States.

KEY TERM: HIGH SEAS FREEDOMS

The freedoms of the vessels of all States, which include freedom of navigation and freedom to fish, provided due regard is given to the freedoms of other States and subject to various environmental obligations. States are not generally permitted to exercise enforcement jurisdiction on foreign flagged vessels on the high seas. The high seas are said to be *res communis*, a form of global commons that is unable to be owned by any State.

2 The 1982 Convention is available at: www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm.

3 See, for example, Articles 192–237 of the 1982 Convention.

4 There is some overlap in this context between the international law of the sea and maritime law. As a general rule, however, the areas of law can be distinguished in roughly the same way that public international law can be distinguished from private international law (or conflicts of law). This chapter will be focused on the public international law rules applicable to the seas and marine resources and to State jurisdiction over persons and vessels at sea. Maritime law focuses predominantly on municipal law (generally contractual) rules relating to the sale and movement of goods by sea and related issues such as the chartering of vessels and insurance.

We will look at the rights and privileges attached to each of these different zones both from the perspective of coastal States and all other States.

Finally, we will conclude our consideration of the law of the sea with a discussion of the rights to the deep sea bed. In 1967, Dr Arvid Pardo, Malta's Ambassador to the UN, proposed that the resources of the deep sea bed be treated as the '**common heritage of mankind**'. The prospect of the exploitation of the deep sea bed and its regulation ended up being a very controversial aspect of the UN's Third International Conference on the Law of the Sea (1973–1982), out of which came the 1982 UN Convention.

KEY TERM: COMMON HERITAGE OF MANKIND

Resources or areas held in common for the benefit of all States. Initially proposed in relation to the deep sea bed and its mineral resources, the principle has been applied to celestial bodies in outer space.

We will then move to consider briefly the international legal rules dealing with airspace and outer space. These rules are similar to the international rules regulating the sea.

The importance of the international law of the sea

Australia was a strong supporter of the 1982 *Law of the Sea Convention*. The Australian delegation and the third UN Conference worked very hard to bridge the gaps between the different interests of States negotiating at the Conference.[5] Why did Australia work so hard? One very significant reason was what we stood to gain from such a treaty. As an island continent surrounded by sea, the international legal rules regulating rights and responsibilities in respect of the sea and its resources are of vital concern to Australia. Australia has an interest in keeping sea routes open to ensure a way in for Australia's imports and a secure way out for its exports. Australia also has the world's second-largest continental margin. The 1982 Convention served to strengthen and enhance international legal rules dealing with these issues in a way that has greatly benefited Australia.

International legal rules applicable to the sea are therefore of considerable importance to Australia. They are also, in a sense, of critical importance to every other State on the planet. Four-fifths of the Earth's surface is covered by water. The interdependent economies of States rely very much on the movement of goods by sea. Even the 43 or so landlocked States[6] are interested in the *Law of the Sea Convention* and the international legal rules applicable to the world's oceans. The 1982 Convention attempts to ensure access to the sea for landlocked States. The rules of customary international law guarantee rights of landlocked States to have vessels flying their flags sail the high seas with the same freedom as vessels of all other States.

5 See the account in Reicher of Australia's negotiating position during the Conference, H Reicher, *Australian International Law Cases and Materials*, LBC, 1995, Chapter 10.

6 James Crawford, *Brownlie's Principles of Public International Law*, 9th ed, Oxford University Press, 2019, 328.

The international law of the sea is therefore an important topic that warrants consideration in a general international law course. Like most of the other topics we have considered, the law of the sea could easily fill an entire semester course. We are therefore only going to undertake a very brief survey of the relevant international legal rules.

The law of the sea: Sources of international legal obligation

I have mentioned the 1982 *Law of the Sea Convention* a couple of times already. I have also referred to customary international law. Something should, I believe, therefore be said about the sources of international legal obligation in relation to the sea.

Customary international law

For hundreds of years, the international law of the sea was customary in nature. In the 17th and 18th centuries, there was a debate over whether the high seas could be subject to appropriation by States. Portugal and Spain made significant 'sovereign' claims to the seas in the 15th and 16th centuries. An important academic advocate of this 'closed sea' approach was the English writer, John Selden. Against Selden, Hugo Grotius argued for freedom of the high seas. It was Grotius' view that eventually prevailed.[7]

States began to accept that the high seas could not be claimed by any State and that international law protected freedom of navigation and the freedom to fish on the high seas.

Changes in customary law

Up to 1945, the world had a relatively stable set of customary rules that regulated the seas. There was some debate on the width of sea a State was entitled to as its territorial sea, but otherwise there was general agreement on the rules of customary international law.

This consensus was shattered after the Second World War. Two critical things had occurred by 1945 to undermine the pre-existing consensus. The first was the development of offshore mining technology. The second was the Truman Proclamation.

Offshore mining technology

By 1945, it had become possible to extract oil resources offshore under the Continental Shelf. The Continental Shelf is a geological formation which is essentially an underwater prolongation of the above water land mass. The general configuration of continental shelves is that they gently slope out from the coastline to a distance ranging from under one nautical mile (the slope would then not be so gentle) to hundreds of nautical miles.[8] The end of a Continental Shelf normally involves a steep slope which ends in the deep sea bed or abyssal plain.

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7 For references on the different positions taken by States since the 16th century, see ibid, 281–282.

8 A nautical mile is 1853 metres. All references in this section to miles are references to nautical miles as this is the unit of measurement used by the international law of the sea.

Now that it had become possible for resources under the Continental Shelf to be exploited, the question of the legal right to exploit these resources loomed large.

Customary international law in 1945 did not give coastal States any right to exploit resources beyond the territorial sea, the maximum width of which (consistent with international law) was probably only three nautical miles. International law in 1945 therefore offered no basis for claims to exploit the mineral resources of the Continental Shelf beyond three nautical miles.

The Truman Proclamation

The second critical event occurred on 28 September 1945. On that day, US President Truman proclaimed that the US had 'jurisdiction and control' of the resources of the Continental Shelf 'appertaining to the US'.[9] This proclamation shattered the general legal consensus that had existed prior to 1945. The US proclamation was followed by similar proclamations from other States asserting rights to their respective continental shelves. Australia's proclamation came in 1953.[10]

The Truman Proclamation carefully avoided making any claim to the water above the Continental Shelf. But in another proclamation made on the same day the US asserted the right to establish 'explicitly bounded' conservation zones for fishing resources in areas of the high seas 'contiguous to the United States'.[11] What essentially followed was a variety of claims, not just to Continental Shelf resources, but also to fishing resources and to other rights and privileges. Some States claimed rights to resources out to 200 nautical miles, even where they had a very narrow Continental Shelf.

The 1958 *Geneva Conventions*

The position under customary international law was soon in a state of complete confusion. The International Law Commission began working on the codification and progressive development of international law in this area in 1949. Out of its work, the first UN Conference on the Law of the Sea was convened, which produced the four *Geneva Conventions* on the Law of the Sea of 1958:

- *Convention on the Territorial Sea and the Contiguous Zone*
- *Convention on the High Seas*
- *Convention on Fishing and Conservation of the Living Resources of the High Seas* and
- *Convention on the Continental Shelf.*

Recall the *North Sea Continental Shelf cases*.[12] They dealt with the significance of the 1958 *Convention on the Continental Shelf* to the international legal rules on the delimitation of the Continental Shelf between adjacent States.

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9 Marjorie M Whiteman, *Digest of International Law*, US State Department, Volume 4, 1965, 756.

10 See Reicher, note 5 above, 343.

11 Crawford, *Brownlie's Principles*, note 6 above, 260.

12 *North Sea Continental Shelf cases*, [1969] ICJ Reports.

The 1958 Conventions codified certain aspects of the customary law of the sea. However, States were unable to agree on important questions such as the allowable width of the territorial sea. Also, the approach taken on certain issues soon proved to be unsatisfactory. The definition of the Continental Shelf in the relevant 1958 Convention linked the extent of a State's sovereign rights to exploitability.[13] Exploitability is something which changes with technology and, thus, it is not a criterion which promotes certainty.

UNCLOS II

In 1960, the Second UN Conference on the Law of the Sea (UNCLOS II) was convened. It tried unsuccessfully to reach agreement on the maximum limit of territorial sea entitlements.

UNCLOS III

In 1973, the Third UN Conference on the Law of the Sea (UNCLOS III) began. At this Conference, the international community sought a comprehensive solution to all major legal questions associated with the seas. The Convention codifies many rules of customary international law. It also involves progressive development.

A significant feature of the Conference was the 'package deal' approach adopted by States negotiating the treaty. States would give in on one area in order to obtain concessions in other unrelated areas. Delegations worked towards an acceptable compromise package. This type of package deal involves certain risks for States making concessions if adherence to the subsequent treaty is not universal. The President of the Conference at its conclusion declared in relation to the negotiated text that, being a package deal, States had to bind themselves under the treaty in order to secure benefits from its rules.[14] The concern was that States might not become parties to the treaty but then argue that those provisions of the treaty which suited them reflected the position under customary international law evidenced by the consensus in favour of those rules achieved at the Conference. These States could also argue, as non-parties to the treaty, that rules in treaty that did not suit them were not binding as treaty obligations and, if they were or became reflective of custom, such non-party States could claim to be persistent objectors.

This is precisely the approach taken by the US and other developed States which initially refused to accept the Convention, but argued that parts of the Convention were reflective of customary international law.

Treaties and custom

We have already looked at how treaty practice can influence the development of customary international law. As at 3 August 2020, the four *Geneva Conventions* had the following number of States parties:

13 *Continental Shelf Convention* 1958, Article 1.

14 Harris and Sivakumaran, note 1 above, 326.

- *Convention on the Territorial Sea and the Contiguous Zone*: 52
- *Convention on the High Seas*: 63
- *Convention on Fishing and Conservation of the Living Resources of the High Seas*: 39 and
- *Convention on the Continental Shelf*: 58.

The 1982 Convention came into force in 1994, together with another treaty[15] varying the terms of the 1982 Convention which had been the stumbling block to US and other developed States' participation in the 1982 treaty regime.

These two treaties, as at 3 August 2020, had 168 and 150 parties, respectively.

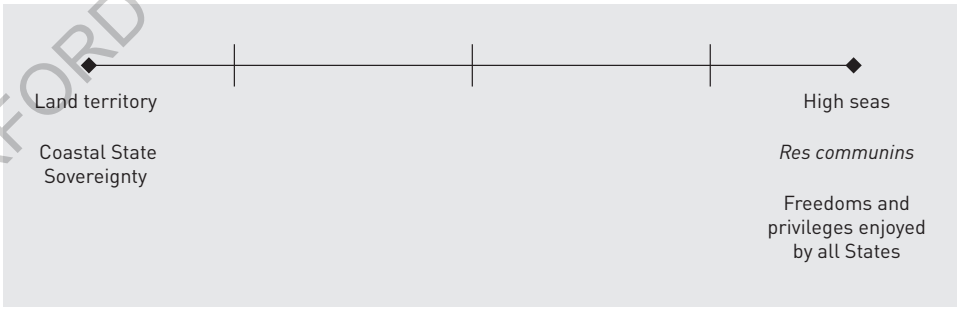
When we talk about international law governing the law of the sea, we are therefore concerned with both customary international law and treaty obligations. The most significant treaty is the 1982 *Law of the Sea Convention*. We will make a number of references to this Convention and I will endeavour to indicate articles of the Convention which reflect the position under customary international law. Obviously, all of the provisions of the 1982 Convention bind States which are parties to the Convention.

International law of the sea: A basic approach

We turn now to the principles underlying the rules of international law that apply to the sea.

Perhaps the best way to approach this area of law is to think of two extremes. One extreme is what might be described as coastal State 'sovereignty'. So, for example, on the land territory of a coastal State, all the rights, capacities and privileges generally described by the term 'sovereignty' are enjoyed by that State in that territory. The State can pass laws (legislative jurisdiction) and can enforce those laws (enforcement jurisdiction) within that territory. These rights and privileges generally apply to all persons and entities within that territory. Foreign nationals are normally fully subject to the powers of the State in which they are present.

FIGURE 11.1 THE SPECTRUM OF MARINE ZONES FROM COASTAL STATE SOVEREIGNTY TO HIGH SEAS FREEDOMS



15 The treaty varying the 1982 Convention is available at: www.un.org/Depts/los/convention_agreements/texts/unclos/agxibody.htm.

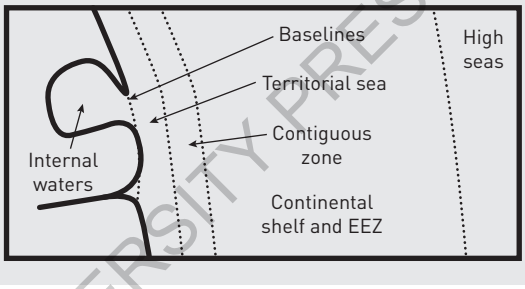
The other extreme is the notion of commonage or *res communis*. This is the traditional rule applicable to the high seas. *Res communis* involves the idea that the high seas cannot be claimed by any State. All States have freedom of navigation (and other related rights[16]) and all States can exploit the living resources of the high seas.

The international legal rules relevant to the seas involve essentially a movement from the land with its full 'sovereignty' (to the exclusion of other States) to the high seas with its full freedom. International law creates various zones between land territory and the high seas. The closer to the land of a coastal State, the closer we are to this notion of 'sovereignty'. As we move out towards the high seas, we find more and more limitations on the rights of the coastal State and more of the indicia of *res communis*.

Marine zones

We will now turn to describing the various zones accepted under international law.

FIGURE 11.2 MARINE ZONES (NOT TO SCALE)



Internal waters

The first zone is what is now known as 'internal waters'. These are rivers and certain bays of States, in which, basically, the full range of rights, capacities and privileges are held by the coastal State. Internal waters are essentially no different to land territory. So just as a tourist driving a campervan in a foreign country would be liable to the laws of that foreign country, so a foreign merchant ship[17] in internal waters is subject to both the legislative and enforcement jurisdiction of the coastal State. Having given that example, I should say something about ships. Unlike campervans, and like people and juridical entities (such as companies), ships are in a sense treated by international law as being capable of having a nationality. The nationality of a ship is related to the flag which it is entitled to fly. Generally, a ship is entitled to fly the flag

16 Such as the freedom of vessels of one State not to be searched and arrested by vessels of another State (although foreign warships have a limited right to 'visit' vessels on the high seas: see Article 110 of the 1982 Convention). Aircraft also have freedom to fly over the high seas.

17 International law makes a sharp distinction between merchant shipping and warships and other ships in the official service of the State. Warships and other official vessels are given certain privileges.

of the State of its registration, which is known as the **flag State of a vessel**. International law deals with problems associated with shipping by reference to notions of nationality.[18] So the first zone (internal waters) is just like a part of the land territory of a coastal State.

KEY TERM: FLAG STATE OF A VESSEL

Vessels are treated as having a nationality, which is essentially the State in which the vessel is registered. A vessel will fly the flag of the State in which it is registered and this State is the flag State. It is generally entitled to exercise jurisdiction over the vessel on the high seas.

Territorial sea

The next zone is known as the 'territorial sea'. Historically, the width of the territorial sea was linked to the so-called 'cannon shot' rule. A State could assert rights in the band of water within the range of cannon on the shore. The most common width of territorial sea linked to the cannon shot rule was three nautical miles. Eventually, most States accepted three nautical miles as the standard width of the territorial sea, notwithstanding improvements in military technology.

The point from which the territorial sea was measured was the low water mark. International law also allowed the drawing of straight base lines across certain bays[19] and the mouths of rivers.[20] As we saw in the *Anglo-Norwegian Fisheries case* in Chapter 3,[21] the International Court of Justice (ICJ) held that Norway's drawing of straight base lines where there was a deeply indented coast and many offshore islands was consistent with international law.

Straight base lines drawn across the mouths of bays and rivers, in fact, serve a dual function. They mark the beginning of the territorial sea, but they also mark the end of internal waters.

I have mentioned already that the Second UN Conference on the Law of the Sea could not reach agreement on the width of the territorial sea. Through the 1950s and 1960s, there was a challenge to the traditional three nautical mile rule. Many States claimed an entitlement to more than three nautical miles. The majority claimed an entitlement to 12 nautical miles. The 1982 *Law of the Sea Convention* set out an entitlement to a 12 nautical mile territorial sea.[22]

18 Article 91(1) of the *Convention on the Law of the Sea*, 1982, provides that 'Ships have the nationality of the State whose flag they are entitled to fly'.

19 The 1958 *Convention on the Territorial Sea and the Contiguous Zone* (Article 7) and the 1982 Convention (Article 10) provide for a 24-mile bay closing rule with an exception for historical bays.

20 Under Article 121 of the 1982 Convention, islands that can sustain human habitation or economic life generate their own marine zones.

21 *Anglo-Norwegian Fisheries case* [1951] ICJ Reports 116.

22 Article 3 of the 1982 Convention.

Currently, some 140 States have claimed an entitlement to a territorial sea of 12 nautical miles.[23] The 12-mile limit, therefore, appears to be a rule of customary international law.[24]

'Sovereignty' and the territorial sea

Article 2 of the 1982 Convention provides:

> [t]he sovereignty of a coastal State extends beyond its land territory and internal waters … to an adjacent belt of sea described as the territorial sea.

Despite this reference to 'sovereignty', the rights of the coastal State over the territorial sea are not as extensive as those over land territory and internal waters.

Innocent passage

Probably the most significant limitation of the coastal State's rights is known as the right of **innocent passage**. This is the right of other States to have their vessels pass through the coastal State's territorial sea without prior approval, provided that the passage is innocent.

KEY TERM: INNOCENT PASSAGE

Passage permitted to all vessels (although controversy exists in relation to naval vessels) through the territorial sea of a coastal State provided the passage remains innocent throughout. To fish in a coastal State's territorial sea would, for example, render the vessel's passage non-innocent.

The meaning of innocent passage is dealt with in Article 19 of the 1982 Convention.

Innocent passage and warships

One question which arises under the 1982 Convention is whether warships can exercise rights of innocent passage through the territorial sea. The Convention implies that they can. Article 20, for example, refers to submarines being required to navigate on the surface through the territorial sea. The *travaux* of the Convention, however, does not support the inference that warships can exercise rights of innocent passage through the territorial sea.[25] In addition, a number of States require prior authorisation before allowing warships to pass through the territorial sea. The *Corfu Channel case* does, however, acknowledge a customary right of innocent passage by warships through internationally recognised straits.[26]

23 Malcolm D Evans, 'The Law of the Sea' in Evans (ed), note 1 above, 635, 642.

24 *Territorial and Maritime Dispute (Nicaragua v Colombia), Judgment* [2012] ICJ Reports 2012 624, [177].

25 Brownlie, *Principles of Public International Law,* 7th ed, Oxford University Press, Oxford, 2008, 188–189. Although see now Crawford, *Brownlie's Principles*, note 6 above, 301–302.

26 *Corfu Channel case, Judgment of 9 April 1949* [1949] ICJ Reports 28.