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LAW OF THE SEA

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Law of the Sea

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Series Preface

Open a newspaper, listen to the radio or watch television any day of the week and you will read or hear of some matter concerning international law. The range of matters include the extent to which issues of trade and human rights should be linked, concerns about refugees and labour conditions, negotiations of treaties and the settlement of disputes, and decisions by the United Nations Security Council concerning actions to ensure compliance with international law. International legal issues have impact on governments, corporations, organisations and people around the world and the process of globalisation has increased this impact. In the global legal environment, knowledge of international law is an indispensable tool for all scholars, legal practitioners, decision-makers and citizens of the 21st century.

The Library of Essays in International Law is designed to provide the essential elements for the development of this knowledge. Each volume contains essays of central importance in the development of international law in a subject area. The proliferation of legal and other specialist journals, the increase in international materials and the use of the internet, has meant that it is increasingly difficult for legal scholars to have access to all the relevant articles on international law and many valuable older articles are now unable to be obtained readily. These problems are addressed by this series, which makes available an extensive range of materials in a manner that is of immeasurable value for both teaching and research at all levels.

Each volume is written by a leading authority in the subject area who selects the articles and provides an informative introduction, which analyses the context of the articles and comments on their significance within the developments in that area. The volumes complement each other to give a clear view of the burgeoning area of international law. It is not an easy task to select, order and place in context essays from the enormous quantity of academic legal writing prublished in journals – in many languages – throughout the world. This task requires professional scholarly judgment and difficult choices. The editors in this series have done an excellent job, for which I thank and congratulate them. It has been a pleasure working with them.

ROBERT McCORQUODALE
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Introduction

Few areas of international law have witnessed so much change in the last few decades as the law of the sea. The classic legal regime regulating marine space developed in the late 18th century, as the principle of freedom of the seas advocated by Hugo Grotius, in his *Mare Liberum* published in 1609, came to be accepted. That principle applied to virtually all of the sea, namely the high seas beyond a narrow belt of water along the coastlines, called the territorial sea, which was under the sovereignty of the coastal State. This legal structure responded to the interests of the great maritime nations in traditional uses of the sea – navigation and fishing.

The efforts of the international community to codify the law of the sea began under the auspices of the League of Nations. In 1930, the League's Council convened The Hague Codification Conference. Only one of the three topics considered ripe for codification related to the law of the sea: the law of territorial waters. The Conference was unable to reach agreement on a binding instrument. However, it produced a Draft on 'The Legal Status of the Territorial Sea' which was a pioneer document in the process of codification of the law of the sea. The stumbling block was the question of the breadth of the territorial sea. The 3-mile rule strongly supported by the naval powers was the great loser. As Gidel observed, it was 'a fallen idol' and it was not replaced.[1]

The four 1958 Geneva Conventions succeeded in codifying the law of the sea. But the question of the breadth of the territorial sea remained unsettled. Under a legal regime based on the traditional dichotomy of territorial sea and high seas, it was extremely difficult to agree on a formula that could satisfy the claims of developing coastal States for exclusive fishing jurisdiction in sea areas adjacent to their coasts. Thus, the 1958 Convention on the Territorial Sea and the Contiguous Zone only provided that '(T)he sovereignty of the State extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea'. Except for the Convention on the Continental Shelf, the 1958 Geneva Conventions codified the 'old' law of the sea based on the freedom of the sea.[2] Efforts at the Second United Nations Conference on the Law of the Sea, in 1960, to settle the question of the breadth of the territorial sea and the fishing rights of coastal States were also unsuccessful.

In the years that followed, the technological revolution, the new uses of the sea and its resources, and the substantial increase in the membership of the international community in the 1960s brought about by the decolonization process, precipitated the collapse of the traditional regime for the oceans. The exploitation of the resources of the sea, both living and non-living, acquired a new dimension. The threat of the exhaustion of some species of fish stocks in the areas adjacent to their coasts, as well as the need to protect these areas from the threat of pollution, prompted a number of States, particularly in Africa and Latin America, to proclaim territorial seas or other maritime zones up to 200 miles from the coast.

It was clear that a new legal order for the sea could only emerge from a 'package deal' negotiated among all the members of the international community. This formidable task was entrusted to the Third United Nations Conference on the Law of the Sea (UNCLOS III). The

innovative methods of work in the conference led Sir Robert Jennings to observe that 'international law will never be the same again'.[3] The Conference showed that international law could be adapted to the changing realities and regulate all the activities in the oceans. The United Nations Convention on the Law of the Sea (hereinafter 'the Convention'), was adopted on December 10, 1982. Its negotiation and conclusion in themselves stimulated a general harmonization of State practice following the main lines of the Convention.

However, the objective of universality of the new regime was threatened by the refusal of the industrial States to accept the systems for deep seabed mining in Part XI of the Convention. Consultations between representatives of these States and the developing States, held under two UN Secretaries General between 1992 and 1994, led to the adoption, in June 1994, of an Agreement relating to the Implementation of Part XI of the Convention. The Agreement, as stated in two preambular paragraphs, noted 'the political and economic changes, including market-oriented approaches, affecting the implementation of Part XI' and expressed the wish of the States Parties 'to facilitate universal participation in the Convention'. Global ratification is the only way to ensure that all the States of the world will be subject to the rule of law embodied in the Convention. Even if a number of the provisions of the Convention became customary law, the institutional provisions of the Convention, especially those establishing the International Tribunal for the Law of the Sea, the International Seabed Authority and the Commission on the Limits of the Continental Shelf, would only be binding on the States Parties and not on third States. In addition, the lack of precision and incompleteness of the norms of customary law would not contribute to the fair application of the new regime for the oceans. Customary law cannot be substituted for the universality of the Convention.

The Agreement largely succeeded in its goal. The Convention entered in force on 16 November 1994. As at September 1999 there are now more than 130 parties to the Convention and nearly 100 parties to the Implementation Agreement.

The Convention, which has been rightly called 'a Constitution for the Oceans', constitutes a comprehensive reformation of the public international law of the sea. It was not, however, written on a clean slate. Rather, it was heavily influenced by prior developments including the earlier international efforts at codification as well as national claims and legislation. On the whole, it represents a compromise among different competing interests as regards the uses of the sea, both within and between States. This consisted in establishing an equitable international regime for the area and resources of the seabed and ocean floor beyond national jurisdiction, and with resolving a broad range of related issues, including the question of the breadth of the territorial sea and passage through international straits as well as the critical questions of control over natural resources and prevention of pollution in coastal areas beyond the territorial sea.

The renewed efforts of the United Nations to establish a truly universal legal order for the ocean space started in the late 1960s during the preparatory work of the Seabed Committee. In UNCLOS III, the international community confronted the need to depart from traditional negotiating procedures employed at previous codification conferences, and adopted original working methods that could enable it to fulfill its mandate. Among them was the creation of negotiation bodies and working groups within the Conference that acted as mediators and go-betweens. Those novel techniques led to successive informal negotiating texts and brought consensus.

The United Nations thus drew from past experience and avoided many of the negotiating procedures, which had led to fragile and inconclusive results at UNCLOS I. This awareness

partly explains why the 1982 Convention was not based on draft articles prepared by the International Law Commission, unlike the four Geneva Conventions and most of the United Nations' sponsored conventions codifying or developing norms of international law up to that time. The emphasis was placed on a political negotiation leading to political consensus on a single comprehensive framework.

The scope of the law of the sea is too broad and its content too rich to be embraced by any single volume. The present work selects twenty-four essays on the public international law of the sea, mainly as reflected in the Convention and contemporary State practice, on some of the most important aspects of the subject.

The first set of essays examines the coastal regimes, beginning with the coastal baselines. The next addresses the high seas areas and the international seabed area. The final set addresses certain general issues that transcend maritime zones.

Baselines and the Territorial Sea

The Convention finally settled the question of the breadth of the territorial sea. Every State has the right to establish the territorial sea up to a limit not exceeding 12 nautical miles measured from the baselines. This was accepted by the naval powers subject to the adoption of a new legal regime, called transit passage, for ships and aircraft through and over straits used for international navigation, as well as greater clarity regarding the right of innocent passage through the territorial sea generally as well as through certain other areas.

In his essay (Chapter 1), 'Baseline Delimitations and Maritime Boundaries', Lewis M. Alexander takes up the question of baselines.[4] He analyzes the historical development of baseline provisions, the relevant articles in the Convention dealing with normal baselines, straight baselines and archipelagic baselines. Finally, he considers the impact of baselines on maritime boundaries.

Shekhar Ghosh's essay (Chapter 2) on 'The Legal Regime of Innocent Passage through the Territorial Sea'[5], after dealing briefly with the origins of the concept of territorial sea and the link between innocent passage and world shipping, considers the issues of the breadth of the territorial sea and the passage of warships. He then analyzes the various texts on innocent passage in the 1930 Hague Draft, the 1956 ILC Draft, the 1958 Geneva Convention on the territorial sea and the contiguous zone and those which during negotiations in UNCLOS III served as a basis for the provisions now embodied in Part II, section 3, of the Convention.

Straits

Satya N. Nandan and David H. Anderson, co-authors of the essay (Chapter 3) 'Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982'[6], co-chaired the so-called 'Fiji/UK Group' or 'Private Working Group on Straits used for International Navigation' during UNCLOS III negotiations. The set of articles prepared by this Group was incorporated in the informal single negotiating text prepared by the Chairman of the Second Committee in 1975, endured the entire negotiating process with minor drafting changes, and was finally embodied in Part III of the Convention.

The new legal regime of passage through international straits effectively balances the competing interests of States bordering straits on the one hand, and of naval powers and commercial trade and navigation on the other. The idea was to establish a new legal regime that was more liberal than innocent passage, but unlike the full freedoms of navigation and overflight applicable on the high seas in which it is rooted, it is limited to continuous and expeditious passage. This approach essentially created a new intermediate regime for navigation and overflight: the right of 'transit passage' through international straits connecting two parts of the high seas or exclusive economic zones with another. In this essay, Nandan and Anderson trace the evolution of the law on international straits and examine each one of the provisions contained in Part III.

Islands, Archipelagos and Archipelagic States

In his essay (Chapter 4) on 'The Legal Status of Islands in the New Law of the Sea', Janusz Symonides discusses the evolution of the definition of 'island' from the first attempt by the 1930 Hague Codification Conference to the adoption of Article 121 of the Convention.[7] This single provision in Part VIII of the Convention entitled 'Regime of Islands' distinguishes between islands and rocks to settle the basic question of the right to sovereignty or jurisdiction over offshore marine spaces. This issue became particularly important to avoid further limitations to the area known as the 'common heritage of mankind'. Symonides also examines the various legal issues raised concerning artificial islands, installations and structures.

The legal regime of archipelagic States laid down in Part IV of the Convention is taken up in an essay (Chapter 5) by H.P. Rajan on 'The Legal Regime of Archipelagos'.[8] This regime constitutes an innovation. The 1958 Convention on the Territorial Sea and the Contiguous Zone contains no specific provision referring to archipelagos or archipelagic States, in spite of the claims of States like Indonesia and the Philippines. The main objections came from the maritime powers because of the threat to international navigation through the waters enclosed within the archipelago. In UNCLOS III, a group of archipelagic States renewed their claims for the right to draw straight baselines joining the outermost points of the outermost islands. Under the compromise arrived at the negotiations, the sovereignty of the archipelagic State over its 'archipelagic waters' is subject to the right of innocent passage by ships of all States. In addition, as provided in Article 53, foreign ships and aircraft enjoy the right of 'archipelagic sea lanes passage' in sea lanes and air routes designated by the Archipelagic State and approved by the 'competent international organization'. According with paragraph 12 of the same article, if an archipelagic State does not designate sea lanes or air routes, the right of 'archipelagic sea lanes passage' may be exercised through the routes normally used for international navigation. As observed by Rajan 'archipelagic sea lanes passage' is practically the same as transit passage through straits used for international navigation.

The Exclusive Economic Zone

The concept of EEZ emerged in the 1970s and was consolidated throughout the negotiations in UNCLOS III. It is one of the pillars of the contemporary law of the sea, which led to the

removal of the obstacles that had prevented the adoption of a universal and comprehensive legal regime for the oceans. Tommy T.B. Koh, an active participant and former President of UNCLOS III, examines the genesis of the EEZ in his essay (Chapter 6) on 'The Exclusive Economic Zone'.[9] First, he refers to the conflict between developed coastal States and distant-water fishing States, following the failure of UNCLOS II in 1960. As he observes, the ICJ decision in the *Fisheries Jurisdiction* Case ICJ Rep 1974 3 was an important development in the process towards the acceptance of the right of coastal States to an exclusive fisheries zone. Then, Koh focuses on the conflict between developing coastal States and distant-water fishing States. Several declarations in Latin America and Africa confirmed the aspirations of developing States to control the economic resources off their coasts, particularly fish stocks.

The provisions on the EEZ are contained in Part V of the Convention. Although the concept of EEZ comprises the sovereign rights of the coastal State over the living and non-living resources up to 200 miles from the baselines, most of the articles in Part V deal with conservation and utilization of the living resources. The coastal State's rights with respect to the seabed and subsoil of the Zone are laid down in Part VI on the continental shelf.

Koh deals extensively with the regime of fisheries in the EEZ. As regards the status of the EEZ, he refers to the agreement negotiated in UNCLOS III, reflected in Article 55 of the Convention to conclude that the EEZ is neither territorial sea nor part of the high seas, but is *sui-generis*.

The Continental Shelf

The first clear assertion of the right of a coastal State over the natural resources of the subsoil and seabed of the continental shelf was the Proclamation by President Truman in 1945.[10] It was followed by a number of unilateral legislative acts and declarations by other States, particularly in Latin America. Some of these claims went beyond the United States Proclamation and extended not only to the continental shelf itself but also to the superjacent waters. In his essay (Chapter 7), 'The Juridical Concept of the Continental Shelf', Makhdoom Ali Khan discusses these precedents and the definition of the continental shelf in the 1958 Convention based on the criteria of adjacency and exploitability.[11] As he observes, the exploitability test had been rendered redundant by the advancement in the field of scientific discovery, and adjacency could not provide a firm rein on the claims of coastal States.

With the creation of an international regime for the exploration and exploitation of seabed and ocean floor and subsoil beyond the 'limits of national jurisdiction', the definition of the outer limit of the continental shelf became a hard core issue in UNCLOS III. The definition contained in Article 76 of the Convention, including the establishment of the Commission on the Limits of the Continental Shelf, reflects the compromise between the margineers or group of broad-shelf States and the supporters of the 200-mile distance criteria. In addition, a revenue sharing system for the exploitation of the continental shelf beyond 200 miles is intended to accommodate the interests of developing States, particularly the least developed and the land-locked among them.

Duncan J. McMillan's essay (Chapter 8), 'The Extent of the Continental Shelf: Factors Affecting the Accuracy of a Continental Margin Boundary'[12] examines the technical uncertainties in the interpretation of Article 76 of the Convention because of the lack of precise definitions of the

terms 'sedimentary rock' and 'foot of the slope', in particular. He concludes that the importance of these uncertainties depends on the latitude to be allowed in its application to the Commission on the Limits of the Continental Shelf, the importance of the resources outside 200 miles, and the status of the definition amongst broad-shelf States.

Delimitation of Maritime Boundaries

The provisions of the Convention on delimitation of the territorial sea, the EEZ and the continental shelf between States with opposite or adjacent coasts emerged after protracted negotiations in UNCLOS III. Two schools of thought were confronted in these negotiations: one was in favour of the method of equidistance; the other favoured the application of more flexible equitable principles.[13]

With regard to the territorial sea boundaries, Article 15 of the Convention is substantially identical to the corresponding provision in the 1958 Convention, that is, failing agreement, neither of the two States is entitled to extend its territorial sea beyond the median or equidistance line. Exception is made when, by reason of historic title or other special circumstances, it is necessary to effect delimitation in a way which is at variance therewith.

Articles 74 and 83 of the Convention concerning delimitation of the EEZ and the continental shelf contain no reference to equidistance or the median line. They adopt the same approach: (1) the delimitation 'shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution'; (2) if no agreement can be reached 'in a reasonable period of time', the matter is to be referred to the dispute settlement procedures provided for in Part XV; (3) pending agreement, the States concerned shall make every effort to enter into provisional arrangements of a practical nature.

In his essay (Chapter 9) entitled 'Geography in International Maritime Boundary-Making', Shabtai Rosenne analyzes the process of determining maritime boundaries in the context of the evolving law of the sea.[14] He gives particular emphasis to the geographic problems involved in the outer limit of the territorial sea, loxodromes and geodesics, charting maritime boundaries, and the outer limit of the continental shelf.

Barbara Kwiatkowska, in her essay (Chapter 10) on 'Equitable Maritime Boundary Delimitation – A Legal Perspective', examines what she characterizes as the ever-increasing role of the legal concept of equity 'in modern interstate relations and in the management of practical international affairs that involve sharing/participation/allocation/utilization/delimitation of natural resources and/or boundaries'.[15]

In the light of the jurisprudence of the ICJ and arbitral tribunals, she asserts that the doctrine of equitable principles is the fundamental norm of customary international law governing maritime delimitation and provides for effecting delimitation by agreement, in accordance with equitable principles, taking account of all relevant circumstances, so as to arrive at an equitable result. These principles would be compatible with the provisions of the Convention concerning the EEZ and the continental shelf boundaries. The conclusion of Kwiatkowska's analysis is that the doctrine of equitable principles has already attained the degree of clarity and predictability sufficient for its recognition as the basic norm operating within, and not outside, the law.

The High Seas

The 1958 Convention on the High Seas defines the high seas as 'all parts of the sea not included in the territorial sea or in the internal waters of a State'. As a result of the advent of the EEZ and of the concept of archipelagic waters, that definition has become obsolete. Article 86 of the Convention provides that its high seas provisions apply 'to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the interval waters of a State, or in the archipelagic waters of an archipelagic State'. However, Article 58 also incorporates relevant aspects of the high seas regime into the regime of the exclusive economic zone. Like the 1958 Convention on the High Seas, Article 87(1) of the Convention also gives a non-exhaustive list of examples of high seas freedoms. These include the freedoms of navigation, overflight, laying of submarine cables and pipelines and construction of artificial islands and installations (these freedoms have been subject to the provisions on the continental shelf), fishing (subject to a general duty of States to cooperate with other States in the conservation and management of living resources in the areas of the high seas and taking such measures for their nationals as may be necessary for the conservation of those resources), and freedom of scientific research (subject to the rights of coastal States and their continental shelves, and of the International Seabed Authority under Parts VI and XIII of the Convention, respectively). In addition, as stated in Article 87(2), 'these freedoms shall be exercised by all States with due regard for the interests of other States in the exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area'.

In his essay (Chapter 11) on 'Freedom of the Seas: Past, Present and Future', Ram P. Anand discusses the origins and the history of the freedom of the seas.[16] In his view, the unobstructed freedom of navigation and commercial shipping were accepted by all countries in the Indian Ocean and other Asian seas for centuries, and in contesting the Portuguese monopoly, Grotius took his inspiration from the Asian maritime practices of free navigation and trade. He analyzes the post-1945 era and the changes brought by the collapse of colonialism, the technological revolution and the development of marine technology in the law of the sea. His conclusion is that freedom of the seas 'will still be necessary for the proper use of the ocean, but it will be freedom within reasonable limitations, freedom under the law as it has come to be developed in recent years and is in the processs of codification'.[17]

Fisheries

Shigeru Oda, in his essay (Chapter 12) on 'Fisheries Under the United Nations Convention on the Law of the Sea',[18] takes up the subject of the fisheries regime introduced by the Convention. He begins by referring to the characteristics of the exploitation of the living resources of the sea under the traditional dichotomy between the territorial sea and the high seas, and the unsuccessful efforts at UNCLOS I and II to adopt a proposal that would give coastal States a 6-mile territorial sea, with an additional 6-mile fishing zone. Oda rightly asserts that the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, although setting forth a new concept of special interest to the coastal State, 'did not disturb the established rule of freedom of the high seas, under which fishing vessels need observe only the law of their own flag State'.[19] He then discusses the rules of the fishing regime in the 200-mile EEZ. Over

90 per cent of the living resources subject to commercial fishing are found in this area. The most important exceptions are the various species of tuna, approximately 40 per cent of which are taken outside that limit.[20] In Oda's view, the rules establishing obligations of the coastal State regarding conservation and optimum utilization of fishery resources, are likely to result in great difficulties when put into practice. Finally, he analyzes the new regime on high seas fisheries, some of which provisions, he says, 'seem to be drawn from a somewhat ambiguous concept of the cooperation of States'.

The Convention contains only one provision dealing with the question of fish stocks occurring within the EEZ of two or more coastal States or both within the EEZ and in the area beyond and adjacent to it. Article 63 provides that the States concerned – including the State fishing on the high seas for straddling stocks – shall seek to agree upon the measures necessary for the conservation of such stocks. The 1992 United Nations Conference on Environment and Development (UNCED), in its Agenda 21, Chapter 17 (concerned with the 'Sustainable Use and Conservation of Marine Living Resources of the High Seas'), noted the considerable expansion of fisheries in the high seas, representing approximately 5 per cent of the total world landing and stressed the need for more effective management. UNCED urged States to convene a UN Conference on straddling stocks and highly migratory fish stocks. The UN General Assembly convened a Conference following the recommendation by UNCED, which adopted an Agreement in August 1995.

Moritata Hayashi's essay (Chapter 13) on 'The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention'[21] deals with the principal legal aspects of this instrument. He examines those articles of the Agreement facilitating the implementation of the relevant provision of the Convention, and those making Part XV of the Convention applicable *mutatis mutandi* with respect to any dispute between States Parties to the Agreement relating to the interpretation or application of the Agreement whether or not they are also parties to the Convention. He further discusses the development of new rules, within the legal framework laid down by the Convention, as the adoption of the 'precautionary approach'; the compatibility of conservation and management measures for areas under national jurisdiction and for the adjacent high seas areas; the role of subregional or regional fisheries organizations; the duties of the flag State with respect to its vessels; the regional cooperation in enforcing conservation and management measures adopted by a regional organization; and the new concept of 'port State enforcement'. Finally, Hayashi mentions three areas where the Agreement appears to depart from the letter of the Convention's provisions, although arguably not from its fundamental requirements of conservation and environmental protection: the denial of the freedom to fish on the high seas to those States which neither belong to the relevant regional organization nor agree to apply the conservation and management measures adopted by the organization; the boarding and inspection of a fishing vessel on the high seas by non-flag State inspectors and the right to take certain other enforcement actions; and port State jurisdiction over activities at sea of foreign fishing vessels. The Agreement is not yet in force.

The International Seabed Area

The concept of common heritage of mankind, which was advocated by Ambassador Arvid

Pardo before the First Committee of UN General Assembly in 1967[22] and led to UNCLOS III and the adoption of the Convention, is analyzed in an essay (Chapter 14) on 'The Common Heritage of Mankind: Utopia or Reality?' by Alexandre Kiss.[23] He explains how the concepts of *re nullius* and *res communis*, in the light of the technological progress in seabed mining, led to the conviction that a simple regime of non-appropriation and common use of resources was not sufficient. He says that the first elements of the concept of common heritage of mankind appeared in the 1959 Antarctic Treaty. However, its most developed formulation is found in Part XI of the Convention, which possesses such elaborate and complex machinery 'that some of the most important States considered it unrealistic and even dangerous and did not sign the Convention'. As discussed above, the 1994 Agreement introduced important changes in that machinery in response to these concerns.

In his essay (Chapter 15), 'Law of the Sea Forum: The 1994 Agreement and the Convention', Bernard H. Oxman deals with the 1994 Agreement relating to the implementation of Part XI of the Convention.[24] After referring to its purpose of enhancing the prospects for widespread ratification of the Convention, he looks into the question of how the Agreement responds to the concerns expressed by the United States and other industrialized States. His analysis covers these headings: decision making, production limitation, technology transfer, access, the Enterprise, finance, regulatory burden, distribution of revenues and review conference. Oxman concludes that the Agreement 'substantially accommodates the objections of the United States and other industrial States to the deep seabed mining provisions' of the Convention.

Land-locked States

In their essay (Chapter 16), 'The Land-Locked Countries and the United Nations Convention on the Law of the Sea', Helmut Tuerk and Gerhard Hafner discuss the provisions of the Convention dealing with land-locked States.[25] They refer to the recognition in the Paris Peace Treaties and in the Declaration of Barcelona in 1921, of the right of land-locked States to fly their flag on the seas. However, this right can only be effective if these States have access to the seas. The 1958 Convention on the High Seas made this right dependent on agreement among the States concerned 'on the basis of reciprocity'.

The authors mention the aspirations of the group of land-locked and geographically disadvantaged States in UNCLOS III. They analyze the provisions of the Convention on the right of access of land-locked States to and from the sea and freedom of transit container in Part X; the rights of these States to participate in the exploitation of the living resources in the EEZ; the revenue sharing system for the exploitation of the continental shelf extending beyond 200 miles; and the rights of land-locked States regarding marine scientific research. Although Tuerk and Hafner recognize that a convention on the law of the sea cannot refashion nature and geography by turning land-locked into coastal States, they consider that the fruit of the intense negotiation effort at UNCLOS III, 'by far cannot be regarded as a set of legal regulations which wholly satisfy the interests and needs of the land-locked States'.[26] However, they assert, the application of the Convention, as an instrument fostering harmony among States will only be achieved if the particular situation of land-locked countries is adequately taken into account.

The Protection and Preservation of the Marine Environment

Alan E. Boyle's essay (Chapter 17) on 'Marine Pollution Under the Law of the Sea Convention'[27] provides a comprehensive analysis of Part XII of the Convention, entitled 'Protection and Preservation of the Marine Environment'. He states that the control, reduction and elimination of marine pollution has become one of the major issues in the contemporary law of the sea. The Convention sets out a general framework for a legal regime that establishes the obligations, responsibilities and powers of States in all matters of environmental protection. As Boyle observes, the 1958 Geneva Conventions had little to say on the subject. When UNCLOS III began its work, the existing regime lacked a generally accepted structure of legal principles dealing with marine pollution problems and defining the rights and duties of States.

The Convention places on States a basic duty to protect and preserve the marine environment and an obligation to take all measures necessary to prevent, reduce and control marine pollution. The author emphasizes that for the first time, States are obliged to cooperate globally and regionally in controlling pollution, formulating rules and standards, giving notification of imminent or actual damage and undertaking research and the exchange of information. Also, for the first time, there are obligations to provide technical assistance and to conduct monitoring and environmental assessments. Boyle examines three elements of this new legal regime: the distribution, content and control of prescriptive jurisdiction; the attribution of competence to enforce applicable standards; and the allocation of risk through principles of State responsibility and related concepts of liability, notification and intervention. His conclusion is that the primary significance of the provisions of the Convention is clearly their formulation of a structure of principles concerning all aspects of marine pollution prevention and control.

Marine Scientific Research

Patricia Birnie in her essay (Chapter 18), 'Law of the Sea and Ocean Resources: Implications for Marine Scientific Research'[28], discusses the legal regime of marine scientific research. Her essay concentrates on the relevant major requirements and implications for the sustainable development aims of UNCED, of the new legal order established by the Convention. As she states, Part XIII of the Convention deals exclusively with the legal regime relating to marine scientific research, but there are also other provisions on this matter in the Convention with reference to the continental shelf, the EEZ, the international seabed area and settlement of disputes. After referring to the provisions on scientific research in some of the 1958 Geneva Conventions, Birnie examines the requirements in the Convention for marine scientific research in relation to resource exploitation in the territorial sea, the EEZ, the high seas, the continental shelf and the deep seabed area. Finally, she examines the provisions of Part XIII. The major areas subject to controls by the coastal States are the EEZ and the continental shelf. In her view, some of the problems arising from the Convention regime derive from the lack of definition of terms, such as 'marine scientific research' and the 'constructive ambiguity' of the language in which many articles have been cast. These provisions, she maintains, require a liberal interpretation, which could be enabled both by States enacting appropriate formulations and procedures in their national legislation and by commissions and international organizations developing guidelines and standardized procedures.

Maritime Jurisdiction and Enforcement

Ivan A. Shearer's essay (Chapter 19) on 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels'[29] deals with the questions of jurisdiction and law enforcement over foreign vessels. The subject of his essay is to determine the extent to which the conflicting interests of the coastal States to secure recognition for their resources and security interests, and the interests of the maritime power to secure freedom of passage for their navies or distant water fishing fleets, were reconciled, and how clearly, in the Convention.

Shearer analyzes the jurisdictional and enforcement problems involved in the territorial sea, the contiguous zone, the international seabed area, archipelagos, the EEZ, the continental shelf, the high seas and the international seabed area. He also examines the enforcement of pollution laws and the exercise of enforcement powers in general. His conclusion is that the Convention itself 'restates a fundamental rule of international law that the exercise of rights, jurisdiction and freedoms shall not be conducted in such a manner as to constitute an abuse of right'. However, he adds that this broad principle is unlikely to prove an effective restraint on, or give adequate practical guidance to States in the exercise of the myriad of powers that the Convention proffers to them.

Military Uses of the Sea

Budislav Vukas in his essay (Chapter 20) on 'Military Uses of the Sea and the United Nations Law of the Sea Convention'[30], explains that although the provisions of the Convention on this matter are scarce and ambiguous, it should be emphasized that many of those provisions apply to a number of activities irrespective of their civil or military nature. He discusses the term 'military activities' which, in his view, does not include law enforcement activities and is limited to activities aimed at increasing the readiness of a State for war.

Vukas takes up the articles in the Convention on the territorial sea, in which specific military activities are mentioned, including the definition and immunities of warships. He refers to the issues of navigation of warships in the territorial sea, straits, and the EEZ. He then examines the rules in the Convention on the establishment and use of artificial islands, installations, structures and devices in maritime areas other than the territorial sea. In his opinion, the coastal state has exclusive rights in respect of such objects used for economic purposes or those which may interfere with the rights of the coastal State in the EEZ and the continental shelf. In respect of all other objects, even those for military purposes, all States have equal rights, having due regard to the rights and duties of the coastal State and to the peaceful uses of the seas. Regarding marine scientific research conducted for military purposes, he considers that – as stated in Article 301 of the Convention – it will be forbidden in any part of the oceans, if it is contrary to the prohibition of the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the UN Charter. Finally, on the notion of 'reservation of the sea for peaceful purposes', he also concludes that it neither limits nor forbids any particular military activity at sea, as long as it does not violate the above provisions of the UN Charter.

In his essay (Chapter 21) on 'Military Activities on the High Seas: What Are the Impacts of