side of the closing line. If the area of the semi-circle is less than that of the area of water the indentation is, for the purposes of baseline construction, a bay; if the area of the semi-circle is greater than the area of the water on the landward side of the closing line, the indentation is not—for legal purposes—a bay. The second stage is to draw a closing line. If the distance between the natural entrance points used for the previous calculation is less than 24 nautical miles (n. miles), the closing line may be drawn between them. If that distance exceeds 24 n. miles, then a closing line of up to that length can be drawn 'within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length' (LOSC Article 10(6)). This seemingly simple provision is very complex to apply in practice, with the identification of the natural entry points being a particular problem, and the bay being a 'well marked indentation' another.[10]

It may be the case that the coastline of a bay belongs to more than one State. This poses an additional difficulty since the exceptional rule in LOSC Article 10 only applies to those bays whose coasts belong to a single State. However, in the *Land, Island and Maritime Frontier Dispute* the ICJ sought to identify a concept of a 'pluri-State' bay, where the coasts belong to a number of States yet a closing line might still be drawn.[11] Whilst such an approach might be appropriate if, as in that case, there is a particular historical justification, it is difficult to see how it could be used more generally, if only because the waters behind the closing line would be 'internal' to all of the States concerned and this would simply generate a further need to differentiate between them. It seems to create more problems than it solves and is not found in State practice. In any case, LOSC Article 10(6) expressly renders the convention regime inapplicable to 'historic bays', these being indentations claimed by the coastal State as a part of its internal waters on the basis of a long-standing claim, assertion of jurisdiction, and acquiescence by others' (O'Connell, 1982, Ch 11). This offers an alternative route for States wishing to make claims in respect of indentations which cannot fulfil the criteria set out in the convention. However, such claims are difficult to substantiate and will often meet with considerable protest, as is the case with the Libyan claim to the Gulf of Sirte, a 'bay' nearly 300 n. miles in extent (Ahnish, 1993, Ch 7).

D. ARCHIPELAGOES

The 1951 *Anglo-Norwegian Fisheries* case also addresses what might be called 'coastal archipelagoes'. But what of States comprised wholly or partly of groups of islands? Should the waters be enclosed and treated as internal? What of the navigational rights of third States? At UNCLOS III the interests of archipelagic States, such as Indonesia and the Philippines, and the concerns of adjacent maritime neighbours, such as Australia, combined to produce a particular regime, set out in Part IV of the convention, applicable to 'archipelagic states'. Rather self-referentially, LOSC Article 46 defines an archipelagic State as a State 'constituted wholly by one or more archipelagoes' and other islands, where an 'archipelago' is itself further defined as a group of islands, or parts of islands, and their

[9] See, eg, *Post Office* v *Estuary Radio* [1968] 2 QB 740. See also Marston, 2002.

[10] See, eg, the US Supreme Court judgment in *United States* v *Alaska* 545 US 17 (2005), pp 17–20.

[11] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua) Judgment of 11 September 1992, ICJ Reports 1992*, p 351, para 395. The entire concept was roundly criticized by Judge Oda in his Dissenting Opinion, ibid, p 732, paras 1–26.

interconnecting waters which are so closely interconnected as to form, or be regarded as forming, an intrinsic entity, or which have been historically regarded as such. Therefore Indonesia, the Philippines, Fiji, Japan, and the UK are archipelagic States for convention purposes and so are entitled to draw archipelagic baselines, whereas island groups such as the Azores (belonging to Spain) and the Galapagos (belonging to Ecuador) are not.

However, not all archipelagic States are able to construct archipelagic baselines since such baselines must conform to strict criteria, the principal elements of which are that they must link the main islands of the group; no baseline may be more than 100 n. miles long, except that 3% of the total may be up to 125 n. miles in length; they must follow the general configuration of the island grouping; and, most importantly, fulfil the requirement that the ratio of water to land within the baselines must be not less than 1:1 and not more than 9:1 (LOSC Article 47). The result is both that those archipelagic States which primarily consist of a few large islands (such as Japan and the UK) and those which are composed of very small and widely spaced islands (such as Kiribati) are unable to draw archipelagic baselines even though they fall within the definition of an archipelagic State. It is the latter category of small and scattered island States which stood to gain most from the concept but they were unable to influence the negotiations in their favour and the details of the regime found in the convention favour the interests of the larger archipelagic States. It may be that, in time, State practice and customary law might develop in a fashion which is somewhat less rigid than the convention regime.

The waters within archipelagic baselines are 'archipelagic waters' rather than internal waters and are subject to special rules concerning, *inter alia*, fishing and navigation which will be considered later (LOSC Articles 49–53). Once again, and whatever its shortcomings, the Archipelagic regime offers another example of the manner in which the convention sought to forge a new approach to the division of jurisdictional competences, and moved away from a strict approach based on the distinction between the territorial and high seas.

III. THE INTERNAL WATERS, TERRITORIAL SEA, AND CONTIGUOUS ZONE

A. INTRODUCTION

The idea that States are entitled to exercise authority over the waters beyond their land territory (and internal and archipelagic waters) is deeply entrenched in international legal thinking. Although it was once argued that the competences States enjoyed within waters off their coasts fell short of territorial sovereignty and had to be positively asserted,[12] it is now clear that this authority flows automatically from the sovereignty exercised over land territory and so all coastal States do in fact have a territorial sea.[13] Practically speaking, however, States need to make some form of pronouncement, if only to determine the extent of their jurisdiction.

[12] This view found reflection—somewhat unexpectedly—in *R* v *Keyn* (1876) 2 Ex D 63, the substance of which was subsequently reversed by the 1878 Territorial Waters Jurisdiction Act.

[13] A view expressed by Judge McNair in his Dissenting Opinion in *Fisheries, Judgment, ICJ Reports 1951*, p 116 at p 160.

The breadth of water over which a State might legitimately exercise sovereign jurisdiction has been the subject of lengthy debate down the ages, but at the dawn of the twentieth century the preponderance of known practice fixed that distance at 3 n. miles. The conflict between those who favoured broadening this zone, in order to enhance coastal State security or to increase access and control over resources, and those who opposed this in the name of the freedom of navigation (and of fishing on the high seas) not only underpinned the development of the various functional maritime zones which will be considered shortly but was also responsible for the failure of UNCLOS I and II to determine the issue. By the time of UNCLOS III, however, it seemed clear that an expansion of territorial seas to 12 n. miles was inevitable and the only question was the price that its opponents could extract from its proponents. LOSC Article 3 now recognizes the right to establish a territorial sea of up to 12 n. miles, the overwhelming majority of States—nearly 140—have done so and this is now the position under customary international law. Although described as the territorial sea, the sovereignty of the State extends to the airspace above and the seabed and subsoil beneath (LOSC Article 2(2)).

It is important that States make their position clear since possession of a territorial sea not only entails rights but also duties: in his Separate Opinion in the *Fisheries Jurisdiction* case Judge Fitzmaurice pointed out that coastal States were obliged to maintain navigational aids within their territorial sea[14] and could be held responsible for damage flowing from the failure to do so. Clearly, the scope of this obligation depends on the extent of the territorial sea.

B. JURISDICTION OF THE COASTAL STATE

Although the coastal State exercises 'sovereignty' within its territorial sea, this sovereignty is circumscribed in a number of ways which will be considered in this section. It is also helpful to consider the jurisdiction enjoyed by a State within its territorial sea alongside that which it may exercise within its internal waters and in the contiguous zone that lies beyond, since these together represent a progression from the strongest to the weakest form of jurisdictional competences over maritime spaces which are grounded upon territorial sovereignty.

1. Internal waters

Predictably, a coastal State exercises sovereignty to its fullest extent within its internal waters. No State is obliged to allow foreign vessels into its internal waters, except in cases of distress and, exceptionally, where drawing straight baselines encloses waters which were not previously regarded as such, the right of innocent passage (described below) applies within internal waters (LOSC Article 8(2)). Otherwise, coastal States are free to restrict or impose whatever conditions they wish upon entry into internal waters, and it should be stressed that this includes entry into its ports, the waters of which form part of its 'internal waters'. Indeed, many international conventions are drawn up which *require* States to prevent unseaworthy vessels from entering ports as a matter of international law.

[14] *Fisheries Jurisdiction (United Kingdom v Iceland), Jurisdiction of the Court, Judgment, ICJ Reports 1973*, p 3 at p 27.

Once a foreign vessel has entered internal waters it is subject to the domestic legislation of that State which can, in principle, be enforced against it. On entering a port, the port State (as the coastal State then becomes known) is particularly well-placed to take enforcement action against vessels, if only because it can prevent them from leaving. The expansion of 'port State jurisdiction' over vessels is a feature of contemporary law, particularly as regards vessels which have breached health and safety regulations or have been causing pollution outside of the territorial sea of the State concerned (Özçayir, 2001). Indeed, there is an increasing trend to encourage the use of port State jurisdiction as a means of addressing the failures of flag States to exercise jurisdiction over vessels acting in breach of international standards (see Molenaar, 2006). However, States generally exercise restraint in enforcing local law over incidents taking place on board foreign vessels in their ports, limiting this to matters such as the infringement of customs laws, or activities which threaten to disrupt the peace of the port. This may include offences such as murder,[15] which have an intrinsic gravity that on-board scuffles between crew members lack. States will, however, generally exercise jurisdiction over incidents which involve non-crew members, as these concern more than the 'internal economy' of the vessel, and also take action in situations where the captain requests intervention. Such restraint reflects the temporary nature of the vessel's presence in a port and the fact that the flag State of the vessel itself has the right to exercise jurisdiction and that it is often more appropriate for it do so.

2. Territorial sea

The dominant view is that coastal State jurisdiction automatically extends to the territorial sea, with the logical corollary that the entire body of State law applies there. However, this does not mean that the coastal State has an unfettered discretion regarding the content of that legislation since international law places imposes a number of important restrictions upon what the coastal State might render unlawful activity within the territorial sea, the most important of which concerns vessels exercising the right of innocent passage, considered below. Moreover, logic does not necessarily make for practicality and the full rigours of this approach (assuming it to be doctrinally correct) are mitigated by a more restrictive approach to the enforcement of domestic law within the territorial sea, irrespective of whether a vessel is engaged in innocent passage or not.

It would be odd if States were to enforce their criminal law over vessels merely passing through their territorial seas in circumstances which would not have triggered enforcement within internal waters. Therefore, LOSC Article 27(1) exhorts States to refrain from investigating or arresting those suspected of offences committed on board a vessel unless: the consequences extended to the coastal State; it was of a kind to disturb the peace of the country or the good order of the territorial sea; assistance was requested; or it was necessary for the suppression of illicit traffic in drugs (LOSC Article 27(1)(a)–(d)). If the vessel has just left the State's internal waters it need show no such restraint (LOSC Article 27(2)), but in all cases the coastal State is to have 'due regard to the interests of navigation' when deciding whether, or how, to carry out an arrest within the territorial sea. These provisions apply to the criminal jurisdiction of the State. There are further exhortations against the exercise of jurisdiction over vessels in respect of civil matters, the chief of which is that

[15] Eg *United States v Wildenhaus*, 120 US 1 (1887), concerning the assertion of jurisdiction by the local courts over a murder on board a Belgian vessel in New York harbour.

vessels should not be stopped in order to exercise civil jurisdiction over an individual or with regard to actions *in rem*, rather than in respect of the activities of the vessel itself (LOSC Article 28). Finally, and unsurprisingly, coastal States are not permitted to arrest a warship or other vessels being used for governmental purposes which belong to another State. Rather, such vessels may be 'required' to leave the territorial sea immediately (LOSC Article 30) and it is implicit in this that the requisite degree of force necessary to ensure compliance with such a request might be used.

3. Contiguous zone

Traditionally, where the territorial sea ended, the high seas began and the laws of the coastal State no longer applied. However, policing maritime zones is no easy matter and, unlike land boundaries, they are simple to cross and it is therefore easy for vessels to commit offences within the territorial sea but to evade arrest by moving just a little further seawards. The answer was to permit coastal States to arrest vessels outside their territorial seas in connection with offences that either had been committed or which it was suspected were going to be committed within their territorial sea. Under LOSC Article 33 (and following a compromise first agreed upon in the 1958 TSC Article 24) the coastal State is permitted to 'prevent' and 'punish' infringements of some, but not all, of its laws (those concerned being 'customs, fiscal, immigration or sanitary laws and regulations') in a zone which might be up to 24 n. miles from the baselines (thus permitting a State with a three mile territorial sea to have a contiguous zone of up to 21 n. miles). Not all States have declared a contiguous zone, but their usefulness is such that an increasing number do so.[16]

The ability to 'punish' means that vessels that have committed such offences within the territory of the State may be arrested even though they have left the territorial seas. The ability to 'prevent' suggests that a State might stop a vessel from entering its waters when it has reason to believe that such an offence would be committed should that vessel enter. This is clearly open to abuse. Indeed, the entire concept represents a not insignificant extension of coastal State authority and there is a tendency for States to assert jurisdiction for a more ambitious range of matters than those mentioned in the convention text.

C. NAVIGATION IN THE TERRITORIAL SEA

The desire of coastal States to assert their jurisdiction in the waters off their coasts is matched by the needs of the international community to ensure that the seas remain open to navigation. Once again, there has been progressive development in both the range and the content of regimes applicable to navigation within waters over which coastal States exercise sovereignty. The principal regime concerns innocent passage through the territorial sea and the manner in which that regime has sought to the balance the relevant competing interests has shifted over time. In addition, some entirely new regimes of passage have been developed that reflect other developments.

[16] Some 84 States currently claim contiguous zones for a variety of purposes (not all in compliance with the LOSC) and the overwhelming majority are of 24 n. miles.

1. Innocent passage

Ships of all States enjoy a right of 'innocent passage' through the territorial seas of coastal States. For these purposes, 'passage' means that the vessel is in the process of travelling through the territorial sea and is doing so in a 'continuous and expeditious' fashion, though there are exceptions for stops which are 'incidental to ordinary navigation' or as a result of *force majeure* (LOSC Article 18). Thus a ship loitering within the territorial sea or traversing in a circuitous manner would not be engaged in 'passage' at all.

Not all passage is 'innocent'. According to the 1958 TSC Article 14(4), 'Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State'. It is, however, unclear who is to make that determination. In the *Corfu Channel* case[17] the ICJ adopted a fairly objective approach, suggesting that the innocent nature of passage was capable of objective assessment, that the opinion of the coastal State was not decisive and the mere fact that a violation of local law had occurred was not in itself sufficient to demonstrate prejudice to the interests of the coastal State. The difficulty that faced the Court was that it needed to allow coastal States sufficient scope to decide whether to take measures against vessels exercising the right of innocent passage but also needed to guard against their acting in an arbitrary and capricious fashion. The approach adopted in the *Corfu Channel* case seemed to favour the interests of ships in passage over that of the coastal State. The balance struck by the 1958 TSC seemed to adopt a rather more subjective and coastal-State oriented approach. It also provided for two special cases in which the very manner of passage would be enough to result in the loss of innocence, irrespective of whether there was in fact any prejudice to the coastal State or not: these concerned infringements by foreign fishing vessels of local legislation concerning fishing in the territorial sea (TSC Article 14(5)) and the requirement that submarines were to 'navigate on the surface and show their flag' (TSC Article 14(6)). Such activities were deemed to be incompatible with 'innocent passage' altogether.

These provisions in the 1958 TSC were widely regarded as unsatisfactory, particularly given the trend towards establishing increasingly broad belts of territorial seas and they were revisited at UNCLOS III. Although LOSC Article 19(1) endorses the general principle established in TSC Article 14(1), it takes a more objective approach to the determination of innocence by setting out in Article 19(2) a considerably longer list of activities and circumstances in which innocence is deemed to be lost, irrespective of whether there is any actual prejudice or infringement of local law. Moreover, these heads are themselves rather open textured, particularly the final catch-all provision of 'any other activity not having a direct bearing on passage' (LOSC Article 19(2)(j). At first sight this might suggest that the right of innocent passage has been limited even further by the LOSC. This has to be balanced against the argument that the list of exceptions is now exhaustive and closed, an argument forcefully put by the USA and former USSR in a joint statement in 1989. However, the wording of the convention is ambiguous on this matter, to say the least. Churchill and Lowe also point out that Article 19(2) refers to 'activities' and so the mere 'presence' of a vessel may no longer be sufficient to deprive it of innocence (Churchill and Lowe, 1999, p 85). It is clear that there is still considerable controversy surrounding this Article, but it would be consonant with the general thrust

[17] *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p 4 at pp 30–31.

of the convention if it were to be understood as representing a modest move towards enhanced, but objectively verifiable, coastal State control over passage through the territorial sea.

Even this assessment must be balanced against developments concerning the other plank of the innocent passage regime. Being engaged in innocent passage does not exempt a vessel from the need to comply with coastal State legislation, but the coastal State may only legislate for the range of issues that are set out in LOSC Article 21. These concern the safety of navigation, cables and pipelines; the conservation of living resources and prevention of infringements of fisheries laws; matters concerning the preservation of the environment and marine pollution, marine scientific research, and prevention of infringements of customs, fiscal, immigration, and sanitary laws. By way of checks and balances however, the coastal State may not use these legislative competences in ways which hamper innocent passage by, for example, imposing onerous or discriminatory requirements (LOSC Article 24(1)). Moreover, such laws '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' (LOSC Article 21(2)), these being those agreed under the auspices of the International Maritime Organization (IMO). The coastal State does have the power to 'suspend temporarily' innocent passage in specified areas, but only if this is non discriminatory, is 'essential for the protection of its security', and is duly publicized (LOSC Article 25(3)).[18]

Vessels violating such laws are liable to arrest in accordance with LOSC Article 27 even though they may be exercising the right of innocent passage through the territorial sea. It would, of course, be in breach of international law for a coastal State to enforce laws on matters other than these upon a vessel simply because it ceased to be engaged in innocent passage by reason of entering internal waters. The more exacting standards that can be applied to ships not engaged in innocent passage can only be enforced against those whose passage ceased to be innocent *whilst in the territorial sea* and in accordance with Article 27.

A final question concerns the range of vessels which are entitled to exercise innocent passage. The convention texts refer to 'ships' and in the *Passage through the Great Belt* case[19] Denmark questioned whether the regime was applicable to structures such as oil rigs. The better view is that a broad, purposive approach should be taken in unusual cases such as this, but the most controversial issue is whether warships can exercise a right of innocent passage. No agreement could be reached on this issue at UNCLOS I or III, and the matter is not dealt with directly by the TSC or the LOSC. The major maritime powers favour warships enjoying the right of innocent passage, but this is opposed by many smaller States or those in strategically sensitive locations.

There are three schools of thought: that the passage of warships requires the prior authorization of the coastal State; that such passage must be notified to the coastal State, though no express authorization need be requested or given; or that such passage is possible provided that it conforms to the general rules on innocent passage as set out in the

[18] Notifications made to the UN Secretary-General are publicized on the UN website at http://www.un.org/depts/los.

[19] *Passage Through the Great Belt (Finland* v *Denmark), Provisional Measures, Order of 29 July 1991, ICJ Reports 1991*, p 12.

convention. For some, this last approach is implausible since the mere presence of a foreign warship within a territorial sea is prejudicial to the coastal State's interests. However, the move towards focusing upon 'activities' rather than the presence of ships within the territorial sea in the LOSC makes this argument less persuasive. Moreover, the convention texts provide some support for warships enjoying innocent passage: the general rules are set out in a section headed 'Rules Applicable to all Ships'; some of the activities listed in Article 19(2) as leading to the loss of innocence can only (or largely) be undertaken by warships; and submarines, most (but not all) of which are warships, can exercise that right if surfaced and showing their flag (Churchill and Lowe, 1999, p 89). None of these arguments is wholly convincing and State practice is as diverse as it is predictable, with major maritime powers such as the UK and the USA (joined by the USSR in their 1989 Joint Statement)[20] arguing in favour of warships enjoying the right of innocent passage and less powerful coastal States enacting legislating requiring authorization or notification. Despite the growing trend towards increased coastal State dominance of offshore areas, the imperatives of essential military interests would suggest that this is likely to remain a matter of controversy for some time to come, though on a day-to-day basis pragmatic approaches are usually found which respect the positions of all concerned.

2. Straits

The regime of innocent passage is a concession by coastal States to accommodate the interests of navigation but, as has been seen, the coastal State still enjoys a formidable array of jurisdictional competences. Whilst this might be acceptable where there is no real need, other than convenience or desire, to enter the territorial seas, different considerations apply to narrow straits wholly comprised of territorial seas but which are also used for international navigation, such as the straits of Dover, Gibraltar, and Hormuz. In such cases, international law shifts the balance somewhat in favour of the freedom of navigation (see generally Nandan and Anderson, 1989; Jia, 1998).

In the *Corfu Channel* case the ICJ concluded that, irrespective of the position more generally, warships were entitled to exercise a right of innocent passage through straits used for international navigation and that coastal States were not entitled to 'suspend' innocent passage within such straits for any form of ship.[21] This variant on innocent passage only applied in straits which linked one part of the high seas with another and which were actually used as a route of international navigation. Importantly, the existence of a relatively convenient alternative (in this case, around the western side of the Island of Corfu) did not deprive it of this status. Arguably, this was an overly generous approach to the interests of the international community at the expense of the coastal State but it was nevertheless reflected in 1958 TSC Article 16(4), which further expanded the regime by applying it to straits linking the high seas with the territorial sea of a third State at the head of a Gulf (this being intended to facilitate access to the Israeli port of Eilat at the head of the Gulf of Aqaba). This latter gloss did not reflect customary law, and was rejected by Arab States, but it was retained in Article 45 of the LOSC which reflects the TSC approach, though now expanded to take account of the Exclusive Economic Zone (EEZ).

[20] USA-USSR Uniform Interpretation of Norms of International Law Government Innocent Passage (1989), 14 *Law of the Sea Bulletin* 12. See Schachte, 1993, pp 182–183.

[21] *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p 4 at p 28.

Under the LOSC, the *Corfu Channel* regime of 'non-suspendable innocent passage' has something of a residual flavour, now applying only to straits not covered by the new regime of transit passage, considered below. However, there is no doubting the customary law status of the *Corfu Channel* regime which provides an assured minimum guarantee of passage though international straits for all vessels, including warships.

3. Transit passage

A major problem facing UNCLOS III concerned the consequences of the breadth of the territorial sea increasing from 3 to 12 n. miles. This meant that many major strategic waterways which had previously been high seas, such as the Straits of Dover, could become entirely territorial seas and at best be subject to the regime of non-suspendable innocent passage. During the Cold War, when super-power security was thought to depend in part on relatively undetectable submarine-based nuclear missiles, the idea that submarines should surface and show their flags when prowling the oceans was an additional concern. The result was a comprise that sought to further reduce the ability of coastal States to restrict passage within their territorial seas.

The LOSC regime of transit passage applies to all straits connecting high seas or EEZs with other areas of high seas or EEZs and which are used for international navigation unless there is a corridor of high seas or EEZ running through it (LOSC Article (36)) or the strait is formed by an island which belongs to the coastal State and seawards of which there is an alternative route (LOSC Article 38(1)). In cases covered by this latter rule, known as the 'Messina Strait' exception (after the Straits between Italy and Sicily), the *Corfu Channel* regime of non-suspendable innocent passage continues to apply. Straits covered by particular treaty regimes, such as the Turkish Straits (the Dardanelles and the Bosphorus), are also expressly excluded from the scope of the provisions concerning transit passage (LOSC Article 35(c)).

Whereas innocent passage only applies to ships and submarines, transit passage also applies to aircraft which are accorded the right of overflight. Although not expressly stated, the regime applies to military ships and aircraft, and submarines may proceed submerged. Ships or aircraft must 'proceed without delay' and 'refrain from any threat or use of force' against the States bordering the strait (thus, for example, hurrying through the Straits of Gibraltar to conduct military activities in the eastern Mediterranean would be permissible). Although ships and aircraft must comply with generally accepted international regulations regarding safety matters (LOSC Article 39), coastal States may themselves only regulate a very circumscribed list of activities: maritime safety (including traffic separation schemes); internationally approved regulations concerning discharges of oil, oily waste, and noxious substances in the strait; with respect to fishing vessels, prevention of fishing and the stowage of fishing gear; and loading and unloading in connection with customs, fiscal, immigration, or sanitary laws (LOSC Article 42(1)). The balance struck clearly favours the freedom of navigation. The customary law status of transit passage has been challenged (de Yturriaga, 1991) and remains unclear, although State practice outside the convention framework increasingly reflects these provisions. Whilst the increasing numbers of States party to the LOSC has taken some of the heat out of this debate, it remains the case that maritime powers which are not party to the Convention may need to rely on the customary status of transit passage in order to be assured of passage for warships and overflight of aircraft through or over straits of key strategic significance.

4. Archipelagic sea lane passage

Drawing archipelagic baselines converts vast tracts of waters which were previously either high seas or territorial seas into 'archipelagic waters'. LOSC Article 52 provides that the right of innocent passage applies throughout such waters and, moreover, Article 53 provides for a right of 'archipelagic sea lane passage' in 'corridors' to be designated by the archipelagic State. Archipelagic sea lane passage is substantially similar to transit passage, meaning that the jurisdiction of archipelagic States over a wide range of matters in waters within their baselines is substantially reduced. As a result, the demands of international navigation have been given precedence over local control.[22]

IV. THE HIGH SEAS

A. THE FREEDOMS OF THE SEAS

The idea that beyond the territorial seas lie the high seas which are free for use by all lies at the heart of the law of the sea. Both the 1958 HSC and the LOSC proclaim the high seas to be free and open to vessels of all States and give non-exhaustive lists of freedoms. The HSC mentions navigation, fishing, overflight, and cable laying (HSC Article 2), and the LOSC adds the construction of artificial islands and marine scientific research. All are to be enjoyed with 'due regard' (in the HSC, 'reasonable regard') to the interests of others (LOSC Article 87).

It has already been seen how that space has been eroded by the expansion of the territorial seas, and some of the balances that have been struck as a consequence. Later sections will look at how the high seas have been further eroded by the creation of zones of functional jurisdiction. This section considers how freedom of navigation on the high seas has fared.

The key to regulating activities within the high seas is the concept of flag State jurisdiction. All vessels must be registered according to the laws of a State and, in consequence, are subject to its legislative jurisdiction and, whilst on the high seas or within its own territorial sea or EEZ, to its enforcement jurisdiction. In principle, a flag State enjoys exclusive jurisdiction over its vessels, although there are exceptions. However, if a ship is stateless, or flies more that one flag so that its true State of registry is not clear, then any State can exercise jurisdiction over it.[23]

Although the content of domestic laws applicable to vessels will vary considerably, there are an increasingly large number of international conventions relating to matters such as pollution control, resource management, and health and safety at sea which seek to ensure as common an approach as possible. Beyond this lies the problem of enforcement. A State is obliged to 'effectively exercise its jurisdiction and control' over ships operating under its flag (LOSC Article 94(1)) but this is often easier said than done. Many States simply do not have the capacity to enforce their laws over vessels flying their flag, (many of which may only rarely, if ever, put into port in their State of registry), whilst others simply lack

[22] The first example of a designation was that of Indonesia. See Indonesian Government Reg No 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes, 28 June 2002 (2003) 52 *Law of the Sea Bulletin* 20.

[23] See, eg, *Molvan* v *Attorney General for Palestine* [1948] AC 351.