

Trusteeship Council	The Trusteeship Council of the United Nations; one of the six principal organs of the UN.
<i>Ultra vires</i>	'Beyond power'; an authority which exceeds its lawful powers acts <i>ultra vires</i> .
United Nations (UN)	An international organisation of almost every State in the world, founded in 1945 by the UN Charter; successor to the League of Nations.
<i>Usus</i>	The objective element of customary international law; a widespread and virtually uniform practice of States.
<i>Uti possidetis juris</i>	'As you possess under law'. Colonial borders and internal administrative boundaries automatically become the lawful international borders of new States once they achieve independence from the colonial power. The same principle now applies to the internal administrative boundaries of new States emerging from the break-up of larger States. These boundaries may be changed only by agreement between the affected States.
World Court	A shorthand expression referring to both the International Court of Justice and the Permanent Court of International Justice.

Nature and sources of international law

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Objectives

After completing this chapter, you should:

- (1) understand the material scope of international law;
- (2) have a basic understanding of the historical origins of modern international law;
- (3) understand and be able to explain the structure of the international legal system;
- (4) understand and be able to explain the juridical character of international law;
- (5) understand and be able to identify the sources of international law;
- (6) have a basic understanding of treaties and 'soft law';
- (7) understand and be able to explain the salient characteristics of customary international law;
- (8) understand and be able to explain the salient characteristics of the general principles of law;
- (9) understand and be able to explain the role played by judicial and arbitral decisions and the teachings of eminent publicists;
- (10) understand and be able to identify the modes by which acts of public international organisations affect the normative requirements of international law; and
- (11) understand and be able to identify the way in which unilateral declarations by States can create legally binding obligations.

Key cases

Anglo-Norwegian Fisheries case (United Kingdom v Norway) ICJ Rep (1951) 116

Asylum case (Colombia v Peru) ICJ Rep (1950) 266

North Sea Continental Shelf cases (Germany v Denmark, Germany v The Netherlands) ICJ Rep (1969) 3

Right of Passage case (Portugal v India) ICJ Rep (1960) 6

Factory at Chorzów (Indemnity) (Merits) (Germany v Poland), PCIJ Rep (1928) Series A No 17

Diversion of Water from the River Meuse case (The Netherlands v Belgium) PCIJ Rep (1937) Series A/B No 70

Russian Indemnities case (Russia v Turkey), Russian Claim for Interest on Indemnities (Damages Claimed by Russia for Delay in Payment of Compensation Owed to Russians Injured During the War of 1877-1878), Award of the Tribunal, 11th November, 1912 (accessible at the Permanent Court of Arbitration website, pca-cpa.org).

Nuclear Tests cases (Australia v France, New Zealand v France) ICJ Rep (1974) 253

Frontier Dispute case (Burkina Faso v Mali) ICJ Rep (1986) 554

Key treaties and instruments

Charter of the United Nations (1945): Art 1, Art 103

Statute of the International Court of Justice (1945): Art 38(1)

Concept of international law

1.1 Until relatively recent times, international law was regarded as a system of legally binding rules and principles that regulated relations exclusively among sovereign States. These States were held to be the only subjects of international law and the only entities possessing legal personality on the international plane. This meant that only States could enjoy legal rights and be under legal obligations at the international level. For the purposes of international law, the word 'State' denotes a country that exhibits certain specific features: an independent government, a definite territory, a permanent population, and a capacity to enter into legal relations with other States.¹ States, in other words, are independent countries.

1.2 Other entities, such as natural persons or corporations, fell within the ambit of international law only by virtue of having a designated relationship to a State. These non-State entities were regarded as 'objects' of international law, whose affairs were of concern to international lawyers only to the extent that a State was either responsible for their actions or entitled to protect them against the actions of other States.²

¹ See 4.4–4.17.

² See Chapter 5.

1.3 Since World War I, the concept of international law has broadened to include among its subjects public international organisations and individuals. Thus, international organisations established by agreement among States, such as the United Nations (UN), may also have certain rights, obligations and capacities under international law.³ Individuals have increasingly become subjects of international law in certain fields, as States have concluded agreements codifying and conferring human rights and establishing direct individual responsibility for international crimes.⁴

1.4 International law can now be defined as a body of rules and principles that regulates relations:

- (i) among States and public international organisations inter se;
- (ii) between States and individuals in the field of international human rights; and
- (iii) between international society and individuals who have committed international crimes.

1.5 International law is frequently called 'public international law' in order to distinguish it from private international law (also sometimes called 'conflict of laws'). Whereas public international law is a uniform and autonomous system of norms regulating relations among its subjects, private international law consists of norms developed within States as part of their own domestic legal orders to resolve disputes between private parties where a foreign element is involved. Private international law determines the choice of law applicable to a legal dispute, whether a particular domestic court or tribunal has jurisdiction where there is a cross-border element and whether it should exercise any such jurisdiction, and whether a domestic court may order the enforcement of a foreign court's judgment.

A clash between public international law and private international law may arise in a number of ways. There may, for example, be a simple failure to comply with a treaty coordinating or harmonising rules of private international law among the contracting States. In such a case, the State that has failed to maintain or reform its domestic law or practices in accordance with its treaty obligations has committed a breach of the treaty in question. Such a breach would be a violation of the delinquent State's duties under public international law — namely, the duty to perform treaty obligations in good faith. A more familiar cause of conflict between the two systems is the existence of a domestic rule of private international law that affirms or denies a domestic court's jurisdiction inconsistently with a customary norm of public international law. Once again, by applying such a domestic rule,

³ See 4.67–4.71.

⁴ See 1.21, Chapters 10–11.

the delinquent State violates its duty under public international law — in this case, the duty to comply with applicable customary legal obligations.

Development and scope of international law

1.6 International law, understood simply as a body of norms regulating relations among political rulers, can be traced back to the period of early antiquity. Indeed, archaeologists have discovered treaties between kings of city-states in ancient Mesopotamia, the cradle of civilisation, dating from around 3000 BCE. Treaty relations among rulers remained a feature of political life throughout the ancient history of the Middle East and the Mediterranean, with most civilisations recognising the binding force of treaties and respecting the persons of diplomatic envoys.

1.7 Medieval Europe enjoyed a more elaborate form of international law, though the structure of feudal realms was not well suited to the emergence of a distinctly separate legal system for the regulation of relations among sovereigns.

These feudal kingdoms, principalities and duchies were not States in the modern sense. There was usually no sovereign exercising undisputed authority within the realm's boundaries. Feudal princes shared power internally with an aristocratic class who often maintained their own armies and legal systems. Furthermore, the rulers, and sometimes their vassals, frequently owed political allegiance to external authorities such as the Church or the Holy Roman Emperor. There was, therefore, an absence of that specifically modern concept of sovereignty that is emblematic of modern statehood and that makes possible an autonomous body of international law: the exercise of political authority over a definite territory and population, unrestricted by any external political authority, and limited only by the requirements of international law.

In relation to any parcel of territory, there might easily have been a number of overlapping, and sometimes conflicting, political authorities — more than one of which participated directly in Europe's 'international' life. During this period, the law governing relations among European rulers was an expression mostly of the *jus gentium*: the 'law of nations' or the 'common law of all mankind', which has conceptual roots in both Roman law and the natural law. Thus, the principle *pacta sunt servanda* (agreements are to be observed) applied equally to treaties and to private commercial contracts as an expression of the *jus gentium*. Medieval princes were bound like everyone to observe the universal principles of the *jus gentium* in their dealings with all people, regardless of whether they were commoners, nobles or other princes.

1.8 During the course of the 15th and 16th centuries, several powerful States emerged (Spain, Portugal, England, France, the Netherlands and Sweden) in which internal authority became more centralised. These States, and especially those in Northern Europe where the Protestant revolution was most influential, refused to accept the political authority of entities beyond themselves. This development prepared the ground for the modern autonomous system of international law.

1.9 In its origins, the modern system of international law was concerned almost exclusively with regulating relations among States as armed actors on the European stage. Emerging from the turmoil of Europe's religious wars in the 16th and 17th centuries, modern international law was long dominated by norms regulating the conduct of war and clarifying matters about which disagreements might lead to war. Indeed, the most influential book in international law's early modern period was *De iure belli ac pacis* (*On the Law of War and Peace*), published in 1625 and written by the Dutch jurist and diplomat Hugo Grotius (1583–1645). This definitive work in three volumes was concerned with the lawfulness or justice of war itself, the causes of just war, and the legal status of particular acts performed in the course of waging war. Grotius also expounded upon issues such as the property of States and their freedom on the high seas, which provided notorious points of friction potentially leading to armed conflict between States.

Grotius explained the reason for his focus on the law of international armed conflict and security, and underscored modern international law's essentially European origins, in the following terms:⁵

I saw prevailing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint.

For the next 300 years, international law was largely a matter of working through the terrain mapped by Grotius, although the precise content of the norms that emerged often departed substantially from those propounded by the great pioneer.

1.10 The emergence of the modern conception of statehood was a lengthy process with origins traceable to England and France in the 15th century. The treaties concluding the Peace of Westphalia at the end of the Thirty Years War (1618–48) confirmed the modern State system, and feudal

⁵ Hugo Grotius, *De iure belli ac pacis libri tres*, with an abridged translation by William Whewell, John W Parker, London, 1853, Vol I, lix (Prolegomena, 28).

conceptions of international order were extinguished as a potent force animating intra-European relations. The treaties established the rights of numerous small States to participate directly in the international system, with only symbolic concessions to the pre-modern order represented chiefly by the Holy Roman Empire. The peace treaties confirmed the legitimacy of States based on differing versions of Christianity, established that no political authority existed over States, and enshrined the principle of religious tolerance for minorities in some parts of Europe.

The sovereignty of States was, thus, simultaneously established and limited in a way that dimly foreshadowed the later emergence of international human rights law. The treaties of Westphalia also established diplomatic machinery for the peaceful settlement of international disputes, though this system remained dormant.

The peace treaties of Westphalia, at whose negotiations over 190 established or nascent States were represented, settled and regulated many of the issues that had ignited the most destructive and exhausting series of wars Europe had yet endured. As a result, religion was largely eliminated as a cause likely to stir the European powers to open warfare among themselves.

1.11 The Final Act of the Congress of Vienna (1815) and related international agreements sought to adapt the Westphalian State system to substantially new circumstances. The task of the Act and agreements was to maintain international peace in the situation brought about by the insistent movement within many European States away from monarchical despotism, under which territories and populations could be transferred at will, towards various forms of democratic control based on nationalism and national self-determination. This movement, whatever its merits in other regards, was revolutionary in character and proved highly disruptive to peace within Europe, as the recently concluded wars against Napoleonic France amply demonstrated.

The principal European powers established a formal system of collective security against revolutionary turmoil anywhere within Europe, which system was successfully employed on several occasions. The concept of formalised collective security would become a familiar refrain in international law. Other potential flashpoints of armed conflict were also addressed by, among other things, extending freedom of navigation to international rivers within Europe and codifying certain rules relating to diplomats. The Final Act's formal condemnation of the slave trade was also a significant development in international law, and made another important conceptual link between human rights concerns and the maintenance of international peace.

1.12 The increasingly destructive power of military technology during the course of the 19th century, and the emergence of mass military mobilisation, posed new challenges for international law, with its continuing focus on the law of war and peace.

The American Civil War (1861–65), which up to that point was the world's most destructive war, killed more than 600,000 people and wounded more than 500,000. The Geneva Convention of 1864 gave legal protection to the wounded in international military conflicts and to those seeking to assist the wounded. The Brussels Conference of 1874 and the Hague Peace Conferences of 1899 and 1907 formulated and agreed upon rules protecting non-combatant civilians, as well as rules for the treatment of prisoners of war, in international armed conflicts. The 1899 conference also established the Permanent Court of Arbitration in an attempt to provide a standing mechanism for the peaceful settlement of international disputes.

1.13 While international law, at this stage, retained its overriding focus on the law of war and peace, there was also an increasing interdependence of international life in the fields of transport, communications and economics. Indeed, the first great era of globalisation occurred in the late 19th and very early 20th centuries.

This period saw international law begin to broaden its domain beyond issues of war and peace, and turn its attention to facilitating international cooperation in a range of technical areas. Significant achievements during this period include the Paris Convention establishing the International Telegraph Union (1865), the Berne Convention establishing the General Postal Union (1874), the Paris Convention for the Protection of Industrial Property (1883), the Berne Convention for the Protection of Literary and Artistic Works (1886), the Brussels Convention for the Publication of Customs Tariffs (1890) and the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (1891). All these, and other similar, agreements foreshadowed the wide cooperation in technical matters that was to become a major feature of international law in the late 20th century.

1.14 Just as the Thirty Years War and the Napoleonic Wars ended in peace conferences that changed the course of international law, so too did World War I. The Paris Peace Conference (1919) established the League of Nations, a bold experiment in international order. The traumatic experience of the war, in which more than 16 million people died, prompted the victors to establish the League with a view to preventing the recurrence of any similar conflict. It was thought that a principal catalyst of hostilities was the rush to war by several States in the summer of 1914, while martial passions remained high. The remedy contained in the Covenant of the League of Nations was a mandatory cooling-off period of three months before

resorting to war. The Covenant did not, therefore, prohibit resort to war as an instrument of national policy; on the contrary, war was conditionally preserved as a remedy of last resort among the League's member States.⁶ The League of Nations ultimately failed in its primary mission to prevent the recurrence of another world war.

1.15 In 1928, an attempt was made to outlaw resort to war completely by the General Treaty for the Renunciation of War as an Instrument of National Policy (the Kellogg–Briand Treaty, or Pact of Paris).⁷ Consisting of two brief Articles, it is one of the shortest treaties in history. Article I provides: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.' Article II provides: 'The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.' No attempt was made to define 'war', which left open the question of whether it applied to prohibit the use of armed force without a formal declaration of war.⁸ In 1949, the UN General Assembly made an attempt to supplement the Kellogg–Briand Treaty by establishing a conciliation and arbitration procedure. The result was the Revised General Act for the Pacific Settlement of International Disputes.⁹ Having been adopted in the shadow of the more comprehensive UN Charter, however, it has attracted the participation of only eight States.¹⁰

1.16 A substantially more successful development was the establishment of the Permanent Court of International Justice (PCIJ) by the League of Nations in 1921. The PCIJ lasted until 1945, handing down 32 judgments in contentious cases between States and giving 27 advisory opinions at the request of League institutions. Many of these judgments made lasting contributions to the development of international law in a variety of fields. The years between the world wars were, indeed, something of a springtime for the international arbitration of disputes. In addition to the outpourings of the PCIJ, numerous ad hoc arbitral tribunals and commissions produced

⁶ See 9.5.

⁷ League of Nations Treaty Series, Vol 94, p 57. The original parties were Australia, Belgium, Canada, Czechoslovakia, France, Germany, India, Ireland, Italy, Japan, New Zealand, Poland, South Africa, the United Kingdom and the United States. A further 39 States (including China and the Soviet Union) subsequently became parties.

⁸ See 9.6.

⁹ UNTS, Vol 71, p 101.

¹⁰ Belgium, Burkina Faso, Denmark, Estonia, Luxembourg, Netherlands, Norway and Sweden.

awards that, likewise, made important contributions to the development of international law, even if the awards themselves were sometimes ignored by participating States. The International Court of Justice (ICJ) replaced the PCIJ in 1946 soon after the establishment of the United Nations.

1.17 In the immediate aftermath of World War II, international law's spotlight remained, understandably, principally trained on the perennial questions of war and peace. The UN Charter was opened for signature while the war against Japan was still being fought (26 June 1945). By the time the Charter entered into force (24 October 1945), two Japanese cities had been devastated by atomic bombs, the war had finally ended, and the International Military Tribunal for the Punishment of War Criminals had held its first session in Germany.

1.18 The UN architecture for preserving and restoring international peace will be considered in more detail in chapters 8–9. For present purposes, it is sufficient to observe that a serious attempt was made to improve upon the legal mechanisms that existed in the years between the world wars. In particular, the League Covenant's highly qualified restriction on resort to 'war' was replaced by a more comprehensive UN Charter prohibition 'on the threat or use of force',¹¹ subject to an 'inherent right of individual or collective self-defence if an armed attack occurs'.¹² The UN Security Council is, furthermore, able to authorise or require the use of economic sanctions and to authorise armed force in order to maintain or restore international peace and security.¹³

The result was that, for the first time, the customary international law right of States to resort to armed force as a means of resolving disputes was apparently superseded for those States that became a party to the Charter. Furthermore, the customary right itself disappeared either immediately upon the entry into force of the Charter, or over time as States aligned their practice to the Charter's requirements.

An interesting question is whether the continuing non-occurrence of another global war is primarily due to this newer legal architecture, or whether other factors have been decisive. In particular, and in contrast to the League of Nations, the United Nations has not until recently had to deal with a multi-polar system in which several of the world powers were totalitarian States determined to establish or reclaim empires by force of arms, and where no other State or alliance of States was sufficiently resolute to deter them.

¹¹ UN Charter, Art 2(4).

¹² Ibid, Art 51.

¹³ Ibid, Arts 39, 41 and 42.

1.19 The trial and conviction of many of the National Socialist leaders for crimes against the peace, crimes against humanity and war crimes was of monumental significance in demonstrating that responsibility for the most serious offences against international law could attach to political and military leaders, and not simply to the State whose affairs they directed. This was reaffirmed by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,¹⁴ which provides for punishment of individual offenders after conviction by a national court or an international criminal tribunal.

1.20 Since World War I, there has been an unprecedented expansion in the material scope of international law beyond its traditional concern with issues of war and peace. While the law of armed force remains of central concern to many international lawyers, a range of political and technological developments have, over the last century, provided a climate in which there has been a dramatic expansion of the subject matter over which international law exercises authority. This process has gathered even further pace since the end of the Cold War, with increased opportunities for international economic and political cooperation.

1.21 As noted above, the personal scope of international law has expanded to embrace individuals, at least for some purposes.¹⁵ This has been primarily in the areas of human rights protection and the law relating to international crimes, such as crimes against the peace, crimes against humanity, war crimes and genocide. In the case of human rights protection, international law's traditional link with the maintenance of international peace is recognised in the preambles to the 1948 Universal Declaration of Human Rights (UDHR),¹⁶ the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, or ECHR),¹⁷ the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁸ and the 1966 International Covenant on Civil and Political Rights (ICCPR).¹⁹

1.22 As Grotius and other early publicists recognised, competition for the use of the seas, which cover more than 70 per cent of the Earth's surface, was also intimately connected with the maintenance of international peace. It followed that the Law of the Sea was one of the earliest areas of international law to be developed.

14 UNTS, Vol 999, p 171.

15 See 1.3.

16 General Assembly Resolution 217A (III); UN Doc A/810, 71 (1948).

17 UNTS, Vol 213, p 221; Council of Europe Treaty Series, No 5.

18 UNTS, Vol 993, p 3.

19 UNTS, Vol 999, p 171.

This is also an area that has been the subject of extensive development and refinement since World War II.²⁰

1.23 As the factual interdependence of international society has increased, so has the material scope of international law naturally expanded to provide a framework within which States and other members of international society may fruitfully coordinate their joint and competing activities for the benefit of the common good.

1.24 As with domestic law, international law frequently lags behind developments in the society to which it corresponds. Forces with vested or sectional interests may periodically retard developments in international law that would be beneficial to the society as a whole, just as such forces might sponsor new developments that undermine the common good.

The risk of such distortions appearing is generally increased wherever political authority is not, in some real sense, representative of the whole of the society that it governs. International society has, since the Peace of Westphalia and the transmission of the European State system to the rest of the world, been under the political authority of the society of States. The activities of these States generate the treaties and customs that constitute positive international law.²¹

It is notorious, however, that many States that participate in the exercise of this international political authority are not representative of their populations. These States frequently exercise domestic power and use their international authority directly against their people's fundamental interests and without their consent. Not being concerned with their own people's welfare or consent, such States have only limited interest in the development of international law in directions genuinely beneficial to international society as a whole. Furthermore, the continuing participation of such dysfunctional or dictatorial States in the generation of international law sometimes creates a reluctance on the part of other States to entrust international law with a major role in the solution of international problems.

1.25 Notwithstanding this serious weakness in the international legal system, there has emerged a universal system of legal cooperation in a large number of fields. These include areas that might be regarded as essentially systemic or constitutional to international law itself, such as a more fully developed conception of international law's sources,²² the law relating to States and intergovernmental organisations,²³ title to territory,²⁴ the law of

20 See Chapter 12.

21 See 1.27.

22 See 1.79–1.212 and Chapter 2.

23 See Chapter 4.

24 See Chapter 7.

International law in Hong Kong law

3

Objectives

After completing this chapter, you should:

- (1) be aware of the traditional distinction between monist and dualist conceptions of international law, and understand that most domestic legal orders blend elements of both approaches;
- (2) understand and be able to explain the extent to which international law affects the common law of Hong Kong;
- (3) understand and be able to explain the extent to which international law affects enacted law in Hong Kong;
- (4) understand and be able to explain the extent to which international law affects the exercise of administrative discretion in Hong Kong;
- (5) be aware of the Basic Law provisions on Hong Kong's external affairs.

Key cases

Chung Chi Cheung v R [1939] AC 160, (1938) 30 HKLR 37(2), [1938] 4 All ER 786

Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529, [1977] 1 All ER 881, [1977] 2 WLR 356, [1977] 2 CMLR 465

R v Secretary of State for the Home Department, ex parte Thakrar [1974] QB 684

Mabo v State of Queensland (No 2) (1992) 175 CLR 1, (1992) 107 ALR 1

R v Jones (Margaret) [2007] 1 AC 136, [2006] 2 All ER 741, [2006] 2 WLR 772, [2006] 2 Cr App R 9

Democratic Republic of the Congo v FG Hemisphere Associates LLC (2011) 14 HKCFAR 95, [2011] 4 HKC 151

Lilik Andayani v Chan Oi Ling [2001] 2 HKLRD 572, [2001] 1 HKC 252

Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273, (1995) 128 ALR 353

Chan To Foon v Director of Immigration [2001] 3 HKLRD 109

3.1 International law, understood as the rules and principles regulating relations among States and public international organisations on the plane of international relations, is a field in which only a very small proportion of lawyers will ever practice on a regular basis. The vast majority of lawyers spend almost all of their professional lives dealing with matters regulated by private or public domestic law. Nevertheless, international law has always impinged on the theory and practice of domestic law. The frontier between international law and Hong Kong law is not perfectly watertight, and there are several strategic points at which there is significant seepage. It is at these points that international law acquires a practical significance for most practitioners and students of Hong Kong domestic law.

Monism and dualism

3.2 It is traditional to discuss the relationship of international law to domestic law by reference to two theories known as 'monism' and 'dualism'.

According to the monist theory, frequently identified with the civil law tradition and some natural law theories, there is only one legal order in which international law and domestic law are different aspects. In this theory, as it is usually presented, domestic law derives its authority from international law, international law is automatically part of a State's domestic legal order, and any inconsistency between the two systems must be resolved in favour of international law.

According to the dualist theory, frequently identified with the common law tradition and varieties of legal positivism, international law and domestic law are completely distinct legal orders with different sources and different subjects. In this theory, as it is usually presented, inconsistencies between the two legal orders cannot really arise because international law regulates State-to-State relations on the international plane, while domestic law regulates relations among persons and institutions within the jurisdiction of States. In order for a rule of international law to enter the domestic legal order, a formal step of transformation into domestic law (such as legislation) is required.

3.3 Thus very briefly outlined, the monist and dualist theories are presented in their starkest and most radical forms. These characterisations of the theories are useful intellectual starting points, but in reality pragmatic blends of the two theories characterise the relationship of international law to most domestic legal orders.

Many domestic legal systems which embrace an officially or predominantly monist stance towards international law require a formal domestic act of transformation or recognition before some rules of

international law can be made effective in domestic law. For instance, most democratic States which operate within the monist tradition deny domestic effect to at least some treaties unless they have been authorised or approved by the legislature¹ (whereafter the Head of State usually performs a formal act of ratification).

Many domestic legal orders which operate within the dualist tradition permit international law to affect, in certain circumstances, the way in which domestic legislation may be interpreted and administrative discretion exercised. They also frequently distinguish between conventional and customary international law, with stricter requirements for the reception of the former into domestic law and more relaxed criteria for the latter.

3.4 More than pragmatism is at work in the practical blurring of monist/dualist theoretical distinctions. The hybrid positions which actually prevail in most States are natural products of modern international law's doctrinal origins. Prior to the emergence of the modern State system in the seventeenth century, relations between sovereign princes were not understood in terms of an autonomous 'international law'.² Rather, and following Roman law conceptions, relations between sovereigns and their subjects were governed by the *jus civile* (customary and enacted laws specific to a given community) which were specific manifestations of the *jus gentium*. Sourced partly in custom and partly in natural law, the *jus gentium* consists of general legal precepts accepted by all civilised peoples.³ As sovereigns could not legislate with binding force for each other, relations between sovereigns were regulated directly by the *jus gentium*. For example, just as every person was obliged to honour his agreements (*pacta sunt servanda*) and was permitted to defend himself from attack, so every sovereign prince was obliged to honour his agreements and to defend his realm from attack. Christendom's legal order was, in this sense, a unity.

3.5 With the emergence of the modern State system, of which the Peace of Westphalia (1648) was a major catalyst, inter-sovereign relations were progressively placed on a new footing. Sovereignty became less an attribute of individual princes, and more a feature of new corporate State entities. These corporate States were possessed of increasingly clear and exclusive sovereign rights and responsibilities within defined territories. They also began to constitute a new and distinct stratum of political, diplomatic, military and economic relations, relatively autonomous from

¹ Eg. Art 80 of the Constitution of the Italian Republic: 'Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation.'

² See 1.7.

³ See 1.152-1.182.

relations among individual subjects, or between subjects and their State. The emergence of autonomous State interests, increasingly detached from the interests of individual princes, was accompanied by the diminishing political powers of princes within their realms and often by their replacement with republican constitutional arrangements. There was also a steadily decreasing political significance of personal relations among those princes who retained a diminishing constitutional role within their States; dynastic princely marriages, for instance, eventually came to lose virtually all their former strategic importance.

In this new environment States were able to engage with each other as fully-sovereign corporate entities in their own right, free from the complications of overlapping sovereignties of individual princes which characterised pre-modern Europe. Modern States gradually developed, in their relations with each other, customary and conventional rules giving particular form to the general precepts of the *jus gentium*.

3.6 Although the *jus gentium* thereby gradually retreats behind the curtain of customary and conventional rules, it remains important in two respects. It provides the *ratio juris* – the ultimate juridical justification – of rules sourced in custom and treaty. It also remains a direct source of law, as the ‘general principles of law recognised by civilised nations’,⁴ where custom and convention have yet to provide a norm necessary to resolve a legal dispute on the international plane.

3.7 It is therefore not correct to say that domestic law derives its authority from international law. Nor is it correct to say that domestic law and international law are completely distinct legal orders. Rather, domestic law and international law are different legal orders (*contra* the pure monist theory) deriving their authority from a common source (*contra* the pure dualist theory).

In accommodating this reality each State develops a set of rules and principles regulating the extent to which and the modes by which international law produces effects within its domestic legal order. These rules and principles are informed by each State’s juridical and historical context. Some States, particularly those which share the civilian legal tradition, tend to emphasise the unity of the domestic and international legal orders. Other States, particularly those which share the common law tradition, tend to emphasise the separateness of the two legal orders. All States will, in fact, blend elements of both the monist and dualist conceptions of international law into a doctrine which allows international law to play a role in the domestic legal order consistent with the latter’s structure, fundamental values, and historical development.

4 See 1.152–1.182.

3.8 International law itself is neither monist nor dualist. It requires simply that States comply with their international obligations. Failure to comply cannot be justified, from the perspective of international law, on the basis that international legal obligations are inconsistent with the requirements of domestic law.⁵ Whether a State complies with international law by regarding it as automatically forming part of domestic law (incorporation), or whether the State does so by a domestic act of legislative transformation, is a matter of indifference to international law.

At this point, it is opportune to make an observation about terminology. Judicial authorities and publicists frequently use the expressions ‘incorporation’, ‘adoption’, ‘recognition’, ‘transformation’, and ‘transposition’ to describe the two main processes by which a rule of international law becomes a rule of domestic law. Unfortunately, there is much inconsistency in usage among the authorities with a resulting potential for confusion unless the reader pays close attention to the context.

This chapter employs the usage adopted by Denning LJ in *Trendtex Trading Corporation v Central Bank of Nigeria*.⁶ Thus, ‘incorporation’ indicates the process by which a rule of international law is simply recognised as automatically forming part of domestic law. We shall see that, in most common law jurisdictions including Hong Kong, incorporation can sometimes apply to customary international law but never to treaty law. In contrast, ‘transformation’ indicates the process by which a rule of international law is legislatively enacted into the domestic legal order. We shall see that, in Hong Kong and most other common law jurisdictions, transformation is required in order that a rule of treaty law may also be regarded as a rule of domestic law.

3.9 The remainder of this chapter is concerned with the extent to which, and the modes by which, Hong Kong law accommodates itself to international law. In Hong Kong’s juridical context, this task can be usefully approached by examining the relationship between international law and: (i) the common law; (ii) legislation including the Basic Law; (iii) the exercise of executive discretion. This chapter concludes with an overview of the Hong Kong Basic Law provisions dealing with diplomatic relations, treaty-making powers, passports and immigration controls.

5 See 5.16–5.20 concerning international legal obligations generally, and 2.44 specifically concerning conventional obligations.

6 *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, [1977] 1 All ER 881, [1977] 2 WLR 356, [1977] 2 CMLR 465 (ECA).

International law and the common law

Nature of common law

3.10 The common law (understood broadly to include equity) is the portion of Hong Kong's domestic law that is not sourced in the Basic Law, in legislation, or in Chinese customary law. It provides the foundation of law in every jurisdiction in which it applies. Indeed, the rule that legislation displaces inconsistent requirements of the common law is itself a common law rule which emerged in the seventeenth century,⁷ and even the Hong Kong Basic Law is interpreted according to common law principles.⁸

3.11 Frequently described as 'judge-made' law, the common law is more accurately understood as that body of a community's customary practices which the courts recognise as furnishing norms for the resolution of legal disputes, supplemented where necessary by a process of practical reasoning drawing heavily on analogy and universally recognised general principles of law.

The proposition that the common law is an essentially customary system has a long and respectable pedigree. A full treatment of the common law's essentially customary nature is beyond the scope of this work, but for present purposes it is worth noting that an impressive consensus across epochal periods has subscribed to a vision of the common law as customary or essentially customary in character. As Sir Frederick Pollock (1845–1937) observed, 'the Common Law is a customary law if, in the course of about six centuries, the undoubting belief and uniform language of everybody who had occasion to consider the matter were able to make it so.'⁹ Rather than being 'judge-made', the common law is more accurately understood as 'judge-recognised'.

7 As late as 1610, Coke CJ was able to say in *Dr Bonham's Case* (1610) 8 Co Rep 114a, 118a: 'And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometime adjudge them to be utterly void: for when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void'. See also Hobart CJ in *Day v Savadge* (1614) Hob 85, 80 ER 235, 237: '[E]ven an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself, for *jura naturae sunt immutabilia*, and they are *leges legum*'.

8 *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 223–224, [2001] 2 HKLRD 533, 545–546 (HKCFA); *Democratic Republic of the Congo v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95, [2011] 4 HKC 151, 271 (HKCFA).

9 Sir Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law*, (Gaunt, Holmes Beach FL, 1994 (reprint of the 6th edition, 1929)), 254. See also; James Coolidge Carter, *The Provinces of the Written and the Unwritten Law*, (Banks & Brothers, New York NY, 1889), *The Ideal and the Actual in the Law*,

Common law in Hong Kong

3.12 The Basic Law, which provides the current constitutional framework for Hong Kong's system of law and government, entered into force on 1 July 1997. It provides, in part, as follows:

Article 5. The socialist system and policies shall not be practiced in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.

Article 8. The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Article 18. The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region. National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. ...

Article 84. The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.

Article 160. Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region ... Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law.

(Dando, Philadelphia PA, 1890), *Law: Its Origins, Growth and Function*, (G P Putnam, New York NY, 1907), 179–190; W Blake Odgers and Walter Blake Odgers, *The Common Law of England*, (Sweet & Maxwell, London, 2nd ed, 1920), Vol I, Chap VII; Sir Carleton Kemp Allen, *Law in the Making*, (Clarendon, Oxford, 7th ed, 1964); Lon L Fuller, 'Human Interaction and the Law' (1969) 14 *American Journal of Jurisprudence* 1–36; T F T Plucknett, *Legislation of Edward I*, (Oxford University Press, Oxford, 1970), 6–8; Friedrich A Hayek, *Law, Legislation and Liberty: Volume I, Rules and Order*, (Chicago University Press, Chicago IL, 1983), 72–93; Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy*, (Melbourne University Press, Melbourne, 1988); Leon Sheleff, 'Customary Law as Common Law', in Leon Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, (Frank Cass, London, 1999, 79–90); David VanDrunen, *Law & Custom: The Thought of Thomas Aquinas and the Future of the Common Law*, (Peter Lang, New York NY, 2003, 5–15).

3.13 The common law that was applicable before 1 July 1997, and which has been maintained and adopted since that date by Articles 18 and 160 of the Basic Law, was not the whole of the English common law. Section 3 of the Application of English Law Ordinance (Cap 88), which was in force until the last day of British sovereignty over Hong Kong, provided as follows:

3. (1) The common law and the rules of equity shall be in force in Hong Kong —
- (a) so far as they are applicable to the circumstances of Hong Kong or its inhabitants;
 - (b) subject to such modifications as such circumstances may require;
 - (c) subject to any amendment thereof (whenever made) by —
 - (i) any Order in Council which applies to Hong Kong;
 - (ii) any Act which applies to Hong Kong; or
 - (iii) any Ordinance.
- (2) The common law and the rules of equity shall be in force in Hong Kong as provided in subsection (1) notwithstanding any amendment thereof as part of the law of England made at any time by an Order in Council or Act which does not apply to Hong Kong.

Thus, the common law's applicability in Hong Kong was subject to British legislation which applied to Hong Kong and ordinances of the Hong Kong legislature.¹⁰ Its applicability was not, however, subject to British legislation which did not apply to Hong Kong.¹¹ British legislation did not apply in Hong Kong unless it was expressed to do so or required by necessary implication.

3.14 Just as significantly, the English common law was not to apply to Hong Kong where it was not applicable to the circumstances of Hong Kong people,¹² and the common law in Hong Kong was to be modified when local circumstances required.¹³ Thus the English common law was imported into Hong Kong, but express warrant existed for the emergence of a Hong Kong common law on an English foundation (or for the application of Chinese customary law instead of the common law in appropriate cases). It is this common law which was maintained in Hong Kong on 1 July 1997.

¹⁰ Section 3(1)(c), Application of English Law Ordinance (Cap 88).

¹¹ *Ibid*, section 3(2).

¹² *Ibid*, section 3(1)(a).

¹³ *Ibid*, section 3(1)(b).

Customary international law: incorporation

3.15 The common law is usually regarded as adopting a dualist stance towards the applicability of international law within the domestic legal order. This might suggest that the common law will never permit rules or principles of international law from being applied domestically without a domestic law act transforming the international rule into a domestic one.

As indicated above, however, few if any domestic legal orders are either purely dualist or purely monist. As far as England's common law is concerned, high authority from as early as the eighteenth century recognised a significant monist tendency in connection with customary international law. In 1737, Lord Talbot LC observed that the *jus gentium* immunity on foreign ambassadors would have been part of English law even without statutory transformation because 'the law of nations ... in its fullest extent was and formed part of the law of England'.¹⁴ Writing of customary international law fewer than thirty years later, Sir William Blackstone postulated that 'the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be a part of the law of the land'.¹⁵

3.16 Rules of customary international law were thus 'incorporated' or 'adopted' by the courts into the common law and, accordingly, enjoyed the same status as the common law. This meant that rules of customary international law were, as with common law rules generally, subordinate to inconsistent statute law.¹⁶ They were also subject to *stare decisis* so that they would not survive inconsistency with decisions of more superior courts in the same judicial hierarchy.

3.17 There arose in the nineteenth century a competing theory that customary international law could not be merely incorporated or adopted into the common law by the courts, but required instead to be formally transformed into domestic law by legislative enactment.¹⁷

¹⁴ *Barbuit's Case (Buvot v Barbuit)* (1737) Forr cases T Talbot 281, 25 ER 777 (see note 1, 25 ER 778). Lord Talbot's dictum was expressly approved by Lord Mansfield in *Triquet v Bath* (1764) 3 Burr 1478, 1482, 97 ER 936, 938.

¹⁵ William Blackstone, *Commentaries on the Laws of England*, University of Chicago Press facsimile of the first edition with an introduction by Stanley N Katz, Chicago IL, Vol 4 (1765), Chap 5, 68.

¹⁶ *Mortensen v Peters* (1906) 8 F (J) 93.

¹⁷ This competing conception of transformation rested primarily on the decision of the Court for Crown Cases Reserved in *R v Keyn* (1876) LR 2 Ex D 63, (1876–77) LR 2 QBD 90. The captain of a German vessel was convicted of manslaughter arising out of a collision at sea which occurred less than three miles off the coast of England. This may have been within the United Kingdom's territorial sea at customary international

In *Chung Chi Cheung v R*,¹⁸ however, the incorporation/adoption theory received confirmation by the Privy Council in an appeal from Hong Kong against a conviction for murder:

Lord Atkin: This is an appeal from the judgment of the Full Court of Hong Kong dismissing an appeal by the appellant from his conviction and sentence at a trial in the Supreme Court of Hong Kong before the Chief Justice, MacGregor C.J., and a jury. The appellant was convicted of the murder of Douglas Lorne Campbell, and was sentenced to death. The murder was committed on board the Chinese Maritime Customs cruiser *Cheung Keng* while that vessel was in Hong Kong territorial waters. Both the murdered man and the appellant were in the service of the Chinese Government as members of the officers and crew of the cruiser. The former was captain; the appellant was cabin boy. Both were British nationals. At the trial the point was taken that, as the murder took place on an armed public vessel of the foreign Government, the British Court had no jurisdiction in the matter. The contention was overruled by the Chief Justice at the trial, and on appeal his decision was upheld by the Full Court, over which he presided.

... On January 11, 1937, the accused shot and killed the captain. He then went up the ladder to the bridge and shot at, and wounded, the acting chief officer, and then went below and shot and wounded himself. The acting chief officer, as soon as he was wounded, directed the boatswain to proceed to Hong Kong at full speed and hail the police launch. He wanted, he said, help to arrest the accused from the Hong Kong police. Within a couple of hours the launch of the Hong Kong water police came alongside in answer to the cruiser's signal. The police took the wounded officer and the accused to hospital. They took possession of the two revolvers with which the accused had armed himself, of the spent revolver bullets and expended shells, and of some unexpended cartridges. On February 25 extradition proceedings were commenced against the accused on the requisition of the chairman of the Provincial Government of Kwangtung, alleging murder and attempted murder on board the Chinese Customs cruiser "within the jurisdiction of China while the said cruiser was approximately one mile off Futaumun (British waters)." This appears to be an allegation that the vessel had not at the time reached British territorial waters. The fact that the crime was in reality committed within British waters is not now in dispute. After many adjournments the magistrate decided, on evidence called for the defence, that the accused was a British national, and that the proceedings therefore failed. The accused was at once rearrested and charged with murder "in the waters of this colony," and duly committed. At the hearing before the magistrate, and at the trial, the acting chief officer and three of the crew of the Chinese cruiser were called as witnesses for the prosecution. Police witnesses produced, and gave evidence as to, the

law, but there was no domestic legislation or other expression of assent by the United Kingdom giving effect to this rule. The conviction was overturned (by a majority of 7-6) on the basis that, absent legislative transformation into domestic law or other expression of British assent to the asserted international custom, English courts lacked jurisdiction over the place where the collision occurred.

18 *Chung Chi Cheung v R* [1939] AC 160, (1938) 30 HKLR 37(2), [1938] 4 All ER 786.

revolvers, cartridge cases and bullets. As has already been stated, the accused was convicted and sentenced to death.

On the question of jurisdiction two theories have found favour with persons professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is, or is to be treated by other nations as, part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There will therefore be no jurisdiction in fact in any Court where jurisdiction depends upon the act in question, or the party to the proceedings, being done or found or resident in the local territory. The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic Courts, in accordance with principles of international law, will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view, the immunities do not depend upon an objective territoriality, but on implication of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs.

Their Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. ...

... it appears to their Lordships as plain as possible that the Chinese Government, once the extradition proceedings were out of the way, consented to the British Court exercising jurisdiction. It is not only that with full knowledge of the proceedings they made no further claim, but at two different dates they permitted four members of their service to give evidence before the British Court in aid of the prosecution. That they had originally called in the police might not be material if, on consideration, they decided to claim jurisdiction themselves. But the circumstances stated, together with the fact that the material instruments of conviction, the revolver bullets, etc., were left without demur in the hands of the Hong Kong police, make it plain that the British Court acted with the full consent of the Chinese Government. It therefore follows that there was no valid objection to the jurisdiction, and the appeal fails.

Lord Atkin gave the advice of the Board, the other members of which were Lord Macmillan, Lord Porter, Sir Lancelot Sanderson, and Sir George Rankin.

3.18 The Privy Council in *Chung Chi Cheung* was confronted with the task of choosing between two competing conceptions of the customary international law relating to a State's jurisdiction over crimes committed within its territorial waters but aboard vessels owned by foreign States. The Board rejected the view that customary international law treated State-owned vessels as, in effect, floating islands of the owning State's national territory such that other States' jurisdictions were always excluded ('objective extraterritoriality'). Such a conception would have precluded the jurisdiction of British colonial courts over any criminal acts committed aboard the Chinese government's customs vessel. Instead, the Board accepted the more modest formulation that customary international law treated State-owned vessels as falling within the territorial jurisdiction of foreign States subject only to an array of immunities which the owning State may waive. On the facts of *Chung Chi Cheung*, China had impliedly waived its immunities over the events occurring aboard its vessel inside British territorial waters, with the result that the British colonial trial court was properly seized of jurisdiction over the crime.

The principal significance of *Chung Chi Cheung* for present purposes lies in the Board's unanimous confirmation that, whichever conception of State jurisdiction was correct at customary international law, it could operate as a rule of domestic law only if it had been 'accepted and adopted' by domestic law. This means that once a common law court 'acknowledges the existence' of a rule of customary international law, it will be incorporated (or adopted) as a common law rule subject to inconsistent legislation and binding judicial precedent. The Board accepted that the more modest formulation of State jurisdiction accorded with customary international law, and that there was nothing inconsistent between that law and either domestic legislation or binding judicial precedent.

3.19 The decision in *Chung Chi Cheung* postulated that common law courts 'acknowledge the existence of a body of rules which nations accept amongst themselves'. In order to make that acknowledgement, so that a particular rule of customary international law is potentially available for incorporation into the common law, it is necessary that the putative rule be one which is widely recognised as such. In *Chow Hung Ching v R*,¹⁹ the High Court of Australia refused to incorporate into the common law a putative international customary law rule to the effect that members of visiting armed forces enjoyed a general immunity from prosecution in the host State's courts. There was no evidence of settled international practice because there was a divergent range of incompatible views among 'writers' and 'authorities' (Latham CJ), and it was a matter which State practice

¹⁹ (1948) 77 CLR 449.

indicated was determined between them by treaty rather than custom (Starke J and Dixon J).

In *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 513, Lord Oliver remarked:

A rule of international law becomes a rule – whether accepted into domestic law or not – only when it is certain and is accepted generally by the body of civilised nations; and it is for those who assert the rule to demonstrate it, if necessary before the International Court of Justice. It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.

3.20 Once a rule of customary international law is incorporated or adopted into the domestic legal order of a common law jurisdiction it becomes, in effect, part of the common law itself. It should therefore be unsurprising that such customary international law rules are not treated as foreign law for the purposes identifying them. Whereas the law of foreign jurisdictions (or at least, of non-common law foreign jurisdictions) is to be established as facts by expert evidence, the courts are taken to know customary international law just as they are taken to know the common law. In practice, this means that courts may inform themselves as to the requirements of customary international law in much the same way that they inform themselves of domestic law. They may thus consult domestic legislation and judicial precedent, take account of submissions by counsel, and refer to the teachings of publicists in textbooks and journal articles and such other written materials as seem relevant but which need not be of a technically authoritative character.²⁰ They may, furthermore, consult treaties as well as the judicial decisions and practice of foreign States.²¹

Customary international law: stare decisis

3.21 As *Chung Chi Cheung* makes clear, a rule of customary international rule remains subject not only to inconsistent legislation, but also to binding judicial precedent which is inconsistent with the putatively adopted rule. The potential problem with this idea is that both the common law and customary international law are systems which are constantly evolving in order to meet the requirements of the communities they serve. It is therefore possible that a rule of customary international law may

²⁰ *Lord Advocate's Reference No 1 of 2000* [2001] SLT 507, 513, [2001] JC 143, 152 (High Court of Justiciary, Scotland).

²¹ *Trendix Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 569, [1977] 2 WLR 356, 379, per Stephenson LJ; *Compania Naviera Vascongada v The Cristina* [1938] AC 485, 497, [1938] 1 All ER 719, per Lord MacMillan.

gun and a bomb, and by failing to protect her from Carla on board the aircraft — would not be covered by sovereign immunity (Draft Articles on Jurisdictional Immunities of States and Their Property and United Nations Convention on Jurisdictional Immunities of States and Their Property, Arts 10(1) and 1(c)).

To the extent, however, that the proposed suit is based on the law of torts, it would be more likely to attract a successful claim of sovereign immunity in international law. Common Art 12 of the Draft Articles and the Convention effectively preserves a State's right to claim sovereign immunity in a 'proceeding which relates to pecuniary compensation for death or injury to the person' unless the act or omission occurred in whole or in part in the territory of the forum State and if the author of the act or omission was present in that territory at the time of the act or omission. All the relevant acts or omissions in this case appear to have occurred outside Australian territory by persons who were likewise outside that territory.

Whether there is a cause of action and a competent Australian court for the proposed suit against the airline is a matter of Australian domestic law.

Further tutorial discussion

1. International law does not permit a State's court to assert jurisdiction over any matter unless there is an internationally recognised basis for the exercise of jurisdictional sovereignty. Do you agree?
2. Why should the passive nationality principle constitute a valid basis of jurisdiction only in cases of terrorist offences?
3. Look at the tutorial question and answer. Would the answer concerning Oscar's conduct be different if he were a consul and not an ambassador?
4. Who gets to make the final decision on whether conduct constitutes a threat to the State when the protective principle is employed to justify an exercise of jurisdiction? The State itself?
5. If a person guilty of genocide, war crimes, or crimes against humanity is present in a State's territory, is the State obliged to prosecute the person?
6. If a State is always entitled to exercise criminal jurisdiction over a person on the basis that he or she is a national of that State, why is a State not always entitled to exercise criminal jurisdiction over a person on the basis that he or she has entered the State's territory?

state territory

7

Objectives

After completing this chapter, you should:

- (1) appreciate the importance of territory for States and statehood in international law;
- (2) be aware of the scope of State territory;
- (3) understand that disputes over title to territory are decided by establishing which State has the stronger claim;
- (4) understand and be able to explain and apply the five principles by which all States may justify a claim to title over territory (cession, occupation, prescription, accretion and conquest); and
- (5) understand and be able to explain and apply *uti possidetis juris* as a basis for determining the international borders of States established by decolonisation or by the secession from or dissolution of States.

Key cases

Western Sahara advisory opinion, ICJ Rep (1975) 12

Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v Mexico) (1931) 2 RIAA 1105 (in French), 26 AJIL 390 (in English)

Island of Palmas case (Netherlands v United States) (1928) 2 RIAA 829

Frontier Dispute (Burkina Faso v Mali) ICJ Rep (1986) 554

Nature and scope of State territory

7.1 State territory is that portion of the Earth that is subject to the sovereign authority of a State. Indeed, unless an entity has a government with the ability to prescribe and enforce its will in its own defined territory, it cannot be described as a State.¹

¹ See 4.6–4.11.

Importance of territory

7.2 State territory is important in international law because it is the place in which a State's prescriptive and enforcement jurisdiction may be exercised to the exclusion of all other States. According to Max Huber (1874–1960) in the *Island of Palmas* case:²

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.

In the *Lotus* case, the Permanent Court of International Justice (PCIJ) similarly remarked:³

Now the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

7.3 This normally exclusive legal authority exercised by a State over its territory is, indeed, a cornerstone principle of the international legal system. Article 2(4) of the UN Charter provides, for example, that all members of the United Nations (UN) must 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

7.4 A State may exercise its sovereign authority as it pleases in any part of its territory, subject only to the requirements of international law. In the *Corfu Channel* case, the International Court of Justice (ICJ) observed that it is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.⁴ Other States may also acquire limited rights over a State's territory by treaty or local custom

2 *Island of Palmas* case (*Netherlands v United States*) (1928) 2 RIAA 829, 838. See 7.20.

3 *SS Lotus* (*France v Turkey*) PCIJ Rep (1927) Series A No 10, 18.

4 *Corfu Channel* case (Merits) (*United Kingdom v Albania*) ICJ Rep (1949) 4, 22. See 12.52.

— for example, Portugal's restricted right of passage in parts of India's territory in the *Right of Passage* case.⁵

Scope of territory

7.5 A State's territory includes all lands and internal waters within its international boundaries, its territorial sea adjacent to its coast, the airspace above the State's land and territorial sea, the seabed and subsoil beneath the territorial sea, and all the resources thereof.⁶ A State's territorial sea cannot be more than 12 nautical miles wide,⁷ although some States make more ambitious claims. The upper limit of a State's airspace is not certain, but it is clear that a State's territory does not extend as far as outer space, no part of which may be appropriated by any State.⁸ A State's land territory extends downwards, in theory, to the Earth's core; a State's territorial jurisdiction therefore encompasses persons, things and events in mines and other underground locations.

Internal waters are treated in the same way as a State's land territory. They consist of all rivers, lakes, canals or other bodies of water that are surrounded by a State's land territory, and include all bodies of water to the landward side of any baselines used for measuring the territorial sea.⁹ The territorial sea, however, is subject to a regime whereby ships of foreign States enjoy certain rights of transit (known as 'innocent passage').¹⁰ Special rules apply to archipelagic States,¹¹ such as Indonesia, the Philippines and several micro-States in the Pacific Ocean.

Title to land territory is critical because title to other forms of territory depends on rules that make reference, directly or indirectly, to land territory. For example, a State will not possess a territorial sea, and will therefore have no title to airspace above it and the land and resources below it, if the State does not possess title to any coastal land.

5 *Right of Passage over Indian Territory* Merits (*Portugal v India*), ICJ Rep (1960) 6. See 1.148.

6 Chicago Convention on International Civil Aviation, Art 1, UNTS, Vol 15, p 295; Convention on the Law of the Sea, Art 2, UNTS, Vol 1833, p 3.

7 Convention on the Law of the Sea, Art 3.

8 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Art 2, UNTS, Vol 610, p 206.

9 Convention on the Law of the Sea, Art 8. See 12.39.

10 Convention on the Law of the Sea, Arts 17–32. See 12.48–12.57.

11 Convention on the Law of the Sea, Arts 46–54. See 12.34–12.38.

Disputes over territory

7.6 With the possible exception of Antarctica, virtually all the world's land territory is now under the sovereign authority of one of the almost 200 States currently in existence. Consequently, rules governing the establishment of first title to territories previously unpossessed by any State are now of practical value only where two or more States lay claim to the same piece of territory and the relative strengths of the competing claims need to be assessed. As the Permanent Court of International Justice remarked in the *Legal Status of Eastern Greenland* case, '[i]n most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to sovereignty, and the tribunal has had to decide which of the two is stronger'.¹²

Antarctica

7.7 Antarctica is something of a special case and, as it occupies about 14 million square kilometres of land (China occupies 9.6 million square kilometres), its status is worth mentioning. The continent is the subject of partly overlapping claims by Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom. Some other States reject all these claims and favour instead an international status for the whole territory. The Antarctic area south of 60°S latitude is subject to a *sui generis* regime established by the 1959 Antarctic Treaty,¹³ to which the seven territorial claimants are party together with Belgium, Japan, Russia, South Africa and the United States. The most important feature of the Treaty is a requirement that Antarctica be used for peaceful purposes only; there must be no military bases, military manoeuvres, weapons testing or any other measures of a military nature. Further, freedom of movement and scientific exploration is guaranteed throughout the territory. The Treaty specifically provides that it prejudices neither existing territorial claims nor the position of any party as regards its recognition or non-recognition of any other State's claim. While the Treaty remains in force, no new claim may be made, and no activities shall constitute a basis for asserting, supporting or denying any claim to territorial sovereignty. In 1991, the parties adopted a protocol concerning

12 *Legal Status of Eastern Greenland* case (*Norway v Denmark*) PCIJ Rep (1933) Ser A/B No 53, 46.

13 Agreement between the Governments of Australia, Argentina, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of the Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America concerning the Peaceful Uses of Antarctica, UNTS, Vol 402, p 71.

environmental protection of Antarctica and designating it a natural reserve devoted to peace and science.

Modes of establishing title

7.8 There are five customary law principles by which all States may justify a claim to title over territory:

1. cession;
2. occupation;
3. prescription;
4. accretion; and
5. conquest.

For former colonial and sub-national territories that have achieved statehood, the customary international law principle of *uti possidetis juris* may also be relevant in determining their claims to territorial title.

Each of these principles will be considered in turn.

Cession

7.9 Cession is the transfer of sovereignty over territory by one sovereign to another. Transfer is effected by treaty, often at the conclusion of armed hostilities. One State must evince an intention to assume sovereignty over a territory, and the other State must evince an intention to relinquish it — an agreement to permit the exercise by a foreign State of certain State functions on the territory will not suffice. Thus, a treaty permitting a foreign State to establish and maintain military bases on a State's territory will not effect a transfer of territorial sovereignty, even if the agreement permits the foreign State's domestic law to be applied in respect of events on the base.

7.10 An act of cession will be void if it was the result of a treaty procured by the threat or use of force in violation of the principles of international law embodied in the UN Charter.¹⁴

Such an act of cession will, however, be valid under the inter-temporal principle¹⁵ if it was made prior to the emergence of the prohibition on the threat or use of force.

7.11 A ceding State can neither derogate from its own grant, nor pass a better title than it possessed. Consequently, if the territory, prior to cession, was affected by sovereign rights of third States (for example, rights of passage), such rights continue after cession has been effected and may also

14 Vienna Convention on the Law of Treaties, Art 52. See 2.104.

15 See 7.37–7.38.

be enforced against the territory's new State sovereign. Similarly, no State may cede title to territory that does not belong to it. This limitation, an instance of the principle *nemo dat quod non habet*, was manifested in the *Island of Palmas* case,¹⁶ in which Spain's purported cession to the United States of an island by treaty was ineffective because the Netherlands possessed title at the time of the treaty's conclusion.

Occupation

7.12 Occupation was the means by which a State acquired title to a territory that lacked a State sovereign, either because there never was such a sovereign or because a sovereign had abandoned the territory. It was thus an original mode of acquisition inasmuch as title did not derive from the prior sovereignty of another State.

A territory was not considered abandoned unless the departing sovereign demonstrated an *animus relinquendi* — that is, an intention to relinquish sovereignty.¹⁷ Occupation could occur only in relation to territory that was, at the time occupation commenced, *terra nullius*.

Terra nullius

7.13 In international law, the phrase '*terra nullius*' denotes a territory that is owned by no-one. The circumstances in which, for the purposes of international law in the 19th century, a territory could be considered *terra nullius* have been addressed by the ICJ.

In the *Western Sahara* advisory opinion,¹⁸ Spain had decided to conduct a referendum in its colony of Western Sahara in order to allow its inhabitants to exercise their right of self-determination. The King of Morocco objected to Spain's plans, arguing that Morocco was entitled to exercise sovereignty over the territory of Western Sahara on the basis of 'historic title' predating Spain's colonisation. Mauritania made a similar claim. The UN General Assembly asked the ICJ to furnish an advisory opinion in response to two questions:

- I. Was Western Sahara ... at the time of colonisation by Spain a territory belonging to no-one (*terra nullius*)? If the answer to the first question is in the negative,

16 *Island of Palmas* case (*Netherlands v United States*) (1928) 2 RIAA 829, 838. See 7.20.

17 *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island* (*France v Mexico*) (1931) 2 RIAA 1105, 26 AJIL 390 (*Clipperton Island* case). See 7.16.

18 *Western Sahara* advisory opinion, ICJ Rep (1975) 12.

- II. What were the legal ties between the territory and the Kingdom of Morocco and the Mauritanian entity?

The Court said:

79. ... The expression '*terra nullius*' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory.

'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be *terra nullius* a territory belonging to no-one at the time of the act alleged to constitute the 'occupation' ... In the view of the Court, therefore, a determination that Western Sahara was a '*terra nullius*' at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'.

80. Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or people having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word 'occupation' was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an 'occupation' of a '*terra nullius*' in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.

81. In the present instance, the information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them. It also shows that, in colonizing Western Sahara, Spain did not proceed on the basis that it was establishing its sovereignty over *terrae nullius*. In its Royal Order of 26 December 1884, far from treating the case as one of occupation of *terra nullius*, Spain proclaimed that the King was taking the Rio de Oro under his protection on the basis of agreements which had been entered into with the chiefs of the local tribes. ...

The Court needed to determine if Western Sahara (or Rio de Oro, as it was formerly known) was *terra nullius* at the time of Spain's colonisation in order to assess whether there could have been any pre-existing 'legal ties' between Western Sahara and Morocco. If the Court had determined that the territory was *terra nullius*, such ties would have been impossible. The Court concluded that the territory was not *terra nullius*, as that term was understood in 1884, because its inhabitants were 'socially and politically

organized in tribes and under chiefs competent to represent them'. The Court then examined the claim to pre-existing 'legal ties', but concluded that they were not effective to establish legal title to the territory.

7.14 The Court's historical approach to the *terra nullius* doctrine in the *Western Sahara* case was required partly because of the way in which the UN General Assembly framed the request for an advisory opinion. It was also necessary because of the doctrine of inter-temporal law.¹⁹

7.15 If a territory was *terra nullius*, title by occupation would exist only if two elements were established: possession and administration.

Possession

7.16 Possession involved some formal act (for example, planting flags or making official proclamations) with an intention to occupy (*animus occupandi*) and, usually, actual settlement by a population under the authority of the possessing State. The requirement of *animus occupandi* by the State poses a problem where acts are performed by individuals without State authority because 'the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of ... some ... authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them'.²⁰

The requirement of actual settlement was relaxed where the territory involved was particularly inaccessible or its climate especially inhospitable, to such an extent that the establishment of a permanent settlement would be practicably very difficult.

In the *Clipperton Island* case,²¹ France sent a naval vessel to a small, remote and unpopulated coral island reef in the Pacific Ocean. Upon arrival, the vessel's commander made a proclamation of French sovereignty over the island and briefly landed some of the vessel's crew members on the reef. A French consul shortly thereafter notified a foreign government (Hawaii) of France's claim and made an announcement of the claim in a Hawaii newspaper. The arbitrator said:²²

... [T]here is ground to admit that, when in November, 1858, France proclaimed her sovereignty over Clipperton, that island was in the legal situation of *territorium nullius*, and, therefore, susceptible of occupation. ...

¹⁹ See 7.37–7.38.

²⁰ Dissenting opinion of Judge Sir Arnold McNair in the *Anglo-Norwegian Fisheries case* (*United Kingdom v Norway*) ICJ Rep (1951) 116, 184.

²¹ *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island* (*France v Mexico*) (1931) 2 RIAA 1105 (in French), 26 AJIL 390, 393 (in English).

²² 26 AJIL 390, 393–394.

It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. The taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its first appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby complete.

France was held to have established effective title in 1858 and subsequently did nothing to evince an intention to relinquish sovereignty over the island reef. Consequently, when Mexico, some 40 years later, sought to take possession of the territory, it was already 'occupied' by France and therefore no longer *terra nullius*.

Similarly, the PCIJ did not regard Denmark's failure to establish permanent colonies in the vast but highly inhospitable eastern region of Greenland as defeating its claim to occupation dating from about 1721. The Court regarded as significant that Denmark had populated the more habitable parts of Greenland and that, for most of the period of its asserted sovereignty over eastern Greenland, no State contested Denmark's claim.²³

Furthermore, the ICJ did not regard the United Kingdom's non-establishment of a permanent population on two groups of practicably uninhabitable islets and rocks in the English Channel as fatal to its territorial claim over them.²⁴

Administration

7.18 The administration element of occupation is characterised by Oppenheim in the following terms:²⁵

After having taken possession of a territory, the possessor must establish some kind of administration thereon which shows that the territory is really governed by the new possessor. If, within a reasonable time after the act of taking possession, the possessor does not establish some responsible authority

²³ *Legal Status of Eastern Greenland case* (*Norway v Denmark*) PCIJ Rep (1933) Ser A/B No 53.

²⁴ *Minquiers and Ecrehos case* (*France v United Kingdom*) ICJ Rep (1953) 47.

²⁵ Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, 9th ed, Longman, New York, 1992, § 251, 689.

which exercises governing functions, there is then no effective occupation, since in fact no sovereignty is exercised by any state over the territory.

These governing functions 'are in particular, but not limited to, legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations'.²⁶ For instance, the establishment or activity of State agencies in the disputed territory, the adoption or enforcement of legislative measures which apply to the territory, or the conduct of judicial proceedings or execution of judicial orders in the territory, can all amount to measures indicating a State's administration of the territory.

7.19 These administrative, legislative and judicial measures are sometimes referred to as *efectivités*, which the ICJ has defined as 'the effective exercise of powers appertaining to the authority of the State over a given territory'.²⁷

However, a measure cannot amount to an *efectividad* unless it leaves no doubt as to its applicability to the territory in question. Thus, a State's measure can amount to an *efectividad* only if it is clear from its terms or effects that it pertained to the disputed territory. A measure of general application throughout the State's territory, without reference to the disputed territory, will not constitute an *efectividad* in relation to that territory.²⁸

7.20 The extent of the obligation to establish an administration is, like the requirement to establish and maintain a settled population, relative to the nature of the territory in question.

In the *Island of Palmas* case,²⁹ Spain had ceded the Philippines to the United States in 1898 under the Treaty of Paris, at the conclusion of the Spanish-American War. The Treaty indicated that the island of Palmas (also known as Miangas) was part of the Philippines. The island lies about 50 miles off the southern coast of the Philippines island of Mindanao. It is less than two square miles in size. Eight years after assuming sovereignty over the Philippines, a United States official made a visit to Palmas, on the understanding that Spain had ceded the island to the United States along with the Philippines. Upon

26 *Territorial and Maritime Dispute (Nicaragua v Colombia)* ICJ Rep (2012) 624, para 80; *semble, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, ICJ Rep (2007) 659, paras 176–208.

27 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Colombia)*, Judgment, ICJ Rep (2007), para 172.

28 *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* ICJ Rep (2002) 625, para 136; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Colombia)*, Judgment, ICJ Rep (2007) 659, para 117.

29 *Island of Palmas case (Netherlands v United States)* (1928) 2 RIAA 829.

his arrival, he discovered a Dutch flag flying on the island. Dutch authorities subsequently confirmed to United States officials that the Netherlands regarded Palmas as a Dutch colonial possession. The dispute concerning sovereignty over the island was referred by the two States to the Permanent Court of Arbitration. At the time of the arbitration, Palmas had a population of fewer than 1,000. The United States relied on the cession provisions in the Treaty of Paris, and claimed Palmas as successor to Spain.

The Netherlands claimed that its title derived, *inter alia*, from a continuous exercise and display of Dutch sovereignty dating from about 1700. The central issue was whether the island was part of Spanish territory in 1898, so that Spain could cede it to the United States, or whether it was a Dutch possession at that date and therefore beyond Spain's authority to cede. The sole arbitrator, Max Huber (1874–1960), made the following remarks in his award:³⁰

Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has a corollary duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights that each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. ...

International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations. ...

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions which are accessible from, for instance, the high seas. It is true that neighbouring States may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of Hinterland may also be mentioned in this connection.

If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as, e.g. in the case of an island situated in the high seas, the question arises whether a title is valid *erga omnes*, the actual continuous and peaceful display of State functions is in case of dispute the sound and natural criterion of territorial sovereignty. ...

As regards the territory forming the subject of the present dispute, it must be remembered that it is a somewhat isolated island, and therefore a territory clearly delimited and individualised. It is moreover an island permanently

30 *Ibid.*, 839–868.

inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods. The memoranda of both Parties assert that there is communication by boat and even with native craft between the Island of Palmas (or Miangas) and neighbouring regions.

The inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty, even if the sovereignty be regarded as confined within such narrow limits as would be supposed for a small island inhabited exclusively by natives. ...

The Netherlands found their claim to sovereignty essentially on the title of peaceful and continuous display of State authority over the island.

Since this title would in international law prevail over a title of acquisition of sovereignty not followed by actual display of State authority, it is necessary to ascertain in the first place, whether the contention of the Netherlands is sufficiently established by evidence, and, if so, for what period of time. ...

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights. ...

Now the evidence relating to the period after the middle of the 19th century makes it clear that the Netherlands Indian Government considered the island distinctly as part of its possessions and that, in the years immediately preceding 1898, an intensification of display of sovereignty took place. ...

There is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might counterbalance or annihilate the manifestations of Netherlands sovereignty. ... These circumstances, together with the absence of any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas (or Miangas), are an indirect proof of the effective display of Netherlands sovereignty. ...

The display has been open and public, that is to say it was in conformity with usages as to exercise of sovereignty over colonial States. A clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible. ...

The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled.

Administration and inhospitable territories

7.21 Palmas was 'an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods'. However, public displays of State authority on such a remote and small island did not need to be frequent, provided that they were:

... enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

7.22 Where a territory is completely uninhabited, the requirement that the possessing State establish an administration may be satisfied by even less. In such cases, the possessing State need merely perform public and official acts affecting the territory which demonstrate to other States that it is exercising sovereign powers over the territory.

In the *Clipperton Island* case,³¹ the arbitrator said that a State wishing to exercise sovereignty over a territory must take 'steps to exercise exclusive authority there'. Establishing in the territory 'an organisation capable of making its laws respected' is the usual way a State achieves this result, but it need not go so far in the case of a completely uninhabited territory. The few steps taken by France in that case were considered adequate to establish an administering authority over an uninhabited and remote coral reef lagoon.

The ICJ regarded the unchallenged exercise of judicial and administrative authority over certain uninhabited rocks and islets in the English Channel as conferring title on the United Kingdom.³²

7.23 In the *Legal Status of Eastern Greenland* case, the PCIJ was impressed by the King of Denmark's grant of concessions for trading, hunting, mining and the erection of telegraph lines in the sparsely populated and inhospitable eastern region of Greenland. This was regarded as sufficient to establish Denmark's exercise of public administration over the region. The Court said:³³

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied

31 *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v Mexico)* (1931) 2 RIAA 1105 (in French), 26 AJIL 390 (in English). See 7.16.

32 *Minquiers and Ecrehos case (France v United Kingdom)* ICJ Rep (1953) 47.

33 *Legal Status of Eastern Greenland case (Norway v Denmark)* PCIJ Rep (1933) Ser A/B No 53, 46. See 2.11.

Law of the sea

12

Objectives

After completing this chapter, you should:

- (1) appreciate the pre-modern genesis of the law of the sea, including the contest between freedom of the sea and sovereignty of the sea;
- (2) appreciate the role of The Hague Conference and the three United Nations conferences on the law of the sea in the creation of the modern law;
- (3) appreciate that maritime zones are the main organising principle of the modern law of the sea;
- (4) understand and be able to explain why the rules on baselines are essential to the system of maritime zones, and be able to contrast normal baselines with straight baselines;
- (5) understand and be able to apply the rules on internal waters;
- (6) understand and be able to apply the rules on territorial sea, especially including innocent passage;
- (7) understand and be able to apply the rules on the contiguous zone;
- (8) understand and be able to apply the rules on the exclusive economic zone (EEZ);
- (9) understand and be able to apply the rules on the continental shelf;
- (10) understand and be able to apply the rules on the high seas, with particular reference to the rules on flag State jurisdiction and hot pursuit;
- (11) understand and be able to apply the rules on the international seabed; and
- (12) be aware of the principles by which maritime boundary disputes are determined

Key cases

Anglo-Norwegian Fisheries case (United Kingdom v Norway) ICJ Rep (1951) 116

Corfu Channel case (Merits) (United Kingdom v Albania) ICJ Rep (1949) 4

M/V 'Virginia G' case (Panama v Guinea-Bissau), Judgment of 14 April 2014, ITLOS Case No 19, (2014) 53 ILM 1161

M/V 'Saiga' (No 2) case (Saint Vincent and the Grenadines v Guinea), Judgment of 1 July 1999, ITLOS Case No 2, (1999) 37 ILM 1202
Maritime Delimitation in the Black Sea (Romania v Ukraine) ICJ Rep (2009) 61

Key treaties and instruments

Convention on the Law of the Sea (CLS) (1982)
Convention on the Territorial Sea and the Contiguous Zone (CTSCZ) (1958)
Convention on the High Seas (CHS) (1958)
Convention on the Continental Shelf (CCS) (1958)
Convention on Fishing and Conservation of the Living Resources of the High Seas (CFC) (1958)

Freedom of the sea and sovereignty of the sea

12.1 International law in every field owes a large debt to those statesmen and scholars who, in the 16th and 17th centuries, painstakingly established the earliest rules and principles by which Europe's leading maritime States coordinated their use of the sea. Together with the law regulating the use of armed force, the law of the sea is one of the twin pillars upon which all subsequent developments in international law have been built.

This foundation provided States with the fundamental techniques, methods and sources of legal reasoning by which their relations could be increasingly regulated by rules and principles possessing a legal character. Indeed, for the 350 years between the early 17th century and the end of World War II, the law of the sea and the regulation of armed force dominated the legal dimension of international relations.

12.2 During the Middle Ages, and as part of its prolonged and accelerating recovery from the collapse of the Roman Empire in Western Europe, European traders had increasing contact with China, South East Asia and India. The origins of these contacts are usually traced to the 20-year journey of the Venetian adventurer Marco Polo (c 1254–1324) through those regions in the late 13th century. Polo's published account of his travels portrayed Eastern societies enjoying economic prosperity and technological prowess in advance of conditions then prevailing in Western Europe. His descriptions of exotic luxuries — particularly silks and spices — spurred others to explore avenues for trade with the Far East. It was soon apparent that substantial profits could be made by merchants importing Asian luxury goods into Europe.

By the late Middle Ages, the Silk Road and other overland caravan routes from Asia fed Europe's demand for Eastern goods in a trade dominated by the Arabs, Venetians and Genoese. Relative political stability provided reasonably secure conditions within which the overland trade between Europe and Asia could flourish. All this changed in the latter half of the 15th century with the turbulent collapse of Tamerlane's vast Mongol empire and the apparently inexorable rise of the Ottoman Turks, which was starkly evidenced by the Ottoman seizure of Constantinople in 1453.

The roads eastward ceased to provide a sufficiently economical or secure route for the Asian imports in respect of which increasingly prosperous Europeans had developed a firmly acquired taste, and for which they were prepared to pay handsomely.

It was against this background that the nascent maritime powers of Spain and Portugal — located far from the overland routes to Asia and facing the wide ocean — began their quests for a sea route to the Asian goods for which Europe's increasingly prosperous inhabitants clamoured.

12.3 The 1490s were a fateful decade for the modern law of the sea. In 1492, a Spanish expedition led by Christopher Columbus (1451–1506) discovered the Americas while on a quest to open a sea route to the East Indies. Six years later, the Portuguese navigator Vasco da Gama (c 1460–1524) succeeded in reaching India via Southern Africa. Columbus's discovery was mistakenly thought to have encroached upon Portugal's claims in East Asia and gave rise to jurisdictional questions concerning different Catholic religious orders engaged in missionary activities.

In 1493, in an attempt to settle these canonical issues, Pope Alexander VI issued a papal bull dividing between Spain and Portugal the entire non-European world that was accessible by sea. The Pope's determination was, with an alteration favourable to Portugal, given legal effect in 1494 by the Treaty of Tordesillas, which placed the dividing line at a north–south meridian that runs through present-day Brazil (and later extended to an anti-meridian on the opposite side of the world along a north–south line running through eastern Australia). Everything to the east of the meridian was to be Portugal's, and everything to the west, Spain's.

Neither the papal bull nor the Treaty of Tordesillas in terms divided the seas between Spanish and Portuguese sovereignties. Nevertheless, both Spain and Portugal subsequently gave the documents this interpretation when they sought to exclude foreign ships from trading in areas within their claimed areas. It was Portugal's claims to exclusive trading rights in India and East Asia, with an asserted concomitant right to exclude foreign shipping from the surrounding seas, that sparked the great struggle between proponents of freedom of the seas and sovereignty of the seas.

This struggle gave birth to the modern law of the sea and, indeed, to much of modern international law generally.

12.4 The main challenge to Portuguese pretensions came from the Netherlands. In 1580, Spain and Portugal were effectively unified when the King of Spain assumed the Portuguese throne. The northern region of the Spanish Netherlands declared independence the following year. Up until that time, Dutch merchants had benefited from Spain's claimed maritime hegemony with Portugal, but now they were treated as foreigners and Portugal sought forcibly to exclude Dutch vessels from its lucrative trading routes in Asia. The Dutch, in turn, vigorously resisted Portugal's efforts to enforce its claimed exclusive trading rights.

In legal terms, matters came to a head in 1604. The Portuguese armed merchant vessel *Catharina* and its hugely valuable cargo, which had been captured by Dutch forces near Malaya, were declared forfeit by a Dutch prize court (the law of prizes is a branch of admiralty law that determines the status of a vessel and its cargo which have been seized by force in armed conflict). Hugo Grotius (1583–1645), widely regarded as the founder of modern international law, appeared in the prize court proceedings and was instrumental in securing the *Catharina's* forfeiture.

Drawing on his pleadings in the *Catharina* case, Grotius wrote one of the great classics of international law, *De jure praedae commentarius* (*A Commentary on the Law of Prizes*). The *Commentarius* was probably written in 1605 or 1606, although it was not published in Grotius's lifetime. It extended to matters well outside the immediate issues in the *Catharina* case, such as the jurisprudential foundations of law among sovereigns and the rules and principles regulating the international use of force.

12.5 The long war between Spain and its rebellious former provinces in the Netherlands drew to a conclusion in 1609 with a formal armistice. As part of the armistice negotiations, Spain and Portugal demanded that the Dutch refrain from trading in India, East Asia and the West Indies. Their argument was that the seas connecting Europe to these trading destinations were under the sovereign jurisdictions of Spain and Portugal, at least insofar as navigation for commercial purposes was concerned (Portuguese claims to sovereignty over the Indian Ocean extended to navigation for all purposes).

This maritime sovereignty was said to rest not only on the division effected by Pope Alexander VI, but also on discovery and prescription.¹ The idea that sovereign authority could extend to the seas was a credible element in the ideology of State sovereignty that had been gaining steady

¹ See 7.24–7.26.

momentum in Europe since the late 16th century, and that was to win a major institutional victory in the 1648 Peace of Westphalia.²

Concerned that the Dutch government might concede to the Spanish and Portuguese demands in order to secure an armistice, the United East India Company (which enjoyed semi-official powers and a monopoly of Dutch trade in India and East Asia) requested Grotius to publish a chapter from the *Commentarius*, which dealt with an asserted right to Dutch freedom of navigation for the purposes of trade with the Far East. Grotius's *Mare liberum sive de jure quod Batavis competit ad Indicana commercia dissertatio* (*The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the Indian Trade*) was published in 1609. *Mare liberum* rejected claims to exclusive use of the seas and proved to be a work of monumental significance in the development of the law of the sea and of international law generally.

12.6 In rejecting Spanish and Portuguese claims, *Mare liberum* also engaged the interests of England, which had, since the defeat of the Spanish Armada in 1588, begun to supplant the Iberian kingdoms as the world's dominant maritime power. England had its own claims to sovereignty over the seas. These claims were based mainly on a desire to exclude or restrict foreign fishing in waters claimed as English, but were also sometimes invoked to prevent ships trading with England's enemies during times of war.

Much less ambitiously than the Spanish and Portuguese claims over the broad oceans, England claimed sovereign rights over the seas abutting England's land territory (similar claims were made for Scotland, which shared a monarch with England after the accession to the English throne of Scotland's James VI in 1603).

England's claims to sovereignty embraced a ribbon of sea — of various widths at different times — immediately adjoining the land. Sometimes claims of a more extensive nature were made, so that the whole of the North Sea, the Irish Sea and the English Channel were included. The most influential English proponent of sovereignty over the seas was John Selden (1584–1654), who, in about 1618, wrote *Mare clausum sive de domino maris* (*The Closed Seas or the Sovereignty of the Seas*) as a rebuttal to *Mare liberum*. Initially suppressed for diplomatic reasons, *Mare clausum* was eventually published in 1635 with royal patronage.

12.7 The 17th-century controversy over whether the seas were inherently free (*mare liberum*) or subject to sovereignty (*mare clausum*) eventually resulted in a synthesis around which a broad consensus formed. By 1700, it was generally accepted that a claim to sovereignty over land or sea was

² See 1.10.

justified by the fact of effective occupation, and not mainly by resort to arguments of a theological or philosophical character of the sort that tended to predominate during the earlier part of the century.

Initially, it was widely considered that effective occupation of the sea could be established by naval domination. However, the limited technological sophistication of ships in the 17th century, the endemic naval rivalry and warfare of the period, and the sheer scale of the world's oceans exposed the impossibility of using naval domination as a test for establishing effective maritime occupation. It came to be broadly accepted in European writings and practice that sovereignty could be exercised only in those parts of the sea where State power could be effectively projected. This meant, in practice, the seas immediately adjacent to a State's territory. Different claims were made as to the width of this 'territorial sea' or 'national sea'.

A frequently expounded rule was that States could claim sovereignty over so much of the sea as lay within range of cannon-shot from the shore. A claim of three miles³ became common, although other claims of up to 100 miles were also sometimes made. Widespread disagreement over the maximum permissible width of the territorial sea endured until well into the 20th century, and unanimity does not exist even now.

12.8 By the turn of the 18th century, *mare clausum* had prevailed in relation to the territorial sea, but *mare liberum* was victorious in relation to the vastly larger portion of the seas that lay beyond. Freedom of the seas had become freedom of the high seas. The United Kingdom, in full bloom as the dominant maritime power of the 18th and 19th centuries, emerged as the pre-eminent champion of freedom of the high seas.

Under this evolving regime, all States enjoyed a freedom to navigate the high seas for any purpose — although the rule did not require States to abandon the policy of mercantilism, in pursuance of which domestic laws were frequently enacted restricting international trade. Furthermore, the freedom of navigation on the high seas was not always respected, even by States that were its energetic advocates — for example, the United Kingdom's sustained campaign in the early 19th century to suppress the international slave trade by having the Royal Navy interdict suspect vessels of any nationality in the Atlantic Ocean.

The successful conclusion of the British naval and diplomatic campaign against the international slave trade coincided with the decline of mercantilism, the rise of international free trade, and the advent of steam-powered navigation. These developments heralded, in the mid-19th century, the apogee of the freedom of the high seas. This period also saw

³ All references to 'miles' in this chapter are to nautical miles. One nautical mile is equivalent to 1.15077945 statute miles, or 1.8520000031807997 kilometres.

an erosion of sovereign powers in the territorial sea with the emergence of a right of innocent passage.

Codification of the law of the sea

12.9 From its origins at the end of the 15th century until the second half of the 20th century, the international law of the sea was almost entirely customary. A reasonably clear, stable and comprehensive set of customary rules and principles had emerged by the late 19th century. The establishment of the League of Nations after World War I provided an opportunity for treaty codification and, in so doing, possible resolution of remaining points of disagreement among States.

Hague Conference

12.10 After six years of preparatory work by a League of Nations Committee of Experts, codification of the law on the territorial sea was among the tasks placed before the 1930 Hague Conference on the Codification of International Law. Although broad agreement was reached on the right of innocent passage and the extent of sovereign rights in the territorial sea, the Conference failed to produce a draft convention because of disagreement on the issue of the maximum permissible width of the territorial sea.

The main sticking point was fisheries conservation. The prevailing view was that jurisdiction over fisheries had to be co-extensive with the territorial sea, so that States which preferred more vigorous efforts to conserve fisheries desired a broader territorial sea than the three miles on offer at the Hague Conference. Many States favoured six miles, some wanted 12, while others made even larger claims extending out as far as the continental shelf. These more ambitious claims encroached on the high seas and, thereby, stood to diminish the geographical scope of the freedom to navigate and harvest resources that were enjoyed by all States in those waters.

UNCLOS I and UNCLOS II

12.11 No further substantive progress on codification was made until after World War II and the establishment of the United Nations. The codification and progressive development of the law of the sea were taken up by the International Law Commission (ILC),⁴ which, after six years

⁴ See 1.54.

of work, submitted draft Articles on the law of the sea to the UN General Assembly in 1956. Two years later, the first United Nations Conference on the Law of the Sea (UNCLOS I) was held in Geneva. The result was four conventions dealing with different aspects of the law of the sea: the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ);⁵ the Convention on the High Seas (CHS);⁶ the Convention on the Continental Shelf (CCS);⁷ and the Convention on Fishing and Conservation of the Living Resources of the High Seas (CFC).⁸ China is not a party to these conventions.

12.12 The four Geneva Conventions attracted reasonably widespread adherence by States, mainly because each Article was adopted by a two-thirds majority vote of the States participating in UNCLOS I. Nevertheless, the juridical stability that might have been expected to flow from UNCLOS I did not materialise. There were three principal reasons for this.

First, as with the 1930 Hague Conference, UNCLOS I did not produce agreement on the width of the territorial sea. This was a significant weakness in the UNCLOS I regime. A second United Nations Conference on the Law of the Sea (UNCLOS II) was convened in 1960 in order to settle this matter and the closely related issue of State jurisdiction over fisheries. However, UNCLOS II failed to produce an agreement, as leading maritime States continued to favour a three-mile territorial sea while many others continued to press their more ambitious claims. The Conference narrowly rejected a compromise proposal for a six-mile territorial sea and an adjacent six-mile fisheries zone.

Second, UNCLOS I was concluded during the early stage of decolonisation. Within 15 years of the Conference, there was a dramatic increase in the number of the world's States. The United Nations had 82 members in 1958, but by 1974 that number had grown to 138. Almost all the new States were coastal. Although many of these States accepted the results of UNCLOS I and became parties to the Geneva Conventions, many others embraced the ideological position that they should not be required to accept treaty terms 'imposed' by older developed States allegedly against the interests of newer developing States.

In particular, many new States sought to resurrect the spirit of *mare clausum* by asserting sovereign or exclusive economic rights over natural resources located in the high seas but proximate to their territories, even where they lacked the technological expertise or capital to exploit those resources. This revision of the international maritime order was vigorously

5 UNTS, Vol 516, p 205.

6 UNTS, Vol 450, p 11.

7 UNTS, Vol 499, p 311.

8 UNTS, Vol 559, p 285.

asserted to be a cure for economic underdevelopment. In this cause, many new States took a political lead from the Soviet bloc and the rulers of the Chinese mainland.

The implausibility of the asserted link between economic underdevelopment and the prevailing freedom of the high seas was obscured by the international politics of the Cold War. The strengthening political influence of the Soviet Union, Mainland China, and their clients in the 'Non-Aligned' movement of numerous developing and socialist-orientated States during this period provided a powerful impetus for revising UNCLOS I. The increasing possibilities for exploiting the mineral resources of the international seabed were a third factor in favour of a revision of UNCLOS I. Up until the 1960s, it remained virtually impossible to access minerals in deeper waters economically, but technology was by then beginning to make significant progress against the barriers placed by nature in the way of mining the international seabed.

The exploitation of international seabed mineral resources became increasingly feasible. These scientific developments were used to buttress the political campaign tendentiously associating the plight of underdeveloped States with their lack of exclusive rights to the exploitation of resources located in the high seas.

UNCLOS III

12.13 The third United Nations Conference on the Law of the Sea (UNCLOS III) began its work in 1973, and held its first major session in Caracas the following year. Its deliberations were to span 11 major sessions and were not concluded until 1982. The protracted nature of the process was consistent with the difficult task confronting the Conference, whose brief was the preparation of a comprehensive treaty on all important aspects of the law of the sea. This involved brokering numerous complex and difficult compromises among a large number of States with differing, and frequently contradictory, interests.

The result was the 1982 United Nations Convention on the Law of the Sea (CLS),⁹ a comprehensive treaty of 320 articles and nine annexes. It is without doubt one of the most important artefacts of international law. Because of the delicate and interlocking nature of the numerous compromises that the CLS incorporates, it was drafted as a package. Parties are generally not permitted to make any reservations or enter any exceptions.¹⁰

9 UNTS, Vol 1833, p 3.

10 CLS, Art 309: 'No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.'

The CLS covers all the topics of the four Geneva Conventions, and establishes new legal regimes concerning the EEZ and the international seabed. In relation to the matters covered by the Geneva Conventions, the CLS sometimes merely repeats the earlier provisions, and sometimes lays down different or more detailed requirements.

12.14 The early life of the CLS was not without its difficulties. As noted earlier, the Convention's genesis lay largely in the international politics of the Cold War. Its more controversial provisions were not harmonious with the interests of developed States that favoured a more liberal regime in relation to non-territorial seas and the international seabed. These differences meant that it was difficult to attract ratifications of the CLS from developed States. Indeed, almost all the ratifications before the Convention's entry into force in 1994 were from developing States.

The main obstacles to ratification for most developed States were the original CLS provisions on the international seabed, which, in the view of most developed States, unreasonably sought to lock maritime resources away from those most able to extract them. This obstacle was, however, effectively overcome by 1994.¹¹

12.15 The law of the sea is now a patchwork. All States are bound by the customary rules, except in their relations with other States with which they have concluded one or more of the 1958 and 1982 conventions — in which case, the treaty provisions will prevail if they are inconsistent with custom. The Convention obligations will apply concurrently with custom if the conventional rule codifies or reflects customary law.

As between States that are parties to the same Geneva Conventions, there is also the impact of any reservations that they may have made.

Some new customary rules, binding on all States, may also have crystallised as a result of the widespread ratification and implementation of the conventions and as a result of non-parties adopting the conventional rules in their State practice out of a sense of legal obligation.¹²

Some States are parties to one or more of the Geneva Conventions but not the CLS, and other States are parties to the CLS but not all of the Geneva Conventions. Their relations *inter se* will be governed by customary law as modified by the impact of the conventions on State practice and *opinio juris*. There are about 160 parties to the CLS, including China, but that means there are about 30 States that are not parties to it — including the United States. In China's region, Cambodia and North Korea have signed

¹¹ See 12.110–12.112.

¹² *North Sea Continental Shelfcases (Germany v Denmark, Germany v The Netherlands)* ICJ Rep (1969) 3, paras 71–74. See 1.140.

but not ratified the CLS. The CTSCZ, the CHS and the CCS each have between 50 and 60 parties, while the CFC has fewer than 40 parties.

In addition to all this, there are numerous bilateral and regional treaties relating to maritime matters (for example, maritime boundary treaties and regional treaties on fisheries and maritime pollution), and the possibility of local customary law of the sea.

Maritime zones

12.16 The modern law of the sea deals with the competing interests of States in the world's seas and submerged lands by dividing them into several zones defined by their geographical relationship to a State's territory, the uses to which they may be put, and the conditions attached to such uses. Indeed, maritime zones furnish the organising principle around that the modern law of the sea is structured. The seven maritime zones recognised in, or established by, the CLS are internal waters; territorial sea; contiguous zone; exclusive economic zone; high seas; continental shelf; and international seabed. There are also special legal regimes for straits and archipelagic States.

baselines

12.17 The baseline is a legal device upon which almost the whole system of maritime zones depends. The locations of all maritime zones, except the international seabed, are completely or partly determined by reference to baselines. Baselines are drawn by reference to a State's land territory. It is in this sense that the International Court of Justice (ICJ) has observed that 'the land is the legal source of the power which a State may exercise over territorial extensions to seaward'¹³ and 'the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it'.¹⁴ The ICJ has also remarked that the 'title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts'.¹⁵

12.18 For the purpose of drawing baselines, islands and even exposed rocks may frequently be useful in extending the geographic scope of a State's claims to the sea.¹⁶ A valid claim to sovereignty over an island

¹³ *North Sea Continental Shelfcases (Germany v Denmark, Germany v The Netherlands)* ICJ Rep (1969) 3, para 96.

¹⁴ *Continental Shelf (Tunisia v Libya)* ICJ Rep (1982) 18, para 73.

¹⁵ *Maritime Delimitation in the Black Sea (Romania v Ukraine)* ICJ Rep (2009) 61, para 77; see also, *Territorial and Maritime Dispute (Nicaragua v Colombia)*, ICJ Rep (2012) 624, para 140.

¹⁶ See 12.32.