

**The Implications of Modern Law of the Sea on  
the Protection of Sunken Warships in the Gulf of Finland**

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<p>This paper evaluates what mechanisms coastal States have to regulate activities on shipwrecks beyond the territorial waters, in particular sunken warships. The evaluation focus is on the legal framework of the 1982 United Nations Convention on the Law of the Sea (LOSC) and the effects this Convention has on sunken warships beyond the territorial waters of a coastal State. This is done by examining the history and contents of the relevant provisions of the LOSC for how the attribution of rights and jurisdiction affects the protection of sunken warships in the Gulf of Finland as archaeological and historical objects.</p> <p>From a cultural heritage management point of view, the delimitation of different maritime zones, which determine the level of protection underwater cultural heritage is entitled to receive, makes little sense. The provisions of the LOSC are far from complete, and pose serious problems to coastal States and flag States alike who wish to protect sunken warships and other forms of underwater cultural heritage. While the issues regarding the protection of underwater cultural heritage have been addressed in the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (CPUCH), only one Baltic State has ratified that Convention. Furthermore, CPUCH only covers shipwrecks that were sunk over 100 years ago, thus presently excluding the last shipwrecks from World War I (1914–1918) and all shipwrecks from World War II (1939–1945).</p> <p>For as long the CPUCH does not receive wider acceptance, and the questions deal with shipwrecks from World War II, coastal States are left with the provisions of the LOSC and individual State practice. Although the Convention does not offer any applicable framework for the protection of sunken warships or underwater cultural heritage, coastal States in the Baltic Sea have multiple options to consider.</p>			
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Säilytyspaikka – Förvaringställe – Where deposited			
Muita tietoja – Övriga uppgifter – Additional information			

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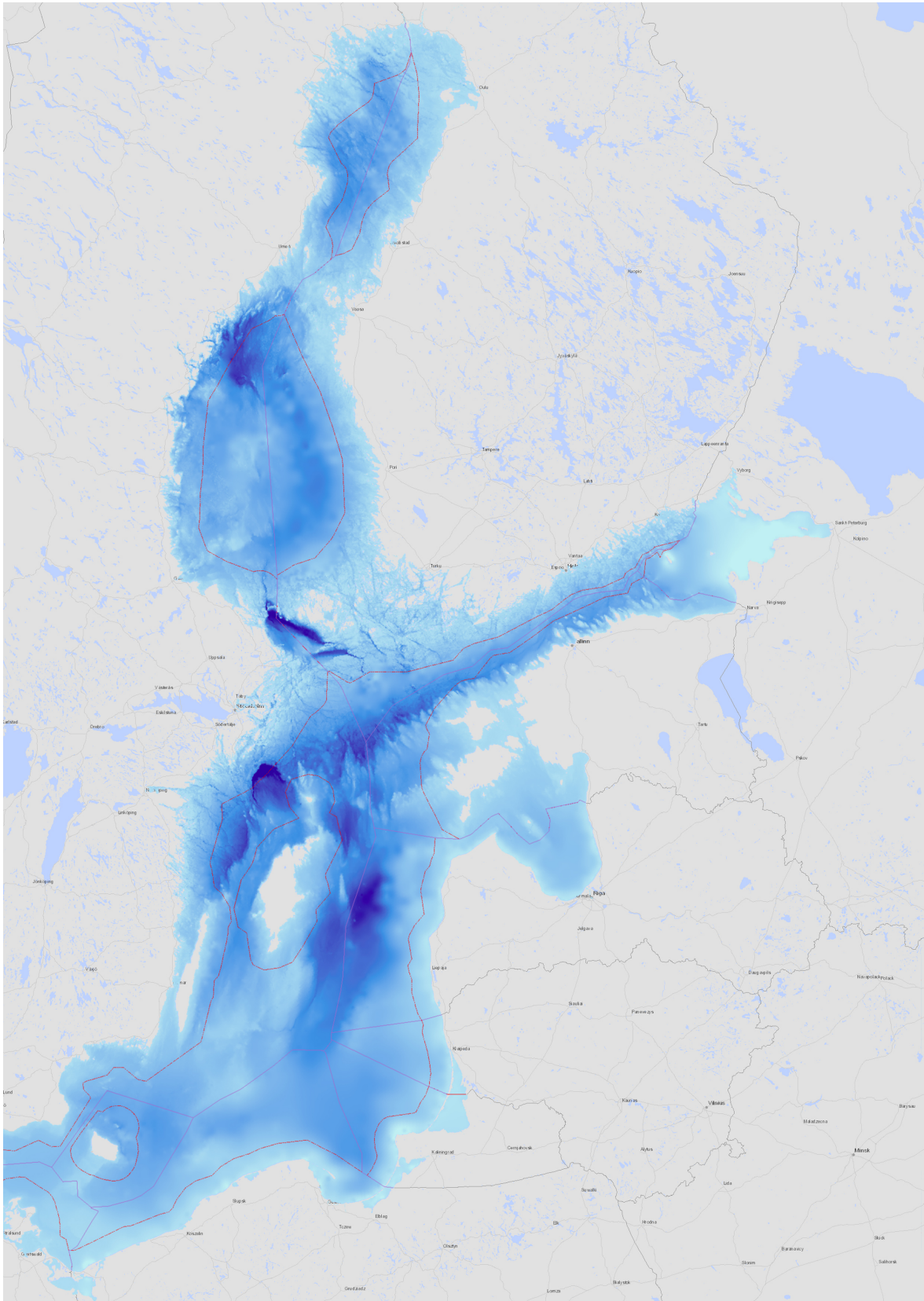
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## Abbreviations

ALDFG	Abandoned, lost or otherwise discarded fishing gear
ANCODS	The Australian and Netherlands Committee on Old Dutch Shipwrecks
AUV	Autonomous Underwater Vehicle
BFSP	British and Foreign State Papers
CCR	Closed-Circuit Rebreather
CFCLR	Convention on Fishing and Conservation of the Living Resources of the High Seas
CIA	United States Central Intelligence Agency
CPUCH	The UNESCO Convention on the Protection of the Underwater Cultural Heritage
CSC	Convention on the Continental Shelf
CTS	Consolidated Treaty Series
DOALOS	United Nations Division of Ocean Affairs and Law of the Sea
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishing Zone
FAO	Food and Agriculture Organization of the United Nations
G77	Group of 77
GNSS	Global Navigation Satellite System
GPS	Global Positioning System
HELCOM	Baltic Marine Environment Protection Commission — Helsinki Commission
HMS	Her Majesty's Ship
HSC	Convention on the High Seas
ICJ	International Court of Justice
ICOMOS	International Council on Monuments and Sites
ICUCH	ICOMOS International Scientific Committee on Underwater Cultural Heritage
IIL	Institute of International Law
ILC	International Law Commission
IMO	International Maritime Organization
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
LNTS	League of Nations Treaty Series
LOSC	United Nations Convention on the Law of the Sea
MARPOL	International Convention for the Prevention of Pollution from Ships

MBES	Multibeam echosounder
MoU	Memorandum of Understanding
MSR	Marine Scientific Research
NOAA	National Oceanic and Atmospheric Administration
OME	Odyssey Marine Exploration, Inc.
OPSD	Optional Protocol on the Settlement of Disputes
PCIJ	Permanent Court of International Justice
QC	Queen's Counsel
ROV	Remotely Operated Underwater Vehicle
SA	Selective Availability
SCUBA	Self-contained Underwater Breathing Apparatus
SM U	Seiner Majestät Unterseeboot i.e. His Majesty's Submarine (Imperial German Navy)
TSC	Convention on the Territorial Sea and the Contiguous Zone
UCH	Underwater Cultural Heritage
U.S.	United States Reports
UN	United Nations
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNEP	United Nations Environment Programme
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
VOC	Vereenigde Oost-Indische Compagnie i.e. Dutch East India Company
WRC	Nairobi International Convention on the Removal of Wrecks



*This map illustrates the current maritime limits and boundaries in the Baltic Sea. The outer limits of the territorial waters are marked in red, and the delimitation of the exclusive economic zones is marked in purple. (Source: HELCOM, 2016.)*



## INTRODUCTION

The treatment of the maritime legacy of the First and Second World Wars, and of potentially hazardous wrecks dating from earlier times, is a matter that should be addressed by the international community as a matter of urgency.<sup>1</sup>

*Sarah Dromgoole*

### 1. Introductory Notes

A fellow diver of mine was once asked why he preferred diving in the Baltic Sea over every other ocean in the world. His answer was simple, although perhaps a bit brutal: ‘Because of the two World Wars’. Most people do not know that the brackish waters of the Baltic hide the most well-preserved shipwrecks in the whole world. Nowhere else can one find and have access to intact men-of-war from the 17th century, with cannons still sticking out of their gun ports; sailing ships from the same century still standing upright on the ocean floor; or warships of the past two World Wars, with their guns, railings and painted wooden structures waiting to be discovered. What Tintin and Donald Duck saw in the comic books, is reality in the Baltic.<sup>2</sup>

The romantic ideas of ‘underwater treasures’ seen in the comic books have certainly shaped the general public’s attitude towards shipwrecks. However, these attitudes have not always been welcomed by the scientific community. Robert Grenier, the President of the ICOMOS International Scientific Committee on Underwater Cultural Heritage (ICUCH), has said that one of the problems faced by the drafters of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (CPUCH)<sup>3</sup> was the general ignorance regarding underwater cultural heritage issues. The negotiations had to be liberated from ‘the romantic clichés fostered by comic strips, literature or cinema which has [sic] nurtured us with archetypes as extravagant as the Titanic or even the image of Red Rackham’s treasure, in the *Tintin series*’.<sup>4</sup>

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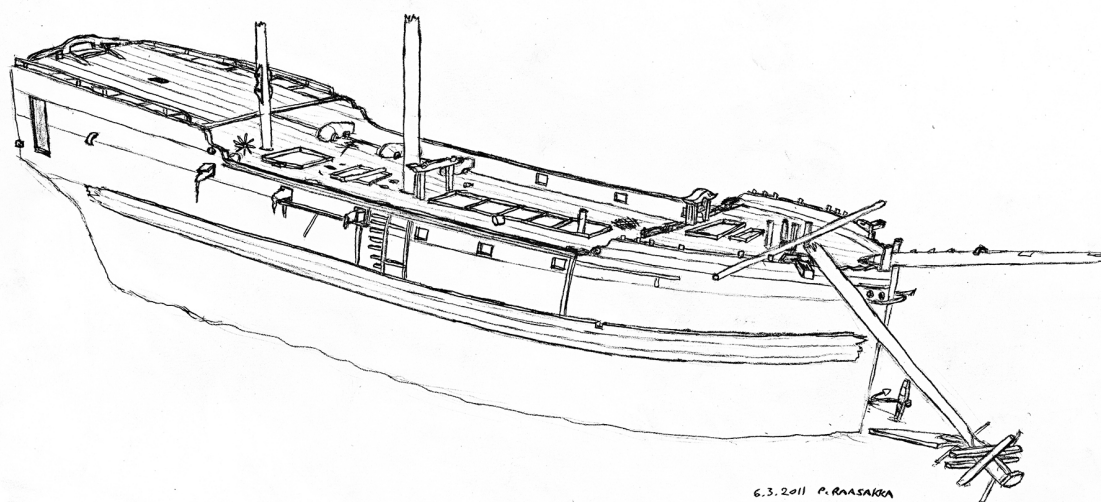
<sup>1</sup> Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press: New York, 2013) at 165–166. Sarah Dromgoole is a professor of Maritime Law at the University of Nottingham.

<sup>2</sup> From the *Tintin series*, see especially Hergé, *The Secret of the Unicorn* (1943); Hergé, *Red Rackham's Treasure* (1944).

<sup>3</sup> Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, in force 2 January 2009, 41 ILM 40.

<sup>4</sup> Robert Grenier, David Nutley, and Ian Cochran (eds), *Underwater Cultural Heritage at Risk: Managing Natural and Human Impacts* (ICOMOS: Paris, 2006) at x.

Grenier was also referring to the discrepancy between cultural protection on land and at sea, where the latter has been subject to the age-old tradition of ‘first come, first served’ salvage practice. This practice has seen historic wrecks as a source of supply rather than something worth protecting. One of the most important contributing factors to the diluted appreciation of shipwrecks in general is that activities — both desirable and objectionable; preservative and destructive — on dry land leave traces and can be observed by witnesses, but as Grenier explains, underwater almost anything can happen unnoticed.<sup>5</sup> All too often, ‘out of sight’ does mean ‘out of mind’.



*An unknown sloop-of-war sunk near Helsinki, found in 2002 by the Finnish Maritime Administration. One theory suggests that the ship was a privateer, possibly of English origin based on the artefacts found on the deck. (Copyright 2011 P. Raasakka/badewanne.fi)*

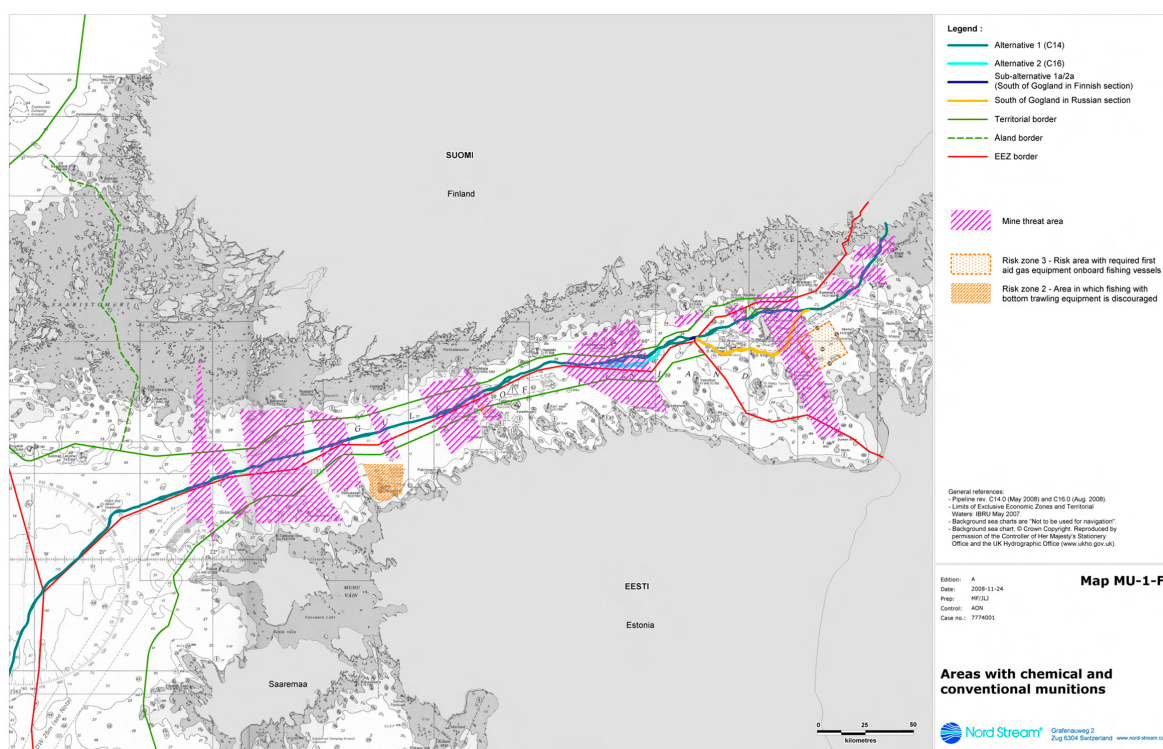
The year 2014 marked the centenary of the First World War. UNESCO (United Nations Educational, Scientific and Cultural Organization) estimated that roughly 10 000 wrecks from World War I can be found on the seabed around the world. This figure includes warships as well as civilian vessels, sunk both by accident and as victims of naval blockades. Globally some wrecks are well preserved, but many have been destroyed or severely damaged by non-scientific salvage, commercial exploitation, looting, scrapping and trawling.<sup>6</sup> Many ships were lost during battle, but the majority of losses were caused by the mine lines laid down by the belligerents. During the past two World Wars, the Baltic Sea was by far the most heavily mined sea in the world, with an estimated total exceeding 60 000 naval mines.

Many new wreck discoveries related to both World Wars were made in the Baltic Sea during 2014 and 2015. Different projects and diving teams made several remarkable discoveries, including the two German submarines SM *U-26* and *U-679*, and at least three Soviet submarines, the *M-95*, *Sch-324* and *Sch-306*. Other discoveries include the German

<sup>5</sup> *Ibid.*

<sup>6</sup> See <[www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/world-war-i](http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/world-war-i)> for more information and news regarding the centenary of the First World War. References to all online sources are accurate as of 24 April 2016.

torpedo boat *T18* and Schnellboot *S106*. Most of these wrecks are located outside the territorial waters of Finland or Estonia, but in the exclusive economic zone (EEZ) of the two countries.



The general locations of naval mines (shown in pink), and the threat they pose, is illustrated in the 2008 survey conducted by Nord Stream for the natural gas pipeline system through the Baltic Sea.<sup>7</sup>

Sunken warships are objects of great cultural, historical and archaeological value and can hold significant national importance. In this sense, they are non-renewable resources, and they will grow even more valuable over time, as direct windows into the past. Whether sunken warships fall under the scope of underwater cultural heritage (UCH), and are protected on a national level, is a matter of domestic legislation. Many national jurisdictions follow a 100-year cut-off rule inside their territorial waters, meaning that a wreck becomes UCH and generally protected as such after 100 years have passed since the sinking of the ship. This national protection extends to the limits of a State's territorial jurisdiction, leaving shipwrecks resting in areas beyond the territorial sea usually with very little or no legal protection.

What makes this issue even more relevant now are the recent advances in technical diving. Underwater sites were first made accessible after World War II, following the invention of the open-circuit self-contained underwater breathing apparatus 'Aqua-Lung' — better known today as SCUBA — by French engineer Émile Gagnan and French naval officer Jacques-Yves Cousteau. This opened up the underwater world and its hidden cultural heritage in a whole new way, although sadly with this came the plundering of most archaeological remains in

<sup>7</sup> Map MU-1-F, 'Areas with chemical and conventional munition' in Nord Stream, *Environmental impact assessment in the exclusive economic zone of Finland*, February 2009, at 39.

shallow waters. In the beginning of the 1990s, technical open-circuit mixed gas diving started to gain popularity in the Nordics. Today the advances and affordability of mixed gas technology, along with computer-controlled closed-circuit rebreathers (CCR), allow divers to safely and effectively reach depths of over 100 metres. The mean depth of the Baltic Sea is only 54 metres; in the EEZ in the Gulf of Finland the depth varies roughly between 50 and 100 metres, making it accessible to all trained technical divers.



*The badly damaged conning tower of German World War II submarine U-479. She was sunk by a mine in the late autumn of 1944 and rests on the seabed at 95 metres. (Picture: Jouni Polkko, courtesy of badewanne.fi, 2015.)*

While virtually all Nordic and Baltic States have relatively well-developed cultural heritage laws, the issue of sunken warships remains an unsolved problem especially at the international level. Beyond the territorial seas, most of the Baltic Sea and the Gulf of Finland fall under the regime of the EEZ — there are no high seas. As a result, a significant proportion of the Baltic Sea consists of waters beyond territorial jurisdiction, where legal protection is very weak or non-existent. The geographical location of a shipwreck does not determine its cultural or historical value; however, the location does have substantial impact on which level of protection coastal or flag States<sup>8</sup> can enforce. Most of the warships from the World War I and II rest outside territorial waters, and so the question is: How can they be protected from unwanted disturbance — namely looting and unwanted salvage? The only thing authors and

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<sup>8</sup> A flag State is a State whose flag a ship flies and is entitled to do so under the United Nations Convention on the Law of the Sea, see *infra* note 11.

scholars seem to generally agree on, is that the legal regime surrounding sunken warships is rather ambiguous.

Before the 21st century no international treaty or convention addressed the issue of property rights over warships that were captured or sunk during wartime or otherwise, leaving matters primarily to be decided by the customary rules of international law.<sup>9</sup> The situation has not improved much since then. Today, some conventions do mention warships (i.e. operational warships), but typically only as exclusions to the scope and framework provided for other vessels. However, these conventions neither address the issue of sunken warships (i.e. non-operational warships), nor the protection of these wrecks as cultural or historical monuments.

One solution for an applicable and comprehensive protective framework is the ratification of the CPUCH, which was designed to provide better mechanisms for States to regulate activities on shipwrecks and underwater cultural heritage beyond the territorial sea.<sup>10</sup> However, in order to achieve effective results, the Convention would require wide support and implementation. Furthermore, pursuant to Article 1 of the CPUCH, it covers only the UCH that has been underwater for more than 100 years. Many of the shipwrecks from World War I (1914–1918) and all shipwrecks from World War II (1939–1945) currently fall outside the scope of the CPUCH.

Given that in the Baltic Sea only Lithuania has currently ratified the CPUCH, this paper will study the implications of modern law of the sea, namely the influence of the 1982 United Nations Convention on the Law of the Sea (LOSC),<sup>11</sup> on the protection of sunken warships. It has been generally recognised that the LOSC does not provide any working framework for States, since the LOSC deals with more general issues of the attribution of rights and jurisdiction in different maritime zones established in the Convention. Despite the lack of specific provisions in the LOSC, the Convention can still provide tools for coastal States to regulate activities on shipwrecks. However, there is a need for new legal frameworks for the protection of historical shipwrecks; rules on the allocation of State jurisdiction beyond the territorial sea; guidelines for uniform national standards; and provisions for the settlement of international disputes.

## 2. Research Question, Objective and Structure

This paper evaluates the mechanisms coastal States have to regulate activities on shipwrecks, in particular sunken warships, taking into consideration that the Baltic Sea is a semi-enclosed sea

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<sup>9</sup> J. A. Roach and R. W. Smith, *Excessive Maritime Claims* (3rd edn, Martinus Nijhoff Publishers: Leiden, 2012) at 543.

<sup>10</sup> Sarah Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage', 25 *International Journal of Marine and Coastal Law*, no. 1 (2010) 33–61 at 35.

<sup>11</sup> United Nations Convention on the Law of the Sea, 10 December 1982, in force 16 November 1994, 1834 UNTS 397.

where cooperation between coastal States already exists for the protection of the marine environment and other uses of the sea. The evaluation focus is on the legal framework of the LOSC and the effects this Convention has on sunken warships beyond the territorial waters of a coastal State.

The principal research question is:

*What are the implications and effects of the 1982 United Nations Convention on the Law of the Sea on the protection of sunken warships in the Gulf of Finland that have been lost during the past two World Wars?*

This question is answered by examining the history and contents of the relevant provisions of the LOSC for how the attribution of rights and jurisdiction affects the protection of sunken warships in the Gulf of Finland as archaeological and historical objects. An analysis of the findings follow each area of examination. This paper is based on the premise that all coastal States of the Baltic Sea have interest in the cultural heritage from the past World Wars, as many States share a historical connection with these wrecks, either as the original flag State, owner or builder of the ship, or simply as a party to the dispute. The paper concentrates on the Gulf of Finland — especially on the EEZ between Finland and Estonia — and focuses on sunken warships that have been lost during the past two World Wars, thus excluding airplanes and other forms of State craft.

This paper specifically reviews the LOSC in order to identify various mechanisms coastal States have at their disposal *outside* of the framework provided by the CPUCH. This approach is taken for two particular reasons. First, only one State has currently ratified the CPUCH in the Baltic Sea, which makes further study of the CPUCH within this paper unnecessary. Second, the CPUCH only covers shipwrecks that were sunk over 100 years ago, thus presently excluding the last shipwrecks from World War I (1914–1918) and all shipwrecks from World War II (1939–1945). Thus, there are currently no existing regulatory frameworks in a conventional form for coastal States to apply. The fundamental issue was well-phrased by the Polish delegation during the negotiations at UNESCO regarding the CPUCH:

The discussion of a time-limit came to no conclusion. In central Europe there has been a general tendency for objects older than the end of the Second World War to be protected. There would seem to be a good case for protection of the relics of the period of the Second World War since wrecks of ships and aircraft of this period and in many cases war graves are also being looted for collections of military items. This view may be regarded as Eurocentric, but the Second World War is a meaningful cultural horizon over most of the hemisphere. Warships of the period before 1945

(at least) contain historical information unobtainable from other sources and must be preserved and protected from looting and uncontrolled 'salvage' operations.<sup>12</sup>

The historical importance of sunken warships in the Baltic Sea is introduced in Part I in order to explain the legal settings and what makes protection of sunken warships important. Furthermore, it is explained why sunken warships should be included in the notion of objects of an archaeological and historical nature. Part II explains the relevant terms and associated disciplines by analysing the history and development of these terms and legal doctrines. Their importance and possible problems for the subject matter are also identified. Part III explains the history and recent developments in the law of the sea and relevant provisions of the LOSC. This part also explains the current maritime delimitation and introduces the differences between present maritime zones. This paper concludes with a summary of findings in order to establish whether a basis and necessary support exist for developing possible further regional agreements. The principal research question is answered through an analysis of what the *lex lata*<sup>13</sup> is, and whether there is room for improvement. As far as possible this paper reflects the law and State practice as it was in April 2016.

### 3. About the Source Material

The subject of this paper goes beyond the borders of traditional disciplines of international law. Shipwrecks involve many interest groups, such as coastal and flag States, scientific institutions and organisations, archaeologists, historians, divers, salvors and the general public, which all have their own traditions, motives and languages. Therefore the literature on the subject can sometimes be rather varied. The values and ethics of an archaeologist and those of an admiralty lawyer are simply different. The same applies to the views of different coastal States. The juxtapositions are sometimes obvious — what is absurd and totally inapplicable to one group, can be generally accepted rules of international law to others. Therefore the reader should proceed with some caution due to the rather biased opinions of some scholars and authors. However these viewpoints form academic opinions and state Practice, and should be equally respected.

#### 3.1. Source Material

There is a vast amount of literature on the law of the sea, but books and studies concentrated around the issues associated with legal matters surrounding sunken warships are scarce. The most important works on the law of the sea are probably the two extensive volumes written by

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<sup>12</sup> Report by the Director-General on Action Taken Concerning the Desirability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, Paris, 5 August 1997, UNESCO Doc. 29C/22, 5–6 in Annex II.

<sup>13</sup> Latin, 'the law as it exists'.

Professor Daniel Patrick O’Connell;<sup>14</sup> the work of Professors Robin Churchill and Vaughan Lowe QC;<sup>15</sup> and the two-volume multi-author handbook published under the editorship of René-Jean Dupuy and Daniel Vignes.<sup>16</sup> The negotiations and drafting history of the LOSC is put together in the massive seven-volume commentary on the United Nations Convention on the Law of the Sea edited under the supervision of Myron H. Nordquist.<sup>17</sup> The Convention itself however has no official *travaux préparatoire*.<sup>18</sup>

From the field of underwater cultural heritage law, the seminal works of Dr Anastasia Strati,<sup>19</sup> Eke Boesten,<sup>20</sup> and Professor Sarah Dromgoole<sup>21</sup> are of great value to the general subject of shipwrecks in international law. Anyone interested in the national perspectives should look at the two collections of national essays published under the editorship of Dromgoole.<sup>22</sup> European perspective on the protection of UCH can be found from the report prepared by John Roper for the Parliamentary Assembly of the Council of Europe on the issue of underwater cultural heritage.<sup>23</sup> The report is widely referred to as the ‘Roper Report’ and, even after almost 40 years since being first published, its influence is still seen, and its approach is still considered very modern.<sup>24</sup> The most comprehensive reviews of the CPUCH and associated legal issues include the commentary written by Professor Patrick O’Keefe<sup>25</sup> and the book published under the editorship of Roberta Garabello and Professor Tullio Scovazzi.<sup>26</sup>

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<sup>14</sup> See D. P. O’Connell, *The International Law of the Sea Volume I* (Oxford University Press: Oxford, 1984); D. P. O’Connell, *The International Law of the Sea Volume II* (Oxford University Press: Oxford, 1984).

<sup>15</sup> See Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press: Manchester, 1999).

<sup>16</sup> See René-Jean Dupuy and Daniel Vignes (eds), *A Handbook on the New Law of the Sea, Volume I* (Martinus Nijhoff Publishers: Dordrecht, 1991); René-Jean Dupuy and Daniel Vignes (eds), *A Handbook on the New Law of the Sea, Volume II* (Martinus Nijhoff Publishers: Dordrecht, 1991).

<sup>17</sup> See Myron H. Nordquist (ed.) *United Nations Convention on the Law of the Sea 1982: A Commentary, Volumes I–VII* (Martinus Nijhoff Publishers: Dordrecht, 1985–2011).

<sup>18</sup> French, ‘preparatory works’.

<sup>19</sup> See Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (Brill: The Hague, 1995).

<sup>20</sup> See Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters: Public International Law and What it Offers* (T.M.C. Asser Press: The Hague, 2002).

<sup>21</sup> See Dromgoole, *Underwater Cultural Heritage and International Law*, *supra* note 1.

<sup>22</sup> See Sarah Dromgoole (ed.) *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (Kluwer Law International: London, 1999); Sarah Dromgoole (ed.) *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, Publications on Ocean Development, vol. 55 (2 edn, Brill: Leiden, 2006).

<sup>23</sup> See John Roper, *The Underwater Cultural Heritage: Report of the Committee on Culture and Education (Rapporteur Mr John Roper)* (Council of Europe: Strasbourg) Doc. 4200 - E.

<sup>24</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 36–37, *supra* note 1.

<sup>25</sup> See Patrick J. O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (Institute of Art and Law: Leicester, 2002). This commentary has been updated recently, see Patrick J. O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (2nd edn, Institute of Art and Law: Builth Wells, 2014). Due to practical reasons this paper will refer to the first published edition.

<sup>26</sup> See Roberta Garabello and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff Publishers: Leiden, 2003).



Reference has also been made to other relevant publications, the writings of recognised scholars and authors, relevant court decisions and journal articles.

### 3.2. Previous Studies on the Subject

In 2015, the 9th Commission of the Institute of International Law (IIL) concluded its work on the Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law. The general subject of ‘ownership and protection of wrecks beyond the limits of national maritime jurisdiction’ was also included in the long-term program of the International Law Commission (ILC) in 2012 after being first outlined by Sir Derek Bowett in 1993.<sup>27</sup>

The 9th Commission was created in 2007 and a preliminary report was published after the IIL’s 2011 session in Rhodes.<sup>28</sup> Based on the work of the 9th Commission, a Resolution was adopted on 29 August 2015 and some preparatory works were published.<sup>29</sup> The Commission wanted to contribute to the clarification of international law, being aware of the uncertainties that continue to surround the question of wrecks of warships.<sup>30</sup> The Resolution deals with the theoretical questions of State ownership and sovereign immunity,<sup>31</sup> and recognises that ‘sunken State ships are immune from the jurisdiction of any State other than the flag State’.<sup>32</sup> However, it does not focus on practical matters such as coastal or flag State jurisdiction. Furthermore, the Resolution applies the status of ‘underwater cultural heritage’ to wrecks that have been underwater for more than 100 years — thus excluding wrecks from the Second World War — but it does not deal with the protection of such wreck sites and UCH. The Resolution also adopted a set of provisions in Articles 7–10 with regards to sunken warships in different maritime zones. The IIL Report concluded that State practice is oriented towards, and decisively endorsing, the recognition of sovereign immunity to sunken warships.<sup>33</sup> It is argued however, that this immunity is rendered virtually useless if States cannot enforce protective legislation beyond the territorial sea in cases of looting or unwanted salvage. Professor Lowe

<sup>27</sup> See *Outlines prepared by members of the Commission on selected topics of international law* (1993), A/CN.4/454, in *Yearbook of the International Law Commission, vol. II (Part I)* (1993) at 211–213. On the selection of topics, see <legal.un.org/ilc/programme.shtml>.

<sup>28</sup> Natalino Ronzitti, ‘The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law’ in 74 *Yearbook of Institute of International Law* (2011), 133–177.

<sup>29</sup> For the preparatory works, see Natalino Ronzitti, *The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law* (Institut de droit international) 9th Commission. For the Resolution, see *The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law* (IIL Resolution), 29 August 2015. Both available at <justitiaetpace.org/resolutions.php>.

<sup>30</sup> See the preamble of the IIL Resolution, *ibid*.

<sup>31</sup> Sovereign immunity can be defined as the immunity a State enjoys, in respect of itself and its property, from the jurisdiction of the courts of another State. See Article 5 of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2 December 2004, not yet in force, UN General Assembly A/RES/59/38. Sovereign immunity of sunken warships refers generally to immunity from the exercise of enforcement jurisdiction, i.e., their immunity from arrest, attachment, or execution in the territory of any other State than the flag State. Regarding sovereign immunity and sunken ships in general, see Roach and Smith, *Excessive Maritime Claims*, at 536–558, *supra* note 9.

<sup>32</sup> See Article 3 of the IIL Resolution, *supra* note 29.

<sup>33</sup> *Preparatory works of Tallinn Session*, at 28 and 30, *supra* note 29.

pointed out correctly in correspondence within the IIL that '[d]oes immunity not flow from the relationship with the State whose immunity applies to the ship/wreck, rather than from anything to do with its character as a ship?' and '[c]ould the flag State have immunity in respect of the wreck without having jurisdiction over it?'.<sup>34</sup> While the works of the IIL are of significant interest, it falls partly beyond the scope of this paper. Nevertheless Professor Lowe made perhaps one of the most important observations of the whole work done in the IIL:

I wonder if there is not a case for pausing our work and trying to engage in detail with one of the other professional groups concerned — such as the marine archaeologists — to see what changes (if any) in the international legal framework are necessary to accommodate the conduct of their work according to their own best practices and professional standards.<sup>35</sup>

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<sup>34</sup> *Ibid.*, at 14.

<sup>35</sup> See the subsequent comments of Professor Lowe in *ibid.*, at 59.

## PART I

### THE HISTORICAL IMPORTANCE OF SUNKEN WARSHIPS IN THE BALTIC SEA

#### 1. The Value of Sunken Warships

The history of mankind is unfortunately a long history of war. As wars and conflict have shaped our society, records of these events have been written and preserved for the future. However, the further in time we move from an event, the further these written records are from giving a complete and full account. Crucial contextual information, that a contemporary reader would be expected to be aware of, may be obscured to a modern reader. At times the written records are misleading or incomplete. Deep comprehension of the events of the past can only be gained through the complementary study of *unwritten* records — the material remains of the period under investigation.

Marine archaeologist Niklas Eriksson explains, ‘the basic facts of history and the important questions about the past tend to be established by historians from the written sources’ whereas ‘[t]he role of the material remains, the things dug up from the soil or salvaged from the seabed, tends to be an ancillary or supportive role only, basically reduced to illustrations’.<sup>36</sup> Eriksson’s observation was that as historical events can be told by written sources, shipwrecks that result from those events are seldom documented at all. Anthropologist Richard A. Gould came to the same conclusion. He adds that wrecks and wreck sites, ‘[a]s “documents”, [...] are subject to various kinds of alterations arising from circumstances of deposition as well as human behaviour which differ significantly from the literacy and ideological editing process that affect historic documents’.<sup>37</sup> Thus, both physical and written histories can demonstrate flaws and incompleteness, though of different natures. Individually, each source can only tell part of the story. It is only through the complement of one to the other that significant information may be uncovered, and historical texture may be better understood.

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<sup>36</sup> Niklas Eriksson, *Urbanism Under Sail: An archaeology of fluit ships in early modern everyday life* (Södertörn University: Huddinge, 2014) at 31.

<sup>37</sup> Richard A. Gould, ‘The Archaeology of War: Wrecks of the Spanish Armada of 1588 and the Battle of Britain, 1940’ in Richard A. Gould (ed.) *Shipwreck Anthropology* (University of New Mexico Press: Albuquerque, 1983), 105–142 at 105 citing Michael B. Schiffer, ‘Behavioral Archaeology’ (Academic Press: New York, 1976) at 14–16.

## 2. Technological developments

Before the new millennium, the equipment commonly used for navigation and finding shipwrecks was relatively expensive and out of reach of the general public. During the Third United Nations Conference on the Law of the Sea (UNCLOS III), which concluded in 1982, satellite navigation technology was not yet in mainstream use.

Most of the technical and technological equipment commonly in use today was developed during and after the Second World War, including sonar and radar, which were developed by the Allies for anti-submarine warfare.<sup>38</sup> Later followed scuba technology, and subsequently improved diving equipment and accessories suitable for use in depths over 100 metres. What we know today as the Global Navigation Satellite System (GNSS) was created by the US military in the 1960s. The most well-known version, the Global Positioning System (GPS), became fully operational for civilians and globally available in 1995.<sup>39</sup> The first pronouncement from the United States regarding the civil use of GPS came in 1983 after Korean Air Lines Flight 007 was shot down by the Soviet Union when the plane strayed into Soviet territory.<sup>40</sup> President Ronald Reagan announced in September 1983 that the United States would make the Standard Positioning Service of GPS available for use by civilian aircraft free of charge, once the system became operational.<sup>41</sup> However, the GPS signal was deliberately degraded by the United States through a feature called Selective Availability (SA), which introduced a random error of up to 100 metres, making GPS technology less useful for civilian use. As of 1 May 2000, at the direction of President Bill Clinton, the United States government discontinued the use of SA.<sup>42</sup>

The traditional sonar, or depth sounder, has also seen important technical developments: the side-scan sonar, and the multibeam echosounder (MBES). Generally, echosounding is based on transmitting acoustic pulses from the ocean surface or water column to the ocean floor and recording the reflection (i.e. echoes) of these pulses. The side-scan sonar is a device that uses acoustic sound pulses for mapping of the ocean floor.<sup>43</sup> The pulses are reflected back and processed to produce an image. Different colours are used to illustrate the hardness of the material that has reflected the pulse back to the receiver. In the most typical configuration, the side-scan unit is operated as a 'towfish', towed from a boat. Practical and environmental

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<sup>38</sup> It is worth mentioning that these inventions actually turned the course of the war from the so-called 'happy time' or 'golden days', terms commonly used by German U-boat crews during the first years of the war till August 1942 describing their significant success during the Battle of the Atlantic.

<sup>39</sup> Scott Pace (et al.), *The Global Positioning System: Assessing National Policies* (RAND: Santa Monica, 1995) at 2. For more information on GPS, see <[www.gps.gov](http://www.gps.gov)>. Today a fully operational alternative to GPS is the Russian GLONASS. For more information on GLONASS, see <[www.glonass-iac.ru/en](http://www.glonass-iac.ru/en)>.

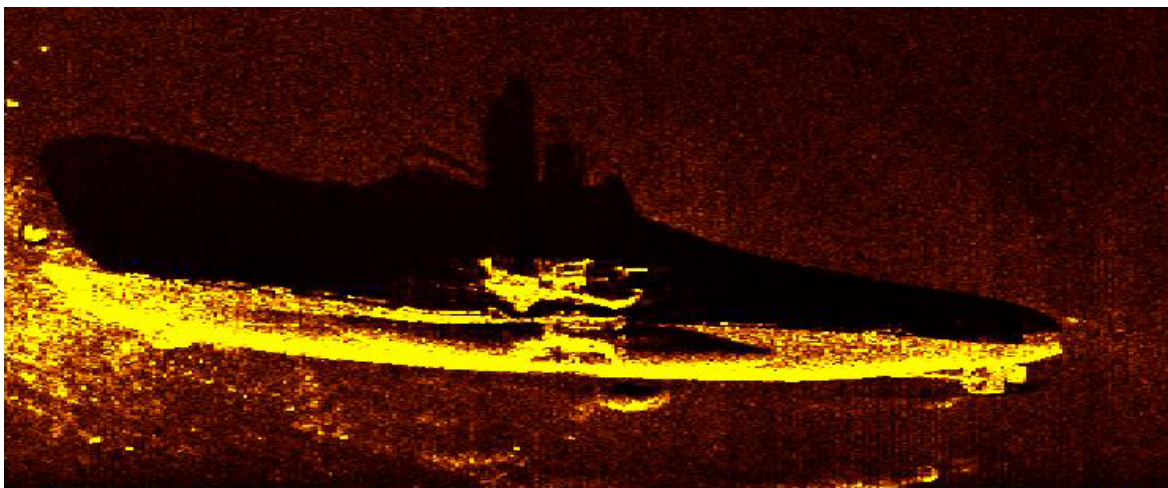
<sup>40</sup> *Ibid.*, at 247–248.

<sup>41</sup> *Ibid.*, at 263.

<sup>42</sup> Office of the Press Secretary, Statement by the President Regarding the United States' Decision to Stop Degrading Global Positioning System Accuracy, 1 May 2000.

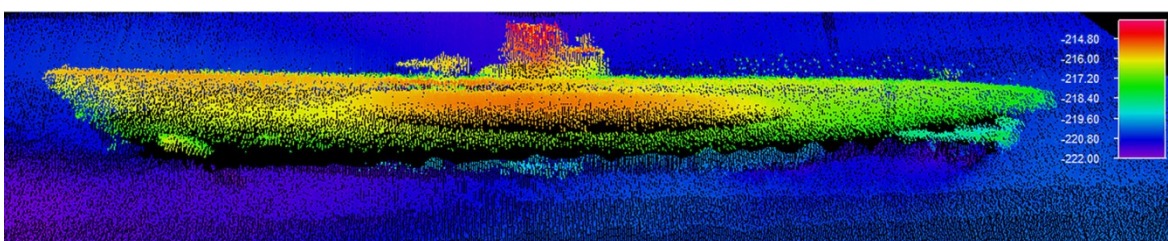
<sup>43</sup> See, generally regarding the capabilities of side-scan sonar surveys and applications, Mark W. Atherton, *Echoes and Images: The Encyclopedia of Side-Scan and Scanning Sonar Operations* (OysterInk Publications: Vancouver, 2011).

limitations such as ambient noise, water conditions and depth, and the drag caused by the towfish cable, make side-scan sonars typically most cost-effective in shallow depths, such as in the Baltic Sea. Modern side-scan sonars are theoretically accurate to one centimetre in ideal conditions.<sup>44</sup>



*A side-scan sonar image of the wreck of the German U-479 (Type VII/C) on the Estonian EEZ. (Courtesy of Estonian Maritime Administration, 2013.)*

An MBES is a type of sonar that transmits multiple pings in order to create a three-dimensional point cloud of the ocean floor. Multibeam solutions are commonly used in ocean exploration bathymetric surveys because of their effectiveness and multipurpose application. Multibeams can also be used to create clear images of shipwrecks and their condition.<sup>45</sup>



*A multibeam sonar image of the wreck of the German U-576 (Type VII/C) on the ocean floor. (Copyright NOAA & SRI International, 2014.)*

There is a wide range of other tools and equipment that can be used for the search and recovery of shipwrecks. These include autonomous underwater vehicles (AUV), remotely operated vehicles (ROV), magnetometers, sub-bottom profilers, and manned and unmanned (deep sea) submersibles. We have reached a point where anything on the ocean floor can be located, and search efforts are ‘only restricted by cost alone’.<sup>46</sup> However, side-scan sonars and technical diving equipment — along with appropriate training to use these items — remain

<sup>44</sup> For example the Swedish made 680 kHz Deepvision DE680D side-scan sonar has a resolution of 1 cm and an operational range up to 100 metres. See further <deepvision.se>.

<sup>45</sup> For different commercial MBES applications, 3D images and bathymetry, see e.g., <www.adusdeepocean.com> and <www.ngdc.noaa.gov/mgg/bathymetry/multibeam.html>.

<sup>46</sup> Gillian Hutchinson, ‘Threats to underwater cultural heritage: The problems of unprotected archaeological and historic sites, wrecks and objects found at sea’, 20 *Marine Policy*, no. 4 (1996) 287–290 at 288.

the most essential elements in the Baltic Sea needed for the search for shipwrecks, and are widely available for a reasonable price and are commonly used by recreational divers and dive clubs.

### 3. The Threats

The threats posed to historic shipwrecks are relatively new and have surfaced as a consequence of the technological developments that allowed sophisticated search, location and exploitation of shipwrecks.<sup>47</sup> These threats can be split into three categories. The first is of human-sourced activities that are directed at shipwrecks and have shipwrecks as their primary target. This category includes commercial treasure hunting and salvage, looting and souvenir collecting. The second category is of human-sourced indirect activities that do not have shipwrecks as their primary target. This category includes commercial fishing and off-shore projects such as laying underwater cables, the building of pipelines and other structures that are placed on the seabed. The third category is of natural impacts, which include deterioration caused by time, currents, tidal movements, corrosion and other natural physical, chemical, biochemical and biological processes. This paper addresses category one activities of commercial treasure hunting and looting. Environmental issues, namely oil and other harmful substances, are also discussed briefly, due to the serious threat they pose for the future.

#### 3.1. Commercial Treasure Hunting

Commercial treasure hunting traditionally refers to a business model employed by companies such as the Florida-based Odyssey Marine Exploration (OME), and individuals such as the late Mel Fisher. In the wider sense, this business model ‘can encompass any form of money-making enterprise derived from [cultural material]’.<sup>48</sup> Perhaps more commonly the business model ‘carries with it the implication that the *sale* of cultural material is involved’, which traditionally leads to the irretrievable dispersal of cultural objects and related information.<sup>49</sup> So far commercial treasure hunting has not emerged in the Baltic as a professional activity — presumably due to the lack of sites possessing sufficient economic value, i.e., valuable metals such as gold, silver or copper. However, the illegal and unwanted activities of looting and souvenir collecting have been present since the introduction of scuba, and pose one of the most serious threats to shipwrecks in the Baltic.

Weighing in on the debate against commercial treasure hunting, is the question of whether the dignity of the fallen should be more valuable than the resale price of their personal belongings. The demand for maritime antiques is considerable, and subsequently the prices for

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<sup>47</sup> *Ibid.*, at 287.

<sup>48</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 210, *supra* note 1.

<sup>49</sup> *Ibid.* For different business models and suggestions, see further *ibid.*, at 210–240. See also Tatiana Villegas Zamora, ‘The Impact of Commercial Exploitation on the Preservation of Underwater Cultural Heritage’, 60 *Museum International*, no. 4 (2008) 18–30.

items found at wreck sites are high. A treasure hunter can make a small fortune selling artefacts — such as plates with Nazi imprints, and other articles associated with the Third Reich. Many experts question the acceptability of salvaging items, which could have a monetary value amongst private collectors, when these items originate from war graves. In Poland, Professor Wojciech Kowalski explains ‘[t]hese wrecks have attracted considerable attention from amateur divers [...] in search of various artefacts which then emerge on the German antiquities market’.<sup>50</sup>

### 3.2. Looting and Souvenir Collecting

The wreck of First World War-era Russian armoured cruiser *Pallada* was found in 2000. She was sunk with all hands on deck on 13 October 1914 by the German U-boat SM *U-26*. Over the next twelve years the wreck site was carefully mapped and documented through still photography, video and illustrations. Over a hundred exploration dives later, the story of the *Pallada* was published in print by *Helsingin Sanomat* in the October 2012 issue of *Kuukausiliite* monthly supplement.<sup>51</sup>

The *Pallada* sunk in less than six minutes and became the first loss of the Imperial Russian Fleet during World War I. The wreck site is the final resting place of 597 Russian sailors, and for almost a hundred years they had been resting in peace. However, during the research field season in 2013 it was discovered that the wreck site had been plundered. Equipment had been removed from the armoured command bridge and some items had been moved to a more favourable location at the site, presumably for future recovery. Those responsible are yet — if ever — to be found, but it is clear the items were taken either for personal amusement, or more probably for a future sale on the black market. Among the missing items were the ship’s engine telegram, radio equipment and other control devices whose meaning and functions were yet to be discovered.

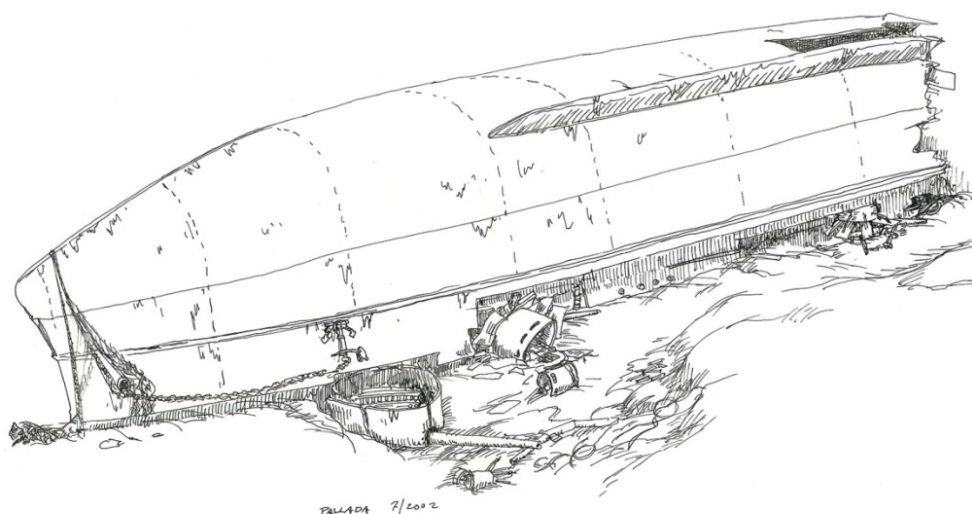
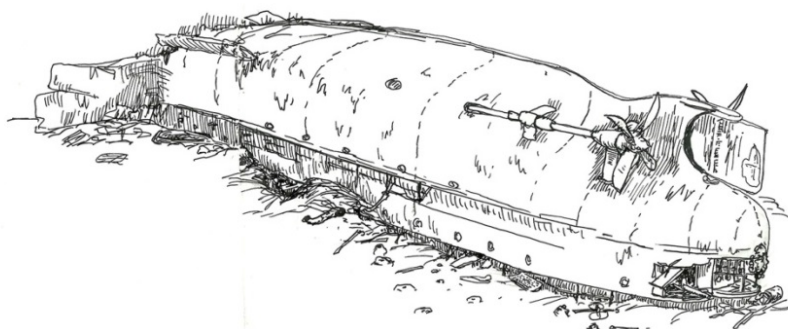


*The fire control tower of Pallada on the left, as it was discovered in 2000. On the right, the situation as it was observed in 2013. The missing items include at least two telegrams and a radio ‘box’ (Pictures: Jouni Polkko, courtesy of badewanne.fi, 2001 & 2013.)*

<sup>50</sup> See Wojciech Kowalski, ‘Chapter 11: Poland’ in Sarah Dromgoole (ed.) *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (2nd edn, Martinus Nijhoff Publishers: Leiden, 2006), 229–246 at 235–236 and 241.

<sup>51</sup> Unto Hämmäläinen, ‘Juuri tässä paikassa’, *Helsingin Sanomat Kuukausiliite* 10/2012, at 31–42.

The wreck site of *Pallada* lies within the Finnish EEZ. The 100th anniversary of the sinking of *Pallada*, and the centenary of World War I, were marked in 2014. The wreck site of the SM *U-26*, that sunk *Pallada*, was located in May 2014. After October 2014 *Pallada* would have been protected by CPUCH, and protection of the wreck of SM *U-26* would have followed in 2015. However, Finland is not a party to the Convention.



*The wreck site of Pallada in situ in 2002. (Courtesy of Juha Flinkman, 2002.)*

The *Pallada* is a good example of a clearly planned mission to remove objects from a shipwreck. The way in which the removal had been executed illustrates that professional tools and equipment were used in order to remove the looted objects from the bridge.

### 3.3. Other Human Impacts

One of the best resources for divers is the local fishing community. Fishermen know where you should not fish, and where your nets get stuck. Sometimes the causes are natural formations, but especially at the open sea nets are caught on wrecks. This is always unintentional, but still an indirect activity that has a direct effect on shipwrecks. It is listed



among the threats not only because it destroys underwater sites, but also because of the possible future necessity for removal of these nets.

One of the most tragic consequences of indirect human interference to wrecks in the Baltic — and around the globe for that matter — has been caused by commercial fishing, and trawling in particular. Almost all shipwrecks resting in deeper waters in the Gulf of Finland have been damaged by trawl nets to some extent. On the Estonian side, this has been caused mostly by the local Soviet-era fishing cooperative. Whereas wooden wreck structures usually give up and collapse, metal wreck structures do not. The result is a super-structure covered in intertwined trawl nets, which have been pulled to every possible direction by the trawler in a desperate attempt to free the net. In the process, many lighter structures such as cabins, railings, antennas, telegrams, wheels and even deckhouses can be destroyed or wiped from the decks.

However, the worst impact of these abandoned trawl nets, and other derelict fishing equipment, has been on the marine environment, especially on fish and marine mammals. This phenomenon is called ‘ghost fishing’ and it is what happens when derelict fishing gear continues to fish.<sup>52</sup> The issue of abandoned, lost or otherwise discarded fishing gear (ALDFG) has recently been recognised by the United Nations Environment Programme (UNEP) as well as by the Food and Agriculture Organization of the United Nations (FAO) and the US National Oceanic and Atmospheric Administration (NOAA).<sup>53</sup> As a result, non-profit organisations — such as Ghost Fishing, founded by enthusiastic divers of the Dutch North Sea — have started to fight the problem. While this subject is beyond the scope of this paper, it is worth mentioning because it is present at every single wreck site.

### 3.4. Wreck-Sourced Pollution and (Dumped) Munitions

An emerging threat that has been given relatively little attention is wreck-sourced pollution. An issue paper from the 2005 International Oil Spill Conference demonstrated that wrecks associated with World War II comprised the largest group of potentially polluting shipwrecks, and were of particular concern because of their age.<sup>54</sup> Many warships that sunk in the Baltic were carrying tonnes of bunker oil and were heavily armed. These shipwrecks are still full of oil and other harmful substances such as naval mines, depth charges and other ammunition. Numerous wrecks have leaked small amounts of oil for years. While bigger leaks have so far been avoided, the risk of a catastrophic discharge of oil is real. Most of this oil is still trapped

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<sup>52</sup> See <[www.ghostfishing.org](http://www.ghostfishing.org)> for more information.

<sup>53</sup> See especially Graeme Macfadyem, Tim Huntington, and Rod Cappell, *Abandoned, lost or otherwise discarded fishing gear* (UNEP/FAO: Rome) UNEP Regional Seas Reports and Studies, No. 185; FAO Fisheries and Aquaculture Technical Paper, No. 523. See also *NOAA Marine Debris Program. 2015 Report on the Impacts of “Ghost Fishing” via Derelict Fishing Gear* (NOAA: Charleston).

<sup>54</sup> Jacqueline Michel (et al.), *Potentially Polluting Wrecks in Marine Waters* (An Issue Paper Prepared for the 2005 International Oil Spill Conference), at 14.

inside oil tanks, but some has saturated the seabed. For example, at the site of the SM *U-26* the layered clay of the seabed is saturated with oil that has been released from the wreck, either when she sunk or slowly over the past 100 years.

Another issue that has received emerging attention<sup>55</sup> is the amount of dumped munitions and chemical warfare materials in the Baltic Sea. After the end of World War II the US, British, French and Soviet authorities reported that a total of some 300 000 tonnes of chemical warfare materials had been found in the different occupation zones in Germany.<sup>56</sup> According to HELCOM (the Baltic Marine Environment Protection Commission, or the Helsinki Commission), the disposal of these munitions was dealt with in different ways in accordance with the Potsdam Agreement of 1945: bulk quantities were either destroyed and recycled on land, or dumped at sea.<sup>57</sup> Today we know that, while the US and Britain dumped munitions found in their respective occupation zones in areas of the Skagerrak, a large part of the stocks found in the Soviet occupation zone were dumped into the Baltic Sea.<sup>58</sup> Furthermore, even before the end of the Second World War, and for decades after, dumping activities of dangerous and obsolete munitions were conducted at sea.<sup>59</sup>

HELCOM has estimated that at least 40 000 tonnes of chemical warfare materials were dumped after World War II, and that out of this amount some 13 000 tonnes are of chemical warfare agents. While in some cases these munitions were dumped at sea item-by-item, many others were loaded in various types of unseaworthy vessels available after the war, and then sunk loaded to their maximum capacity. The locations of the main dumping areas are well known and include the southeast of Gotland, east of Bornholm and south of Little Belt.<sup>60</sup>

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<sup>55</sup> The issues regarding the environmental effects and general awareness related to chemical munitions dumped at sea has also received attention from the UN. See UNGA, Cooperative measures to assess and increase awareness of environmental effects related to waste originating from chemical munitions dumped at sea, GA Res. 68/208, 20 December 2013.

<sup>56</sup> HELCOM, *Chemical Munitions Dumped in the Baltic Sea. Report of the ad hoc Expert Group to Update and Review the Existing Information on Dumped Chemical Munitions in the Baltic Sea* (HELCOM: Helsinki) Baltic Sea Environment Proceeding (BSEP) No. 142, at 28. For a list of the chemical warfare agents and associated compounds, see *ibid.*, at 99–111.

<sup>57</sup> *Ibid.*, at 28. See generally the Berlin (Potsdam) Conference of 17 July–2 August 1945, (a) Protocol of the Proceedings, 1 August 1945, available at <[avalon.law.yale.edu/20th\\_century/decade17.asp](http://avalon.law.yale.edu/20th_century/decade17.asp)>. The Agreement was a settlement between the Soviet Union, USA and UK, in which the heads of the three respective governments decided on the policy for the occupation and reconstruction of Germany and other related issues after the German surrender and end of hostilities in the European Theatre of World War II.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, at 10, 32–34.

## PART II

### DEFINITIONS

‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone,

‘it means just what I choose it to mean — neither more nor less.’

‘The question is,’ said Alice,

‘whether you can make words mean so many different things.’

*Lewis Carroll, Through the Looking Glass*

The subject of legal protection of sunken warships and underwater cultural heritage affects different academic traditions and disciplines — including maritime archaeology, history, and anthropology — and it can be argued that legal protection should exist to guarantee that there is something left to study. The principal research question will be examined from a multi-disciplinary angle. Therefore all of the main concepts and terms are explained, as definitions can vary between, and even within, disciplines. Branches of law are also explained in order to understand the legal regime that will be analysed. These concepts, terms and branches of law cannot be fully understood without context, including that of the historical events which instigated and shaped them.

#### 1. Warships

It might seem that the task of defining a warship should not cause any trouble, but warships have existed for centuries, and these ships, their operations and types have changed radically over time. The modern notion of warship was established according to the 1856 Declaration of Paris<sup>61</sup> (which abolished privateering) and the 1907 Hague Convention VII<sup>62</sup> (regarding the

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<sup>61</sup> See Paris Declaration Respecting Maritime Law, 16 April 1856, in force 16 April 1856, reproduced in Natalino Ronzitti (ed.) *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Martinus Nijhoff Publishers: Dordrecht, 1988) at 61–75. See also Hisakazu Fujita, ‘1856 Paris Declaration Respecting Maritime Law’ in Natalino Ronzitti (ed.) *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Martinus Nijhoff Publishers: Dordrecht, 1988), 61–75 at 66. Privateering was ‘[t]he practice of arming privately owned merchant ships for the purpose of attacking enemy trading ships’ by commission of local governments through letters of marque issued to vessels in their merchant fleet. For belligerent powers, privateering was a common practice from the 15th century till the 18th century, and was generally recognised as lawful. See further Bryan A. Garner (ed.) *Black’s Law Dictionary* (8th edn, Thomson West: Eagan, 2004) at 1233.

conversion of private vessels into warships). The modern definition of a warship is codified in Article 29 of the LOSC:

For the purposes of this Convention, ‘warship’ means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.<sup>63</sup>

The LOSC also acknowledges that for the purposes of the Convention there is a larger class of vessels belonging to the group of government-owned vessels which are not warships.<sup>64</sup> Thus, warships can be seen as a subset of a larger class of different kinds of vessels or crafts that can be defined as owned or operated by a State and used, for the time being, only for government non-commercial service.

Modern warships and other government ships operated for non-commercial purposes enjoy sovereign immunity, and this applies regardless of geographical or territorial location. However, whether this immunity continues after a warship has sunk is still under debate. This also raises the question of retroactivity, and whether rules of modern Conventions should be applied to warships that predate present definitions of a warship. The question remains open as to whether these ancient vessels enjoy sovereign immunity, and/or are still the property of the flag State. Most of the controversy surrounding sunken warships in international law is caused by the vessels that engaged in activities and naval warfare prior to or during the 19th century.<sup>65</sup> Substantial issues arise when the modern definition of a warship is applied to sunken warships predating the World Wars. According to Professor Natalino Ronzitti, ancient ships did not necessarily comply with the distinctive modern features of warships. He mentions ships belonging to privateers as one example that would fall outside of the notion of modern warships. Other examples are Spanish galleons transporting goods from the colonies,<sup>66</sup> and the ships of the Dutch East India Company (*Vereenigde Oost-Indische Compagnie* or VOC).<sup>67</sup>

<sup>62</sup> See Convention (VII) relating to the Conversion of Merchant Ships into Warships, 18 October 1907, in force 26 January 1910, 205 CTS 319. Reproduced in James Brown Scott (ed.) *The Hague Conventions and Declarations of 1899 and 1907* (Oxford University Press: New York, 1915) at 146–150.

<sup>63</sup> An earlier version of this Article was codified in the *Convention on the High Seas*, see *infra* note 187.

<sup>64</sup> See e.g., LOSC Articles 31–32, 107, 110(5), 111(5) and 224, and David J. Bederman, ‘Rethinking the Legal Status of Sunken Warships’, 31 *Ocean Development and International Law*, no. 1/2 (2000) 97–125 at 98.

<sup>65</sup> *Ibid.*

<sup>66</sup> This argument is however contested by many scholars, and recent cases show that Spanish galleons have been treated as warships. See further e.g., IIL Resolution, *supra* note 29 and *Preparatory works of Tallinn Session*, *supra* note 29. For most recent case concerning the Spanish frigate *Nuestra Señora de las Mercedes*, see e.g., Dromgoole, *Underwater Cultural Heritage and International Law*, at 149–152, *supra* note 1 and Kimberly L. Alderman, ‘High Seas Shipwrecks Pits Treasure Hunters Against a Sovereign Nation: The *Black Swan* Case’, Spring 2010 *American Society of International Law Cultural Heritage and Arts Review*, (2010) 3–5. For critique regarding the case, see especially Dave Werner, ‘Piracy in the Courtroom: How Salvage \$500 Million in Sunken Treasure Without Making a Cent’, 67 *University of Miami Law Review*, (2012–2013) 1005–1038.

<sup>67</sup> Ronzitti, *The Legal Regime*, at 157–158 *supra* note 29. Pursuant to Article 247 of the 1789 Constitution of the Batavian Republic, the Netherlands is the present legal successor of the VOC. Generally, if the historical flag State

According to Lassa Oppenheim — regarded by many as the father of modern international law — warships remain State organs as long as they are manned, under the command of a responsible officer, and in the ‘service of a state’.<sup>68</sup> A shipwrecked warship that is abandoned by her crew is no longer a State organ, but will still remain the property of that State.<sup>69</sup> Using this logic, it would follow that a warship that has sunk with her crew would also fail to fulfil the functions of a State organ. Oppenheim did not, however, take a stance on sovereign immunity of sunken warships.<sup>70</sup> While Ronzitti claims that the debate concerning the immunity of sunken warships is merely ‘academic’, it is worthwhile to understand that the practical difference between immunity and title<sup>71</sup> is not necessarily significant. In theory, immunity goes undoubtedly further than title, giving the flag State more ‘tools’ to protect sunken warships. However in practice, immunity and property rights are rendered useless by the mere fact that there is no presence to apply or enforce this immunity.

## 2. The Law of the Sea

The most important field of law in this context is that of the law of the sea, which has always been at the heart of international law. The law of the sea falls under public international law, ‘that is generally concerned with relations between states’.<sup>72</sup> Its deep relation and history with international law is perhaps best described by Professor O’Connell:

The history of international law is the history of the law of the sea and vice versa, for the intellectual character of international law, its techniques, and its philosophy, have been largely determined by the accommodations reached among nations respecting the use of the sea.<sup>73</sup>

In essence the law of the sea encompasses ‘the rules and principles that bind States in their international relations concerning maritime matters’.<sup>74</sup> It is only concerned with the laws of peace and generally excludes private matters such as the rules of private maritime law, maritime insurance, carriage of goods, and maritime liens.<sup>75</sup> The law of the sea deals with matters on a State level, leaving private persons and international organisations mostly outside of its scope — although many matters regarding the law of the sea also have a direct or indirect effect on private persons and international organisations. According to Bowett, the evolution

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has ceased to exist, the rules on State succession on moveable public property should be applied to determine to whom the wreck belongs. See further, *Preparatory works of Tallinn Session*, at 31 and Ronzitti, *The Legal Regime*, at 144, *supra* note 29.

<sup>68</sup> Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law: Volume 1 Peace (Parts II to IV)* (9th edn, Longman Group: London, 1992) at 1165, § 560.

<sup>69</sup> *Ibid.*, at 1165, § 560 and fn. 2.

<sup>70</sup> Ronzitti, *The Legal Regime*, at 150, *supra* note 29.

<sup>71</sup> ‘Title’ refers to the ‘union of all elements (as ownership, possession, and custody) constituting the legal rights to control and dispose of property; the legal link between a person who owns property and the property itself’, Garner (ed.) *Black’s Law Dictionary*, at 1522, *supra* note 61.

<sup>72</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 15, *supra* note 1.

<sup>73</sup> O’Connell, *The International Law of the Sea Volume I*, at 29, *supra* note 14.

<sup>74</sup> Churchill and Lowe, *The Law of the Sea*, at 1, *supra* note 15.

<sup>75</sup> *Ibid.*

of the law of the sea can be seen as ‘a response to, and a reconciliation of, the conflicting interests of the Members of the international community’.<sup>76</sup> He continues that the balance of interests ‘could perhaps be most dramatically illustrated by reference to the law of the sea in time of war: the exercise of belligerent rights in the twentieth century changed almost beyond recognition from that accepted as legitimate in the nineteenth century’.<sup>77</sup>

The law of the sea plays a vital role in the protection of cultural heritage, because all shipwrecks are inherently linked to this law due to their location. None of the Conventions regarding the law of the sea were designed for the preservation of UCH or shipwrecks, but because these rules, most importantly those of the LOSC, concern the uses of the sea and the resources on the seabed, everything situated there is affected by them. While the LOSC is generally seen as the ‘constitution of the oceans’,<sup>78</sup> no single text contains the whole of the law that falls under the umbrella of the law of the sea.<sup>79</sup> The law of the sea, as it stands after the adoption of the LOSC, is sometimes also called the ‘new law of the sea’ or the ‘modern law of the sea’.

### 3. Maritime and Admiralty Law

Maritime law, also commonly referred to as ‘rules of admiralty’ or ‘admiralty law’, is ‘[t]he body of law that governs marine commerce and navigation, the carriage at sea of persons and property, and marine affairs in general [...] or relating to commerce on or over water’.<sup>80</sup> One of the main differences between maritime law and the law of the sea is that, while the law of the sea deals almost exclusively with matters between States, maritime law mainly regulates activities between private individuals and registered legal entities.<sup>81</sup>

During UNCLOS III, the President of the UN General Assembly, Hamilton Amerasinghe, reported on the work of the informal plenary meeting of the Conference on general provisions, wherein it was decided that ‘in translating the term “rules of admiralty” from the original English into other languages account should be taken of the fact that this was a concept peculiar to Anglo-Saxon law and the corresponding terms in other legal systems should be used to make it clear that what was meant was commercial maritime law’.<sup>82</sup> However as Professor Scovazzi points out, ‘bodies of “the law of salvage and other rules of admiralty” are today typical of a few common law systems, but are complete strangers to the legislation of

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<sup>76</sup> D. W. Bowett, *The Law of the Sea* (Manchester University Press: Manchester, 1967) at 1.

<sup>77</sup> *Ibid.*

<sup>78</sup> See the remarks of the President of the Third United Nations Conference on the Law of the Sea, Tommy T. B. Koh, ‘A Constitution for the Oceans’ in *Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (1983), at xxxiii. Reproduced in Myron H. Nordquist (ed.) *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume I* (Martinus Nijhoff Publishers: Dordrecht, 1985) at 11–16.

<sup>79</sup> Churchill and Lowe, *The Law of the Sea*, at 24, *supra* note 15.

<sup>80</sup> Garner (ed.) *Black’s Law Dictionary*, at 988, *supra* note 61.

<sup>81</sup> Boesten, *Valuable Shipwrecks in International Waters*, at 2, fn. 6, *supra* note 20.

<sup>82</sup> See point 14 in UN Doc. A/CONF.62/L.58 (22 August 1980).

other countries. Yet, because of the lack of corresponding concepts, the very words “salvage” and “admiralty” cannot be properly translated into languages different from English’.<sup>83</sup>

While maritime law is certainly of an international character, it is applied in different ways depending on whether the domestic legal system is based on common law or civil law, and whether that particular legal system has adopted the dualist or monist approach. Due to the absence of clear guidelines in international law, domestic courts have applied whatever domestic law has been available, or, as has been the case in the US, a freely interpreted version of admiralty law.<sup>84</sup> Due to the disparities in the domestic legal systems, and the dominant presence of US-based case law, one should be careful before jumping to any conclusions based on the legal literature on the subject. Many scholars tend to review only case law from the US and from other common law jurisdictions, claiming its universality, without realising that admiralty law — in the form that it exists in within the common law jurisdictions — does not exist within the civil law jurisdictions of most of Europe. The application of rules regarding salvage differs even between the common law jurisdictions, such as between American and English law.<sup>85</sup>

Most of the case law that exists is not relevant at all to cases in the Baltic. Because of the current absence of commercial salvage in the Baltic Sea, issues regarding admiralty law are not covered any further in this paper.

### 3.1. What Constitutes a Wreck

Within the sphere of commercial treasure salvage, it is usually the cargo and associated objects of monetary value that the salvor is interested in, not the hull or other vessel fittings. Thus it needs to be considered whether the shipwreck, its cargo and other associated objects are to be treated separately or as an interlinked whole. The distinction becomes clearly relevant in cases where vessels, such as the Spanish galleon *Nuestra Señora de las Mercedes*, were carrying cargo that was not the property of the flag State.

The term ‘wreck’ can have many different meanings, depending on the context and the jurisdiction concerned.<sup>86</sup> It is notable that the only international Convention that sets out a definition for ‘wreck’ is the 2007 Nairobi International Convention of the Removal of Wrecks

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<sup>83</sup> Tullio Scovazzi, ‘A Contradictory and Counterproductive Regime’ in Roberta Garabello and Tullio Scovazzi (eds) *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Brill: Leiden, 2003), 3–17 at 9.

<sup>84</sup> Boesten, *Valuable Shipwrecks in International Waters*, at 5, *supra* note 20.

<sup>85</sup> John Reeder (ed.) *Brice on Maritime Law of Salvage* (5th edn, Sweet & Maxwell: London, 2011) at xxvii.

<sup>86</sup> See, e.g., Sarah Dromgoole, ‘A note on the meaning of ‘wreck’’, 28 *International Journal of Nautical Archaeology*, no. 4 (1999) 319–322 at 319; Sarah Dromgoole and Nicholas Gaskell, ‘Interests in Wreck’ in Norman E. Palmer and Evan McKendrick (eds) *Interests in Goods* (2 edn, Routledge: New York, 1998), 141–204 at 141–142.

(WRC).<sup>87</sup> The definition provided by the WRC is very broad, as the Convention's aim is the removal of objects that may constitute a hazard to navigation or to the marine environment. Article 1(4) of the WRC states:

'Wreck', following upon a maritime casualty, means:

- (a) a sunken or stranded ship; or
- (b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or
- (c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or
- (d) a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.

The LOSC does not even mention the term 'wreck'; nor does the 1989 International Convention on Salvage.<sup>88</sup> The former is not concerned with maritime casualties in any form, and the latter uses the terms 'vessel' and 'ship'. A recent definition for 'wreck' and 'sunken State ship' can, however, be found in the IIL Resolution. Article 1 of the Resolution provides that, for the purposes of the Resolution:

1. 'Wreck' means a sunken State ship which is no longer operational, or any part thereof, including any sunken object that is or has been on board such ship.
2. 'A sunken State ship' means a warship, naval auxiliary or other ship owned by a State and used at the time of sinking solely for governmental non-commercial purposes. It includes all or part of any cargo or other object connected with such a ship regardless of whether such cargo or object is owned by the State or privately. This definition does not include stranded ships, ships in the process of sinking, or oil platforms.

Within the context of this paper, the term 'wreck' refers to any sunken vessel or craft capable of navigation (i.e. ships, vessels and aircraft) that has been lost and is situated on the seabed.

### 3.2. Laws of Salvage under Admiralty

The history of salvage law and the law of finds is well documented by the Attorney-Advisor of NOAA, Ole Varmer, in the 2014 gap analysis made by US Department of the Interior, and thus it will not be reproduced here.<sup>89</sup> However, some general observations are made. Dromgoole explains that, initially, the only legislation applicable to interference with material

<sup>87</sup> Nairobi International Convention of the Removal of Wrecks, 18 May 2007, in force 14 April 2015, IMO Doc. LEG/CONF. 16/19.

<sup>88</sup> International Convention on Salvage, 28 April 1989, in force 14 July 1996, 1953 UNTS 194.

<sup>89</sup> See further, Ole Varmer, *Underwater Cultural Heritage Law Study, OCS Study BOEM 2014-005* (U.S. Dept. of the Interior, Bureau of Ocean Energy Management: Herndon, VA, 2014) at 5–11. See also Boesten, *Valuable Shipwrecks in International Waters*, at 97–128, *supra* note 20 and Dromgoole, *Underwater Cultural Heritage and International Law*, at 167–199, *supra* note 1. For cases and critique, see especially O'Keefe, *Shipwrecked Heritage*, at 5–13, *supra* note 25 and Tullio Scovazzi, 'The Application of "Salvage Law and Other Rules of Admiralty" to the Underwater Cultural Heritage: Some Relevant Cases' in Roberta Garabello and Tullio Scovazzi (eds) *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff Publishers: Leiden, 2003), 19–80.



found in the marine environment — namely the law of salvage and finds — was designed to deal with recent maritime casualties, and thus had rather different aims and objectives than the protection of UCH.<sup>90</sup> The original purpose of salvage was the saving of asset values, i.e. safeguarding of the rights of the person or persons having the title in the salvaged property, and returning them back to the stream of commerce. Due to this, a debate exists around whether the rules of salvage should or should not be applied to the salvage of less recent maritime casualties. This debate has its roots in the United States and commercial treasure hunting, mostly based in Tampa Florida, where treasure hunters have been after everything that remains of the Spanish warships transporting gold and other valuables from the Spanish Caribbean to Spain. These include the *Nuestra Señora de Atocha*,<sup>91</sup> sunk in a hurricane in 1622 — the famous find of Mel Fisher — and the eleven out of twelve ships of the ‘1715 treasure fleet’ which sunk in the hurricane of 30 July 1715.

There are two distinct kinds of salvage: contract salvage and pure salvage. In contract salvage, ‘the reward is agreed upon before assistance is given to the distressed vessel’ and the salvor has no right to additional compensation or lien.<sup>92</sup> In pure salvage, ‘a voluntary service is rendered to imperiled property on waters that are navigable by commercial ships with compensation dependent upon success and without prior agreement having been made regarding the salvor’s compensation’.<sup>93</sup> Within the scope of this paper, pure salvage is the most important. What has been called ‘historic salvage’ or ‘treasure salvage’ generally falls under the concept of pure salvage. According to Varmer,<sup>94</sup> pure salvage has been characterised best in the 1879 US Supreme Court case of the *Sabine*, where the court stated that:

Salvage is the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict, or recapture.<sup>95</sup>

The factors that were listed by the Court in the *Sabine* case are also the general requirements for a salvage award. These include first, a marine peril; second, service voluntarily rendered when not required as an existing duty or from a special contract; and third, success in whole or in part, or that the service rendered contributed to such success.<sup>96</sup> From the salvor’s perspective, the whole point of the salvage service rendered is crystallised in the salvage award. Boesten is of the opinion that ‘[t]he protection of underwater cultural heritage *versus* economic considerations seem to be mutually exclusive and raise additional questions as a balance has to

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<sup>90</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 68, *supra* note 1.

<sup>91</sup> See especially R. Duncan Mathewson III, *Treasure of the Atocha: Sixteen Dramatic Years in Search of the Historic Wreck* (Sidgwick & Jackson: London, 1986).

<sup>92</sup> Varmer, *OCS Study*, at 7–8, *supra* note 89.

<sup>93</sup> *Ibid.*, at 7.

<sup>94</sup> *Ibid.*, at 8.

<sup>95</sup> *The Sabine*, 101 U.S. 384, at para. 1.

<sup>96</sup> *Ibid.*, at para. 2.

be found between allocating public financial resources to protect a wreck and, for example, the interest of those who want to commercially explore and exploit shipwrecks'.<sup>97</sup> The laws of salvage were, however, never designed, born nor intended for submerged archaeological sites or ancient shipwrecks 'which, far from peril, have been definitively lost'.<sup>98</sup>

The salvage award is not always easily calculable and a court will always consider it based on the merits of each individual case. In 1869 the US Supreme Court based its ruling on several factors, which are known today as 'the Blackwall Factors'.<sup>99</sup> These include:

- 1) The labor expended by the salvors in rendering the salvage service;
- 2) The promptitude, skill and energy displayed in rendering the service and saving the property;
- 3) The value of the property employed by the salvors in rendering the service and the danger to which the property was exposed;
- 4) The risk incurred by the salvors in securing the property from impending peril;
- 5) The value of the property saved; and,
- 6) The degree of danger from which the property was rescued.<sup>100</sup>

The general problem of the application of salvage law — as it is interpreted especially in the federal admiralty courts of the United States — is nailed down by Scovazzi and deserves to be quoted in full:

The fact remains that the body of 'the law of salvage and other rules of admiralty' is today typical of a few common law systems, but is a complete stranger to the legislation of the majority of other countries. For instance, no Italian lawyer (with the laudable exception of a few scholars) would today know what the 'law of salvage and finds' is, despite the fact that the cities of Rome and Trani, which are said to have contributed to this body of 'venerable law of the sea', are located somewhere in the Italian territory. Nor is it clear how a 'venerable' body of rules, which is believed to have developed in times when nobody cared about the underwater cultural heritage, could provide any sensible tool today for dealing with the protection of the heritage in question. Yet from the conclusions reached in their decisions on underwater cultural heritage, it would seem that some American judges are much better than normal human beings: they do have an access to all the ancient sources whence such a 'venerable law of the sea' can be inferred, they do know all the mysterious languages in which the relevant rules have been written, they are able to interpret such rules correctly, they do seize the intrinsic consistency between one source and the other and, finally, they can explain to the rest of the world why salvage law is the best way to deal with the subject of underwater cultural heritage. This is impressive indeed.<sup>101</sup>

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<sup>97</sup> Boesten, *Valuable Shipwrecks in International Waters*, at 2, *supra* note 20.

<sup>98</sup> Scovazzi, *A Contradictory and Counterproductive Regime*, at 8–9, *supra* note 83.

<sup>99</sup> Varmer, *OCS Study*, at 9, *supra* note 89.

<sup>100</sup> *The Blackwall*, 77 U.S. 1, at 14.

<sup>101</sup> Tullio Scovazzi, 'The Merits of the UNESCO Convention on the Protection of Underwater Cultural Heritage' in Federico Lenzerini and Silvia Borelli (eds) *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Brill: Leiden, 2012), 267-299 at 269.

While there are varying opinions on the matter, Scovazzi is nevertheless right that the laws of salvage and admiralty are total strangers to many other jurisdictions. Proceedings *in rem*<sup>102</sup> — in other words against the wreck itself as the defendant, rather than against a legal person — are alien to civil law jurisdiction. In Finland, an *in rem* action is not even recognised by the applicable legal doctrines because ‘a thing’ cannot be party to a suit. Finnish national courts apply Chapter 16 of the Finnish Maritime Act, which was amended in 2006 after Finland ratified the 1989 International Convention on Salvage.<sup>103</sup> The only two cases concerning ‘historic salvage’ in Finland are the litigation concerning the wreck of *Vrouw Maria*, sunk in 1771, and the dispute between competing salvors regarding the cargo of *Jönköping*, sunk in 1916.<sup>104</sup>

#### 4. Maritime Archaeology and Underwater Cultural Heritage

Archaeology can be defined as ‘the study of the human past from material remains’, and it is inherently linked to anthropology, the study of humans.<sup>105</sup> In archaeology the researcher seeks to understand the reasons, causes and motives behind past events, based on the surviving documentary evidence. The only difference between land and maritime archaeology<sup>106</sup> is that maritime archaeology is focused on activities that took place in the marine environment. As O’Keefe has explained, archaeology is a method, and items as such cannot be ‘archaeological’.<sup>107</sup> Anything can be studied using archaeological methods. Archaeology and anthropology both share the same subject (i.e., humans), methods, and ethics. Archaeology should not be confused with antiquarianism. As archaeologist Joe Flatman explains, ‘maritime archaeology is still perceived — at least by some — to be engaging in antiquarianism, with greater interest in

<sup>102</sup> Latin, ‘against a thing’.

<sup>103</sup> Merilaki (674/1994) with later amendments.

<sup>104</sup> Regarding the case of *Vrouw Maria*, see *Koivusaari and others v. Finland* Turku Court of Appeal (Turun hovioikeus), S 04/2163, Judgement no. 787, 23.3.2005. See also *Rauno Koivusaari and other v. Finland (dec.)*, European Court of Human Rights, Application no. 20690/06, 23 February 2010 (inadmissible). For a brief summary of the case, see further Maija Matikka, ‘Chapter 3: Finland’ in Sarah Dromgoole (ed.) *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (2nd edn, Martinus Nijhoff Publishers: Leiden, 2006), 43-57 at 52–54. *Jönköping* was a Swedish schooner carrying 96 tons of cargo including around 5 000 bottles of Heidsieck Monopole 1907 ‘Goût Américain’ champagne. *Jönköping* was sunk by the German U-boat SM *U-22*. Regarding the case of *Jönköping*, see *C-Star partnership v. Fryckman*, Vakka-Suomi district court case no. 98/750, decision and precautionary measures no. 941, 3 July 1998; *Fryckman v. C-Star partnership*, Vakka-Suomi district court, case no. 98/750, decision and interim decision no. 946, 7 July 1998; *Fryckman v. Idäntie Ky - Österleden Kb and C-Star partnership*, Turku district court (sitting in admiralty), case no. 98/4391, decision and interim precautionary measures no. 5521, 16 July 1998; *Fryckman v. C-Star partnership and Idäntie Ky - Österleden Kb*, Vakka-Suomi district court, case no. 98/814, decision and interim precautionary measures no. 986, 24 July 1998; *C-Star partnership v. Fryckman*, Vakka-Suomi district court, case no. 98/750, decision on precautionary measures no. 1062, 11 August 1998; *Fryckman v. Idäntie Ky - Österleden Kb and C-Star partnership*, Turku district court, case no. 98/4391, decision no. 7577, 9 October 1998.

<sup>105</sup> Chris Scarre (ed.) *The Human Past: World Prehistory and the Development of Human Societies* (2nd edn, Thames & Hudson: London, 2009) at 25.

<sup>106</sup> Also referred to as ‘marine’, ‘nautical’ or ‘underwater’ archaeology. The terms are used interchangeably in this paper.

<sup>107</sup> O’Keefe, *Shipwrecked Heritage*, at 43, *supra* note 25.

the material remains uncovered (particularly precious or technologically significant artefacts) than the use of these materials to help to understand the societies which created them'.<sup>108</sup>

#### 4.1. Maritime Archaeology

Maritime archaeology covers 'the scientific study of the material remains of man and his activities on the sea'.<sup>109</sup> But the primary focus of archaeology is man, not the ships, cargoes, fittings, or instruments with which the maritime researcher is immediately confronted.<sup>110</sup> So why would ships, or shipwrecks for that matter, be subjects of the study of humans? As pioneer of maritime archaeology Keith Muckelroy explains, in pre-industrial societies, boats and (later) ships were the largest and most complex machines produced.<sup>111</sup> The 18th century first-rate naval ship — with its hundred-plus guns and crew of over 800 — exceeded several times over, in terms of constituent artefacts and power harnessed, the largest machines used on land for transport, manufacture, or mining.<sup>112</sup> In 18th century England, the Admiralty was the biggest single employer of labour in manufacturing, and played no small role in determining the level of economic activity, and stimulating industrial innovation.<sup>113</sup> The course of human history has been guided more than a little by maritime activities, and therefore their study constitutes an important element in the search for a greater understanding of man's past.<sup>114</sup>

#### 4.2. The Concept of Underwater Cultural Heritage

There are no generally acceptable definitions for 'cultural heritage' or 'cultural property', even though the terms have appeared frequently in a number of UN and UNESCO conventions and recommendations.<sup>115</sup> This lack of universal definition probably originates from the administration of cultural property traditionally being a matter of domestic legislation. States have mostly protected cultural heritage worthy of safeguarding from a national perspective, traditionally situated on land and/or within the physical limits of State territory and territorial waters. To examine the term 'underwater cultural heritage' word-by-word: 'underwater' poses no complications, it just indicates that something is or has been underwater; 'cultural' suggests

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<sup>108</sup> Joe Flatman, 'Cultural biographies, cognitive landscapes and dirty old bits of boat: 'theory' in maritime archaeology', 32 *International Journal of Nautical Archaeology*, no. 2 (2003) 143–157 at 143.

<sup>109</sup> Keith Muckelroy, *Maritime Archaeology* (Cambridge University Press: Cambridge, 1978) at 3–4. The late Keith Muckelroy is often credited as a pioneer whose thinking and seminal works have had a huge impact on the theory and practice of maritime archaeology. Muckelroy died in a tragic diving accident in Loch Tay in September 1980, only 29 years old at the time. Regarding his methods and ideas, see further Matthew Harpster, 'Keith Muckelroy: Methods, Ideas and Maritime Archaeology', 4 *Journal of Maritime Archaeology*, no. 1 (2009) 67–82.

<sup>110</sup> Muckelroy, *Maritime Archaeology*, at 4, *supra* note 109. It should be noted that it is not a requirement for the subjects or source material to be found in the physical marine environment. For example two ships were found on land under a construction site in Tallinn, Estonia during the summer of 2015; one of the ships was estimated to be at least 600 years old. See <[researchinestonia.eu/2015/07/amazing-well-preserved-cog-found-estonia](http://researchinestonia.eu/2015/07/amazing-well-preserved-cog-found-estonia)>.

<sup>111</sup> *Ibid.*, at 3.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> Strati, *UCH: An Emerging Objective*, at 7, *supra* note 19.

that it is related to us, humans; and ‘heritage’ implies an inherent or otherwise measurable value or quality which is worthy of passing to future generations and thus entitled to special protection.<sup>116</sup> In light of this — and taking into account that national legislation, as well as international conventions and recommendations, vary in their scope, focus and definitions — it comes apparent that what we value as historical or cultural heritage is eventually a matter of circumstance. Therefore cultural heritage will mean different things in different societies. General observations can be made, but exact definitions will always be limited by their conventional or national frameworks.

Within a conventional framework, the concept of ‘underwater cultural heritage’ first appeared in 1978 in the Council of Europe’s Recommendation 848,<sup>117</sup> and was later elaborated on in 1985 in the Draft European Convention on the Protection of the Underwater Cultural Heritage.<sup>118</sup> This progress followed after debates on UCH during UNCLOS III, when the issue was raised by John Roper in the Parliamentary Assembly of the Council of Europe.<sup>119</sup> As a result, the Assembly instructed Roper, who was, at the time, the Vice Chairman of the Committee on Culture and Education, to prepare a report on the issue of underwater cultural heritage.<sup>120</sup> This report founded the basis for Recommendation 848.<sup>121</sup>

Even though the ‘Roper Report’ did not focus on sunken warships, it made observations that are noteworthy within the context of this paper. Roper noted that the problems regarding UCH were to a large degree regional, determined by the waters where the heritage was situated.<sup>122</sup> He also saw that even though there were differences within Europe — for example between the Mediterranean, the North and the Baltic Seas — in general terms the interests of most European states would probably meet in a way that recommendations or even a wider international agreement might be successful.<sup>123</sup>

Roper did not try to rigorously define ‘cultural heritage’; instead he pointed out that a certain degree of flexibility was required in order to investigate, declare and justify what would be important.<sup>124</sup> This means that whatever the scope of cultural heritage would be, it should be backed up by sound arguments that would explain why such property was to be included in the definition of cultural heritage, and the reasons to justify it.

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<sup>116</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 65–66, *supra* note 1.

<sup>117</sup> Recommendation 848 (1978) of the Parliamentary Assembly of the Council of Europe on the underwater cultural heritage. Reproduced in Garabello and Scovazzi (eds), *Before and After the 2001 UNESCO Convention*, at 267–269, *supra* note 26.

<sup>118</sup> Strati, *UCH: An Emerging Objective*, at 10, *supra* note 19. See further Dromgoole, *Underwater Cultural Heritage and International Law*, at 36–44, *supra* note 1.

<sup>119</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 36 and fn. 36, *supra* note 1.

<sup>120</sup> *Ibid.*, at 36–37.

<sup>121</sup> *Roper Report*, *supra* note 23.

<sup>122</sup> *Ibid.*, at 3.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, at 5.

While the annex of Recommendation 848 stated that '[p]rotection should cover all objects that have been beneath the water for more than 100 years', the Draft Convention put forward a different basis for protection: 'being at least 100 years old'.<sup>125</sup> By these guidelines, it could be interpreted that a vessel that operated for 30 years, then sank and remained underwater for 70 years, would be protected by the Draft Convention, but not by Recommendation 848. Ultimately, the Draft was never adopted due to the objections of Turkey.<sup>126</sup> According to Dromgoole only two studies that focused on UCH existed prior to Recommendation 848.<sup>127</sup> The 100-year cut-off introduced in both the Recommendation and the Draft was widely adopted in Nordic domestic legislation, although it can mostly be said to have served administrative purposes and does not really define cultural or historical importance. While perhaps the most well-known part of UCH consists of shipwrecks, it also covers submerged landscapes, prehistoric settlements and any kind of object that can be found in the water element, embedded or lying in sediment, including the sea, lakes and rivers. Thus it should be recognised that the term 'underwater cultural heritage' covers more than just objects that are commonly found in the sea. Since this paper is focused on the law of the sea, inland waters and waterways are excluded.

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<sup>125</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 41 and fn. 64, *supra* note 1.

<sup>126</sup> As Dromgoole explains, at that time the Council of Europe had a treaty adoption system under which it was possible for one State to block the signature process simply by objecting to the Draft. It is noteworthy that Turkey did not object to the Draft as such; the only opposition was relating to the territorial scope of the Convention that might have caused difficulties in Aegean Sea due to the territorial dispute between Turkey and Greece. See *ibid.*, at 40–44.

<sup>127</sup> See *ibid.*, at 37 fn. 40. These include studies published by UNESCO in 1972 and Crane Miller in 1973.

## PART III

### LEGAL FRAMEWORK AND APPLICABLE RULES OF INTERNATIONAL LAW

The problem of treaty interpretation [...] is one of ascertaining the logic inherent in the treaty, and pretending that this is what the parties desired. Insofar as this logic can be discovered by reference to the terms of the treaty itself, it is impermissible to depart from those terms. Insofar as it cannot, it is permissible. These two propositions underlie the so-called ‘canons’ [i.e., principles] of treaty interpretation, which are no more than logical devices for ascertaining the real area of treaty operation. Writers have divided into those who believe it is possible to formulate definite rules for interpretation and those who believe that this is a delusion. In several decided cases, the courts have prefaced their remarks by laying down rules for interpretation and have immediately departed from them because it was found that the text required it.<sup>128</sup>

*D. P. O’Connell*

#### 1. The Significance of Jurisdiction

This paper is focused on the implications and effects of the 1982 United Nations Convention on the Law of the Sea on the protection of sunken warships that have been lost during the past two World Wars beyond the present territorial jurisdiction of coastal and flag States. To a large extent, these implications are embodied in the existence or absence of jurisdiction.

Jurisdiction — for the purposes of this paper — essentially concerns ‘the extent of each [S]tate’s right to regulate conduct or the consequences of events’.<sup>129</sup> In other words jurisdiction describes ‘the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make, apply, and enforce rules of conduct upon persons’.<sup>130</sup> However, ‘[j]urisdiction is not coextensive with [S]tate sovereignty, although the relationship between them is close’<sup>131</sup> because traditionally the State’s ‘title to exercise jurisdiction rests in its sovereignty’.<sup>132</sup>

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<sup>128</sup> D. P. O’Connell, *International Law* (2nd edn, Stevens & Sons Ltd: London, 1970) at 253.

<sup>129</sup> Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law: Volume 1 Peace (Introduction and Part I)* (9th edn, Longman Group: London, 1992) at 456, § 136.

<sup>130</sup> Vaughan Lowe, ‘Jurisdiction’ in Malcolm D. Evans (ed.) *International Law* (2nd edn, Oxford University Press: Oxford, 2006), 335–360 at 335.

<sup>131</sup> Jennings and Watts (eds), *Oppenheim’s International Law*, at 457, § 136, *supra* note 129.

<sup>132</sup> *The Case of the SS Lotus (France v. Turkey)*, PCIJ Series A, No. 10, at 19.

In order to avoid confusion, it is noted that the term ‘jurisdiction’ is also commonly used to describe the judicial powers of international courts and tribunals to adjudicate upon cases. These two forms of jurisdiction should be kept and treated as separate.<sup>133</sup> Jurisdiction of international and domestic courts and tribunals is not treated extensively in this paper; however, occasional reference will be made to issues relating to the jurisdiction of domestic courts, different court decisions and relevant cases. The jurisdiction of domestic courts is inherently linked to jurisdiction of States. When States regulate different matters through their jurisdiction, this legislative power will eventually be exercised through the enforcement of domestic court decisions.

In matters regarding the law of the sea, jurisdictional rights of States generally vary in different maritime zones. Moreover, sovereignty does not mean to entail that States have a sovereign right to exercise jurisdiction in whatever circumstances they choose.<sup>134</sup> These limitations can be observed, for example, on the territorial sea with regards to sunken warships of States other than the coastal State. As Dromgoole has explained, political tensions are most likely to arise when there is conflict between sovereignty of the coastal State and the notion that sunken warships still enjoy sovereign immunity and are thus subject to the exclusive jurisdiction of the flag State.<sup>135</sup> Furthermore, problems can also arise when a State seeks to assert its authority over persons, property or circumstances which occur abroad, for example in the EEZ.<sup>136</sup>

While there are varying opinions on the topic of jurisdiction in international law — and especially regarding the extent of such jurisdiction — one treatment of the bases of jurisdiction can be found in Part Eight of the 1997 Council of Europe Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law.<sup>137</sup> It is reproduced below for illustrative purposes.

Part Eight: Jurisdiction of the State

- I. *Bases of jurisdiction*
  - a. Territorial principle
  - b. Personal principle
  - c. Protective principle
  - d. Universality principle
  - e. Other bases
- II. *Types of jurisdiction*
  - a. Jurisdiction to prescribe
  - b. Jurisdiction to adjudicate

<sup>133</sup> Lowe, *Jurisdiction*, at 336, *supra* note 130.

<sup>134</sup> Jennings and Watts (eds), *Oppenheim’s International Law*, at 457, § 136, *supra* note 129.

<sup>135</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 139, *supra* note 1.

<sup>136</sup> Jennings and Watts (eds), *Oppenheim’s International Law*, at 457, § 136, *supra* note 129.

<sup>137</sup> Recommendation No. R (97) 11 of the Committee of Ministers to Member States on the Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law of 12 June 1997 (Council of Europe).



- c. Jurisdiction to enforce
- III. *Extra-territorial exercise of jurisdiction*
  - a. General
  - b. Consular jurisdiction
  - c. Jurisdiction over military personnel abroad
  - d. Others (artificial island, *terrae nullius* etc.)
- IV. *Limitations upon jurisdiction (servitudes, leases, etc.)*
- V. *Concurrent jurisdiction*

The bases and types of jurisdiction summarised by the Model Plan are generally recognised among distinguished scholars.<sup>138</sup> Consequently, if a State wishes to enforce rules on any subject at sea, enforcement action and jurisdiction has to be founded on an accepted basis and principles of international law. These will depend on the nationality of the parties involved, the location (i.e. the maritime zone) of the incident, status of the vessel(s), and the activity of the vessel(s) and individual(s) concerned.

The current delimitation of maritime zones and boundaries is based on the framework set out by the LOSC. Pursuant to the LOSC, sovereignty of the coastal State is limited to internal waters, or to archipelagic waters if the State in question is an archipelagic State, and to the territorial sea. The territorial sea has a maximum limit of twelve nautical miles (22 244 metres) when opposite or adjacent geographical features do not cause any limitations. The LOSC also recognises three zones of ‘functional jurisdiction’ — the contiguous zone, the exclusive economic zone, and the continental shelf — which all extend seaward from the outer limits of the territorial sea.

For a State to regulate matters which take place beyond the territorial sea, and thus beyond the sovereignty of the State, jurisdiction has to originate from something other than the territorial principle. Thus, if the State wishes to act, intervene, prescribe rules or enforce these rules on the contiguous zone, EEZ, continental shelf or beyond, jurisdiction has to be established on an internationally accepted basis. If a State has sovereign interests outside its territorial sovereignty, it is bound by the interests that other States enjoy on that particular area. While any State can generally enforce and extend its domestic legislation to cover its own nationals and registered legal entities, a comprehensive protective framework for sunken warships would in practice require that it be applicable to all persons, whether legal, public or private, that operate in all of the maritime zones. Unless the State has a jurisdictional basis in international law, it lacks enforcement jurisdiction outside the scope of its territorial

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<sup>138</sup> Regarding maritime law enforcement in general, see Roach and Smith, *Excessive Maritime Claims*, at 559–630, *supra* note 9. Regarding jurisdiction in general, see Jennings and Watts (eds), *Oppenheim’s International Law*, at 456–498, *supra* note 129; Lowe, *Jurisdiction*, at 335–358, *supra* note 130 and Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press: Oxford, 2008) at 299–321. Regarding functional jurisdiction, see Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Brill: Leiden, 2007). Regarding the theory of maritime jurisdiction, see O’Connell, *The International Law of the Sea Volume II*, at 733–746, *supra* note 14.

sovereignty. Where the State lacks enforcement jurisdiction, it cannot enact effective protective measures to safeguard sunken warships. These limits restraining the reach of territorial sovereignty originate from the fundamental struggle of *mare liberum* and *mare clausum*.<sup>139</sup>

## 2. *Mare Liberum* vs *Mare Clausum*

The Third United Nations Conference on the Law of the Sea (UNCLOS III) took place between 1973 and 1982. UNCLOS III ended on 10 December 1982 and the end product — the LOSC — is one of the most ratified conventions ever, with 167 State parties.<sup>140</sup> The negotiations that took place during UNCLOS III have probably been some of the longest ever in international law-making, and many of the matters at the heart of the debate have a long history dating back to the early 17th century (and even earlier), and to the struggle between *mare liberum* and *mare clausum*.<sup>141</sup>

The concept of *mare clausum* originates from the time of the Roman Empire, when the term was used to denote a ‘closed sea’ during periods of bad weather. Over time, *mare clausum* came to mean any part of a sea, ocean or other body of water that falls under a State’s jurisdiction, and is not freely accessible by other States. *Mare clausum* and the notion of ‘closed seas’ is an exception to *mare liberum*, the ‘free sea’.

Prior to the World War II, most of the oceans were free for use by all States, and coastal State sovereignty was most commonly limited to three nautical miles (5 556 metres). Until the end of the World War II, the very foundations of the public international law of the sea were based on the traditional principle of the ‘free sea’ or ‘the freedom of the seas’ as introduced by Hugo Grotius in 1609 in his aptly-named publication *Mare Liberum*. According to O’Connell, the freedom of the sea is undeniable.<sup>142</sup> While this 400-year-old argument is accepted today, a full appreciation of it requires some understanding of the events and the context that led to this axiom of international law.

Grotius’ *Mare Liberum* was written in order to support the Dutch East India Company (VOC) and dispute the self-proclaimed trade monopoly in the East Indies by the Spanish and the Portuguese.<sup>143</sup> The history and origins of the ‘free seas’ date back to the early morning of

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<sup>139</sup> Latin, ‘free sea’ and ‘closed sea’.

<sup>140</sup> The chronological list of ratifications, accessions and successions to the Convention and the related Agreements as of 2 January 2015, is at <[www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm)>.

<sup>141</sup> See e.g., R. P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Martinus Nijhoff Publishers: The Hague, 1983) at 72–123.

<sup>142</sup> O’Connell, *The International Law of the Sea Volume I*, at 33, *supra* note 14.

<sup>143</sup> Churchill and Lowe, *The Law of the Sea*, at 4, *supra* note 15. The original publication was in fact published anonymously because Grotius felt it would be safer, and in order to ‘find out judgement of others and to consider more carefully anything that might be published to the contrary’. See David Armitage (ed.) *Hugo Grotius, The Free Sea, trans. Richard Hakluyt, with William Welwod’s Critique and Grotius’s Reply* (Liberty Fund: Indianapolis, 2004) at xi. However, Grotius’ employment by VOC and his presumed partiality in the matter might have been defining factors in the decision to publish *Mare Liberum* anonymously. *Mare Liberum* should be understood

25 February 1603, when Dutch captain and admiral Jacob van Heemskerck attacked Portuguese merchantman *Santa Catarina* in the Strait of Malacca.<sup>144</sup> The prize of *Santa Catarina*'s very wealthy cargo was auctioned in Amsterdam during the autumn of 1604. The gross proceeds amounted to more than three million Dutch guilders, which was equivalent to just less than the annual revenue of the English government at that time.<sup>145</sup> However, van Heemskerck — a captain working for VOC<sup>146</sup> — did not possess any privateering commission at the time, and the magnitude of the prize caused an instant debate on the legitimacy of such an action occurring in the distant seas of the East Indies. In addition, even if the Dutch Admiralty Board had authorised this kind of action, it has been argued that the validity of such a privateering commission would have been highly questionable even under the contemporary international law.<sup>147</sup>

In September 1604, Jan ten Grootenhuys — the younger brother of VOC director Arent ten Grootenhuys — asked his friend Hugo Grotius to write an apology and a formal defence for VOC of van Heemskerck's seizure of *Santa Catarina*.<sup>148</sup> Apparently the directors of VOC were expecting a short pamphlet describing the inequities committed by the Portuguese, thus indicating they were deserving of punishment for the harassment and cruelty to which Dutch merchants had been subjected for some years.<sup>149</sup> Grotius, however, ignored such requests and hopes for a quick publication and instead produced an in-depth study that resulted in a manuscript called *De Jure Praedae*, which was a very serious and thorough study of the matter.<sup>150</sup> However, only an adaptation of chapter twelve of this manuscript was published at the time: *Mare Liberum*.

*De Jure Praedae* itself remained totally unknown to the public until 1864 when Martinus Nijhoff (of Martinus Nijhoff Publishers) auctioned Grotius' personal papers and the original manuscript was purchased by Grotius' *alma mater*, the Leiden University.<sup>151</sup> *De Jure Praedae* dealt with the questions of prize, booty, just war, trade and free access to the world's oceans

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along with another important piece Grotius wrote, *De Jure Praedae*. See Martine Julia van Ittersum (ed.) *Hugo Grotius, Commentary on the Law of Prize and Booty* (Liberty Fund: Indianapolis, 2006).

<sup>144</sup> van Ittersum (ed.) *Hugo Grotius, Commentary on the Law of Prize and Booty*, at xiii, *supra* note 143. Regarding the capture of *Santa Catarina*, see especially Martine Julia van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the *Santa Catarina* and its Justification in *De Jure Praedae* (1604–1606)', 31 *Asian Journal of Social Science*, no. 3 (2003) 511–548; Peter Borschberg, 'The Seizure of the *Sta. Catarina* Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602 - C.1616)', 33 *Journal of Southeast Asian Studies*, no. 1 (2002) 31–62.

<sup>145</sup> Armitage (ed.) *Hugo Grotius, The Free Sea*, at xii, *supra* note 143.

<sup>146</sup> The Vereenigde Oost-Indische Compagnie (VOC) was formed in March 1602 when the Holland and Zeeland overseas trading companies, including the United Amsterdam Company, merged together. See van Ittersum (ed.) *Hugo Grotius, Commentary on the Law of Prize and Booty*, at xiv, *supra* note 143.

<sup>147</sup> *Ibid.*, at xiii.

<sup>148</sup> *Ibid.*, at xiv–xv.

<sup>149</sup> *Ibid.*, at xv.

<sup>150</sup> *Ibid.*, at xvi–xvii.

<sup>151</sup> *Ibid.*, at xxiii.

after the *Santa Catarina* incident.<sup>152</sup> Grotius' point in *De Jure Praedae* was that the systematic Portuguese brutality prevented the Dutch from exercising their natural right to trade.<sup>153</sup> The basis of Grotius' defence was two primary natural laws derived from the divine will: self-defence and self-preservation.<sup>154</sup> Along with these two 'God-given rights', one of Grotius' central arguments was that 'it is lawful for any nation to go to any other and to trade with it' because the sea was *publica juris gentium*, i.e. common to all and proper to none.<sup>155</sup>

While Grotius' work was based on the incident of *Santa Catarina*, the published version of *Mare Liberum* made no reference to it or the alleged Portuguese aggression.<sup>156</sup> Instead, it was a general statement on the right to freedom of trade and navigation, and it caused a lot of controversy within the contemporary foundations of international law.<sup>157</sup> However the dispute with the Portuguese — and the Spanish, as Portugal was under Spanish dominion at that time — was an important part of and the whole purpose of the-then unpublished manuscript of *De Jure Praedae*.

Dr Martine Julia van Ittersum has argued that historians have failed to recognise that Grotius' conceptualisation of natural rights and natural law in *De Jure Praedae* was based largely on van Heemskerck's own justification of privateering.<sup>158</sup> Grotius' defence rested on the assumption that van Heemskerck had the individual's right to punish transgressors of the natural laws in the absence of an independent and effective judge — and had been forced to do so in revenge for Portuguese mistreatment of Dutch merchants in the East Indies.<sup>159</sup> The trade and colonisation in the East Indies was vital to the Habsburg kings of Spain and Portugal — but also to the Dutch, and especially to the VOC. The dispute over the trade monopolies was not new: in 1494 Spain and Portugal signed the Treaty of Tordesillas,<sup>160</sup> which sought to divide rights to the 'new' world between the two countries.<sup>161</sup> However, as the Treaty excluded other European powers, it was generally either ignored and thus a source of conflict.

As Churchill and Lowe have demonstrated, '[e]arly treatises on the law of the sea were often written in the context of particular disputes, as were tracts on other subjects of international

<sup>152</sup> Grotius originally named the chapter *De rebus Indicis*, meaning 'On the Affairs of the Indies'. See further Armitage (ed.) *Hugo Grotius, The Free Sea*, at xiii, *supra* note 143.

<sup>153</sup> van Ittersum, 'Hugo Grotius in Context', at 521, *supra* note 144.

<sup>154</sup> van Ittersum (ed.) *Hugo Grotius, Commentary on the Law of Prize and Booty*, at xiii, *supra* note 143 citing Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge University Press: Cambridge, 1993) at 169–179.

<sup>155</sup> Armitage (ed.) *Hugo Grotius, The Free Sea*, at 10 and 25, *supra* note 143.

<sup>156</sup> *Ibid.*, at xiv.

<sup>157</sup> *Ibid.*, at xv.

<sup>158</sup> van Ittersum, 'Hugo Grotius in Context', at 513, *supra* note 144.

<sup>159</sup> *Ibid.*, at 514.

<sup>160</sup> Treaty between Spain and Portugal concluded at Tordesillas, 7 June 1494, ratified by Spain 2 July 1494 and by Portugal 5 September 1494. Reproduced and translated in Frances Gardiner Davenport (ed.) *European Treaties bearing on the History of the United States and its Dependencies to 1648* (Carnegie Institution of Washington: Washington, 1917) at 84–100.

<sup>161</sup> See Davenport (ed.) *European Treaties to 1648*, at 88, *ibid.*, and Ann L. Hollick, *U.S. Foreign Policy and the Law of the Sea* (Princeton University Press: Princeton, 1981) at 5.

law'.<sup>162</sup> Grotius' *Mare Liberum* was not any different. Thus, within the context that created the 'axiom' O'Connell argues exists, it should always be remembered that the birth of the free seas was not an effort to contribute to humanity as a whole — it was an attempt to argue in favour of something that would support private economical gain.

After the publication of *Mare Liberum*, the English and the Scots felt that their fishing rights in the North Sea were assaulted, as did the Spanish, who felt that their overseas empire was now threatened.<sup>163</sup> Therefore *Mare Liberum* received many written responses and spurred vigorous debates — the intellectual duel of Grotius and John Selden being the most well-known.<sup>164</sup> The concept of the free seas has managed to persist and keep its status as one of the core principles of the public international law of the sea till the present. However, what is retained by the law of the sea has grown apart from the historical concept of the free seas, and the intellectual foundations upon which these early concepts were built — namely natural law and divine will — have been completely abandoned.<sup>165</sup>

As the enforcement of unilateral claims of dominion over the oceans was a practical impossibility, it is not surprising that the freedom of the seas gained universal acceptance. Another factor was that the concept did not really have any negative impact to other States — it merely made global trade a possibility for everyone. The initial balance between minimal national authority and maximum freedoms on the high seas persisted until the turn of the 20th century, when major shifts in world politics and advances in technology occurred.<sup>166</sup> The long-accepted principles began to erode after the discoveries of vital resources, such as oil and deep sea minerals, and the emerging problems with depleting fish stocks. The notion of *mare liberum* the free seas, is an important and perhaps essential part of the law of the sea. However, it cannot exist to the total exclusion of *mare clausum*, the closed seas. A balance between the two must be struck.<sup>167</sup>

### 3. A Short History of the Modern Law of the Sea

The law of the sea relates to the seventy per cent of our planet comprised of seas and oceans, providing regulatory framework for a number of human activities that take place in the marine

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<sup>162</sup> Churchill and Lowe, *The Law of the Sea*, at 4, *supra* note 15.

<sup>163</sup> Armitage (ed.) *Hugo Grotius, The Free Sea*, at xi, *supra* note 143.

<sup>164</sup> See John Selden, *Mare Clausum seu, De Dominio Maris* (Printed by William Du-Gard: London, 1652). The other famous commentators are the Scot William Welwod, *An Abridgement of All Sea-Lawes* [1613]; *De Dominio Maris* [1615], the Portuguese Justo Seaphim de Freitas, *De Justo Imperio Lusitanorum Asiatico* [1625] and the Spanish Juan Solórzano Pereira, *De Indiarum Jure* [1629]. See Armitage (ed.) *Hugo Grotius, The Free Sea*, at xviii, *supra* note 143.

<sup>165</sup> Churchill and Lowe, *The Law of the Sea*, at 4–5, *supra* note 15.

<sup>166</sup> For example, the world fish catch and the gross tonnage of merchant ships quadrupled between 1950 and 1975. See e.g., Scott G. Borgerson, *The National Interest and the Law of the Sea, Council Special Report No. 46, May 2009* (Council on Foreign Relations: New York), at 7.

<sup>167</sup> Helmut Tuerk, *Reflections on the Contemporary Law of the Sea* (Brill: Leiden, 2012) at 8.

environment.<sup>168</sup> On top of their political and strategic importance, our seas and oceans are vital for offshore industries, seaborne trade and commercial fishing. The transition away from the ‘pure’ free seas began after use of the oceans increased to the point where different maritime activities started to affect one another. According to the United Nations Conference on Trade and Development (UNCTAD), around eighty per cent of global trade by volume, and over seventy per cent by value, is carried by sea today.<sup>169</sup> In short, these are the interests that shape domestic and international policies regarding the modern law of the sea.

The history and development of the law of the sea is well documented.<sup>170</sup> The first major changes took place after World War I reshaped the political geography of the world — that is, after the four defeated empires were broken up and new nations were born.<sup>171</sup> Finland, Latvia, Estonia, Lithuania and Poland, among others, became independent and the League of Nations was established. A gradual pressure for wider belts around coastlines was now building.<sup>172</sup> In 1930, The Hague Conference for the Codification of International Law — including that of the law of the sea — was convened under the auspices of the League of Nations. However, the conference was unable to reach an agreement on any of the agenda issues. The state of affairs remained largely unchanged until the end of World War II. David Anderson, a former judge of the International Tribunal for the Law of the Sea (ITLOS), has summarised the law of the sea till the early 20th century as follows:

Coastal States had territorial waters extending to three nautical miles, subject to insignificant exceptions, and measured in a belt around the coasts. Beyond that limit, the seas and oceans had the status of high seas. Maritime law was based upon relatively simple foundations: international custom derived from the practice of States, among which maritime powers loomed large; a few conventions on technical matters; the writings of professors; and a few arbitral decisions. No inter-governmental organizations with maritime mandates existed and there was no forum for discussing maritime questions. Maritime disputes were justiciable only with the consent of the States concerned.<sup>173</sup>

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<sup>168</sup> David Anderson, *Modern Law of the Sea: Selected Essays* (Brill: Leiden, 2008) at 3.

<sup>169</sup> See the UNCTAD online Statistical Annexes available at <unctad.org>, UNCTAD, *Review of Maritime Transport 2014* (United Nations: Geneva). See also UNCTAD, *Key Statistics and Trends in International Trade 2014* (United Nations: Geneva).

<sup>170</sup> For a compact presentation, see Anderson, *Modern Law of the Sea*, at 3-22, *supra* note 168. For a detailed history of the law of the sea, see Jennings and Watts (eds), *Oppenheim's International Law*, chapters 5 and 6, *supra* note 129, O'Connell, *The International Law of the Sea Volume I*, and especially suggested further reading at 25, *supra* note 14 and Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited*, *supra* note 141. For the recent developments, see James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press: Cambridge, 2011). For a comprehensive list of treaties and studies regarding the evolution of the modern law of the sea, see Appendix 12, in Roach and Smith, *Excessive Maritime Claims*, at 845-860, *supra* note 9.

<sup>171</sup> Tommy T. B. Koh, 'The Origins of the 1982 Convention on the Law of the Sea', 29 *Malaya Law Review*, no. 1 (1987) 1-17 at 6.

<sup>172</sup> Anderson, *Modern Law of the Sea*, at 6, *supra* note 168.

<sup>173</sup> *Ibid.*

After World War II the United Nations was established and the League of Nations saw its demise. There was now — again — a wholly new world order, and the number of newly independent States continued to rise, this time as a result of decolonisation. After the war, the traditional division of territorial seas and the high seas started to shift slowly towards what can be called a ‘functional and resource-oriented’ division of the seas.<sup>174</sup> As Professor Maria Gavouneli explains, ‘[t]he “unlimited expanse” of Grotius has been converted into tidy stripes of jurisdiction, often vying for the same territory’.<sup>175</sup> Increased demand for oil and other resources, and technological advances opening up new uses of the sea, propelled these changes forward.<sup>176</sup> Bernhard Oxman, who served as the Vice-Chairman of the US delegation to UNCLOS III, calls this trend ‘territorial temptation’,<sup>177</sup> and it accelerated after the Truman Proclamations of 1945.

US President Harry S. Truman made two presidential proclamations concerning fisheries and the jurisdiction and rights of the United States over natural resources on the continental shelf.<sup>178</sup> The original thought came from the US Secretary of the Interior, Harold Ickes, who recommended President Roosevelt to consider ways in which the United States could lay claims to resources off the coast, due the increased need for raw materials following the war.<sup>179</sup> After the Truman Proclamations, other coastal States were encouraged to make corresponding claims, spurred on by both growing interest in the living resources within the water column above the continental shelf, and the US’s encouragement to do so. Political scientist Zdenek Slouka suggests that the US’s encouragement ‘indicated the existence of a deliberate intention to initiate the development of a rule of customary law’.<sup>180</sup>

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<sup>174</sup> Malcolm D. Evans (ed.) *International Law* (2nd edn, Oxford University Press: Oxford, 2006) at 623.

<sup>175</sup> Gavouneli, *Functional Jurisdiction in the Law of the Sea*, at 3, *supra* note 138.

<sup>176</sup> Anderson, *Modern Law of the Sea*, at 7–8, *supra* note 168.

<sup>177</sup> Bernard H. Oxman, ‘The Territorial Temptation: A Siren Song at Sea’, 100 *The American Journal of International Law*, (2006) 830–851 at 830, fn. 1, citing Jean-François Revel.

<sup>178</sup> President Harry S. Truman, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf of 28 September 1945, 3 C.F.R. 67; President Harry S. Truman, Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas of 28 September 1945, 3 C.F.R. 68. For an in-depth analysis of, and the history behind, the proclamations, see especially Chapter 2 ‘The Truman Proclamations’ in Hollick, *U.S. Foreign Policy and the Law of the Sea*, at 18–61, *supra* note 161. See also Donald Cameron Watt, ‘First steps in the enclosure of the oceans: The origins of Truman’s proclamation on the resources of the continental shelf, 28 September 1945’, 3 *Marine Policy*, (1979) 211–224. The policy however was already formulated during the administration of President Franklin D. Roosevelt and originated in the 1930s when the US sought to control different resources offshore by excluding foreign access. See Hollick, *U.S. Foreign Policy and the Law of the Sea*, at 18–19, *supra* note 161.

<sup>179</sup> Jean-François Pulvenis, ‘The Continental Shelf Definition and Rules Applicable to Resources’ in René-Jean Dupuy and Daniel Vignes (eds) *A Handbook on the New Law of the Sea, Volume I* (Martinus Nijhoff Publishers: Dordrecht, 1991), 315–381 at 325–327. See also Hollick, *U.S. Foreign Policy and the Law of the Sea*, at 33–39, *supra* note 161.

<sup>180</sup> Pulvenis, *The Continental Shelf Definition and Rules Applicable to Resources*, at 326, *supra* note 179, and Zdenek J. Slouka, *International Custom and the Continental Shelf: A Study in the Dynamics of Customary Rules of International Law* (Martinus Nijhoff Publishers: The Hague, 1968) at 80.

In addition to the weight of the opinion of the US, there were two contributing factors to the wider international acceptance of the Proclamations. The first is that the Proclamations were ‘based on facts and goals of a general character, not applicable exclusively to the United States’ but to all coastal States. The second factor was that the Proclamations contained an element of reciprocity, in that to ‘have this right recognized by others, the United States was, implicitly, yet clearly, denying itself an opportunity to assert for itself or its national industries free access to resources hidden in about ten million square miles of the continental shelves off foreign coasts’, thereby calling other States ‘to adopt a corresponding policy’.<sup>181</sup> Ironically the next decades — and continuing into the present — were spent by the US ‘trying to roll back and limit the expansive moves of other States’.<sup>182</sup> The chief scientist working at the Department of the United States Navy, Dr John Craven, was the first to predict that the sovereign rights claimed by coastal States over the seabed would soon be followed by similar claims over the water column above and to the subsoil below.<sup>183</sup> He was right. The United States has ever since been in strong opposition of this ‘creeping jurisdiction’.

Soon after the Truman Proclamations, in 1949 the International Law Commission (ILC) began its work. The law of the high seas was included on the list of topics of international law that were ready for codification and progressive development. The ILC studied the matter for six years and in 1955 presented draft articles to the UN General Assembly.<sup>184</sup> In 1957 the General Assembly decided to convene the first United Nations Conference on the Law of the Sea to consider the newly revised draft articles.<sup>185</sup>

### 3.1. UNCLOS I and UNCLOS II

The First United Nations Conference on the Law of the Sea (UNCLOS I)<sup>186</sup> opened in Geneva in February 1958 and ended in April with the adoption of four conventions that created five legal zones in the sea: internal waters, territorial sea, the contiguous zone, the high seas and the continental shelf. These conventions — known together as the 1958 Geneva Conventions on the Law of the Sea — were: the Convention on the Territorial Sea and Contiguous Zone (TSC); the Convention on the High Seas (HSC); the Convention on the

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<sup>181</sup> Slouka, *International Custom and the Continental Shelf: A Study in the Dynamics of Customary Rules of International Law*, at 75–76 and 77–83, *ibid.* See also Pulvenis, *The Continental Shelf Definition and Rules Applicable to Resources*, at 326, *supra* note 179.

<sup>182</sup> Hollick, *U.S. Foreign Policy and the Law of the Sea*, at 19, *supra* note 161. Regarding the US policy on excessive maritime claims, see generally Roach and Smith, *Excessive Maritime Claims*, *supra* note 9.

<sup>183</sup> Erik Franckx, ‘The 200-Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?’, 39 *George Washington International Law Review*, no. 3 (2007) 467–498 at 476–477.

<sup>184</sup> Koh, ‘The Origins of the 1982 Convention on the Law of the Sea’, at 11, *supra* note 171 and Anderson, *Modern Law of the Sea*, at 9, *supra* note 168.

<sup>185</sup> Koh, ‘The Origins of the 1982 Convention on the Law of the Sea’, at 12, *supra* note 171.

<sup>186</sup> For an introduction to UNCLOS I, see Tullio Treves, ‘1958 Geneva Conference on the Law of the Sea’, *United Nations Audiovisual Library of International Law*, (2008). Available at <legal.un.org/avl/pdf/ha/gclos/gclos\_e.pdf>.



Continental Shelf (CSC); and the Convention on Fishing and Conservation of the Living Resources of the High Seas (CFCLR).<sup>187</sup> The Conference also adopted an Optional Protocol on the Settlement of Disputes (OPSD)<sup>188</sup> and nine resolutions. While the Conference has been considered to be a success in its own right, it did not manage to define the breadth of the territorial sea or the breadth of any exclusive fishing zones (EFZ). The proposals on the limit of the territorial sea varied from three to 200 nautical miles (5 556 metres to 370.4 km) and none obtained the required two-thirds majority vote.<sup>189</sup> Shipwrecks and underwater cultural heritage were far from being a concern at the time, since ‘the lack of adequate underwater technology made the search for, and removal of, underwater cultural property far too remote to create juridical problems’.<sup>190</sup>

The Second United Nations Conference on the Law of the Sea (UNCLOS II) was held in 1960 without reaching agreement on any of the issues on the table.<sup>191</sup> The closest the conference ever came to an adoption was an amended joint proposal for a six-nautical-mile (11.1 km) territorial sea and a six-nautical-mile fishing zone that failed to obtain the required two-thirds majority by one vote.<sup>192</sup> The four Conventions adopted in Geneva two years earlier came into force soon after UNCLOS II finished, but they never gained universal support and were always met with a degree of opposition.<sup>193</sup> Furthermore, in 1969 the International Court of Justice (ICJ) decided in the *North Sea Continental Shelf* cases<sup>194</sup> that Article 6 of the CSC (regarding the delimitation of the continental shelf) did not reflect customary international law, and that customary law required the application of the concept of ‘natural prolongation’.<sup>195</sup> According to ITLOS judge Helmut Tuerk, natural prolongation was used to support claims to an ever-wider continental shelf.<sup>196</sup>

Another of the major issues with the 1958 Geneva Conventions was that they were not part of a package acceptance deal. This meant that States could pick and choose between the four

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<sup>187</sup> Convention on the Territorial Sea and Contiguous Zone, 29 April 1958, in force 10 September 1964, 516 UNTS 205; Convention on the High Seas, 29 April 1958, in force 30 September 1962, 450 UNTS 82; Convention on the Continental Shelf, 29 April 1958, in force 10 June 1964, 499 UNTS 311; Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, in force 20 March 1966, 559 UNTS 285.

<sup>188</sup> Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 29 April 1958, in force 30 September 1964, 450 UNTS 169.

<sup>189</sup> Koh, ‘The Origins of the 1982 Convention on the Law of the Sea’, at 12–13, *supra* note 171.

<sup>190</sup> Strati, *UCH: An Emerging Objective*, at 254, *supra* note 19.

<sup>191</sup> See generally Arthur H. Dean, ‘The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Sea’, 54 *American Journal of International Law*, no. 4 (1960) 751–789.

<sup>192</sup> *Ibid.*, at 782.

<sup>193</sup> Anderson, *Modern Law of the Sea*, at 9–10, *supra* note 168. Regarding the unresolved issues of both Conferences, see especially Chapter II in Bowett, *The Law of the Sea*, at 4–19, *supra* note 76.

<sup>194</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports 1969, 3, at 47, para. 83.

<sup>195</sup> The term ‘natural prolongation’ refers to the natural extension of a coastal State’s land territory to define that coastal State’s continental shelf. The connection between the land territory and the natural prolongation can be geomorphological and/or geological. See further George K. Walker, *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention* (Brill: Leiden, 2012) at 253–254.

<sup>196</sup> Tuerk, *Reflections on the Contemporary Law of the Sea*, at 12, *supra* note 167.

Conventions, eliminating the possibility of universal acceptance.<sup>197</sup> Furthermore, individual States were left with problems that the Conventions could not provide solutions for, indirectly encouraging them to take matters into their own hands. The CFCLR failed to provide solutions to problems that arose when fish stocks were exploited by multiple users and the sustainable yield was exceeded.<sup>198</sup> Tuerk argues that this threat ‘prompted political pressure on coastal States to find ways to protect local fishing industries facing foreign competition for a limited resource’ and mounted pressure that ‘contributed to the claims to control the sea up to 200 nautical miles and even beyond’.<sup>199</sup>

Another problem related to the voting system. In both Conferences it was difficult to achieve the required two-thirds majority vote due the inherent conflicting interests of States. This issue was clearly demonstrated at UNCLOS II, where no agreements were reached. Bowett formulated the problem into a question: ‘Does it involve the proposition that if 70 States prefer rule X, and 50 States rule Y, then rule X is the better rule? Surely not, for the real interests of these States may vary enormously, and conceivably the majority of the great maritime Powers could be in the minority which favoured rule Y’.<sup>200</sup> In both Conferences the equality of voting between participating States illustrated this problem, as Bowett continues to explain:

The argument that the majority vote must, in a democratic world community, be accepted as the better rule is based upon a false analogy with municipal systems. By and large, a municipal system operates upon the assumption that all citizens have an equal interest in the content of their legal system. This is plainly a false assumption on the international plane. How can one realistically equate the interests in the rule about the breadth of the territorial sea of, say, Burundi and the Soviet Union?<sup>201</sup>

Around the time the Conferences were held, the composition of States was still changing after the last British, Dutch and French colonial territories gained independence. Among other things, these newly independent States had to consider the extent of their territorial seas.<sup>202</sup> According to Tommy Koh, President of the later UNCLOS III, by the mid-1960s big maritime powers and coastal States alike started to feel the need for a new legal order for the

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<sup>197</sup> *Ibid.*, at 11.

<sup>198</sup> *Ibid.*, at 12.

<sup>199</sup> *Ibid.*

<sup>200</sup> Bowett, *The Law of the Sea*, at 2, *supra* note 76.

<sup>201</sup> *Ibid.*, at 2, fn. 3. Regarding the ‘common interests’ versus the interests of particular States, see further Myres S. McDougal and William T. Burke, ‘Crisis in the Law of the Sea: Community Perspectives Versus National Egoism’, 67 *Yale Law Journal*, no. 4 (1958) 539–589. In contrast, see Max Sørensen, *Law of the Sea: International Conciliation*, No. 520, November, 1958. Regarding the community interests and abuse of rights, see in general Chapter V in Bowett, *The Law of the Sea*, at 44–59, *supra* note 76.

<sup>202</sup> As a result the Group of 77 (G77) was established on 15 June 1964 by seventy-seven developing States that were highly active and influential during UNCLOS III. See ‘About the Group of 77’, available at <[www.g77.org/doc/index.html#establish](http://www.g77.org/doc/index.html#establish)>.

oceans.<sup>203</sup> The four 1958 Geneva Conventions had gained relatively few ratifications and were rapidly being overtaken by State practice.<sup>204</sup> The last important step towards the new legal order was taken in 1967 when the then Ambassador of Malta to the United Nations, Arvid Pardo, proposed that the resources of the seabed and ocean floor beyond the limits of national jurisdiction should be declared the 'common heritage of mankind', not subject to national appropriation, and reserved exclusively for peaceful purposes.<sup>205</sup> Furthermore in 1967, the Soviet Union approached the United States and other States with a proposal of recognising a twelve-nautical-mile (22.2 km) territorial sea, provided that a high seas corridor was preserved in international straits.<sup>206</sup> The decision was made on 17 December 1970 to convene the Third United Nations Conference on the Law of the Sea.<sup>207</sup>

### 3.2. UNCLOS III

The Third United Nations Conference on the Law of the Sea lasted from 1973 to 1982.<sup>208</sup> The outcome — after years of arduous and protracted negotiations — was a 'package deal'.<sup>209</sup> Tullio Treves, a former judge of ITLOS, explains that the historic circumstances were complex, involving 'momentous changes in the structure of international society and in the uses of the sea'.<sup>210</sup> On the broad agenda were issues such as the common heritage of mankind, the expansion of coastal State sovereignty, and the protection of the marine environment. The need to protect the marine environment was an emerging issue in international law after the 1972 United Nations Stockholm Conference on the Human Environment, and the adoption of conventions such as the London Convention of 1972<sup>211</sup> and the MARPOL 73/78

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<sup>203</sup> Koh, 'The Origins of the 1982 Convention on the Law of the Sea', at 16, *supra* note 171.

<sup>204</sup> *Ibid.* At the end of 1985, the TSC had 46 parties, the HSC had 57 parties, the CSC had 54 and the CFCLR had 36 parties. See *ibid.*, at 16, fn. 60.

<sup>205</sup> UNGA, Official Records of the 22nd Session (1967) 1st Committee, 1515th and 1516th meeting 1 November 1967, A/C.1/PV.1515 and A/C.1/PV.1516. This proposal is known as the 'Maltese Proposal'.

<sup>206</sup> Koh, 'The Origins of the 1982 Convention on the Law of the Sea', at 17, *supra* note 171.

<sup>207</sup> UNGA, Reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference of the law of the sea, GA Res. 2750 (XXV), 17 December 1970.

<sup>208</sup> Regarding the negotiation process, see generally Nordquist (ed.) *UNCLOS: A Commentary, Vol. I*, at 29-134, *supra* note 78. For a brief historical account, see The United Nations Convention on the Law of the Sea – A Historical Perspective. Available at <[www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm)>. See also Tullio Treves, 'United Nations Convention on the Law of the Sea', *United Nations Audiovisual Library of International Law*, (2008). Available at <[legal.un.org/avl/pdf/ha/uncls/uncls\\_e.pdf](http://legal.un.org/avl/pdf/ha/uncls/uncls_e.pdf)>.

<sup>209</sup> Tuerk, *Reflections on the Contemporary Law of the Sea*, at 2, *supra* note 167.

<sup>210</sup> Treves, 'United Nations Convention on the Law of the Sea', at 1, *supra* note 208.

<sup>211</sup> Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 December 1972, in force 30 August 1975, 1046 UNTS 120. See also 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, 7 November 1996, in force 24 March 2006, amended 2 November 2006, amendment in force 10 February 2007, IMO Doc. LC/SM 1/6.

Convention of 1973 with later amendments.<sup>212</sup> UNCLOS III started its work without the benefit of the previous work of experts and without a basic draft, unlike in the case of the 1958 Geneva Conventions.<sup>213</sup>

Following the lessons learned from the 1958 and 1960 Conferences, UNCLOS III adopted five distinct procedural techniques.<sup>214</sup> The first was the consensus procedure, which meant that ‘the Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until efforts at consensus have been exhausted’.<sup>215</sup> While the consensus procedure is preferable in order to secure the widest possible acceptance, a convention adopted by consensus is likely to be obscure because of the need for compromise.<sup>216</sup> This consensus procedure should not be confused with unanimity — adoption with unanimity means adoption by voting after all actors involved have agreed, but the consensus procedure precludes voting.<sup>217</sup> The second procedural technique was the ‘package deal’ approach. Under this approach the final treaty was to be accepted in its entirety, which also contributed to the adoption of a single treaty.<sup>218</sup> The third procedural feature was that the discussions took place in a variety of interest groups.<sup>219</sup> The fourth was that a substantive amount of the meetings were informal, without summary records, and many of the issues were resolved in privately-convened negotiating groups.<sup>220</sup> The fifth feature was to formulate and adopt a Single Negotiating Treaty Text in each of the Committees.

One of the biggest forces behind the negotiations was the growing realisation of the ‘enormous resources and the great economic potential of the seas, growing concern over the toll taken on coastal fish stocks by long-distance fishing fleets and over the danger of pollution and wastes from transport ships and oil tankers carrying noxious cargoes which threatened coastal communities and all forms of ocean life’.<sup>221</sup> Koh pointed out correctly that the old legal order collapsed under the weight of three issues: ‘first, the progress of technology; second, the

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<sup>212</sup> International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 Relating to Thereto (with annexes, final act and International Convention of 1973), 2 November 1973 and 17 February 1978, in force 2 October 1982, 1340 UNTS 62.

<sup>213</sup> Treves, ‘United Nations Convention on the Law of the Sea’, at 2, *supra* note 208.

<sup>214</sup> Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn, Cambridge University Press: Cambridge, 2015) at 27–29.

<sup>215</sup> See the Declaration Incorporating the Gentleman’s Agreement made by the President and endorsed by the Conference at its 19th Meeting (27 June 1974). Reproduced in 13 ILM 1209.

<sup>216</sup> Tanaka, *The International Law of the Sea*, at 27–28, *supra* note 214.

<sup>217</sup> *Ibid.*, at 27, fn. 81.

<sup>218</sup> *Ibid.*, at 28. This approach is clearly visible in the final text. Pursuant to Article 309 of the LOSC no reservations or exceptions may be made to the Convention unless expressly permitted by other articles of the Convention.

<sup>219</sup> These groups included the G77 of developing countries, the LL-DGS of land-locked and geographically disadvantaged States, the group of archipelagic States and many others. See further Nordquist (ed.) *UNCLOS: A Commentary*, Vol. I, at 54–55, *supra* note 78.

<sup>220</sup> Tanaka, *The International Law of the Sea*, at 28, *supra* note 214.

<sup>221</sup> Tuerk, *Reflections on the Contemporary Law of the Sea*, at 9, *supra* note 167. See also *UNCLOS – A Historical Perspective*, *supra* note 208.

failure of the traditional law to deal adequately with the concerns of coastal [S]tates regarding the utilisation of oceanic resources; and third, the emergence of the developing countries'.<sup>222</sup>

Ultimately, the LOSC was a compromise based on the fundamental premise that different ocean uses are closely interrelated and need to be considered as a whole — thus the Convention tried to strike a balance between the rights of the coastal States and the freedoms enjoyed by all other States.<sup>223</sup> There was hope that the Convention would rein in territorial temptations, and address the issue of creeping jurisdiction, i.e. the extension of sovereign rights and national jurisdiction further over the seas.<sup>224</sup> However, the LOSC did not provide an efficient scheme of protection of shipwrecks or underwater cultural heritage. Strati argues that this 'is the result both of the manner in which the archaeological issue was dealt with during the negotiations of UNCLOS III and of the determination of the maritime powers to prevent the expansion of coastal competence over archaeological objects on the continental shelf'.<sup>225</sup>

The LOSC was finally adopted at the resumed tenth session on 28 August 1981 and amended at the eleventh session in order to accommodate mostly the concerns of the United States.<sup>226</sup> Nevertheless, the United States could not accept some of the major elements of the deep seabed mining regime and requested a vote on the final text.<sup>227</sup> On 30 April 1982 the Conference adopted the Convention and four Resolutions as a package: 130 votes were in favour, 4 against, 18 abstained and 18 were unrecorded.<sup>228</sup>

#### 4. 1982 United Nations Convention on the Law of the Sea

Like many of my generation of international lawyers, I spent the early days of my academic career poring over the successive proposals and negotiating texts that emerged from the Third UN Conference on the Law of the Sea (UNCLOS III). Each small change in the language took on the sort of significance that shards of pottery or half-gnawed bones have for the archaeologist: a small, incomplete sign from which entire world-views could be inferred (or perhaps, upon which entire world-views could be imposed).<sup>229</sup>

Vaughan Lowe QC

<sup>222</sup> Koh, 'The Origins of the 1982 Convention on the Law of the Sea', at 14, *supra* note 171.

<sup>223</sup> Tuerk, *Reflections on the Contemporary Law of the Sea*, at 2–3, *supra* note 167.

<sup>224</sup> See, e.g., Franckx, 'The 200-Mile Limit', *supra* note 183 and Stuart Kaye, 'Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction' in David Freestone, Richard Barnes, and David Ong (eds) *The Law of the Sea: Progress and Prospects* (Oxford University Press: Oxford, 2006), 347–364 at 347–348.

<sup>225</sup> Strati, *UCH: An Emerging Objective*, at 311, *supra* note 19.

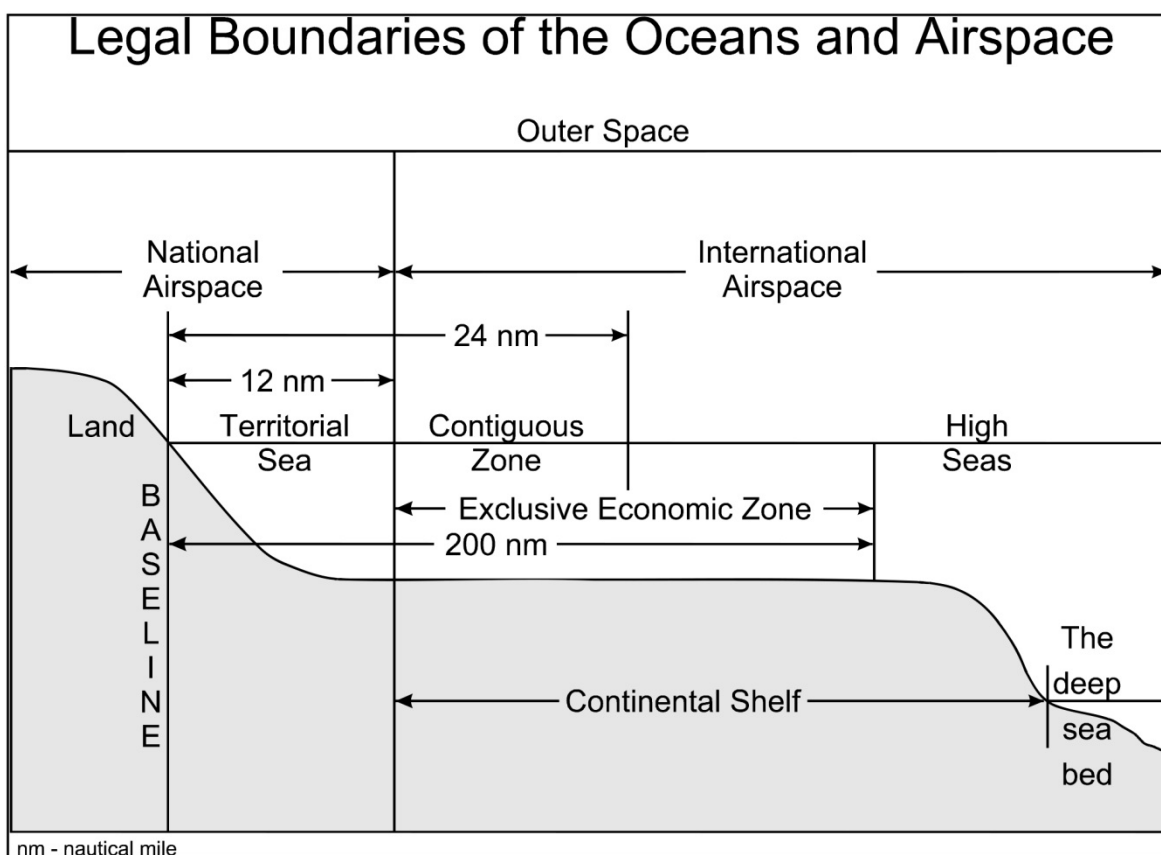
<sup>226</sup> Tanaka, *The International Law of the Sea*, at 29, *supra* note 214.

<sup>227</sup> See further Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea' in René-Jean Dupuy and Daniel Vignes (eds) *A Handbook on the New Law of the Sea, Volume I* (Martinus Nijhoff Publishers: Dordrecht, 1991), 163–244 at 239–244.

<sup>228</sup> For the distribution of votes, see *ibid.*, at 243, fn. 51–54.

<sup>229</sup> Vaughan Lowe, 'Was it Worth the Effort?' in David Freestone (ed.) *The 1982 Law of the Sea Convention at 30: Success, Challenges and New Agendas* (Martinus Nijhoff Publishers: Leiden, 2013), 201–207 at 201.

Today the modern law of the sea is understood within the framework established by the LOSC. The division of oceans into different zones, rights of coastal States and other States, and essential concepts incorporated in the framework of the LOSC are explained below. However, problems regarding maritime delimitation, defined as ‘the process of establishing lines separating the spatial ambit of coastal State jurisdiction over maritime space where the legal title overlaps with that of another State’, will be excluded.<sup>230</sup> The following treatise identifies the relevant factors that have an effect on the jurisdictional powers coastal States and other States have in different maritime zones, and how provisions for these have developed over time. How these provisions affect the protection of sunken warships in different maritime zones is then analysed.



Source: Figure 1-1. *Legal Boundaries of the Oceans and Airspace* from The Commander's Handbook on the Law of Naval Operations, edition July 2007 (US NAVY, NWP 1-14M).

#### 4.1. Archaeological and Historical Objects Found at Sea

Article 303, placed under Part XVI (General Provisions) of the LOSC, is concerned with archaeological and historical objects found at sea. According to Article 303:

<sup>230</sup> Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing: Oxford, 2006) at 7 and in general. See also Daniel Vignes and Rainer Lagoni (eds), Daniel Vignes and Rainer Lagoni, *Maritime Delimitation* (Martinus Nijhoff Publishers: Leiden, 2006). Regarding maritime delimitation in the Baltic Sea, see Erik Franckx, 'Maritime Delimitation in the Baltic Sea: What Has Already Been Accomplished?', 6 *TransNav, the International Journal on Marine Navigation and Safety of Sea Transportation*, no. 3 (2012) 437–442.

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.<sup>231</sup>

Dromgoole observed that the placement of Article 303 under the general provisions of the Convention favours the assumption that Article 303 is generally applicable — with the exception of paragraph 2 relating to the contiguous zone — and it is thus not geographically restricted such as Article 149 is, which concerns solely the international seabed (the Area).<sup>232</sup> This is also supported by Professor Guido Carducci, who is of the view that in principle Article 303(1) as *lex generalis*<sup>233</sup> covers UCH located anywhere within the scope of the LOSC.<sup>234</sup> In contrast, Boesten was more doubtful, and she argues, ‘[a] duty to protect after all requires the means to protect, which could easily result in a requirement of legislative competence and extension of jurisdiction’ and ‘Article 303 cannot be interpreted as including any form of coastal State jurisdiction over such objects in the EEZ or on the continental shelf’.<sup>235</sup> Nevertheless, she was of the view that Article 303 contained ‘the important statement that the protection of the objects amounts to a duty that needs to be achieved by co-operation’.<sup>236</sup>

The LOSC does not define what is meant by ‘objects’, ‘archaeological’ or ‘historical’. Furthermore, it is unclear from the wording of Article 303 whether the word ‘and’ (archaeological *and* historical) should be understood conjunctively, as it is in the Chinese, English and French translations, or disjunctively as in the Arabic, Russian and Spanish translations.<sup>237</sup> It has been suggested that ‘[i]n many countries archaeology (antiquities) is regulated by law, and for that reason it may be suggested that exceptionally, in this context, the word may be read disjunctively, “historical” being more a matter of subjective appreciation’.<sup>238</sup>

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<sup>231</sup> For a commentary of Article 303, see further Myron H. Nordquist, Shabtai Rosenne, and Louis B. Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume V* (Martinus Nijhoff Publishers: Dordrecht, 1989) at 158–162.

<sup>232</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 33, *supra* note 1.

<sup>233</sup> Latin, ‘a law of general application’.

<sup>234</sup> Guido Carducci, ‘New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage’, 96 *The American Journal of International Law*, no. 2 (2002) 419–434 at 420.

<sup>235</sup> Boesten, *Valuable Shipwrecks in International Waters*, at 58–59, *supra* note 20.

<sup>236</sup> *Ibid.*, at 59.

<sup>237</sup> Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. V*, at 160, *supra* note 231.

<sup>238</sup> *Ibid.*

Professor Lucius Caflisch is of the similar view that, since archaeological objects are a subcategory of objects of historical origin, there would be no case of an archaeological object that could not be considered as of historical origin.<sup>239</sup> However, there are still remaining issues that can arise from the terms ‘archaeological’ and ‘historical’.<sup>240</sup> Different interpretations of these terms are illustrated well by Oxman, in his discourse regarding the scope of Article 303, and by O’Keefe, in his commentary of the definition of UCH in the CPUCH. Oxman suggested that:

[Article 303] is not intended to apply to modern objects whatever their historical interest. Retention of the adjective ‘historical’ was insisted upon by Tunisian delegates, who felt that it was necessary to cover Byzantine relics that might be excluded by some interpretations of the word ‘archaeological’. Hence, the term historical ‘origin’, [sic] lacking at best in elegance, when used with the term ‘archaeological objects’ [...] does at least suggest the idea of objects that are many hundreds of years old.

The article contains no express time limit. As time marches on, so does our sense of what is old. Nevertheless, given the purpose for using the term ‘historical,’ it may be that if a rule of thumb is useful for deciding what is unquestionably covered by this article, the most appropriate of the years conventionally chosen to represent the start of the modern era would be 1453: the fall of Constantinople and the final collapse of the remnants of the Byzantine Empire. Everything older would clearly be regarded as archaeological or historical. A slight adjustment to 1492 for applying the article to objects indigenous to the Americas, extended perhaps to the fall of Tenochtitlán (1521) or Cuzco (1533) in those areas, might have the merit of conforming to historical and cultural classifications in that part of the world.<sup>241</sup>

O’Keefe points out some of the problems that become quickly apparent from Oxman’s interpretation of the terms ‘archaeological’ and ‘historical’:

Something may be of archaeological interest or significance but nothing is of an archaeological character. This was pointed out by the representative of ICOMOS and was clearly supported by many experts but unfortunately the word found its way into the text. Whether something is ‘cultural’ or ‘historical’ cannot be objectively determined. There cannot be any trace of human existence which does not have a cultural element or an historical character. Even human remains qualify. Indeed, anything over 100 years of age may be said to have an ‘historical character’ by its very nature. Much of the opposition to this phrase centred on an argument that the cultural or historical importance of an object can often not be determined in advance of excavation. But the importance of something is very different to its character and the latter is the word used in the definition. The phrase ‘cultural, historical or archaeological character’ thus neither adds to nor detracts from the already established scope of the definition. It mirrors the wording of UNCLOS

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<sup>239</sup> Lucius Caflisch, ‘Submarine Antiquities and the International Law of the Sea’, 13 *Netherlands Yearbook Of International Law*, (1982) 3–32 at 7, fn. 18. See also Strati, *UCH: An Emerging Objective*, at 199, fn. 81, *supra* note 19.

<sup>240</sup> See further e.g., Strati, *UCH: An Emerging Objective*, at 176–182, *supra* note 19 and Dromgoole, *Underwater Cultural Heritage and International Law*, at 71–76, *supra* note 1.

<sup>241</sup> Bernard H. Oxman, ‘The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)’, 75 *American Journal of International Law*, no. 2 (1981) 221–256 at 241, fn. 152.



in Articles 149 and 303 and is an unfortunate revival of a phrase which the [International Law Association] and UNESCO/DOALOS drafts carefully avoided.<sup>242</sup>

Dromgoole went to suggest that Oxman and other delegates at UNCLOS III had been influenced by the drafting history of Article 303, and especially the views of Mediterranean States such as Greece and Turkey whose domestic legislation had been designed to protect ‘the treasures of antiquity’ from the times that predated the Middle Ages.<sup>243</sup> Greece had been behind the original proposal that had, after many amendments, led to the adoption of Article 303. Furthermore, there is nothing that would suggest, other than the restrictive view of Oxman, that the scope of Article 303 is limited to Byzantine relics or objects originating from before the fall of Tenochtitlan.<sup>244</sup> According to Dromgoole, subsequent State practice has proven, in light of Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT),<sup>245</sup> that the restrictive view of Oxman has not prevailed.<sup>246</sup> Furthermore, ‘it needs to be borne in mind that throughout the long gestation period of the LOSC in the late 1960s and 1970s, marine archaeology was barely a scientific discipline at all, and understanding of the potential historical and archaeological value of the underwater cultural heritage was limited and undeveloped’.<sup>247</sup>

O’Keefe explained that archaeology is a process and a method, not a description or feature that an object can possess — anything can be studied using archaeological methods. According to Maria Christina Giorgi, ‘as the time limit for these objects is not set in a precise form, [...] their prescription as archaeological or historical will depend on the attitude of the international community and of a given society towards the values to be protected and consequently on the assessment of the international and national authorities concerned’.<sup>248</sup> This means that the interpretation and implementation of Article 303 is left to State parties to the LOSC, which entails that the definitions and criteria for any objects of an ‘archaeological and historical’ nature will differ depending on the domestic legislation and domestic criteria because there is no internationally agreed definition.

Could sunken warships be included in the notion of objects of an archaeological and historical nature? The term ‘time capsule’ often comes up when maritime historians and archaeologists talk about shipwrecks — a shipwreck is seen as a single event with the

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<sup>242</sup> O’Keefe, *Shipwrecked Heritage*, at 43, *supra* note 25. Footnotes omitted.

<sup>243</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 74, *supra* note 1.

<sup>244</sup> Strati, *UCH: An Emerging Objective*, at 181, *supra* note 19.

<sup>245</sup> Vienna Convention on the Law of Treaties, 23 May 1969, in force 27 January 1980, 1155 UNTS 331. For a commentary of the VCLT, see further Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers: Leiden, 2009). Regarding the interpretation of Article 31, see *ibid.*, at 415–441.

<sup>246</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 75, *supra* note 1.

<sup>247</sup> Dromgoole, ‘Revisiting the Relationship between MSR and the UCH’, at 37–38, *supra* note 10.

<sup>248</sup> Maria Cristina Giorgi, ‘Underwater Archaeological and Historical Objects’ in René-Jean Dupuy and Daniel Vignes (eds) *A Handbook on the New Law of the Sea, Volume I* (Martinus Nijhoff Publishers: Dordrecht, 1991), 561–575 at 565.

assumption that all objects on board the ship were deposited at the same time, and that ‘the event of a vessel’s loss encompasses a moment in time that produces a unit of contemporaneity in the archaeological record’.<sup>249</sup> Thus it follows that an untouched shipwreck is a journey back in time to long-lost information that has not been significantly altered or changed after its deposition. While this informational richness is undoubtedly a gift in the Baltic Sea, it is also a big legislative challenge when it comes to preservation of this cultural heritage, especially for shipwrecks from the World Wars. If we fail to appreciate the value of our remaining cultural heritage today, the information it holds about our societies and history will be lost forever. The importance and potential of shipwrecks is not limited or defined by their age, because the historical gaps that these wrecks can fill cannot otherwise be explained without the resources we have waiting for us on the seabed. These precious sites will continue to slowly erode, increasing the pressure to protect and preserve them while it is still possible. Especially in the case of sunken warships, recent maritime casualties can provide information that is no longer available from any other source<sup>250</sup> — their exclusion from the scope of ‘archaeological and historical’ objects would be simply absurd. For the archaeologist ‘the commonplace has the same value as the spectacular. What is important is not the recovery of spectacular items, but the acquisition of information’.<sup>251</sup>

#### 4.1.1. Article 303(1) — The General Duty to Cooperate

States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.

Article 303(1) renders unto coastal States a general duty to cooperate with each other to protect objects of an archaeological and historical nature. According to Strati, Article 303(1) provides a basis for the adoption of coastal measures where the coastal State is ‘not only entitled to adopt protective legislation in order to avoid interference of innocent passage with marine archaeological operations, but it also has the duty to do so’.<sup>252</sup> Furthermore, Strati argues that Article 303(1) may be used as a basis for requiring flag States to comply with coastal legislation. As all States have a general duty to protect objects of archaeological and historical nature, and cooperate for this purpose, flag States should respect any measures coastal States adopt under this duty.<sup>253</sup> However, as Scovazzi points out, ‘[a] State which persistently disregards any request by other States to negotiate on forms of cooperation aiming at the protection of the underwater cultural heritage could also be held responsible for an

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<sup>249</sup> Richard A. Gould, *Archaeology and the Social History of Ships* (Cambridge University Press: New York, 2011) at 15.

<sup>250</sup> Hutchinson, ‘Threats to underwater cultural heritage’, at 289, *supra* note 46.

<sup>251</sup> Strati, *UCH: An Emerging Objective*, at 310, *supra* note 19.

<sup>252</sup> *ibid.*, at 199, fn. 81.

<sup>253</sup> *Ibid.*, at 149, fn. 48.

<sup>253</sup> *Ibid.*

internationally wrongful act'.<sup>254</sup> The same would apply to a State that would knowingly destroy or allow the destruction of objects belonging to underwater cultural heritage.<sup>255</sup> The scope and further implications of Article 303(1) were reviewed in 2013 by Michail Risvas. He concluded that States could make more use of flag and port State jurisdiction, as well as of different ad hoc bilateral and regional agreements.<sup>256</sup> In another article, Risvas demonstrated how multilateral treaties are not always the best way of creating binding rules in international law, and therefore bilateral approaches could be shown to be a fruitful way of protecting underwater cultural heritage.<sup>257</sup> In this context, there are two international agreements, that deserve to be reviewed in brief.

### *1995 M/S Estonia Agreement*

M/S *Estonia* was a ro-ro<sup>258</sup> passenger ferry flying the Estonian flag and operating a daily route between Tallinn and Stockholm. The ship capsized and sank in an autumn storm during the night of 28 September 1994. Of the 989 people on board, only 137 survived the accident, making it the worst maritime disaster in the Baltic during peacetime.<sup>259</sup> The wreck rests on the continental shelf of Finland within the Finnish EEZ. At the time of the sinking Finland had not declared an EEZ, so the vessel sank originally within Finland's fishery zone of the time.<sup>260</sup> The Finnish Act on the Exclusive Economic Zone entered into force on 1 February 2005.<sup>261</sup> The disaster had a big impact particularly in Sweden and Estonia, due to the amount of casualties that were mostly of Swedish and Estonian citizenship.

On 23 February 1995 an agreement between Finland, Estonia and Sweden was signed in Tallinn regarding the wreck of M/S *Estonia*.<sup>262</sup> Currently the Agreement has nine State parties: the United Kingdom, Latvia, Lithuania, Poland, Denmark, Russia, and the original signatories.

Pursuant to Article 1 of the Estonia Agreement, the wreck of the M/S *Estonia* and the surrounding area shall be regarded as a final place of rest for victims of the disaster, and as such

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<sup>254</sup> Tullio Scovazzi, 'The Law of the Sea Convention and Underwater Cultural Heritage', 27 *International Journal of Marine and Coastal Law*, no. 4 (2012) 753–761 at 755.

<sup>255</sup> *Ibid.*

<sup>256</sup> See further Michail Risvas, 'The Duty to Cooperate and the Protection of Underwater Cultural Heritage', 2 *Cambridge Journal of International and Comparative Law*, no. 3 (2013) 562–590.

<sup>257</sup> See further Michail Risvas, 'Multilateral and Bilateral Approaches in the Protection of Underwater Cultural Heritage', 10 *Transnational Dispute Management*, no. 5 (2013) 1–10.

<sup>258</sup> Roll-on/roll-off vessel designed for carrying vehicles and other wheeled cargo that are driven on and off the ship.

<sup>259</sup> See generally Joint Accident Investigation Commission, *Final report on the capsizing on 28 September 1994 in the Baltic Sea on the ro-ro passenger vessel MV Estonia* (Joint Accident Investigation Commission and Edita Ltd: Helsinki).

<sup>260</sup> Since the beginning of 1975 Finland had established a fishery zone adjacent to the territorial sea pursuant to the customary rules of international law. On the concept of the fishery zone see O'Connell, *The International Law of the Sea Volume I*, at 530–539, *supra* note 14 and *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, (Merits, Judgment) ICJ Reports 1974, 3, at para. 52.

<sup>261</sup> See Laki Suomen talousvyöhykkeestä (1058/2004); Hallituksen esitys Eduskunnalle laiksi Suomen talousvyöhykkeestä ja eräiksi siihen liittyviksi laeiksi (HE 53/2004 vp).

<sup>262</sup> Agreement Between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden regarding M/S *Estonia*, 23 February 1995, in force 26 August 1995, 20 *Marine Policy* 4 at 355–356; 1890 UNTS 175.

shall be afforded appropriate respect. The Parties also agreed, pursuant to Article 3, that the M/S *Estonia* shall not be raised. Pursuant to Article 4:

1. The Contracting Parties undertake to institute legislation, in accordance with their national procedures, aiming at the criminalization of any activities disturbing the peace of the final place of rest, in particular any diving or other activities with the purpose of recovering victims or property from the wreck or the seabed.
2. The Contracting Parties undertake to make it possible to punish the commission of an offence, established in accordance with paragraph 1 of this Article, by imprisonment.
3. Notwithstanding the above provisions, a Contracting Party may take measures to cover the wreck or to prevent pollution of the marine environment from the wreck.

The legal implications of this treaty are covered in detail by Professor Jan Klabbers and Dr Marie Jacobson.<sup>263</sup> The Estonia Agreement uses nationality and territory principles of jurisdiction in order to regulate activities on the wreck site, and thus it is not binding upon non-contracting Parties and their nationals. So far no State has objected to the treaty. Even though M/S *Estonia* is a relatively recent wreck, it will one day become part of UCH.

#### *1972 Agreement Between the Netherlands and Australia Concerning the Old Dutch Shipwrecks*

An agreement between Australia and the Netherlands was signed on 6 November 1972 concerning old Dutch shipwrecks of Dutch East India Company vessels in the waters off the Western Australian coast. The Australian and Netherlands Committee on Old Dutch Shipwrecks (ANCODS) was established to determine the maintenance and allocation of the material that would emerge from these vessels.<sup>264</sup> Shipwrecks covered by the Agreement — although mentioned only in the arrangement setting up the Committee — include *Zuytdorp* (1712), *Batavia* (1629), *Vergulde Draeck* (the ‘Gilt Dragon’) (1656) and *Zeewijk* (1727).<sup>265</sup> Strati has noted that: ‘[T]o date, there has been no protest against Australia on the basis of the extension of its jurisdiction over the continental shelf. On the contrary, the latter has concluded two bilateral Agreements, one with the Netherlands and one with Papua-New Guinea, which assume the extension of its competence over the outer continental shelf area’.<sup>266</sup>

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<sup>263</sup> Jan Klabbers, ‘On maritime cemeteries and objective régimes: the case of the M/S *Estonia*’, (1997) at 2. See also Marie Jacobsson and Jan Klabbers, ‘Rest in Peace? New Developments Concerning the Wreck of the M/S *Estonia*’, 69 *Nordic Journal of International Law*, no. 3 (2000) 317–332.

<sup>264</sup> See Agreement Between the Netherlands and Australia Concerning old Dutch Shipwrecks, 6 November 1972. See also the Arrangement Setting out the Guiding Principles for the Committee to Determine the Disposition of Material from the Shipwrecks of the Dutch East India Company Vessels off the Coast of Western Australia, 6 November 1972. Both reproduced in Garaballo and Scovazzi (eds), *Before and After the 2001 UNESCO Convention*, at 254–258, *supra* note 26.

<sup>265</sup> See the website of the Australian Government for more information, Australia and the Netherlands Concerning Old Dutch shipwrecks at <[www.environment.gov.au/node/20233](http://www.environment.gov.au/node/20233)>.

<sup>266</sup> Strati, *UCH: An Emerging Objective*, at 280, fn. 56, *supra* note 19; Agreement Between the Netherlands and Australia Concerning old Dutch Shipwrecks, *supra* note 264 and Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries,

#### 4.1.2. Article 303(2) — A Legal Fiction

In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

Article 303(2) is concerned with archaeological and historical objects found in the contiguous zone. While this article seems to be limited only to the *removal* of objects from the seabed, its precise nature has been recently subject to debate. The implications of Article 303(2) are reviewed and analysed in the chapter on the contiguous zone.

#### 4.1.3. Article 303(3) — Identifiable Owners and the Laws of Salvage

Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

Article 303(3) states that nothing in Article 303 affects the rights of identifiable owners, the law of salvage and other rules of admiralty, or laws and practices regarding cultural exchanges. Scovazzi has called Article 303(3) an ‘invitation to looting’ and is of the view that salvage law and other rules of admiralty are given an overarching status.<sup>267</sup> In the Baltic Sea, the current absence of professional treasure salvage will severely limit the implication and effects that Article 303(3) might have. An argument can also be made, that sunken warships as ships operated for non-commercial purposes should not be subject to salvage, because there is nothing the salvor could return to the stream of commerce. Furthermore, pursuant to Article 30(d) of the 1989 International Convention on Salvage,<sup>268</sup> a State can reserve the right not to apply the provisions of the Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the seabed. For example Finland has made such a reservation.

#### 4.1.4. Article 303(4) — Relationship of Article 303 to Other International Agreements

This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

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including the area known as Torres Strait, and related matters, 18 December 1978, 18 ILM 1979. Pursuant to Article 9 of the latter: (1) Wrecks of vessels and aircraft which lie on, in or under the seabed in an area of seabed jurisdiction of a Party shall be subject to the jurisdiction of that Party; (2) If a wreck of historical or special significance to a Party is located or found in an area between the two countries under the jurisdiction of the other Party, the Parties shall consult with a view to reaching agreement on the action, if any, to be taken with respect to that wreck; (3) The provisions of this article shall be without prejudice to the competence of the courts of a Party, for the purposes of the laws of that Party, in relation to maritime causes of action in respect of wrecks coming within the provisions of this article; (4) This article shall not apply to any military vessel or aircraft of either Party wrecked after the date of entry into force of this Treaty. Pursuant to Article 1(i) of the same Treaty, the term ‘seabed jurisdiction’ means ‘sovereign rights over the continental shelf in accordance with international law’.

<sup>267</sup> Scovazzi, *A Contradictory and Counterproductive Regime*, at 8, *supra* note 83.

<sup>268</sup> See 1989 IMO Salvage Convention, *supra* note 88.

Article 303(4) includes a ‘without prejudice’ clause towards international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature. While Nordquist has suggested that Article 303(4) is ‘self-explanatory’ and interlinked with Article 311 (concerning the relation of the LOSC to other conventions and international treaties), the precise meaning of Article 303(4) remains open to interpretation.<sup>269</sup> For example, it is unclear whether Article 303 is without prejudice only to pre-existing treaties and conventions, or also to any related agreements that are made after the adoption of the LOSC.<sup>270</sup> According to O’Keefe ‘it is obvious that Article 311(3) can only apply where the other agreement modifies or suspends’ provisions of the LOSC.<sup>271</sup> It seems that there is more support for the interpretation that Article 303(4) is encouraging further agreement regarding the protection of objects of archaeological and historical nature and that it was, in fact, ‘intended to harmonize the rules of the law of the sea regarding marine archaeology with the content of the emerging law of archaeology and cultural artifacts’.<sup>272</sup> Furthermore, Boesten considered that while Article 303 offers no practical guidance for practical implementation, it ‘paves the way for new legal agreements’.<sup>273</sup>

## 4.2. Baselines

Baselines are the lines (i.e. points) on the coast of the coastal State from which the outer limits of all maritime zones of the coastal State are measured. Baselines, which often follow the low-water line, also form the boundary between territorial sea and internal waters. Traditionally baselines were seen as a part of the body of law relating to the territorial sea, due to the fact that the territorial sea was the only zone under coastal State jurisdiction.<sup>274</sup> However, this has changed because baselines are used to measure the outer limits of all maritime zones, and thus have special significance.

While the acceptance of some kind of coastal State sovereignty over a belt of water seawards from the coastline has been accepted for hundreds of years, the modern concept of baselines appeared for the first time in the 1839 Anglo–French Fisheries Convention,<sup>275</sup> which used the low-water mark — and under certain conditions, other natural phenomena — as the normal

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<sup>269</sup> Nordquist (et al.) (eds), *UNCLOS: A Commentary*, Vol. V, at 161, *supra* note 231. For a commentary of Article 311, see further *ibid.*, at 229–243.

<sup>270</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 35, *supra* note 1.

<sup>271</sup> O’Keefe, *Shipwrecked Heritage*, at 59–60, *supra* note 25.

<sup>272</sup> Bernard H. Oxman, ‘Marine archaeology and the international Law of the Sea’, 12 *Columbia-VLA Journal of Law & the Arts*, no. 3 (1987–1988) 353–372 at 364. See also Boesten, *Valuable Shipwrecks in International Waters*, at 63, *supra* note 20 and Scovazzi, *A Contradictory and Counterproductive Regime*, at 10, *supra* note 83.

<sup>273</sup> Boesten, *Valuable Shipwrecks in International Waters*, at 64, *supra* note 20.

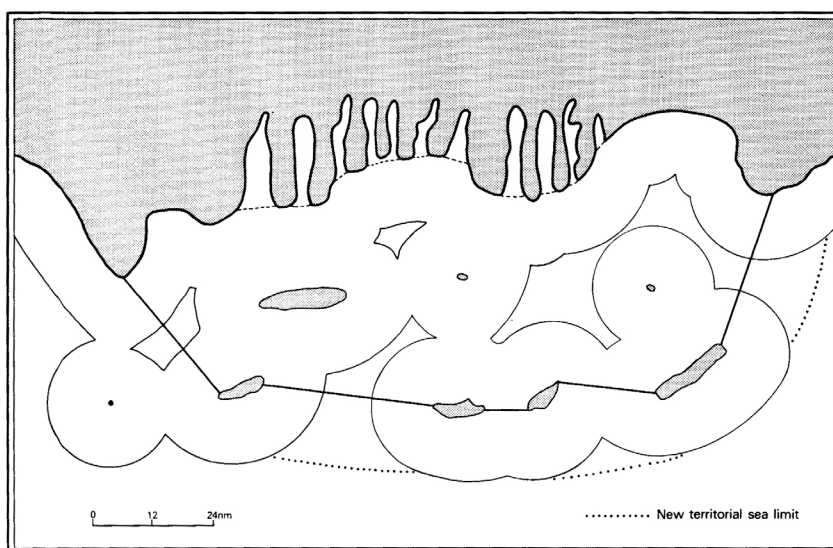
<sup>274</sup> Churchill and Lowe, *The Law of the Sea*, at 31, *supra* note 15.

<sup>275</sup> Convention for Defining the Limits of Exclusive Fishing Rights, 2 August 1839, in force 17 August 1839, 89 CTS 221; 27 BFSP 983.

baseline.<sup>276</sup> The League of Nations attempted to codify rules regarding baselines in the law of the sea, and the 1930 Hague Codification Conference tried to tackle a number of issues regarding baselines. Even though the Conference was unsuccessful in achieving a convention, the resultant draft articles expressed what many countries apparently held to be customary international law at that time.<sup>277</sup> The work of the Codification Conference was not in vain, and draft articles formed much of the basis for the preparatory work of the International Law Commission (ILC) for UNCLOS I.<sup>278</sup> As a result, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone included a number of articles that dealt with baselines and in most respects also represented customary international law.<sup>279</sup> The LOSC repeats the contents of the 1958 Convention. The rules embodied in Articles 5–11, 13, 14 and 47 of the LOSC distinguish between normal baselines, straight baselines and archipelagic baselines.

#### 4.2.1. Normal and Straight Baselines

Pursuant to Article 5 of the LOSC, the normal baseline is the low-water line along the coast as marked on large-scale charts officially recognised by the coastal State.<sup>280</sup> While this approach seems logical, in practice coasts are rarely straight, and often feature indentations or penetrations by bays, islands, sandbanks and rocks.<sup>281</sup> Thus, many coastal States have adopted the use of straight baselines.



Source: Map No. 3530.4 — *The role of straight baselines in simplifying territorial sea boundaries* from *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations: New York, 1989).

<sup>276</sup> Office for Ocean Affairs and the Law of the Sea United Nations, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations: New York, 1989) at viii.

<sup>277</sup> *Ibid.*

<sup>278</sup> Churchill and Lowe, *The Law of the Sea*, at 32, *supra* note 15.

<sup>279</sup> *Ibid.* See Convention on the Territorial Sea and Contiguous Zone, Articles 3–11 and 13, *supra* note 187.

<sup>280</sup> For a commentary of Article 5, see Myron H. Nordquist (et al.) (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II* (Martinus Nijhoff Publishers: Dordrecht, 1993) at 87–90.

<sup>281</sup> Churchill and Lowe, *The Law of the Sea*, at 32, *supra* note 15.

Straight baselines are described in Article 7 of the LOSC.<sup>282</sup> Straight baselines allow the coastal State to eliminate complex patterns that would otherwise result from the use of normal baselines. At the same time, straight baselines ‘allow the coastal State, at its discretion, to enclose those waters which, as a result of the close interrelationship with land, have the character of internal waters’.<sup>283</sup>

The baseline system incorporated in 1958 was substantially based on the decision of the ICJ in the 1951 *Anglo–Norwegian Fisheries Case*,<sup>284</sup> where the Norwegian use of straight lines was confirmed legal under international law. Today, the use of straight baselines is well recognised by the LOSC and it is not seen as an exception to the law.<sup>285</sup>

#### 4.2.2. Analysis

After studying State practice regarding baselines, geographer Professor John Prescott concluded that ‘it would now be possible to draw a straight baseline along any section of the coast in the world and cite an existing straight baseline as a precedent’.<sup>286</sup> The way that coastal States draw their baselines, and thus measure the outer limits of their territorial seas, can extend the limits of every other maritime zone further seawards for noticeable distances, thus bringing greater areas within a coastal State’s internal waters and territorial sea.<sup>287</sup> Professors W. Michael Reisman and Gayl Westerman warned that:

[T]he chief practical effect of a straight baseline claim is to augment the areas of internal and territorial waters within State control. When individual baseline segments are very long, however, significant areas of continental shelf and exclusive economic zone are also gained.<sup>288</sup>

Churchill and Lowe note the importance of precise and objective rules which would lead two independent cartographers to the same results.<sup>289</sup> Maritime law professionals Ashley Roach and Robert Smith have argued that ‘[w]hile no detailed internationally accepted standards currently exist that define what is meant by the terms in [A]rticle 7 of the LOS Convention, it appears that only certain countries have coastlines that qualify for straight baselines’.<sup>290</sup> At the same time they point out that among the few countries that appear to be in compliance are Norway, Sweden and Finland. As Churchill and Lowe explain, ‘[t]he effect of drawing straight baselines, even strictly in accordance with the rules, is often to enclose considerable bodies of

<sup>282</sup> Nordquist (et al.) (eds), *UNCLOS: A Commentary*, Vol. II, at 95–103, *supra* note 280.

<sup>283</sup> Roach and Smith, *Excessive Maritime Claims*, at 59, *supra* note 9.

<sup>284</sup> *Anglo–Norwegian Fisheries Case (United Kingdom v. Norway)*, ICJ Reports 1951, 116, at 132–133.

<sup>285</sup> Regarding the use of straight baselines, see Churchill and Lowe, *The Law of the Sea*, at 33–41, *supra* note 15. For a more detailed treatment, see O’Connell, *The International Law of the Sea Volume I*, at 171–229, *supra* note 14. For a review of current baselines claims, see Roach and Smith, *Excessive Maritime Claims*, at 57–133, *supra* note 9.

<sup>286</sup> Churchill and Lowe, *The Law of the Sea*, at 40, *supra* note 15, citing J. R. V. Prescott, ‘Straight and archipelagic baselines’ in G. Blake (ed.) *Maritime Boundaries and Ocean Resources* (Groom Helm: London, 1987), 38–51 at 38.

<sup>287</sup> Churchill and Lowe, *The Law of the Sea*, at 32, *supra* note 15.

<sup>288</sup> W. Michael Reisman and Gayl S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (St Martin’s Press: New York, 1992) at 105.

<sup>289</sup> Churchill and Lowe, *The Law of the Sea*, at 32, *supra* note 15.

<sup>290</sup> Roach and Smith, *Excessive Maritime Claims*, at 72, see also fn. 67, *supra* note 9.



sea as internal waters'.<sup>291</sup> To the common user of the sea this has no practical difference, but the rights a coastal State enjoys on internal waters differ from the rights enjoyed on the territorial sea.

### 4.3. Internal Waters

Pursuant to Article 8 of the LOSC, waters which lie landward from baselines are called internal waters.<sup>292</sup> Internal waters also include lakes and rivers, which form part of the land territory of the State.<sup>293</sup> However, Article 7(3) of the LOSC states that sea areas within straight baselines must be sufficiently closely linked to the land to be internal waters. Within their internal waters coastal States enjoy full sovereignty as expressed in Article 2(1) of the LOSC.

To the recreational user of the seas, the difference between internal waters and territorial sea is hardly seen in real life and makes no practical difference. Internal waters usually comprise bays, estuaries, ports and other waters enclosed by straight baselines, which are common destinations for recreational use.<sup>294</sup> However, according to Professor Ian Brownlie, 'for purposes of international law the distinction between internal waters and territorial sea is important, in spite of the fact that the legal interest of the coastal State amounts to sovereignty in either case'.<sup>295</sup> This conclusion is probably based on the absence of right for innocent passage within internal waters. Pursuant to Article 17 of the LOSC, innocent passage is limited to the territorial sea. Although recreational and commercial vessels flying foreign flags visit ports around the world on a regular basis, the sovereignty that coastal States enjoy over ports and internal waters implies that there is no inherent right of innocent passage for foreign flagged vessels to enter these zones.<sup>296</sup> According to Churchill and Lowe the only exception to this rule in customary law is in the case of distress, for example if a ship needs to enter a port within internal waters in order to preserve human life.<sup>297</sup>

For foreign flagged vessels, the most important consequence of entering a foreign port is that the ships put themselves within the territorial jurisdiction of the coastal State, thus

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<sup>291</sup> Churchill and Lowe, *The Law of the Sea*, at 41, *supra* note 15.

<sup>292</sup> For a commentary of Article 8, see Nordquist (et al.) (eds), *UNCLOS: A Commentary*, Vol. II, at 104–108, *supra* note 280.

<sup>293</sup> Brownlie, *Principles of Public International Law*, at 116, *supra* note 138 and O'Connell, *The International Law of the Sea Volume I*, at 338, *supra* note 14. For a more thorough review of the concept of internal waters, see Churchill and Lowe, *The Law of the Sea*, at 60–70, *supra* note 15; O'Connell, *The International Law of the Sea Volume I*, at 338–388, *supra* note 14 and Nordquist (et al.) (eds), *UNCLOS: A Commentary*, Vol. II, at 64–74, *supra* note 280.

<sup>294</sup> Churchill and Lowe, *The Law of the Sea*, at 60, *supra* note 15.

<sup>295</sup> Brownlie, *Principles of Public International Law*, at 117, *supra* note 138. Brownlie also points out that the term 'territorial waters' is sometimes confusing because it is occasionally used in domestic legislation to describe internal waters. Moreover, for the general public this mix up is rather common. See *ibid.*, at 173.

<sup>296</sup> Churchill and Lowe, *The Law of the Sea*, at 61, *supra* note 15.

<sup>297</sup> *Ibid.*, at 63. See further A. V. Lowe, 'The Right of Entry into Maritime Ports in International Law', 14 *San Diego Law Review*, no. 1 (1977) 597–622.

entitling the coastal State to enforce its laws against the ships and those on board.<sup>298</sup> The right of the coastal State to prescribe conditions for access to their ports is regarded as a rule of custom.<sup>299</sup> While the coastal State can exercise control over its ports as an indirect means to control activities that affect shipwrecks and UCH, a strong presumption still exists that ‘designated ports are open to foreign vessels in the absence of express provisions to the contrary made by the port State’.<sup>300</sup> Freedom of access to maritime ports by all ships, and the equal treatment of all ships, is guaranteed by the 1923 Convention and Statute on the International Regime of Maritime Ports.<sup>301</sup> Article 2 of the Statute requires every contracting State to grant the vessels of every other contracting State equality of treatment with its own vessels. However, port States still have the right to prescribe conditions of entry, as long as all ships, regardless of nationality, are treated equally. Therefore a coastal State can make ‘entry to its ports dependent on conditions concerning the removal of underwater cultural property,’ and ‘its permission will be required for archaeological operations conducted from its ports, even when the latter take place in international waters’.<sup>302</sup>

All ships are dependent on the use of ports, and the success of underwater operations depends to a large extent upon using these ports for service, shelter and as a base of operation.<sup>303</sup> The use of port control is not limited to archaeological operations, and it can be used on every matter the port State has an interest in.<sup>304</sup> Even if the coastal State does not have the possibility to extend its laws to cover sites such as sunken warships or other shipwrecks beyond the territorial sea, its port control can ensure a substantial degree of control on a practical level — assuming that the port State is aware of the operations that ships entering its ports have engaged in.<sup>305</sup> Port control can thus provide *ex post facto*<sup>306</sup> means to control access

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<sup>298</sup> Churchill and Lowe, *The Law of the Sea*, at 65, *supra* note 15. However ‘[m]atters solely relating to the “internal economy” of the ship tend in practice to be left to the authorities of the flag State’. See *ibid.*, at 66.

<sup>299</sup> For a discussion regarding the access to ports, see further Strati, *UCH: An Emerging Objective*, at 113–114 and fn. 6–7, *supra* note 19. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Judgement) ICJ Reports 1986, 14, at 111 para. 213 where the Court recognised that it is ‘by virtue of its sovereignty that the coastal State may regulate access to its ports’. At the same time the Court recognised that ‘[o]n the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters’, see *ibid.*, at 111 para. 214. What follows is that ‘any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for maritime navigation’, see *ibid.*, at 111–112 para. 214.

<sup>300</sup> Strati, *UCH: An Emerging Objective*, at 136, fn. 7, *supra* note 19.

<sup>301</sup> Convention and Statute on the International Regime of Maritime Ports, 9 December 1923, in force 26 July 1926, 58 LNTS 285. The Convention and Statute is ratified by all coastal States in the Baltic Sea with the exception of Lithuania. See also Paris Memorandum of Understanding on Port State Control, 26 January 1982, in force 1 July 1982, 38th amendment in force 1 July 2015. Available at <[www.parismou.org](http://www.parismou.org)>. The Paris MoU has 27 participating States including all coastal States in the Baltic Sea. Pursuant to the Paris MoU the 27 participating Maritime Authorities agree to implement a harmonised system of port control.

<sup>302</sup> Strati, *UCH: An Emerging Objective*, at 132, *supra* note 19.

<sup>303</sup> *Ibid.*, at 113.

<sup>304</sup> *Ibid.*, at 114.

<sup>305</sup> *Ibid.*

<sup>306</sup> Latin, ‘retroactively’ or ‘after the fact’.

to sunken warships and other shipwrecks, in the event that the operating vessel enters a port of the coastal State. Because the Baltic Sea and the Gulf of Finland are relatively small areas, the use of local ports is unavoidable. However, an effective regime would require consistency and cooperation between States, because port control is only effective if the legislation is uniform and there are no safe havens where protective legislation is weaker.

#### 4.4. Territorial Sea

One of the oldest concepts in the history of the law of the sea is the territorial sea. The early practice and developments regarding the territorial sea were more concerned with the water column than with submerged areas or the seabed,<sup>307</sup> but the acceptance of some kind of coastal State sovereignty over a belt of water seawards from the coastline has been recognised for hundreds of years.<sup>308</sup> This perception of sovereignty was traditionally based on the theory that the territorial sea is the property of the coastal State, acquired by the processes of occupation and embodied in the exercise of power from the shore via the ‘cannon-shot rule’ and other forms of constructive presence.<sup>309</sup> Before the breadth of the territorial sea was finally agreed upon in UNCLOS III, most States accepted three nautical miles as the customary rule of international law. While the three-nautical-mile limit is generally thought to originate from the cannon-shot rule, O’Connell proposed that, ‘[i]n the present state of historical research the relationship between the cannon-shot rule and the three-mile limit in its genesis cannot be satisfactorily explained’.<sup>310</sup> However, this view can be contested to some extent:

In 2014 the Vasa Museum tested a replica lightweight 24-pounder cannon, and with the powder used, the maximum calculated range was 4 200 metres, which is a little over two nautical miles. However, this required elevating the gun to 40 degrees from the horizontal, which is not possible with the type of carriage and gun port arrangement used on ships. Shore batteries could elevate their guns much more, and sometimes chose to do so in order to achieve plunging fire — shot which fell straight down onto the target rather than coming in from the side. The 2014 tests showed that the spread of shot at 1 000 metres was in a circle about 18 metres in diameter, so at 5 ½ times that distance — three nautical miles — a more than six times larger circle would be expected due to an aerodynamic effect called the Magnus Effect, that causes the spread of round shot to expand like a trumpet rather than a cone. So if the circular error — as artilleryists call it — is 120 metres, and the shore artillery is shooting at a target 50 metres long and 50 metres tall (a typical ship at that time), the chance of hitting is less than 1 in 4 under optimum circumstances,

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<sup>307</sup> Strati, *UCH: An Emerging Objective*, at 138, fn. 17, *supra* note 19.

<sup>308</sup> For a discussion of the development and history of the territorial sea, see further O’Connell, *The International Law of the Sea Volume I*, at 59–229 and 260–298, *supra* note 14 and see Churchill and Lowe, *The Law of the Sea*, at 71–75, *supra* note 15.

<sup>309</sup> O’Connell, *The International Law of the Sea Volume I*, at 60, *supra* note 14. For a discussion of the cannon-shot rule, see further *ibid.*, at 124–129. For the history of the cannon-shot rule, see especially H. S. K. Kent, ‘The Historical Origins of the Three-Mile Limit’, 48 *American Journal of International Law*, no. 4 (1954) 537–553; Wyndham L. Walker, ‘Territorial Waters: The Cannon Shot Rule’ in H. Lauterpacht (ed.) 22 *The British Yearbook of International Law* (Oxford University Press: Oxford, 1945), 210–231.

<sup>310</sup> O’Connell, *The International Law of the Sea Volume I*, at 129, *supra* note 14.

before one takes into account factors such as visibility, movement of the target and human factors in loading and aiming. The range of guns varied with a lot of different factors, such as size, length of barrel, type of powder, type of shot and size of charge. Surviving gunners' tables from the late 16th and early 17th centuries indicate that at maximum elevation of 40 degrees, heavier guns could readily send a shot more than 3 nautical miles (5 556 metres), although accuracy at that distance was questionable. Generally speaking, a larger gun has a longer potential range than a smaller gun, since the larger ball has less surface area to produce resistance for its mass than a smaller ball. Still, if a shore battery could fire enough rounds, ships within three nautical miles were at risk, and the three-nautical-mile limit became a practical buffer for ships sailing off a potentially hostile shore.<sup>311</sup>

It has been clearly demonstrated that shore batteries could reach distances of over three nautical miles, and that this was roughly the maximum belt of water that coastal States could effectively control — at least around the coastal areas and ports where shore batteries were present. It can be reasonably assumed that the three-nautical-mile limit was indeed based on the distance that coastal States could effectively protect from the shore.

Nordic States such as Sweden and Finland deviated from the traditional cannon-shot rule and adopted the fixed distance of a Scandinavian league of four nautical miles regardless of the actual presence of shore-based batteries.<sup>312</sup> According to Wyndham L. Walker, 'in the case of both the four mile and the three mile limit the standard was taken without any conscious reference to cannon range what[so]ever, [but] simply as one league — a general primary and convenient standard of measurement at sea'.<sup>313</sup> The Scandinavian approach was thus based on a practical measurement instead of an assumed range of a cannon shot.

In the 1950s the three-nautical-mile limit had gained widespread acceptance, but in practice most claims varied between three and twelve nautical miles.<sup>314</sup> Furthermore, when the limits of the territorial sea was discussed by the ILC, most members were of the opinion that no customary rule existed fixing the breadth of the territorial sea, and that there were no modern principles from which it could be logically derived.<sup>315</sup> The view expressed by Professor Alphonse Gidel on this matter is apt: there was only a rule in the negative sense, that the validity of claims of up to three nautical miles could not be denied.<sup>316</sup>

The first steps towards codification were taken in 1930 when The Hague Conference for the Codification of International Law discussed, among other things, the breadth of the

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<sup>311</sup> This paragraph is a summary from correspondence with the Director of Research at the Vasa Museum, Dr Fred Hocker. Personal correspondence on file with the author.

<sup>312</sup> Walker, *Territorial Waters: The Cannon Shot Rule*, at 228, *supra* note 309 and Churchill and Lowe, *The Law of the Sea*, at 77, *supra* note 15.

<sup>313</sup> Walker, *Territorial Waters: The Cannon Shot Rule*, at 228, *supra* note 309.

<sup>314</sup> See the table and report of J. P. A. François in *Yearbook of the International Law Commission*, vol. II (1952) at 26–49 and table at 29–30.

<sup>315</sup> O'Connell, *The International Law of the Sea Volume I*, at 161, *supra* note 14 and *Yearbook of the International Law Commission*, vol. I (1950) at 204–207.

<sup>316</sup> Churchill and Lowe, *The Law of the Sea*, at 79, *supra* note 15 citing Gilbert Gidel, *Le droit international public de la mer*, Volume III (Méllotée, Châteauroux: Paris, 1934 reprinted in 1981 by Topos Verlag, Vaduz) at 134.

territorial sea. The Bases for Discussion No. I stated that a '[S]tate possesses sovereignty over a belt of sea round its coasts; this belt constitutes its territorial waters'.<sup>317</sup> However the Conference was not able to agree upon a convention on the territorial sea, nor was it able to agree upon the breadth of the territorial sea.

In 1958, UNCLOS I was also unable to define the breadth of the territorial seas. However, it did succeed in codifying rules regarding the territorial sea and the contiguous zone in the TSC. It was not until UNCLOS III that international efforts to stabilise the maximum limits of the territorial sea succeeded — a process that was made easier by the acceptance by the United States and the Soviet Union to hold territorial sea claims to twelve nautical miles.<sup>318</sup> Pursuant to Article 3 of the LOSC, every State has the right to establish a territorial sea up to a limit not exceeding twelve nautical miles, measured from baselines.<sup>319</sup>

Nowadays coastal State sovereignty over the territorial sea, as expressed in Article 2 of the LOSC, has become a fundamental principle of the law of the sea:

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.<sup>320</sup>

The LOSC and international law recognise the sovereignty of coastal States, but they do not 'determine the extent and the degree of the authority that each sovereign exercises in the territorial sea'.<sup>321</sup> Thus it is up to domestic legislation to determine the extent and form of jurisdiction that a coastal State wishes to exercise in the territorial sea. However in practice, the laws that apply on internal waters also apply on the territorial sea. Inside their territorial waters coastal States have full jurisdictional powers when it comes to regulating activities towards UCH and shipwrecks. There are two commonly applied approaches: some coastal States generally apply and extend the cultural heritage legislation of land archaeology to cover underwater sites; other coastal States, such as in the Baltic region and especially in the Nordics,

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<sup>317</sup> Reproduced in Jesse S. Reeves, 'The Codification of the Law of Territorial Waters', 24 *The American Journal of International Law*, no. 3 (1930) 486–499 at 490. Regarding the attempts to agree upon a convention at the Conference, see *ibid.* Regarding the Conference in general, see Shabtai Rosenne, *League of Nations Conference for the Codification of International Law (1930)* (Oceana Publications: New York, 1975).

<sup>318</sup> O'Connell, *The International Law of the Sea Volume I*, at 164, *supra* note 14.

<sup>319</sup> For a commentary of Article 3, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 75–82, *supra* note 280. Article 15 sets out rules on the delimitation of the territorial sea between States with opposite or adjacent coasts. See further *ibid.*, at 132–143.

<sup>320</sup> For a commentary of Article 2, see *ibid.*, at 64–74.

<sup>321</sup> Strati, *UCH: An Emerging Objective*, at 119, *supra* note 19.

have adopted relatively uniform cultural heritage laws and special legislation dealing specifically with UCH.<sup>322</sup>

For security reasons, virtually all coastal States have issued legislation that requires a licence to be obtained, and prior notification to be given, for survey activities within their territorial sea. For example in Finland, pursuant to Section 12 of the Territorial Surveillance Act, exploration of the formation, structure or composition of the seabed or sediments through geological or geophysical surveys, and systematic measurement and recording of the topography of the sea bottom, are not allowed within the Finnish territorial waters without permission.<sup>323</sup>

#### 4.4.1. Innocent Passage

The only limitation to coastal State sovereignty is the right of innocent passage through the territorial sea as expressed in Article 17 of the LOSC.<sup>324</sup> Article 18 of the LOSC states that innocent passage must be ‘continuous and expeditious’, and exclude all kinds of ‘hovering’ for purposes other than stopping and anchoring insofar as it is incidental to ordinary navigation or rendered necessary by *force majeure* or distress.<sup>325</sup> ‘Innocent passage’ is defined in Article 19 of the LOSC, which also enumerates activities which would render passage not innocent.<sup>326</sup> Activities applicable to marine operations affecting shipwrecks and UCH would render passage not innocent, under the provisions of:

Article 19(2)(g) ‘the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State’;<sup>327</sup>

Article 19(2)(j) ‘the carrying out of research or survey activities’;<sup>328</sup> and

Article 19(2)(l) ‘any other activity not having a direct bearing on passage’.<sup>329</sup>

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<sup>322</sup> For the most recent studies on the national perspectives on UCH, see Dromgoole (ed.) *Legal Protection of the UCH: National and International Perspectives*, *supra* note 22 and Dromgoole (ed.) *Protection of the UCH: National Perspectives*, *supra* note 22.

<sup>323</sup> See Section 12 of Aluevalvontalaki (755/2000) with later amendments. An unofficial English translation is available at <[www.finlex.fi/fi/laki/kaannokset/2000/en20000755.pdf](http://www.finlex.fi/fi/laki/kaannokset/2000/en20000755.pdf)>.

<sup>324</sup> For a commentary of Article 17, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 151–157, *supra* note 280. For a discussion regarding the right of innocent passage, see further Churchill and Lowe, *The Law of the Sea*, at 81–92, *supra* note 15. For the purposes of this paper, only innocent passage as expressed in the LOSC will be covered. For a commentary on the differences between the LOSC and the TSC, see K. Hakapää and E. J. Molenaar, ‘Innocent passage – past and present’, 23 *Marine Policy*, no. 2 (1999) 131–145.

<sup>325</sup> For a commentary of Article 18, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 158–163, *supra* note 280.

<sup>326</sup> For a commentary of Article 19, see *ibid.*, at 164–178.

<sup>327</sup> Archaeological objects allow the interpretation of cultural property as a commodity because these objects can be valued in money and traded in commercial transactions. This should not however be seen as contradictory to the generally accepted principle among professional archaeologists that underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods. The fact that something *can* be valued in money or traded, does not mean that it *should* be. See Strati, *UCH: An Emerging Objective*, at 121–122, fn. 42–43, *supra* note 19.

<sup>328</sup> The language used in the paragraph is broad enough to include archaeological and any other form of underwater research. See *ibid.*, at 121.

Furthermore, pursuant to Article 21, coastal States may adopt laws and regulations — in conformity with the provisions of the LOSC and other rules of international law — relating to innocent passage.<sup>330</sup>

#### 4.4.2. Creeping Jurisdiction and Territorial Temptations

The phrase ‘creeping jurisdiction’ is often employed, especially by the big maritime powers, as a defence against the gradual extension of other States’ jurisdiction seawards from the coast.<sup>331</sup> E. D. Brown summarised the notion of creeping jurisdiction as the ‘belief that maritime jurisdictional rights granted for one purpose are likely to expand either *ratione loci* or *ratione materiae*<sup>332</sup> and that there is no guarantee that they will not “creep” out further into the high seas or that the freedom of navigation will not be further eroded’.<sup>333</sup>

The issue of creeping jurisdiction is clearly visible the further we depart from the territorial sea, and it is therefore closely associated with the protection of shipwrecks and UCH. Ninety per cent of the time, the location of shipwrecks on the seabed is a matter of pure coincidence. Furthermore, the maritime zones where sunken warships from the World Wars rest today did not even exist in their present form and extent at the time of the sinking. As a result the question is which State, if any, has jurisdiction over the ocean space where these wrecks rest on the seabed? Moreover, who has the right to regulate activities at these sites, if the location is beyond the territorial sovereignty of any State? The problem is that maritime boundaries are not based on any natural state of affairs, but result from man-made decisions. Unfortunately, shipwrecks do not care about man-made boundaries.

The protection of sunken warships and other forms of UCH has always been dependent on the location, rather than the nature, of the property. As the location on the seabed does not determine the interests States generally have on sunken warships, coastal and flag States alike

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<sup>329</sup> The language used in the paragraph is broad enough to include any kind of underwater and surface operations, as Article 18 of the LOSC makes clear that a passage that will engage in any kind of activities which are not incidental to ordinary navigation cannot be considered continuous and expeditious.

<sup>330</sup> Strati observed that ‘[t]here seems to be an inconsistency between [A]rticle 21 and [A]rticle 19(2). If [A]rticle 19(2) is interpreted so as to consider that the carrying out of marine scientific research during passage automatically renders it non-innocent, then the inclusion of marine scientific research in the list of [A]rticle 21, which enumerates the subjects on which the coastal State may adopt laws and regulations relating to innocent passage, is incomprehensible. Article 19(2) should therefore, be interpreted as specifying those activities with respect to which the presumption exists that they make passage non-innocent. The coastal State, however, may destroy this presumption and hold otherwise. Under this interpretation, a ship carrying out marine scientific research during passage through the territorial sea in accordance with coastal laws enabling such research or, in the absence of such laws, with prior express consent of the coastal State, is still exercising the right of innocent [sic] passage.’ See Strati, *UCH: An Emerging Objective*, at 148, fn. 44, *supra* note 19 and Alfred H. A. Soons, *Marine Scientific Research and the Law of the Sea* (T.M.C. Asser Instituut: The Hague, 1982) at 148.

<sup>331</sup> See further Kaye, *Security and Creeping Jurisdiction*, *supra* note 224 and John A. Knauss, ‘Creeping Jurisdiction and Customary International Law’, 15 *Ocean Development and International Law*, no. 2 (1985) 209–216.

<sup>332</sup> Latin, ‘by reason of the place’, and ‘by reason of the matter involved’.

<sup>333</sup> E. D. Brown, ‘Maritime Zones: A Survey of Claims’ in Robin Churchill, K. R. Simmonds, and Jane Welch (eds) *New Directions in the Law of the Sea, Volume III* (British Institute of International and Comparative Law: London, 1973), 157–192 at 172.

have been tempted to find ways to protect shipwrecks beyond their territorial waters through different forms of functional jurisdiction. Professor R. P. Anand noted there is always a risk that ‘exclusive rights for some purposes’ will easily transform into ‘exclusive rights for others, perhaps all purposes’.<sup>334</sup> The expansion of the breadth of the territorial sea from a general three nautical miles to twelve is still a relatively new change in international affairs. This, and the introduction of new maritime zones of functional jurisdiction has eroded the ambit of freedoms States can enjoy on the sea. Therefore big maritime States are against the fragmentation of the provisions of the LOSC, and are reluctant to make changes that would deviate from the consensus framework achieved during UNCLOS III.<sup>335</sup> This attitude was clearly present before and during the negotiations at UNESCO that lead to the adoption of the CPUCH in 2001.<sup>336</sup>

In 1995 UNESCO published a preliminary study on the advisability of preparing an international instrument for the protection of UCH.<sup>337</sup> On the basis of this study a group of experts was convened to debate the main issues of the proposal. The group was composed of people nominated by UNESCO, International Maritime Organization (IMO) and the United Nations Division of Ocean Affairs and Law of the Sea (DOALOS), along with observers sent by some States.<sup>338</sup> Garabello noted that ‘[u]nanimity was reached on the issue of the necessity of a new international instrument, while all other aspects proved to be very contentious’.<sup>339</sup> In other words, any attempts to elaborate the vague and ambiguous Article 303 of the LOSC beyond ‘mere repetition’ were resisted.<sup>340</sup> While the fears of creeping jurisdiction certainly have some justification, it is suggested that in practice the protection of shipwrecks hardly hampers the freedom of navigation or other traditional uses of the sea. As Strati observed:

With respect to archaeological objects, the creeping jurisdiction argument may be thought to have a basis in reality since the attribution of sovereign rights over archaeological objects is additional to the already existing rights over the natural resources of the continental shelf and the EEZ. This is clearly not the case for the following reasons: (a) underwater archaeological remains are inevitably connected with the continental shelf in that they are located on and under the seabed. Whatever the legal regime of their protection, it will ‘overlap’ with the continental shelf; (b) the continental

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<sup>334</sup> R. P. Anand, *Legal Regime of the Sea-Bed and the Developing Countries* (A. W. Sijthoff-Leyden: Leyden, 1976) at 110.

<sup>335</sup> See further Oxman, ‘The Territorial Temptation’, *supra* note 177.

<sup>336</sup> These issues are covered in-depth in Ariel W. Gonzalez, ‘Negotiating the Convention on Underwater Cultural Heritage’ in Roberta Garabello and Tullio Scovazzi (eds) *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff Publishers: Leiden, 2003), 83–88.

<sup>337</sup> Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, Paris, 4 October 1995, UNESCO Doc. 28C/39.

<sup>338</sup> Roberta Garabello, ‘The Negotiating History of the Provisions of the Convention on the Protection of Underwater Cultural Heritage’ in Roberta Garabello and Tullio Scovazzi (eds) *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff Publishers: Leiden, 2003), 89–192 at 90.

<sup>339</sup> *Ibid.*, at 91. See further Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage, Paris, 22–24 May 1996, UNESCO Doc. CLT-96/CONF.605/6.

<sup>340</sup> Gonzalez, *Negotiating the Convention on Underwater Cultural Heritage*, at 84, *supra* note 336.



shelf regime itself, introduced by Truman's Proclamation, was a departure from the freedom of the high seas, which presumably covered the vast ocean areas beyond the territorial sea boundary. The emergence of the need to protect and preserve the underwater cultural heritage should likewise have resulted in the enunciation of a legal regime shaped upon its nature and needs. Claims are creeping forward in any event. A major advantage of the conventional establishment of jurisdictional zones is that these trends are held to a reasonable limit. If a jurisdictional [sic] zone is well defined and the attributed rights properly specified, the possibilities of 'creeping' jurisdiction are minimised and the prospects of a minimum public order of the oceans are increased. The attribution of jurisdiction alone would not turn the continental shelf into a territorial zone.<sup>341</sup>

In light of the notion of State ownership and sovereign immunity of sunken warships, the views expressed by Strati are convincing. Nothing suggests that the ideology behind the Truman Proclamations could not be applied to the extension of some flag State rights over sunken warships or UCH. In this application, a strong element of reciprocity would exist in the form of recognition of the rights of other States over their sunken warships; all States would have the right to adopt corresponding policies; and the flag State could not assert any rights to sunken warships of other States. If this logic is applied solely to sunken warships, the *ratione materiae* is very limited and narrow.

#### 4.4.3. Analysis

Extensions to the breadth of the territorial sea were made in order to bring a stop to creeping jurisdiction. However, these extensions have made many maritime nations wary of any further future increases to coastal State jurisdiction. Regarding the protection of sunken warships and UCH in general, port control can have substantial impact even on underwater operations beyond the territorial sea. Furthermore the undertaking of any kind of research activities during passage automatically renders the passage non-innocent, because archaeological research cannot be justified either as an exercise of the freedom of navigation or as any related use of the sea.<sup>342</sup> The protection of shipwrecks in general within territorial waters under the sovereignty of a coastal State does not create considerable problems under international law.<sup>343</sup> However, issues may emerge when a sunken warship is found within the territorial limits of a State other than the flag State, if these States do not or cannot cooperate. International conflicts are likely to be caused by States that wish to expand the extent of domestic legislation beyond the current territorial limits. In principle these States are assumed to expand the ambit of protection to the same legislative extent that has been adopted within the domestic legal framework. This means that a shipwreck outside of the territorial sea would be protected on the same grounds and legal basis as a shipwreck within territorial waters. These bases are mostly founded on domestic policies shaped by political and historical matters of individual

<sup>341</sup> Strati, *UCH: An Emerging Objective*, at 192, fn. 30, *supra* note 19.

<sup>342</sup> *Ibid.*, at 286, fn. 76.

<sup>343</sup> *Ibid.*, at 132, generally regarding protection of UCH within maritime zones under sovereignty of the coastal State, see 113–134.

States. It is likely that these policies will also dictate how States will act in the international arena. States' international relations and diplomacy policies regarding UCH and sunken warships are easier to understand from a domestic perspective. It is highly unlikely that a State would try to enforce policies or other ambitions internationally, if they are not part of the domestic agenda or legislation. While Nordic heritage laws share the same background, they differ mostly in the definitions of cultural property that is entitled to protection. For example, Finland has adopted 100 years as the cut-off point for protection, while Sweden protects objects from the year 1850 or earlier — the same policy they apply on land. Thus protection practice is far from uniform.<sup>344</sup> However the domestic approach can make a difference if the coastal State wishes to exercise the rights granted by Article 303(2) of the LOSC regarding archaeological and historical objects in the contiguous zone.

#### 4.5. Contiguous Zone

The contiguous zone is a zone seaward of the territorial sea where the coastal State can exercise certain measures of control necessary to prevent and punish infringements of its customs, fiscal, immigration or sanitary laws that take place within its territory or territorial sea.<sup>345</sup> The contiguous zone is not subject to coastal State sovereignty and all vessels and aircraft enjoy the high seas freedoms of navigation, overflight and other internationally lawful uses of the seas.

O'Connell described the contiguous zone as 'the product of a nineteenth-century notion that a coastal State had jurisdiction beyond its territorial sea for the purpose of protecting its revenue against smuggling and its public health against disease'.<sup>346</sup> Historically the concept of the contiguous zone dates back to the 18th century when Great Britain enacted 'Hovering Acts' in order to control and fight foreign smuggling within a distance of eight leagues (i.e. 24 nautical miles) from the shore.<sup>347</sup> From that time till the 20th century, State practice regarding the concept and acceptance of the contiguous zone has varied.<sup>348</sup> Churchill and Lowe observed that in Europe several States did not claim territorial seas, but rather, a variety of jurisdictional

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<sup>344</sup> For an illustrative list on the time limits provided by domestic heritage legislation as it stood in 1994, see *ibid.*, at 179.

<sup>345</sup> For a commentary of Article 33, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 266–275, *supra* note 280. For the development and history of the concept, see Churchill and Lowe, *The Law of the Sea*, at 132–140, *supra* note 15 and A. V. Lowe, 'The Development of the Concept of the Contiguous Zone' in Robert Y. Jennings and Ian Brownlie (eds) 52 *British Yearbook of International Law* (Oxford University Press: Oxford, 1982), 109–169. For an interpretation of Article 24 of the TSC, see Alan M. Frommer, 'The British Hovering Acts: A Contribution to the Study of the Contiguous Zone', 16 *Revue Belge de droit international*, no. 2 (1981–82) 435–458; Gerald Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea: Part I – The Territorial Sea and Contiguous Zone and Related Topics', 8 *International and Comparative Law Quarterly*, no. 1 (1959) 73–121 at 108–121.

<sup>346</sup> O'Connell, *The International Law of the Sea Volume II*, at 1034, *supra* note 14.

<sup>347</sup> Churchill and Lowe, *The Law of the Sea*, at 132, *supra* note 15. However according to O'Connell the British smuggling legislation did not at first refer to any limits or distance from the shore, see O'Connell, *The International Law of the Sea Volume II*, at 1034, *supra* note 14.

<sup>348</sup> Regarding State practice and history up until the UNCLOS I, see especially Lowe, *The Development of the Concept of the Contiguous Zone*, *supra* note 345 and O'Connell, *The International Law of the Sea Volume II*, at 1034–1061, *supra* note 14.

zones mostly concerned with fiscal matters, fisheries or customs where the ‘width of each zone was fixed at whatever distance the State concerned thought it was necessary for the purpose for which that zone was established’.<sup>349</sup> These authors also identified three main approaches used in the early part of the 20th century to the issue of coastal State jurisdiction beyond the widely accepted three-nautical-mile territorial sea. First, there were States that denied the existence of such a jurisdiction; second, there were States that claimed a variety of jurisdictional zones; and third, there were States that claimed jurisdictional zones distinct from the territorial sea for a specific purpose such as security or customs.<sup>350</sup>

In the 1920s the idea and concept of the contiguous zone was taken up by the ‘learned societies’.<sup>351</sup> The first attempts to codify the rules regarding the contiguous zone were taken at the 1930 Hague Conference for the Codification of International Law. The proposal for the contiguous zone was not well received and the Conference was unable to reach any agreement due to two major obstacles. As Lowe observed, the first obstacle was ‘that extended jurisdiction should be limited, in essence, to the control necessary to secure compliance with coastal laws within territorial waters: in other words, that the zone had as its *raison d’être* [French, ‘reason for existence’] the establishment of enforcement, not legislative, jurisdiction’.<sup>352</sup> The second obstacle was that some States believed that the zone should be an area of the high seas, implying the freedom of navigation. This meant that ‘any agreement upon the establishment of a contiguous zone would therefore have had to settle the question of the limit of territorial sea as well’.<sup>353</sup> Because the Conference failed to reach an agreement on the limit of the territorial sea, there was no way to draw clear lines between the two zones.<sup>354</sup>

#### 4.5.1. Development of the Current Rules

During the years following the 1930 Hague Conference, an increasing number of States adopted the contiguous zone in their practice and the concept became clearly distinguished from the territorial sea.<sup>355</sup> According to Lowe, State practice during the years 1930–1958 indicate that ‘States thought themselves entitled to extend legislative and enforcement jurisdiction alike, for limited purposes, into the contiguous zone’.<sup>356</sup> However, the views of prominent authors such as Gidel, Fitzmaurice, and Lauterpacht, along with State practice, differed on the nature of the zone — namely whether it was one of enforcement jurisdiction only or an extension of legislative jurisdiction of the coastal State. The issues regarding the

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<sup>349</sup> Churchill and Lowe, *The Law of the Sea*, at 132, *supra* note 15.

<sup>350</sup> *Ibid.*, at 134.

<sup>351</sup> *Ibid.*, at 135. See also Lowe, *The Development of the Concept of the Contiguous Zone*, at 141–145, *supra* note 345 and O’Connell, *The International Law of the Sea Volume II*, at 1052–1053, *supra* note 14.

<sup>352</sup> Lowe, *The Development of the Concept of the Contiguous Zone*, at 139, *supra* note 345.

<sup>353</sup> *Ibid.*, at 139–140.

<sup>354</sup> *Ibid.*, at 140.

<sup>355</sup> *Ibid.*, at 157.

<sup>356</sup> *Ibid.*

legislative and enforcement jurisdictions that coastal States could enjoy in the contiguous zone were also debated in-depth at the ILC when the Commission was preparing its draft articles for UNCLOS I.<sup>357</sup> Regardless of the different opinions, there was evidently sufficient support for the concept of the contiguous zone in the practice of States for UNCLOS I to consider its adoption.<sup>358</sup> Interestingly, Lowe also observed that there was no detailed discussion at the Conference of the juridical nature of the contiguous zone, and ‘the debates centred upon attempts to widen the list of interests which could be protected within it, and the relation between the width of the zone and the width of the territorial sea’.<sup>359</sup> Article 24 of the TSC provided that:

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
  - (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
  - (b) Punish infringement of the above regulations committed within its territory or territorial sea.
2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.
3. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.

The text suggests that the intention of the Conference was to establish only the right of coastal States to enforcement jurisdiction.<sup>360</sup> If Article 24 ascribes only enforcement jurisdiction to the coastal State, it follows that enforcement action can only be taken ‘in respect of offences committed within the territory or territorial sea of a State, not in respect of anything done within the contiguous zone itself’.<sup>361</sup> In other words, if the coastal State could not legislate within the contiguous zone, it has no applicable legislation to enforce and thus ‘the “crimes” in relation to which the powers of prevention and punishment are given to the coastal State must be committed within the territory or territorial sea of the coastal State’.<sup>362</sup> Churchill and Lowe observed that this seemed to be the intention of UNCLOS I. Any other interpretation would have suggested extending coastal jurisdiction in such a way that the freedom of the high seas would have been attenuated. During UNCLOS III two significant

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<sup>357</sup> Regarding the preparatory work of the ILC, see further *ibid.*, at 159–164.

<sup>358</sup> *Ibid.*, at 158–159.

<sup>359</sup> *Ibid.*, at 164.

<sup>360</sup> *Ibid.*, at 165. See also Churchill and Lowe, *The Law of the Sea*, at 137, *supra* note 15.

<sup>361</sup> Churchill and Lowe, *The Law of the Sea*, at 137, *supra* note 15.

<sup>362</sup> Lowe, *The Development of the Concept of the Contiguous Zone*, at 167, *supra* note 345.

changes were introduced to the new Article 33 of the LOSC; however, the list of purposes followed Article 24 of the TSC verbatim. Pursuant to Article 33 of the LOSC:

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
  - (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
  - (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>363</sup>

The first significant difference between the Conventions, was that under the TSC the contiguous zone was ‘a zone of the high seas contiguous to [...] territorial sea’ but Article 33 expresses it as ‘a zone contiguous to [...] territorial sea’. Thus if the coastal State has not declared an EEZ the contiguous zone is part of the high seas regime. If the coastal State *has* declared an EEZ, then the contiguous zone will become a part of the EEZ, and the legal regime associated with the EEZ will be applied instead of the regime of the high seas.<sup>364</sup> In the Baltic Sea, all coastal States have claimed an EEZ, and so the regime of the EEZ is applicable.<sup>365</sup> A strict reading of Article 33 makes this distinction important because coastal State jurisdiction over the contiguous zone pertains only to the waters above the seabed. If the coastal State has declared an EEZ, the seabed will fall under the *sui generis*<sup>366</sup> regime of the EEZ, rather than sharing the legal status of the continental shelf. This has now increased the difficulty of resolving the problem of the legal status of the contiguous zone.<sup>367</sup> Furthermore, Article 33(1) contains no reference to the internal waters, but it is reasonable to consider that internal waters are included in the ambit of ‘territory’.<sup>368</sup>

Another significant difference between the Articles was the omission of any provisions corresponding Article 24(3) of the TSC on the delimitation of the contiguous zone between adjacent States. A dispute arising out of conflicting claims by States whose coasts are opposite or adjacent to each other will be subject to the dispute settlement provisions of Part XV of the LOSC. Caflisch suggested that problems should be resolved, preferably, by analogy to Article

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<sup>363</sup> For a commentary of Article 33, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 266–275, *supra* note 280.

<sup>364</sup> Gavouneli, *Functional Jurisdiction in the Law of the Sea*, at 3, *supra* note 138.

<sup>365</sup> See *infra* note 447 for a chronological list of EEZ claims.

<sup>366</sup> Latin ‘of its own kind’.

<sup>367</sup> Churchill and Lowe, *The Law of the Sea*, at 139, *supra* note 15.

<sup>368</sup> Tanaka suggested that ‘it would be inconceivable that the drafters of this provision had an intention to exclude the internal waters from the scope of this provision since these waters are under the territorial sovereignty of the coastal State. Thus it appears to be reasonable to consider that internal waters are also included in the scope of “its territory or territorial sea”’. See Tanaka, *The International Law of the Sea*, at 122, *supra* note 214.

15 of the LOSC on the delimitation of the territorial sea.<sup>369</sup> Somewhat by contrast a group of experts chaired by Satya N. Nandan noted that:

There is no provision in the [LOSC] for the delimitation of contiguous zones. Such a zone cannot, by definition, be extended into the territorial sea of another [S]tate. Since the nature of control to be exercised in the contiguous zone does not create any sovereignty over the zone or its resources, it is possible for two [S]tates to exercise control over the same area if their zones should overlap, for the purpose of prevention of or punishment for infringement of their respective customs, fiscal, immigration or sanitary laws and regulations within their respective territories or territorial sea.<sup>370</sup>

Even though the *ratione materiae* of the contiguous zone has not been changed by Article 33 of the LOSC, it is apparent that the legal status of the coastal State jurisdiction over the contiguous zone is still not free from controversy. A restrictive interpretation of Article 33 arrives at the same conclusion as the interpretation of Article 24 of the TSC: that ‘the coastal State has only enforcement jurisdiction in its contiguous zone and, consequently, action of the coastal State may only be taken concerning offences committed within the territory or territorial sea of the coastal State, not in respect of anything done within the contiguous zone itself’.<sup>371</sup> As a result the laws and regulations of the coastal State are not extended to its contiguous zone, which means that any infringement of municipal laws of the coastal State within the contiguous zone is outside the scope of this provision. According to a more liberal view supported by Judge Shigeru Oda and Professors O’Connell and Ivan Shearer, the coastal State could regulate the violation of its municipal law within the contiguous zone for some limited purposes.<sup>372</sup>

The LOSC does not contain specific requirements for how notice is to be given of the establishment of a contiguous zone. Nevertheless, a contiguous zone is not automatically ascribed to coastal States, so a formal establishment declaration is needed.<sup>373</sup> Nordquist suggests that a notice of some sort in most cases ‘will probably be performed through some legislative act, the publication and notification of which will be left to the State promulgating

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<sup>369</sup> Lucius Caflisch, ‘The Delimitation of Marine Spaces Between States With Opposite or Adjacent Coasts’ in René-Jean Dupuy and Daniel Vignes (eds) *A Handbook on the New Law of the Sea, Volume I* (Martinus Nijhoff Publishers: Dordrecht, 1991), 425–499 at 442–445.

<sup>370</sup> Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 273–274, *supra* note 280 citing Commonwealth Expert Study Group on Maritime Issues, *Ocean management, a regional perspective : the prospects for Commonwealth maritime co-operation in Asia and the Pacific. Report by a Commonwealth Group of Experts* (Commonwealth Secretariat: London).

<sup>371</sup> Tanaka, *The International Law of the Sea*, at 122–123, *supra* note 214. This restrictive view was supported by Fitzmaurice, see further Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea’, at 113–115, *supra* note 345.

<sup>372</sup> See further Shigeru Oda, ‘The Concept of the Contiguous Zone’, 11 *International and Comparative Law Quarterly*, no. 1 (1962) 131–153 at 153. See also O’Connell, *The International Law of the Sea Volume II*, at 1060, *supra* note 14 and I. A. Shearer, ‘Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels’, 35 *International and Comparative Law Quarterly*, no. 2 (1986) 320–343 at 330.

<sup>373</sup> See e.g., Churchill and Lowe, *The Law of the Sea*, at 135, *supra* note 15 and Mariano J. Aznar, ‘The Contiguous Zone as an Archaeological Maritime Zone’, 29 *International Journal of Marine and Coastal Law*, (2014) 1–51 at 48.

such legislation'.<sup>374</sup> It can be assumed, that a coastal State would always give due publicity to any claims or declarations regarding the contiguous zone. It seems that most, if not all, claims regarding the establishment of a contiguous zone have been published in the *Law of the Sea Bulletin* after some sort of formal proclamation.<sup>375</sup> It is up to the coastal State to determine the matters outlined in Articles 33 and 303(2) (i.e. customs, fiscal, immigration or sanitary laws) for which the contiguous zone will be established. For example, Section 3(1) of the Finnish Customs Act states that the customs territory of Finland extends two nautical miles beyond the outer limit of the territorial sea, unless otherwise agreed at international level.<sup>376</sup> As a result, Finland does not have a contiguous zone proper, but nevertheless this claim has been internationally recognised and the national customs authorities can supervise adherence of domestic customs regulations as provided by the Customs Act. This also limits enforcement solely to customs matters.

#### 4.5.2. Genesis of Marine Archaeology Within the Contiguous Zone

Historically the contiguous zone, as a water column regime prior to the adoption of the LOSC, remained irrelevant to marine archaeology and shipwrecks because the seabed was subject to principles excluding coastal State sovereignty — and shipwrecks are always on, or embedded in, the seabed. Article 303(2) of the LOSC, regarding the protection of objects of an archaeological and historical nature, extends the rights that coastal States already enjoy within the contiguous zone by virtue of Article 33. Article 303(2) was based on a proposal put forward by the Greek delegation to UNCLOS III in 1979 — and later amended several times by Greece and supported by Cape Verde, Italy, Malta, Portugal, Tunisia and Yugoslavia — which became known as the 'seven-State proposal'. The first version of the proposal concerned the EEZ and the continental shelf respectively:

- (a) The coastal State exercises sovereign rights over any object of purely archaeological or historical nature on the seabed and subsoil of its exclusive economic zone [or] on or under its continental shelf for the purpose of research and salvaging.
- b) However, regarding archaeological or historical objects originating from a State or country or from a State of cultural origin other than the coastal State, the State of the primary origin will have, in case of disposal, preferential rights.<sup>377</sup>

This proposal was amended and revised several times by the seven States. Every revised proposal suggested that coastal States would exercise, in various forms, sovereign rights over

<sup>374</sup> Nordquist (et al.) (eds), *UNCLOS: A Commentary*, Vol. II, at 274, *supra* note 280.

<sup>375</sup> See the *Law of the Sea Bulletins*, available at <[www.un.org/depts/los/doalos\\_publications/los\\_bult.htm](http://www.un.org/depts/los/doalos_publications/los_bult.htm)>. Aznar listed nine States that have unilaterally extended their archaeological competences over their contiguous zone without declaring it. See further Aznar, 'The Contiguous Zone as an Archaeological Maritime Zone', at 49, *supra* note 373.

<sup>376</sup> See Section 3(1) of Tullilaki (1466/1994) with later amendments. An unofficial English translation is available at <[www.finlex.fi/fi/laki/kaannokset/1994/en19941466.pdf](http://www.finlex.fi/fi/laki/kaannokset/1994/en19941466.pdf)>.

<sup>377</sup> Reproduced in Renate Platzöder (ed.) *Third United Nations Conference on the Law of the Sea, Volume V* (Oceana Publications: Dobbs Ferry, New York, 1984) at 526.

any object of purely archaeological or historical nature on the seabed and subsoil of their exclusive economic zones, or on or under their continental shelf for the purpose of research, protection, presentation and salvaging.<sup>378</sup> In the final revision of the proposal, the term ‘sovereign rights’ was changed to ‘jurisdiction’:

The coastal State may exercise jurisdiction, while respecting the rights of identifiable owners, over any object of an archaeological and historical nature on or under its continental shelf for the purpose of research, recovery and protection. However, particular regard shall be paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin, in case of sale or any other disposal, resulting in the removal of such objects out of the coastal State.<sup>379</sup>

However, this proposal received strong opposition, in particular from the Netherlands, the United Kingdom and the United States, and was not included in the next round of negotiations.<sup>380</sup> The US delegation tried to dissociate the issue of archaeological objects from the natural resource regime and introduced the idea of a general duty to protect archaeological objects found at sea. The US’s proposal read:

All States have the duty to protect objects of an archaeological and historical nature found in the marine environment. Particular regard shall be given to the State of origin, or the State of cultural origin, or the State of historical and archaeological origin of any objects of an archaeological and historical nature found in the marine environment in the case of sale or any other disposal, resulting in the removal of such objects from a State which has possession of such objects.<sup>381</sup>

Strati observed that the seven-State proposal and later amendments were rejected because there was fear that ‘the extension over the continental shelf of a set of rights which bore no relation to natural resources would favour creeping jurisdiction and alter overtime [sic] the conceptual character of the regime applicable to this area’.<sup>382</sup> This would have been problematic, especially because the negotiations on the continental shelf and EEZ were already concluded. According to Oxman the proposals in question,

were found objectionable on substantive grounds and because they would reopen negotiations on the substance of the economic zone and continental shelf regimes. Major maritime powers made clear that they could not accept a general extension to the continental shelf or economic zone of a set of coastal [S]tate rights that bore no relation to natural resources. They argued that over time it

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<sup>378</sup> Informal proposal by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia, UN Doc. A/CONF.62/C.2/Informal Meeting/43 (16 August 1979). See further Strati, *UCH: An Emerging Objective*, at 162–166, *supra* note 19 and cited literature and sources.

<sup>379</sup> UN Doc. A/CONF.62/C.2/Informal Meeting/43/Rev.3 (27 March 1980).

<sup>380</sup> Strati, *UCH: An Emerging Objective*, at 163, *supra* note 19. See also the second revised Informal Composite Negotiating Text (ICNT/Rev.2).

<sup>381</sup> UN Doc. A/CONF.62/GP.4 (27 March 1980). See further Oxman, ‘The Ninth Session (1980)’, at 240, *supra* note 241 and Strati, *UCH: An Emerging Objective*, at 164–165, *supra* note 19.

<sup>382</sup> Strati, *UCH: An Emerging Objective*, at 164, *supra* note 19.



could alter the conceptual character of the regimes applicable to those areas, a matter of particular importance in dealing properly with the question of allocating residual rights.<sup>383</sup>

Nevertheless, there seemed to be no opposition to ‘some enforcement powers’ over the contiguous zone, as long as ‘they were narrowly circumscribed and did not constitute a precedent’.<sup>384</sup> After it became clear that the acceptance of some powers existed, the problem then became how to expand the rights of the coastal State over the contiguous zone in such a way that the limited enforcement competence would not mount to legislative competence.<sup>385</sup> As a result UNCLOS III adopted a ‘presume the facts and leave the principle intact’ approach — a legal fiction.<sup>386</sup> Pursuant to Article 303(2):

In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.<sup>387</sup>

According to Oxman this approach ‘avoids the procedural and substantive risks and complications of a doctrinal change and in a special situation achieves with efficiency a generally desired result’.<sup>388</sup>

Strati suggests that the introduction of a 24-nautical-mile archaeological zone was nevertheless one of the main innovations of UNCLOS III, despite the limiting language of Article 303(2) and its departure from the initial proposal of Greece and supporting States.<sup>389</sup> In substance, she argues, far more extensive rights are recognised through ‘the combination of Article 303(1), which advocates the general duty to protect archaeological objects, and the fiction established by Article 303(2), allows the expansion of coastal legislation over the 24-mile zone’.<sup>390</sup> Despite the critique received by Article 303(2), other prominent authors are also of the opinion that this provision has in fact created an archaeological zone and that the provisions of Article 303(2) in combination with Article 33 have been superseded by normative action and State practice.<sup>391</sup> In contrast the more limited scope of Article 24 of the

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<sup>383</sup> Oxman, ‘The Ninth Session (1980)’, at 240, *supra* note 241.

<sup>384</sup> *Ibid.*

<sup>385</sup> *Ibid.*

<sup>386</sup> *Ibid.*, at 241. On legal fictions, see further Lon L. Fuller, *Legal Fictions* (Stanford University Press: Stanford, 1967). See also Kenneth Campbell, ‘Fuller on Legal Fictions’, 2 *Law and Philosophy*, no. 3 (1983) 339–370.

<sup>387</sup> For an analysis of Article 303(2), see Strati, *UCH: An Emerging Objective*, at 165–186, *supra* note 19. For a commentary of Article 303, see Nordquist (et al.) (eds), *UNCLOS: A Commentary*, Vol. V, at 158–162, *supra* note 231.

<sup>388</sup> Oxman, ‘The Ninth Session (1980)’, at 241, *supra* note 241.

<sup>389</sup> Strati, *UCH: An Emerging Objective*, at 328–329, *supra* note 19.

<sup>390</sup> *Ibid.*

<sup>391</sup> See especially Aznar, ‘The Contiguous Zone as an Archaeological Maritime Zone’, *supra* note 373. See also Strati, *UCH: An Emerging Objective*, at 159–186, *supra* note 19; Anastasia Strati, ‘Protection of the underwater cultural heritage: From the shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention’ in Anastasia Strati, Maria Gavouneli, and Nikolaos Skourtos (eds) *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Martinus Nijhoff Publishers: Leiden, 2006), 21–62 at 29–31. See also Petros Sioussiouras, ‘The contiguous zone as a mechanism for protecting the underwater

TSC made the establishment of any archaeological zone not permissible due to the limited number of purposes for which the zone could be established.<sup>392</sup>

#### 4.5.3. A Legal Fiction

Due to the restricted scope of Article 33 of the LOSC, Article 303(2) relies on a dual fiction in order to avoid any express statement of expansion to coastal State jurisdiction beyond the territorial sea. First, Article 303(2) assumes that the removal of archaeological and historical objects is to be regarded as an infringement of customs, fiscal, immigration or sanitary laws and regulations of the coastal State, which in practice have nothing to do with archaeological and historical objects. Second, it is assumed that the removal of archaeological and historical objects within the contiguous zone is to be considered as an act within the territory or the territorial sea of the coastal State. Nordquist explains this peculiar approach by reasoning that:

Article 303, on archaeological and historical objects found at sea, uses the expression ‘in applying article 33’ with regard to the control of traffic in objects of an archaeological and historical character found at sea. These words may appear ambiguous, but in light of the legislative history of article 303 probably do not require the coastal State to assert any rights of control under article 33 for the purpose of exercising its rights under article 303 [...]. The implication is that the coastal State’s rights of control under article 33 exists independently of its rights under article 303, and that there is no interrelationship between the two articles.<sup>393</sup>

Furthermore:

[Article 303(2)], in creating a presumption *juris et de jure*, deliberately does not use the term ‘contiguous zone’, which is the title of article 33. The duty and rights of the coastal State under article 303 are different in kind from those under article 33.<sup>394</sup>

The use of this fiction as a means of expanding coastal jurisdiction over archaeological and historical objects found in the 24-nautical-mile zone is the reason for the interpretation problems surrounding its precise scope and nature.<sup>395</sup> Article 303(2) empowers coastal States to treat the removal of such archaeological and historical objects from the seabed of the contiguous zone as if the objects were removed from the State’s territory or territorial sea. The coastal State would thus be able to exercise preventive or punitive control over the perpetrators in the contiguous zone. If a foreign ship has removed archaeological and historical objects

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cultural heritage’ in Anastasia Strati, Maria Gavouneli, and Nikolaos Skourtos (eds) *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Martinus Nijhoff Publishers: Leiden, 2006), 63–70. In contrast see, e.g., Jean Allain, ‘Maritime Wrecks: Where the Lex Ferenda of Underwater Cultural Heritage Collides with the Lex Lata of the Law of the Sea Convention’, 38 *Virginia Journal of International Law*, no. 4 (1997–1998) 747–776 at 756–758; Oxman, ‘Marine archaeology and the international Law of the Sea’, *supra* note 272. Allain rejected the idea of a 24-nautical-mile archaeological zone as too expansive and argues that the provision is only an example of creeping jurisdiction, whereas Oxman argued that Article 303(2) does not expand coastal State powers to the contiguous zone in any way but just permits the coastal State to establish a presumption of smuggling.

<sup>392</sup> Strati, *UCH: An Emerging Objective*, at 161, *supra* note 19.

<sup>393</sup> Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 275, *supra* note 280.

<sup>394</sup> Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. V*, at 161, *supra* note 231.

<sup>395</sup> Strati, *UCH: An Emerging Objective*, at 330, *supra* note 19.

from the seabed or subsoil of the contiguous zone, the coastal States would also, it seems, enjoy a right of hot pursuit under Article 111(1) of the LOSC. However, this right of hot pursuit would only apply in the case that the contiguous zone in question has been proclaimed for the protection of such archaeological or historical objects.<sup>396</sup>

Strati suggested two different ways to interpret Article 303(2): a grammatical interpretation and a teleological interpretation. Under the grammatical interpretation, she argues ‘the coastal State would be granted enforcement jurisdiction to control the removal of archaeological objects from the contiguous zone’.<sup>397</sup> Under the teleological interpretation, Article 303(2) establishes a 24-nautical-mile archaeological zone. However, the language ‘caters for both interpretations’, as Strati concluded.<sup>398</sup> Nevertheless, most authors seem to accept that the coastal State can in fact establish an archaeological zone by virtue of Article 303(2).

#### 4.5.4. Contiguous Zone as an Archaeological Zone

In his 2014 seminal article Professor Mariano Aznar studied conventional and unilateral State practice regarding the expansion of coastal State rights over the contiguous zone during the last decades.<sup>399</sup> Aznar tabulated the practice of over 120 States, among which 78 had declared archaeological rights over their contiguous zone, EEZ or continental shelf. Twenty-nine of these declaring States were among the 50 States with the longest coastline and the biggest EEZ.<sup>400</sup>

Aznar’s conclusion was that State practice has changed the legal rules governing the coastal States’ archaeological rights over their contiguous zone. Aznar demonstrated how coastal States have gradually extended their rights over their contiguous zone conventionally and unilaterally in an attempt to protect underwater cultural heritage, with no clear objections from other States. In this way, the ambiguity of Article 303(2) of the LOSC has slowly introduced a new functional jurisdictional zone.<sup>401</sup> Aznar’s view is that the following three factors have been critical to the rise of this zone. First, the influence of cold war paradigms: the issues of security concerns and access to resources superseded any archaeological preoccupations during UNCLOS III.<sup>402</sup> Today archaeological concerns have changed due to technological advances and remote survey capabilities. Second, the emerging trend to protect underwater cultural heritage: this should be interpreted as application of the LOSC (especially Article 303(4)),

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<sup>396</sup> E. D. Brown, *Sea-Bed Energy and Minerals: The International Legal Regime – Volume 2 Sea-Bed Mining* (Kluwer Law International: The Hague, 2001) at 95. See also Giorgi, *Underwater Archaeological and Historical Objects*, at 569, *supra* note 248.

<sup>397</sup> Strati, *UCH: An Emerging Objective*, at 167, *supra* note 19.

<sup>398</sup> *Ibid.*

<sup>399</sup> See Aznar, ‘The Contiguous Zone as an Archaeological Maritime Zone’, *supra* note 373.

<sup>400</sup> *Ibid.*, at 46.

<sup>401</sup> *Ibid.*, at 38–45.

<sup>402</sup> *Ibid.*, at 39.

along with the CPUCH.<sup>403</sup> Third, a lack of objections from other States: there have been no objections in the wake of coastal States declaring conventional and unilateral extensions of cultural heritage legislation over the contiguous zone.<sup>404</sup> As Churchill and Lowe have generally observed, '[t]he claims to legislative jurisdiction in the contiguous zone do not appear to have evoked significant international opposition in practice'.<sup>405</sup> This is especially the case with underwater cultural heritage: interests in cultural heritage can be assumed to be general, in the sense that the interests of other States are not affected in practice. In other words, the protection benefits everyone. Many sunken warships affect the interests of more than one State. Especially in the Baltic Sea, all coastal States can be assumed to share an interest in the protection of sunken warships, as they share the historical basis for that protection. Such shared interest is crucial, as the practicability of the contiguous zone and the extent of coastal State legislation over that zone will be dependent on reciprocity and recognition of the coastal States' legislation and enforcement decisions.

Furthermore, as Churchill and Lowe expressed, '[o]pposition to the extension of contiguous zone rights to cover security interests should perhaps be seen as a reflection of the concern among maritime States that security zones represent a particular threat to the freedom of navigation. The extension of contiguous zone rights in other respects (as was done in relation to archaeological objects in [A]rticle 303 of the 1982 Convention) may prove to be more acceptable to the international community'.<sup>406</sup> Based on current State practice and the absence of protests, it seems that they have.

It can be debated whether State practice concerning the protection of underwater cultural heritage represents fragmentation, interpretation or amendment of the applicable rules. Aznar contends that there has been,

a broader change of the rule through a customary process, departing from Art. 303(2) LOSC (and even earlier), through a conventional and unilateral practice — not easily or simply labelled as the 'subsequent practice' envisaged in Art. 31(3)(b) [of the Vienna Convention on the Law of Treaties] — and the crystallisation of a new rule with the adoption of Art. 8 of the UNESCO Convention. It is not, hence, a mere new understanding of the meaning of the LOSC terms, but an intention to create a new legal regime governing coastal States' archaeological rights in their contiguous zone, adding to the original, limited and controversial enforcement rights more extensive legislative

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<sup>403</sup> *Ibid.*, at 40–41.

<sup>404</sup> *Ibid.*, at 41. The only clear exception to this rule is Turkey, which has persistently objected to new coastal State jurisdictional powers over the contiguous zone. This supposedly originates from the maritime dispute between Turkey and Greece in the Aegean Sea. See further *ibid.*, at 19, 31 and 45.

<sup>405</sup> Churchill and Lowe, *The Law of the Sea*, at 138, *supra* note 15.

<sup>406</sup> *Ibid.*

rights over all and any activities directed to underwater cultural heritage located in that maritime zone. This, as we have just seen, has historical, contextual and material reasons.<sup>407</sup>

#### 4.5.5. Analysis

The law of the sea has been constantly evolving since its inception: the development of new rules and constantly developing State practice is nothing new. Just as the 1958 Geneva Conventions were superseded by subsequent practice and codification, the LOSC is not immutable.<sup>408</sup> Time moves on, and circumstances and the legislative environment are constantly changing. As Lowe points out:

Treaty texts will always have lacunae, and possibilities of different legal analyses, and uncertainties concerning the legal characterization of factual circumstances. That is inherent in the nature of the relationship between language and the physical reality to which it is applied. All that can reasonably be asked is that the main areas of anticipated uncertainty in respect of which agreement upon precise legal stipulations is possible should be addressed. Unanticipated problems, by definition, cannot be addressed in advance, except by creating dispute settlement processes which give to specified institutions the power to resolve such disputes with authoritative, binding effect.<sup>409</sup>

While Aznar admits that State practice is not uniform, his research demonstrates that there is a ‘general and constant practice in favour of the existence of a crystallised customary rule recognizing, as a matter of law, legislative and enforcement rights in favour of coastal States for the protection of underwater cultural heritage in the contiguous zone’.<sup>410</sup> After the adoption of the LOSC, the rights and duties that coastal States enjoy over the contiguous zone have been elaborated on and clarified to some extent in the CPUCH. However, in the Baltic Sea, only Lithuania has ratified the CPUCH, and only Estonia is in the process of ratification. The practicability of the contiguous zone and the extent of coastal State legislation over that zone will be solely dependent on reciprocity and recognition of the coastal States’ legislation and enforcement decisions.

If State practice and the concept of an archaeological zone as demonstrated by Aznar is accepted, the contiguous zone can — in its developed form as an archaeological zone — make significant contributions to the level of protection coastal States can assert in the Gulf of Finland. From an administrative point of view however, problems can arise since the LOSC does not provide any regulatory framework that coastal States could apply. Thus, any rules that coastal States would eventually wish to apply and enforce within the 24-nautical-mile zone, depend solely on the authorities of the coastal State and its domestic legislation. The lack of any internationally accepted definition for objects of ‘archaeological and historical’ nature

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<sup>407</sup> Aznar, ‘The Contiguous Zone as an Archaeological Maritime Zone’, at 44, *supra* note 373. Footnotes omitted. See also the Vienna Convention, *supra* note 245, and regarding the interpretation of Article 31, see Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, at 415–441, *supra* note 245.

<sup>408</sup> Aznar, ‘The Contiguous Zone as an Archaeological Maritime Zone’, at 44–45, *supra* note 373.

<sup>409</sup> Lowe, *Was it Worth the Effort?*, at 206, *supra* note 229.

<sup>410</sup> Aznar, ‘The Contiguous Zone as an Archaeological Maritime Zone’, at 45–47, *supra* note 373.

means it is up to the coastal States to determine what such an object is. If the domestic definition were to include shipwrecks from the World Wars, they can be protected as objects of archaeological and historical nature in the contiguous zone. Due to the opposite and adjacent coasts of Finland, Estonia and Russia, which limit each other in the Gulf of Finland, the adoption of an archaeological zone would cover the whole Gulf beyond the territorial seas of the respective States. Each coastal State would have the means to control activities in the contiguous zone. However, in the absence of any applicable cooperative framework the current situation remains unresolved.

In the case that the contiguous zone shares the legal status of the EEZ, it is suggested that Article 59 of the LOSC would apply should any conflict of interest arise between two States.<sup>411</sup> Pursuant to Article 59, in cases where a dispute arises concerning a claim by a coastal State to jurisdictional rights not expressly granted under the Convention, the question should be resolved ‘on the basis of equity’ and ‘taking into account the respective importance of the interests’ of the parties concerned and the international community as a whole. The implication of Article 59 are reviewed and analysed in the chapter on the EEZ. Churchill and Lowe do not attempt to presume the effects of the contiguous zone being under the regime of the EEZ, but note that ‘it is likely to make the extension of contiguous zone rights *ratione materiae*, and the inclusion of both enforcement and legislative jurisdiction, more easy to defend than formerly’.<sup>412</sup>

#### 4.6. The High Seas and ‘International Waters’

The first attempt to codify the law regarding the high seas took place under the auspices of the League of Nations in 1930 to no avail. In 1958 UNCLOS I adopted the Convention on the High Seas (HSC) as a declaration of established principles of international law. Pursuant to Article 1 of the HSC, the term ‘high seas’ refers to all parts of the sea that are not included in the territorial sea or internal waters of a State. However, this has changed since the introduction of new functional maritime zones, namely the EEZ and the Area (i.e. the international seabed area).<sup>413</sup> The LOSC does not provide any definition for the high seas, and only states in Article 86 of Part VII<sup>414</sup> titled ‘High Seas’ that:

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<sup>411</sup> *Ibid.*, at 41.

<sup>412</sup> Churchill and Lowe, *The Law of the Sea*, at 139, *supra* note 15.

<sup>413</sup> Regarding the concept of the high seas in general, see *ibid.*, at 203–222. Regarding jurisdiction on the high seas, see O’Connell, *The International Law of the Sea Volume II*, at 792–830, *supra* note 14. For an examination of the high seas freedoms in modern law of the sea, see Anderson, *Modern Law of the Sea*, at 229–249, *supra* note 168. Regarding the high seas and UCH, see Strati, *UCH: An Emerging Objective*, at 215–230, *supra* note 19.

<sup>414</sup> For an introduction to Part VII, see Myron H. Nordquist (et al.) (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume III* (Martinus Nijhoff Publishers: Dordrecht, 1995) at 27–43.

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.<sup>415</sup>

Consequently the high seas refer only to the water column and the surface of the maritime zone that start at the outer limits of the EEZ — assuming that an EEZ has been declared. On the high seas the seabed forms part of the Area pursuant to Part XI of the LOSC. Sometimes the term ‘international waters’ is used instead of ‘high seas’ to describe areas beyond the territorial jurisdiction of any State. However, this term can be misleading and it should not be confused with other zones beyond the sovereignty of the coastal State — where the traditional high sea freedoms do not apply without restrictions and the coastal State has functional jurisdiction — such as on the EEZ. Thus, Article 86 must be read together with Article 58 on the rights and duties of other States in the EEZ. One of the major difficulties during UNCLOS III was the relationship between the EEZ and the high seas.<sup>416</sup> The conclusion of the Conference was that due to the *sui generis* nature of the EEZ, the LOSC should not attempt to define the high seas but instead indicate the *ratione loci* of the provisions relating to the high seas.<sup>417</sup>

Pursuant to Article 87<sup>418</sup> of the LOSC the high seas are open to all States, whether coastal or landlocked. The freedom of the high seas is comprised of, inter alia:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI of the LOSC;
- (d) freedom to construct artificial islands and other installations permitted under international law;
- (e) freedom of fishing, subject to the conditions laid down in Section 2 (of Part VII, regarding conservation and management of the living resources of the high seas); and
- (f) freedom of scientific research, subject to Parts VI and XIII of the LOSC.

These freedoms are to be exercised with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under the LOSC with respect to activities in the Area outlined in Part XI. The high seas shall be reserved for peaceful purposes and no State may validly purport to subject any part of the high seas to its sovereignty. As the Baltic Sea has no high seas, they will not be covered any further in this paper.

#### 4.7. The Area and International Seabed

The ‘Area’<sup>419</sup>, sometimes also the ‘international seabed area’, refers pursuant to Article 1(1.1) of the LOSC to the seabed, ocean floor and subsoil beyond the limits of national jurisdiction. All

<sup>415</sup> For a commentary and history of Article 86, see *ibid.*, at 59–71.

<sup>416</sup> *Ibid.*, at 32.

<sup>417</sup> *Ibid.*

<sup>418</sup> For a commentary and history of Article 87, see *ibid.*, at 72–86.

of the freedoms of the high seas apply in the Area. Article 136 of the LOSC recognises the Area and its resources as a part of the common heritage of mankind,<sup>420</sup> and Article 137(1) states that sovereign rights may not be claimed over any part of the Area or its resources.<sup>421</sup>

The framework of the Area is applicable to the seabed beyond the outer limits of the continental shelf of coastal States (pursuant to Article 76 of the LOSC), and of archipelagic States (pursuant to Article 47 of the LOSC). The regime of the Area is mainly concerned with mineral recovery from the deep seabed beyond the limits of national jurisdiction.

As the Baltic Sea has no Area or international seabed that would be a part of the common heritage of mankind, the subject will not be covered any further in this paper. However, the Area deserves to be covered in brief due to its impact on the negotiations at UNCLOS III and on the regime adopted in the LOSC.<sup>422</sup>

#### 4.7.1. Part XI and the 1994 Implementation Agreement

The regime of the Area is placed under Part XI of the LOSC and should be read together with the 1994 Implementation Agreement.<sup>423</sup> Part XI is the largest part of the LOSC and was the hardest to negotiate.<sup>424</sup> Many industrialised States, including big maritime powers such as the United States, United Kingdom and Germany, were dissatisfied with Part XI and the original deep sea mining regime while being open to the rest of the Convention.<sup>425</sup> While many States ratified the LOSC within the first decade of its adoption, they consisted almost exclusively of

<sup>419</sup> When reading the English version of the LOSC the usage of the word 'Area' with an uppercase 'A' should always be distinguished from the use of the word 'area' with a lowercase 'a', which is always used in its dictionary sense. See Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 40, *supra* note 280.

<sup>420</sup> For a detailed discussion regarding the concept of the 'common heritage of mankind', see Carl Q. Christol, 'The Common Heritage of Mankind Provision in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies', 14 *International Lawyer*, no. 3 (1980) 403–483. For a commentary of Article 136, see Myron H. Nordquist (et al.) (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume VI* (Martinus Nijhoff Publishers: Dordrecht, 2002) at 95–100.

<sup>421</sup> For a commentary and history of Article 137, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. VI*, at 101–111, *supra* note 420.

<sup>422</sup> For history and background, see generally Churchill and Lowe, *The Law of the Sea*, at 223–254, *supra* note 14. Regarding the treatment of UCH in the Area, see generally Boesten, *Valuable Shipwrecks in International Waters*, at 50–55, *supra* note 20; Strati, *UCH: An Emerging Objective*, at 295–315, *supra* note 19 and Anastasia Strati, 'Deep Seabed Cultural Property and the Common Heritage of Mankind', 40 *International and Comparative Law Quarterly*, no. 4 (1991) 859–894.

<sup>423</sup> See Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 9 June 1994, 1836 UNTS 3; 33 ILM 1311. In accordance with Article 2 of the 1994 Implementation Agreement, the Agreement and Part XI 'shall be interpreted and applied together as a single instrument' and in the event of any inconsistency between the Agreement and Part XI, the provisions of the Agreement shall prevail. The 1994 Implementation Agreement has 147 State parties, see *supra* note 140. For a comprehensive introduction to Part XI, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. VI*, at 3–68, *supra* note 420.

<sup>424</sup> Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. VI*, at 3, *supra* note 420.

<sup>425</sup> *Ibid.*, at 3–4. Churchill and Lowe, *The Law of the Sea*, at 236–238, *supra* note 15 and Anderson, *Modern Law of the Sea*, at 15, *supra* note 168.



members of the ‘Group of 77’, the coalition of developing States of the UN.<sup>426</sup> The original Part XI regime prevented many industrialised States from becoming parties to the LOSC until the adoption of the 1994 Implementation Agreement. This Agreement removed the most controversial elements, such as the compulsory transfer of technology and subsidisation of the activities of the Enterprise, the organ of the International Seabed Authority which carries out activities in the Area.<sup>427</sup>

#### 4.7.2. Manganese Nodules

Until the 20th century, the deep ocean floor received very little legal attention due to its inaccessibility. In 1872 the HMS *Challenger* set sail on a five-year oceanographic expedition, which, has been considered to be one of the most important stages in the development of ocean science and marine scientific research.<sup>428</sup> No previous expedition had been devoted solely to scientific research, and the effort put into and the amount of data generated by the expedition exceeded by far what had been done before.<sup>429</sup> Our understanding of the sea has developed enormously since the *Challenger* expedition, but the legacy of this nearly 150-year-old voyage is still affecting the use of the seas in multiple ways. One of these lingering legacies stems from the discovery of manganese nodules, also called polymetallic nodules.

On 7 March 1873 the ship’s dredge hauled up on its deck something the crew described as ‘peculiar black oval bodies which were composed of almost pure manganese oxide’.<sup>430</sup> While the chemical composition of these nodules varies, the most valuable chemical elements are nickel, copper, and cobalt.<sup>431</sup> Manganese nodules attracted attention from around the globe over 80 years later, during the 1957–1958 International Geophysical Year, and especially in 1965 when mining engineer John Mero published a book regarding the economic possibilities of mining manganese nodules, with the prediction that it should become a sound business in the future.<sup>432</sup> Soon it was widely recognised that commercial seabed mining would benefit only a handful of developed States, and partly endanger trade of the minerals by land-based

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<sup>426</sup> The Group of 77 included around 120 States during UNCLOS III and today consists of 134 members, see <[www.g77.org/doc/members.html](http://www.g77.org/doc/members.html)>. Regarding G77 and their influence on Part XI, see especially Churchill and Lowe, *The Law of the Sea*, at 227–229, *supra* note 15.

<sup>427</sup> Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. VI*, at 4, *supra* note 420. The Enterprise is the organ of the International Seabed Authority which shall carry out activities in the Area. See further Annex IV of the LOSC.

<sup>428</sup> A. L. Rice, ‘The Challenger Expedition - the end of an era or a new beginning?’ in Margaret Deacon, Tony Rice, and Colin P. Summerhayes (eds) *Understanding the Oceans: A Century of Ocean Exploration* (reprinted 1st edn, Routledge: Abingdon, 2003), 27–48 at 27.

<sup>429</sup> *Ibid.*

<sup>430</sup> See the International Seabed Authority, Deep Sea Mineral Resources: Polymetallic Nodules, at <[www.isa.org.jm/deep-sea-mineral-resources-polymetallic-nodules](http://www.isa.org.jm/deep-sea-mineral-resources-polymetallic-nodules)>.

<sup>431</sup> See the brochure of the International Seabed Authority, *Polymetallic Nodules*. Available at <[www.isa.org.jm/documents-resources/publications](http://www.isa.org.jm/documents-resources/publications)>.

<sup>432</sup> See Boesten, *Valuable Shipwrecks in International Waters*, at 32, *supra* note 20 and John L. Mero, *The Mineral Resources of the Sea* (Elsevier Publishing Company: Amsterdam, 1965).

exporters (many of which were developing States).<sup>433</sup> The issue was debated in the UN General Assembly during the following years.<sup>434</sup>

With regards to sunken warships, manganese nodules played a major role in ‘Project Azorian’,<sup>435</sup> which was an attempt by the CIA (United States Central Intelligence Agency) to recover a sunken Soviet submarine — the *K-129* — lost on the high seas in 1968.<sup>436</sup> For this specific purpose the CIA built a deep-sea drillship platform called the USNS *Hughes Glomar Explorer* and used extraction of manganese nodules as a cover story for the vessel. As Ronzitti points out, some commentators have argued that the level of secrecy adopted for the operation shows that the US was of the opinion that it could not recover the vessel without Soviet consent.<sup>437</sup>

#### 4.7.3. Article 149: Archaeological and Historical Objects

Article 149 of the LOSC is concerned with ‘archaeological and historical objects’ found in the Area.<sup>438</sup> Article 149 provides that:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

Article 149 has received critique due to its ambiguity and alleged lack of significance.<sup>439</sup> One of the biggest issues is the absence of an international body to implement the Article because the International Seabed Authority (ISA) does not have any jurisdictional powers over UCH. The ISA’s jurisdiction in the Area is limited by Articles 1(3) and 133(b) of the LOSC, and extends only to activities related to the exploration and exploitation of mineral resources.

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<sup>433</sup> Churchill and Lowe, *The Law of the Sea*, at 223–224 and 227–229, *supra* note 15.

<sup>434</sup> See UNGA, Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV), 17 December 1970. Resolution 2749 formed the basis for the Articles in the LOSC that established the Area. Regarding the developments in the General Assembly, see especially Churchill and Lowe, *The Law of the Sea*, at 224–229, *supra* note 15.

<sup>435</sup> Sometimes erroneously called ‘Project Jennifer’.

<sup>436</sup> See, e.g., Michael G. Collins, ‘The Salvage of Sunken Military Vessels – Project Jennifer: A Dangerous Precedent?’, 8 *Journal of Maritime Law and Commerce*, no. 4 (1977) 433–454; Frederic A. Eustis, ‘The Glomar Explorer Incident: Implications for the Law of Salvage’, 16 *Virginia Journal of International Law*, no. 1 (1975) 177–185.

<sup>437</sup> Ronzitti, *The Legal Regime*, at 147, *supra* note 29.

<sup>438</sup> The problems regarding the definition of objects of ‘archaeological and historical nature’ have already been addressed. For a commentary and in-depth analysis of Article 149, see especially Nordquist (et al.) (eds), *UNCLOS: A Commentary*, Vol. VI, at 226–232, *supra* note 420 and Strati, *UCH: An Emerging Objective*, at 296–315, *supra* note 19.

<sup>439</sup> See, e.g., Strati, *UCH: An Emerging Objective*, at 301, *supra* note 19; O’Keefe, *Shipwrecked Heritage*, at 17–20, *supra* note 25; Dromgoole, *Underwater Cultural Heritage and International Law*, at 30–32 and 35, *supra* note 1; Boesten, *Valuable Shipwrecks in International Waters*, at 50–55, *supra* note 20 and Caflisch, ‘Submarine Antiquities and the International Law of the Sea’, at 29, *supra* note 239. For a more optimistic view, see Nicola Ferri, ‘The Right to Recovered Underwater Cultural Heritage: The Neglected Importance of Article 149 of the UN Law of the Sea Convention’ in Silvia Borelli and Federico Lenzerini (eds) *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus Nijhoff Publishers: Leiden, 2012), 253–265.

As objects of ‘archaeological and historical nature’ do not fall under the scope of ISA, the implementation of Article 149 seems to have been left solely to the State parties.<sup>440</sup>

Other issues concern the lack of specifications for how this heritage — these ‘objects’ — shall be ‘preserved or disposed of for the benefit of mankind’, and who is responsible for these actions. Moreover, there is no obligation to report accidental discoveries of UCH, nor any establishment of preferred rights for the three State interest groups that are acknowledged. In the end the Article leaves it entirely open as to how mankind should benefit from these objects. As far as the author is aware, Article 149 has only been invoked once — by Peru during the case concerning the Spanish warship *Nuestra Señora de las Mercedes* sunk in 1804. Peru’s claims were rejected on the grounds that, first, Peru was not a party to the LOSC and, second, that the wreck was found in the EEZ of Portugal.<sup>441</sup>

#### 4.8. Continental Shelf

In the law of the sea, and within the framework of the LOSC, the regime of the continental shelf ultimately concerns the natural resources of the ocean floor and seabed. The term ‘continental shelf’, however, embodies two different definitions.<sup>442</sup> The first is geological, and the second is judicial. From a geological perspective, the continental shelf is merely a submerged prolongation of the land territory which refers to ‘that part of the continental margin which is between the shoreline and the shelf break or, where there is no noticeable slope, between the shoreline and the point where the depth of the superjacent water is approximately between 100 and 200 meters’.<sup>443</sup> From a judicial perspective, coastal States have a continental shelf up to a distance of 200 nautical miles, unless limited by opposite or adjacent coasts. Thus the coastal State will always have a judicial continental shelf, regardless of the geological features of the seabed, by virtue of Article 76(1) of the LOSC:

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines

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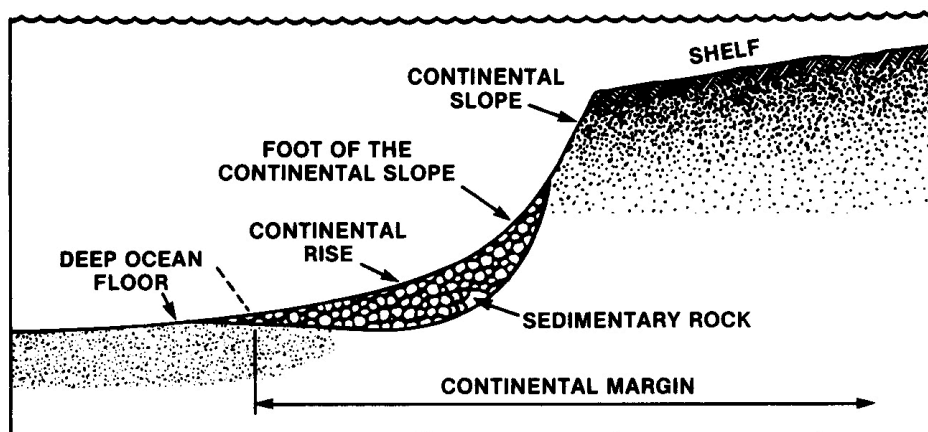
<sup>440</sup> Boesten, *Valuable Shipwrecks in International Waters*, at 50, *supra* note 20.

<sup>441</sup> Ferri, *The Right to Recovered Underwater Cultural Heritage*, at 261–262, *supra* note 439. See also the affidavit by John Norton Moore, 30 January 2009 and Peru’s Sur-Reply in Opposition to Spain’s Motion to Dismiss, 4 May 2009, both available at <dockets.justia.com/docket/florida/flmdce/8:2007cv00614/197978>.

<sup>442</sup> For an introduction to Part VI that sets out the regime of the continental shelf, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 825–836, *supra* note 280. For the genesis and history of the concept, see especially O’Connell, *The International Law of the Sea Volume II*, at 467–509, *supra* note 14. For technical aspects, see Pulvenis, *The Continental Shelf Definition and Rules Applicable to Resources*, *supra* note 179. See also Churchill and Lowe, *The Law of the Sea*, at 141–159, *supra* note 15.

<sup>443</sup> See Commission on the Limits of the Continental Shelf (CLCS) — The continental shelf, ‘The definition of the continental shelf and criteria for establishment of its outer limits’, available at, <www.un.org/depts/los/clcs\_new/continental\_shelf\_description.htm>. For an introduction to Part VI that sets out the regime of the continental shelf, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 825–836, *supra* note 280.

from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.<sup>444</sup>



*Continental margin as defined in Article 76 of the LOSC from Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea (United Nations: New York, 1989).*

The regime of the continental shelf is placed under Part VI of the LOSC. Pursuant to Article 76 of the LOSC, a coastal State may establish the outer limits of its continental shelf wherever the continental margin extends beyond 200 nautical miles. The foot of the continental slope can only be established by meeting the requirements of Article 76(4)–76(7). The final limits of the continental shelf will be established on the final and binding recommendation of the Commission on the Limits of the Continental Shelf (CLCS).

There are now two distinct legal bases for coastal State rights to the seabed beyond territorial sovereignty. The first is that of the continental shelf, and the second is that of the EEZ.<sup>445</sup> If a coastal State has not declared an EEZ, the waters above the continental shelf are part of the high seas. If a coastal State has established an EEZ, the continental shelf becomes the seabed part of the EEZ.<sup>446</sup> In the Baltic Sea, coastal States cannot extend their continental shelf as the whole seabed is part of the continental shelf proper and is limited by opposite and adjacent States. Furthermore, all coastal States in the Baltic region have declared an EEZ.<sup>447</sup> Thus, the continental shelf and EEZ of every coastal State overlap to the present established maximum distance.

#### 4.8.1. Rights of the Coastal State Over the Continental Shelf

The first clear assertion of title over natural resources on the continental shelf was made in 1945 by President Truman in his two proclamations regarding the natural resources on the

<sup>444</sup> For a commentary of Article 76, see *ibid.*, at 837–890.

<sup>445</sup> Churchill and Lowe, *The Law of the Sea*, at 145, *supra* note 15.

<sup>446</sup> Gavouneli, *Functional Jurisdiction in the Law of the Sea*, at 3–4, *supra* note 138.

<sup>447</sup> EEZ claims in chronological order were made by Norway (1976), Russia (1984), Poland (1991), Sweden (1992), Estonia (1993), Latvia (1993), Germany (1994), Denmark (1996), Lithuania (2004) and Finland (2004). See DOALOS, Table of claims to maritime jurisdiction (as at 15 July 2011), available at <[www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/table\\_summary\\_of\\_claims.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf)>.

seabed and high seas fisheries.<sup>448</sup> The proclamation regarding the continental shelf stated that the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation was reasonable and just. This was not a claim to ownership of the seabed itself, but related only to the rights to harvest and exploit the resources of specific areas on the high seas.<sup>449</sup> Since the water column above the continental shelf would still keep its character as high seas, the right of free and unimpeded navigation would not be affected.

In the following years, more and more States laid claims over their continental shelves. By the time of UNCLOS I at least a certain amount of right over the continental shelf was already recognised and generally accepted.<sup>450</sup>

The rights that coastal States enjoy over the continental shelf were first formally recognised in the Convention on the Continental Shelf (CSC). Article 2(1) of the CSC expressed that coastal States enjoyed sovereign rights for the purpose of exploring and exploiting natural resources of the continental shelf. Natural resources are defined in Article 2(4) of the CSC and include the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species. The rights expressed in the CSC over the continental shelf were firmly established by the International Court of Justice (ICJ) in 1969 when the Court stated in the *North Sea Continental Shelf* cases that:

The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention [on the Continental Shelf], it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.<sup>451</sup>

Within the LOSC, the rights of States over the continental shelf are outlined in Article 77. The term 'natural resources', which appears in different contexts depending on the maritime zone in question, is not defined further.<sup>452</sup> Pursuant to Article 77:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

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<sup>448</sup> See further Hollick, *U.S. Foreign Policy and the Law of the Sea*, at 18–61, *supra* note 161 and Watt, 'The origins of Truman's proclamation', *supra* note 178.

<sup>449</sup> Churchill and Lowe, *The Law of the Sea*, at 143, *supra* note 15.

<sup>450</sup> *Ibid.*, at 144.

<sup>451</sup> *North Sea Continental Shelf Cases* at 22, para. 19., *supra* note 194.

<sup>452</sup> On the definition of natural resources, see further Walker, *Definitions for the Law of the Sea*, at 254–257, *supra* note 195.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.<sup>453</sup>

While some coastal States have enacted legislation that protects shipwrecks and UCH on the continental shelf, it is commonly accepted that natural resources do not include shipwrecks, UCH or related cargo. This was expressed already in 1956 by the International Law Commission (ILC) in the Commission's comments on the draft for UNCLOS I. It was stated that: '[i]t is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil'.<sup>454</sup> Regardless of this, a growing number of States have extended their jurisdiction over archaeological objects beyond the territorial sea to the continental shelf.<sup>455</sup> Since the continental shelf doctrine is superseded in the Baltic Sea by the EEZ, the relevant issues will be dealt with below within the framework of the EEZ.

#### 4.8.2. Analysis

In the Baltic Sea, the continental shelf doctrine plays an insignificant role, since all coastal States have established an EEZ. Some authors have argued that one simple way to control activities on shipwrecks on the continental shelf is to regulate the disturbance of the seabed. O'Connell has argued that 'a wreck site embedded in coral could be immunized by the expedient of forbidding interference with the coral, which is a "natural resource" of the continental shelf'.<sup>456</sup> While this argument can be accepted, its applicability in the Baltic is severely limited: shipwrecks covered by anything other than barnacles, or located in such a way that interference with them could constitute a disturbance of the seabed, are nowhere to be found. Most of the wrecks found in the Baltic are well preserved, sometimes completely intact and sitting more or less upright on the seabed. Thus the removal of objects would not disturb the seabed, since the objects are not embedded at all.

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<sup>453</sup> For a commentary of Article 77, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 891–899, *supra* note 280.

<sup>454</sup> *Yearbook of the International Law Commission, vol. II* (1956) at 298.

<sup>455</sup> See further O'Keefe, *Shipwrecked Heritage*, at 58–59, *supra* note 25 and Markus Rau, 'The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea' in J. A. Frowein and R. Wolfrum (eds) *6 Max Planck Yearbook of United Nations Law* (Martinus Nijhoff Publishers: Leiden, 2002), 387–472 at 402.

<sup>456</sup> O'Connell, *The International Law of the Sea Volume II*, at 918, *supra* note 14.

#### 4.9. Exclusive Economic Zone

The exclusive economic zone extends up to 200 nautical miles from baselines, and within it coastal States enjoy sovereign rights for the purposes of exploring and exploiting, conserving and managing living and non-living natural resources. Within the EEZ, the freedom of the high seas, including the high sea fisheries, has ceased to exist in its traditional form.<sup>457</sup>

The EEZ is a zone of recent origin, though it developed out of the doctrine of the continental shelf and the resource-related rights that coastal States enjoyed beyond the territorial sea.<sup>458</sup> According to Professor Barbara Kwiatkowska, the phenomenon of post-World War II claims over the seabed and creeping jurisdiction ‘culminated in the concept of the 200 mile EEZ which combined the pre-existing rights of the coastal [S]tate over the sea-bed resources with those over living resources of the superjacent waters under one category of sovereign rights over all natural resources’.<sup>459</sup> The juxtaposition of rights on the continental shelf and on the EEZ has been considered ‘a remarkable novelty’ in international law and ‘a significant departure’ from the continental shelf doctrine.<sup>460</sup>

Because the continental shelf regime already granted exclusive rights over the resources on the seabed, some States preferred to claim a 200-nautical-mile exclusive fishing zone (EFZ) instead of an EEZ.<sup>461</sup> According to Churchill and Lowe, the EEZ became ‘a reflection of the aspiration of the developing countries for economic development and their desire to gain greater control over the economic resources off their coasts, particularly fish stocks, which in many cases were largely exploited by the distant-water fleets of developed States’.<sup>462</sup> As a result, many States saw the EEZ during UNCLOS III as a compromise to the contemporary exclusive fishing zone, territorial sea and epicontinental sea claims up to 200 nautical miles.<sup>463</sup> A vast majority of the States that have claimed an EEZ did so before the LOSC was adopted, with ‘an almost complete absence of protests’.<sup>464</sup> This led most scholars to conclude that the concept of an EEZ was already customary international law before it was codified in the LOSC.<sup>465</sup> In 1985, nine years before the LOSC came into force, the ICJ concluded in the *Libya/Malta Continental Shelf* case, that:

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<sup>457</sup> Strati, *UCH: An Emerging Objective*, at 223, *supra* note 19.

<sup>458</sup> Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff Publishers: Dordrecht, 1989) at 6–7.

<sup>459</sup> *Ibid.*, at 7.

<sup>460</sup> *Ibid.*

<sup>461</sup> Churchill and Lowe, *The Law of the Sea*, at 161, *supra* note 15. However, many of these EFZ claims were converted to EEZ in the years following the adoption of the LOSC, see *ibid.*, at 161, fn. 3.

<sup>462</sup> *Ibid.*, at 160–161.

<sup>463</sup> See further *ibid.*, at 161. See also Kwiatkowska, *The 200 Mile Exclusive Economic Zone*, at 6–9, *supra* note 458.

<sup>464</sup> Churchill and Lowe, *The Law of the Sea*, at 161, *supra* note 19.

<sup>465</sup> *Ibid.*

It is in the Court's view incontestable that [...] the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law.<sup>466</sup>

The socio-economic importance of the EEZ has been enormous. As Churchill and Lowe observed, '[t]he universal establishment of 200 mile EEZs would embrace about thirty-six per cent of the total area of the sea. Although this is a relatively small proportion, the area falling within 200 mile limits contains over ninety per cent of all presently commercially exploitable fish stocks, about eighty-seven per cent of the world's known submarine oil deposits, and about ten per cent of manganese nodules'.<sup>467</sup> The acceptance of the EEZ also meant a move away from open access to many resources and regulations based on flag State jurisdiction, to almost exclusive coastal State access and jurisdiction to these resources.<sup>468</sup>

#### 4.9.1. Rights and Duties

Article 55 of the LOSC<sup>469</sup> states that the EEZ is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in Part V of the LOSC,<sup>470</sup> under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed. The rights, jurisdiction and duties that coastal States enjoy in the EEZ are expressed in Article 56:

1. In the exclusive economic zone, the coastal State has:
  - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
  - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
    - (i) the establishment and use of artificial islands, installations and structures;
    - (ii) marine scientific research;
    - (iii) the protection and preservation of the marine environment;
  - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.<sup>471</sup>

<sup>466</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports 1985, 13, at 33, para. 34.

<sup>467</sup> Churchill and Lowe, *The Law of the Sea*, at 162, *supra* note 19.

<sup>468</sup> *Ibid.*, at 176.

<sup>469</sup> For a commentary of Article 55, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 511–520, *supra* note 280.

<sup>470</sup> For an introduction to Part V, see generally *ibid.*, at 491–510.

<sup>471</sup> For a commentary of Article 56, see *ibid.*, at 521–544.



The rights of other States are expressed in Article 58:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.<sup>472</sup>

Departing from the traditional high seas regime of the HSC, fishing has now come within the jurisdiction of the coastal State inside the EEZ. While other high sea freedoms have persisted in the EEZ, they are subject to a greater degree of limitations than on the high seas.<sup>473</sup> As it is clear from the wording of Articles 56 and 58, the LOSC contains no provisions to attribute any jurisdictional rights to coastal States with regards to shipwrecks or archaeological and historical objects found within the EEZ. Thus the LOSC leaves open the question of whether coastal States can prescribe and enforce legislation that would protect shipwrecks and sunken warships on the EEZ.

#### 4.9.2. Legal Nature

While there seems to be a strong presumption of the search, study and recovery of shipwrecks as a high seas freedom, the situation is significantly different within the EEZ, which does not form a part of the high seas.<sup>474</sup> Thus, the EEZ has been described as a *sui generis* zone — it is neither part of the high seas nor does it fall under the full sovereignty of coastal States. Professor René-Jean Dupuy summed up this twofold premise and its importance:

[T]here had been uncertainty and disagreement on the question [of] whether or not the economic zone remained part of the high seas. That question is of essential importance at a practical level: it affects the scope of the rights of the coastal State and the rights of third States. If the answer given is affirmative, the result is that the rights and competences of coastal States are what the French jurists specializing in public law call ‘competences of attribution’. This means that since the zone is a subdivision of the high seas, therefore where the legal texts are mute,<sup>475</sup> freedoms are presumed to exist and the rights and competences of the coastal State should be regarded as exceptions to this principle. As is well known, every exception must be interpreted strictly.

<sup>472</sup> For a commentary of Article 58, see *ibid.*, at 553–565.

<sup>473</sup> See further Churchill and Lowe, *The Law of the Sea*, at 170–174, *supra* note 15.

<sup>474</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 258–259, *supra* note 1.

<sup>475</sup> It is possible, that Dupuy meant ‘moot’ i.e. subject to debate or dispute.

Conversely, if one analyses the economic zone not as part of the high seas but as a new type of 'zone of national jurisdiction', this leads to regarding the rights and competences of the coastal State as the principle, while the freedoms of navigation, overflight, cable-laying and pipeline-laying must be interpreted as remnants, in the zone, of the former régime of freedom of the high seas, and consequently as exceptions to the principle of the coastal State's primacy.<sup>476</sup>

The LOSC offers arguments in favour of both a high seas and a *sui generis* status of the EEZ, as Kwiatkowska has demonstrated.<sup>477</sup> According to Churchill and Lowe the fear of creeping jurisdiction during UNCLOS III made many maritime States argue that the EEZ should have a residual high seas character, 'i.e., any activity not falling within the clearly defined rights of the coastal State would be subject to the regime of the high seas'.<sup>478</sup> However, this sentiment did not find its way to the final Convention, and Articles 55 and 86 of the LOSC clearly state that the EEZ does not have a residual high seas character. However, it does not have a residual territorial sea character either. Thus, there is no presumption in favour of either the coastal State or other States in the case that an activity is not covered by Article 56 or 58 of the LOSC. It is easy to agree with Judge Oda, who wrote that '[t]he EEZ is a *sui generis* regime, and the argument as to whether it still remains a part of the high seas seems to be purely academic'.<sup>479</sup> Oxman is of similar opinion, and considered the issue as,

the classic dilemma of describing the glass as half-full or half-empty, thereby arguably implying the direction of movement. The advocates of the view that the economic zone is *sui generis* did not deny the application of some high seas principles and rules to the zone; the high seas advocates did not deny the application of some non-high seas principles to the zone. In large measure, the two groups could agree on the result, but not on the theory.<sup>480</sup>

Whereas the provisions of the LOSC have covered most of the more obvious uses of the EEZ, there are uses which do not fall within the rights or jurisdiction of either coastal or other States.<sup>481</sup> The LOSC contains no specific provisions for shipwrecks or UCH located on the continental shelf or EEZ beyond the 24-nautical-mile contiguous zone — all proposals for such recognition were rejected during UNCLOS III. As Dromgoole explains, '[t]he basic international legal regime governing the search for, and recovery of, shipwrecks and other UCH beyond the twenty-four miles is therefore dependent on the fundamental juridical (in other words, legal) nature of these zones'.<sup>482</sup> Uses that fall under the category of 'residual' or

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<sup>476</sup> René-Jean Dupuy, 'The Sea Under National Competence' in René-Jean Dupuy and Daniel Vignes (eds) *A Handbook on the New Law of the Sea, Volume I* (Martinus Nijhoff Publishers: Dordrecht, 1991), 247–313 at 284.

<sup>477</sup> See further the arguments in favour of both interpretations in Kwiatkowska, *The 200 Mile Exclusive Economic Zone*, at 230–235 *supra* note 458.

<sup>478</sup> Churchill and Lowe, *The Law of the Sea*, at 165, *supra* note 15.

<sup>479</sup> Shigeru Oda, 'Fisheries Under the United Nations Convention on the Law of the Sea', 77 *American Journal of International Law*, no. 4 (1983) 739–755 at 741.

<sup>480</sup> Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The 1977 New York Session', 72 *American Journal of International Law*, no. 1 (1978) 57–83 at 70.

<sup>481</sup> Churchill and Lowe, *The Law of the Sea*, at 175, *supra* note 15.

<sup>482</sup> Dromgoole, *Underwater Cultural Heritage and International Law*, at 258, *supra* note 1.

‘unattributed’ rights, leave open the question of which State has the competence to regulate activities on shipwrecks on the EEZ.<sup>483</sup> Such activities can include the protection of, the search for, and the recovery of shipwrecks.<sup>484</sup>

#### 4.9.3. Unattributed Rights and Jurisdiction

In the case of an unattributed right, there are no presumptions in favour of either coastal States or other States. Thus each case would ‘be decided on its own merits on the basis of the criteria set out in [A]rticle 59’ of the LOSC.<sup>485</sup> The LOSC does not provide any solution to unattributed rights except under Article 59, which concerns resolution for conflicts on matters not specifically attributed to coastal States or other States. Strati points out that the reciprocal ‘due regard rule’ of Articles 56(2) and 58(3) is only applicable to rights and duties governed by the LOSC, while Article 59 deals with the attribution of residual rights:<sup>486</sup>

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.<sup>487</sup>

Since Article 59 does not refer to any procedure for solving disputes concerning residual rights, it has been suggested that the first step is to attempt settlement by consensual means. If this turns out to be unsuccessful, the matter becomes subject to the dispute settlement procedures of Part XV.<sup>488</sup>

While Article 59 has been described as being ‘elusive’ and ‘one of the most ambiguous provisions’<sup>489</sup> of the whole Convention, it has several important implications.<sup>490</sup> First, it acknowledges ‘the existence of rights or jurisdiction in the EEZ attributed by the Convention to neither coastal State nor other States’.<sup>491</sup> Second, it reinforces the *sui generis* nature of the EEZ. As the original sponsor of Article 59 Ambassador Jorge Castañeda explains, the question of unattributed rights of States within the EEZ,

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<sup>483</sup> Churchill and Lowe, *The Law of the Sea*, at 175, *supra* note 15. See also Dromgoole, *Underwater Cultural Heritage and International Law*, at 258–260, *supra* note 1 and Robert Beckman and Tara Davenport, “The EEZ Regime: Reflections after 30 Years”, The 2012 LOSI-KIOST Conference on Securing the Ocean for the Next Generation (Seoul, Korea, May 2012), at 12.

<sup>484</sup> See e.g., Tanaka, *The International Law of the Sea*, at 130, *supra* note 214; Kwiatkowska, *The 200 Mile Exclusive Economic Zone*, at 228, *supra* note 458 and Churchill and Lowe, *The Law of the Sea*, at 175–176 *supra* note 15.

<sup>485</sup> Churchill and Lowe, *The Law of the Sea*, at 175, *supra* note 15.

<sup>486</sup> Strati, *UCH: An Emerging Objective*, at 268, *supra* note 19.

<sup>487</sup> For a commentary of Article 59, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 566–569, *supra* note 280.

<sup>488</sup> Churchill and Lowe, *The Law of the Sea*, at 175, *supra* note 15. See also Kwiatkowska, *The 200 Mile Exclusive Economic Zone*, at 230, *supra* note 458.

<sup>489</sup> Tim Stephens and Donald R. Rothwell, ‘The LOSC Framework for Maritime Jurisdiction and Enforcement 30 Years On’ in David Freestone (ed.) *The 1982 Law of the Sea Convention at 30: Success, Challenges and New Agendas* (Martinus Nijhoff Publishers: Leiden, 2013), 27–35 at 31.

<sup>490</sup> Kwiatkowska, *The 200 Mile Exclusive Economic Zone*, at 228, *supra* note 458.

<sup>491</sup> *Ibid.*

would not arise had the zone been characterized, either as a territorial sea or as high seas, since in one case or the other the coastal State or the third State would have been respectively favoured according to whether the zone had been identified as one or the other. Precisely, because the zone was defined as a *sui generis* zone, which was neither territorial sea nor high seas, it was indispensable to rely on some guideline or criterion to settle disputes that might arise out of concurrent uses of the sea within the exclusive economic zone, that is by the presence of competitive rights between the coastal State and the other States.<sup>492</sup>

According to the President of UNCLOS III, Tommy Koh:

The compromise was not to say that the residual rights and jurisdictions belong either to the international community or the coastal States. What we did say in Article 59 is that each case has to be judged on its merits on a basis of equity and taking into account all the circumstances of each case. That is the compromise. Again, I would say that some coastal States in recent years have asserted the view that residual rights and jurisdictions belong to the coastal States. This position, in my view, is not consistent with the consensus arrived at in the Castañada [sic] negotiating group and not consistent with the intention of Article 59 of the Convention.<sup>493</sup>

In 1989, Kwiatkowska noted that the provisions of Article 59 had not been tested, and were 'only exceptionally incorporated into the EEZ basic legislation of states'.<sup>494</sup> Today the situation is not fundamentally any different, and there seems to be little State practice regarding the application of Article 59. One of the only cases where the question of unattributed right arose was in the *M/V Saiga (No. 2)* case of Saint Vincent and the Grenadines against Guinea.<sup>495</sup> The central question in this case was whether or not Guinea was entitled to apply its customs law in its EEZ. The *M/V Saiga* was an oil tanker serving as a bunkering vessel (i.e. a vessel supplying fuel) and had supplied bunker oil to three fishing vessels licensed by Guinea to fish in its EEZ. The *M/V Saiga*, after being fired on and boarded by Guinean patrol boats, was arrested and brought to Conakry, where the ship and her crew were detained, the cargo of bunker oil was removed, and the ship's master was prosecuted for customs violations.<sup>496</sup> St Vincent and the Grenadines had stated that the imposition of customs duties on an oil tanker for bunkering activities carried out in the exclusive economic

<sup>492</sup> Jorge Castañeda, 'Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea' in Jerzy Makarczyk (ed.) *Essays in International Law in Honour of Judge Manfred Lachs* (Martinus Nijhoff Publishers: The Hague, 1984), 605–623 at 615. Article 59 is often referred to as the 'Castañeda formula'.

<sup>493</sup> Tommy T. B. Koh, 'Remarks on the Legal Status of the Exclusive Economic Zone' in Myron H. Nordquist, Tommy T. B. Koh, and John Norton Moore (eds) *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff Publishers: Leiden, 2009), 53–55 at 55.

<sup>494</sup> Kwiatkowska, *The 200 Mile Exclusive Economic Zone*, at 230, supra note 458. In this respect it should be noted that the LOSC came in force on 16 November 1994.

<sup>495</sup> *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, 3 ITLOS Reports 10.

<sup>496</sup> At the time of its arrest, the *M/V Saiga* was owned by a Cypriot company, managed by a Scottish company, and chartered to a Swiss company. Another Swiss company owned the cargo of bunker oil. The vessel was manned by a Ukrainian master and crew. Previously registered in Malta, the *M/V Saiga* was provisionally registered in St Vincent. Regarding the facts of the case, see further Bernard H. Oxman, 'The *M/V "Saiga" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), Judgment (ITLOS Case No. 2)', 94 *American Journal of International Law*, no. 1 (2000) 140–150.

zone was prohibited by the LOSC. The International Tribunal for the Law of the Sea (ITLOS) found that Guinea's actions had violated the LOSC and awarded damages to Saint Vincent and the Grenadines. However the judgement was not based on the application of Article 59; no reference was made to the Article at all, although it had been considered as a possible way of solving the conflict in an *obiter dictum* of the Tribunal.<sup>497</sup>

In practice, the application of Article 59 to solve problems regarding unattributed rights requires that a dispute, based on some sort of legislative act or enforcement, has already begun. In the case of shipwrecks and UCH, a coastal State would first have to assert jurisdiction over such objects, and then wait to see whether this act would cause any objections from other States. Would such an attempt to protect underwater cultural heritage, then, amount to a breach of an international obligation, and be seen as an act against the rights other coastal States enjoy over the EEZ? This dilemma is considered by Strati who sums up, with reference to the continental shelf, that:

At international level, the coastal State will not be responsible simply by asserting jurisdiction over underwater cultural property on the continental shelf. As a rule, the mere act of passing legislation is not creative of responsibility. The responsibility of a State for acts or omissions of the legislature arises from the *implementation* of legislation which is in breach of international law. Normally, in the case of injury to aliens a claimant must establish damage consequent on the implementation of legislation. Nevertheless, as argued by Prof. Schwarzenberger: 'It is a matter of argument whether the mere existence of such legislation or only action under it constitutes the breach of an international obligation. Sufficient relevant *dicta* of the World Court exist to permit the conclusion that the mere existence of such legislation may constitute a sufficient proximate threat of illegality to establish a claimant's legal interest in the proceedings for at least a declaratory judgment.' In practice, as with most maritime claims, the validity of claims over cultural property on the continental shelf is ultimately a question of opposability. They will still be valid *vis-à-vis* States which have acquiesced [sic] in them.<sup>498</sup>

Thus it could be inferred that the mere passing of legislation on unattributed rights would not amount to a breach of an international obligation — at least so long as the State in question acts *bona fide* and there is no abuse of rights in the sense that the State simply decided to disobey the law. Lowe expressed that '[f]requently, disputes arise not because States choose simply to disobey the law; rather, they disagree on what the law is'.<sup>499</sup> Thus, '[t]here is no rational basis on which any formulation of a rule inferred from State practice can be said to constitute an "improper" inference of a rule from that practice, although there may be considerations of principle or policy external to the process of inference which render one

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<sup>497</sup> *The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, 2 ITLOS Reports 16, at para. 58.

<sup>498</sup> Strati, *UCH: An Emerging Objective*, at 259, *supra* note 19 citing Georg Schwarzenberger, *International Law, Volume I* (3rd edn, Stevens & Sons: London, 1957) at 614. Footnotes omitted.

<sup>499</sup> Vaughan Lowe, 'The Role of Equity in International Law' in D. W. Greig (ed.) 12 *The Australian Yearbook of International Law* (Australian National University: Canberra, 1988–1989), 54–81 at 60. See also Michael Akehurst, 'Equity and General Principles of Law', 25 *International and Comparative Law Quarterly*, no. 4 (1976) 801–825.

interpretation preferable to another'.<sup>500</sup> Because there are no presumptions in favour of either the coastal State or other States in the EEZ, there is an inherent juxtaposition of rights, but no prejudice to the nature of the use of unattributed rights. Furthermore, as the wording of Article 59 suggests, a settlement by consensual means between States in a dispute would also mean that the decision on the attribution of rights would partly rest with these States. Since every case of attribution of residual rights has to be decided individually, and on the basis of equity and in light of all the relevant circumstances, attribution of the same rights could be different in separate cases. This demonstrates the difficulty of predicting possible results in future cases. Nevertheless, some general observations and presumptions can be made in light of the wording and purpose of Article 59.

Generally authors have recognised different categories of equity based on the three, sometimes four, different functions equity can perform. Lowe has distinguished these different kinds of equity as follows:

The traditional categories are equity *infra legem*, equity *praeter legem*, and equity *contra legem*, to which some jurists add a fourth category of decisions *ex aequo et bono*. Each category is said to have distinguishing characteristics. Equity *infra legem* is 'that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes', or equity 'used to adapt the law to the facts of individual cases'. Equity *praeter legem*, in contrast, is equity used to fill gaps in the law, or more precisely used 'not ... with a view to filling a social gap in law, but ... in order to remedy the insufficiencies of international law and fill its logical lacunae'. Equity *contra legem* is equity used in derogation from the law, to remedy the social inadequacies of the law. Decisions *ex aequo et bono* are decisions which 'do not have to be at all related to judicial considerations'. In fact, this attractive division cannot easily be sustained in the context of public international law.<sup>501</sup>

An equitable solution under Article 59 would thus require the combination and application of equity *infra legem* and *praeter legem*, and most certainly also some aspects of *ex aequo et bono*. Generally there has been disagreement on whether international tribunals could fill gaps in the law by recourse to equity *praeter legem*,<sup>502</sup> but in the case of unattributed rights Article 59 actually demands it in the absence of precise rules of attribution. However, the attribution of rights would certainly be based on an adaption of the rules of the LOSC to the facts of the individual case, thus invoking equity *infra legem*. Furthermore, nothing suggests that the result could not be based solely on *ex aequo et bono*.

According to Nordquist:

Equity is not an abstract concept, but is qualified by the provision that a conflict resolved on the basis of equity should take into account 'the respective importance of the interests involved to the parties as well as to the international community as a whole'. Given the functional nature of the exclusive economic zone, where economic interests are the principal concern this formula would

<sup>500</sup> Lowe, *The Role of Equity in International Law*, at 60, *supra* note 499.

<sup>501</sup> *Ibid.*, at 56. Footnotes omitted.

<sup>502</sup> Akehurst, 'Equity and General Principles of Law', at 805, *supra* note 499.

normally favour the coastal State. Where conflicts arise on issues not involving the exploration for and exploitation of resources, the formula would tend to favour the interests of other States or of the international community as a whole.<sup>503</sup>

Kwiatkowska is of the view that ‘the concerns of the international community would certainly be of significant importance in the case of any conflict with regard to jurisdiction over archeological [sic] and historical objects found within the EEZ’.<sup>504</sup> This is probably particularly true when a coastal State wishes to protect sunken warships — regardless of their nationality — in order to preserve them for historical purposes.

Strati listed four factors relevant to the settlement of disputes regarding the exercise of archaeological research and the right to control access to underwater sites.<sup>505</sup> These factors are: first, the existence of a cultural link between the cultural property in question and one of the parties of the dispute; second, in case of relatively recent wrecks, the qualification of one of the parties as the flag State of the sunken vessel; third, the accommodation of the interests of the international community in the protection and preservation of the underwater cultural property; and fourth, interference with the exercise of the rights of the coastal or flag States.

It is not difficult to apply Strati’s four factors to the Baltic region. The naval battles and operations that took place in the Baltic Sea certainly have a cultural link to several coastal States in the Baltic region — all coastal States will benefit from the protection of underwater cultural heritage from the World Wars because it is common history. Most of these wrecks are of recent origin, and practice has shown that coastal States have wide national interest in their sunken warships and naval history. There is also a strong element of reciprocity between Nordic and Baltic States in general, that suggest that the interests of other States would be respected in matters regarding the protection of underwater cultural heritage and shipwrecks.

Strati posits that it will be ‘difficult for third States to oppose the expansion of coastal jurisdiction over archaeological objects in the EEZ’.<sup>506</sup> Another solution is that ‘coastal States may take advantage of their extensive rights over the EEZ and exercise control over underwater cultural property indirectly, i.e., by claiming that archaeological research conducted by third States interferes with their resource-related rights’ as there is nothing in the LOSC ‘to prevent coastal States from undertaking protective measures in the exercise of their resource jurisdiction over the EEZ’.<sup>507</sup>

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<sup>503</sup> Nordquist (et al.) (eds), *UNCLOS: A Commentary*, Vol. II, at 569, *supra* note 280.

<sup>504</sup> Kwiatkowska, *The 200 Mile Exclusive Economic Zone*, at 230, *supra* note 458.

<sup>505</sup> Strati, *UCH: An Emerging Objective*, at 266, *supra* note 19.

<sup>506</sup> *Ibid.*, at 269. Footnotes omitted.

<sup>507</sup> *Ibid.*

#### 4.9.4. Analysis

In the Nordic region there has always been strong State protection and State-controlled preservation of ancient sites and cultural heritage.<sup>508</sup> This has been based on the idea that the State has the best means for providing, and is more *bona fide* towards, protection of cultural heritage, which is seen as common heritage and public property.<sup>509</sup> This approach echoes contemporary practice and the trend of the ‘common heritage of mankind’ ideology, which is endorsed especially in the CPUCH.<sup>510</sup> Furthermore, technically all States protect underwater cultural heritage and shipwrecks under their domestic laws, regardless of the country of origin.

The Finnish Act on the Exclusive Economic Zone<sup>511</sup> makes no reference to unattributed rights. In Sweden, Section 10 of the Swedish Economic Zone Act<sup>512</sup> is explained by Professor Mahmoudi as laying the burden of proof ‘on the flag [S]tate to show that the enjoyment of a certain right has in fact been recognized as a general principle of international law’.<sup>513</sup> The only Baltic State that applies domestic cultural heritage laws in its EEZ is Estonia. In 2011 the Estonian Heritage Conservation Act<sup>514</sup> was amended and, pursuant to Section 3(5), the Act covers all ‘underwater monuments’ within the territorial sea and on the EEZ. Section 34(3) of the Act specifies that any search or study of an underwater monument, which includes all shipwrecks, is subject to permission from the Estonian National Heritage Board. Additionally, Section 34(4) states that an activity license is required for any underwater study specified in the Act. The Act is and has been enforced on foreign nationals in the EEZ, and it is noteworthy that so far no State has objected. The adoption of such legislation can be considered as an application of the general duty to protect archaeological and historical objects pursuant to Article 303(1) of the LOSC.

In the Baltic region virtually all sunken warships, with a few exceptions, were lost during the past World Wars. These wrecks belong to a conflict that influenced all coastal States within this particular region. All States lost warships beyond the present territorial limits. Within the Nordic cultural heritage tradition it would seem unlikely that any Nordic State would object to cultural heritage laws aimed at protecting underwater cultural heritage beyond territorial

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<sup>508</sup> Matikka, *Chapter 3: Finland*, at 45, *supra* note 104.

<sup>509</sup> For example, the *travaux préparatoires* of the Finnish Antiquities Act state that cultural heritage is seen as a part of public property and national heritage, and deserves to be preserved for future generations due to its research potential. For this particular reason shipwrecks that have sunk over 100 years ago, and can be presumed abandoned, default to the State. See further (in Finnish), Hallituksen esitys Eduskunnalle laiksi muinaismuistolain 20 §:n muuttamisesta (HE 80/2002) and Hallituksen esitys eduskunnalle muinaismuistoja koskevan lainsäädännön uudistamiseksi (HE 100/1962).

<sup>510</sup> The CPUCH acknowledges in the beginning of the Preamble ‘the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage’.

<sup>511</sup> Laki Suomen talousvyöhykkeestä (1058/2004).

<sup>512</sup> Lag (1992:1140) om Sveriges ekonomiska zon.

<sup>513</sup> Said Mahmoudi, ‘Current Legal Developments: Sweden’, 8 *International Journal of Marine and Coastal Law*, no. 4 (1993) 524–529 at 528–529.

<sup>514</sup> Muinsuskaitseadus (RT I 2002, 27, 153). See further <[www.muinas.ee/board/legislation](http://www.muinas.ee/board/legislation)>.



waters. While Estonia is the only coastal State in the Baltic that has established such laws, the absence of protests from other States suggests that there is generally no opposition to this kind of legislation. Furthermore, foreign nationals diving in the EEZ of Estonia have complied with the Estonian heritage legislation.

#### 4.10. Marine Scientific Research

The origins of marine scientific research (MSR) date back to the HMS *Challenger* oceanographic expedition that took place between 1872 and 1876. The expedition was followed by twenty years of compiling and organising the gathered information.<sup>515</sup> Contemporary MSR however, was born in the aftermath of World War II when the exploitation of natural resources of the sea started to expand.<sup>516</sup>

In a general sense, MSR can be defined as ‘study and experimental work designed to increase man’s knowledge of the marine environment’ and it ‘encompasses any scientific work, wherever carried out, having the marine environment as object’.<sup>517</sup> This was the definition included in the Informal Single Negotiating Text (ISNT) of UNCLOS III, but later omitted from the final text of the LOSC.<sup>518</sup> By another definition, MSR means ‘those activities undertaken in ocean space to expand scientific knowledge of the marine environment and its processes’.<sup>519</sup>

As an activity, MSR falls under the wider concept of ‘marine data collection’, which should be understood as a generic term without legal content describing the umbrella under which to consider different data collection activities that take place in the marine environment.<sup>520</sup> The LOSC however, does not use the term ‘marine data collection’. Instead, the Convention distinguishes between ‘marine scientific research’, ‘hydrographic surveys’ and ‘research and survey activities’, without providing any definition for these terms, thus leaving their interrelation and specific meaning open to different interpretations. According to Professor Alfred Soons, this just implies that if States cannot agree on a definition, consensus is best maintained by having no definition at all.<sup>521</sup> Unfortunately, an approach such as this leaves many practical difficulties unsolved. However, even in the absence of clear definitions,

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<sup>515</sup> Florian H. Th. Wegelein, *Marine Scientific Research: The Operation and Status of Research Vessels and Other Platforms in International Law* (Brill: Leiden, 2005) at 23.

<sup>516</sup> Soons, *Marine Scientific Research and the Law of the Sea*, at 1–2, *supra* note 330 and Zhang Haiwen, ‘The Conflict Between Jurisdiction of Coastal States on MSR in EEZ and Military Survey’ in Myron H. Nordquist, John Norton Moore, and Kuen-chen Fu (eds) *Recent Developments in the Law of the Sea and China* (Martinus Nijhoff Publishers: Leiden, 2006), 317–331 at 318.

<sup>517</sup> Soons, *Marine Scientific Research and the Law of the Sea*, at 6, *supra* note 330.

<sup>518</sup> See further *ibid.*, at 118–125.

<sup>519</sup> Walker, *Definitions for the Law of the Sea*, at 241, *supra* note 195.

<sup>520</sup> Roach and Smith, *Excessive Maritime Claims*, at 413, *supra* note 9.

<sup>521</sup> Alfred H. A. Soons, ‘Marine Scientific Research Provisions in the Convention on the Law of the Sea: Issues of Interpretation’ in Edward D. Brown and Robin R. Churchill (eds) *The UN Convention on the Law of the Sea: Impact and Implementation* (Law of the Sea Institute: Honolulu, 1989), 366–367 at 366.

different types of marine data collection activities can be identified. Roach and Smith outlined four general categories, with seven subcategories, for the division of marine data collection:

- 1) Marine scientific research
- 2) Surveys
  - Hydrographic surveys
  - Military surveys
- 3) Operational oceanography
  - Ocean state estimation
  - Weather forecasting
  - Climate prediction
- 4) Exploration and exploitation of
  - Natural resources
  - Underwater cultural heritage (shipwrecks)<sup>522</sup>

Within the category of marine scientific (or oceanographic) research, Soons has identified four subcategories:

- Physical oceanography, which deals with waves, tides, currents, magnetism, heat exchange, etc.;
- Chemical oceanography, which involves the study of the complex chemistry of the ocean;
- Marine biology, which consists of the study of plant and animal organisms in the sea; and
- Marine geology and geophysics, which deal with the study of sediments and topography of the ocean floor, as well as the deeper structure of the ocean floor and its physical properties.<sup>523</sup>

According to Soons, the gathering of any data that does not concern the marine environment is not considered to be MSR. Following this logic, marine archaeological research would not be MSR because it ‘does not involve the study of the natural marine environment, but involves the study and recovery of man-made objects present on and in the sea floor which are relevant from a historical or cultural point of view’.<sup>524</sup> Strati arrived at the same conclusion: ‘within the sphere of the law of the sea, archaeological endeavour does not constitute marine scientific research, which is confined to the natural environment and its resources’.<sup>525</sup> Her further observations explain the issue:

The position may become complicated in relation to devices that are employed both in archaeological research and in other oceanographical surveys, such as the photographic sonar. If it is considered that marine archaeology is a multi-disciplinary science which derives from and contributes to a wide range of applied sciences, it will be very difficult to draw the line between archaeological

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<sup>522</sup> See further Roach and Smith, *Excessive Maritime Claims*, at 413–450, *supra* note 9.

<sup>523</sup> Soons, *Marine Scientific Research and the Law of the Sea*, at 6 and fn. 29, *supra* note 330.

<sup>524</sup> *Ibid.*, at 8 and fn. 38.

<sup>525</sup> Strati, *UCH: An Emerging Objective*, at 42, *supra* note 19.

research and research concerning the continental shelf simpliciter. Most importantly, which will be the criteria on the basis of which the nature of research will be determined?<sup>526</sup>

It should be borne in mind that, during the negotiations at UNCLOS III, the understanding of UCH and its archaeological and historical value was very limited. Maritime archaeology was still evolving as a new discipline, and was barely even considered as a scientific discipline of its own.<sup>527</sup> Furthermore, technology such as the MBES did not exist, and archaeological issues were considered to be of little value next to the more pressing matters of the time.

Another matter which has had an impact, perhaps bigger than many people understand, has been the wide adoption of GPS and associated satellite positioning systems used for precise navigation. Before satellite navigation and electronic charts became commonly used standards, it was extremely difficult to get an accurate position on the sea without the support of adjacent coastal State(s) and the use of shore stations (such as the Decca Navigation System)<sup>528</sup> to triangulate the position of the surveying vessel.<sup>529</sup> This issue is considerable with regards to shipwrecks. Without accurate positioning, locating shipwrecks becomes highly challenging, and all the more so, the greater the distance from shore. An inaccurate positioning means that the exact location of a newly-found shipwreck is not known, thus depriving the find of any usability. Prior to the introduction of the GPS in the 1990s, and later the Differential GPS (DGPS), all navigation systems required the establishment of fixed stations ashore in the proximate vicinity of the survey area. It was not until the GPS that the surveying vessel became independent of the need for shore stations for positioning.<sup>530</sup> As Dr Sam Bateman pointed out in 2005, '[i]t is possibly not a coincidence that hydrographic surveying in the EEZ has only become controversial over the last decade or so with the introduction of GPS that has allowed ships to accurately fix their position without shore control'.<sup>531</sup>

The absence of this technology during the time of UNCLOS III had an impact on what was achieved in the MSR regime of Part XIII of the LOSC. Furthermore, Professor Soons' widely-cited opinions regarding the exclusion of marine archaeology and hydrographic surveys from the ambit of MSR were written during the negotiations of UNCLOS III, well before the 'advent (in the late 1990s) of the systematic search operations that are now being conduct-

<sup>526</sup> *Ibid.*, at 256. Within this context, the term 'photographic sonar' should be understood as the side-scan sonar.

<sup>527</sup> Dromgoole, 'Revisiting the Relationship between MSR and the UCH', at 37–38, *supra* note 10 and Muckelroy, *Maritime Archaeology*, at 22–23, *supra* note 109. Muckelroy was one of the first scholars to articulate in favour of the inclusion of marine archaeology as a sub-discipline of archaeology.

<sup>528</sup> The Decca Navigator System allowed ships and aircraft to determine their positions using triangular positioning by receiving radio signals from shore-based radio beacons. Decca was commonly used for navigation before the introduction of GPS.

<sup>529</sup> Sam Bateman, 'Hydrographic Surveying and MSR in EEZ' in Myron H. Nordquist, Tommy T. B. Koh, and John Norton Moore (eds) *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff Publishers: Leiden, 2009), 105–131 at 123.

<sup>530</sup> Sam Bateman, 'Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research', 29 *Marine Policy*, no. 2 (2005) 163–174 at 168.

<sup>531</sup> Bateman, *Hydrographic Surveying and MSR in EEZ*, at 123–124, *supra* note 529.

ed'.<sup>532</sup> Nonetheless, it cannot be denied that the views of Professor Soons reflected the aims of the Conference. Many authors still generally agree with Soons, that the term MSR 'encompasses scientific research that is directed *at* the marine environment, rather than merely undertaken *in* the marine environment'.<sup>533</sup> Thus, maritime archaeology would always fall outside the scope of MSR: it is not focused on the marine environment itself, but on objects that are found within the marine environment. However, this dominant view of the exclusion of maritime archaeology, shipwreck hunting and other survey activities, has recently been challenged by several authors, and thus deserves to be reviewed.<sup>534</sup> Ocean explorer Dr Katherine Croff explains that these challenges have been raised because '[t]he inclusion of archaeology as marine science would have implications that would open up new rights and responsibilities of coastal and research States, as both fulfill their duties to protect and preserve archaeological and historical objects found on the seabed'.<sup>535</sup> While many problems associated with conducting survey activities are generally related to the deeper waters of the continental shelf and the EEZ,<sup>536</sup> in the Baltic Sea any search for shipwrecks can be conducted without the use of expensive deepwater technology due to the relatively shallow depth of water, especially in the Gulf of Finland.

#### 4.10.1. The Regime of MSR Under the LOSC

The LOSC has twenty-seven Articles concerning MSR, all placed under Part XIII of the Convention.<sup>537</sup> However, the LOSC does not define MSR by activity, nor does it define any operational methods or means of undertaking MSR. It also does not establish any objective criteria to determine the purposes and motives of MSR activities. This has led to conflicting positions regarding jurisdiction, especially concerning the control of hydrographic and military surveys in the EEZ.<sup>538</sup>

Hydrographic surveys reveal anomalies on the seabed — such as shipwrecks — although generally speaking they are activities '*with the purpose* of collecting data for the production of

<sup>532</sup> Dromgoole, 'Revisiting the Relationship between MSR and the UCH', at 46, *supra* note 10.

<sup>533</sup> *Ibid.*, at 43. See further e.g., Wegelein, *Marine Scientific Research*, at 78, *supra* note 515; Soons, *Marine Scientific Research and the Law of the Sea*, at 6 and 124–125, *supra* note 330; Caflisch, 'Submarine Antiquities and the International Law of the Sea', at 23, fn. 78, *supra* note 239 and Giorgi, *Underwater Archaeological and Historical Objects*, at 570–571, *supra* note 248.

<sup>534</sup> See e.g., Dromgoole, 'Revisiting the Relationship between MSR and the UCH', *supra* note 10; Boesten, *Valuable Shipwrecks in International Waters*, at 65–72, *supra* note 20 and Katherine L. Croff, 'The Underwater Cultural Heritage and Marine Scientific Research in the Exclusive Economic Zone', 43 *Marine Technology Society Journal*, no. 1 (2009) 93–100. For the traditional view excluding marine archaeology from the ambit of MSR, see e.g., Soons, *Marine Scientific Research and the Law of the Sea*, at 7–8 and fn. 38, *supra* note 330; Roach and Smith, *Excessive Maritime Claims*, at 413–450, *supra* note 9 and Wegelein, *Marine Scientific Research*, at 214–219, *supra* note 515.

<sup>535</sup> Croff, 'UCH and MSR in the EEZ', *supra* note 534.

<sup>536</sup> Dromgoole, 'Revisiting the Relationship between MSR and the UCH', at 47, *supra* note 10.

<sup>537</sup> For an introduction to Part XIII, see Myron H. Nordquist (et al.) (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume IV* (Martinus Nijhoff Publishers: Dordrecht, 1990) at 429–437.

<sup>538</sup> Guifang (Julia) Xue, 'Marine Scientific Research and Hydrographic Survey in the EEZs: Closing up the Legal Loopholes?' in Myron H. Nordquist, Tommy T. B. Koh, and John Norton Moore (eds) *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff Publishers: Leiden, 2009), 209–225 at 223–224.

navigational charts to support safety of navigation, such as the depth of water, configuration and nature of the natural bottom, directions and force of currents, height and times of tides, and hazards for navigation'.<sup>539</sup> More often than not, sunken ships are found as by-products of hydrographic and other surveys,<sup>540</sup> but these survey activities are also used for intentional and directed UCH searches. If these survey activities would be categorised as MSR for the purposes of the LOSC, coastal States would have the possibility to regulate — and thus gain greater control over — shipwreck survey activities on the EEZ and continental shelf.

Pursuant to Article 238 of the LOSC, all States and competent international organisations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in the Convention.<sup>541</sup> General principles concerning the conduct of MSR are provided in Article 240 of the LOSC:

In the conduct of marine scientific research the following principles shall apply:

- (a) marine scientific research shall be conducted exclusively for peaceful purposes;
- (b) marine scientific research shall be conducted with appropriate scientific methods and means compatible with this Convention;
- (c) marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea compatible with this Convention and shall be duly respected in the course of such uses;
- (d) marine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.<sup>542</sup>

The circumstances under which a coastal State can withhold its consent to MSR activities in the EEZ and on the continental shelf are listed in Article 246(5) of the LOSC.<sup>543</sup>

Many authors generally exclude hydrographic (and other marine) surveys from the ambit of MSR because Part XIII of the LOSC (concerning MSR) does not mention hydrographic surveys at all. Furthermore, the argument goes that MSR should be distinguished from hydrographic surveying activities because Articles 19(2)(j) and 21(1)(g) of the LOSC make a distinction between 'marine scientific research', 'hydrographic surveys' and 'research and survey activities'.<sup>544</sup> According to Professor Soons, '[f]rom Articles 19, 21 and 40, which use the term "hydrographic surveying" separately from "research", it follows that the term "marine

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<sup>539</sup> *Ibid.*, at 217.

<sup>540</sup> See e.g., Nord Stream, *Fact Sheet: Underwater Cultural Heritage in the Baltic Sea, November 2013*. See also Nord Stream, *Nord Stream Espoo Report: Key Issue Paper – Maritime Cultural Heritage, February 2009*. Both available online at <www.nord-stream.com>.

<sup>541</sup> For a commentary of Article 238, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. IV*, at 438–450, *supra* note 537.

<sup>542</sup> For a commentary of Article 240, see *ibid.*, at 454–462.

<sup>543</sup> For a commentary of Article 246, see *ibid.*, at 496–519.

<sup>544</sup> See e.g., Roach and Smith, *Excessive Maritime Claims*, at 422 and 435, *supra* note 9 and Churchill and Lowe, *The Law of the Sea*, at 405, fn. 3, *supra* note 15. For a commentary of Article 19, see Nordquist (et al.) (eds), *UNCLOS: A Commentary, Vol. II*, at 186–203, *supra* note 280. For a commentary of Article 21, see *ibid.*, at 164–178.

scientific research”, for the purposes of the Draft Convention, does not cover hydrographic surveying activities’.<sup>545</sup> He goes on:

With respect to hydrographic surveying (an activity which is not to be considered marine scientific research, although it is somewhat similar to it [...]), it is submitted that this activity, when it is conducted for the purpose of enhancing the safety of navigation or in connection with the laying of submarine cables or pipelines, must be regarded as an internationally lawful use of the sea associated with the operations of ships in accordance with Article 58, and can therefore be conducted freely in the exclusive economic zone. However, hydrographic surveying activities in connection with the exploration and exploitation of the natural resources of the exclusive economic zone must be regarded as part of the exploration or exploitation activities and are therefore subject to complete coastal State jurisdiction.<sup>546</sup>

Another proposed reason for authors excluding hydrographic and other surveys from the scope of MSR is that hydrographic surveying activities can be regarded ‘as embracing the safety of navigation’, and ‘as an internationally lawful use of the sea related to the freedom of navigation and therefore permissible for all States in the EEZ’<sup>547</sup> pursuant to Article 58 of the LOSC. Based on this argument, Roach and Smith argue that ‘[t]he conduct of surveys in the EEZ is an exercise of the freedoms of navigation and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operations of ships, which [A]rticle 58 of the LOS Convention guarantees to all States’.<sup>548</sup>

#### 4.10.2. New Interpretations for Hydrographic Surveys as MSR

Any search for shipwrecks is essentially a hydrographic survey that attempts to locate anomalies on the seabed. Such a survey — with the specific aim of locating underwater cultural heritage — falls under the scope of maritime archaeology. However, the exact same methods and equipment are used for other purposes in different kinds of marine data collection. Thus, a survey conducted for archaeological purposes is sometimes effectively indistinguishable from MSR. The fundamental problem is that the same activities can be carried out for different purposes, and fall under and be regulated by different regimes.<sup>549</sup> For example an MBES survey will always produce backscatter data as a by-product, which is ‘valuable for geological mapping, habitat assessments and for engineering [matters] such as submarine cable route selection’.<sup>550</sup> As a result, the data collected can be the same, when the

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<sup>545</sup> Soons, *Marine Scientific Research and the Law of the Sea*, at 125, *supra* note 330.

<sup>546</sup> *Ibid.*, at 157.

<sup>547</sup> Churchill and Lowe, *The Law of the Sea*, at 405, fn. 3, *supra* note 15.

<sup>548</sup> Roach and Smith, *Excessive Maritime Claims*, at 436, *supra* note 9, and generally J. Ashley Roach, ‘Marine Data Collection: Methods and the Law’ in Myron H. Nordquist, Tommy T. B. Koh, and John Norton Moore (eds) *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff Publishers: Leiden, 2009), 171–208.

<sup>549</sup> Roach and Smith, *Excessive Maritime Claims*, at 450, *supra* note 9.

<sup>550</sup> Doug Lockhart, Edward Saade, and Jerry Wilson, ‘New Developments in Multi-beam Backscatter Data Collection and Processing’, *Fugro Pelagos, Inc.*, (2004). Available online at <[www.fisherieshabitat.net/lib/newdevelopmentsinmultibeam.pdf](http://www.fisherieshabitat.net/lib/newdevelopmentsinmultibeam.pdf)>. Backscatter is defined as ‘the amount of acoustic energy being received by

only thing that makes the distinction between MSR and applied surveys is the collected parameters and their intended use.<sup>551</sup> This issue is elaborated on by Dromgoole:

Although the primary purpose of remote-sensing activities by treasure salvors is to locate shipwrecks, a considerable amount of general data concerning the seabed and subsoil inevitably will be generated through the use of sonar and magnetic imaging devices. For each search area (and it should be recalled that these areas can be thousands of square miles in size), a substantial databank of information will be systematically accumulated and stored. This information will include many of the natural parameters of the marine environment. Such data have many potential applications, including in relation to the exploration and exploitation of marine resources, development of renewable energy sources, conservation and management of the marine environment, and even the delimitation of maritime boundaries and zones. It is a truism that much of the seafloor is currently unmapped and that present levels of knowledge about the seabed and subsoil are poor and inadequate. The data collected by treasure salvors are therefore likely to be of considerable potential utility and, consequently, commercial value. As Bateman points out, such data are a 'tradable commodity'; there is nothing to preclude those that have gathered the data from selling them on for use in a potentially wide variety of applications.<sup>552</sup>

More practical problems arise from the terms — 'marine scientific research', 'hydrographic surveys' and 'research and survey activities' — used by the LOSC, as Dr Julia Xue explains:

Based on Part XIII of the [LOSC], people may argue that the methods of the data collected and their motives or intended use constitute the primary differences between MSR and hydrographic/military survey and thus distinguish whether the marine data collection activities are MSR and subsequently determine the relevant applicable rules. Then some questions are more difficult, such as how can the motives for MSR and hydrographic/military survey be determined? What constitutes 'scientific purpose' and 'military purpose' and who determines it? When does information for 'making of navigational charts and safety of navigation' become a military survey and not hydrographic survey? These questions are especially difficult to answer in a general climate of mistrust and suspicion.<sup>553</sup>

The data collected from hydrographical surveys can be used for different purposes, and has clear economic value to the coastal State. Bateman opines that 'the coastal State should be in a position to manage and control the release of such data, regardless of how and by whom it was collected'.<sup>554</sup> Xue is supportive of this view, and argues further that:

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the sonar after a complex interaction with the seafloor. This information can be used to determine bottom type, because different bottom types "scatter" sound energy differently. For example, a softer bottom such as mud will return a weaker signal than a harder bottom, like rock. Multibeam bathymetry on the other hand, provides seafloor depth information and is computed by measuring the time that it takes for the signal to return to the sonar'. See further 'What is Multibeam Backscatter' at <[oceanexplorer.noaa.gov/oceanos/explorations/ex1104/logs/aug12/aug12.html](http://oceanexplorer.noaa.gov/oceanos/explorations/ex1104/logs/aug12/aug12.html)>.

<sup>551</sup> Roach and Smith, *Excessive Maritime Claims*, at 450, *supra* note 9.

<sup>552</sup> Dromgoole, 'Revisiting the Relationship between MSR and the UCH', at 48, *supra* note 10 citing Bateman in Bateman, 'Hydrographic surveying in the EEZ', at 170, *supra* note 529.

<sup>553</sup> Xue, *Closing up the Legal Loopholes?*, at 218, *supra* note 538.

<sup>554</sup> Bateman, 'Hydrographic surveying in the EEZ', at 169, *supra* note 530.

If ‘hydrographic survey’ or ‘military survey’ were to be excluded from the scope of MSR, ‘hydrographic survey’ and ‘military survey’ could be carried out in coastal States’ EEZ without any restrictions. Eventually, this would lead to a collapse of the present MSR regime in the EEZ. This was certainly not what the [LOSC] regime intended. The increased importance of EEZ management and State practice suggest that hydrographic/military survey in the EEZ should be under the jurisdiction of the coastal State.<sup>555</sup>

The collapse that Xue warns of would result from the free choice to conduct MSR through other forms of marine data collection, which would provide the same data and results, without the need to consent to the MSR regime of the LOSC.

#### 4.10.3. Analysis

The legal nature and intended purpose of hydrographic surveys affects the right to conduct them. If hydrographic surveys are included in the notion of MSR, they fall under the consent regime of the coastal State. If hydrographic surveys are excluded from the scope of MSR, there are two possible approaches. One approach is put forward by authors such as Roach and Smith, who have argued that the conduct of surveys is an exercise of the freedoms of navigation, and other internationally lawful uses of the sea related to those freedoms, which Article 58 of the LOSC guarantees to all States without restriction.<sup>556</sup> The other view is that, since the search for archaeological and historical objects (conducted in a form of hydrographic survey), or any other form of archaeological research is not included in the comprehensive list of freedoms mentioned in Article 58, this activity would fall under the category of unattributed rights in the EEZ. Thus, should a dispute arise between two or more States over, for example, a hydrographic survey for the search for archaeological and historical objects, then the dispute resolution process for unattributed rights as set forth in Article 59 of the LOSC would apply.<sup>557</sup>

Thus it remains uncertain whether the attribution of rights in the case of hydrographic surveys would fall under Article 58 or eventually Article 59, should a dispute between two or more State arise. The following example demonstrates the issue:

On 23 October 2009 the Swedish survey company Marin Mätteknik Ab (today MMT Ab) published a press release regarding the discovery of a British submarine, HMS *E-18*, lost in the Baltic Sea during World War I in May 1916.<sup>558</sup> The search was conducted by MMT’s survey vessel *M/V Triad*, sailing under a Swedish flag, in an area off the Estonian island of Hiiumaa in the Estonian EEZ. Just before entering the Estonian EEZ, *M/V Triad* finished a survey it had been conducting for the Nord Stream natural gas pipeline in the Finnish EEZ. Swedish historian–explorer and

<sup>555</sup> Xue, *Closing up the Legal Loopholes?*, at 222, *supra* note 538.

<sup>556</sup> Roach and Smith, *Excessive Maritime Claims*, at 436, *supra* note 9. The United States and the United Kingdom have, for example, taken the position that the conduct of surveys in the EEZ of the coastal State is an exercise of the freedom of navigation and other internationally lawful uses of the sea under Article 58(1).

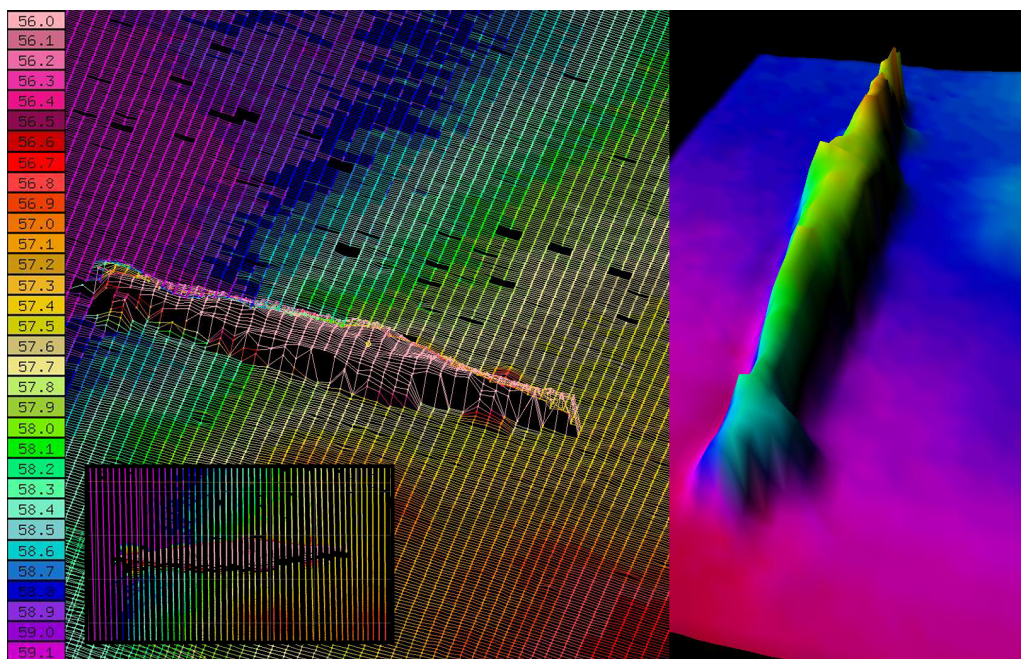
<sup>557</sup> Giorgi, *Underwater Archaeological and Historical Objects*, at 571, *supra* note 248.

<sup>558</sup> MMT, ‘Churchill’s Lost Submarine’, 23 October 2009. Available at <[www.mmt.se/news-media/churchills-lost-submarine](http://www.mmt.se/news-media/churchills-lost-submarine)>.



Chairman of the Board of MMT, Carl Douglas, had been searching for the wreck in cooperation with Australian Darren Brown, whose great-grandfather, Albert Robinson, had been serving on the submarine. Robinson survived the loss of *E-18* because he fell ill with appendicitis and was confined to his bed shortly before *E-18*'s last patrol. For years Brown had spent much of his spare time researching historical archives of Britain, Germany, Estonia and Russia.

According to Estonian officials, *M/V Triad* had been at the wreck site for three days. On the first day, the Estonian Police and Border Guard enquired as to the intentions of *M/V Triad*. According to the Estonians, the vessel replied that it was calibrating its equipment. On the second day, the vessel stated that they were, in fact, doing research on an unknown shipwreck under the permit from the Estonian Ministry of Foreign Affairs. By the time Estonian officials realised that no permits had been issued, *M/V Triad* had already left the Estonian EEZ. According to Estonian newspaper *Postimees*, *M/V Triad* had left, if not escaped, the Estonian EEZ at full steam after a Border Guard plane performed a flight over the vessel.<sup>559</sup> In the aftermath, Estonian officials contacted the appropriate Swedish authorities. MMT did not, however, disclose the location of the wreck to Estonian authorities. Nevertheless, the location of *M/V Triad* had been marked down and when the Estonian Maritime Administration conducted multibeam surveys in the area in 2013, the wreck was found, again. Ola Oskarsson, one of the founders of MMT, commented that according to their view, they did not have any legal obligation to disclose the location of the wreck in spite of it being in the Estonian EEZ, and that the Estonians had acted aggressively for no good reason.



*The British World War I submarine HMS E-18, as seen in a multibeam sonar hydrographic survey on the Estonian EEZ. (Courtesy of Estonian Maritime Administration, 2013.)*

The situation is similar to the one faced by ITLOS in the case of *M/V Saiga (No. 2)*, where the Tribunal had to identify the exact powers of States with regards to bunkering in the EEZ. The Tribunal chose not to address the question of whether bunkering was ancillary to fishing

<sup>559</sup> Küllike Rooäli, 'Sunken British submarine, discovered twice', *Postimees* 24 October 2013. Available online at <[news.postimees.ee/2573096/sunken-british-submarine-discovered-twice](http://news.postimees.ee/2573096/sunken-british-submarine-discovered-twice)>.

(which is subject to coastal State jurisdiction) or ancillary to navigation (which is subject to the freedoms and lawful uses of the sea granted to all States under Article 58 of the LOSC). The Tribunal also avoided any reference to Article 59 and unattributed rights. It remains unclear whether hydrographic surveys can be conducted as an exercise of the freedom of navigation and other internationally lawful uses of the sea under Article 58(1). While the intentions of the drafters at UNCLOS III is rather clear, the new developments in technology and current State practice have indicated that coastal States might be more eager than before to assert rights on hydrographic surveys and archaeological research alike.

## CONCLUSIONS

### Unilateral Action.

One cannot complain that this is an illicit process in any way, for the technological changes of the time, and the disturbances that have resulted in environmental and social matters, require that there be changes in the law. It is not a matter of recording old rules, but one of making new ones, and there are no other ways of doing this than by agreement or unilateral action; and when agreement is not forthcoming then by unilateral action alone. It has always been the case that claims to the sea have been made unilaterally, but since 1945 there has been a fundamental change in the way they have been vindicated. Previously, they were defined as consistent with the existing law, because its rules were said to be unclear or flexible. Ambiguity was exploited. Today they tend increasingly to be justified only on the hypothesis that change is necessary. It is this alteration in emphasis that so seriously affects the methodology of international law, for there is no discernible criterion for determining, in a condition of incoherence, what rule the practice of States supports. Certainly a prime condition of authentic legal reasoning is that it supports the old rule until the new one takes its place, but it is often difficult to say, from the mere enumeration of subscribers to the one or the other point of view, when the substitution has taken place.<sup>560</sup>

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It is clear that the evolution of the modern law of the sea had very little, if anything, to do with the protection of shipwrecks and other forms of underwater cultural heritage. From a cultural heritage management point of view, the delimitation of different maritime zones, which determine the level of protection underwater cultural heritage is entitled to receive, makes little sense. The delicate package deal reached during UNCLOS III was a compromise where every party gained and lost something. Underwater cultural heritage and shipwrecks were one of the 'parties' that lost. It has become widely accepted that the LOSC represents customary international law — if not completely, then at least mostly. This interpretation is supported by the vast number of State parties to the Convention: 167 in total, after Palestine's ratification on 2 January 2015. O'Keefe points out there are those 'who consider [the LOSC] as the only international instrument which would guide all developments concerning underwater cultural heritage'.<sup>561</sup> However, the provisions of the LOSC are far from complete, and pose serious problems to coastal States and flag States alike who wish to protect sunken warships and other forms of underwater cultural heritage. While the issues regarding the

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<sup>560</sup> O'Connell, *The International Law of the Sea Volume I*, at 31, *supra* note 14.

<sup>561</sup> O'Keefe, *Shipwrecked Heritage*, at 57–58, *supra* note 25.

protection of underwater cultural heritage have been addressed in the CPUCH, only one Baltic State has ratified that Convention. Furthermore, the CPUCH only covers shipwrecks that were sunk over 100 years ago, thus presently excluding the last shipwrecks from World War I (1914–1918) and all shipwrecks from World War II (1939–1945). Nevertheless, for as long the CPUCH does not receive wider acceptance, coastal States are left with the provisions of the LOSC and individual State practice, which provide at least the following possibilities to coastal States regarding the protection of shipwrecks and especially sunken warships.

The lack of any internationally accepted definition for objects of ‘archaeological and historical’ nature leaves it up to coastal States to determine what may be included in such a category. Thus what objects will be considered as having an archaeological and historical nature will always depend on domestic heritage legislation and domestic policies. For example Estonia protects any underwater monument based on its historical importance; Finland protects objects that have been underwater for more than 100 years; and Sweden protects objects from the year 1850 or earlier. Nevertheless, nothing suggests that sunken warships from the World Wars could not be included in the notion of archaeological and historical objects pursuant to Article 303. Sunken warships from both World Wars are historically and archaeologically important, and hold source material and information which are not available from any other source. Therefore they should be protected under special circumstances as objects of historical and archaeological nature.

The nature of the laws of salvage in civil law tradition is distinct from the laws of salvage under the common law admiralty. Thus an action *in rem* is not even recognised by Nordic legal doctrines because ‘a thing’ cannot be party to a suit. This severely limits the potential for professional treasure hunting in the Baltic region.

The Baltic Sea and the Gulf of Finland are relatively small areas, and the use of local ports by ships is unavoidable. Because of this dependence on ports, coastal States can make use of port control — which is not limited to archaeological operations, but can be exercised on every matter the port State has an interest in. Even if a coastal State cannot extend its laws to cover sites such as sunken warships or other shipwrecks beyond the territorial sea, its port control can ensure a substantial degree of control on a practical level. However, an effective regime requires consistency and cooperation between coastal States, and most importantly, political will: port control is only effective if legislation is uniform and there are no safe havens where protective legislation is weaker.

In the contiguous zone, recent State practice (and the opinions of respected authors) provide evidence that coastal States have, in fact, wide possibilities to protect UCH by virtue of Article 303(2) and the establishment of a 24-nautical-mile archaeological zone. However, it is left solely to the coastal States to assess and implement the required provisions for such a

zone. In the Gulf of Finland, the establishment of an archaeological zone by all coastal States — Finland, Estonia and Russia — would protect the whole Gulf.

In the continental shelf Article 81 of the LOSC could be utilised to afford coastal States a broad right to regulate drilling. While term 'drilling' is not defined by the LOSC, it has been argued that it could be interpreted to include activities that disturb or alter the seabed, which may be the effect of intrusive operations at a shipwreck site. For archaeological activities where equipment such as underwater installations and structures could be utilised, it may be possible to use the provisions in Articles 60 and 80, which give coastal States certain rights to authorise and regulate the construction, operation and use of such facilities. However, the absence of any salvage industry focused on historical shipwrecks in the Baltic Sea makes the application of Articles 60, 80 and 81 somewhat theoretical and irrelevant. Furthermore, activities such as looting seldom disturb the seabed in any way, because most shipwrecks in the Baltic Sea are well preserved and not embedded in the seabed.

Within the EEZ, the adoption and enforcement of national legislation could be considered as an application of the general duty to protect archaeological and historical objects pursuant to Article 303(1). Furthermore, physical tampering with a shipwreck may well cause damage to living resources — and a coastal State may be able to argue that there has been interference with its sovereign rights. As an unattributed right in the EEZ, the protection of shipwrecks and underwater cultural heritage is subject to the provisions of Article 59 and without prejudice to coastal State laws until there is a dispute. Thus, any consequences in the event that a coastal State should extend its laws to the EEZ are hard to predict. Currently only Estonia has enacted such legislation, which has not been objected to by other States.

Article 303(4) is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature. Thus, coastal States always have an option to conclude regional or bilateral treaties (such as in the case with *M/S Estonia* and the treaty between the Netherlands and Australia). Regional treaties seem to be the most effective way to achieve protective regimes, because they are easier to conclude and in the Baltic Sea it can be assumed that many coastal States have an interest for such protective treaties. While it has been suggested that a new convention could be drafted for the protection of UCH, it is hard to imagine that any international forum could negotiate a treaty that could take into consideration the varying interests of all States. Since such a treaty would require global acceptance, the most effective results can be gained through regional and bilateral treaties. Regional agreements have the weakness of being inapplicable and unenforceable to third States, but the interests and characteristics of the Baltic Sea would make it virtually impossible for vessels from third States to jeopardise a protective scheme set up in a comprehensive regional agreement.

The regulation of marine scientific research — and the question of whether the use of hydrographic surveys is an exercise of the freedoms of navigation and other internationally lawful uses of the sea — has proven to be a contentious issue. If such surveys were included in the ambit of marine scientific research, they would fall under the consent regime of coastal States. While this would give coastal States some control regarding the finding of new shipwrecks, the control of surveys does not as such offer any protection for known wreck sites.

For as long as government officials from coastal States keep waiting for clear and ready-made provisions printed in bold font — and for someone else to enforce them — our cultural heritage will languish. Changes to international policies, and the creation of new customary and conventional international law, are usually driven by the pressures of domestic politics.<sup>562</sup> Although the LOSC does not offer any applicable framework for the protection of sunken warships or underwater cultural heritage, coastal States in the Baltic Sea have multiple options to consider.

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<sup>562</sup> Lawrence A. Howard, 'The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy', 16 *Texas International Law Journal*, no. 3 (1981) 321–345 at 333–334.

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Never ever depend upon governments or institutions to solve any major problem.

All social change comes from the passion of individuals.

*Margaret Mead*