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The Contiguous Zone as an Archaeological Maritime Zone

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Abstract

The law of the sea, mainly codified in the UN Convention on the Law of the Sea (LOSC), does not properly address the protection of underwater cultural heritage. This is particularly evident for the contiguous zone, a maritime area where different public and private marine activities may be threatening that heritage. Articles 33 and 303(2) LOSC are counterproductive and may create a legal problem that the 2001 UNESCO Convention on the protection of underwater cultural heritage tries to solve and clarify. In addition to this Convention, State practice shows how coastal States have been expanding their rights over their contiguous zone by adding legislative powers to the limited enforcement powers allegedly endorsed in the LOSC. This article tries to demonstrate that general and consistent State practice over the last decades, both conventional and unilateral, has produced a change in the legal rules governing the coastal States' archaeological rights over their contiguous zone, expanding them with no clear objection among States, which now consider the protection of underwater cultural heritage—a generally absent interest during the negotiation of the LOSC—indispensable to safeguard for future generations the fragile elements composing that heritage.

Keywords

law of the sea – contiguous zone – customary process – state practice – treaty interpretation – underwater cultural heritage

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Introduction

Impressive advances in technology during the last decades have permitted human beings to know and gather the most accurate information from the seas and the subsoil beneath their waters. These technologies have also found vestiges and remains of the presence of humans on the coasts, in shallow water and the deep sea: historical traces of ancient baselines, old harbours, coastal installations and entire villages now submerged, traditional fishing gear, shipwrecks, caves, etc. All the historical and archaeological information provided by these elements helps to fill the gaps in the account of our common history.[1]

Nowadays, however, new threats to this underwater cultural heritage are appearing: human activities along the coasts, fishing techniques without environmental or archaeological controls, and treasure-hunting pose new and dangerous threats to the subsistence of all these traces of human life. Against these threats, the law of the sea and other international and domestic rules try to articulate a structured normative protection. Certain threats have been addressed by the UNESCO normative action, particularly its Convention on the Protection of Underwater Cultural Heritage (2001 UNESCO Convention hereinafter).[2]

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1 Sometimes recent maritime history has also been encapsulated beneath the waters. On 15 April 2012, the RMS *Titanic*—perhaps the most popular wreck—became "officially" a part of the underwater cultural heritage as 100 years had elapsed since its foundering in the tragedy of 14–15 April 1912. See MJ Aznar and O Varmer, 'The Titanic as Underwater Cultural Heritage: Challenges to its Legal International Protection' (2013) 44 *Ocean Development and International Law* 96–112. On the other hand, for 2014, UNESCO has invited the preparation of commemorative events highlighting the extensive underwater cultural heritage from World War I on the occasion of the 100th anniversary of the outbreak of that war (see <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/dynamic-content-single-view/news/-888870e6ca/>, accessed 12 January 2013).

2 Adopted 2 November 2001 (entered into force 2 January 2009) 2562 *UNTS* 1. For an analysis of the Convention (including its drafting), see R Garabello, *La Convenzione* UNESCO *sulla protezione del patrimonio culturale subacqueo* (Giuffrè Editore, Milan, 2004). See also C Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51 *International and Comparative Law Quarterly* 511–554; MJ Aznar, 'La Convención sobre la protección del patrimonio cultural subacuático de 2 de noviembre de 2001' (2002) 54 *Revista Española de Derecho Internacional* 475–481; and S Dromgoole, '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2003) 18 *International Journal of Marine and Coastal Law* 59–108. See recently S Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press, Cambridge, 2013).

States have normally protected cultural heritage within their domestic realm with diverse rules and institutions. Certain rules are applicable to the maritime zones under State sovereignty or jurisdiction. But the governance of these zones—internal waters, territorial sea, archipelagic sea, contiguous zone, exclusive economic zone (EEZ) and continental shelf, as defined by the 1982 UN Law of the Sea Convention (LOSC)[3]—reflect, to some extent, how the rights and jurisdiction of the coastal State diminish as one moves seaward from the coastal baselines. If sovereignty extends to the inland waterways and territorial sea of every State[4]—and therefore the coastal State's domestic cultural legislation does fully apply to these zones—over the rest of the zones the coastal State has more limited powers, mainly limited to the exploration for and exploitation of living and non-living resources. But what about the contiguous zone? What are the rights of the coastal State with regard to the protection of underwater cultural heritage, particularly in its contiguous zone?

This article explores these possible rights based on the following premises:

- Current normative texts—particularly the LOSC and the 2001 UNESCO Convention—create a possible contradiction between the provisions set by the general international law of the sea and those established by special international law protecting underwater cultural heritage in the contiguous zone;
- States' conventional and unilateral practice shows how States have gradually extended their rights over their contiguous zones to achieve general protection of underwater cultural heritage in these zones, hence solving the gap referred to above;
- This practice—as a customary process—has elucidated the current legal status of the contiguous zone with regard to the general protection of underwater cultural heritage; and
- Consequently, it could be argued that current international law includes a so-called archaeological maritime zone which extends to the outer limit of the State's contiguous zone.[5]

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3 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 *UNTS* 397 (LOSC).

4 Art. 2 LOSC. *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits) [1986] ICJ Rep 14, at 111 (para. 212).

5 The term 'archaeological maritime zone' may be dated back to the 1980s when some authors — particularly Italians and Greeks—began to analyse the legal implications of that zone. See the first approach in T Treves, 'La nona sessione della conferenza sul Diritto del Mare' (1980) 63 *Rivista di Diritto Internazionale* 432–463 and, later, 'Stato costiero e archeologia sottomarina' (1993) 76 *RDI* 698–719. See also, among others, U Leanza, 'La zona archeologica marina

In order to develop this hypothesis, the present article will address: (1) the possible normative contradiction between general and particular international law regarding the protection of underwater cultural heritage in the contiguous zone; (2) the effect of State practice on current international law with regard to that possible protection; and (3) the current existence, limits and regulation of a so-called archaeological maritime zone coincident with the contiguous zone declared by coastal States.

Clarifying Contradictory Terms

The contiguous zone—codified for the first time in the first UN Conference on the Law of the Sea (UNCLOS I)[6] and currently regulated by Article 33 LOSC—is

e la protezione dei beni culturali subacquei', in P Paone (ed), *La protezione internazionale e la circulazione comunitaria del beni culturali mobili* (Ed. Scientifica, Naples, 1998) 91–117; L Migliorino, *Il recupero degli oggetti stocirici ed archeologici sommersi nel Diritto internazionale* (Giuffrè Editore, Milan, 1987), at 125; N Ronzitti, 'Stato costiero, archeologia sottomarina e tutela del patrimonio historico sommerso' [1984] *Diritto marittimo* 3–24; E Rocounas, 'Submarine archaeological research: some legal aspects', in U Leanza (dir), *The international legal régime of the Mediterranean Sea* (Giuffrè Editore, Milan, 1987) 309–334; S Karagiannis, 'Une nouvelle zone de jurisdiction: la zone archéologique maritime' (1990) 4 *Espaces et ressources maritimes* 1–27; A Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (Kluwer, The Hague, 1995) at 166. In Spain, see J Barcelona, 'Notas sobre el régimen internacional de las intervenciones arqueológicas submarinas' (2002) 6 *Patrimonio Cultural y Derecho* 47–72; but *cf* MJ Aznar, *La protección del patrimonio cultural subacuático* (Tirant, Valencia, 2004), at 99–101 and 149–155; and J Carrera Hernández, *Protección internacional del patrimonio cultural submarino* (Ed. Univ. Salamanca, Salamanca, 2005), at 53. See further L Caflisch, 'Submarine Antiquities and the International Law of the Sea' (1982) 13 *Netherlands Yearbook of International Law* 3–32, at 20; L Caflisch, 'Les zones maritimes sous jurisdiction nationale, leurs limites et leurs délimitation', in D Bardonnet and M Virally (eds), *Le nouveau droit international de la mer* (Pedone, Paris, 1983) 35–116, at 57; and JP Beurier, 'Pour un droit international de l'archéologie sous-marine' (1989) 93 *Revue générale de droit international public* 45–68, at 51.

6 Stemming from the British 'Hovering Acts' of the eighteenth century, the Spanish customs zones of the nineteenth century, the neutrality zones of certain other countries, and the customs and security zones of certain Latin American States, the contiguous zone was finally endorsed in Art. 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 *UNTS* 205. See different approaches over time in S Oda, 'The Concept of the Contiguous Zone' (1962) 11 *ICLQ* 131–153; AV Lowe, 'The Development of the Concept of the Contiguous Zone' (1981) 52 *British Yearbook of International Law* 109–169; J Symonides, 'Origin and Legal Essence of the Contiguous Zone' (1989) 20 *ODIL* 203–211; VL Gutiérrez-Castillo, 'La zone contigüe dans la

a zone that cannot extend beyond 24 nautical miles (nm) from the baselines from which the breadth of the territorial sea is measured, and over which 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; and (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

To the four realms provided for in that Article, the LOSC adds archaeological and cultural objects through a deficient wording of a legal fiction endorsed in its Article 303(2), which reads as follows:

> 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.

It is to be supposed that only to literally "control" the "traffic" of archaeological objects, the "removal" of (but not other possible damage to) these objects would result in an infringement of coastal State regulations if made without its approval.[7] This wording has been not only criticised by authors,[8] but also seems to have been superseded by normative action and State practice. However, before discussing these changes, general considerations are given.

As is well known, there is a fundamental change between the 1958 and 1982 Conventions regarding the legal status of the contiguous zone: this zone always was "a zone of the high seas" contiguous to a State's territorial sea in the 1958 Geneva Convention, but in the 1982 LOSC, if a Coastal State has declared an

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Convention des Nations Unies sur le droit de la mer' [2002] *Annuaire droit de la mer* 149–164.

7 However, as has been pointed out, the different authentic texts of this Article may be interpreted in different ways. See Karagiannis (n 5), at 11.

8 See among others BH Oxman, 'Marine Archaeology and the International Law of the Sea' (1987–1988) 12 *Columbia Journal of Law and the Arts* 353–372; C Lund, 'Protection of the Under-Water Cultural Heritage', in U Leanza (dir), *Il regime giuridico internazionale del Mare Mediterraneo* (Giuffrè Editore, Milan, 1987) 351–354; T Scovazzi, 'A Contradictory and Counterproductive Regime', in R Garabello and T Scovazzi (eds), *The Protection of the Underwater Cultural Heritage, Before and After the 2001 UNESCO Convention* (Martinus Nijhoff, Leiden, 2003) 3–18; A Strati, 'Protection of the underwater cultural heritage: from shortcomings of the UN Convention on the law of the sea to the compromises of the UNESCO Convention', in A Strati, M Gavouneli and N Skourtos (eds), *Unresolved Issues and the New Challenges to the Law of the Sea* (Martinus Nijhoff, The Hague, 2006) 21–62.

EEZ, then the contiguous zone will fall within that zone and hence will have its *sui generis* status rather than constituting part of the high seas.

The contiguous zone's legal regime refers to the water column but not to the soil and subsoil of that zone. This has led to arguments that the contiguous zone's seabed shares the legal status of the continental shelf.[9] However, for the particular case of archaeological objects, Article 303(2) expressly mentions the removal of these objects "from the seabed in the zone referred to". Irrespective of the legal status of the contiguous zone's seabed, the regime created by Article 303(2) for the particular case of the archaeological objects seems to establish a particular regime for these objects which may overlap with the general regime created by the LOSC for the continental shelf.

Another question discussed is the nature—enforcement or legislative—of coastal State jurisdiction.[10] Some authors have narrowed coastal States' powers to a limited enforcement jurisdiction.[11] However, this may contradict the text of Article 303(2) when it explicitly refers to the "approval" by the coastal State.[12]

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9 However, this does not throw new light on the coastal State's rights because, among the "natural resources" to which Article 77(1) LOSC refers, underwater cultural heritage is not included. As the International Law Commission (ILC) early affirmed, "[i]t is clearly understood that the rights of the coastal State do not cover objects such as wrecked ships and their cargoes (including bullion) lying in the seabed or covered by sand in the subsoil" (*Yearbook of the International Law Commission*, vol. II, 1956, at 289).

10 Preliminary works are not conclusive. During the IIIrd UN Conference on the Law of the Sea (UNCLOS III), the following proposal, made by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia, was rejected: "[t]he coastal State exercises sovereign rights over any object of purely archaeological and historical nature on or under its continental shelf for the purpose of research, salvaging, protection and proper presentation. However, the State or country of origin, or the State of cultural origin, or the State of historical origin shall have preferential rights over such objects in case of sale or any other disposal" (UN Doc. A/CONF.62,/C.2 Informal Meeting/43, 16 August 1976). Greece then proposed to extend coastal State jurisdiction to apply its laws and regulations on marine archaeology up to 200 nm from the baselines, but this was also rejected (UN Doc. A/CONF.62/GP/10, 18 August 1980). The negotiation process focusing on the question of underwater cultural heritage can be found in Strati (n 5), at 162–165.

11 See among others Oxman (n 8), at 364; E Boesten, *Archaeological and/or Historical Shipwrecks in International Waters: Public International Law and What it Offers* (TMC Asser Press, The Hague, 2002), at 58.

12 Even more clear in other LOSC authentic languages: 'autorización' in the Spanish text and 'approbation' in the French version. For Tullio Treves, the text of Article 303(2) indeed favours a wider interpretation: "La combinazione dei poteri di prevenzione e repressione di cui gode lo Stato costiero nella zona contigua, resi applicabili alla rimozione non autorizzata di oggetti di natura archeologica e storica, col potere di autorizzare la rimozione testé ricordato, fa pensare che lo Stato costiero possa legittimamente pretendere di avere

If there is an act of approval by the coastal State, this necessarily implies a legislative term of reference.[13] Given the fiction endorsed in Article 303(2), nothing would preclude the jurisdiction of the coastal State from including both only enforcement and legislative faculties.

Nevertheless, in the light of legal developments—conventional and unilateral—occurring in the last 30 years, room for discussing the scope and extent of the jurisdiction provided for in Article 303(2), in conjunction with Article 33 LOSC remains. The 2001 UNESCO Convention does not explicitly clarify any of the two first considerations. However, its Article 8 seems to clarify the question of the nature of coastal State jurisdiction over the contiguous zone. This article reads as follows:

> Without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied.[14]

Three questions related to the drafting of this Article require comments in order to elucidate the extent of its meaning and to offer a possible answer to the remaining doubts.[15]

First, it must be recalled that the rights conferred on coastal States in Article 8 refer *solely* to "activities directed at underwater cultural heritage". These activities, under Article 1(6) of the Convention, are those "having underwater cultural heritage as their *primary object* and which may, directly

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informazione, e informazione anticipata, circa le attività interessanti beni di natura archeologica o storica svolgentisi all'interno della linea delle 24 miglia. Tale conoscenza serve a permettere attività di sorveglianza miranti a prevenire e a reprimere rimozioni non autorizzate" (Treves (n 5), at 703).

13 With regard to these legislative powers and the the contiguous zone, see Lowe (n 6), at 157.

14 The 'Rules' referred to are the rules annexed to the Convention (an "integral part" of it under its Article 33), imported *mutatis mutandis* from the archaeological protocol adopted by the International Council on Monuments and Sites (ICOMOS) in its Charter on the Protection and Management of Underwater Cultural Heritage (ratified by the 11th ICOMOS General Assembly in Sofia, October 1996), a common place for underwater archaeologist deontological rules. See this Charter at <http://www.international.icomos.org/charters/underwater_e.pdf>, accessed 15 February 2013.

15 Apart from the compulsory, and not recommendatory, character of the Rules to be applied in the contiguous zone as stated in the final sentence of Article 8.

or indirectly, physically disturb or otherwise damage underwater cultural heritage."[16]

Second, there is an obscure and contradictory reference to Articles 9 and 10 of the Convention, which refer to the cooperative system created for the EEZ and the continental shelf.[17] It includes at the same time "without prejudice" and "in addition", which seems to confuse the regime foreseen for the contiguous zone with that provided for the EEZ and continental shelf. Garabello tends not to interpret this proviso literally—underlying its *"poco felice"* drafting[18]—but as a simple link between the general regime established in Articles 9 and 10 for the continental shelf (which includes the seabed of the contiguous zone) and the special regime established in Article 8 for the particular portion of the seabed included in a contiguous zone.[19] It has been argued that this could be interpreted as leaving the regime foreseen in Article 8 available only for those States having declared a contiguous zone.[20] Irrespective of this declaration, it would mean that coastal States had those powers provided for in Article 10, i.e.:

- the preference to be a "coordinating State",[21] although acting "on behalf of the States Parties as a whole and not in its own interest"; and taking into account that "[a]ny such action shall not in itself constitute a basis for the

16 Art. 1(6) of the Convention, emphasis added. Consequently, in principle these rights should not be opposable to other activities incidentally affecting underwater cultural heritage, that is, "activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage." [Art. 1(7) of the Convention.]

17 Only Greece criticized this proviso in its Statement on the vote during the meeting of Commission IV on Culture (29 October 2001, 31st Session of the UNESCO General Conference), stating that "[t]he reference in article 8 of articles 9 and 10 *should be deleted* as it diminishes the rights, which the coastal already enjoys in this area under article 303(2) of the LOS Convention." (reproduced in Garabello and Scovazzi (n 8), at 247, emphasis in the original).

18 Garabello (n 2), at 179.

19 *Ibid.*, at 178.

20 M Rau, 'The UNESCO Convention on the Protection of Underwater Cultural Heritage and the International Law of the Sea' (2002) 6 *Max-Planck Yearbook of United Nations Law* 387–472, at 413.

21 The "coordinating State" is regulated in Arts. 10(5) (for the EEZ/continental shelf) and 12(4) (for the Area) of the Convention. In general a "coordinating State" takes over the control of the site, coordinating the cooperation and consultations among States Parties and implementing their decisions, while acting on behalf of all interested States Parties (and for the benefit of humanity as a whole, in the case of the Area) and not in its own interest.

assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea." [Article 10(6).]

- the ability to implement agreed measures of protection, issue all necessary consequential authorizations in conformity with the Rules and conduct (or authorize to conduct) any necessary preliminary research, promptly informing the UNESCO Director-General of the results [Article 10(5)];[22] and
- this cooperative system notwithstanding, the right to take "all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting." [Article 10(4).]

Supposedly "without prejudice" and "in addition" to these powers, coastal States, having declared a contiguous zone, may also "regulate" and "authorize" any other activities directed at underwater cultural heritage within their contiguous zone. However, the latter would logically include the former. The UNESCO Convention intends to foster cooperation in the better protection of underwater cultural heritage [Article 2(2)]; but in the absence of this cooperation—either because of a lack of "interested States" or because of inaction by States as such—coastal States still may regulate and authorize any activity directed at underwater cultural heritage within their contiguous zone.[23]

The third question refers to the explicit mention of Article 303(2) LOSC in Article 8 of the 2001 UNESCO Convention. Included in the 1999 Draft Convention,[24] but deleted in the so-called Single Negotiated Text of 2001 (SNT),[25] the regulations and authorization that may be adopted by the coastal State must supposedly be "in accordance with article 303, paragraph 2, of the

22 The Director-General will make such information promptly available to other States Parties.

23 Leaving aside the fact that on their continental shelves—including the seabed of the contiguous zone—coastal States have the right "to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea." [Article 10(2).]

24 UNESCO Doc. CLT-96/CONF.202/5 Rev., 2 July 1999, at 4.

25 UNESCO Doc. CLT-2001/CONF-203/INF.3 (consolidated version of working document), 1 March 2001, at 37.

United Nations Convention on the Law of the Sea."[26] This may have two different interpretations:

- To reduce the scope of Article 8 to the literal interpretation of Article 303(2) LOSC, as suggested by Boesten, who deduces from this that Article 8 "should be read as '[...] regulate and authorise '*removal*' activities'."[27] But this contradicts the proper sense—read literally—of Article 8, because it refers to "activities directed at underwater cultural heritage." Article 1(6) of the Convention defines these activities as "activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage." That covers not only *removal* activities, but also *any* other kind of activities.
- To interpret this addition in the sense described above, that is, giving logical sense to the term 'approval' in Article 303(2) LOSC, which refers to an act of approval by the coastal State that necessarily implies a legislative term of reference.[28] The reference to Article 303(2) LOSC in Article 8 of the

26 The very first draft of the Convention was the 1994 Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage, prepared by the International Law Association's (ILA) Cultural Heritage Law Committee (available at <http://www.jastra.com.pl/nurek/badcpuch.htm>, accessed 15 February 2013). In this Draft the creation of a "cultural heritage zone" (Art. 5) was foreseen, in which "the State Party shall have jurisdiction over activities affecting the underwater cultural heritage." In the commentary to this article, the Committee expressed the idea that "[t]he jurisdiction of States over the underwater cultural heritage was briefly discussed at ... UNCLOS III. In Article 303 of the Convention, a legal fiction was created to give States some control over excavations within but not beyond their contiguous zones. This provision is widely regarded as ineffective and insufficient for protection of the underwater cultural heritage. Moreover, it pays no regard to inconsistencies in the current territorial jurisdiction exercised by States over the underwater cultural heritage. Some States use the contiguous zone as a benchmark (e.g. France); others the continental shelf (e.g. Australia, Ireland, Spain); Denmark uses its 200-mile fishing zone; and yet others use the exclusive economic zone (e.g. Morocco). The Convention allows each State Party to establish a 'cultural heritage zone' coextensive with the continental shelf (Article 1). This is compatible with the 1992 European Convention on the Protection of the Archaeological Heritage (Revised)." See on this Draft, JAR Nafziger: 'The Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage' (1997) 6 *International Journal of Cultural Property* 119–120.

27 Boesten (n 11), at 161.

28 The majority of delegations shared this non-limitative interpretation during the negotiations of the Convention. See G Carducci: 'New Developments in the Law of the Sea: the UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2002) 96 *American Journal of International Law* 419–435, at 428 ff.

> Convention may not be a simple term of art—"*un rinvio del tutto formale*"[29]—but another "constructive ambiguity" of the negotiating process in line with State practice which should have filled in the gap—another "constructive ambiguity"?—left by UNCLOS III in 1982. Carducci has defined this as "functional improvements",[30] which seems to be a plausible approach that we will complete below with the analysis of that practice.

Article 8 of the 2001 UNESCO Convention thus clearly adds the "legislative" jurisdiction to the "enforcement" jurisdiction.[31] For some this could entail a new example of creeping jurisdiction. However, as we have tried to show, this does not necessarily contradict what the LOSC says. It is also remarkable that, as we will see, when the 2001 UNESCO Convention was adopted, no State opposed this particular creeping jurisdiction (if any).

In order to assess the true scope and extent of the jurisdiction provided for in that Article 8, its textual and contextual analysis might be completed by the assessment of State practice with regard to State jurisdiction over the relevant contiguous zone, including specific powers referring to the protection of underwater cultural heritage in that zone.[32]

State Practice

The previous analysis shows that the legal contours of the international rules governing the rights and powers of the coastal State for the protection of the underwater cultural heritage in its contiguous zone are not clear, based only on the interpretation to be given to the provisions of Articles 33 and 303(2) LOSC and Article 8 of the 2001 UNESCO Convention. From the time the LOSC was adopted, State practice may have shaped that rule. This practice could

29 Garabello (n 2), at 173.

30 G Carducci, 'The expanding protection of underwater cultural heritage: The new UNESCO Convention *versus* existing International Law', in G Camarda and T Scovazzi (eds), *The Protection of the Underwater Cultural Heritage. Legal Aspects* (Giuffrè Editore, Milan, 2002) 135–216, at 191.

31 As a consequence, implied rights for the contiguous zone may be applied, particularly the right of hot pursuit defined in Article 111 LOSC, and the exclusive right to grant archaeological research permits vested in the coastal State.

32 That will not affect in principle the ownership of or title to the objects, particularly when these objects are sunken State vessels. See MJ Aznar, 'Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage' (2010) 25 *IJMCL* 209–236.

have better defined its contours, clarifying the content and extent of the "archaeological rights" in the contiguous zone and also changing these rights from 1982 to today, with Article 8 of the 2001 UNESCO Convention being a sort of crystallisation of that practice.[33]

In the case of State practice concerning the rights of the coastal State in its contiguous zone for the protection of underwater cultural heritage, both conventional practice and unilateral practice must be assessed.[34] Reactions to both sets of State practice—sometimes not easily separated—must also be considered. Practice of States "whose interests are specially affected"[35] must be included. However, its weight in the general stream of State practice is unclear, because the identification of these specially affected interests is, to say the least, complicated. Contrary to other provinces of the law of the sea—delimitation, freedom of navigation, archipelagic waters, uses of the Area, etc.—no list of States specially interested in matters related to the protection of underwater cultural heritage can be drafted, because *all* States seem to be interested; irrespective of the location of the underwater cultural heritage in a particular maritime zone or the clear identification of a sovereign owner, the interest in cultural heritage is presumed to be general.[36]

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33 "Crystallisation" in the sense given by the International Court of Justice (ICJ) in its North Sea Continental Shelf case, that is "as reflecting, or as crystallizing, received or at least emergent rules of customary international law [...]" *North Sea Continental Shelf Case* (*Federal Republic of Germany/Netherlands*) [1969] ICJ Rep 3, at 39 (para. 63). See also *Military and Paramilitary* ... (n 4) at 95 (para. 177).

34 The main sources of this State practice are the database at the Division for Ocean Affairs and the Law of the Sea (DOALOS), available at <http://www.un.org/Depts/los/index.htm>, which includes references to the *Law of the Sea Bulletin* when needed; and the database of UNESCO, available at <http://www.unesco.org/culture/natlaws/index.php?&lng=en>. An assessment of certain States' practice may be found in S Dromgoole, *The Protection of Underwater Cultural Heritage. National Perspectives in Light of the UNESCO Convention 2001* (2nd ed., Martinus Nijhoff, Leiden, 2006).

35 *North Sea Continental Shelf Case* (n 36), at 45 (para. 74).

36 An example could better illustrate this idea: a Phoenician shipwreck, located in the Spanish contiguous zone, might not only affect the interests of Spain as coastal State, but also the historical or archaeological interests of the large historical Phoenician community, including among others Israel, Italy, Lebanon, Libya, Morocco, Spain, Syria, and Tunisia. But along with these States, Phoenicians visited the entire Mediterranean basin; this culture is essential to understand the general history of humankind. The same could be said about a wooden workboat sunk in the Mekong Delta, a Viking drakkar (*långskip*) found in a Scottish firth or a Spanish Manila Galleon wrecked in San Francisco Bay or along the Japanese coast.

Conventional Practice

The main conventional practice would be that which follows the ratification of: (1) the LOSC, (2) the 2001 UNESCO Convention and (3) other universal and regional conventions.

Law of the Sea Convention

Following Niger's ratification on 7 August 2013, 166 States are parties to the LOSC as of September 2013. The LOSC is among the treaties with the most parties, despite some important absences.[37] The general customary international law nature of most of its provisions—some of which declaring previous customary law, others crystallising customary rules and a few generating customary rules—includes the regime established in Article 33,[38] keeping in mind not only its development from Article 24 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone,[39] but subsequent State practice as well.

In the declarations accompanying their instruments of ratification, few States referred to archaeological and historical objects found at sea in relation to Article 303 LOSC. Four States—Bangladesh, Cape Verde, Malaysia and Portugal—declared, in quite identical wording, that:

> without prejudice to article 303 of the Convention on the Law of the Sea, that any objects of an archaeological and historical nature found within the maritime areas over which it exercises sovereignty or jurisdiction shall not be removed, without its prior notification and consent.[40]

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37 A paramount example is the United States, which has not acceded to the LOSC, now more for parochial reasons rather than any objection to the text. Actually, the US has accepted the main LOSC principles as reflecting customary international law (see *Restatement* (*Third*) *of the Foreign Relations Law of the United States* (vol. 2, American Law Institute, Washington, 1987) at 5–6). Among other non-party States with well-known remains of underwater cultural heritage in their contiguous zone may be cited Colombia, Iran, DPR Korea, Libya, Peru, Syria and Venezuela. Iran, however, is a State party to the 2001 UNESCO Convention.

38 As Lowe affirmed even before the adoption of the LOSC, "[t]he contiguous zone is now firmly established in international law." Lowe (n 6), at 109.

39 See C Economides, 'The contiguous zone today and tomorrow', in C Rozakis and CA Stephanou (eds), *The New Law of the Sea* (Elsevier, Oxford, 1983) 69–81, at 72.

40 Text of Bangladesh instrument of ratification (2001), similar to those of Cape Verde (1987) and Malaysia (1996). Portugal, upon ratification in 1997, declared that, "without prejudice to the provisions of Article 303 of the United Nations Convention on the Law of the Sea and to the application of other legal instruments of international law regarding the protection of the underwater archaeological heritage, any objects of a historical or archaeological nature found in the maritime zones under its sovereignty or jurisdiction may be

Upon ratification in 1996, the Netherlands stated that:

> [j]urisdiction over objects of an archaeological and historical nature found at sea is limited to articles 149 and 303 of the Convention. The Kingdom of the Netherlands does however consider that there may be a need to further develop, in international cooperation, the international law on the protection of the underwater cultural heritage.

This limited practice is, however, not conclusive as such, notwithstanding the clear extension of jurisdiction declared by those first four States. For them, underwater cultural heritage found in their contiguous zone cannot be removed "without its prior notification and consent" or, using the Portuguese words, "only after prior notice to and subject to the consent of the competent Portuguese authorities."

The 2001 UNESCO Convention

As we have seen, Article 8 of the 2001 UNESCO Convention seems to alter the regime established by Articles 33 and 303 LOSC, adding the legislative jurisdiction to the enforcement jurisdiction already provided for in the LOSC. However, it is remarkable that when the 2001 UNESCO Convention was adopted, no State—apart from Turkey[41]—opposed this particular creeping jurisdiction (if any).[42] On the contrary,

– certain States celebrated that activities directed at underwater cultural heritage could not take place until they had been authorized under the Convention (Canada);

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removed only after prior notice to and subject to the consent of the competent Portuguese authorities."

41 Mainly due to its particular situation in the Aegean Sea and its maritime disputes with regard to Greek islands close to the Turkish mainland. As argued during the negotiating process of the 2001 UNESCO Convention, "Turkey [wanted] to underline that to declare a contiguous zone for the purpose of controlling the traffic of underwater cultural heritage that lies on or under its continental shelf, not only falls contrary to State practice and to customary rules of international law in this field, but also means to reduce the area of jurisdiction and to confine the coastal State powers." Turkey's views on Article 5 of the Draft Convention on the Protection of Underwater Cultural Heritage, quoted in Garabello (n 2), at 171. This position, if firmly sustained by Turkey, might lead to a persistent objector position with regard to a new customary law development of jurisdiction over the contiguous zone. See generally JI Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *BYbIL* 1–24.

42 See the text of these declarations in Garabello and Scovazzi (n 8), at 241–253.

– other States, although criticizing (Netherlands, Norway, Russia, the United Kingdom and the United States) or not (Turkey) the creeping jurisdiction allegedly endorsed by the Convention, only and explicitly referred to the EEZ and continental shelf but not to the contiguous zone, and nothing in their declarations implies that they subsumed the contiguous zone within the other two areas;[43]
– as we already saw, only one State (Greece) criticised the confusion of Article 8 with Articles 9 and 10, stating that "[t]he reference in article 8 of articles 9 and 10 *should be deleted* as it diminishes the rights, which the coastal State already enjoys in this area under article 303(2) of the LOS Convention."[44]
– Sweden—an abstaining State—particularly welcomed "the fact that the legal content of the rules concerning the mandate of the coastal State in its declared contiguous zone is clarified in the Convention and regards this clarification as an indication of the present status of customary law";[45] and
– finally, in general terms, certain other States did not find inconsistencies between the Convention and the LOSC (Denmark, Japan).[46]

43 This is particularly the case of the United States. US jurisdictional concerns refer to Arts. 9 and 10, not to Article 8 (see Statement by Robert C. Blumberg, US Observer Delegate to the 31st UNESCO General Conference, to Commission IV of the General Conference, regarding the US views on the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, 29 October 2001, Paris, France, available at <http://www.gc.noaa.gov/documents/gcil_heritage2_blumberg.pdf>, accessed 18 February 2013). As stated by authoritative commentators on the US position, "[t]he seaward limit of coastal State jurisdiction over such UCH is 24 nautical miles from the baseline from which the Territorial Sea is measured, which corresponds with the seaward limit of the Contiguous Zone [art. 303(2)]." O Varmer, J Gray and D Alberg, 'United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2010) 5 *Journal of Maritime Archaeology* 129–141, at 131. See further S Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (2013) 38 *Marine Policy* 116–123.

44 Garabello and Scovazzi (n 8), at 247 (emphasis in the original).

45 *Ibid.*, at 250.

46 It is significant that Japan maintained during the drafting of the Convention "that international customary law recognises the coastal State's rights to exercise jurisdiction over underwater cultural heritage in its territorial waters by sovereignty, and in its contiguous zone by using Article 302(2) of UNCLOS in respect of archaeological and historical objects. It considers that seaward from the contiguous zone, no State has general jurisdiction over underwater cultural heritage. Therefore, it would treat in different ways, these two groups of maritime zones, for example in specifying that in the internal waters, territorial sea and contiguous zone." See Synoptic Report of Comments on the Draft Convention on the

To sum up, creeping jurisdiction concerns seem to generally refer to the regime foreseen for the cooperative scheme created for the EEZ and the continental shelf (and particularly with regard to the rights of the "coordinating State's" powers), but not to the contiguous zone.

As of September 2013, the UNESCO Convention has 45 State parties.[47] During the UNESCO General Assembly of 2 November 2001, 88 States voted in favour of its final text, logically including Article 8.[48] None of them has made its intention clear not to become a party to the Convention. Therefore, all of them are bound by the obligation imposed by Article 18 of the 1969 Vienna Convention on the Law of Treaties.[49] Some abstaining States—particularly Paraguay, France and the Netherlands—have changed their opinion and have decided to become a party (or initiate the process to become a party) to the Convention.[50]

Protection of the Underwater Cultural Heritage, UNESCO Doc. CLT-99/CONF.204/5, April 1999, at 2.

47 Albania, Antigua and Barbuda, Argentina, Barbados, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Cambodia, Croatia, Cuba, Democratic Republic of the Congo, Ecuador, France, Gabon, Grenada, Haiti, Honduras, Iran (Islamic Republic of), Italy, Jamaica, Jordan, Lebanon, Libya, Lithuania, Mexico, Montenegro, Morocco, Namibia, Nigeria, Palestine, Panama, Paraguay, Portugal, Romania, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Slovakia, Slovenia, Spain, Togo, Trinidad and Tobago, Tunisia and Ukraine.

48 Apart from the States quoted in the previous note (except France and Paraguay, which abstained; Albania, Bulgaria, Cambodia, DR Congo, Gabon, Haiti, Jordan, Namibia, Slovakia, Slovenia, St Kitts and Nevis, Trinidad and Tobago, which were absent; and Montenegro, not a State in 2001), the following 61 States plus Palestine voted in favour of the Convention: Algeria, Australia, Austria, Bangladesh, Belize, Canada, China, Congo, DPR Korea, Republic of Korea, Costa Rica, Denmark, Egypt, El Salvador, United Arab Emirates, Ethiopia, Philippines, Finland, Georgia, Ghana, Guatemala, Guyana, Hungary, India, Indonesia, Iraq, Ireland, Cook Islands, Japan, Kyrgyzstan, Laos, Latvia, Luxemburg, Macedonia, Madagascar, Malaysia, Malawi, Mali, Mauritania, Moldavia, Monaco, Niger, New Zealand, Pakistan, Poland, Qatar, Central African Republic, Dominican Republic, Rwanda, Senegal, Syria, Sri Lanka, South Africa, Sudan, Thailand, Tanzania, Uganda, Vanuatu, Vietnam, Yemen and Zambia.

The following States abstained: Brazil, Colombia, Czech Republic, France (today a State party), Germany, Greece, Guinea-Bissau, Iceland, Israel, Netherlands, Paraguay (today a State party), Sweden, Switzerland, United Kingdom and Uruguay.

The following States voted against: Norway, Russia, Turkey and Venezuela. The United States, not a UNESCO member, also expressed its negative concerns.

49 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 *UNTS* 331 (VCLT).

50 Paraguay and France became party to the Convention on 7 September 2006 and 17 January 2013, respectively. In view of the entry into force of the Convention, the Netherlands

Hence, it could be argued that, at least within the realms of this limited conventional practice, nothing precludes the acceptance by States concerned of a so-called archaeological maritime zone coincident with the contiguous zone, where the coastal State should have legislative and enforcement jurisdiction to protect underwater cultural heritage.

Other Treaties

Some other treaties, either *ratione materiæ* or *ratione loci*, may have a bearing on the subject. Among the former, general treaties protecting cultural heritage must be analysed in order to determine whether or not they apply to the contiguous zone. Among the latter, certain treaties applicable to the contiguous zone may include the protection of underwater cultural heritage in their rationale. As we will see, it is at a regional level where conventional cases protecting underwater cultural heritage in the contiguous zone are found.

Although generally accepted (190 States parties as of September 2013), the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage[51] only granted general protection rights to States within their "territories" (Articles 3, 4, 5, 6, 11, 13 and 19), thus excluding the contiguous zone. The same could be said of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict:[52] its text also recognises rights of States within their territories (Articles 3, 4, 5, 12, 13, 18 and 19). Finally, the 1970

began a "rethinking process," which resulted in a more open position to the Convention and its possible ratification (see Advisory Committee on Issues of Public International Law, *Advisory Report on the UNESCO Convention on the Protection of the Underwater Cultural Heritage*, Advisory Report no. 21, The Hague, December 2011, available at <http://www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/rapporten/2011/12/20/cavv-21-cultureel-erfgoed-onder-water-en.html>, accessed 9 January 2013). On 2 October 2013 the government's response to the Advisory Report was sent to the Dutch Parliament, announcing that the government will now start to research the steps that are necessary for ratifying the Convention. If the Netherlands decides to ratify the Convention, this decision would have a direct effect on the three islands in the Caribbean that became special municipalities on 10 October 2010: St Eustatius, Saba and Bonaire, and this may have a decisive effect on future actions to be adopted by the three island countries within the Dutch Kingdom: Aruba, Curaçao and Sint Maarten. They have to take their own decisions on whether or not to become party to the Convention.

51 Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 *UNTS* 151.

52 Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 *UNTS* 240. 126 States parties as of September 2013. See also its first (249 *UNTS* 358) and second (2253 *UNTS* 212) Protocols of 1954 and 1999, respectively.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[53] also limits its scope to the territory of its States parties (Articles 4, 6, 15 and 23). These treaties therefore create no new jurisdictional powers in the contiguous zone.

However, some regional treaties may have a bearing on the matter. The 1992 European Convention on the Protection of the Archaeological Heritage (revised),[54] whose aim is to protect through different legislative and enforcement actions "the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study" [Article 1(1)], states in its Article 1(2)(iii) that:

> [t]o this end shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs [...] which are located in any area within the jurisdiction of the Parties.

The explanatory report of this Convention says with regard to this paragraph that:

> it emphasises that the actual area of State jurisdiction depends on the individual States and, in this respect, there are many possibilities. Territorially, the area can be coextensive with the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone or a cultural protection zone. Among the members of the Council of Europe some States restrict their jurisdiction over shipwrecks, for example, to the territorial sea, while others extend it to their continental shelf. The revised convention recognises these differences without indicating a preference for one or the other.[55]

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53 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 27 April 1972) 823 *UNTS* 231; 122 States parties as of September 2013.

54 European Convention on the Protection of the Archaeological Heritage (revised) (adopted 19 January 1992, entered into force 25 May 1995) *European Treaty Series* No. 143 (Valletta Convention) available at <http://conventions.coe.int/Treaty/en/Treaties/Html/143.htm>, accessed 15 February 2013. All Council of Europe (CoE) member States (plus the Holy See) are parties to this Convention except Austria, Iceland, Italy, Luxembourg, Montenegro and San Marino.

55 Available at <http://conventions.coe.int/Treaty/en/Reports/Html/143.htm>, accessed 15 February 2013.

Therefore, States parties to this Convention may apply their domestic legislation protecting underwater cultural heritage in their contiguous zones. No express declaration against the possibility of implementing this Convention in the contiguous zone and beyond has been submitted.[56]

Another regional agreement is the 1995 Specially Protected Areas (SPA) Protocol.[57] This Protocol—adopted in the general framework of the Barcelona Convention[58]—offers the possibility to create "specially protected areas", some of them of "Mediterranean Importance" (SPAMI), to safeguard "sites of particular importance because of their scientific, aesthetic, cultural or educational

56 It is worth remembering that the Council of Europe Parliamentary Assembly recommended as early as 1978 to the CoE Committee of Ministers to negotiate an "agreement between member States on the declaration of national cultural protection zones up to the 200-mile limit." [Recommendation 848 (1978) 4 October 1978]. However, the failed attempt—precisely because of the maritime dispute between Turkey and Greece in the Aegean Sea—of a European Convention which would have been applied up to the 24-nm limit (Art. 2) is well known. The draft text of the Convention is reproduced in Council of Europe, *Ad Hoc* Committee of Experts on the Underwater Cultural Heritage, 'Final Activity Report,' Doc. CAHAQ (85) 5, 23 April 1985 (not a public document). See U Leanza, 'The Territorial Scope of the Draft European Convention on the Protection of the Underwater Cultural Heritage', in Council of Europe, *International Legal Protection of Cultural Property. Proceedings of the Thirteenth Colloquy on European Law* (CoE, Strasbourg, 1984) 127–130.

Nevertheless, during the UNESCO negotiation process, the CoE Parliamentary Assembly again recommended to encourage member States "to legislate to protect the underwater cultural heritage from commercial and/or unauthorised recovery operations in their internal waters, territorial seas, contiguous zones, continental shelves and exclusive economic zones, and to take such measures as are in their power to thwart such operations by their own nationals or by nationals of other countries seeking to sail under their maritime flags or to use their territory as bases or ports of landing." Recommendation 1486 (2000), 9 November 2000, para. 13(vi).

57 Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (adopted 10 June 1995, entered into force 12 December 1999) 2102 *UNTS* 203. This Protocol replaces the previous Protocol concerning Mediterranean Specially Protected Areas of 1982, which was more explicit with regard to the protection of archaeological heritage. All Mediterranean basin States (plus the European Union), except Bosnia and Herzegovina, Greece, Israel and Libya, are parties to the 1995 Protocol. These four States are parties to the 1982 Protocol.

58 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (adopted 10 June 1995, entered into force 9 July 2004), text available at <http://195.97.36.231/dbases/webdocs/BCP/bc95_Eng_p.pdf>, accessed 15 February 2013. This Convention replaces the previous Convention for the Protection of the Mediterranean against Pollution (adopted 16 February 1976, entered into force 12 February 1978) 1102 *UNTS* 27.

interest." [Article 4(d).] Each State party "may establish specially protected areas in the marine and coastal zones subject to its sovereignty or jurisdiction." [Article 5(1).] The creation of these protected areas allows the State parties to the Protocol to apply their domestic legislation protecting underwater cultural heritage to their contiguous zones.

Similarly, Caribbean States have adopted the 1990 Specially Protected Areas and Wildlife (SPAW) Protocol[59] within the general framework of the 1983 Cartagena Convention.[60] The Protocol also allows State parties to create "Protected areas" in areas "over which [they] exercise sovereignty, or sovereign rights or jurisdiction" [Article 4(1)] in order to conserve, maintain and restore areas of special cultural or archaeological value [Article 4(2)(d)]. To this end, as stated in Article 5(1) of the Protocol:

> [e]ach Party taking into account the characteristics of each protected area over which it exercises sovereignty, or sovereign rights or jurisdiction, shall, in conformity with its national laws and regulations and with international law, progressively take such measures as are necessary and practicable to achieve the objectives for which the protected area was established.

Again, the creation of these protected areas permits the State parties to the 1990 Protocol to apply their domestic legislation protecting underwater cultural heritage to their contiguous zones, without explicit declared opposition from other States.

To sum up, this conventional practice shows how, from 1982 when adopting the LOSC, States have developed an evolving practice that has progressively enlarged the territorial scope of their domestic legislation protecting underwater cultural heritage through different conventional instruments: from a material protection based on a legal fiction in the LOSC, through a specialised geographical extension in the Valletta Convention and the Mediterranean and Caribbean Protocols, towards a more general and complete jurisdiction in the

59 Protocol Concerning Specially Protected Areas and Wildlife (adopted 18 January 1990, entered into force 18 June 2000), text available at <htts://www.cep.unp.org>, accessed 16 February 2013. At present the contracting parties are Bahamas, Barbados, Belize, Colombia, Cuba, Dominican Republic, France, Grenada, Guyana, the Netherlands, Panama, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, United States, and Venezuela.

60 Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (adopted 24 March 1983, entered into force 11 October 1986), text available at <htts://www.cep.unep.org>, accessed 16 February 2013.

2001 UNESCO Convention. This conventional practice, not contested by other States, may lead to a change in the current principles governing coastal State jurisdiction protecting underwater cultural heritage in the contiguous zone. As we will see, unilateral practice points in the same direction.

Unilateral Practice

Evidence of State practice, in connection with the proof of a new customary "archaeological" regime applicable to the contiguous zone, may be also found in "unilateral practice", that is, State legislation, decisions by governmental executive and judicial branches, statements by diplomatic and/or official representatives, etc.

The domestic legislative decisions, both "maritime" and/or "cultural", concerning jurisdiction in the contiguous zone, are particularly interesting. To this other domestic legislation also dealing with archaeological concerns can be added; for example, when conducting mining activities in the continental shelf.[61] Despite all the limits on the assessment of that practice,[62] State domestic legislative and enforcement decisions on the protection of underwater cultural heritage in the contiguous zone demonstrate how the international legal regime for that maritime zone may have developed or even changed from 1982 onwards. Logically, it must be assumed that the 45 States parties to the 2001 UNESCO Convention already accept that the legal regime for their contiguous zone is that foreseen in its Article 8.[63] Therefore, we focus on the practice of States *not* parties to this Convention.

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61 For a recent analysis of further practice "redefining" the contiguous zone see D de Pietri, 'La redefinición de la zona contigua por la legislación interna de los Estados' (2010) 62 *REDI* 119–144.

62 See RR Churchill and AV Lowe, *The Law of the Sea* (3rd ed., Manchester University Press, Manchester, 1999) at 11–12.

63 Among those States, some had or have enacted domestic legislation extending their jurisdiction over their contiguous zone, the EEZ or the continental shelf for the protection of underwater cultural heritage. See, for example, the cases of Argentina (*Ley 25.743 de 25 de junio de 2003, Protección del patrimonio arqueológico y paleontológico*, Art. 2), Cuba (*Decreto Legislativo nº 158/95, de 12 de abril de 1995, De la Zona Contigua de la República de Cuba*, Art. 3), France (*Code du patrimoine*, Sec. 4, Ch. 2, as amended by the *Ordonnance nº 2004–178 du 20 février 2004 relative à la partie legislative du code du patrimoine*), Italy (*Legge 8 febbraio 2006, n. 61, Instituzione di zone di protezione ecologica oltre i limite esterno del mare territoriale*, Arts. 1 and 2), Jamaica [*Exclusive Economic Zone Act 1991*, Art. 4(c)], Morocco (*Act No. 1-81 of 18 December 1980 Promulgated by Dahir No. 1-81-179 of 8 April 1981, establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan Coasts*, Art. 5), Portugal (*Lei nº 34/2006 de 28 de Julho, Determina a extensão das zonas marítimas sob soberania ou jurisdição nacional e os poderes que o Estado Português nelas exerce, bem*

Maritime Practice

As of 15 July 2011, 89 States had declared a contiguous zone.[64] In all cases the breadth declared was 24 nm, except in the case of Bangladesh, Gambia, Saudi Arabia and Sudan (which declared an 18-nm zone), Venezuela (declaring a 15-nm zone), Finland (which declared a zone of two nm beyond the outer limits of the territorial sea) and Lithuania (which declared a zone based on coordinates).[65] In these declarations, the majority of States invoked the text of Article 33 LOSC declaring their general enforcement jurisdiction on customs, fiscal, immigration and sanitary matters. Some States simply made a general reference to international law without citing these matters (Ireland and Lithuania) or a reference to the LOSC (Dominican Republic). Numerous States further declared their jurisdiction on security,[66] navigation,[67] border control[68] or environmental[69] matters, provoking the protestations of other States (particularly with regard to the security matters).[70] Some States declared their jurisdiction with regard to some but not all of Article 33 LOSC matters[71] and

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como os poderes exercidos no alto mar, Art. 16), Slovenia (*Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act*, 22 October 2005, Art. 6), Spain (*Ley 16/85, de 25 de junio, del Patrimonio Histórico Español*, Art. 40) and Tunisia (*Loi 86-35 du 9 mai 1986, relative à la protection des biens archéologiques, des monuments historiques et des sites naturels et urbains*, Art. 2).

64 To this, the DPR Korea can be added, which declared a 50-nm military zone on 1 August 1977.

65 In the case of Peru (not party to the LOSC), by *Supreme Decree No. 047-2007-RE*, 11 August 2007, a 'Maritime Dominion' of 200 nm was declared where, under Art. 54 of the Peruvian 1993 Constitution, "Peru exercises sovereignty and jurisdiction, without prejudice to the freedoms of international communications, in accordance with the law and the treaties ratified by the State [...]" As is well known, Chile protested this declaration in Note No. 1415/07, 12 August 2007. See the Decree and the Note reproduced in (2007) 65 *Law of the Sea Bulletin*, at 15–16 and 37, respectively.

66 These States are Bangladesh, Cambodia, Haiti (allegedly), India, Iran, Myanmar, Pakistan, Saudi Arabia, Sri Lanka, Syria, United Arab Emirates, Venezuela, Vietnam and Yemen.

67 Iran and Saudi Arabia.

68 This is the case of China.

69 These are the cases of Iran, Malta, Mozambique, Samoa, Saudi Arabia and Syria.

70 See for example the compilation of US reactions in JA Roach & R Smith, *United States Responses to Excessive Maritime Claims* (3rd ed, Martinus Nijhoff, Leiden, 2012).

71 Finland only in customs matters, St. Kitts and Nevis in all but fiscal matters, Palau declared its jurisdiction for "living resources", and Venezuela in all but customs matters. Sudan equated its contiguous zone to the high seas and included its jurisdiction on security matters. In 1968 the Gambia declared a zone of 18 nm contiguous to its territorial sea where it may "exercise control necessary to prevent and punish the infringement of *any* law or

others did not refer to the content of their jurisdiction in their contiguous zone.[72]

Some States expressly referred to Article 303 LOSC or to archaeological or historical objects as such. Algeria declared that its right to control within its contiguous zone should be exercised "[i]n accordance with articles 33 and 303 of the [LOSC]."[73] Mozambique declared that its Government may regulate, in accordance with international law, "[a] *protecção de objectos de carácter arqueológico no mar*" [the protection of archaeological objects in the sea].[74] Some States issued a simple reminder of what was at stake: in the case of Norway, it was declared that "[l]egislation on the removal of objects of an archaeological of historical nature applying to the territorial sea is also applicable to the contiguous zone";[75] and the US declaration simply stated that "[t]his extension is an important step in preventing the removal of cultural heritage found within 24 nautical miles of the baseline."[76] Some other States went further: Cyprus declared that within its contiguous zone it may not only exercise "the control necessary to [...] control traffic of objects of an archaeological and historical nature found in this zone"[77] but Cyprus might issue regulations as well with the purpose of adopting:

> preventive measures aiming to the control, the avoidance or prevention of traffic of objects of an archaeological and historical nature found in [the contiguous zone] and to the licensing procedures for their removal.[78]

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right of The Gambia." (*Territorial Sea and Contiguous Zone Act*, 1968, as amended in 1969, emphasis added).

72 These States are Bahrain, DR Congo, Djibouti, New Zealand, St. Lucia, Trinidad and Tobago, and Vanuatu.

73 *Presidential Decree No. 04-344, establishing a Zone Contiguous to the Territorial Sea*, 6 November 2004.

74 *Lei nº 4/96*, 4 January 1996, Art. 34(d).

75 *Act No. 57 relating to Norway's territorial waters and contiguous zone*, 27 June 2003.

76 *Contiguous Zone of the United States—Proclamation by the President of the United States of America*, 2 September 1999.

77 *A Law to Provide for the Proclamation of the Contiguous Zone by the Republic of Cyprus*, 2 April 2004, sec. 4(b). This paragraph follows saying that: "It is presumed that their removal from the sea-bed in this zone without the approval of the Republic, would result in an infringement within its territory or territorial sea of the law and regulations in accordance with Article 303 of the Convention."

78 *Ibid.*, sec. 5(2)(b).

Cuba's declaration goes even farther by affirming that the State shall exercise the control measures necessary to prevent any infringement of the laws and regulations relating to "cultural heritage" committed not only in the Cuban contiguous zone but in its "economic zone" and on its continental shelf as well.[79] Furthermore, it also declared that:

> Maritime cultural assets consisting of deposits, remains, vestiges or in general any asset of prehistoric, archaeological or historical interest situated within the contiguous zone, on the seabed subsoil of the contiguous zone, shall be the property of the Cuban State.[80]

With another wording, the Former Yugoslavia declared that it "shall exercise sovereign rights over the continental shelf relating to the exploration and exploitation of the natural resources and other resources of the shelf" where the latter means "archaeological and other buried articles."[81] Vanuatu asserted that it has "jurisdiction and control in the exclusive economic zone, in respect of: [...] the authorization, regulation and control of scientific research and the recovery of archaeological or historical objects [...]"[82]

Other States adopted a different approach.[83] Thus, South Africa created a proper "maritime cultural zone", which overlaps its contiguous zone. Section 6 of the *Maritime Zones Act 1994*[84] reads as follows:

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79 *Legislative Decree No. 158, Contiguous Zone*, 12 April 1995, Art. 3(a).

80 *Ibid*., Arts. 4 and 5 add to this that: "The Cuban State Cuba may engage in hot pursuit in its contiguous zone whenever it has reliable grounds for believing that a vessel has committed an infringement of the laws and regulations of the State, especially those mentioned in article 3 of this Legislative Decree, and whenever it has reasonable grounds for suspecting that the vessel is engaged in [...] illicit trafficking in [...] cultural assets [...]"

81 *Act concerning the Coastal Sea and the Continental Shelf* (23 July 1987), Art. 24.

82 *Maritime Zones Act No. 6 of 2010* (18 June 2010), Art. 10(2)(b).

83 In the complex case of Taiwan, Article 16 of the 1998 *Law on the Territorial Sea and Contiguous Zone of the Republic of China*, 21 January 1998 (an English translation is found at <http://www.land.moi.gov.tw/law/enhtml/>, accessed 6 February 2013) states that "[a]ll objects of a historical nature or relics found in the territorial sea and the contiguous zone of the Republic of China, while undertaking archaeological and scientific research, or other activities, shall belong to the Republic of China and be administered by the Government in accordance with related laws and regulations." See N-T A Hu: 'The 2001 UNESCO Underwater Cultural Heritage Convention and Taiwan's Domestic Legal Regime' (2008) 39 *ODIL* 372.

84 *Maritime Zones Act No. 15 1994*, 11 November 1994. To these "maritime cultural zones" the *National Heritage Resources Act No. 25 1999*, 28 April 1999, also applies.

> (1) The sea beyond the territorial waters referred to in section 4, but within a distance of twenty four nautical miles from the baselines, shall be the maritime cultural zone of the Republic.[85]
> (2) Subject to any other law the Republic shall have, in respect of objects of an archaeological or historical nature found in the maritime cultural zone, the same rights and powers as it has in respect of its territorial waters.

A quite similar approach was adopted by Mauritius in 2005. A "maritime cultural zone" was created which "is an area coincident with the contiguous zone" and over which Mauritius's "Prime Minister may make regulations to regulate and authorise activities directed at underwater cultural heritage within [that] maritime cultural zone."[86]

The Dominican Republic declared that "ancient sunken vessels within [its] exclusive economic zone [...] constitute part of the national cultural heritage."[87] Cape Verde stated that:

> [w]ithout prejudice to the rights of identifiable owners and the norms of salvage or other norms of maritime law, and to practices in the field of intercultural exchanges, the location, exploration and recovery of any object of an archaeological and historical character, as well as treasures existing in the maritime areas of the Republic of Cape Verde as defined in article 1, by any entity, whether national or foreign, shall require the express authorization of the competent national authorities.[88]

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85 Previously, in its section 5, this Act creates the contiguous zone as follows: "(1) The sea beyond the territorial waters referred to in section 4, but within a distance of twenty four nautical miles from the baselines, shall be the contiguous zone of the Republic. (2) Within the contiguous zone and the airspace above it, the Republic shall have the right to exercise all the powers which may be considered necessary to prevent contravention of any fiscal law or any customs, emigration, immigration or sanitary law and to make such contravention punishable."

86 *Maritime Zones Act No. 2 of 2005*, 1 April 2005, Sect. 25. Furthermore, under Section 26 it is provided that "[t]he Prime Minister may, notwithstanding any other enactment, make regulations to prohibit or authorise any activity directed at underwater cultural heritage in the EEZ or the continental shelf to prevent interference with the sovereign rights and jurisdiction of Mauritius."

87 *Act 66–77*, 22 May 2007, Art. 16 (additional paragraph *in fine*).

88 *Law No. 60/IV/92*, 21 December 1992, Art. 28.

Several States included "all resources", "any research" or "all activities" clauses in their declarations of different maritime zones (particularly EEZs and continental shelves):[89] Barbados,[90] Guyana,[91] Iceland,[92] DPR of Korea,[93] Malaysia,[94] Pakistan,[95] Philippines,[96] and Tanzania.[97] However, apart from the

89 Some of them, however, have abandoned this type of clause, i.e., Seychelles (cf its Maritime Zones Acts of 1977 and 1999).

90 *Marine Boundaries and Jurisdiction Act of 1978* (25 February 1978), Art. 6(1)(a).

91 *Maritime Boundaries Act 1977* (30 June 1977), Art. 10(1)(a). Furthermore, Art. 17 asserts that "[n]o person (including a foreign Government) shall, except under and in accordance with the terms of any agreement with the Government of Guyana or of a licence or a letter of authority granted by the Minister responsible for natural resources, explore or exploit any resources of the exclusive economic zone or carry out any search or excavation or conduct any research within the exclusive economic zone or drill therein or construct, maintain or operate any artificial island, offshore terminal, installation or other structure or device therein for any purpose whatsoever."

92 "In the economic zone, Iceland has: sovereign rights for the purpose of exploring, exploiting, conserving and managing the resources, whether living or non-living, of the seabed and subsoil and the superjacent waters, 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 [...]" *Law No. 41 concerning the Territorial Sea, the Economic Zone and the Continental Shelf* (1 June 1979), Art. 4.

93 "No foreign person, vessel or aircraft may engage in fishing, install facilities, take photographs, investigate, survey, prospect, exploit or engage in any other harmful economic activity in the economic zone of the People's Democratic Republic of Korea without the prior approval of the competent authorities of the People's Democratic Republic of Korea." *Decree by the Central People's Committee establishing the Economic Zone of the People's Democratic Republic of Korea* (21 June 1977).

94 *Exclusive Economic Zone Act 1984* (no date), Sec. 5(a). Paragraph (b) of this Section states that "[e]xcept where authorized in accordance with the provisions of this Act or any applicable written law, no person shall in the exclusive economic zone or on the continental shelf [...] carry out any search, excavation or drilling operations [...]"

95 *Territorial Waters and Maritime Zones Act 1976* (22 December 1976), Secs. 5 & 6.

96 *Presidential Decree No. 1599 of 11 June 1978 establishing an Exclusive Economic Zone and for other purposes* (11 June 1978), Art. 3(a). Paragraph (b) of the same section states that "[e]xcept in accordance with the terms of any agreement entered into with the Republic of the Philippines or of any licence granted by it or under authority by the Republic of the Philippines, no person shall, in relations to the exclusive economic zone [...] Carry out any research, excavation or drilling operations."

97 *Territorial Sea and Exclusive Economic Zone Act, 1989* (no date), Sec. 10(a). Paragraph (b) of this Section states that "[s]ubject to this Act, no person shall, within the Zone, except under or in accordance with an agreement with the Government of the United Republic [...] Carry out any search or excavation [...]"

cases dealing with the regulation of "excavations" (Guyana, DPR Korea, Malaysia, Philippines and Tanzania), in the present author's view, the term 'resources' could not be interpreted as including underwater cultural heritage.[98]

Finally, another State—Papua New Guinea—could be added to this chapter, not because of its domestic legislation, but due to a delimitation agreement signed with Australia.[99] In Article 9(1) of this Treaty it is stated that "[w]recks of vessels and aircraft which lie, in or under the seabed jurisdiction of a Party [i.e. the continental shelf] shall be subject to the jurisdiction of that Party."

Cultural Practice

Domestic cultural legislation also offers an array of legal positions with regard to the jurisdiction of coastal States *vis-à-vis* underwater cultural heritage within their contiguous zones. Hence, numerous coastal States have simply declared the extension of their licensing, authorization or protective domestic legislation on cultural heritage to their contiguous zone (or even their continental shelf or EEZ). This is the case for, among others, Australia,[100] Bermuda,[101] Brazil,[102]

98 Cf Strati (n 5), at 249–252. See further *supra* n. 9.

99 Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters (adopted 18 December 1978, entered into force 15 February 1985) 1429 *UNTS* 207, Art. 9(1).

100 *Historic Shipwrecks Act 1976* (as amended), 15 December 1976, in connection with the *Petroleum* (*Submerged Lands*) *Act 1967*, 28 November 1967.

101 *Historic Wrecks Act 2001* (as amended 2004), 27 December 2001, Sec. 2, Interpretation.

102 *Lei Nº 7.542* (as amended by *Lei Nº 10.166* of 2000), 26 September 1986, Art. 20. This Law is applicable to waters "under national jurisdiction" ("sob jurisdição nacional") without explaining this concept. However, in the Law No 9.966 of 28 April 2000 on maritime oil pollution (*Dispõe sobre a prevenção, o controle e a fiscalização da poluição causada por lançamento de óleo e outras substâncias nocivas ou perigosas em águas sob jurisdição nacional e dá outras providências*), when using the same concept it is understood to include the EEZ waters and the continental shelf's superjacent waters ("as águas abrangidas por uma faixa que se estende das doze às duzentas milhas marítimas, contadas a partir das linhas de base que servem para medir o mar territorial, que constituem a zona econômica exclusiva-ZEE" and "as águas sobrejacentes à plataforma continental quando esta ultrapassar os limites da ZEE"). See Arts. 3(ii)(b) and (c) of the Decree No 4.136, 20 February 2002).

Canada,[103] China,[104] Colombia,[105] Denmark,[106] Greece,[107] Ireland,[108] Madagascar,[109] the Netherlands,[110] the United States[111] and Vietnam.[112]

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103 *Canada National Marine Conservation Areas Act 2002*, 13 June 2002, Secs. 5 and 16(1)(b).

104 *Regulations Concerning the Management and Protection of Underwater Cultural Relics*, 20 October 1989 (as amended 2002), Art. 2(2). For China, in addition to the chapter devoted to it in Dromgoole (n 34), at 17, see Kuen-chen Fu, 'A Chinese Perspective on the UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2003) 18 *IJMCL* 109–126.

105 *Ley nº 26 Normas sobre antigüedades y valores náufragas*, 24 January 1986, Art. 4. See also the *Ley 1675 por medio de la cual se reglamentan los artículos 63, 70 y 72 de la Constitución Política de Colombia en lo relativo al Patrimonio Cultural Sumergido*, of 30 July 2013.

106 *Act No. 749 of 2007, Act on Nature Conservation*, 21 June 2007.

107 *Law 3028/2002 on the Protection of Antiquities and the Cultural Heritage in General*, 28 June 2002, Art. 1 (2). It has been said that this law, in connection with Art. 303(2) LOSC, empowers Greece to establish a 24-nm archaeological zone. See A Strati, 'Greece', in Dromgoole (n 34), at 106.

108 *National Monuments* (*Amendment*) *Act, 1987*, 22 July 1987, Sec. 3.

109 *Loi Nº 99–028, portant refonte du Code Maritime*, 3 February 2000, Ch. 5.

110 *Kingdom Act of 28 April 2005* (*Contiguous Zone* (*Establishment*) *Act*) *and Decree of 14 June 2006* (*Contiguous Zone* (*Outer Limits*) *Decree*). These must be read in connection with the *Monuments and Historic Building Act 1988*, as explained in the 'Explanatory Memorandum' added to the publication of the Act and reproduced in 62 *Law of the Sea Bulletin* 159 (2006), at 160–162. Furthermore, the *2007 Monuments Act* governs the excavation licenses in the contiguous zone (Arts. 10 and 12) and the compulsory reporting system established for that zone (Arts. 8, 9 and 10).

111 *National Marine Sanctuaries Act* (NMSA)(2000), 16 U.S.C. s.1431 *et seq*. and *Sunken Military Craft Act* (SMCA)(2004), 10 U.S.C. 113 note. Under the NMSA, an area of 'marine environment' may be designed and regulated that includes "the exclusive economic zone, consistent with international law." [16 USC 1432, para. (3)] This was the case with the USS *Monitor*—located about 16 nm southeast of Cape Hatteras—when it was declared a National Marine Sanctuary in 1975, the US had a 3-nm territorial sea and a 12-nm contiguous zone. Currently in the US contiguous zone, the USS *Monitor* is not the only case where the US has regulated underwater cultural heritage (whether mixed with natural heritage or not) beyond its territorial sea: for example, the Florida Keys (declared in 1990), Monterey Bay (declared in 1992), the Flower Garden Banks (declared in 1992), and the Papahānaumokuākea Monument (declared in 2006 and inscribed in the UNESCO World Heritage List in 2010). For the US practice and position before the adoption of the UNESCO Convention, see R Elia, 'US Protection of Underwater Cultural Heritage Beyond the Territorial Sea: Problems and Prospects' (2000) 29 *The International Journal of Nautical Archaeology* 43–56.

112 *Decree No 92/2002/ND-CP, on detailed regulations to implement some articles of the Law on Cultural Heritage*, 11 November 2002.

In application of its domestic legislation, Spain has recently enforced its national laws on the protection of cultural heritage when the Royal Spanish Navy reacted to the presence of two vessels in the Spanish contiguous zone and EEX in the Alboran Sea: the *Seaway Invincible* and the *Seaway Endeavour*, both flying the flag of Togo and owned by the same Swedish company (Seaway Offshore Ltd.). Both vessels—tracked and surveyed by Spanish authorities during several weeks—were performing the typical treasure-hunters' manoeuvres in a well-known area rich in submerged archaeological objects. In December 2012, the *Invincible* was boarded and expelled from Spanish maritime zones. In May 2013, the *Endeavour* was also boarded, accompanied to the Spanish port of Algeciras, then inspected and finally expelled from Spanish waters. There has been no reaction from Togo, Sweden or any other nation. The case is under the criminal jurisdiction of a magistrate's court in Spain, which has declared the secrecy of the procedure at the time of writing. However, this author knows that the Navy's argument involved the coastal State's rights and duties over its EEZ, although the vessels were boarded when operating in the Spanish contiguous zone.[113]

Other Domestic Legislation

Other cases show by implication the application of domestic cultural legislation to the contiguous zone and beyond. These are, for example, the legislation of States on mining within their EEZ or on their continental shelf. Archaeological concerns have been introduced, among others, in mining (hydrocarbon) legislation of Denmark,[114] Greece,[115] Norway,[116]

113 It must be kept in mind that applicable Spanish legislation—*Ley 16/85, de 25 de junio, del Patrimonio Histórico Español*—states that Spanish cultural heritage includes "movable or immovable property of a historical nature that can be studied using archaeological methodology forms part of the Spanish Historical Heritage, whether or not it has been extracted and whether it is to be found on the surface or under ground, *in territorial seas or on the continental shelf*. Geological and palaeontological elements relating to the history of man and his origins and background also form part of this heritage." (emphasis added)

114 *Executive Order No. 684 on Environmental Impact Assessment, consequence of assessment concerning international nature conservation areas and protection of certain species in connection with projects about offshore exploration for and production of hydrocarbons, storage in the subsoil, pipelines, etc.*, 2011, sec. 16.

115 *Law No. 468 on Prospecting, Exploration and Exploitation of Petroleum* (*Hydrocarbons*) *and the Settlement of Related Matters*, 1976, Arts. 16(6) and 39.

116 Its *Act No. 57 relating to Norway's territorial waters and contiguous zone*, 27 June 2003, simply states that "[l]egislation on the removal of objects of an archaeological or historical nature applying to the territorial sea is also applicable to the contiguous zone." (Art. 4.)

Israel,[117] Italy,[118] Libya,[119] Spain,[120] Thailand[121] and the United States.[122] However, as stated by Strati, "[s]uch practice should not be considered as a unilateral extension of the heritage legislation of the States concerned, but rather as the undertaking of protective measures in the exercise of their resource-related rights."[123]

A Provisional Appraisal

To sum up, conventional and unilateral practice shows that:

- 45 States (parties to the 2001 UNESCO Convention) have explicitly accepted that the coastal State has legislative and enforcement jurisdiction over underwater cultural heritage located in the contiguous zone; and that this legal position has not been challenged by the remaining 61 States (plus Palestine) voting in favour of the Convention when it was adopted, casting therefore a total vote of 106 States initially in favour of what Article 8 of the 2001 UNESCO Convention endorses.

The Petroleum Act No. 72 of 1996 as applied in the case of the steamship *Louise Horn*, found 65 nm off the Norwegian baseline, clarified that the Norwegian authorities applied not only that Act, but also the LOSC, the 1992 Valletta Convention and the annexed Rules to the 2001 UNESCO Convention (not in force in Norway). See the case in F Kvalø and L Marstrander, 'Norway', in Dromgoole (n 34), at 223–224. See also the *Royal Decree relating to Exploration and Exploitation of Petroleum and Substrata of the Norwegian Continental Shelf*, 1972, sec. 44.

117 *Submarine Areas Law No. 5713*, 1953, Art. 77.

118 *Decreto del Presidente de la Repubblica No. 886*, 1979, Art. 24.

119 *Petroleum Law No. 25*, 1955 (as amended 2002), Art. 9(12).

120 *Ley de Hidrocarburos*, as amended 2008, Art. 6 and environmental report guidelines. The current Draft of the Law on Environmental Assessment (available in Spanish at <http://www.magrama.gob.es/es/calidad-y-evaluacion-ambiental/participacion-publica/anteproyecto_de_Ley_de_Evaluaci%C3%B3n_Ambiental_tcm7–273087.pdf>, accessed 7 June 2013) foresees in its Art. 37(1)(c) that among the compulsory and determinative assessment reports will be included the 'cultural heritage report.'

121 *Petroleum Act*, 1971 (as amended 2007), sec. 73.

122 The recently created Bureau of Ocean Energy Management (BOEM) is obliged by sec. 106 of the *National Historic Preservation Act*, 1996 (as amended 2006, 16 U.S.C. 470f) which obliges any BOEM-funded and -permitted actions to not adversely affect significant historic properties on the US continental shelf. BOEM has specific guidelines for conducting remote-sensing surveys and writing reports on archaeological sites. See <http://www.boem.gov/GOM-Archaeology/>, accessed 3 April 2013.

123 Strati (n 5), at 261. Along with the references in Strati's book, other references may be also found in Garabello (n 2), at 233–235 (and accompanying notes). Those included in the present article have been updated.

- among the States casting a negative vote on the adoption of the Convention, only one—Turkey—expressed a clear rejection of those new jurisdictional powers of the coastal State over its contiguous zone. Two of the other States casting a negative vote—Norway and the United States—have otherwise declared that their domestic cultural law generally applies to their contiguous zone.
- 36 States, apart from those parties to the 2001 UNESCO Convention, have enacted domestic legislation expanding their powers for the protection of underwater cultural heritage to their contiguous zone, EEZ or continental shelves.
- there has been no legal reaction against this new jurisdiction unilaterally decided by some States before the negotiation and adoption of the 2001 UNESCO Convention or after its adoption.
- Finally, these States, although not including important States in terms of underwater cultural heritage and maritime interests like Chile,[124] Russia, Saudi Arabia, Turkey, the United Kingdom and Venezuela,[125] represent "a widespread and representative participation" of the interested States in the protection of underwater cultural heritage existing in their contiguous zones.

Table 1 shows a summary of all the legal bases upon which States have extended (or may extend) their legislative and enforcement rights to protect underwater cultural heritage in their contiguous zone. States in light grey [78] have clearly declared so (conventionally or unilaterally). The rest of the States have simply not opposed or protested the extension (or the adoption of a legal basis for this extension). States in italics have declared a contiguous zone. The final column marks the States having extended their archaeological rights up to their EEZ or continental shelves.

124 In the case of Chile, initially, the *Ley No 17288 de Monumentos Nacionales*, 4 February 1970, Arts. 1 and 21, expanded its cultural legislation to its continental shelf. However, the *Decreto Exento 311*, 8 October 1999, later limited the applicability of that legislation to the territorial sea.

125 They have not, however, been opposed to that practice, except in the case of Turkey. In fact, during the final steps of the 2001 UNESCO Convention's negotiation, Russia and the United Kingdom submitted a Draft resolution (also sponsored by the US) which did not alter the regime established by Art. 8 of the current Convention. See UNESCO Doc. 31C/COM.IV/DR.5 (COM.IV), 26 October 2001. Venezuela's main concern referred to Art. 25 of the Convention, which deals with the peaceful settlement of disputes and explicitly refers to the LOSC, a treaty to which Venezuela is not a party. See Venezuela's statement on the vote during the meeting of Commission IV on Culture, 29 October 2001, reproduced in Garabello and Scovazzi (n 8), at 252–253.

TABLE 1 *Legal basis for coastal State jurisdiction in the contiguous zone*[126]

STATE	LEGAL BASIS	EXT
Albania	2001 UNESCO Convention	
Algeria	*Presidential Decree No. 04-344, establishing a Zone Contiguous to the Territorial Sea*	
Andorra	Valletta Convention	
Antigua and Barbuda	*2001 UNESCO Convention*	
Argentina	*2001 UNESCO Convention*	x
Armenia	Valletta Convention	
Australia	*Historic Shipwrecks Act 1976*	x
Austria	VCLT (Art. 18)	
Azerbaijan	Valletta Convention	
Bahamas	Caribbean SPA Protocol	
Bangladesh	*VCLT (Art. 18)*	x
Barbados	2001 UNESCO Convention	x
Belgium	*2001 UNESCO Convention*	
Belize	VCLT (Art. 18) + Caribbean SPA Protocol	
Benin	2001 UNESCO Convention	
Bermuda	Historic Wrecks Act 2001	
Bosnia and Herzegovina	2001 UNESCO Convention	
Brazil	*Lei Nº 7.542 of 1986*	x
Bulgaria	*2001 UNESCO Convention*	
Cambodia	*2001 UNESCO Convention*	
Canada	*Canada National Marine Conservation Areas Act 2002*	x

(*Continued*)

126 This Table summarizes available and relevant State practice as collected by DOALOS and UNESCO (see n 34).

TABLE 1 (*Continued*)

STATE	LEGAL BASIS	EXT
Cape Verde	*Law No. 60/IV/92*	x
Central African Republic	VCLT (Art. 18)	
China	*Regulations Concerning the Management and Protection of Underwater Cultural Relics, 1989*	x
Colombia	Ley nº 26 Normas sobre antigüedades y valores náufragas	x
Cook Islands	VCLT (Art. 18)	
Costa Rica	VCLT (Art. 18)	
Croatia	2001 UNESCO Convention	
Cuba	*2001 UNESCO Convention*	x
Cyprus	*A Law to Provide for the Proclamation of the Contiguous Zone by the Republic of Cyprus, 2004*	
Czech Republic	Valletta Convention	
Denmark	*Act No. 749 of 2007, Act on Nature Conservation*	
Dominican Republic	*Act 66–77*	x
DPR Korea	Decree by the Central People's Committee establishing the Economic Zone of the People's Democratic Republic of Korea, 1977	x
DR of Congo	*2001 UNESCO Convention*	
Ecuador	2001 UNESCO Convention	
Egypt	*VCLT (Art. 18) + Mediterranean SPA Protocol*	
El Salvador	VCLT (Art. 18)	
Estonia	Valletta Convention	
Ethiopia	VCLT (Art. 18)	
Finland	*VCLT (Art. 18) + Valetta Convention*	
France	*2001 UNESCO Convention*	

(*Continued*)

TABLE 1 (*Continued*)

STATE	LEGAL BASIS	EXT
Gabon	*2001 UNESCO Convention*	
Georgia	*VCLT (Art. 18) + Valetta Convention*	
Germany	Valletta Convention	
Ghana	*VCLT (Art. 18)*	
Greece	Law 3028/2002 on the Protection of Antiquities and the Cultural Heritage in General	
Grenada	2001 UNESCO Convention	
Guatemala	VCLT (Art. 18)	
Guyana	Maritime Boundaries Act 1977	x
Haiti	*2001 UNESCO Convention*	
Holy see	Valletta Convention	
Honduras	*2001 UNESCO Convention*	
Hungary	VCLT (Art. 18) + Valetta Convention	
Iceland	Law No. 41 concerning the Territorial Sea, the Economic Zone and the Continental Shelf	x
India	*VCLT (Art. 18)*	
Indonesia	Act No. 5 of 1983 on the Indonesian exclusive economic zone + VCLT (Art. 18)	x
Iran (Islamic Rep. of)	*2001 UNESCO Convention*	x
Iraq	VCLT (Art. 18)	
Ireland	*National Monuments (Amendment) Act, 1987*	x
Israel	Mediterranean SPA Protocol 1982	
Italy	2001 UNESCO Convention	
Jamaica	*2001 UNESCO Convention*	x
Japan	*VCLT (Art. 18)*	

(*Continued*)

TABLE 1 (*Continued*)

STATE	LEGAL BASIS	EXT
Jordan	2001 UNESCO Convention	
Kyrgyzstan	VCLT (Art. 18)	
Korea (Rep. of)	*VCLT (Art. 18)*	
Laos	VCLT (Art. 18)	
Latvia	VCLT (Art. 18) + Valetta Convention	
Lebanon	2001 UNESCO Convention	
Libya	2001 UNESCO Convention	
Liechtenstein	Valletta Convention	
Lithuania	*2001 UNESCO Convention*	
Luxembourg	VCLT (Art. 18)	
Macedonia	VCLT (Art. 18) + Valetta Convention	
Madagascar	*Loi N° 99-028, portant refonte du Code Maritime*	x
Malawi	VCLT (Art. 18)	
Malaysia	VCLT (Art. 18)	x
Mali	VCLT (Art. 18)	
Malta	*Valletta Convention + Mediterranean SPA Protocol*	
Mauritania	*VCLT (Art. 18)*	
Mauritius	*Maritime Zones Act No. 2 of 2005*	
Mexico	*2001 UNESCO Convention*	
Moldavia	VCLT (Art. 18) + Valletta Convention	
Monaco	VCLT (Art. 18) + Valletta Convention + Mediterranean SPA Protocol	
Montenegro	2001 UNESCO Convention	
Morocco	*2001 UNESCO Convention*	x
Mozambique	*Lei n° 4/96*	

(*Continued*)

TABLE 1 (*Continued*)

STATE	LEGAL BASIS	EXT
Namibia	*2001 UNESCO Convention*	
Netherlands	*Kingdom Act 2005 (Contiguous Zone (Establishment) Act) and Decree 2006 (Contiguous Zone (Outer Limits) Decree) in connection with Monuments and Historic Building Act 1988*	
New Zealand	*VCLT (Art. 18)*	
Niger	VCLT (Art. 18)	
Nigeria	2001 UNESCO Convention	
Norway	*Act No. 57 relating to Norway's territorial waters and contiguous zone, 27 June 2003*	
Pakistan	*Territorial Waters and Maritime Zones Act 1976*	x
Palestine([127])	2001 UNESCO Convention	
Panama	*2001 UNESCO Convention*	
Papua New Guinea	Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, 1978	
Paraguay	2001 UNESCO Convention	
Peru	Supreme Decree No. 047-2007-RE	
Philippines	*Presidential Decree No. 1599 of 11 June 1978 establishing an Exclusive Economic Zone*	x
Poland	VCLT (Art. 18) + Valetta Convention	
Portugal	*2001 UNESCO Convention*	x
Qatar	VCLT (Art. 18)	
Romania	*2001 UNESCO Convention*	
Russian Federation	*Valletta Convention*	
Rwanda	VCLT (Art. 18)	

(*Continued*)

TABLE 1 (*Continued*)

STATE	LEGAL BASIS	EXT
Saint Kitts and Nevis	*2001 UNESCO Convention*	
Saint Lucia	*2001 UNESCO Convention*	
Senegal	*VCLT* (*Art. 18*)	
SFR Yugoslavia	Act concerning the Coastal Sea and the Continental Shelf, 23 July 1987	x
Slovakia	2001 UNESCO Convention	
Slovenia	2001 UNESCO Convention	
Sudan	VCLT (Art. 18)	
South Africa	*Maritime Zones Act 1994*	
Spain	*2001 UNESCO Convention*	x
Sri Lanka	*VCLT* (*Art. 18*)	
St Vincent and the Grenadines	*2001 UNESCO Convention*	
Sweden	Valletta Convention	
Syria	*VCLT* (*Art. 18*) + *Mediterranean SPA Protocol*	
Taiwan([127])	Law on the Territorial Sea and Contiguous Zone of the Republic of China, 21 January 1998	
Tanzania	Territorial Sea and Exclusive Economic Zone Act, 1989	x
Thailand	*VCLT* (*Art. 18*)	
Togo	*2001 UNESCO Convention*	
Trinidad and Tobago	2001 UNESCO Convention	
Tunisia	*2001 UNESCO Convention*	

(*Continued*)

127 Palestine and Taiwan are included for information.

TABLE 1 (*Continued*)

STATE	LEGAL BASIS	EXT
Turkey	Persistent objector	
Uganda	VCLT (Art. 18)	
Ukraine	2001 UNESCO Convention	
United Arab Emirates	*VCLT (Art. 18)*	
United Kingdom	Valletta Convention	
United States	*National Marine Sanctuaries Act (NMSA)(2000) and Sunken Military Craft Act (SMCA)(2004)*	
Vanuatu	*Maritime Zones Act No 6 of 2010*	
Venezuela	*Caribbean SPA Protocol*	
Vietnam	*Decree No 92/2002/ND-CP, on detailed regulations to implement some articles of the Law on Cultural Heritage*	
Yemen	*VCLT (Art. 18)*	
Zambia	VCLT (Art. 18)	

The Existence of the Archaeological Maritime Zone

State practice—both conventional and unilateral—as summarized in previous sections, shows that a general trend exists among States to expand their rights to the general protection of underwater cultural heritage up to 24 nm. That protection covers not only enforcement jurisdiction to avoid the removal of cultural objects from the contiguous zone, but also general legislative jurisdiction on each and every aspect of the protection of that heritage. This would equate the coastal State's rights over its contiguous zone to those in its territorial sea with only one difference: in the territorial sea these rights arise out of the *sovereignty* of the State and in the contiguous zone these rights seem to be mere *functional* rights.[128] This relative assimilation between the two zones

128 Art. 7(1) of the 2001 UNESCO Convention states that "States Parties, *in the exercise of their sovereignty*, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea."

illustrates the core concept of the contiguous zone: an "accompaniment", or a supplement to the territorial sea.

In order to support this assertion theoretically, some summary remarks are now presented on the analysis of the process that has led to the acceptance of the existence of a so-called archaeological zone that matches the 24-nm contiguous zone.

Transforming a Legal Fiction into a New Jurisdictional Zone

As we have already seen, Articles 33 and 303(2) LOSC recognize certain rights of the coastal State over its contiguous zone. These rights are created by a legal fiction with different caveats, diverse and even contradictory interpretations, and a limited, albeit unclear, extent. More than thirty years after its adoption, the current legal appraisal of the particular regime created for the contiguous zone deserves a new approach based on a triple analysis.

First, historically, that regime derived from a review of State interests influenced by security and geostrategic concerns and drafting contingencies instead of archaeological preoccupations. As Oxman has clearly stated:

> [f]or reasons of principle whose importance transcended any interests in marine archaeology as such, the maritime powers were unwilling to yield to any further erosions in the freedoms of the seas, particularly regarding coastal State jurisdiction over non-resource uses beyond the territorial sea. The inclusion of paragraph 2 of article 303 in the general provisions of the Convention rather than the texts dealing with jurisdiction, and the indirect drafting style employing cross-references and presumptions, were intended to emphasize both the procedural and substantive points that the regimes of the coastal State jurisdiction [...] were not being reopened or changed.[129]

However, this changed thirty years later and cold-war paradigms were modulated, if not replaced, by other interests at stake. The protection of underwater cultural heritage is among the latter. When the LOSC was drafted, archaeological concerns were limited to shallow and coastal waters due to limitations in submarine technology. Today this has dramatically changed and current

(Emphasis added.) If the activities referred to are directed at a sunken State vessel, then two sovereign rights may collide: the coastal State's right over its territorial sea and the flag State's right over its vessel. A discussion of this question—not clearly solved in the Convention, and a main concern that is still under discussion—is in Aznar (n 32), at 225–228.

129 Oxman (n 8), at 363.

marine scientific research techniques are applicable to deep water and the subsoil, including in the contiguous zone.[130] Innumerable cases of treasure hunters,[131] but also legitimate activities by States and other stakeholders beyond the outer limits of the territorial sea (fishing, wind-farm installations, mining, cable and pipeline-laying, off-shore drilling, etc.) are direct and indirect threats to underwater cultural heritage. The 2001 UNESCO Convention echoes these new concerns and frames a new legal regime that recognizes the coastal State's more extensive rights over their contiguous zone.

Second, contextually, this trend has to be interpreted as an application of the LOSC. When paragraph 4 of its Article 303 states that "[t]his article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature", this must be interpreted not only with regard to already existing agreements in 1982,[132] but also to future agreements protecting underwater cultural

130 Although not implicitly included in Part XIII LOSC when drafted in 1982 [see A Soons, *Marine Scientific Research and the Law of the Sea* (Kluwer, Deventer, 1982), at 136–141], marine scientific research may now properly include underwater cultural heritage research [see S Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage' (2010) 25 *IJMCL* 33–61] If so accepted—and this author is in favour of its inclusion, given the recent technological evolution as applied to underwater cultural heritage—the rights of coastal States over this heritage will expand up to their current rights under the LOSC with regard to marine scientific research covering the continental shelf and EEZ.

This could be the case, among others, of Indonesia, which in its *Act No. 5 of 1983 on the Indonesian exclusive economic zone*, 18 October 1983, declared that for the purpose of this Act " 'Scientific research' means *any* activity in connection with the research on *any* maritime aspects on the water surface, in the water column, on the sea-bed and in the subsoil thereof the sea floor in the Indonesian exclusive economic zone" (Art. 1(c), emphasis added).

131 As is well known, one of these treasure hunter companies quite recently discovered and excavated without any archaeological care and without the sovereign owner's permission the wreck of the Spanish Royal Navy frigate *Nuestra Señora de las Mercedes* about 1,000 meters deep on the Portuguese continental shelf. The case, argued before the US Admiralty courts, was finally decided in favour of Spain's sovereign rights applying the jurisdictional immunity principle. See *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2379 (2012).

132 Particularly the Agreement between Australia and the Netherlands concerning Old Dutch Shipwrecks, and Arrangement (adopted 6 November 1972, entered into force 6 November 1972), *Australian Treaty Series* No. 18 (1972), also available at <http://www.austlii.edu.au/au/other/dfat/treaties/1972/18.html>, accessed 15 February 2013.

heritage.[133] Among the latter, the 2001 UNESCO Convention is a landmark for the protection of underwater cultural heritage, a normative text that "shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea." (Article 3.)[134]

Third, materially, this change of paradigm may be legally tracked across the State practice described above: contrary to what happened with some unilateral declarations establishing contiguous zones and adopting security or navigation rights by the declaring coastal State, which were protested or rejected by other States,[135] no negative reaction followed the declarations or legislative enactments extending archaeological rights to declared contiguous zones. The change in the legal status of the contiguous zone from 1958 to 1982 also influenced the acceptance of more limited rights of coastal States over their contiguous zone for a more proactive and effective protection of underwater cultural heritage. If doubts persist and the contiguous zone shares the legal status of the EEZ (Article 55 LOSC), then Article 59 LOSC applies and the solution to any conflict of interest between a coastal State and other States "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."[136] As we have tried to demonstrate in this article, current relevant circumstances and

133 Article 311(2) LOSC recalls that "[t]his Convention [LOSC] shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention."

134 Problems may derive from the interplay of two linked 'non-prejudice' clauses: that of Article 303(4) LOSC and that of Article 3 of the 2001 UNESCO Convention. To solve this *couple diabolique*, a contextual and historical analysis must be used, applying the general rules of treaty interpretation.

135 As Churchill has said, "the practice [...] seems insufficient to have given rise to a new rule of customary international law permitting security to be included in the list of interests." RR Churchill, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention', in AG Oude Elferink (ed.), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff, Leiden, 2005) 91–143, at 126.

136 In the so-to-say opposite direction, Article 10(2) of the 2001 UNESCO Convention also safeguards coastal State rights over the EEZ and continental shelf, stating that "[a] State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea." There is a *continuous dialogue* between the LOSC and the UNESCO Convention which

the interests of the parties involved and the international community as a whole—as derived from recent practice—have changed the legal canvas in favour of the coastal States' will to protect underwater cultural heritage in their contiguous zones.

The "Contiguous Archaeological Zone" as a Legal Process

This has not occurred instantly, but over the thirty years that have elapsed since the adoption of the LOSC in 1982. The latter has been historically described as a "Constitution for the Oceans".[137] But, as with any other "constitution", the LOSC is not carved in stone.[138] It may be changed through the subsequent practice of States concerned. This practice may have different results depending on the intensity of its normative role: from mere application, to interpretation, modification and, even, abrogation.[139] The process and final product may, therefore, differ.

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helps to interpret jurisdictional rights and limits on the protection of underwater cultural heritage.

137 See the remarks by Tommy TB Koh as President of UNCLOS III, available at <http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf>, accessed 15 February 2013.

138 Perhaps a constitution-concept more in line with Lowe's view of "[...] the Convention as Constitution, where the selection of principles for expression in the text is based not upon a comprehensive pegging-out of the ground covered by the instrument, but rather upon the perception that there are certain key principles whose application must be secured in the face of the threat of erosion from a myriad of what may be apparently innocuous regulations and practice." AV Lowe, 'Was it worth the effort?', in D Freestone (ed.), *The 1982 Law of the Sea at 30: Successes, Challenges and New Agendas* (Martinus Nijhoff, Leiden/Boston, 2013) 201–207, at 202.

139 G Distefano, 'La pratique subséquente des États parties à un traité' (1994) 40 *Annuaire français de droit international* 41–71, at 43. See further JP Cot, 'La conduite subséquente des parties à un traité' (1966) 37 *RGDIP* 632–666; O Casanovas y La Rosa, 'La modificación de los acuerdos internacionales por la práctica posterior' (1968) 21 *REDI* 328–345; and J Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 *Law & Practice of International Courts and Tribunals* 443–494. See also the Dissenting Opinion by Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau to the case of the *Rights of Nationals of the United States of America in Morocco* (*France* v *United States of America*) [1952] ICJ Rep 176, particularly at 220; and *Interpretation of the air transport services agreement between the United States of America and France* (1963) 16 *RIAA* 5, particularly at 63–64.

A "Creation" or a "Re-creation" of the Rule?

In his third Report on the Law of Treaties, Waldock warned that "if the interpretation adopted by the parties diverges, as sometimes happens, from the natural and ordinary meaning of the terms, there may be a blurring of the line between the *interpretation* and the *amendment* of a treaty by subsequent practice."[140] In our particular case, Rau has contended that:

> [g]iven that during the negotiations of the UNESCO Convention, Article 8 was rather undisputed, one might argue, however, that the provision constitutes a 'subsequent practice' in the application of the Law of the Sea Convention within the meaning of Article 31 para. 3(b) of the Vienna Convention on the Law of Treaties.[141]

The latter would suppose a so-called re-creation of the rule governing the archaeological rights of the coastal State in its contiguous zone, inasmuch that subsequent practice would have simply "(re-)interpreted" Art. 303(2) LOSC.[142]

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140 *Yearbook of the International Law Commission*, 1964, vol. II, at 60 (para 25).

141 Rau (n 20), at 445.

142 As "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" [VCLT, Art. 31(3)(b)]. On the subsequent practice, along with Fitzmaurice's elaboration in the *British Yearbook* of the concept of the 'emergent purpose' ['The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *BYbIL* 1–28, at 8 (fn 2); and 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Certain Other Treaty Points' (1957) 33 *BYbIL* 203–293, at 208], see Distefano's paper in the *Annuaire français* (n 139), where the discussions about this dual function of the subsequent practice and the discussions around it within the ILC are comprehensively traced as well as the deletion of Article 38 on 'Modification of treaties by subsequent practice.' However, the ILC (and its *rapporteur*, particularly Waldock) did not neglect its content. It was simply not included in the VCLT by the Vienna Conference, mainly due to the complicated relations between conventional and customary law (see Distefano, n 143, at 55–61).

In 2008 the ILC decided to include the topic 'Treaties over time' in its programme of work and to establish a Study Group accordingly (UN Doc. A/63/10, para 353). Chaired by Professor Georg Nolte, in 2010 the Study Group began its work on the aspects of the topic relating to subsequent agreements and practice. In 2012, the ILC decided to change the title of the topic to 'Subsequent agreements and subsequent practice in relation to interpretation of treaties.' The three written reports are in G Nolte (ed.), *Treaties and Subsequent Practice* (Oxford University Press, Oxford, 2013), at 169 ff., which also includes interesting contributions on 'Interpretation and Change' by G Hafner ('Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment', at

However, this article assumes a broader change of the rule through a customary process, departing from Art. 303(2) LOSC (and even earlier),[143] through a conventional and unilateral practice—not easily or simply labelled as the "subsequent practice" envisaged in Art. 31(3)(b) VCLT—and the crystallisation of a new rule with the adoption of Art. 8 of the UNESCO Convention.[144] 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 rights over all and any activities directed to underwater cultural heritage located in that maritime zone.[145] This, as we have just seen, has historical, contextual and material reasons.

In international law, State practice may change previous conventional agreements. As discussed in the *Delimitation of the Continental Shelf between the United Kingdom and France Arbitral Award* of 1977, "a development in customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations."[146] This evolving process is not unfamiliar to the

105–122), JE Álvarez ('Subsequent Practice Between Interpretation, Informal Modification, and Formal Amendment: A Comment', at 123–132) and A Bianchi ('Law, Time and Change: The Self-Regulatory Function of Subsequent Practice', at 133–141).

143 Assessing this early practice, it has been commented that "[i]t thus cannot be excluded that the concept of an 'offshore cultural protection zone', coextensive with the continental shelf or a 200-mile zone or both, will gain further support in the future." B Kwiatkowska, 'Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Prectice' (1991) 22 *ODIL* 153–187, at 164.

144 That is, using Fitzmaurice's words, reviewing practice "not as a theory of interpretation, but as a substantive rule of a treaty law affecting the revision of treaties." Fitzmaurice (1957) (n 142), at 43.

145 It is important to recall again that, as expressly stated in Art. 8 of the Convention, the new rights provided in that Article refer *solely* to the regulation by the coastal States of the activities "directed to underwater cultural heritage" and not necessarily to other activities which may incidentally affect underwater cultural heritage.

146 *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (*UK/France*) (1977) 18 *RIAA* 3, at 37 (para. 47). See T Treves, 'The Development of the Law of the Sea since the Adoption of the UN Convention on the Law of the Sea: Achievements and Challenges for the Future', in D Vidas (ed.), *Law, Technology and Science for Oceans in Globalisation* (Martinus Nijhoff, Leiden/Boston, 2010) 41–58, at 42 ("It cannot be excluded that customary law developing between States, including parties to the LOS Convention, could derogate provisions of the latter, and that customary rules distinct from those of the Convention could emerge between all or some of the parties to it.")

law of the sea. Quite the opposite: the law of the Geneva Convention was superseded by subsequent practice, then declared and/or crystallised in the LOSC, which generated new customary law and, in the case of underwater cultural heritage, subsequent practice created new rules again in Paris with the UNESCO Convention.

This customary process may perfectly crystallise in a new conventional text (which would bind State parties) and in the creation, at the same time, of a new customary rule (with *erga omnes* effects).[147] Both rules may share the same principle but may differ in the details, the written text being normally more precise. Operability and applicability may also differ.[148] Article 8 of the UNESCO Convention does apply only to State parties to that Convention, and its content seems to be clear. However, the content of a customary rule recognising particular rights of coastal States in their contiguous zones with regard to the protection of underwater cultural heritage needs to be confirmed and specified.

The Existence of the Rule: Remaining Doubts

Conventional and unilateral State measures analysed in this article show 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. Some remaining doubts appear with regard to the uniformity of that practice.

This process has been also accepted as having occurred in the case of two of the most important Conventions currently in force: the UN Charter, in relation to the amendment by practice of its Articles 27(3) and 12(1) (see respectively *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), *Advisory Opinion* [1971] ICJ Rep 16, at 22 para 22; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion* [2004] ICJ Rep 136, at 149 para 27); or the European Convention on Human Rights (with regard to its Articles 2 and 3 in connection with the death penalty; see *Soering v the United Kingdom* (App no 14038/88)(1989) Series A no 161, at 40 para 103; *öcalan v Turkey* (App no 46221/99) ECHR 12 March 2003, para 198).

147 Only persistent objectors—as perhaps Turkey may demonstrate (see *supra* n. 41)—might avoid the opposability of that emergent customary rule. See *Fisheries Case* (*United Kingdom v Norway*) [1951] ICJ Rep 116, at 131.

148 *Military and Paramilitary Case* (n. 4) at 94–95 (paras 175–177).

- *Generality*. As reviewed, the evidence gathered comes from all geopolitical areas of the planet, including "old" and "new" States, maritime and non-maritime powers, with an ancient presence on maritime routes and in commerce either locally or worldwide. It includes evidence of most of the States "historically" interested, with one clear objector —Turkey—and some relatively "absent" States—for example Russia, the United Kingdom and Venezuela—that have nevertheless declared their commitment to the general principles enshrined in the 2001 UNESCO Convention and have not protested the terms and legal consequences of its Article 8.
  Among almost 200 States in the world, 48 are landlocked and, consequently, have no possibility (for the time being) to have a contiguous zone. In this article the practice of more than 120 States has been tabulated. Among the 78 States that have (conventionally or unilaterally) declared archaeological rights over their contiguous zone, EEZ or continental shelf, 29 are among the 50 States with the longest coastline and the biggest EEZ. This may simply add a "quantitative" measure of States involved in that practice, but offers yet another building block when assessing the applicable zones where a coastal State has expanded its competencies for the protection of underwater cultural heritage.
- *Duration*. More than thirty years have elapsed since the adoption of the LOSC in 1982. State practice, both maritime and cultural, shows even earlier evidence. As is well known, a long or immemorial State practice is not necessary for the maturation of a customary rule.[149] Actually, some customary changes took place between UNCLOS II and III, over the same—or even shorter—maturation period. The State practice analysed concerning the archaeological rights over the contiguous zone displays a dense array of positive and negative conduct over the last decades—with a landmark in the adoption of the 2001 UNESCO Convention—that suffices to confirm the crystallisation of a new customary rule.
- *Consistency*. Some doubts might remain with respect to the uniformity or consistency of the State practice, not with regard to the material content

149 The ICJ *dictum* in the North Sea Continental Shelf case is worth noting: "[a]lthough the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." *North Sea Continental Shelf Case* (n 36) at 43 (para. 74).

of the new rule—recognition of both legislative and enforcement powers of coastal States—but, rather, about the spatial limit of those powers: 24 nm or 200 nm. Most States have limited themselves to their contiguous zone, when declared. But others have unilaterally expanded their archaeological powers up to the outer limits of their EEZ or continental shelf.[150] However, it seems that there is a common understanding and a general acceptance that those powers extend, at least, up to the outer limit of the contiguous zone.

Nevertheless, the practicability of the rule must still be tested: what would happen, for example, in a case where an enforcement action has been taken by a coastal State against another State's vessel performing an activity directed at the underwater cultural heritage without the permits foreseen in the coastal State's domestic legislation? Among States parties to the 2001 UNESCO Convention the answer may be found in Article 8: the coastal State may regulate and authorize these activities and, even, "shall require [that] the annexed Rules be applied".

Problems arise between States parties to the Convention and third States, and between third States amongst each other, depending on whether or not they have enacted domestic legislation similar to that set out in Article 8 of the UNESCO Convention. It is to be assumed that between a State party to the Convention and a third State having enacted this kind of legislation, both parties would respect the coastal State's legislation and enforcement decisions on the contiguous zone. Furthermore, between States not party to the Convention but having enacted this kind of legislation, both parties would also supposedly respect the coastal State's legislation and enforcement decisions on the contiguous zone; and finally, between a State party to the Convention or a third State having enacted this kind of legislation and a third State not having enacted this kind of legislation,[151] due to the alleged customary nature of the rule, both States would respect the coastal State's legislation and enforcement decisions on the contiguous zone.

The geographical scope of the legislative and enforcement decisions may vary depending on the particular condition of each State. The possibilities enunciated above are all applicable to the contiguous zone. Its possible application to the EEZ and continental shelf should only be possible between States having enacted similar legislation for similar zones.

150 Twenty-seven of the 122 tabulated States. This might conflict with the regime foreseen in Articles 9 and 10 of the 2001 UNESCO Convention which establishes a cooperative scheme for the protection of underwater cultural heritage in the EEZ and on the continental shelf.

151 And not having systematically opposed the rule as a persistent objector, i.e., the case of Turkey.

The Operability of the Rule

Contrary to what occurs in the territorial sea—"an essential appurtenance of land territory"—[152] and the continental shelf—over which States have rights "*ipso facto* and *ab initio* by virtue of its sovereignty over the land"—[153] the other two marine areas—the EEZ and the contiguous zone—need a formal declaration to exist.[154] As has been said, "States are not obliged to maintain contiguous zones, as they are to maintain territorial seas [...] the contiguous zone is not automatically ascribed to the coastal State."[155] Therefore, a question has been posed with respect to the archaeological rights of the coastal State over its contiguous zone: whether there is a need to declare it first in order to exercise these rights.[156] This theoretical question must be practically answered,[157] that is, it is necessary to ascertain the development of the concept of the archaeological zone in State practice.

Among the 45 States parties to the 2001 UNESCO Convention, 19 States have not declared a contiguous zone.[158] Among the 36 non-party States reviewed here that have unilaterally extended their archaeological competencies over

152 *Grisbådarna Arbitration* (*Norway v Sweden*) (1909) 11 *RIAA* 155, at 159. "The possession of this territory—said Lord McNair in his dissenting opinion in the *Anglo-Norwegian Fisheries case*—is not optional, not dependent upon the will of the State, but compulsory." *Fisheries Case* (n 150), at 160). It has been authoritatively said that "[t]his notion of a territorial sea automatically appurtenant to coastal States [...] in implicit in both the 1958 Territorial Sea Convention [art 1] and the Law of the Sea Convention (art. 2) which follows the 1958 text." (Churchill and Lowe (n 62), at 81) It follows that a coastal State might only declare the *breadth* of *its* territorial sea up to 12 nm.

153 *North Sea Continental Shelf Case* (n 36), at 22 (para. 19).

154 For the EEZ, see C*ontinental Shelf* (*Libyan Arab Jamahiriya/Malta*) [1985] ICJ Rep 13, at 33 (para. 34).

155 Churchill and Lowe (n 62), at 135.

156 Some doctrinal positions and a discussion are in Garabello (n 2), at 156–158. See also for the questions of delimitation of this "archaeological marine zone", I Papanicolopulu, 'La zona contigua archeologica e la sua delimitazione', in T Scovazzi (ed), *La protezione del patrimonio culturale sottomarino nel Mare Mediterraneo* (Giuffrè Editore, Milano, 2004) 43–70.

157 The doctrinal discussion departs from the text of both Articles 33 and 303(2) LOSC, which in the present author's view have been superseded by State practice and must be contextually interpreted, keeping in mind such State practice, both conventional (with a particular attention to the 2001 UNESCO Convention) and unilateral.

158 Albania, Barbados, Benin, Bosnia-Herzegovina, Croatia, Ecuador, Grenada, Italy, Jordan, Lebanon, Libya, Montenegro, Nigeria, Palestine, Paraguay, Slovakia, Slovenia, Trinidad and Tobago, and Ukraine. Bosnia-Herzegovina and Slovenia have minimal coasts with no space to claim a contiguous zone. Paraguay, Slovakia and Slovenia are landlocked States. Benin and Ecuador have declared a 200-nm territorial sea.

their contiguous zone, 9 States have not declared this zone.[159] 29 of 46 of the States voting in favour of the 2001 UNESCO Convention have not declared a contiguous zone either.[160] Finally, among the remaining 11 States reviewed, 10 have not declared a contiguous zone.[161]

Some of the tabulated States without a contiguous zone, but unilaterally declaring competencies similar to those enshrined in Article 8 of the 2001 UNESCO Convention, have made such declarations with regard to their EEZ and continental shelf.[162] Therefore, depending on each case, the powers so enshrined are to be implemented in each applicable zone. State practice, hence, is not conclusive enough.

From a customary law point of view then, there is some ambiguity on the geographical extent of the "archaeological zone". From a conventional law point of view, Article 8 of the 2001 UNESCO Convention states that the rights discussed—to regulate and authorize activities directed at underwater cultural heritage—may be exercised by States parties "within their contiguous zone."[163] This seems to presuppose the previous declaration of this zone which, as recalled again, needs to be declared in order to exist. Some prominent authors have affirmed that a combined reading of Articles 33 and 303(2) LOSC permits discussion of an autonomous archaeological zone as opposed to the contiguous zone.[164] The full jurisdictional nature of an "archaeological zone", unlike the limited enforcement jurisdiction in the contiguous zone, points in that direction. However, the 2001 UNESCO Convention, in the present author's

159 Bermuda, Colombia, Greece, Guyana, Iceland, Indonesia, Peru, Philippines and Tanzania. The SFR Yugoslavia did not declare a contiguous zone either. DPR Korea declared a 50-nm military zone.

160 Austria, Belize, Central African Republic, Cook Islands, Costa Rica, El Salvador, Ethiopia, Guatemala, Hungary, Indonesia, Iraq, Kyrgyzstan, Laos, Latvia, Luxembourg, Macedonia, Malawi, Malaysia, Mali, Moldavia, Monaco, Niger, Poland, Qatar, Rwanda, Sudan, Togo, Uganda and Zambia. Fourteen (Austria, Central African Republic, Hungary, Kyrgyzstan, Laos, Luxembourg, Macedonia, Malawi, Mali, Moldavia, Niger, Rwanda, Uganda and Zambia) are landlocked States.

161 Andorra, Armenia, Azerbaijan, Czech Republic, Estonia, Germany, Holy See, Liechtenstein, Russian Federation, Sweden and the United Kingdom. Five (Andorra, Armenia, Czech Republic, the Holy See and Liechtenstein) are landlocked States.

162 Australia, Brazil, Canada, Cape Verde, China, Dominican Republic, Guyana, Iceland, Ireland, Indonesia, Madagascar, Pakistan, Philippines and Tanzania. To these States must be added DPR Korea and the former SFR Yugoslavia.

163 "[E]n su zona contigua", in Spanish, and "dans leur zone contigüe", in French.

164 See, for example, Treves (n 5), at 707–708; Ronzitti (n 5), at 9; Strati (n 5), at 169; Garabello (n 2), at 178. See also MH Nordquist, S Rosenne and LB Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary* (vol. 5, Martinus Nijhoff, Dordrecht, 1989), at 161.

view, conveys detailed shades of meaning that unwritten rules cannot express.[165] In this sense, Article 8 of the 2001 UNESCO Convention has given a more formal shape to the aforesaid customary rule. As this article foresees a new limitation to third States' rights and territorial privileges, a restrictive interpretation could be supported[166] and a previous declaration of a contiguous zone seems necessary to invoke Article 8 between States parties to the Convention.[167] In those cases, however, where domestic legislation is enacted for the EEZ and the continental shelf, an previous declaration of an EEZ should be necessary, but not for the continental shelf, which legally exists without declaration.

Conclusion

In his seminal article on the contiguous zone, Lowe ended his analysis on the enforcement and legislative nature of coastal State's rights over that zone with an assessment of the consequences of the lack of State practice. Then (1981), Lowe argued that, "[u]nfortunately, it is impossible to resolve any remaining doubts on this point by reference to the subsequent practice of States."[168] Today, more than thirty years later, State practice offers a general, quite uniform and constant evidence of the acceptance of a coastal State's right to legislate on and to enforce the protection of underwater cultural heritage located in its contiguous zone.

The acceptance of this new customary rule—also declared in Article 8 of the 2001 UNESCO Convention—responds to a new interest present in the international community, i.e., to protect underwater cultural heritage, which can be balanced with other interests of, mainly, maritime powers, which during the second half of the 20th century preserved the freedom of the seas against proposals of "creeping jurisdiction". Both interests are now not in

165 I here paraphrase Treves's wise words in another clarifying article on the customary process: 'Military Installations, Structures and Devices on the Seabed' (1980) 74 *AJIL* 808–857, at 814.

166 See *Territorial Jurisdiction of the International Commission of the River Oder* [1929] PCIJ Rep Series A No 23, at 26; and *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgement* (*Canada/United States of America*) [1984] ICJ Rep 246, at 301, para 119.

167 This previous declaration scheme was also foreseen in the 1985 Draft European Convention (Art. 2), *supra* n. 56. From a non-formalistic viewpoint, an unequivocal practice of a coastal State acting *de facto* and *de jure* over its contiguous zone could arguably substitute for the more formal declaration of that zone.

168 Lowe (n 6), at 168.

opposition but in a "continuous dialogue", a result of which is the new customary rule protecting a new *nécessité sociale*.[169]

Between the restrictive (territorial sea) and the maximalist (EEZ/continental shelf) positions among States regarding the territorial scope of maritime archaeological rights, Article 8 of the 2001 UNESCO Convention reflects conventionally what has crystallised customarily over the last thirty years. The visions confronted during the drafting of both the LOSC and the UNESCO Convention have found a lowest common denominator between those legal positions, accepting as a general rule that coastal States can establish an archaeological zone in their declared contiguous zones. In that archaeological zone, coastal States have both enforcement and legislative rights to protect underwater cultural heritage.

Against the progressive destruction of archaeological and cultural objects beneath the waters—true "time capsules"—States have progressively decided to protect underwater cultural heritage with more effective legal measures, both domestic and international. One of these measures is the adoption of the 2001 UNESCO Convention, which, in the present author's view, has facilitated the crystallisation of a new customary rule that recognizes coastal State power to legislate and enforce in the declared contiguous zone the necessary rules to protect underwater cultural heritage. In this sense, the Convention honours what is explicitly said in its preamble, which declares "the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice [particularly including] the United Nations Convention on the Law of the Sea of 10 December 1982."

169 As has been said, "la règle coutumière correspond à un équilibre des forces internationales en présence à un moment donné, à une confrontation des sujets de droit sur un problème international. La formation spontanée de telles règles se réalise par suite d'une prise en conscience juridique collective de la nécessité sociale." P Daillier, M Fortheau and A Pellet, *Droit international public* (8th ed., Paris, LGDJ, 2009), at 355.