



NETwork of experts on the legal aspects  
of MARitime SAFETY and security

IS 1105 COST ACTION

# REGIONAL STRATEGIES TO MARITIME SECURITY

## A COMPARATIVE PERSPECTIVE

Editors

**EVA M<sup>a</sup> VÁZQUEZ GÓMEZ**  
**CLAUDIA CINELLI**



UNIVERSIDAD DE CÓRDOBA



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**A COMPARATIVE PERSPECTIVE**

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# REGIONAL STRATEGIES TO MARITIME SECURITY A COMPARATIVE PERSPECTIVE

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CLAUDIA CINELLI

*Editors*



UNIVERSIDAD DE CÓRDOBA



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## *Foreword*

This MARSAFENET Editorial Project on “Regional Strategies to Maritime Security: A Comparative Perspective” is based on the outcomes of the related Workshop (held in the Rectorado of the University of Córdoba, Spain, on 27th November 2013), and on further research activities, including those carried out within the framework of the Marsafenet Working Group n. 4 on “The protection of fragile and semi-enclosed seas”. Likewise, it has also been developed under the umbrella of the national Research Project “El Derecho del Mar y la Unión Europea” DER2013-47863-P (Ministerio Español de Economía y Competitividad).

The aim of this Workshop Editorial Project was to investigate current maritime security issues from a comparative perspective with a focus on identifying appropriate responses in terms of regional strategies which present various characteristics and are found in areas which may be under different legal regimes.

The international community has over the past decade become increasingly concerned about many activities carried out in oceans and coasts that call for immediate action on issues such as the protection of fragile and vulnerable ecosystems as well as governance of marine protected areas. In this regard, the first part of the book deals with a comparative analysis of regional strategies regarding *medi terraneum* seas, in particular the Arctic Ocean, the Barents Sea, the Black Sea and the Mediterranean Sea.

On the other hand, Regional Seas Conventions and Action Plans fulfill an important role in implementing the international agenda on security and safety in the context of marine policies. These Conventions and Action Plans also endeavour to effectively apply an ecosystem approach to the management of the marine and coastal environment in order to protect oceans and marine ecosystems, while maintaining their biodiversity and enabling their conservation and sustainable use for present and future generations. On these grounds, the second part of the book analyses different responses in terms of strategies, regarding, in particular, marine environmental protection, natural resource management and enforcement at sea.

The editors wish to thank for the support and help received, both in carrying out the scientific Marsafenet Workshop and in the publication



of its results: the MARSAFENET Cost Action and the Chair, Professor Gemma Andreone; the Scientific Committee; the Faculty of Law and Economics of the University of Córdoba (Spain), in particular, the Dean Professor Miguel Agudo Zamora and Professor Rafael Casado Raigon, Chair of the Public International Law Department; the Fundación Universitaria para el Desarrollo de la Provincia de Córdoba (FUNDECOR) and the XVIII Research Program of the Universidad de Córdoba 2013.

Eva M. Vázquez Gómez  
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Córdoba-Sevilla-Pisa  
December 2013

**I. REGIONAL STRATEGIES AT  
*MEDI TERRANEUM SEAS***



# *The emergency of the Dead Sea and the Two Seas Canal: Critical remarks on strategies and regional cooperation carried out by Israel, Jordan and Palestine*

MARTINA BIANCHI\*

**Summary:** I. Introduction; II. The causes of the environmental emergency: physical and morphological characteristics and exploitation activities; III. The international cooperation project: the Two Seas Canal; A. The role played by World Bank; IV. The opponents of the project; A. Ecologists and civil society; B. The Egyptian position; C. The other dissenting voices: water issue in Palestine; 1. The current legislation on water in Palestine; 2. World Bank's ambiguous position; IV. The study by Strategic Foresight Group; V. Final Reflections. A. Final Reflections and ....; B. .... remedies from a theoretical point of view.

## I. INTRODUCTION

The aim of this study is to analyse the case represented by the project known as the “Two Seas Canal” as an example of international cooperation carried out in order to stem the environmental crisis of the Dead Sea.

The international scientific community has, in fact, denounced the risk of total drying up of the Dead Sea by 2050 as a result of the continuous lowering of the water level, which proceeds inexorably to about one meter per year.

Indeed, dealing with marine ecosystems at risk, scientific and academic world rarely puts its attention to the Dead Sea area as one of the top of its agenda, because of both its relatively small size and the geographic specificity of the region involved.

However, due to its morphological and naturalistic properties on the one hand, and the geostrategic role it plays within the framework of the State of Israel, Jordan and the Occupied Palestinian State regarding their

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production activities on the other, the Dead Sea represents a unique case in the world.

Both these aspects have to be deeply analysed, as they represent respectively the factual and the theoretical premises of the environmental crisis to which the cooperation project tries to give an answer.

This answer has been identified in the construction of the so-called “Two Seas Canal”, an engineering project without precedents, which would connect with a 180 km underground pipeline the Red Sea to the Dead Sea.

Since the first assessments, it seems plausible to affirm that these premises – both morphological and geostrategic and economic peculiarities – force us to a critical evaluation of the cooperation project.

Indeed, the “Two Seas Canal”, also supported by World Bank, raises many doubts about its sustainability and about the true aims of the regional cooperation (i.e., to preserve the strong economic interests linked to the exploitation of the Dead Sea). The “Two Sea Canal” project does not seem to consider that the environmental emergency management is not possible without a rethinking of water resources the management, especially from a social and political point of view. What is meant here to be demonstrated is, actually, the full validity of the thesis advanced by the Strategic Foresight Group<sup>1</sup> in a report, not surprisingly titled the “Blue Peace”<sup>2</sup>, according to which the stability of many conflict area in the world, including the Middle East, depends on a great extent on a more equitable and well-studied water management.

## **II. THE CAUSES OF THE ENVIRONMENTAL EMERGENCY: PHYSICAL AND MORPHOLOGICAL CHARACTERISTICS AND EXPLOITATION ACTIVITIES**

The Dead Sea is a closed sea, about 397 metres below sea level, between Israel and Jordan. It is one of the saltiest bodies of water known and it is the lowest point on the surface of the earth. Indeed, the salinity of the Dead

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<sup>1</sup> Strategic Foresight Group (SFG) is a think tank based in India since 2002, which works on issues of global importance and relevance. For more details, see <http://www.strategicforesight.com/index.php>.

<sup>2</sup> The report *The Blue Peace: Rethinking Middle East Water*, commissioned by Swiss and Norway, was published on February 2011; it is available on [www.deza.admin.ch/ressources/resource\\_en\\_198458.pdf](http://www.deza.admin.ch/ressources/resource_en_198458.pdf).

Sea is around 300 g<sup>3</sup> of salt per litre of water, about nine times higher than other seas and oceans. Unfortunately, the characteristics that make the Dead Sea a unique environmental example in the world are also extremely related to its fragility and ability to self-preservation. Specifically, the alarm raised by experts all over the world concerns the concrete possibility for the Dead Sea to completely dry out within the next fifty years.

The warming climate has accelerated the evaporation process and the waters of the Jordan River, the main tributary, are not enough to maintain the constant level of the sea. Today, Jordan River has been reduced to little more than a creek, following a process that began in the sixties. Israel, Jordan and Syria began to divert the course of the river using about 95% of its capacity, to collect drinking water and support the demand of water in the agricultural and industrial sectors. Tel Aviv, by itself, picks up about 60% of water, with dramatic results for the Dead Sea.

To worsen the problem, along with the increasing drought, there are the exploitation activities built on its banks. Jordan and Israel have allowed the construction of plants that, by evaporating water, obtain minerals to extract phosphate. Furthermore, the strong impact of tourist activities and luxury hotels have to be considered: they have grown due to the increasing flow of tourists attracted by the famous thermal properties and healing mud and waters of the Dead Sea.

Numbers witness the gravity of the situation: the Dead Sea, 67 km long and 18 km wide, retires at the rate of 80 cm per year: over last 50 years his waters have dropped off 26 meters, from 394 to 422 meters below sea level.

### **III. THE INTERNATIONAL COOPERATION PROJECT: THE TWO SEAS CANAL**

The emergency represented by the forthcoming disappearance of the Dead Sea has prompted the States directly involved in the implementation of a rescue plan based on pumping water from sources other than the Jordan River.

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<sup>3</sup> The total salinity is 276 g/kg and the composition of the salt, as anhydrous chlorides on a weight percentage basis, is calcium chloride (CaCl<sub>2</sub>) 14.4%, potassium chloride (KCl) 4.4%, magnesium chloride (MgCl<sub>2</sub>) 50.8% and sodium chloride (common salt, NaCl) 30.4%. The concentration of sulfate ions (SO<sub>4</sub><sup>2-</sup>) is very low, and the concentration of bromide ions (Br<sup>-</sup>) is the highest of all waters on Earth. Out of the 21 minerals identified, 12 cannot be found anywhere else.

The idea to use the altitude difference (about 400 meters) between the Dead Sea and the Mediterranean Sea or the Red Sea has spurred the imagination of hydrologists, experts in energy production, environmentalists, statesmen and political visionaries since the mid-of the nineteenth century. Each of the different plans provided connecting the Mediterranean Sea and / or the Red Sea with the Dead Sea through canals, tunnels and aqueducts. The three most important projects proposed the connection North Med-Dead Sea (via: Haifa Bay, Valley of Esdraelon, Bet Shean, Jordan River, Dead Sea), the connection South Med-Dead Sea (the Mediterranean south of Ashkelon up to the Dead Sea) and the connection from northern tip of the Red Sea to the Dead Sea. Among the purposes pointed by the ever-widening group of supporters there are power generation (Theodor Herzl wrote on this topic as early as 1902 in his "*Altneuland*")<sup>4</sup>, the desalination of sea-water to solve the ever-increasing lack of water in the area and, more recently, to encourage regional cooperation. One of these projects has got the point of a possible achievement, in two occasions. First was the Mediterranean-Dead Sea project, seriously considered by Begin's two government and during first mandate of Shamir in 1978-1985. Actually, this specific project, called "The Seas Canal", got so close to the achievement that in February of 1982 the labourist chair Shoshana Arbeli-Almoslino put on the order of business of Knesset a motion about the involvement in the project of Israeli dig engineering to contribute to the solving of unemployment issue, urgent at that time. Finally, the project was set aside for lack of economic feasibility, and because it did not obtain the UN support, due to some objections about his unilateral structure and the supposed violation of international laws involved with its realisation<sup>5</sup>. The second is the

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<sup>4</sup> Theodor Herzl, *The Old New Land* (1902, Jerusalem). The issue of the canalization project is expounded in the fourth book, chapter 3.

<sup>5</sup> See the note issued by the United Nation Environment Programme (UNEP) Governing Council on 8th meeting on 23 May 1983: "The Governing Council, Recalling General Assembly resolutions 36/150 of 16 December 1981 and 37/122 of 16 December 1982, Bearing in mind the Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972) 21/ and the Nairobi Declaration of 1982 regarding the protection and enhancement of the environment, 22/Recognizing that the proposed canal to be constructed partly through the Gaza Strip, a Palestinian territory occupied in 1967, would violate the principles of international law and effect the interests of the Palestinian people, Confident that the canal linking the Mediterranean Sea with the Dead Sea, if executed by Israel, will cause direct, serious, detrimental and irreparable damage to man and his environment in Jordan and to Jordan's rights and legitimate vital interests in the economic, agricultural, demographic and ecological fields, 1. Takes note of the report of the Executive Director on the subject;

current World Bank proposed project: known as “Two Seas Canal” (Read Sea – Dead Sea) or “Peace Canal,” firstly raised after the signing of the Jordan-Israel peace treaty of 1994, it includes now Jordan, Israel and Palestinian Authority; it is carried on under of World Bank aegis, main financial supporter and investor<sup>6</sup>.



After years of studies and meetings between the States involved and after over a year and a half of secret negotiations, on Monday of December, 9, 2013, with a ceremony in World Bank seat in Washington D. C., Israel, Jordan and Palestinian Authority signed a treaty (informally called “Red – Dead Deal”)<sup>7</sup>

23/2. Recalls the General Assembly’s demand in its resolution 37/122 that Israel not construct this canal and cease forthwith all actions and/or plans taken towards the implementation of the project,

3. Recalls that in the same resolution the General Assembly called upon all States, specialized agencies and governmental and non-governmental organizations not to assist, directly or indirectly, in preparations for and the execution of this project

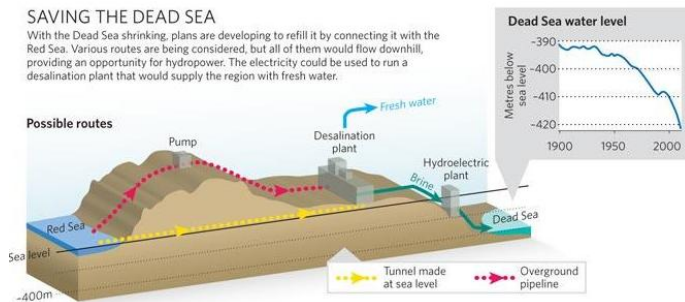
4. Requests the Executive Director to facilitate the work of the Secretary-General in monitoring and assessing, on a continuing basis, all aspects especially ecological ones - of the adverse effects on Jordan and on the Arab territories occupied since 1967, including Jerusalem, arising from the implementation of the Israeli decision to construct the canal, as well as in the preparation of the report of the Secretary-General to be submitted to the General Assembly at its thirty-eighth session, and to report to the Governing Council at its twelfth session on the implementation of the present decision”.

<sup>6</sup> Image courtesy of the Guardian (<http://www.theguardian.com/world/2013/dec/09/dead-sea-pipeline-water-red-sea>).

<sup>7</sup> The treaty full text isn’t yet available. Anyway, the news was published by many agencies and newspaper as the Israeli YNetNews (<http://www.ynetnews.com/ar->



that gives the green light to the realisation of the Red Sea – Dead Sea Canal. The signing States” purposes are to produce millions of cubic meter of fresh water to answer the need of the semi-arid region and to oppose the decrease of the water level of the Dead Sea, preventing its disappearance before 2050<sup>8</sup>. Minister of Energy Mr Silvan Shalom, who is also the Minister for regional cooperation and infrastructure, represented Israel. For Jordan, there was the Minister for hydric resources and irrigation, Hazem Nasser and for Palestinian Authority, the Minister of water, Shaddad Attali. The sign was combined with statement of full satisfaction in particular by Israeli representative, as the Minister Shalom stated to the press: “It is a historical agreement – It’s a dream that becomes true and we hope that would encourage peace in the region”<sup>9</sup>.



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articles/0,7340,L-4462942,00.html), the Daily Mail (<http://www.dailymail.co.uk/sciencetech/article-2521282/Dead-Sea-linked-Red-Sea-112-mile-underground-pipe-stop-drying-completely-2050.html>), Haaretz (<http://www.haaretz.com/news/middle-east/1.562593>), The Guardian, (<http://www.theguardian.com/world/2013/dec/09/dead-sea-pipeline-water-red-sea>) the Telegraph (<http://www.telegraph.co.uk/news/worldnews/middleeast/israel/10506007/Israel-claims-historic-water-agreement-will-save-Dead-Sea.html>), NenaNews ([http://nena-news.globalist.it/Detail\\_News\\_Display?ID=92809](http://nena-news.globalist.it/Detail_News_Display?ID=92809)).

<sup>8</sup> Megan Goldin, “Israel’s Shrinking Sea of Galilee Needs Miracle”, *Reuters*, 14 August 2001; Annette Young, “Middle East Conflict Killing the Holy Water”, *The Scotsman*, 12 September 2004. Caroline Hawley, “Dead Sea “to Disappear by 2050”, BBC, 3 August 2001; Gidon Bromberg, “Water and Peace”, pp. 24-30, *World Watch*, July/August 2004.

<sup>9</sup> All these reported statements have been issued to many international press organisations in occasion of the Washington D. C. treaty signature and have been collected in the special report, titled *Pipeline from the Red Sea to the Dead Sea*, by Sawsan Ramahi, edited for the agency Middle East Monitor on March 2014. The report is available on: [https://www.middleeastmonitor.com/downloads/reports/20140301\\_PipelineFromTheRedSeaToTheDeadSea-web.pdf](https://www.middleeastmonitor.com/downloads/reports/20140301_PipelineFromTheRedSeaToTheDeadSea-web.pdf)

<sup>10</sup> Image courtesy of European Space Agency (ESA), (<http://www.internationalpeaceandconflict.org/forum/topics/blue-peace-red-sea-dead-sea-pipeline-plan>)

About technical aspects, it was given forth that the first phase of Red Sea – Dead Sea connection should cost between 250 and 400 millions of dollars, raised by the donor countries, philanthropic organizations and an injection of liquidity from World Bank. Within the end of 2014, the trilateral plane schedules the publication of an international tender for the construction of a conduit long about 180 km to connect Aqaba seaboard through the Wasi Araba desert to El Mazra'a area, in the Dead Sea. The 50% should be built underground, with the construction of structure with a seven meters diameter. The other half is projected in open air. The Dead Sea surface is about 427 meters under sea level, so water will flow naturally from Red Sea to the north. Without any accident, the building of the structure and desalinisation plant will be finished in four-five years. According to the project estimates, every year 200 million of cubic meters of waters will be pumped from the Red Sea, at the southern end of Israel. At the same time, a big desalinisation plant in the Jordan city of Aqaba will provide drinking water. Israel will get 30-50 millions of cubic meter for the sea port of Eilat and for the community who lives in the arid region of Arava; Jordan will use 30 millions of cubic meters for its southern areas. A hundred millions of cubic meter of by-product highly saline will addresses to the north, in the Dead Sea, to rebuild its precarious level. In force of the same agreement, Israel will pump 50 millions of cubic meters of water to northern regions of Jordan and other 30 millions to the West Bank inhabitants under Palestinian Authority administration, exploiting from a side the fresh-water reserves of Kinneret lake (Galilean Sea), from the other side recycled-water for agriculture<sup>11</sup>.

According to the estimates, the three States could count on the availability of at least 850 millions of cubic meters of water per year, filling their respective hydric lacks for the next fifty years. Furthermore, it should also be available electricity production, thanks to the natural difference in level of about 400 meters between the starting point and the arrival point. The work had already got the approval of all the governments directly involved: if the Jordan Minister Al Alem talked about a “historical chance”, for the Israeli Minister of infrastructures Benjamin Ben Eliezure “a peace agree-

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signed#.U2nvSKVOvrk).

<sup>11</sup> For technical details, we refer to Jamal Kanj, “Israel, Palestine and Jordan: Water Rights and the Red – Dead Sea Canal. A Zionist Project?”, edit. by on Global Research, on 31th December, 2013; Stuart Winer “Israel, Jordan, Palestinians to finally build Red-Dead pipeline”, edit. on The Times of Israel, on 9<sup>th</sup> December, 2013; Projects – Red Dead Conduit [http://foeme.org/www/?module=projects&record\\_id=51](http://foeme.org/www/?module=projects&record_id=51);

ment is a piece of paper that finds strength only through such economic projects”, and the economic assistant of Palestinian President Abu Mazen hopes that “this cooperation will be a positive experience to deepen the dialog and get solutions also in other fields”<sup>12</sup>. If realized, the canal between Red Sea and Dead Sea will be longer than Suez and Panama canals: the first, dated at 1869, is 163 km of length, the second, built-up in 1914, is long 81 km. Anyway, it would be the first case of waters pumped from sea to sea (connections between basins are already done). Israeli Minister for regional cooperation Silvan Shalom continues to support the project, stressing benefits for all the parts involved and for the safety of the Dead Sea. “The project obtained the support of Prime Minister Benjamin Netanyahu and of the President of Palestinian Authority Mahmoud Abbas (Abu Mazen)”, and, obviously, the King of Jordan, declared the Minister Shalom to the radio Galei Tzahal. Jordan Minister Hazem Nassar has underlined that the agreement is not about politics. “It is a humanitarian agreement – he stated – projected to help those who need water, and it has also an environmental value because we are trying to save the Dead Sea. Without water there is no employment and poverty increases. This is the purpose for our collaboration with regional partners”. “The treaty– said the Palestinian Minister Shaddad Attili – is not related with Oslo agreements. This is a regional agreement, it’s important for all of us, and to save the Dead Sea. We proved that we can work together”<sup>13</sup>.

### A. The role played by World Bank

The signing of Washington D.C. agreement was preceded, in January 2013, by the publication of three reports<sup>14</sup> by World Bank on the trilateral plane for the construction of the “Two Seas Canal”. The reports were written by external experts and sponsored by France, Italy, Japan, USA, Netherlands and Greece: a feasibility study, an environmental and social assessment and a study on strategic alternatives. Pointing as the aim of the project to secure the Dead Sea from environmental degradation, to produce desalinated water and to generate hydroelectric energy with reasonable fares, World Bank underlined that the program should work also as “a peace symbol in Middle East”, in particular between Israel, Palestine and Jordan. The feasibility report determined that is possible to build a

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<sup>12</sup> See, n. 8, above.

<sup>13</sup> *Ibid.*

<sup>14</sup> The studies are available on the website <http://web.worldbank.org/>.

conduit in gallery, a big plant of desalination and two hydro electrical plants, all in Jordan territory. Environmental and social assessment instead warned against the risk of *negative changes in water quality and appearance* of the Dead Sea and possible damages to the whole ecological system of the region. The third report, about alternatives, individuated an option that would have combined different solutions: desalination in Aqaba and over Mediterranean coasts, water importation from Turkey and preservation and recycling of water. Final conclusion was that the project is feasible from a financial and engineering point of view<sup>15</sup>.

## IV. THE OPPONENTS OF THE PROJECT

### A. Ecologists and civil society

Many debates risen after the publication of the feasibility studies on the project commissioned by World Bank show an increasing opposition to the project both in ministries directly involved (environment, energy and water, regional cooperation) and in professional and intellectual circles. Those uncertainty are owed to the worry of an irreversible damage to the environment caused by the “Two Sea Canal”, changing the Dead Sea colour in white because of high dumping of gypsum, or in red because of the algae grow, which could make its waters more stinking too.

The main problem - raised by some environmental associations as “Friends of the Earth Middle East” (FoEME)<sup>16</sup> and the Israeli association “Adam Teva V’Din”<sup>17</sup> - concerns the mixing of the two seas. In fact, it is not known how Red Sea waters, coming in form of high-salty mud, will integrate with the particular and fragile ecosystem of the Dead Sea.

According to Gidon Bromberg, director of FoEME in Israel, the real beneficiaries of the project will be industrialists involved in the work, while populations will suffer the prohibitive costs of electricity and the environmental degradation. The Dead Sea, stressed FoEME association, endangers

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<sup>15</sup> See: *Summary, Draft Final Feasibility Study Report*, Report No. 12147RP04, July 2012, available on [http://siteresources.worldbank.org/INTREDESEADEADSEA/Resources/Feasibility\\_Study\\_Report\\_Summary\\_EN.pd](http://siteresources.worldbank.org/INTREDESEADEADSEA/Resources/Feasibility_Study_Report_Summary_EN.pd). Hana Namrouqa, “World Bank says Red-Dead project feasible”, edit. on The Jordan Times on 14<sup>th</sup> Apr 2014 (<http://jordantimes.com/article/world-bank-says-red-dead-project-feasible>).

<sup>16</sup> For more details see: [www.foeme.org](http://www.foeme.org).

<sup>17</sup> For more details see: [www.adamteva.org.il/english](http://www.adamteva.org.il/english).

the proliferation of red algae and the formation of gypsum after mixing with waters from Red Sea (whose salinity is lower) that could irreversibly change its mineral composition.

Among other risks, there is the underground pollution with seawater caused in case of loss from the canal. Thinking about terrorism risk, such a scenario is far to be implausible, as shown by the fifteen sabotage actions made in a year to the pipeline that connect Egypt to Jordan and Israel.

About that, Alexander McPhail, specialist of the Water service of Water Practice Division of World Bank, commented to the Jerusalem Post that tests have been already done and others will take place directly on the field.

However, to evaluate the real and total impact of huge volumes of water pumped inside (forecasted in about 100 – 400 millions of cubic metres) seems to be practically impossible to act, unless monitoring after the infrastructure will be in use.

Furthermore, other problems could be linked to the high seismicity of the area due to the syro-african fault. It's what said Eilon Adar, director of the Zuckerberg Institute for Water Researches at the Ben Gurion University in Israel, who individuated the very weak point of the project in the high seismic risk of the areas involved.

Frequent earthquakes could cause leakage of sea water from the conduit, with several damages to the underground freshwaters aquifers: such an incident is not preventable, prof. Adar explains, because it is impossible to grant the whole waterproofing of 180 km of the pipeline.

More, given that the Gulf of Aqaba will not be closed anymore, it will create a big current with consequences hard to be predicted. If these problems will not be solved, according to Adar, the so-called "Peace Canal", symbol of cooperation between peoples, would be nothing more than an scientific hazard.

Doubts, finally, have been gathered also about the real size of the project. It seems, according to some analysis, that the needed quantities will be highly superior to that indicated as the goal of the canal project: those studies say that a plus of 400 million of cubic meters will not have substantial positive changes for the Dead Sea situation.

Furthermore, criticisms have been raised about financial aspect, maybe the most uncertain one. The study of World Bank evaluates the cost of the project in 9,97 billion of dollars (7,78 billions of euro) – an amount that does not consider the canalisation of freshwater to Israel and Jordan – and

ensures that it will give in return one billion of dollars. Further, “benefits of the peace will bring in the middle term about 30 billions of dollars every year”, thanks to this action of “pacific cooperation” between Israel, Jordan and Palestinian Authority. An affirmation at least theoretical.

World Bank hopes for a private contribution of 2,6 billions dollars, coming from international loans for about 5 billions dollars. Besides, estimates foresee that Jordan - whose budget deficit today is over 10% of GDP - would contribute with 2,5 billions of dollars, that seems to be very realistic.

In connection with that, even if Israel does not refuse to realize a pilot scheme on a small scale that would show environmental and geological consequences, the position adopted by critics gains increasing consensus. However, the preferred solution is to allow freshwater coming from the two rivers Yarmuk and Jordan to stream to the Dead Sea, interrupting most of the upriver deviations of the Jordan River (something that will close the National Aqueduct, completed by Israel in 1964). The water subtracted to Israeli and Jordan hydric system should be replaced with desalinated water from Mediterranean and Red Sea (Aqaba) and with high quality purified wastewater. Maybe it could be possible to launch again the plane, discussed from the middle of 80's up to the beginning of the new millennium, to let flow water in the region from Turkey with aqueducts or tanks lorry.

Restoring the original stream of freshwater to the Dead Sea rather than carrying water from Mediterranean Sea and from Red Sea will not give back the Dead Sea to its ancient shine, but would stop the deterioration and would allow the nature to run its course.

## **B. The Egyptian position**

The three parts that reached the agreement in Washington didn't take in account of Egyptian position, not by chance excluded from negotiations. In 27th July of 2009, General Ahmed Fadel, President of the Suez Canal Society, on the occasion of celebrations for the 53<sup>th</sup> anniversary of nationalisation of the canal, stated that “the project of a canal between Red Sea and Dead Sea is a madness. If realized, it could cause volcanic eruptions and heart quakes, because of the proximity of the African fault. The Red Sea ecosystem would be compromised forever”<sup>18</sup>.

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<sup>18</sup> See Christian Elia, “Quel canale non s’ha da fare”, published on 27th July 2009 by, on Peacereporter.

General Fadel argued even the hypothesis of recourse to the International Court of Justice of the Hague from Cairo government to stop the works. Egyptian fears are clearly tied to the potential risk that the canal would be for the seaside cities on the Red Sea: the potential decline in sea level in the Gulf of Aqaba could harm coral reefs in the Gulf, damaging irreversibly the coastal cities ecosystem like Taba, Dahab, Nuweiba and down to Sharm el-Sheikh, centres with strong tourist vocation.

After the statements of 2009, the high political instability in Egypt impeded the Egyptian government and the State Authorities to take again a strong position with its regional partners and with the World Bank.

However, it is unthinkable that an engineering project of so high size, thought to operate for over a century, doesn't take in account the Egyptian opinion. Despite Egypt right now does not have such an internal structure to put itself as a strong and unitary subject in the management of relationship with other States, it is easy to image that the "Two Seas Canal" will be back to the first places of the public agenda of Cairo after a normalization of the government structure.

Believing those who interpret the Two Seas Canal as a concrete opportunity of cooperation – and so a way to a potential pacification in Middle East -, it is unclear how the Egyptian actor could be excluded from the cooperation project.

These contradictory attitudes seem to confirm some declarations, as those given by Lama El Hatow, PhD candidate at Delft University of Technology in the Netherlands and co-founder of the Water Institute of the Nile, who said: "Israel is actually the main benefactor from such a project, as it's the only Country that has the technological capacity and financial resources to benefit from the desalinated water. This technology is too expensive for Jordan, and the water would probably never reach Palestine, as it would have to pass through Israeli territories first"<sup>19</sup>.

### **C. The other dissenting voices: water issue in Palestine**

Main contrary positions reported up to this point concern essentially the environmental risks associated with the project realisation, a topic that

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<sup>19</sup> See Rana Khaled, "What are the ecological risks of replenishing the Dead Sea with the Red Sea?", published on newspaper Egypt Independent, on 10<sup>th</sup> February, 2013.

especially scientific experts have to evaluate. For our purposes, it is of primary importance to analyse the reasons that determined the decision to invest concretely in the project.

Indeed, as mentioned above<sup>20</sup>, the dramatic leakage of a suitable hydric supply of natural provenience in the Dead Sea and in the Jordan Valley is linked to the choices carried on for decades by neighbouring States, mainly by Israel, about the ways of exploitation of water resources.

Those choices, apart from being devastating the natural environment, constitute a real violation of the fundamental rights protected by international law, both customary and treaty law.

What is meant to focus is the current condition of the majority of Palestinian population resident in the Occupied Territories, to whom is almost forbidden the access to the water, according to World Health Organisation standards<sup>21</sup>.

This occupation is the result of a military action that goes on since 1949, an occupation by now out from temporal exceptionality and improved with an administrative structure functional to the occupation itself. The Israeli continuous effort to concentrate all the aspects of social life in the Occupied Territories under its jurisdiction, both in public and in private relations, is best exemplified precisely in the water issue.

About this matter, choices in management and administration seem to be symptomatic of the real purposes of the occupation.

### ***1. The current legislation on water in Palestine***

Before 1948, Palestinian and Jewish communities water consumption per capita was similar for both domestic and agricultural purposes. Immediately after the armistice of Rhodes in 1949<sup>22</sup>, Israel marked a rapid acceleration in the exploitation of water resources.

Until that time, the legislation was the result of the combination between the laws applied since the sixteenth century under the Ottoman

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<sup>20</sup> See, par. II, above.

<sup>21</sup> The amount of minimum consumption per capita given by World Health Organisation is about 100 litres per day. In some Palestinian communities in the Jordan Valley it reaches a maximum of 40 litres.

<sup>22</sup> Israel, Egypt, Lebanon, Jordan and Syria signed the Rhodé Armistice Agreements in 1949 at the end of the hostilities of the 1948 Arab-Israeli War.



Empire - inspired by the principle of publicity of water-and the regulation introduced under the British mandate- oriented to an higher administrative control of hydric resources<sup>23</sup>.

The situation changed radically with the law n. 571 of 1959, which defines the core of the Israeli law on the management of water resources, and with the simultaneous establishment of the national water company, the Mekorot<sup>24</sup>.

Indeed, reconfirming the public ownership of all water resources and distinguishing it from land ownership, Mekorot became monopolist of production, supply, construction and drilling licenses.

After the parenthesis of the Jordanian administration (1967-1988) on certain areas of the Jordan Valley and the subsequent adoption of additional regulations, Israel has continued to exercise the control over the area and over all the water resources of the territory. However, the triple layer of legislation was never abrogated: such law stratification is, still today, one of the principal causes of the deficiency of the entire system and of the Palestinian lack of access to hydric resources.

It was only with the Oslo Agreements of 1993, when the tricky issue of water and, most importantly, the right of Palestinians to use it, brought up.

The third annex to the agreement, known as Oslo II, contained the Israeli commitment to transfer all powers and responsibilities on water and sanitation in the West Bank - that served only the Palestinian population - to the Palestinian Authority. At the same time, Israel would have to institute the Joint Water Committee (JWC), an organism composed of an equal number of members from both sides and entitled to take decisions unanimously.

Furthermore, Oslo II also established the range of needs for each population, in order to satisfy and protect the Palestinian population hydric need under occupation.

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<sup>23</sup> The British administration determined that any operation involving the extraction of water from aquifers, as well as the construction or rehabilitation of wells, would need administrative specific permission (Law n. 17, High Commissioner for Palestine).

<sup>24</sup> Mekorot is the national water company of Israel and the Country's top agency for water management. Founded as a private company in 1937, it supplies Israel with 90% of its drinking water and operates a cross-country water-supplying network known as the National Water Carrier.

However, Tel Aviv has never respected the provisions signed in the Oslo II agreement. Israel takes advantage of the 57,7 % of the Jordan River resources<sup>25</sup> in order to supply both the settlements closest to it and the more distant towns in the Negev desert, which, thanks to the Israeli National Water Carrier, receive every year about 420 meters cubic of water.

After the war of 1967<sup>26</sup> – an unchanged framework after 1993- the occupying administration has prevented the access to the water sources to the Palestinians living in the Jordan Valley, event recognized – among other citable publications- by a report published in the October 2009 by the no profit association Save the Children<sup>27</sup>.

There is a clear inequality of treatment between Palestinians citizens and Israeli settlers, who don't suffer any form of rationing for per capita water consumption, which is almost 6,6 times greater than Palestinian, which is around 44 cubic meters per year.

Palestinians depend mainly on the aquifers in the area, from which, however, Israel picks up the 25% of its total requirement.

It is necessary to emphasize that this structural deficiency is the direct result of some management policies systematically implemented in the Occupied Territories. As examples, we recall that:

- Joint Water Committee (JWC) doesn't allow the Palestinian farmer to build new wells;
- the lack of water is the direct cause of the failure to cultivate a large number of lands: this entails, in application of a law of Ottoman origin still in force, the possibility of confiscation and occupation by Israeli settlers;
- Palestinians buy water at a much higher fare than the Israeli settlers who enjoy, thanks to Mekorot's trade policies, discounts up to 75%. Since 1967, the West Bank Water Department (Wbwd) is under Israeli Water Affairs civil administration officials" supervision and control and it does not exercise any real power on this sector.

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<sup>25</sup> The Hashemite Kingdom of Jordan uses the 23, 4% of the total available resources, Syria the 11% and Lebanon the 0.3%.

<sup>26</sup> The Six-Day War took place in June 1967 and it was fought between June 5th and June 10th. Israel and Jordan, Syria and Egypt were fighters States.

<sup>27</sup> The report is available on: [www.savethechildren.org.uk/sites/default/files/docs/English\\_Briefing\\_Paper\\_and\\_Citations.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/English_Briefing_Paper_and_Citations.pdf).

On those grounds, in October, 2013, less than two months before the agreements were signed in Washington D.C., a Palestinian non-governmental organizations coalition urged the Palestinian Authority to withdraw from the project of cooperation with Israel and Jordan; NGOs consider, in fact, the project as an obligation “for the Palestinian people to consent to their own expropriation and compromise their own rights”<sup>28</sup>.

The coalition also stated that “any kind of unclear position by the Palestinian leadership in this outrageous plan and any conditions of ambiguity or positive criticism will help to let Israel go unpunished, which, for too long, was allowed to take possession of Palestinian water, denying the rights of the Palestinian population”<sup>29</sup>.

Considering the regulatory and factual framework reconstructed, the attempt to remedy the lack of water in the Jordan Valley through the construction of the “Two Seas Canal” seems more like an attempt to legalize and confirm decisions already taken on the methods of distribution and exploitation of water resources in the region.

The non-fulfilment of the obligations taken by Israel in Oslo, surely yesterday as today the economically and militarily strongest subject, raises important doubts about the possibility that it keeps the commitments made in Washington towards the other partners.

Is not by chance that the violation of international obligations relating to Oslo has not been object of discussion between the Parties: indeed, the Palestinian Minister Shaddad Attili has stated that “the (Washington) agreement is not related with the Oslo agreements”<sup>30</sup>.

The issue of the present study is not so much on the persistent violation of international obligations by the State of Israel (that does not concern only the water resources matter, but also the systematic violation of fundamental human rights and numerous rules and obligations arising from *jus cogens*), but on the active role played by international organizations and third States in the projects implementation. This collaboration is both consequence and cause of the breach of international law.

Regarding the “Two Seas Canal” case, in particular not acceptable is the role played by World Bank, which on the one hand is sponsoring the pro-

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<sup>28</sup> Extract from the statement of the coalition spokesman.

<sup>29</sup> For more details, see: [www.infopal.it](http://www.infopal.it).

<sup>30</sup> See, par. III, above.

ject, on the other describes how the water resources management in the Jordan Valley is unsustainable.

## **2. World Bank's ambiguous position**

On 20<sup>th</sup> April 2009, World Bank published a report, entitled *Assessment of Restrictions on Palestinian Water Sector Development*<sup>31</sup>, which is the first paper on the topic of water resources in the West Bank and the Gaza Strip established by a United Nations organism. The report denounces that the Oslo agreements of 1993, still formally in force, are systematically violated regarding the access to water resources. It's important to note that in a situation of occupation such as Palestine lives since 1967, the responsibility for primary resources managing lies with the occupying State, i.e. Israel. The report points out that all the three sectors under the agreements - procurement, use and processing of water - are closed to Palestinians. Specifically, it shows that restrictions on Palestinians movements imposed by Israel since 2000 made impossible the access to water resources, infrastructure development and maintenance of the water supply. These restrictions - says the study - make vain the investments of the Palestinian Authority and of international donors who have earmarked funds for the implementation of water supply and resource optimization.

Quoting the report: "as has been well documented, physical access restrictions and closures have a large impact on both economic activity and quality of life. Physical access restrictions and unpredictable closures impede all water sector development, but are hard to factor into any planning, as closure is a military action, usually decided locally"<sup>32</sup>.

Put differently, the report implicitly identifies an unbreakable link between the breach of the freedom of movement and the lack of adequate water procurement. World Bank also emphasizes that Israeli per capita consumption of water is about four times more than Palestinians. The international organism compares the efficient water supply in Israel to bad network in the West Bank and to non-existence water management system in the Gaza Strip, where the consequences of the situation on the civil population health are dramatic. World Bank concludes the report with the following recommendation to the international community: to make ef-

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<sup>31</sup> The report (No. 47657-GZ) is available on <http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/WaterRestrictionsReport18Apr2009.pdf>.

<sup>32</sup> See p. 55, par. 143 of World Bank report.

forts in order to allow a rapid action to optimize waste and to rationalize the water resources division.

The report, as mentioned unique in its kind being commissioned by World Bank, has an undeniable value, given the reliability of the source. However, it is limited to “take pictures” of the status quo, without establishing completely the responsibility. It does not recognize, in fact, that the restriction of freedom of movement of Palestinians is not the only cause of the unequal distribution of water resources; it does not address the problem that many define as a constant “misappropriation” carried on by Israel to supply water to the illegal settlements<sup>33</sup> in the West Bank. According to World Bank, the priorities are technical as well as technical are the indicated remedies: to create a common “asymmetric” management between Israelis and Palestinians based on their economic possibilities, loosen restrictions on the movement - at least- of those who are involved in water management, to develop infrastructures that limit waste, streamline deployment and promote health checks.

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<sup>33</sup> The international community has repeatedly condemned the State of Israel because of its policy of colonization. Although the International Court of Justice has been expressed on the issue on the occasion of the Advisory Opinion of July 9, 2004, titled “*Legal consequences of the construction of a wall in the Occupied Palestinian Territory*”. “The Court notes that the route of the wall as fixed by the Israeli Government includes within the “Closed Area” (i.e. the part of the West Bank lying between the Green Line and the wall) some 80 per cent of the settlers living in the Occupied Palestinian Territory, and has been traced in such a way as to include within that area the great majority of the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem). The information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, of the Fourth Geneva Convention which provides: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” The Security Council has taken the view that such policy and practices “have no legal validity” and constitute a “flagrant violation” of the Convention. The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law” [o. 10 of the summary (ref. par. 115-122)]. The full text is available at <http://www.icj-cij.org/docket/files/131/1671.pdf>.

#### IV. THE STUDY BY STRATEGIC FORESIGHT GROUP

In 2009, a group of independent Indian experts, the Strategic Foresight Group (SFG)<sup>34</sup>, was mandated by Switzerland to examine the issue of water resources in Middle East. A series of consultations and meetings took place in 2010 in Montreux (Switzerland), Amman (Jordan) and Sanliurfa (Turkey). Bringing together a hundred experts and leaders from the Middle East, it seems that these consultations paved the way for future collaborations. On the basis of these discussions, they produced a report entitled *The Blue Peace: Rethinking Middle East Water*. This document, presented in Geneva on 10 February 2010, evaluates the main challenges facing the cross-border management of resources.

Just reading the report foreword, it's clear the deep difference in the approach comparing it with World Bank report: the Indian think-tank doesn't take merely a comprehensive view of rivers, tributaries, lakes and underground water bodies, pointed only to technical deficiencies. Otherwise, it realises as "the growing scarcity of water, implications for food security and indeed human security explain why, increasingly, water protection and its optimal use are critically shaping the foreign policy of the Middle Eastern countries and international affairs. In the future, the key geopolitical resource in the Middle East will be water, much more so than oil. The issue of access to water resources, particularly in lean seasons, will impact the way political relations and alliances are framed in the future, even more significantly than it already does. The costs of failing to manage water are counted in terms of poverty, conflict, impaired growth and lost biodiversity. New political behavioural norms and processes are emerging. What was common sense and vision in the past is no longer the case. What can be agreed upon today and tomorrow is not the same as before. The conditions have changed in a way that the solutions of the past are not effective anymore. The rules of the game are evolving at an unprecedented speed. The response is not easy. It is all about fostering a new diplomacy, the "blue diplomacy" with the objective of fostering the blue peace"<sup>35</sup>.

What clearly comes out is that the lack of water in Middle East – i.e. the unequal distribution of water resources - has a political origin and only serious political change can provide solutions. This kind of change should be concrete and quickly implemented, inspired to the principle of the respect

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<sup>34</sup> See n.1 and n. 2, above.

<sup>35</sup> See Report *The Blue Peace: Rethinking Middle East Water, Forward*, pag. III.

of human right and, in the water issue, to cooperation in water resources management. The framework of this cooperation is the United Nations Watercourses Convention of 1997<sup>36</sup>, which promotes the use of water in an equitable and reasonable manner in accordance with the needs of each State.

With these assumptions and its efforts to find pragmatic solutions, Strategic Foresight Group drew up a list of ten recommendations for the short, medium and long term:

**a) implementing hydro-diplomacy:** hydro-diplomacy is defined as regional cooperation that creates dynamics of trans-boundary basin economic development through integrated water resources management. For example, Countries along the Jordan River should establish a daily per-capita water usage of less than 200 litres. In comparison, today Israelis consume a daily average of 350 litres per capita, while Jordanians consume about 60 litres and Palestinians only about 30 litres. In application of this, the report recommends that Near East Countries improve water management through the following steps:

- develop the region economically;
- ensure the fulfilment of domestic and water needs in order to improve food security in the region;
- enhance the struggle against climate change and global warming, which reduce river flows and rainfalls and generate droughts and desertification;
- contribute to political stability through equitable sharing of water resources.

**b) Establish a cooperation council for water resources:** this council should include initially Turkey, Syria, Iraq, Lebanon, and Jordan, secondly Israel and Palestine. It will serve as a political mechanism to establish com-

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<sup>36</sup> The United Nation Convention on the Law of the Non-Navigational Uses of International Watercourses was adopted by the United Nations General Assembly on 21 May 1997; it is the only global Convention that governs the use, management and protection of international watercourses. Article 36 of the Convention provides that “The present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations”. As of 25 February 2014, there were 34 Parties to the Convention, and an additional 3 Nations that had signed but not yet ratified the treaty.

mon standards for measuring water flow and quality, set goals for sustainable management of water resources, adapt regional strategies to combat climate change and drought and facilitate basin-level cooperation in each river basin. The organization will also improve the sharing of knowledge and information about water resources among the Countries.

**c) Develop a high-level confidence-building initiative between Israel and the Palestinian Territories:** this initiative's key responsibility is to answer the specific challenges caused by the on-going conflict between Israelis and Palestinians. The current negotiations about water management depend on figures from the Oslo Accords in the early 1990s, even though studies show that water resources have depleted by seven per cent since then. The panellists highlighted the need for the parties to meet and agree on facts and data, even before starting to negotiate the terms of water management.

**d) Encourage the international community to become actively involved:** the international community should play a critical support role in both the technical and financial aspects of hydro-diplomacy. The panellists emphasized, however, that the cooperation initiative should emerge from the Near East countries, as it is first and foremost their responsibility.

A few initiatives have been launched in the past decade, but they all lack a necessary comprehensive approach. For example, Syria and Lebanon signed an agreement in 2002 to exchange information and monitor the flow and quality of the water for the Orontes and the Nahr El Kebir rivers. However, the construction of a diversion dam on the Orontes was interrupted by Israeli bombings in 2006, showing the crucial need for cooperation and dialogue among all countries.

The report results imply a precise warning: "the growing scarcity of water, implications for food security and indeed human security explain why, increasingly, water protection and its optimal use are critically shaping the foreign policy of the Middle Eastern countries and international affairs. In the future, the key geopolitical resource in the Middle East will be water, much more so than oil"<sup>37</sup>. Put differently, if there will be not a radical change, the current management of water resources will probably become one of the causes of armed conflict in the area.

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<sup>37</sup> See, n. 25, above.



## V. FINAL REFLECTIONS

### A. Final reflections and ....

The analysed issues impose a negative critical evaluation of the “Two Seas Canal” project. There is no doubt that, at least formally, it is consistent with the intention of increasing regional cooperation on management of water resources and protecting of the natural environment at risk. However, many and varied entities focused on the risks associated with its implementation, risks that, if actualized, will make vain all the goals and benefits stated by those who support it. Furthermore World Bank, an organization that should necessarily conform his actions to the standards and principles of the United Nations, does not seem to have properly assessed the geopolitical framework and, above all, the previous international responsibilities of the parties involved. This assessment, regardless of the form and the importance of funding, is the *conditio sine qua non* of any form of international cooperation that wants to be credible as a step to a long-term pacification. As shown by the study of the Strategic Foresight Group, there are many concrete feasible roads for a better resources management in the Middle East, none of them considering the use of force, preferring instead peaceful forms of disputes resolution.

However, the establishment of mutual trust both between the Parties involved and towards supranational actors - required to play the role of mediators and supporters of good practices – is a necessary precondition in order to concretely implement these plans. Such trust could and should be the result of 1) the concrete and non-discriminatory application of existing international law rules; 2) the strengthening of international regulations concerning matters of global interest, such as water, which are currently under State sovereignty. The “warning light” of the rule’s effectiveness is primarily represented by the ability to identify breaches of the obligations that the rule imposes, applying sanctions. Instead, the substantial passive tolerance demonstrated by international organizations towards States, which repeatedly break international law, as Israel, is even worsened by some interventions that justify and support such breaches.

Such a demonstration of weakness and inconsistency, often caused by the primacy of strategic and economic interests, not only prevents *de facto* a solution to the Israeli-Palestinian conflict, but seriously undermines the entire credibility of the institutional framework and the UN system, as drawn in the Charter signed on 26<sup>th</sup> June 1945, in San Francisco. Is not by chance that the Security Council of the United Nations has increasingly

lost its hegemonic position in cases of *threat or breach of the peace, or act of aggression*<sup>38</sup>, playing on more than one occasion the role of a viewer or of a bit-player in the States choices: indeed, especially in relations with Israel, the Security Council showed a repeated failure to enforce resolutions in occasion of breaches of international law and to impose sanctions as a result of the breaches of obligations towards United Nations and Palestine<sup>39</sup>. Therefore, in the present case, to think of an intervention of the Security Council aimed to a different assessment of the Canal project seems to be a possibility very far from reality. Indeed, an action *motu proprio* by the Executive Body of United Nations, given the supporting role played by World Bank, seems highly unlikely and lacking of concrete legal bases. Assuming, instead, a request for action actuated by a specific governmental entity, also able to bring the issue to the attention of the General Assembly, it would miss the interested and entitled to act subject: the States directly involved or 1) signed themselves the Washington treaty (Israel, Palestine, Jordan) or 2) they have such a domestic policy to preclude them from having a expendable voice in the international community (Syria) or 3) they doesn't consider the Canal as a priority of its foreign policy agenda (Egypt).

## B. .... remedies from a theoretical point of view

The only remedy that seems feasible at the moment is represented by a rethinking of the project on the initiative of the Inspection Panel existing within the World Bank<sup>40</sup>. The Inspection Panel of the World Bank is an independent organism<sup>41</sup>, without jurisdictional powers, with the task to activate inquiries regarding alleged violations of internal policies and pro-

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<sup>38</sup> See the instances mentioned in Article. 39, Chapter VII of the Charter of the United Nations.

<sup>39</sup> In particular, this refers to the seventy-six resolutions of condemnation pronounced by the UN Security Council, starting from n. 93 of May 18, 1951 until the n. 1860 of 8 January 2009, never respected by Israel. For a complete comment see: Paul Findley, *Deliberate Deceptions: Facing the Facts About the U.S.-Israeli Relationship*, (second ed. 1995, Chicago) and, as source, <http://www.un.org/documents/series.html>.

<sup>40</sup> For more details see: <http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx>.

<sup>41</sup> The Inspection Panel of the World Bank works permanently and has a very simple structure characterized by the presence of three members (inspectors), each one coming from a different Member State Bank.

cedures of the World Bank in the execution of its projects<sup>42</sup>. It promotes, indeed, the responsibility of the World Bank giving to the damage parties a voice in the protection of their interests and rights: the mandate of the Panel regards the conformity check of the World Bank activities with its *policies, procedures and operational directives*.

These policies and internal operating procedures contemplate several aspects, among other things, environmental protection and the defence of local populations damageable due to the realization of the projects financed by the Bank.

Certainly, the peculiarity of the present case, for some aspects, makes the activation of the Panel a desirable option, especially if the requirements of persons entitled to lodge a complaint are considered. The action is not restricted to subjects of international law, but, more simply, any damaged party may request the Panel intervention, provided that they have two fundamental characteristics: 1. be constituted by a group of individuals (at least two) and not by a single person; 2. be resident in the area affected by the implementation of a project financed by the Bank. Therefore, associations, local representatives and NGOs are allowed to request an inspection.

Despite these clarifications, there is a factor which prevents the Panel to be a considerable effective remedy and that, once again, proposes the issue of trust that should be put in the international organizations and that should be considered as the safety valve of the entire system. Indeed, even if a hypothetical action concerning the Two Seas Canal would be considered admissible<sup>43</sup>, the result of the Inspection Panel would be a written

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<sup>42</sup> In particular, complaints to the Panel concern issues related to projects financed by the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA), while complaints relating to the projects supported by other agencies of World Bank Group, the International Finance Corporation (IFC) and the multilateral investment Guarantee Agency (MIGA) are handled by the Office of the Compliance Advisor Ombudsman (CAO).

<sup>43</sup> First, the Panel must assess the admissibility of actions, which must comply with certain criteria: 1. the prior exhaustion of domestic remedies; 2. the causal link between acts and omissions of the World Bank, or the existence of a direct causal connection between the acts attributable to the Bank and the material injury suffered by the applicants. 3. Temporal criterion, the Panel is not entitled to act if the request is made and took place after the expiry of the loan or when the loan is bestowed for more than 95% of the total.

report<sup>44</sup> without binding effects. The final report<sup>45</sup>, indeed, is to be considered as an invitation to World Bank Executive Board and, so, it is juridical irrelevant. The only tangible effects are that the report can become a significant pressure mechanism (for example, a cognizance of negligence in the World Bank officials activity could have, as a possible consequence, the initiation of a disciplinary action).

The “Two Seas Canal Case”, as resulting from all the previous examination, is a clear example of the endemic inefficiency of the international law, even in contexts that, at least in appearance, are independent from the resolution of more complex scenarios of war and/or aggression. It seems evident that the lack of judicial systems able to prevent and punish conducts contrary to the law determines the possibility for certain subjects of international law to act on global issues without an external control, causing a rift between the nominal equality among the subjects of law and its factual inequality. Moreover, the principle that a State which seriously violates an obligation arising under a peremptory norm of general international law should not and could not get aid and assistance by another State and / or group of States is increasingly an unheeded warning, only existing in theory<sup>46</sup>.

In this case the subject who *de facto* provides help to the perpetuation of serious violation<sup>47</sup> is not a specific State, but a relevant international organization as World Bank. The ever increasing demand of justice, fairness and legal certainty that many invokes towards the international community

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<sup>44</sup> The investigation procedure of the Panel can be summarized in four steps: the investigation request, the preliminary examination, the investigation and the final report.

<sup>45</sup> For a complete view and comment about Inspection Panel activity see: Draetta U. – Fumagalli Meraviglia M., *Il diritto delle organizzazioni internazionali*, (ed. 2011 Milano, Giuffrè Ed.); Sciso E. *Appunti di diritto internazionale dell'economia*, (Torino, Giappichelli Ed. 2012); Seatzu F. *Il Panel d'ispezione della Banca Mondiale*, (Torino, Giappichelli Ed., 2008), Shihata I. F. *The World Bank Inspection Panel: in practice*, World Bank Publications, No.1 (ed. 2001); Vezzani S. *Gli accordi delle Organizzazioni del Gruppo della Banca Mondiale* (Torino, Giappichelli Ed. 2011).

<sup>46</sup> In particular, this refers to articles 40 and 41 of the *Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001). The full text is available on: <http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf>

<sup>47</sup> This refers to the permanent occupation by the State of Israel of Palestinian territory and to all subsequent violations of international law regarding the respect of human rights (access to water, health care, freedom of movement, etc.).

and the organisms responsible for its administration must necessarily be interpreted as unequivocal signs of pervasive lack of confidence in the role played by those organisms themselves.

The choice, conscious and repeated, to ignore these voices results in a call, mute but effective, to prefer a nationalistic vision in State policies, linked to the *law of the strongest*, historically most comparable to the status quo of the first half of the last century and, ultimately, totally contrary to the intentions in the Preamble of the Charter of the United Nations.

# *Fisheries Cooperation between Norway and Russia in the Barents Sea*

IRENE DAHL\*

**Summary:** I. Introduction; II. Legal framework; A. The constitutive Agreements of 1975 and 1976; B. The provisional and discharged Agreement of 1978; C. The Delimitation Treaty of 2010; III. Main content of the cooperation; A. 1976-1990: Responding on the cod crisis; B. 1991-1999: Cooperation on inspection and cod war; C. Third country vessels, responding on a minor crisis and gradually increased quotas; D. Solution to the third country problem: Allocation of quotas; IV. Dealing with third country vessels on the high seas; V. Future cooperation.

## I. INTRODUCTION

For more than 40 years, the coastal States Norway and Russia have cooperated on conservation and management of the shared fisheries resources in the Barents Sea. The cooperation was formalized by establishment of the Joint Norwegian-Russian Fisheries Commission in 1975<sup>1</sup>. One of the main objects of the Commission is to ensure the States duty to make effective efforts with a view to conservation of the living marine resources. Among other factors, the Commission fixes total allowable catches of the fish stocks and allocates it to Norway and Russia. The important stock of Arcto-Norwegian cod has occasionally migrated into the high seas in the Barents Sea (the so-called Loophole), and been subject to unregulated fishing, conducted by third country vessels. This kind of IUU-fishing has the potential to undermine the Commissions conservation measures. The article examines the Commissions quota measures in relation to the duty to conserve the shared stocks (especially the stock of Arcto-Norwegian cod), and how the Commission has managed to achieve compliance from third countries.

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<sup>1</sup> Hereinafter: the Fisheries Commission/the Commission. The protocols from the Commissions annually sessions are available in Norwegian and Russian at the Commissions web site: <http://www.jointfish.no/nno/OM-FISKERIKOMMISJONEN/PROTOKOLLER> (April 2014). English translations are under construction. Renderings from the Commissions protocols in the Article are translated by the author.

## II. LEGAL FRAMEWORK

### A. The constitutive Agreements of 1975 and 1976

At the early 1970s a bilateral cooperation between Norway and the former Soviet Union evolved within the fisheries sector. The cooperation was formalized by an Agreement of 11 April 1975. The main objective of the Agreement was to facilitate cooperation and consultation on practical questions in the fisheries, with special attention to conservation and efficient exploitation of the living marine resources<sup>2</sup>. By the 1975-Agreement the joint Norwegian-Russian Fisheries Commission is established, with object to contribute to the implementation of the Agreement<sup>3</sup>. It is stipulated, that the Commission shall meet not less than once a year, alternating on each of the Parties' territory<sup>4</sup>. From the establishment, the Commission has met regularly, last time in St. Petersburg in October 2013, for the 43 session<sup>5</sup>. At the time for adoption of the 1975-Agreement, neither of the Parties had established 200-miles exclusive economic zones/fisheries zones, nevertheless the 1975-Agreement applies to the marine resources in the area subject to the 1959 Convention on fishing in the north-east Atlantic ocean<sup>6</sup>. Accordingly, one of the main objects was to secure conservation without regard to the resources presence inside areas of national jurisdiction.

Both Norway and the Soviet Union established 200-miles economic zones/fisheries zones, when consensus was reached at the UNs negotiations in the middle of the 1970s on extension of coastal State jurisdiction, following a new phase in the bilateral cooperation in the Barents Sea. Consequently, another Agreement on cooperation between Norway and the former Soviet Union was entered into in 1976<sup>7</sup>. The 200-miles jurisdiction had the result that Norway and Russia obtained sovereign rights over the fish resources in

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<sup>2</sup> Agreement between Norway and the Soviet Union on cooperation in the fisheries (hereinafter: The 1975-Agreement), St.prp. (Proposition to the Storting) no. 86 (1974-75).

<sup>3</sup> 1975-Agreement, article III.

<sup>4</sup> 1975-Agreement, article III (3).

<sup>5</sup> Protocol for the 43 session (hereinafter: Protocol 43 [as uniform referencing in the article]) of the joint Norwegian-Russian Fisheries Commission, article 4.

<sup>6</sup> 1975-Agreement, article I.

<sup>7</sup> Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialistic Republics on mutual fisheries connections (hereinafter: the 1976-Agreement), St.prp. (Proposition to the Storting) no. 74 (1976-77), 5-7.

the Barents Sea, except for the residual high seas (the so-called Loophole). The 1976-Agreement confers Norway and Russia mutual access to the other Party's zones and commits them to cooperate on management and conservation of the shared fisheries resources. Pursuant to the Preamble, the Parties take into consideration that "an essential part of the living resources in the Norwegian Sea and the Barents Sea constitutes a contiguous ecosystem (...)". Owing to the fact that some of the shared resources (particularly the Arcto-Norwegian cod) in addition occur on the high seas (Loophole), the Parties are obliged to cooperate on conservation both by LOSC article 63 no.1 (shared stocks) and no. 2 (straddling stocks). The 1976-Agreement implies the two-dimensional regime, as the Parties undertake to cooperate to secure proper management and conservation of the living resources, both within the 200-miles zones and on the adjacent high seas (Loophole)<sup>8</sup>.

Within the framework of the two Agreements, the Commission annually determines total allowable catches (TACs) on the shared and straddling stocks. TAC on cod for 2014 is illustrative. In its 43 session, the Commission fixed TAC at 993 000 tons, of which 138 530 tons are allocated to third countries. This quantity Norway and Russia make use of in bilateral negotiations. It appears clearly, that the Commission aims to manage and conserve the shared cod stock as well as the straddling stock, as the wording of the protocols typically contains the phrase: "The Parties confirmed their consensus that the regulative measures on the Arcto-Norwegian cod stock and haddock are applicable in its entire range"<sup>9</sup>.

## **B. The provisional and discharged Agreement of 1978**

The Norwegian and Russian 200-mile zones overlapped partly, accordingly LOSC article 74 (1) was applicable, after which the delimitation shall be effected by Agreement on the basis of international law. Consequently, Norway and Russia entered into negotiations on delimitation of the EEZs in 1984<sup>10</sup>. (In 1970, respecting the continental shelves.) The negotiating process was long-lasting, due to several factors. The gap between the Norwegian median line claim and the Soviet sector line claim was significant, and the disputed area was huge, approximately 155 000 square kilome-

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<sup>8</sup> 1976-Agreement, article 7.

<sup>9</sup> Protocol 43, n. 5 above, article 14.8.

<sup>10</sup> White Paper (Report to the Storting) no. 30 (2004-2005), 22.



ters<sup>11</sup>. At the late 1970s there was no immediate need for a boundary of the shelves, as none of the States had started exploration on hydrocarbons in the area<sup>12</sup>. However, the fisheries management required a solution. The area in the southern Barents Sea had for a long time been heavily fished, mostly by Norwegian and Soviet vessels, but also by third country vessels<sup>13</sup>. The absence of a boundary was regarded as an “obstacle (...) to the effective management of living resources”<sup>14</sup>. LOSC article 74 imposes coastal States “pending Agreement as provided for in paragraph 1, (...), in a spirit of understanding and co-operation, [to] make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final Agreement”. By the time of establishment of the Norwegian and Russian EEZs, the States agreed upon the necessity of a practical arrangement for the exercise of coastal State fisheries jurisdiction, particularly over foreign fishing vessels. “Without some such arrangement there would have been unregulated fishing, with a real danger of over-fishing”<sup>15</sup>.

This is the framework for the so-called Grey Zone Agreement of 11 January 1978<sup>16</sup>. The Grey Zone Agreement covered a substantial part of the southern area of the disputed waters, as well as including parts of undisputed Norwegian and Soviet/Russian EEZ<sup>17</sup>. The object was to secure efficient management and utilization of the fisheries resources, forming a coherent ecological system<sup>18</sup>. The Grey Zone Agreement contained regulations on third country fisheries. Both Norway and Russia were qualified to license third country fishing vessels<sup>19</sup>. This is an element of ordinary coastal

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<sup>11</sup> Churchill, R. and Ulfstein, G., *Marine Management in Disputed Areas – The case of the Barents Sea* (1992), 63.

<sup>12</sup> *Ibid.*, 64-65.

<sup>13</sup> *Ibid.*, 65.

<sup>14</sup> *Ibid.*, 56.

<sup>15</sup> *Ibid.*, 65.

<sup>16</sup> The official title of the Agreement is: *Avtale om en midlertidig praktisk ordning for fisket i et tilstøtende område i Barentshavet* (Agreement on an Interim Practical Arrangement for Fishing in an Adjoining Area in the Barents Sea). An English version of the Agreement is probably not published. The Norwegian text is published in “*Overenskomster med fremmede stater*” (1978). Hereinafter: Grey Zone Agreement. Renderings from the Agreement have been translated by the author.

<sup>17</sup> Churchill, R. and Ulfstein, G., *Marine Management in Disputed Areas – The case of Barents Sea* (1992), 70.

<sup>18</sup> Grey Zone Agreement, preamble.

<sup>19</sup> Grey Zone Agreement, article 4.

State jurisdiction, pursuant to LOSC<sup>20</sup>. However, the Agreement contained anomalies from ordinary coastal State jurisdiction as well. All fishing operations in the area had to be in accordance with the measures on gears, mesh size and fish minimum established by NEAFC<sup>21</sup>. Further, the Agreement contained reporting obligations<sup>22</sup>. Regarding enforcement, each of the Parties was obliged to refrain from enforcement measures over vessels from the other Party, or vessels with license from that Party.

### **C. The Delimitation Treaty of 2010**

The latest significant, bilateral Agreement relevant for fisheries is the Delimitation Treaty. On 15 September 2010 in Murmansk, the foreign ministers of Norway and Russia signed Treaty on maritime delimitation and co-operation in the Barents Sea and the Arctic Ocean. The Norwegian Prime Minister, Jens Stoltenberg, considered the event as a historic milestone:

“The Treaty resolves what for several decades remained the most important outstanding issue between Norway and Russia in the Barents Sea and the Arctic Ocean”<sup>23</sup>.

The Treaty entered into force 7 July 2011, and brings 40 years of negotiations to the end, by completion of the maritime delimitation between the Parties<sup>24</sup>.

The stipulation of the delimitation line follows from the Treaty article 1, which points out 8 coordinates in the Barents Sea and the Arctic Ocean. The starting point of the line is the terminal point of the delimitation line of the Varangerfjord Treaty<sup>25</sup>. The delimitation line ends at the outer limits of the continental shelves of Norway and Russia. The primary consequence of the Treaty is that Norway and Russia have agreed on ordinary coastal

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<sup>20</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 396), hereinafter LOSC, article 56 (1).

<sup>21</sup> Grey Zone Agreement, article 7.

<sup>22</sup> Grey Zone Agreement, article 6.

<sup>23</sup> Press release no.: 118/10 from the Norwegian Office of the Prime Minister, available at: <http://www.regjeringen.no/en/dep/smk/press-center/Press-releases/2010/Treaty.html?id=614254> (April 2014).

<sup>24</sup> The authentic Russian and Norwegian texts as well as an English translation of the Treaty are available at: <http://www.regjeringen.no/nb/dep/ud/kampanjer/delelinje/avtalen.html?id=614006> (April 2014).

<sup>25</sup> 11 July 2007 Norway and Russia entered into a Treaty which fixes the delimitation line of the territorial waters, exclusive economic zones (EEZ) and the continental shelves (CS) in the Varangerfjord out to 39 miles.

State fisheries jurisdiction in each part of the former disputed area. As the principal rule, each of the states has sovereign rights for the purpose of exploring and exploiting, conserving and managing the marine resources<sup>26</sup>. For this purpose, the coastal States benefit from a relative extensive degree of enforcement jurisdiction<sup>27</sup>. Consequently, in the predominant part of the former disputed area, the so-called “Grey Zone”, the regime of 1978 on divided jurisdiction is terminated. The Delimitation Treaty also contains a special construction: An area situated within 200 miles from the Norwegian baseline, but beyond 200 miles from the Russian baseline, is located on the Russian side of the delimitation line, The Treaty designates this as “the Special Area”. In the Special Area, Russia is entitled to exercise such sovereign rights and jurisdiction derived from exclusive economic zone jurisdiction that Norway would otherwise be entitled to exercise under international law<sup>28</sup>. The Special Area does not involve any extension of Russian EEZ. That would make a breach of LOSC article 57: “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”. Thus, the legal basis for Russian jurisdiction in the Special Area is the Delimitation Treaty.

Addition to jurisdictional provisions regarding fisheries, the Treaty governs future fisheries cooperation. Norway and Russia have gained experience from 40 years of fisheries cooperation. Although the delimitation line is fixed, the Parties have agreed that the Treaty is not to adversely affect the fishing opportunities of the two states<sup>29</sup>. This will be further discussed under IV.

### III. MAIN CONTENT OF THE COOPERATION

#### A. 1976-1990: Responding on the cod crisis

The first session of the joint Norwegian-Russian Fisheries Commission took place in Moscow, 29-30 January 1976. The subject was increased cooperation in fishery research, particularly on larva<sup>30</sup>. As early as at the second

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<sup>26</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 396), hereinafter: LOSC, article 56 (1).

<sup>27</sup> LOSC, article 73.

<sup>28</sup> Delimitation Treaty, article 3.

<sup>29</sup> Delimitation Treaty, article 4 (1).

<sup>30</sup> Hønneland, *Kvotekamp og kystsolidaritet* (2006), 9.

session, in Oslo 24 December 1976, the Parties started focusing on quotas. Norwegian fishermen were worried about the capelin fisheries, which mainly would be subject to extended Soviet jurisdiction in EEZ. The Parties concluded that there was no need for a total quota on capelin. Further, they agreed to recommend a total allowable catch (TAC) on Arcto-Norwegian cod on 810 000 tons for 1977<sup>31</sup>. At the early eighties the basic elements in the bilateral management regime were fixed, including cooperation on appointed stocks and allocation of quotas. At the same time, the cod stock was decreasing, inter alia as a consequence of Norwegian overfishing of the quotas during several years<sup>32</sup>. The predominant factor was the Norwegian fishermen's opportunity to continue the fishing with passive gears (net, line and hand gear) after the quota was caught. As a consequence, the Parties fixed TAC for 1980 at 390 000 tons, which was in accordance with the recommendation from International Council for the Exploration of the Sea (ICES)<sup>33</sup>. In this manner, the Soviet Union insisted on cessation of the cod fishing until the stock was proper regenerated. However, TAC for 1983 was fixed at 300 000 tons, while ICES advice was 122 000 tons. During the eighties, the oceanographers regularly expressed concern about the cod stock, and in April 1988 the estimated total stock was adjusted downward from 1,9 to 1,3 million tons. The Fisheries Commission arranged an extraordinary session in June 1988, and the Parties agreed to reduce TAC from 590 000 to 451 000 tons (22%)<sup>34</sup>. Later the same year, the Soviet Polar Research Institute of Marine Fisheries and Oceanography (PINRO) recommended a closed season for ten years, and the Norwegian Institute of Marine Research proved that the spawning stock was at the lowest level for 120 years. How did the Fisheries Commission respond to this information? At the session in November 1989, TAC was fixed at the lowest level ever: 160 000 tons. (ICES: 172 000 tons.) The following couple of years, TAC increased to respectively 215 000 and 356 000 tons. The cod crisis was presumably over<sup>35</sup>.

As mentioned above, in the 1976-Agreement the Parties took into consideration that the living resources in the Norwegian Sea and the Barents Sea forming an ecosystem. This comes into line in article 2 a), after which TAC shall be fixed with regard to inter alia *the mutual dependency between the*

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<sup>31</sup> *Ibid.*, 29.

<sup>32</sup> *Ibid.*, 34.

<sup>33</sup> *Ibid.*, 33.

<sup>34</sup> *Ibid.*, 37.

<sup>35</sup> *Ibid.*, 38-39.

*stocks*. Capelin is important food for cod. The cod crisis is to be seen in the light of the capelin crisis. For 1984 and 1985 the Commission fixed TAC to respectively 1,5 and 1,1 million tons. However, previous to the session in 1985, ICES warned about a possible collapse of the capelin stock in the Barents Sea<sup>36</sup>. Norway and Russia agreed upon a temporary stop in the capelin fishing in the period 1987-1990.

## **B. 1991-1999: Cooperation on inspection and cod war**

During the nineties, the Commission increased TAC on cod annually, on the basis of ICES' advice, including 1997 (850 000 tons)<sup>37</sup>. At the session in 1997, the Parties took notice of the uncertainty of the stock estimate and the need for expanded research in the entire range zone. As a consequence, Russian authorities lost control over the fleet's catches. Accordingly, TAC for 1998 and 1999 was reduced respectively to 654 000 tons and 480 000 tons<sup>38</sup>.

In this period, Norway and Russia agreed upon an operative cooperation on inspection. Among other factors, the Parties are allowed to place inspectors on each other's coast guard vessels. Further, Norwegian authorities shall transmit data on Russian vessels landings in Norwegian ports to Russian authorities<sup>39</sup>.

One significant fishing activity has achieved great attention from Norway and Russia from 1991, unregulated fishing on the high seas (in the Loophole) conducted by third country vessels. The starting shot was two Greenlandic trawlers, and both French and Icelandic vessels followed<sup>40</sup>. Unregulated fishing on the high seas in the Barents Sea has potential to undermine Norwegian-Russian conservation and management measures. Accordingly, the Commission in 1993 and 1994 concluded that the uncontrolled fishing from third country vessels without quotas must be determined. The two main elements in this process was increasing presence of Norwegian and Russian coast guard in the Loophole and negotiations with Iceland on a quota<sup>41</sup>.

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<sup>36</sup> *Ibid.*, 36-37.

<sup>37</sup> *Ibid.*, 95.

<sup>38</sup> Protocol 26 and 27, n. 5 above, article 5.1 and Annex 3.

<sup>39</sup> Amendment to protocol 21, n. 5 above, of 10 June 1993, article 5.

<sup>40</sup> Hønneland, *Kvotekamp og kystsolidaritet* (2006), 54-55.

<sup>41</sup> *Ibid.*

### C. 2000-: Third country vessels, responding on a minor crisis and gradually increased quotas

In 1999, the Commission reduced TAC with 90 000 tons compared to the previous year, and fixed it at 390 000 tons for 2000<sup>42</sup>. The oceanographers reported that the cod stock was in bad condition, and TAC for 2001-2003 was fixed at 395 000 tons per year<sup>43</sup>. In 2002, the Commission adopted a code of conduct for stipulation of cod and capelin quotas. The main element is that average fish mortality shall maintain below the precautionary limit, at the same time as TAC shall not vary more than 10% (for cod) and 25% (for capelin) from one year to the next. Exceptions clause applies where the spawning stock has fallen below the precautionary limit<sup>44</sup>. The following years, TAC was based on the fact that the stock is increasing, and it has been fixed at gradually higher levels. For this year (2014): 993 000 tons<sup>45</sup>. The cod stock has increased noticeably during the latest years. The code of conduct for stipulation, mentioned above, is held up as a contributing factor<sup>46</sup>.

As to capelin fishing, the stipulation is based on the adopted principle for exploitation, after which the spawning stock shall maintain at 200 000 tons<sup>47</sup>. On this basis, it was opened for fishing in 2000-2003<sup>48</sup>. However, it was closed again in 2004-2008, because the stock was at a bottom level<sup>49</sup>. Then, the Commission considered the stock to be in good condition, and fixed TAC at 390 000 tons, which is approximately equal to 2010-2013<sup>50</sup>. Then again, a new decrease followed, with 15 000 tons for 2014.

In the middle of the century, third country vessels in the Loophole again gave rise to concern. In September 2005, the Togo flagged vessels *Kerguelen* and *Murtosa* caught cod in default of quota<sup>51</sup>. In June 2006, the Norwegian coast guard arrested the assumed stateless trawler *Joana* on the high seas (the

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<sup>42</sup> Protocol 28, n. 5 above, Annex 3.

<sup>43</sup> Protocols 29, 30 and 31, n. 5 above, article 5.1 and Annex 3.

<sup>44</sup> Hønneland, *Kvotekamp og kystsolidaritet* (2006), 68-72.

<sup>45</sup> Protocol 43, n. 5 above, article 5.1 and Annex 3.

<sup>46</sup> *Ibid.*

<sup>47</sup> Protocol 39, n. 5 above, article 7.

<sup>48</sup> Protocol 28-31, n. 5 above, Annex 3.

<sup>49</sup> Protocol 32-36, n. 5 above, article 6.

<sup>50</sup> Protocol 37-40 and 42, n. 5 above, Annex 3.

<sup>51</sup> Greenpeace press release: <http://www.greenpeace.org/norway/no/press/releases/piratfiske-i-smutthullet/> (April 2014).

Loophole)<sup>52</sup>. The captain was fined, but after one week the vessel returned to the Loop Hole, now under the name *Kabou*, flagged in Guinea<sup>53</sup>. The shipping company expressed that they would continue fishing in the area.

#### **D. Solution to the third country problem: Allocation of quotas**

As counted for in B, Norway and Russia started negotiations with Iceland on a cod quota. This solution is rooted in the Fisheries Commissions scheme. After fixing of TAC on the joint managed stocks, the Fisheries Commission makes an allocation of the quantity. Norway and Russia receive approximately equal parts, and a special allocation for third countries is fixed. As an illustration, Norway and Russia got ca. 410 000 tons each of Arcto-Norwegian cod for 2014, whereas ca. 139 000 tons were allocated to third countries<sup>54</sup>. In addition, the Commission decides the geographical distribution of the third country quota. This year (2014), the distribution on cod is 42 000 tons in Russian EEZ, 58 000 tons in Norwegian EEZ and 40 000 tons in the Svalbard Area.

A particular issue arises in the Svalbard Area, more concrete in the 200 miles Fisheries Protection Zone (FPZ) around the archipelago. Norway achieved “full and absolute sovereignty” over the Archipelago of Svalbard in 1920, by the Svalbard Treaty<sup>55</sup>. In 1977 Norway established FPZ outside Svalbard on the basis of international custom on coastal State jurisdiction<sup>56</sup>. Norwegian authorities are subject to a principle of non-discrimination when it comes to exercise of jurisdiction, pursuant to the Svalbard Treaty<sup>57</sup>. The key point is whether the Svalbard Treaty, and in particular the principle of non-discrimination, is applicable to FPZ. The question has been subject to discussion<sup>58</sup>. The interpretation must be based on the wording

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<sup>52</sup> Greenpeace press release: <http://www.greenpeace.org/norway/no/press/releases/kystvakten-border-Joana/> (April 2014).

<sup>53</sup> <http://www.fvn.no/nyheter/innenriks/article384202.ece> (April 2014).

<sup>54</sup> Protocol 43, n. 5 above, Annex 3.

<sup>55</sup> The full name of the Treaty is Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920. The Treaty is available on the websites of the Norwegian Ministry of Foreign Affairs: <http://www.lovdato.no/traktater/> (April 2014).

<sup>56</sup> Forskrift om fiskevernsoner ved Svalbard (Administrative regulations on fisheries protection zone outside Svalbard) 3 juni 1977, § 1.

<sup>57</sup> Svalbard Treaty, article 2 and 3.

<sup>58</sup> Churchill, R. and Ulfstein, G., “The Disputed Maritime Zones around Svalbard”, in *Changes in the Arctic environment and the law of the sea*, (Brill Academic Publishers, 2010), 563-584.

as regards area of application of the Svalbard Treaty. The wording of the Treaty respecting fishing is as follows:

“Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters”<sup>59</sup>.

Two divergent views have been stressed. The official Norwegian opinion is that the area of application is limited to the islands and the territorial waters. Accordingly, Norway is entitled to establish a complete EEZ and to reserve fisheries to Norwegians<sup>60</sup>. The other view is that the Svalbard Treaty is applicable in a 200-mile zone<sup>61</sup>. A strict present literally interpretation of “territorial waters” supports the official Norwegian view. If so, the Treaty is applicable out to 12 miles. According to LOSC, “every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles”<sup>62</sup>. However, weighty sources draw in the direction of extensive interpretation. In 1920 international law did not recognize any maritime zone beyond the territorial sea, except possibly for a zone resembling today’s contiguous zone<sup>63</sup>. Neither was there any uniform opinion of the juridical character of “territorial waters”<sup>64</sup>. More significant is the fact that one of the objects of the Svalbard Treaty was to secure the state Parties their previous *terra nullius* economic rights, despite the (new) Norwegian sovereignty over the area<sup>65</sup>. In a recent article, Churchill and Ulfstein discuss the question deeply. They point out, that “the various elements of Treaty interpretation do not point to a clear-cut and definite conclusion”<sup>66</sup>. According to them, the dispute is unlikely to be resolved in the near to medium term future. However, they stress that the Parties to the Svalbard Treaty “seem fairly content to live with the current arrangements relating to the FPZ”<sup>67</sup>. If the Treaty and the principle of non-discrimination are applicable to FPZ,

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<sup>59</sup> Svalbard Treaty, article 2.

<sup>60</sup> <http://www.regjeringen.no/nb/dep/ud/dok/regpubl/stmeld/20042005/stmeld-nr-30-2004-2005-/3/3.html?id=407559> (April 2014).

<sup>61</sup> Churchill, R. and Ulfstein, G., “The Disputed Maritime Zones around Svalbard”, n. 59 above, 565.

<sup>62</sup> LOSC, article 3.

<sup>63</sup> Churchill, R. and Ulfstein, G., “The Disputed Maritime Zones around Svalbard”, n. 59 above, 564.

<sup>64</sup> Ulfstein, G., *The Svalbard Treaty: from terra nullius to Norwegian sovereignty* (1995), 425.

<sup>65</sup> *Ibid.*, 439.

<sup>66</sup> Churchill, R. and Ulfstein, G., “The Disputed Maritime Zones around Svalbard”, n. 59 above, 582.

<sup>67</sup> *Ibid.*, 593.



Norwegian regulations on exercise of fisheries must apply non-discriminatory to all contracting Parties to the Svalbard Treaty. However, pursuant to international law, national authorities are entitled to discriminate on the basis of traditional fishing when it comes to allocation of quotas<sup>68</sup>. Accordingly, Norway has allocated cod quotas in FPZ to Russia, EU and the Faroes<sup>69</sup>.

An interesting situation gave rise to a prosecution for the Norwegian courts of justice last year. The Supreme Court has recently pronounced a sentence<sup>70</sup>. The framework for the case is the Fisheries Commissions TAC and allocation of haddock for 2012. TAC was fixed at 318 000 tons, of which ca. 145 000 each to Norway and Russia and 20 500 allocated to third countries. The Fisheries Commission determined the following geographical allocation of the third country quota: 8856 in Norwegian EEZ, 6368 in Russian EEZ and 5270 in the Svalbard Area, the last-mentioned subject to the restriction *solely as by-catch*. The question for the Court was – in the case of application of the Svalbard Treaty in FPZ – if the Norwegian regulations on haddock in FPZ (for 2012) is incompatible with the principle of non-discrimination in the Treaty. Pursuant to the regulations, a general prohibition against haddock fishing applies. However, exceptions are in force regarding to: 1) Norwegian and Russian vessels are allowed to fish on the allocated quota of TAC. 2) EU vessels are subject to a rule of by-catch, as the intermingling of haddock in the (direct) fishing of other species may amount to 19% per haul.

Why is this a problematic issue? The Supreme Court stressed the question if EU – similarly as Norway and Russia – instead of by-catch should have a special quota for haddock based on the principle of equal treatment. The Court describes the implications of the Norwegian by-catch regime, and stress the activity duty to avoid criminal liability for negligence: If the vessel in one haul get to much by-catch, they have to change fishing ground. This transfer may last for several hours, in such a way that their fishing is less effective than vessels from Norway and Russia. The EU vessels need to spend more time to fish the allowed amount, with subsequent higher operating cost. As the Supreme Court summarizes: “In brief, it causes negative economic impacts on EU-vessels, that they don’t have a special haddock quota,

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<sup>68</sup> Churchill, R., “The Maritime Zones of Spitsbergen”, in *The law of the sea and international shipping: Anglo-Soviet post-UNCLOS perspectives*. (Oceana Publ., 1985), 230-231.

<sup>69</sup> Forskrift om regulering av fisket etter torsk i fiskevernsonen ved Svalbard i 2012 (Regulative on cod in FPZ for 2012), 13 desember 2012 no. 1335, §§ 1-3.

<sup>70</sup> Høyesterett (Supreme Court), 21 March 2014, Deutsche Fischfang Union GmbH vs. the Prosecution, Rt (Supreme Court Report)-2014-272.

but are subject to by-catch”<sup>71</sup>. At first sight, these circumstances indicate discrimination. The Court did not discuss the Treaty’s applicability in FPZ. However, the Supreme Court, by unanimity, concluded that the Norwegian regulations on haddock in FPZ does not conflict with the provisions on equal treatment in the Svalbard Treaty<sup>72</sup>. The main reasons for the conclusion are firstly a sustainable management. Until 2011, EU vessels had practiced haddock fishing in FPZ in lack of quota. The Norwegian Directorate of Fisheries considered the situation as a risk regarding to a sustainable management of the stock, and recommended allocation of catch quota to EU on the basis of traditional fishing. Secondly, by-catch was chosen as regulative measure, on grounds of effectiveness. The Court argued, that as distinct from a quota arrangement, that must be prepared in cooperation with Russia, by-catch may be adopted immediate and unilateral by Norway. Thirdly, the amount of by-catch (19%) to EU vessels was fixed on the basis of EUs historical fishing pattern and actual haddock fishing from 2000. Accordingly, the Supreme Court argues that the adopted by-catch regulation on EU vessels is based on justifiable reasons, explained in objective criteria and not on nationality-based discrimination.

Noteworthy is the Court’s considerable doubt, owing to the fact that allocation of a haddock quota on much the same quantity as the by-catch amount, to a greater extent would involve equal conditions for EU vessels compared to Norwegian and Russian vessels<sup>73</sup>. Viewed against this background, it is interesting to examine how the Fisheries Commission has managed the third country quota to EU the last couple of years. For 2013 the third country quota was ca. 12 692 tons, of which 3 264 in the Svalbard Area *solely as by-catch*<sup>74</sup>. For 2014 the third country amount in the Svalbard Area was fixed at 2 899 tons, still as *by-catch only*<sup>75</sup>. In its judgment of discrimination, the Supreme Court calls attention to a letter from the Directorate of Fisheries, after which one in the longer term should evaluate whether allocation of a haddock quota in FPZ would involve a better solution<sup>76</sup>. The allocation to EU of a by-catch amount was introduced in 2011 because of the need for an immediate and in this manner unilateral solution. It was on considerable doubt accepted by the Supreme Court as non-discriminatory.

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<sup>71</sup> Rt-2014-272, n. 71 above, paragraph 41.

<sup>72</sup> Rt-2014-272, n. 71 above, paragraph, 62.

<sup>73</sup> Rt-2014-272, n. 71 above, paragraph 60.

<sup>74</sup> Protocol 42, n. 5 above, Annex 4.

<sup>75</sup> Protocol 43, n. 5 above, Annex 4.

<sup>76</sup> Rt-2014-272, n. 71 above, paragraph 61.

A likely interpretation is that as time goes by, a regime with by-catch to EU vessels and ordinary quotas to Norwegian and Russian vessels, will tend to constitute a discriminatory solution.

#### IV. DEALING WITH THIRD COUNTRY VESSELS ON THE HIGH SEAS

As indicated above, adjacent to FPZ, the Norwegian EEZ and the Russian EEZ in the Barents Sea is situated an area of high seas, the so-called Loophole, subject to the freedom of the high seas, including the freedom of fishing<sup>77</sup>. From time to time, Norwegian-Russian stocks, such as cod, migrate into the Loophole. A significant fishing activity has achieved great attention from the Fisheries Commission during the last decades: Unregulated fishing on the high seas (in the Loophole), conducted by third country vessels. Unregulated fishing in the Loophole has potential to undermine conservation and management measures. Therefore, the Fisheries Commission in 1993 and 1994 concluded that the uncontrolled fishing from third country vessels in lack of quotas must be determined. The main elements in this process was increasing presence of Norwegian and Russian coast guard in the Loophole, negotiations with Iceland and EU on a quota and commitment to abide the quotas.

The achievement of Agreement with third countries is in accordance with LOSC: "States whose nationals exploit identical living resources or different living resources in the same area shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned"<sup>78</sup>. Flag State as well as coastal State obligations are elaborated in the UN Fish Stock Agreement (FSA)<sup>79</sup>. Coastal States and States fishing on the high seas shall pursue cooperation in relation to straddling fish stocks and highly migratory fish stocks either directly or through appropriate subregional or regional fisheries management organizations or arrangements [RFMO/RFMA]<sup>80</sup>. A distinct discussion is if the Fisheries Commission constitutes an RFMO/RFMA. The question has been subject

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<sup>77</sup> LOSC, article 87.

<sup>78</sup> LOSC, article 116-118.

<sup>79</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling fish stocks and Highly Migratory Fish Stocks (2167 UNTS 3), hereinafter: FSA.

<sup>80</sup> FSA, article 8 (1).

to some debate, however, in lack of a clear-cut conclusion<sup>81</sup>. Without regard to the formal status of the Commission, it is significant to examine how third states are obliged to comply with the Commissions management and conservation measures. The relevant States in this respect are Iceland, Greenland, the Faroe Islands and EU. The negotiation with Iceland on a separate cod quota resulted in an Agreement signed by Iceland, Norway and Russia on 15 May 1999, the so-called Loophole Agreement<sup>82</sup>. Iceland is obliged by The Loophole Agreement article 4:

“The Parties agree that total catches from a stock taken under the protocols referred to in Article 3 by vessels flying their flags, wherever they are taken, shall not exceed the total quotas for that stock as set out in the protocols referred to in Article 3”.

In the annually bilateral Agreements between Greenland and Norway, also Greenland undertakes to comply with the Fisheries Commissions measures. The wording is typically: “Greenland undertakes to confine the total catch in the Barents Sea to the species and quotas allocated from the coastal States, regardless of the catch has taken place inside or outside areas under Norwegian or Russian jurisdiction”<sup>83</sup>. Regarding the Faroe Islands, the annually Agreements contain corresponding wording<sup>84</sup>. How has EU undertaken to comply with the Commissions measures? Like Greenland and the Faroe Islands, EU enters into bilateral fisheries Agreements with Norway. However, a corresponding obligation does not appear

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<sup>81</sup> Henriksen, T., *Utviklingen av internasjonal forvaltning av vandrende fiskebestander: Mot et lukket hav?*, (PhD thesis, 2001, ISSN 0801-6259), 119-122, Dahl, I., *Norsk fiskerijurisdiksjon overfor utenlandske fiskefartøyer*, (PhD thesis, 2009, ISBN 978-82-93021-01-8), 287-297. Churchill, R. *The Barents Sea Loophole Agreement: A “Coastal State” Solution to a Straddling Stock Problem*, *The international journal of marine and coastal law*, Vol 14 No 4, 1999, 467-490.

<sup>82</sup> The Agreement is in four official languages: English, Icelandic, Norwegian and Russian. The English title is Agreement between the Government of Norway, the Government of Iceland and the Government of the Russian Federation concerning certain aspects of cooperation in the area of fisheries, available at: <http://emeritus.lovdato.no/traktater/>.

<sup>83</sup> Protocol from meeting in the Norwegian-Greenlandic contact group, Oslo 10-11 December 2013, article 5.1:<http://www.regjeringen.no/nb/dep/nfd/presse-senter/pressemeldinger/2013/norge-og-gronland-er-enige-om-kvoteavtal.html?id=748071> (April 2014).

<sup>84</sup> Protocol from discussions between Norwegian and Faroese authorities in Oslo 11-12 December 2007 on mutual fishing rights in 2008: <http://www.regjeringen.no/upload/FKD/Vedlegg/Diverse/2007/Kvoteavtaler/Kvoteavtale%20Norge%20Færøyene%2008.pdf> (April 2014).

from the Agreements between EU and Norway. Nevertheless, a basis for an obligation on EU to comply with the allocated quotas in the Barents Sea, derives from the system of the annually bilateral fisheries Agreements. The Agreement for 2011 will be used as illustration<sup>85</sup>. According to article 2, the Agreement itself and annexes I to IXV and tables 1 to 4 is comprised by the Agreement. As will appear from annex VII article II, each Party shall authorize fishing by vessels of the other Party for the stocks mentioned in tables 2 to 4 *within the quotas set out in these tables*. The relevant referred quota appears from table 3: “2011 Quotas to the EU of Norwegian Exclusive Stocks”<sup>86</sup>. Pursuant to this table, EU has got a quota on cod on 12 127 tons. In addition, it is shown by table 3, that this quota applies in “ICES area I and II”. From the official map on ICES areas, it appears clearly that area I covers the high seas (I) and area II covers Norwegian EEZ (IIa) and the Svalbard FPZ (IIb). This indicates clearly, that EU is obliged to comply with the quotas allocated from the Commission. Based on the system of trilateral and bilateral Agreements, the Norwegian-Russian Fisheries Commissions conservation measures (TAC and allocation to Norway, Russia and third countries) apply to Iceland, Greenland, Faroe Islands and EU. In case of the Commissions constitution as an RFMA, this regime seems to a great extent to comply with FSAs scheme: “Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply”<sup>87</sup>.

A more problematic issue is the presence of third country vessels, totally in default of quota, such as the Togo and Guinea flagged vessels, mentioned in II C. It is unlikely that other states than those mentioned (EU, Greenland, Iceland and the Faroes), will obtain allocation of quotas on the basis of mutual access, or traditional fishing. However, it seems like the phenomenon UUU fishing on the high seas in the Barents Sea has considerably decreased during the last years. This might be the result of the Fisheries Commissions effort in the shape of inspections, pursuant to FSAs

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<sup>85</sup> Agreed Record of Fisheries Consultations between Norway and the European Union for 2011, Bergen 4 December 2010 - [http://www.regjeringen.no/upload/FKD/Vedlegg/Kvoteavtaler/2011/EU/Final-Agreed\\_record-North\\_Sea-2011.pdf](http://www.regjeringen.no/upload/FKD/Vedlegg/Kvoteavtaler/2011/EU/Final-Agreed_record-North_Sea-2011.pdf) (April 2014).

<sup>86</sup> “Exclusive” in this context means stocks that are not shared between EU and Norway.

<sup>87</sup> FSA, article 8 (4).

scheme of compliance and enforcement<sup>88</sup>. Another possible contributing factor is the increased use of port state measures.

## V. FUTURE COOPERATION

A question is how the Delimitation Treaty impacts the long-lasting Norwegian-Russian fisheries cooperation. Through several years, the states have emphasized their responsibilities as coastal States on conservation and rational management of the living resources in the Barents Sea, according to the law of the sea<sup>89</sup>. Both Norway and Russia benefit from jurisdiction over vast maritime zones, where a lot of fishing takes place. The question is whether the Delimitation Treaty affects the established cooperation. The Treaty includes provisions on how to deal with the shared resources in the entire Barents Sea. The original basis for the Fisheries Commission, the Agreements of 1975 and 1976, shall continue to stay in force for fifteen years after the entry into force of the Delimitation Treaty. After the expiry of this term, each of the Agreements shall remain in force for successive six year terms, unless termination<sup>90</sup>. In this manner, the legal basis for the joint fisheries Commission continues. Due to the Parties' obligations, deriving from LOSC and FSA, it is unlikely that Norway and Russia will terminate the Commission. The importance of the Commission is further stressed by the Delimitation Treaty's obligation to continue to negotiate TAC and to consider improved monitoring and control measures within the Commission<sup>91</sup>. In the case of the Commission forming an RFMA, its relevance may be further strengthened. The fact that RFMO/RFMA is the current body for conservation and management of straddling and highly migratory fish stocks, underlines the Commission's importance on future fisheries management and conservation in the Barents Sea.

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<sup>88</sup> FSA, part VI.

<sup>89</sup> Protocol 42, n. 5 above, article 4.

<sup>90</sup> Barents Sea Treaty, Annex I, article 1.

<sup>91</sup> *Ibid.*, articles 3 and 4.



# *Geography Matters: The European Union and the Arctic Ocean*

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**Summary:** I. Introduction; II. The EU Becoming a Maritime Actor; III. Why the Need for the EU to Create an Arctic Policy, And What Kind of Policy?; IV. What is the Status of the European Union in the Baltic Sea and the Arctic Waters, and Which are the Consequences for EU Regional Policy-Making?; V. Conclusion

## I. INTRODUCTION

The European Union (EU) has been advancing its maritime policies in the Arctic Ocean, despite the fact that it is not a sea basin adjacent to the territory of any EU Member State (MS). Starting from the 2008 Communication from the EU Commission<sup>1</sup>, the EU institutions have one after the other taken stance on how EU's maritime policies should be advanced in waters that seem far away from the core regions of the EU. The mere fact that the EU does not possess a coastline to the Arctic waters makes one wonder why the EU needs to develop Arctic-specific maritime policies.

This article addresses briefly three questions. Why the EU needed to commence the process of creating a specific policy framework for the entire Arctic region, including its maritime areas, even if it had already developed policy frameworks for the European north, namely the Northern Dimension (ND), and had been active member of the Barents Euro-Arctic Council (BEAC). It will be demonstrated that both a number of events in

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<sup>1</sup> European Commission, "The European Union and the Arctic Region", Communication COM(2008)763 final (2008).



the Arctic, factual and perceived, and policy developments within the EU had triggered EU's Arctic policy process. Second, even if such a policy is set in motion, the question arises how strongly the EU can influence the maritime governance in the Arctic Ocean and the adjacent sea areas. Here, it is useful to contrast the Arctic Ocean to another "icy sea", the Baltic Sea, where the EU has gradually increased its presence via the littoral States becoming Member States of the EU and for which it has developed an elaborate regional strategy. The idea is to compare and contrast the way the EU is geographically present in the region, and thereby has also a stronger geopolitical and legal role in the respective maritime areas. In the Arctic context, only Finland and Sweden are MS's of the EU, and they do not possess a coastline to the Arctic waters. Norway has rejected via referendum the member status of the EU already twice, and Greenland has withdrawn from the EU after a referendum. The last to reject the EU was Iceland, who has now decided to discontinue negotiations on its EU membership. Moreover, only Finland has accessed the inner core of the Eurozone from all the Nordic States. It seems fair to conclude that EU's geographical presence in the north and the Arctic is very limited. In conclusion, the different geopolitical and legal roles of the EU in the Arctic Ocean are highlighted in order to shed light on how these roles determine the development of the EU's Arctic policy, and especially its maritime dimension.

## II. THE EU BECOMING A MARITIME ACTOR

The EU's current maritime policy and law is extensive, and holistic due to adoption of integrated approach. This has not always been the case. Only very gradually, the EU – especially because of the European Court of Justice (ECJ) jurisprudence<sup>2</sup> - developed competence over fisheries policy. More integrated approach to marine policy, via focus on marine environmental protection, started with the 2002 Sixth Community Environment

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<sup>2</sup> In *Kramer and others case* (joint 3, 4, 6/76, 14 July 1976), the ECJ confirmed that the EEC (now EU) has exclusive competence to negotiate treaties with third states (European Court of Justice, Cases, 1976). For discussion of the ramification of these cases Robin Churchill and David Owen, 2010, *The EC Common Fisheries Policy* (2010), 6-10 and 75-108. The sharing of competences is now finally codified in the Treaty on the Functioning of the European Union (Consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)). Official Journal of the European Union, C83, 30 March 2010, arts. 3-4 and 6).

Action Programme<sup>3</sup>: it identified marine environment protection as a priority area, and also gave a boost to examine the marine areas in more holistic manner. This process culminated with the 2005 proposal for a European Marine Strategy (EMS), co-ordinated by the European Commission's DG Environment, with a more specific proposal for a Marine Strategy Directive, later finally adopted as the Marine Strategy Framework Directive (MSFD). The strategy has been clearly built on protecting the marine environment via the ecosystem-based management, as well as influencing the European regional sea protection regimes and the global processes. Yet, even if it called for integrated approach, no new structures for ensuring the coherence of policies were proposed. The EMS was also very much MS-centred in that it was the Member States that were to take action, and implement what eventually became the MSFD<sup>4</sup>. The process towards the fully integrated maritime policy, which would eventually include a broad spectrum of environmental, social and economic aspects of maritime governance, started gradually, for instance with the reorganization of the European Commission's DG Fisheries in 2005. The DG was partly re-organized according to various sub-marine regions and its name was changed from DG Fisheries to DG Maritime Affairs and Fisheries (and even its acronym from DG FISH to DG MARE). The action areas for the IMP show well its overarching nature: Maximizing the Sustainable Use of the Oceans and Seas, Building a knowledge and innovation base for the maritime policy, Delivering the Highest Quality of Life in Coastal Regions, Promoting Europe's Leadership in International Maritime Affairs and Raising the Visibility of Maritime Europe. The Integrated Maritime Policy (IMP) was adopted on 10 October 2007 (and later by the European Council in December 2007<sup>5</sup>) as a political initiative, not using formal legal procedures, and is led by DG MARE.

Even if the EU now has an overarching Integrated Maritime Policy, it has to face the fact that MS's still possess much authority over their maritime areas. There clearly is a vast challenge of co-ordinating the actions of 28 sovereign nations (out of which 5 are land-locked) that exercise most of the powers pertaining to their sea areas. This distinguishes the EU's formu-

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<sup>3</sup> See "Sixth Community Action Programme" at the europa.eu website.

<sup>4</sup> Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level* (2007), 94-104.

<sup>5</sup> European Commission, "An Integrated Maritime Policy for the European Union", COM(2007)575final (2007) (*Blue Book*); Council Conclusions on the Integrated Maritime Policy European Council Conclusions, 14 December 2007; CEC 2009).

lation of an integrated maritime policy from the efforts of federal states to create such a regional policy.

### III. WHY THE NEED FOR THE EU TO CREATE AN ARCTIC POLICY, AND WHAT KIND OF POLICY?

EU institutions started to take a more proactive approach to Arctic affairs only around 2007, following and in parallel with the evolution of the EU's Integrated Maritime Policy, the International Polar Year (2007-08), as well as the publication of the Arctic Council's Arctic Climate Impact Assessment (2005) that attracted much attention by envisaging rapidly shrinking extent of Arctic Ocean's sea ice. In addition, with the global surge of interest in the Arctic around 2007, especially due to apprehension related to alleged geopolitical tensions in the region as well as increasing interest in commercial use of the Northern Sea Route (or broader, North-East Passage) into commercial use between the Atlantic and Pacific Oceans, the EU's High Representative for Foreign and Security Policy together with the European Commission expressed their concern, identifying Arctic developments as possibly also affecting EU's security interests<sup>6</sup>. The European Parliament proposed even in its 2008 resolution a treaty for the Arctic, with a controversial reference to the Antarctic Treaty as an inspiration for Arctic governance<sup>7</sup>.

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<sup>6</sup> The EU expressed its concern, "The rapid melting of the polar ice caps, in particular, the Arctic, is opening up new waterways and international trade routes. In addition, the increased accessibility of the enormous hydrocarbon resources in the Arctic region is changing the geo-strategic dynamics of the region with potential consequences for international stability and European security interests. The resulting new strategic interests are illustrated by the recent planting of the Russian flag under the North Pole. There is an increasing need to address the growing debate over territorial claims and access to new trade routes by different countries which challenge Europe's ability to effectively secure its trade and resource interests in the region and may put pressure on its relations with key partners". See: *Climate Change and International Security: Paper from the High Representative and the European Commission to the European Council S113/08*, 14 March 2008.

<sup>7</sup> The European Parliament advocates in a 2008 resolution, "Suggests that the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference

These initial responses to the changes in Arctic governance became more nuanced with the European Commission's Communication on EU Arctic policy (2008)<sup>8</sup>. This communication, which was followed by 2009 Council Conclusions, started a process of formulating the basis for an active EU presence in the entire Arctic, not only in the European portion of the region, where the EU has been active since mid-1990s<sup>9</sup>. As a result, numerous autonomous EU activities have been brought under a common umbrella of the "Arctic policy", or more precisely under a process of formulation of such a policy. The original objectives, as expressed in the Commission's 2008 Communication, were: protecting and preserving the Arctic in unison with its population; promoting the sustainable management and use of natural resources; and international co-operation<sup>10</sup>. The 2012 Joint Communication of the European Commission and High Representative underlined the notions of knowledge (connected with a further focus on Arctic research), responsibility (understanding the EU's environmental and social impact and acting responsibly in shaping EU footprints and Arctic developments) and engagement (co-operation with various Arctic partners)<sup>11</sup>.

To no surprise, Arctic maritime issues have been given a high priority in the EU policy documents. Already the 2008 Commission Communication stated that "explor[ing] and improv[ing] conditions for gradually introducing Arctic commercial navigation, while promoting stricter safety and environmental standards as well as avoiding detrimental effects" are the key EU interests regarding Arctic shipping, alongside "defend[ing] the principle of freedom of navigation and the right of innocent passage in the

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represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean". European Parliament resolution of 9 October 2008 on Arctic governance, 2010/C 9 E/07.para. 15.

<sup>8</sup> Timo Koivurova, "Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance", *Polar Record* 46 (237) (2010), 146-156, also in G. Hønneland (ed.), *The Politics of the Arctic* (2013).

<sup>9</sup> Council of the European Union. (2009). Council conclusions on Arctic issues. (2985th Foreign Affairs Council meeting, Brussels, 8 December 2009).

<sup>10</sup> European Commission (2008), n. 2 above.

<sup>11</sup> European Commission, "Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps". Joint Communication of the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament and the Council. Brussels, 26.6.2012. JOIN(2012)19final.

newly opened routes and areas". In more practical terms, the Commission emphasized full implementation of existing obligation concerning navigation rules, safety and environmental standards in the region, and has been ever since closely following developments in these policy areas. The possible EU's contribution to the improvement of surveillance capacities in the Arctic waters was underlined. The competitive lead of European shipyards in developing technology required for Arctic conditions, including ice-breakers, was to be maintained. Support for the work in the International Maritime Organization (IMO) on enhancing international environmental and safety standards applicable to Arctic waters, which was one of proposals for action in 2008 Communication, turned out to be one of the key elements of EU's activity regarding Arctic shipping, owing to still ongoing development of mandatory Polar Code<sup>12</sup>. The possible designation of particularly sensitive sea areas along Arctic navigational routes was also considered.

Currently, there is an increasing emphasis on supporting Arctic infrastructure and navigation as the EU's flagship space programmes, Copernicus and Galileo, gradually enter into the phase where practical applications may be offered, some of them highly relevant for Arctic transport and research. Staff Working Document accompanying 2012 Communication<sup>13</sup> listed numerous ways in which the EU could support Arctic navigation infrastructures, including SafeSeaNet, CleanSeaNet, Automated Identification System (AIS), Long Range Identification and Tracking of Ships (LRIT). At the same time, much of EU Arctic research funding is dedicated to marine research. European research infrastructures, including space technologies are highly relevant for Arctic marine research. Since 2009, despite the many Arctic actors' suspicion and concerns connected with EU's involvement in Arctic affairs, the European Commission has proven an active participant of Arctic cooperation, including in Arctic Council's Emergency Prevention Preparedness and Response and Protection of Arctic Marine Environment working groups. The Commission also engaged bilaterally with Arctic countries and stakeholders, including for example cruise ship industry regarding possible initiatives aimed at risk reduction<sup>14</sup>.

The 2012 Joint Communication upheld as the main objective for Arctic maritime affairs a "full compliance with international law and principles

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<sup>12</sup> European Commission (2008), n. 2 above; European Commission, Joint Staff Working Document, SWD(2012) 182 final, (2012).

<sup>13</sup> European Commission (2012), n. 13 above.

<sup>14</sup> *Ibid.*

as defined in UNCLOS". It also emphasized the importance of developing Trans-European Transport Networks, extending also to the Europe's High North, as well as the role of the Northern Dimension Partnership on Transport and Logistics, although the latter is primarily of significance for terrestrial transport. The EU is to improve transparency of energy agreements with third countries<sup>15</sup>, which may have long-term relevance for Arctic offshore oil and gas extraction, as the EU is one of the main markets for Arctic hydrocarbons<sup>16</sup>.

On the other hand, the maritime dimension in the process of formulating EU's Arctic policy needs to be seen in the light of the Arctic policy in general, which does not refer only to the Arctic Ocean. That has often proven one of the reasons for misunderstanding the EU's role in the region. The geographical disconnection of the EU from the Arctic Ocean may be relevant for typically maritime affairs, but is of less relevance for other elements brought under the umbrella of Arctic policy. Even though the development of Integrated Maritime Policy was one of the starting points for the Arctic policy process, and such policy would also serve as EU's sea basin strategy, the content of Arctic policy extends well beyond maritime affairs. Even if institutional set-up is considered, it was not the DG Maritime Affairs and Fisheries leading the work on the actual formulation of Arctic policy, but the DG External Relations (DG RELEX), which established Arctic inter-service group bringing together officers from various DGs. Following the Lisbon Treaty, European External Action Service (EEAS) has come to the fore.

The focus on both pan-Arctic, predominantly maritime affairs as well as the European Arctic issues (including issues of terrestrial nature) is perhaps most clearly visible in the 2011 and 2014 resolutions of the European Parliament. The Parliament emphasized the EU's role in ensuring the sustainable development of the region, affirmed the EU's Arctic interests and stressed a need for a co-ordinated EU policy<sup>17</sup>.

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<sup>15</sup> Joint Communication (2012), n. 12 above.

<sup>16</sup> Sandra Cavalieri et al., *EU Arctic Footprint and Policy Assessment Report*, Ecologic Institute (2010).

<sup>17</sup> European Parliament. 2011. Resolution of 20 January 2011 on a sustainable EU policy for the high North, A7-0377/2010. European Parliament. (2014). Joint Motion for a Resolution on the EU strategy for the Arctic (2013/2595(RSP)).

#### IV. WHAT IS THE STATUS OF THE EUROPEAN UNION IN THE BALTIC SEA AND THE ARCTIC WATERS, AND WHICH ARE THE CONSEQUENCES FOR EU REGIONAL POLICY-MAKING?

The EU has evolved via two trends in European integration which remain in complex interrelation – deepening of integration and widening, i.e. spatial enlargement<sup>18</sup>. With each and every enlargement (1973, 1986, 1995, 2004, 2007, 2013 and candidate countries waiting) of the EU, it has become difficult to proceed to tackle the policy problems confronting the EU. With increasing and diverse membership in the EU, it has been often seen that further progress in many policy fields has become difficult. Yet, it is also with these leaps of enlargement that have created demand for action in maritime policies for the EU.

The maritime areas under the sovereignty and jurisdiction of the original six Member States – Belgium, Netherlands, Luxembourg, France, Germany and Italy – of the EU brought the issues primarily related to the North-East Atlantic (and, to some extent, Mediterranean) to the attention of the Union, with the prime focus in the North Sea, in particular after the first enlargement in 1973 (United Kingdom, Ireland and Denmark). The second (1981, Greece) and third enlargements (1986, Spain and Portugal) increased the attention to the Mediterranean issues, while the fourth (1990, East Germany), fifth (1995, Sweden, Finland and Austria) and especially the sixth (2004, Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia) made the Baltic Sea almost an internal sea of the EU, with, however, the important presence of Russia by the Baltic Sea (both in the mainland and in Kaliningrad)<sup>19</sup>. The 1995 enlargement also introduced the EU to Arctic issues and resulted in development of EU's

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<sup>18</sup> For a broad discussion see *Journal of European Public Policy* 21(4). 2014. "Special issue: The European Union: wider and deeper?"

<sup>19</sup> The most recent accession to the EU has been that of Bulgaria and Romania becoming members in 2007, thereby making also Black Sea issues relevant for the EU, and Croatia (member from 1 July 2013), reinforcing the Mediterranean emphasis. The two candidate countries (the Former Yugoslav Republic of Macedonia and Turkey) and potential ones such as Iceland (a country that has also applied for membership but has now put that application on hold in May 2013) will place more emphasis on Mediterranean and the Arctic Ocean issues, if they become MS's at some point in the future. It is also important to note that the so-called outermost regions, which are part of the EU (as distinct from the so-called overseas territories), extend the maritime policy issues to the South-American and African waters.

Northern Dimension (ND), a policy framework proposed by Finland and focused on developing EU activities in North-East Europe and strengthening cooperation with Russia. However, that did not result in any practical interest towards Arctic maritime affairs, or framing EU's policies relevant for Europe's northernmost regions as "Arctic", apart from ambiguous and never really realized "Arctic window" initiative within the ND, which was to refer primarily to Greenlandic engagement in the ND.

Increased intensity of EU policy activity in the Baltic Sea region following the consecutive enlargements illustrates well how geography determines possibilities of the EU, a *sui generis* policy actor of a new type, still not fully understood in scientific terms. Even though the EU has global ambitions and many of its policies exert global influence, it is obviously, just as all other international actors, limited by geography in what it can do and how it can participate in governance of different regions. The Baltic strategy and Arctic policy, even if they are partly founded on the EU's Integrated Maritime Policy, are very different policy statements and their comparison is a difficult undertaking. Mostly this is due to the fact that the EU's geographical presence in a region determines the content and character of a policy<sup>20</sup>.

The EU Strategy for the Baltic Sea Region (EUSBSR) has been adopted in 2009 via the Council endorsement of a communication from the European Commission<sup>21</sup>. The main objectives are to make Baltic region sustainable, prosperous, accessible and attractive, safe and secure. The EUSBSR was the first macro-regional strategy adopted by the Union (followed by Danube regional strategy in 2010/2011), and at the same time, the first fully comprehensive sea basin strategy, constituting regional implementation of the IMP. The importance of the Baltic strategy for the IMP implementation has been underlined by the commissioner Joe Borg, responsible at that time for fisheries and maritime affairs, who said that the strategy "would, in fact, constitute a first example of an integrated maritime strategy at a sea-basin level, providing valuable experience and serving

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<sup>20</sup> Arctic is often presented as a "global region" due to interconnection of developments with global climate changes, the process of globalization and the demand for Arctic resources.

<sup>21</sup> European Commission, Communication concerning the European Union Strategy for the Baltic Region, Communication COM(2009)248 final, (2009); Council of the European Union, Presidency Conclusions. Brussels European Council, 29-30 October 2009, 15265.1.09, Rev 1, Concl 3.



as a model for other maritime regions”<sup>22</sup>. However, as the EUSBSR focuses much attention on the Baltic rim and its regional economy, which are not necessarily related to maritime affairs, the links with the IMP proved weaker than could have been expected at the time of policy formulation<sup>23</sup>. Although the maritime dimension is in the Arctic policy even stronger than in the Baltic, its relationship with the IMP is also not straightforward. Arctic Ocean is seen as one of the sea basins in focus within the IMP. However, as is the case with the EUSBSR, the Arctic policy formulation is not led by the DG MARE, responsible for IMP, and its scope goes much beyond maritime issues (e.g. big part of cohesion/cooperation funding specifically terrestrial transport or research projects, as well as initiatives referring to indigenous peoples)<sup>24</sup>.

The EUSBSR is primarily focused on the integration of the region within the EU, seeing Baltic Sea as an almost internal sea basin of the EU. The external dimension, which extends primarily to Russia, Belarus and Norway, is to be achieved via already existing forms of cooperation such as the ND the Council of Baltic Sea States<sup>25</sup>. Furthermore, vesting the responsibility for formulation, monitoring and coordination to the DG Regional Development (DG REGIO) strengthened the focus on the EU’s territorial cohesion. The internal character of the EUSBSR is also clear in the choice of its objectives, which included enhancing the implementation of EU legislation in the region, primarily by facilitating cooperation between Baltic States, as well as contributing via different projects to better policy-making at the EU level. Markedly, one of the strategy’s horizontal actions is “coop-

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<sup>22</sup> Joe Borg, speech, 2009, as quoted in Rikard Bengtsson, *An EU Strategy for the Baltic Sea Region: Good Intentions Meet Complex Challenges*. European Policy Analysis, September 2009, Issue 9-2009. Swedish Institute for European Policy Studies (2009); see on regional possibilities within the Integrated Maritime Policy, European Commission, “Progress Report on the EU’s Integrated Maritime Policy”, COM(2009)540 final, (2009); as well as “Developing the international dimension of the Integrated Maritime Policy of the European Union”, COM(2009) 536 final, (2009).

<sup>23</sup> In 2012, the Council encouraged strengthening the interlinks between EUSBSR and IMP. See Council of the European Union, Council conclusions on the completion of the review of the European Union Strategy for the Baltic Sea Region. 3180<sup>th</sup> General Affairs Council meeting, Luxembourg, 26 June 2012.

<sup>24</sup> European Commission (2012), n. 13 above.

<sup>25</sup> R. Bengtsson, n. 23 above.

eration in transposition of EU regulations in the region”<sup>26</sup>. This is clearly in contrast with EU policy documents related to the Arctic, where the work was led first by the DG RELEX and then the European External Action Service (EEAS). Even though the Arctic policy encompasses also EU internal elements, much of the focus is on circumpolar issues and in the European Arctic on the cross-border cooperation<sup>27</sup>. Therefore, the choice of DG RELEX and the EEAS appears to be a rational decision.

Although in the formulation of the strategy for the Baltic region it was agreed that no new institutions, EU legislation and funding would be developed<sup>28</sup>, a number of institutionalized tools for implementation of the strategy has been established. First, a High-Level Group of officials from the EU Member States and the Committee of Regions has been set up in order to consult with the Commission on all major developments. Second, eight participating MS’s appointed National Contact Points to assist implementation at the national level. Third, a broad range of stakeholders are gathered in the EUSBSR annual forum<sup>29</sup>. Fourth, a wide variety of projects from different EU programmes are directly connected to the EUSBSR objectives. Finally, the EUSBSR has been already reviewed (via progress report) and revised (for example in the most recent 2013 Action Plan), and it is likely that this process will be conducted regularly<sup>30</sup>.

Although it is difficult to predict what kind of tools would be chosen for implementation of the EU’s Arctic policy, their composition would be certainly different than in the case of basically internal for the EU Baltic strategy, where the chosen tools are partly connected to the relevance of the policy for the implementation of EU regulatory framework.

The difference the direct applicability of EU regulations makes for regional policy formulation is visible well when relevant sectorial policies are considered. As the marine pollution is one of the key areas of Baltic-specific cooperation and activities of Baltic actors, it has received much attention in the EUSBSR, including reduction of nutrient input into the sea, preserving

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<sup>26</sup> Jonathan Metzger and Peter Schmitt, “When soft spaces harden: the EU strategy for the Baltic Sea Region” *Environment and Planning*, 44(2) (2012), 263-280.

<sup>27</sup> European Commission (2012), n. 13 above.

<sup>28</sup> R. Bengtsson, n. 23 above.

<sup>29</sup> J. Metzger and P. Schmidt, n. 27 above.

<sup>30</sup> Council of the European Union (2012). n. 24 above; European Commission, Staff Working Document accompanying Communication concerning the European Union Strategy for the Baltic Sea Region Action SEC(2009) 712/2, February 2013 Version, (2013).

natural areas and marine biodiversity. For fisheries – a policy area where the EU competences (within EU MS’s exclusive economic zones and for their fisheries industries) are exceptionally strong – Baltic biodiversity and sustainability of fishing are listed as key objectives. In terms of shipping, one of the aims of the EUSBSR is to make the Baltic region a leader in maritime safety and security as well as a model region for clean shipping<sup>31</sup>. In all these issue areas, the EU has direct and clear competences and powers to influence the Baltic affairs, whether that is designation of NATURA 2000 marine sites, maritime spatial planning or establishing measures in accordance with Marine Strategy Framework Directive to achieve good environmental status of various marine sub-regions by 2021. That contrasts with the circumpolar Arctic, where, although the number of relevant EU policies and actions is great, their influence on Arctic developments is indirect, complex, very limited and obscure for many regional actors (with exception of policies in the northernmost parts of Sweden and Finland or issue areas included in the EEA Agreement). Despite the context of globalization, geography remains one of the key parameters for policy-making, and in the case of regional policies determines what and how measures can be taken. That holds true, even if we take into account EU’s influence on international regulatory processes, powers of port and flag states, the relevance of European economy as a major market for Arctic products, provider of Arctic technology and a source of pollution in the region, or the fact that European companies actively participate in Arctic developments.

The contrast between Baltic and Arctic regions from the European perspective is also visible in the EU expenditure on the Baltic and Arctic affairs. In 2007-2013 the cohesion spending in the Baltic region amounted to EUR 50-55 billion<sup>32</sup>. That doesn’t include other funding, for example that connected with Common Fisheries Policy, which, at EUR 1,25 billion, was still higher than whole EU cohesion and cooperation expenditure for Arctic regions<sup>33</sup>. There is of course clear difference between the Baltic region inhabited by around 90 million EU citizens (many in less-developed regions) compared to the EU Arctic population of less than half a million. However, this dissimilarity certainly plays a major role in how much importance is given by policy-makers to a particular region, whether there is a region-specific policy/strategy in place or not.

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<sup>31</sup> European Commission (2009), n. 22 above.

<sup>32</sup> *Ibid.*; R. Bengtsson, n. 23 above.

<sup>33</sup> Joint Communication (2012), n. 12 above.

Given the weight the EU policies have in the Baltic affairs and the broad, overarching nature of the EUSBSR, Metzger and Schmitt argue that the European Commission is emerging as an informal “spokesperson” for the Baltic region<sup>34</sup>. This argument is made, even if some of the main Baltic actors are not MS’s of the EU, namely the Russian Federation. The role of spokesperson would mean that the EU institutions, primarily the Commission, become a critical node of Baltic cooperation in its various form, and may be even informally seen as the main voice expressing region’s interests. Such strong role of the EU is indeed visible in multiple venues of Baltic cooperation (Helsinki Commission for Protecting the Baltic Sea - HELCOM, Council of Baltic Sea States – CBSS). For example, at a very practical level, the CBSS Secretariat is responsible for implementing some EUSBSR projects<sup>35</sup>. In the Arctic context, a similar interconnection between the EU-centred Northern Dimension and Barents cooperation, where the EU is just one of the participants, is visible, although certainly not as strong as in the case of the Baltic cooperation. At a circumpolar level, primarily regarding the Arctic Council, such interconnection would be impossible. Thus, the role of the EU clearly diminishes from the Baltic area, where it holds a position of the key player, via Barents region, where it is a potentially influential participant (although that strength has not been so far realized), to the whole circumpolar Arctic, where EU’s standing is much weaker and even questioned.

In contrast to such a predominant presence of the EU in the Baltic region, the EU’s enlargement to the North and the Arctic waters has not been an easy one. When the UK, Ireland, Denmark (including Greenland but not the Faroe Islands) and Norway applied for membership in 1970, only Norway did not become a member since the government lost a referendum on accession. Greenland, which had joined the European Economic Community (EEC, EU’s predecessor) together with Denmark, following establishment of a Home Rule government organized a referendum and withdrew from the EEC in 1985 – a first (and so far the only) territory to have left the EU. Norway rejected the EU membership the second time (again, after a referendum) when it applied to join the EU together with Finland, Sweden and Austria in 1991. Iceland applied for the EU membership in July 2009, and commenced the accession negotiations in July 2010.

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<sup>34</sup> J. Metzger and P. Schmidt, n. 27 above.

<sup>35</sup> Major example is here EUSBSR Horizontal Action “Neighbours”, included in the EUSBSR Action Plan in 2013 and implemented by the CBSS Secretariat and the City of Turku. See Council of Baltic Sea States website.

However, the negotiations were put on hold due to the decision by the Icelandic government in May 2013, and the government is likely to withdraw its application (as of April 2014). Moreover, of the Nordic member states of the EU, only Finland has accessed the Eurozone.

The relevance of EU policies and activities in the Arctic can be seen as a series of dimensions. EU's core region in the north consists of the northern parts of Finland and Sweden, which includes also rivers flowing to the Barents and White Seas. Second dimension consists of Norwegian mainland and Iceland that are both required to implement much of the internal market related legislation of the EU. Third dimension includes partnership agreements with e.g. Greenland and (currently tense) relationship with the Russian Federation. The EU's geographical connection to the European Arctic (EU and EEA territories, Greenland and northwest Russia) is also reflected in EU's role the international co-operation in the region: the Northern Dimension with its Arctic window, Barents Euro-Arctic Council (and Barents Regional Council). In a similar way, the EU regional, cohesion and cooperation funding has relevance for the larger Barents region, including its maritime areas. The fourth dimension is the influence of the EU on international regulatory processes (as EU's power to act externally matches the scope of its internal competences) relevant to the Arctic.

These limitations and diversity in the extent of EU competences in the Arctic are clearly visible in legislation relevant for Arctic maritime governance. Matters presently regulated by European law (under former art. 80(2) TEC, presently Art. 100(2) TFEU) and having potential impact on the safety of Arctic shipping and its impact on the Arctic environment include maritime safety and prevention of pollution from ships, rules for ship inspection, port state control, improving the performance of member states as flag states, and the liability of carriers. Good example is the directive establishing a vessel traffic monitoring and information system (VTMIS Directive 2002/59/EC as amended by the Directive 2009/17/EC), which refers to Arctic navigation indirectly, via powers of MS's as flag and port states. The VTMIS Directive sets forth measures to be taken in the event of risks posed by the presence of sea-ice, making the authorities of MS's responsible for providing proper information on ice conditions, recommend routes and ice-breaking services and they are also empowered to request documents certifying that a vessel's capacity is commensurate with the ice conditions in which it is to operate. In terms of fisheries, the EU already has a much stronger position with regard to trade than to Arctic catches, and therefore it can play a major role by influencing how the Arctic fisher-

ies are governed<sup>36</sup>. The EU can also be an active participant to the future Arctic Ocean fisheries governance, which has been recently discussed by the Arctic Ocean coastal states.

Thus, although EU's geographical presence provides it with only very light direct governance role in the Arctic waters, this does not mean that the EU would not have maritime policy interests in the Arctic Ocean and the adjacent seas. Given that oceans and seas are governed by e.g. the law of the sea convention and a host of IMO conventions to be open for various activities, it is obvious that the EU is also interested in exercising its maritime rights in Arctic waters, especially now when the sea ice is gradually thinning and receding. The EU does have competences, even exclusive competences (in relation to its MS's), which may be exercised in the foreseeable future, when the sea ice further retreats. But for now, it seems obvious that its maritime policy role is fairly indirect, especially if one compares that to the Baltic Sea. This is also reflected in the way the EU's approach to the Arctic has become more nuanced and cautious over the fairly short time it has been formulating Arctic policy, manifested in the 2012 Joint Communication. Compared with the 2008 Commission communication, the 2012 Joint Communication is no longer critical of Arctic governance<sup>37</sup> and expresses the EU's willingness to engage responsibly to meet the challenges the Arctic region faces with its prime actors, namely the region's nation-states and indigenous peoples.

## V. CONCLUSION

The geographical enlargement of the EU to the Baltic Sea and the Arctic waters has developed to very different directions. As was reviewed above, the Baltic Sea has become almost an internal sea of the EU, with one, notable, exception, the Russian Federation. All the other eight littoral states are Member States of the EU, which to no surprise is strongly underlined in EU policy documents referring to the Baltic Sea. The EU's road to the north has confronted clear resistance, Norway having rejected two times

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<sup>36</sup> See Timo Koivurova et al., "The present and future competence of the European Union in the Arctic", *Polar Record* 48(4) (2012), 361-371.

<sup>37</sup> The 2008 Commission Communication, n. 2 above, reads: "The main problems relating to Arctic governance include the fragmentation of the legal framework, the lack of effective instruments, the absence of an overall policy-setting process and gaps in participation, implementation and geographic scope".

the membership status, Greenland withdrawing from the EU and Iceland deciding not to continue accession negotiations.

All in all, there is clear difference as to the geographical presence of the EU in the Baltic Sea and the Arctic Ocean and its adjacent maritime waters. This means that for much of the Baltic Sea, the Integrated Maritime Policy, the Maritime Strategy Framework Directive, and a host of other policy and legal instruments apply directly. Therefore, the governance implications of geographical enlargement are very clear: EU directly regulates and governs many of the issues now in the Baltic Sea, whereas almost the opposite applies to the northern waters. In fact, it can be said that the EU has confronted resistance in its path towards the north and the Arctic, even if all the Nordic states would seem ideal Member States of the EU.

Geography is still important from the viewpoint of governance, even if our legal, social and political systems have become interlinked. Geography still determines what role if any the EU can have in governing the oceans in various parts of our planet. In the Arctic waters, the EU exercises mostly indirect governance role e.g. via import policies and conclusion of international treaties<sup>38</sup>. In the Baltic Sea the EU exercises more direct governance role by implementing its policies and laws.

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<sup>38</sup> The EU has in some matters that apply also in Arctic waters more direct governance role, e.g. via Member States authority (governed partly by European law) as port and flag states, even if they have no coastline at Arctic waters.

# *Creating Marine Protected Areas to assert territorial jurisdiction against the Right of Abode of Native Populations: The Case of the Chagos Archipelago*

NITISH MONEBHURRUN\*

**Summary:** I. Introduction; II. The Creation of the MPA by the United Kingdom Can Be Questioned On Legal Grounds; III. The international cooperation project: the Two Seas Canal; A. The Creation of MPAs Is Implicitly Provided For In Legal Instruments. B. The United Kingdom Lacks Sovereignty to Legally Set Up A MPA in the Chagos. III. The Creation of A Marine Protected Area Serves A Geo-Strategic And Not An Environmental Purpose In The Chagos Case. A. The Creation of the MPA potentially blocks the right of return of the native Chagossians. B. The Creation of the MPA Might Be Irreversible With a Standstill Effect on the Right of Abode. IV. Conclusion.

## I. INTRODUCTION

According to the Convention of Montego Bay on the Law of the Sea, States are entitled to protect and preserve the marine environment<sup>1</sup>. For such purposes, “States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection”<sup>2</sup>. The creation of Marine Protected Areas (hereinafter MPAs or MPA) – which are not, as such, mentioned in the Convention of Montego Bay – constitutes one of these available measures. The use and importance of MPAs for the conservation of marine biodiversity and ecosystem was internationally recognised in 2009 by the Manado

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<sup>1</sup> Convention of Montego Bay on the Law of the Sea (10/12/1982), article 192.

<sup>2</sup> *Ibid.*, article 194(1).



Ocean Declaration<sup>3</sup>. MPAs are specifically delimited to preserve sensitive marine ecosystems and to promote the equilibrium of unique and endangered marine biodiversity<sup>4</sup>. They may be declared as no-take zones within which any form of exploitation is prohibited<sup>5</sup>. There are about ten MPAs worldwide, the largest one being the Australian Coral Sea Commonwealth Marine Reserve (989,842 km sq.) and the smallest one is the Chilean Motu Motiro Marine Park (150,000 km sq.)<sup>6</sup>. The International Union for Conservation of Nature considers a protected area to be “*a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values*”<sup>7</sup>.

Obviously, creating MPAs conflicts with the economic interests any coastal State may nurture, especially in cases of no-take MPAs. Every inch of marine environmental and biodiversity protection potentially limits the economic exploitation of under-water resources, or similarly hinders the fishing industry’s activities and scopes; conversely, MPAs act as an efficient means to thwart savage and abusive extractive or exploitation practices. For instance, these preventive reasons grounded the United States of America’s decision to proclaim an area covering 362,073 square kilometers around the Northwestern Hawaiian Islands as the Papahānaumokuākea Marine National Monument in 2006<sup>8</sup>.

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<sup>3</sup> The Manado Ocean Declaration (2009), point 15: “We resolve to further establish and effectively manage marine protected areas, including representative resilient networks, in accordance with international law, as reflected in UNCLOS, and on the basis of the best available science, recognizing the importance of their contribution to ecosystem goods and services, and to contribute to the effort to conserve biodiversity, sustainable livelihoods and to adapt to climate change”. (available at: <http://www.cep.unep.org/news-and-events/manado-ocean-declaration>).

<sup>4</sup> Alberto Ansuategi et al., “Las áreas marinas protegidas como instrumento de política ambiental”, 71 Cuadernos Económicos de la Información Comercial Española (2006), 93, 95; Randall S. Abate, “Marine Protected Areas as a Mechanism to Promote Marine Mammal Conservation: International and Comparative Law Lessons for the United States”, 88 Oregon Law Review (2009), 255, 260-262; Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (2010), 466.

<sup>5</sup> Pierre Leenhardt et al., “The Rise of Large-Scale Marine Protected Areas: Conservation or Geopolitics?”, *Ocean & Coastal Management* (2013), 1, 1.

<sup>6</sup> *Ibid.*, 2.

<sup>7</sup> International Union for Conservation of Nature (IUCN), *Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas, Best Practice Protected Area Guidelines Series No.19* (2012), 1, 12.

<sup>8</sup> See: Proclamation 8031-Establishment of the Northwestern Hawaiian Islands Marine National Monument (26/06/2006) [available at: <http://www.papa->

However, embarking on MPAs projects may – paradoxically – have a hidden agenda and objectives which are not necessarily related to environmental protection, but which value, safeguard and consolidate political and geopolitical interests<sup>9</sup>. Environmental considerations are for such purposes dressed as a conscientious and pious excuse –, which sometimes satisfy the self-righteous minds. The environmental flag can indeed be waved as a strategy for security reasons. The whole tragedy of the Chagos archipelago is a good case in point.

The Chagos archipelago is found in the middle of the Indian Ocean, to the East of Africa, to the West of Indonesia, to the South of India and to the North-East of the Mascarene Islands (Mauritius, Rodrigues and the Réunion Island).

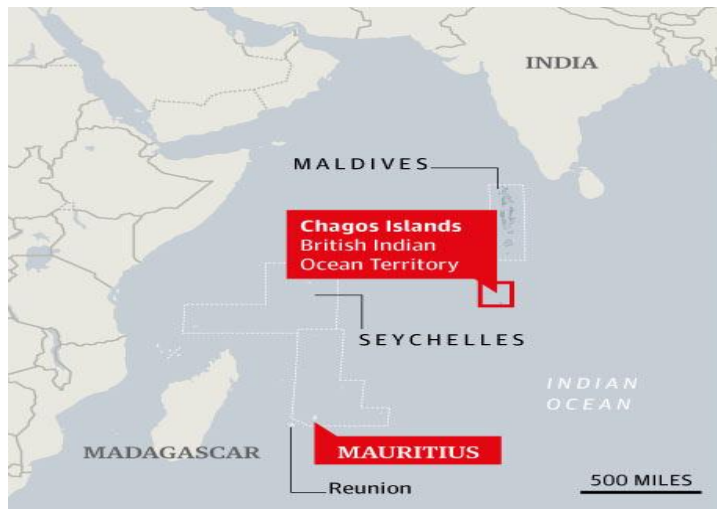


Figure 1: The Chagos Archipelago administrated under the British Indian Ocean Territory<sup>10</sup>

hanaumokuakea.gov/PDFs/proclamation\_8031.pdf]; see also: Alison Rieser, “The Papahānaumokuākea Precedent: Ecosystem-scale Marine Protected Areas in the EEZ”, 13 *Asian-Pacific Law & Policy Journal* (2012), 210, 211-212.

<sup>9</sup> See: Alison Rieser, no.7 above, at 213-214.

<sup>10</sup> Retrieved from: Owen Bowcott and John Vidal, “Britain faces UN tribunal over Chagos Islands marine reserve”, *The Guardian* (28/01/2013), available at: <http://www.theguardian.com/world/2013/jan/28/britain-tribunal-chagos-islands-marine-area>

The story of the Chagos is a whole complex saga and this article cannot relate it inexhaustibly<sup>11</sup>. Two main issues characterise the archipelago's conundrum<sup>12</sup>: the first is the question of the sovereign power which holds jurisdiction over the territory; the second is the lot of the native Chagossians.

There is, firstly, a territorial battle between the United Kingdom and Mauritius concerning the sovereignty over the archipelago. To obtain its independence, Mauritius ceded the Chagos to the United Kingdom<sup>13</sup>. This, it is claimed, was done by defying international law<sup>14</sup>, and the sovereignty question over the Chagos is still topical<sup>15</sup>: even if the archipelago was ceded for a sum of money before its independence in 1968<sup>16</sup>, Mauritius has been claiming back its sovereignty as from the eighties. Dismembering the archipelago was a not a futile and innocent British monomania and manoeuvre: indeed, before granting its independence to Mauritius, the United Kingdom had (already) secretly negotiated the leasing of Diego Garcia – one of the Chagos islands – to the United States which wanted to establish a military base in that geopolitically perfect spot of the Indian Ocean<sup>17</sup>; the location was appropriate for the then cold-war context and it has since then be used as a new *heartland* to police the region<sup>18</sup>; The United States

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<sup>11</sup> For more details, see: John Pilger, "Stealing a Nation", in, John Pilger, *Freedom Next Time* (2006), 37, 37-90, David Vine, *Island of Shame - The Secret History of the U.S. Military Base on Diego Garcia (Indian Ocean)* (2009), 288p; Thierry Ollivry, *Diego Garcia. Enjeux Stratégiques, diplomatiques et humanitaires* (2008), 193p; André Oraison, "Histoire et actualité de la base militaire de Diego Garcia. Les circonstances de la création et de la militarisation du British Indian Ocean Territory (BIOT)", 92 *Outre-mers* (2005), 271, 271-289; John Madeley, "Diego Garcia: A Contrast to the Falklands", 54 *Minority Rights Report* 1, 1-16.

<sup>12</sup> Garth Abraham, "Paradise Claimed: Disputed Sovereignty Over the Chagos Archipelago", 128 *The South African Law Journal* (2011), 63, 68.

<sup>13</sup> Thierry Ollivry, no.10 above, at 57-73.

<sup>14</sup> This will be explained *infra*.

<sup>15</sup> *Ibid.*, at 84-90, 92.

<sup>16</sup> Thierry Ollivry, no.10 above, at 71.

<sup>17</sup> Geoffrey Robertson QC, "Who owns Diego Garcia? Decolonisation and Indigenous Rights in the Indian Ocean", 36 *University of Western Australia Law review* (2013) 1, 10.

<sup>18</sup> It is from Diego Garcia that the attacks on Afghanistan and Iraq were launched. The base was also used for acts of torture by the American military force. See: John Pilger, no.10 above, at 40; Geoffrey Robertson QC, no.14 above, at 2; Garth Abraham, above at no.11, 65-66; André Oraison, "Diego Garcia: enjeux de la présence américaine dans l'Océan indien", 207 *Afrique contemporaine* (2003), 115, 119; Stefen Allen, "Looking Beyond the Bancoult Cases: International Law and The

paid the leaser by discounting the purchasing price of Polaris submarine nuclear missiles<sup>19</sup>. For all these purposes, an Order in Council under Royal Prerogative<sup>20</sup> was adopted in 1965; it created the British Indian Ocean Territory and stated that as from the date of its adoption “[t]he Chagos Archipelago, being islands which immediately before the date of this order were included in the Dependencies of Mauritius (...) shall (...) form a colony which shall be known as the British Indian Ocean Territory”<sup>21</sup>. This leads to the second conundrum.

The dismemberment of the Chagos obnoxiously implied that the native Chagossian population had to be expelled from the archipelago. And they were effectively and literally deported<sup>22</sup> to Mauritius and to the Seychelles; the means used were those of shameless terror and egregious abuse<sup>23</sup>. In a note send to a British diplomat – Mr D.A. Greenhill –, on the 24<sup>th</sup> of August 1966, the British Permanent Under Secretary of that time stated: “We must surely be very tough about this. The object of the exercise was to get some rocks which will remain ours; there will be no indigenous population except seagulls who have not yet got a committee (...)”<sup>24</sup>. And Mr Greenhill retorted: “*Unfortunately along with the birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc. When this has been done I agree we must be very tough and a submission*

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Prospect of Resettling the Chagos Islands”, 7 Human Rights Law Review (2007) 441, 441-442; David Vine, Philip Harvey, S. Wojciech Sokolowski, “Compensating a People For the Loss of Their Homeland: Diego Garcia, the Chagossians, and the Human Rights Standards Damages Model”, 11 Northwestern Journal of International Human Rights (2012), 147,154; Timothy P. Lynch, “Diego Garcia: Competing Claims to a Strategic Isle”, 16 Case Western Reserve Journal of International Law (1984), 101,101-102; Andrew S. Erickson, Walter C. Ladwid, Justin D. Mikolay, “Diego Garcia and the United States” Emerging Indian Ocean Strategy”, 6 Asian Security (2010) 214, 221; Thierry Ollivry, no.10 above, at 39, 43-46.

<sup>19</sup> Thierry Ollivry, no.10 above, at 34; Geoffrey Robertson QC, no.14 above, at 2; Garth Abraham, above at no.11, 65; André Oraison, above no.10, 274; “The Chagos Islands: A Sordid Tale”, BBC News (03/02/2000) (available at: [http://news.bbc.co.uk/2/hi/uk\\_news/politics/1005064.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/1005064.stm))

<sup>20</sup> An order adopted by the monarch (the Queen) on advice of the Privy Council and without parliamentary debate.

<sup>21</sup> See: Garth Abraham, above at no.11, 64-65.

<sup>22</sup> Some official documents use the Word “deport”. See: R (Bancoult) v. Secretary of Foreign and Commonwealth Office (2000), EWHC, Admin 413, paragraph 18.

<sup>23</sup> For more details, see: John Pilger, no.10 above.

<sup>24</sup> R (Bancoult) v. Secretary of Foreign and Commonwealth Office (2006), EWHC, Admin 1038, paragraph 27.

*is being done accordingly*<sup>25</sup>” The forced exile or removal took place between 1967 and 1973<sup>26</sup>. Since then, the exiled population has vigorously pleaded before the United Kingdom’s tribunals and, lately, before the European Court of Human Rights in order to obtain the right of abode and to be able to resettle in their homeland; these vainly efforts are still being sweated<sup>27</sup>.

On the 1<sup>st</sup> of April 2010, the United Kingdom established a Marine Protected Area of 636 600 km<sup>2</sup> around the archipelago – exclusive of Diego Garcia<sup>28</sup>. The zone is a no-take area as acknowledged by the United Kingdom’s foreign office<sup>29</sup>. In its 2013 report to the scientific committee of the Indian Ocean Tuna Commission, the United Kingdom – via the British Indian Ocean Territory –, affirmed that commercial fishing was banned within the MPA<sup>30</sup>. This implies that should the right of abode of the Chagossians be recognised and enforced, their livelihood would suffer a fatal blow in reason of the no-take MPA<sup>31</sup>. The native population was used to a subsistence economic structure where financial and monetary transactions

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<sup>25</sup> *Ibid.*

<sup>26</sup> Garth Abraham, no.11 above, at 67. See also: Michael McCarthy, “Man vs Marine in the Chagos Islands”, *The Independent* (10/02/2010).

<sup>27</sup> Claire Grandison, Seema Niki Kadaba, Andy Woo, “Stealing the Islands of Chagos: Another Forgotten Story of Colonial Injustice”, 20 *Human Rights Briefs* (2013) 37, 37-43.

<sup>28</sup> Peter Sand, “The Chagos Archipelago – Footprint of Empire, or World Heritage?”, 40 *Environmental Policy and Law* (2010) 232, 232; MPA News, “UK Designates MPA Around Chagos Archipelago But No Decision Yet on How Much Will Be No-Take”, 11 *International News and Analysis on Marine Protected Areas* (May/June 2010), 1, 1; Irini Papanicolopulu, “Submission to Arbitration of the Dispute on the Marine Protected Area Around the Chagos Archipelago”, 26 *The International Journal of Marine and Coastal Law* (2011) 667, 669; Peter Prows, “Mauritius Brings UNCLOS Arbitration Against The United Kingdom Over the Chagos Archipelago”, 15 *American Society of International Law Insights* (2011) (available at: <http://www.asil.org/insights/volume/15/issue/8/mauritius-brings-unclos-arbitration-against-united-kingdom-over-chagos>); Juliet Eilperin, “Britain Protects Chagos Islands, Creating World’s Largest Marine Reserve”, *The Washington Post* (20/04/2010); Paul Rincon, “UK Sets Up Chagos Islands Marine Reserve”, *BBC News* (01/04/2010); Marc Roche, “Aux îles Chagos, protection de la nature et droit de retour s’affrontent”, *Le Monde* (03/04/2010).

<sup>29</sup> Owen Bowcott and John Vidal, above no.9.

<sup>30</sup> See: UK (British Indian Ocean Territory) National Report to the Scientific Committee of the Indian Ocean Tuna Commission (2013), Document IOTC–2013–SC16–NR29 (available at: <http://www.iotc.org/files/proceedings/2013/sc/IOTC-2013-SC16-NR29.pdf>)

<sup>31</sup> Pierre Leenhardt et al., no. 4 above, at 4.

had a very relative value and where the sea acted as a nourisher. The creation of a marine park in that region embodies what has been called an “environmental imperialism”<sup>32</sup>: using environmental measures and laws to assert sovereignty and to definitely block the right of return of the native population. It was indeed later on revealed that the MPA was purposefully established to weaken the resettlement movement of the islanders. The environmental reasons appear as a mere bluff. On legal grounds, its legality is therefore obviously questioned considering that its object is environmental only *en apparence*. The creation of the Chagosian MPA is more of a geopolitical strategy with a regional security-based agenda. And, in this turmoil, the legal basis of this watchdog policy vociferously conflicts with a population’s basic rights. Interestingly, environmental protection does not appear an objective but, seemingly, as a means. It follows that the legal existence of the MPA is in itself a serious conundrum<sup>33</sup>.

Indeed, the creation of the MPA by the United Kingdom in the Chagos region can be severely questioned (II) as it serves, in reality, a geo-strategic and not an environmental purpose (III).

## II. THE CREATION OF THE MPA BY THE UNITED KINGDOM CAN BE QUESTIONED ON LEGAL GROUNDS

Even if, in its essence, the creation of MPAs is provided for in legal instruments (A), the United Kingdom has no legal grounds to legally set up a MPA around the Chagos (B).

### A. The Creation of MPAs Is Implicitly Provided For In Legal Instruments.

The United Nations Convention on the Law of the Sea of 1982 states that sovereign States are entitled to protect and preserve the marine environment of the economic exclusive zone (EEZ)<sup>34</sup> – which has an extension

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<sup>32</sup> Peter Sand, above no.25, at 232.

<sup>33</sup> A case is currently pending before the Permanent Court of Arbitration and opposes Mauritius to the United Kingdom on the legality of the MPA. See: [http://www.pca-cpa.org/showpage.asp?pag\\_id=1429](http://www.pca-cpa.org/showpage.asp?pag_id=1429); see also: Irini Papanicolopulu, no.25 above.

<sup>34</sup> Convention of Montego Bay on the Law of the Sea (10/12/1982), article 56.1 (b) (iii).

of 200 nautical miles from the baseline<sup>35</sup>. In this sense, article 194(1) of the same convention highlights that concerned States must use the best practicable and available means to protect the marine environment from pollution. In a corroborative tone, article 194(5) asserts that the relevant measures adopted “shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life<sup>36</sup>. As the law itself allows<sup>37</sup>, such protection of marine life can be undertaken unilaterally<sup>38</sup>. Scientifically, the setting up of MPAs has been championed for such purposes<sup>39</sup>; accordingly, and as aforesaid, MPAs have indeed been declared worldwide.

By its very nature, the EEZ of the Chagos archipelago shelters a diverse and rare marine ecosystem made up of unique species of fishes, of corals and also acts as a breeding space for various fishes and mammals<sup>40</sup>; it is claimed that the coral reefs are as fresh as they were about a century ago<sup>41</sup>. On this basis, the United Kingdom backed by environmental organisations and non-governmental organisations launched a consultation process on the creation of a MPA in the Chagos. On the surface, the initiative appears as an innocuously noble one, with an appearance of legality. And the MPA was effectively declared in April 2010.

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<sup>35</sup> *Ibid.*, article 57.

<sup>36</sup> See also article 207.2 of the convention and more generally section 5 of the same convention.

<sup>37</sup> *Ibid.*, article 194(1).

<sup>38</sup> Iriani Papanicolopulu, no.25 above, p.674.

<sup>39</sup> Peter H. Sand, “Fortress Conservation Trumps Human Rights? The ‘Marine Protected Area’ in the Chagos Archipelago”, 21 *The Journal of Environment and Development* (2012) 36, 36; Pierre Leenhardt et al., no. 4 above, at 2.

<sup>40</sup> North Sea Marine Cluster, “Managing Marine Protected Areas. A Case Study Examining The Chagos Archipelago” (2012) (available at: <http://www.nsmc.eu.com/Marine-Protected-Areas-Report-3.pdf>); Stephen Mangi et al. (eds.), “Establishing a Marine Protected Area in the Chagos Archipelago: Socio-Economic Considerations”, Plymouth Marine Laboratory, Report of Workshop held 7 January 2010, Royal Holloway, University of London, UK (2010) 2, 5; Jay Nelson, Heather Bradner, “The Case For Establishing Ecosystem-Scale Marine Reserves”, 60 *Marine Pollution Bulletin* 635, 636; Marc Roche, “Aux îles Chagos, protection de la nature et droit au retour s’affrontent”, *Le Monde* (03/04/2010) [available at: [http://www.lemonde.fr/planete/article/2010/04/03/aux-iles-chagos-protection-de-la-nature-et-droit-au-retour-s-affrontent\\_1328295\\_3244.html](http://www.lemonde.fr/planete/article/2010/04/03/aux-iles-chagos-protection-de-la-nature-et-droit-au-retour-s-affrontent_1328295_3244.html)].

<sup>41</sup> Stephen Mangi et al., no.37 above, at 5.

It can be claimed that the United Kingdom did not consult relevant and concerned States and organisations before establishing the MPA in the Chagos. Article 194 (1) of the Convention on the Law of the Sea states that measures to protect and preserve the marine environment shall be adopted individually or jointly, that is collectively, whenever appropriate. In practice, the establishment of MPAs have often been preceded by negotiations and consultations<sup>42</sup> –, and in a polemic case like the Chagossian one, due and serious negotiations with Mauritius, but also with representatives of the exiled Chagos population, could have been expected. Consultations, the British claim, were duly undertaken considering that many non-governmental environmental organisations were consulted<sup>43</sup>. The argument has not convinced because the most important and relevant actors – those having a direct interest in every subject concerning the Chagos –, have not been heard. As per the provisions of the Montego Bay Convention, it can be undoubtedly considered that the circumstances were appropriate for a joint decision and for relevant negotiations. The establishment of the MPA was, consequently, peremptory<sup>44</sup>. However, this argument is only an alternative or a subsidiary one. Consultations are required when the acting State is the coastal sovereign State and has a legal capacity to legislate in the concerned territory –, and this is not the case of the United Kingdom. The latter lacks sovereignty to legally set up a MPA in the Chagos.

## **B. The United Kingdom Lacks Sovereignty to Legally Set Up A MPA in the Chagos**

It is the duty of the coastal State to protect and preserve the marine environment within the economic exclusive zone<sup>45</sup>. This is a pure matter of jurisdiction and, in law, only the coastal State has sovereign rights and competence to intervene for economical or environmental purposes on the

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<sup>42</sup> Many protected areas have, for instance, been declared as World heritage by the UNESCO Heritage Committee or as “particularly sensitive sea areas” by the Marine Environment Protection Committee of the International Marine Organisation. See: Peter Sand, no.25 above, at 233; Iriñi Papanicolopulu, no.25 above, at 673.

<sup>43</sup> Jon Lunn, “Disputes Over the British Indian Ocean Territory: A Survey”, Research Paper 13/31 (22/05/2013), House of Commons Library 1, 17.

<sup>44</sup> Peter H. Sand, no.34 above, at 37.

<sup>45</sup> Convention of Montego Bay on the Law of the Sea, no.31 above, article 56 (1) (b) (iii).



territory under its sovereignty. Therefore, a MPA established by a State in a given area over which it does not have sovereignty would be illegal. Considering that the United Kingdom is not a sovereign State within the jurisdiction of the Chagos as per international law, there are no legal grounds sustaining the creation of the MPA.

As mentioned, the Chagos archipelago was dismembered from Mauritius by the United Kingdom, and this acted as a condition of the former's independence. However, excising or fragmenting an ancient colony during the process of its independence is contrary to international law. The practice infringes the *uti possidetis* principle and the United Nations' General Assembly resolutions on decolonisation and self-determination, some of which, like the Resolution 1514 entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples", are deemed to reflect a customary law<sup>46</sup>. The Resolution 1514 states that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"<sup>47</sup>. Frontiers are intangible and cannot be dismembered according to the *uti possidetis* principle<sup>48</sup> and every decolonisation process must abide thereto<sup>49</sup>. The International Court of Justice has already stated that the principle is intrinsically related to the process of independence and that its purpose is to provide stability and a status quo to the frontiers of new States, thereby preventing any territorial wars<sup>50</sup>. In further resolutions specifically adopted on Mauritius, the non-excision was voiced out and confirmed as a legal principle which the United Kingdom was overtly defying and, consequently, violating. In a resolution 2066 entitled "Question of Mauritius" the General Assembly invited "the administering power [the United Kingdom] to take no action which would dis-

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<sup>46</sup> David Raic, *Statehood and the Law of Self-Determination* (2002), 217.

<sup>47</sup> Resolution 1514 (XIV), Declaration on the Granting of Independence to Colonial Countries and Peoples (14/12/1960), paragraph 6. See also: Resolution 1654 (XIV), The Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (27/11/1961).

<sup>48</sup> Patrick Daillier, Alain Pellet, *Droit International Public* (7th, 2002), 468-469; Geoffrey Robertson QC, no.14 above, at 8.

<sup>49</sup> Frontier Dispute (Burkina Faso / Mali), Judgment, I.C.J. Reports (1986), 554, paragraph 20.

<sup>50</sup> *Ibid.*

member the Territory of Mauritius and violate its territorial integrity<sup>51</sup>". Subsidiarily, it can also be claimed that the Mauritian delegation which negotiated the island's independence with the United Kingdom in 1965 did not have a legal or constitutional mandate to discuss the Chagossian issue, and *a fortiori*, to cede or excise it<sup>52</sup>; even if it had the appropriate legal capacity, the excision would still violate the above mentioned legal principles: all excision is *de jure* illegal.

Besides, the United Kingdom acknowledges itself that Mauritius is the sovereign State which has jurisdiction in and over the Chagos<sup>53</sup>. The Chagos was originally detached from Mauritius to be leased to the United States of America for defence purposes. The "Exchange of Notes Constituting an Agreement Concerning the Availability for Defence Purposes of the British Indian Ocean Territory" of 1966 – and signed by the United Kingdom and the United States of America – states that Diego Garcia would be leased for a period of fifty years, the lease remaining in force for a period of twenty years after this period unless the parties decide otherwise two years before the agreement's termination<sup>54</sup>. Via two of its Prime Ministers, the United Kingdom has affirmed that the archipelago would be ceded back to Mauritius when it would no longer be needed for defence purposes<sup>55</sup>: Lady Margaret Thatcher confirmed this in an official letter dated the 20<sup>th</sup> of February 1990<sup>56</sup>. A slight nuance was brought to such affirmations by the For-

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<sup>51</sup> Resolution 2066 (XX), Question of Mauritius (16/12/1965) 4<sup>th</sup> paragraph. See in a similar sense: Resolution 2232 (XXI), Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia St. Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands (20/12/1966); Resolution 2357 (XXII), Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia St. Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands (19/12/1967) (emphasis added).

<sup>52</sup> Geoffrey Robertson QC, no.14 above, at 11; Thierry Ollivry, no.10 above, at 89.

<sup>53</sup> Stefen Allen, no.15 above, at 443

<sup>54</sup> Exchange of Notes Constituting an Agreement Concerning the Availability for Defence Purposes of the British Indian Ocean Territory, London (30/12/1966), article 11.

<sup>55</sup> Thierry Ollivry, no.10 above, at 82-83; Jon Lunn, no.39 above, at 3.

<sup>56</sup> *Ibid.*

eign and Commonwealth Office in 2012, but it did not deny the promises made<sup>57</sup>. Besides, in the Foreign and Commonwealth Office's "Consultation on Whether To Establish A Marine Protected Area In The British Indian Ocean Territory", the United Kingdom's official position reads: "Any decision to establish a marine protected area would not affect the UK Government's commitment to cede the Territory to Mauritius when it is no longer needed for defence purposes"<sup>58</sup>.

It is clear that such representations and promises made by the United Kingdom to Mauritius created legitimate expectations: the latter State legitimately expects that it will retrieve its effective possession of the Chagos and it is aware that the promises made imply that the UK recognises that it is only using the archipelago for temporary defence purposes. One has sovereignty, and the other detains mere usufruct. Any frustration of the legitimate expectations would be an estoppel by representation –, a misrepresentation. An estoppel by representation is one "that arises when one makes a statement or admission that induces another person to believe something and that results in that person's reasonable and detrimental reliance on the belief"<sup>59</sup>. The principle is obviously entrenched in the good faith expected.

The Montego Bay Convention also states that the Parties must act in good faith and must not use the convention's provision so as to abuse the rights therein provided for<sup>60</sup>. Hence, the creation of a MPA is expected to have purely and solely environmental purposes: there can be no other reasons justifying the sensible establishment of such a protected area. On these grounds, the creation of the Chagosian MPA can be questioned as it appears more like a geo-strategic than an environmental manoeuvre.

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<sup>57</sup> Foreign and Commonwealth Office, "The Overseas Territories Security, Success and Sustainability", Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty (2012) 3, 96.

<sup>58</sup> Foreign and Commonwealth Office, "Consultation on Whether To Establish A Marine Protected Area In The British Indian Ocean Territory", FCO Consultation Document (2009)1, 7.

<sup>59</sup> Black's Law Dictionary (9th, 2009), 630.

<sup>60</sup> Convention of Montego Bay on the Law of the Sea, no.31 above, article 300.

### **III. THE CREATION OF A MARINE PROTECTED AREA SERVES A GEO-STRATEGIC AND NOT AN ENVIRONMENTAL PURPOSE IN THE CHAGOS CASE**

The hidden agenda which lurks behind the United Kingdom's acts and behaviour is not an invention, nor a fantasy; the past conducts and behaviours of this State on the Chagossian issue have revealed the perfidy of the Albion's shores. The United Kingdom has always referred to and used all available legal techniques to maintain its grasp over the Chagos and to consequently block all possibilities for the Chagossians to return to their native land. By the record it has created, the United Kingdom has itself opened all doors to scepticism concerning every measure it adopts in the Chagossian context. And it is not the first time that it would have intervened through legal or political means to raise a barrier before the native population's right of abode. On this basis, it can be considered that the creation of the MPA potentially blocks the right of return of the Chagossians (A) and the situation might not be only a temporary one in the view of emerging environmental law principles – like the non-regression or standstill principle – which might apply to the MPA (B).

#### **A. The Creation of the MPA potentially blocks the right of return of the native Chagossians**

The Chagossians were removed and deported from the archipelago by an Ordinance – the 1971 Immigration Ordinance. On the 3<sup>rd</sup> of November 2000, the High Court of England and Wales quashed the said Ordinance, affirming its illegality under British law and, therefore, acknowledging the right of abode of the native population. Examining the defence and geo-strategic priorities for which the Chagossians had been deported, Justice Laws stated in his judgement:

*“5.4 of the Ordinance effectively exiles the Ilois from the territory where they are belongers and forbids their return. But the “peace, order, and good government” of any territory means nothing, surely, save by reference to the territory's population. They are to be governed: not removed. In the course of argument Gibbs J gave what with respect seems to me to be an illuminating example of the rare and exceptional kind of case in which an order removing a people from their lawful homeland might indeed make for the territory's peace, order and good government: it would arise where because of some natural or man-made catastrophe the land had become toxic and uninhabitable. Short of an extraordinary instance of that kind, I cannot see how the wholesale removal of a people from the land where they belong can be said to conduce to the territory's peace, order and good government (...). These people are subjects of the Crown, in right of their British nationality as belongers in the Chagos Archipelago (...).*

In my judgment, for all these reasons, the apparatus of s.4 of the Ordinance has no colour of lawful authority. It was Tacitus who said: They make a desert and call it peace - *Solitudinem faciunt pacem appellant* (Agricola 30). He meant it as an irony; but here, it was an abject legal failure”<sup>61</sup>.

The Ordinance was declared *ultra vires* and a new Immigration Order was even adopted in 2000<sup>62</sup>. However, the United Kingdom undertook a resettlement feasibility study two years later, in 2002, and concluded that various reasons – environmental, geographic, climatic and survival – made resettlement possible but unrealistic, with prohibitive costs<sup>63</sup>. The report can be read with irony and sarcasm: it is very difficult to understand how the archipelago suddenly became unfit for a population settlement. The report’s argumentation is firstly flawed considering that there is military base on one of the islands of the archipelago on which a whole American military troop lives without suffering or likely to suffer from the aforementioned environmental or survival risks<sup>64</sup>. Secondly, two specialists of, respectively, resettlement conundrums and of the Chagos, Professor Jennes of Harvard University and Professor Stoddart of Berkley, refuted the facts and figures brought forward in the report, affirming that these were in many cases utterly whopping... lies<sup>65</sup>. However, despite the recognition of the 1971 Ordinance’s illegality and on the basis of the feasibility study, the United Kingdom adopted two Orders in Council under royal prerogative (that is, without parliamentary debate) in 2004<sup>66</sup> which overturned the High Court’s decision and therefore, bypassed the British law: they declared – once again –, that no one has the right of abode in the British Indian Ocean Territory (the Chagos archipelago) and that any entry therein was submitted to an official authorization. It was a clear defiance of the United Kingdom against its own courts, and its own law. In a decision of the Division Court in 2006, Lord Justice Hooper voiced that the orders

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<sup>61</sup> R (Bancoult) v. Secretary of Foreign and Commonwealth Office (2000), no.18 above, paragraphs 57-59.

<sup>62</sup> Stefen Allen, no.15 above, 448.

<sup>63</sup> Feasibility Study For The Resettlemet of The Chagos Archipelago, Phase II-B, Volume I: Executive Summary (2002), 24p. See also: Stefen Allen, no.15 above, 448; John Pilger, no.10 above, 78; R (Bancoult) v. Secretary of Foreign and Commonwealth Office (2006), no.20 above, paragraph 84.

<sup>64</sup> As an exception to the MPA, fishing is not prohibited in Diego Garcia and The Guardian reports that more than 28 tonnes of fish was caught to be served in Diego Garcia in 2010. See: Owen Bowcott and John Vidal, no.9 above.

<sup>65</sup> John Pilger, no.10 above, 78-79.

<sup>66</sup> hierry Ollivry, no.10 above, 133.

frustrated the legitimate expectations which the Chagossians had created on the possibility of a resettlement<sup>67</sup>.

Like the Orders in Council or the ordered feasibility study, the creation of the MPA appears as another attempt to hinder the return of the Chagossians. The strategy is a clever one and bets on one new religion: sustainability. By promoting an environmental protection measure in the Chagos, the United Kingdom was sure to gain support from environmental organisations<sup>68</sup>. There is a common and worldwide consensus on environmental protection and sustainable development issues. States' proposals aiming at the protection and preservation of the environment are always acclaimed and applauded; public authorities are normally criticised when they are neglectful on these issues. The United Kingdom played a Machiavellian card which has the capacity of winning immense support and understanding.

Strategically and contextually, however, it is probable that the MPA project came up in view of preventing any future condemnation of the United Kingdom –, with the logical expected effects of maintaining a firm stranglehold on the Chagos. The *Bancoult* decisions were overturned by the Supreme Court of England – the former House of Lords – in 2008<sup>69</sup>, but a risk of condemnation existed because an application had been lodged by the Chagos islanders against the United Kingdom before European Court of Human Rights in 2004; in 2012, the Court finally declared that the application was inadmissible<sup>70</sup>. In any case, the MPA was, in this context, an excellent safeguard, a joker at hand or an alternative argument, had a judicial decision frustrated any British political and geo-strategic objective on the Chagossian issue. On the chessboard of power, the MPA serves the interests of the most powerful concerned actors. A new obstacle has been raised before resettlement perspectives and it has been revealed that the intention behind the setting up of a MPA was, effectively, to block or weaken any possibility of return and resettlement.

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<sup>67</sup> R (Bancoult) v. Secretary of Foreign and Commonwealth Office (2006), no.20 above, paragraph 102.

<sup>68</sup> The MPA Project was effectively supported by many environmental groups, like the PEW Environment Group. See:); Juliet Eilperin, no.24 above; Pierre Leenhardt et al., no.4 above, at 2-3; Stephen Mangi et al., no.36 above, at 3.

<sup>69</sup> R (Bancoult) v. Secretary of Foreign and Commonwealth Office (2008), House of Lords, UKHL 61.

<sup>70</sup> Chagos Islanders v. The United Kingdom, ECHR, Application no.35622/04 (2012).

The intentionality behind such measures appeared in leaked diplomatic cables, the so-called *wikileaks*, which still have an uncertain legal value as an element of evidence – considering that such documents might be sealed with confidentiality under the 1961 Vienna Convention on Diplomatic Relations –, even if they were used for such purposes in some cases<sup>71</sup>. It can be argued that a diplomatic cable which has been unclosed has a potential evidentiary value but the legality of the unclosing procedure remains, of course, relevant. This being said, leaked diplomatic cables confirmed in 2010 that the effects of a marine park on the resettlement possibilities of the Chagossians were duly taken into consideration and were of utmost relevance during the negotiations of the MPA project. The cables highlight Mr Colin Roberts”, the director of the Foreign and Commonwealth Office, statements:

“He asserted that establishing a marine park would, in effect, put paid to resettlement claims of the archipelago’s former residents. *Responding to Polcouns’ observation that the advocates of Chagossian resettlement continue to vigorously press their case, Roberts opined that the UK’s “environmental lobby is far more powerful than the Chagossians’ advocates”*<sup>72</sup>.

An official acting on behalf of the Queen affirmed in a similar sense that “[t]he BIOT’s former inhabitants would find it difficult, if not impossible, to pursue their claim for resettlement on the islands if the entire Chagos Archipelago were a marine reserve<sup>73</sup>”. The manoeuvre also appeared in an exchange of notes, quoted in the 2013 *Bancoult* case, and which reads (and the quote is worthy):

“Their plans for resettlement are based on the establishment of an economy based on fishing and tourism. In the specific context of BIOT this would be incompatible with a marine reserve. They are therefore hostile to the proposal, unless the right of return comes with it. They have expressed unrealistic hopes that the reserve would create permanent resident employment based on the outer islands for Chagossians.

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<sup>71</sup> Mentioned in: *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Office* (2013), High Court of Justice, Queen’s Bench Division, Caso no. CO/8588/2010, paragraph 42.

<sup>72</sup> “The US Embassy Cables: The Documents. US Embassy Cables: Foreign Office Does Not Regret Evicting Chagos Islanders”, *The Guardian* (02/12/2010) [available at: <http://www.theguardian.com/world/us-embassy-cables-documents/207149?uni=Article:in%20body%20link>].

<sup>73</sup> *Ibid.*

Assuming we win in Strasbourg (contingency for losing the cases dealt with in earlier submissions), we should be aiming to calm down the resettlement debate. Creating a reserve will not achieve this, but it could create a context for a raft of measures designed to weaken the movement. This could include:

- presenting new evidence about the precariousness of any settlement (climate change, rising sea levels, known coastal defence costs on Diego Garcia)
- activating the environmental lobby
- contributing to the establishment of community institutions in the UK and possibly elsewhere
- committing to an annual visit for representatives of the communities to the outer islands on All Saints Day
- inclusion of a Chagossian representative in the reserve governance<sup>74</sup>.

With such affirmations, it is difficult to be clearer about the possibility of a hidden agenda behind the MPA in the Chagos. Recently, the U.K.'s High Court of Justice held that the establishment of a MPA was not tantamount to a ban of any future resettlement of the Chagossians: it stated that the MPA policy was not a definite one and could be changed; on its face, it does not prevent a resettlement nor does it exclude this possibility. These are two separate questions according to the court and the MPA can be legally accommodated in the future should the circumstances require it. Consequently, it is not an obstacle to a right of abode<sup>75</sup>.

Notwithstanding the understandable logic behind its reasoning, the High Court's decision can be put under scrutiny in that it fails to consider that the elements of temporality and flexibility which it associates to the nature of a MPA do not hold under the spirit of environmental law; indeed, the creation of the MPA might be irreversible – and so might be the prospects of a resettlement.

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<sup>74</sup> (Bancoult) v. Secretary of State for Foreign and Commonwealth Office (2013), no.66 above, paragraph 57.

<sup>75</sup> *Ibid.*, paragraph 198.



## B. The Creation of the MPA Might Be Irreversible With a Standstill Effect on the Right of Abode

The Chagossian MPA, like all MPAs, is established on the basis of sustainability objectives. They are meant to last and are tainted in a permanent and progressive environment protection colour. This spirit is implied in all environmental measures and policies, the aim being to conserve the existing biodiversity and advance in the sense of its non-deterioration<sup>76</sup>. This is what the environmental doctrine calls the non-regression or the standstill principle: once an environmental protection guarantee is given and legally entrenched, there can be no regression, no reverting<sup>77</sup>. The very concept of sustainable development contains the idea and principle of progress and of the permanence of every step made in favour of environmental protection<sup>78</sup>. The protection granted hence obeys to an acquired right logic. The international conventions which have a direct relationship with MPAs enclose the environment protection objective in a long-term perspective, whereby the highest level of protection and care is provided for and expected<sup>79</sup>. This is normal considering that legal framework for environmental protection is always highly rigorous; it is so in order to attain the most efficient level of conservation. The same logic applies to human rights: granted and acquired human rights are not likely to suffer any regression or back step<sup>80</sup>.

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<sup>76</sup> See for instance: The Convention on Biological Diversity (1992), article 1.

<sup>77</sup> Michel Prieur, "Non-Regression in Environmental Law", 5 *Surveys and Perspectives Integrating Environment and Society* (2012) 1, 1-7; Michel Prieur, "De l'urgente nécessité de reconnaître le principe de 'non-régression' en droit de l'environnement", 2 *Romanian Journal of Environmental Law* (2010) 9, 9-30; Ingo Wolfgang Sarlet, Tiago Fensterseifer, "Notas sobre a proibição de retrocesso em matéria (socio) ambiental", in, *O princípio da proibição de retrocesso ambiental*, Senado Federal do Brasil. Comissão de Meio Ambiente, Defesa do Consumidor e Fiscalização e Controle (2012), 131-206.

<sup>78</sup> Michel Prieur, "De l'urgente nécessité de reconnaître le principe de 'non-régression' en droit de l'environnement", no.72 above, at 12.

<sup>79</sup> See for instance: Convention of Montego Bay on the Law of the Sea, no.31 above; The Convention on Biological Diversity (1992) the International Convention for the Prevention of Pollution from Ships (MARPOL) [1973]; The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation And Management of Straddling Fish Stocks And Highly Migratory Fish Stocks (1995).

<sup>80</sup> Michel Prieur, "De l'urgente nécessité de reconnaître le principe de 'non-régression' en droit de l'environnement", no.72 above, at 13-15.

In this sense, it is expected that a no-take MPA – like the Chagossian one – remains as such, on a permanent basis and under a permanent consolidation agenda. The difference between no-take MPAs and “normal” MPAs rests on their respective degree of fragility, sensitivity, scarcity and vulnerability; when a MPA is declared a no-take zone, it means that the covered area is a highly endangered one with a precarious and precious marine ecosystem. The established hierarchy has a purpose. Consequently and considering the non-regression logic, the declaration of a no-take MPA in the Chagos is very likely to be of a permanent nature. Removing the “no-take” character would be tantamount to retrograding as far as marine environment protection is concerned. With the support of environmental groups and lobbies, the United Kingdom can rely on the non-regression argument to maintain the Chagossian MPA as a no-take one under the commands and priorities of sustainability. Any opposition would appear as a disregard for and as an attack against sustainability policies.

The game has been cleverly played: opposing human rights to environmental concerns. While the European Court of Human Rights has been upholding and valorising environmental protection through human rights principles in a harmonising and cross-fertilisation approach<sup>81</sup>, the United Kingdom has set both of these ambits in a gladiatorial arena. This highly compromises the possibility of a resettlement of the Chagossians who relied on the sea – as they used to –, as a means of survival. As a no-take zone cannot be exploited for fishing, for crafting or for tourism, the MPA was

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<sup>81</sup> See for instance: *Tatar v Romania*, Case no. 67021/01 (2009); *Brânduse v Romania*, Case no.6586/03 (2009); *Flamenbaun and others v France*, Case no. 3675/04 and 23264/04 (2012); *Fadeyeva v Russia*, Case no.55723/00 (2005). See also: Adélie Pomade, “L’établissement du lien de causalité entre le dommage subi et l’exploitation des ressources”, in, Mihaela Ailincăi and Sabine Lavorel, *Exploitation des ressources naturelles et protection des droits de l’Homme* (2013),121-131; Dinah Shelton, “Tatar c. Roumanie: European Court of Human rights decision on protections against environmental harms and on proof of causation and damages”, 104 *American Journal of International Law* (2010) 247, 247-253; Dinah Shelton, “Developing Substantive Environmental Rights”, 1 *Journal of Human Rights and the Environment* (2010) 89, 89-120; Dinah Shelton, “Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?”, 35 *Denver Journal of International Law and Policy* (2006) 129, 129-171; Jean-Christophe Martin, Sandrine Maljean-Dubois, “La Cour européenne des droits de l’Homme et le droit à un environnement sain”, in, PRADEL, Jean (ed.), *Prévention des risques et responsabilités pénales en matière de dommage environnemental: une approche internationale, européenne et nationale* (2008), 37-56.

the perfect technique to block any realistic and pragmatic return. Their right of return stands still. If the short term debate revolves around the law and ethics of the MPA, the long run one – once the marine park has been firmly rooted – might well include the legality of undoing and reverting the MPA's status as per sustainability considerations and non-regression imperatives.

This (sudden) priority accorded to the environment in the Chagos however lacks coherence. If environmental protection is a sincere preoccupation while administrating a particular region, all available legal means – for example, the international legal instruments on environmental protection which have been ratified by the administrator – must be effectively used and enforced. This is an affirmation which the United Kingdom itself acknowledges. It is one of its commitments taken in the Environment Charter of the BIOT whereby the U.K. underlines its will and engagement to extend all its multilateral environmental agreements to the Chagossian territory when the latter has the required implementation capacity<sup>82</sup>. This commitment was timidly enforced: only five environmental agreements were extended to the BIOT<sup>83</sup>. These are the International Whaling Convention (1946), the Wetlands Convention (1971), the Convention on Trade in Endangered Species (1973), the Migratory Species Convention (1979) and the Ozone Layer Convention 1985<sup>84</sup>. Other ratified conventions still do not apply to the BIOT and it is interesting to note that some of these have not been ratified by the United States of America which currently occupies Diego Garcia<sup>85</sup>. Some claim that this was done on purpose to protect the United States' military base and activities on the island<sup>86</sup>. The speculation might be true even if the United Kingdom can legally extend these agreements to the BIOT with the exclusion of Diego Garcia – as it has done for the MPA: but in this case, the political and strategic manoeuvre would be

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<sup>82</sup> See: "Environment Charter of the British Indian Ocean Territory. Guiding Principles for the UK, for the Government of the British Indian Ocean Territory" (26/09/2001), Commitment no.3.

<sup>83</sup> Peter Sand, no.24 above, at 235.

<sup>84</sup> Peter Sand, no.24 above, at 235.

<sup>85</sup> Examples are the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Access to Justice in Environmental Matters, the Convention on Biological Diversity, the Stockholm on Persistent Organic or the Kyoto Protocol to the 1992 UN Framework Convention on Climate Change. See: Peter Sand, no.24 above, at 235; Geoffrey Robertson QC, no.14 above, at 24.

<sup>86</sup> See: Peter Sand, no.24 above, at 235-236; Geoffrey Robertson QC, no.14 above, at 24.

too apparent. In whatsoever case, the environmental reasons sustaining the creation of the MPA are *in fine* not convincing: there is a massive incoherence and inconsistency in championing the need of a MPA on one side of the archipelago whilst overlooking and disregarding the environmental threat which potentially lurks behind the presence of nuclear submarines or of stocked landmines<sup>87</sup> in Diego Garcia –, or neglecting the occurrence of oil spills caused by the military base<sup>88</sup>. For these reasons, the good faith which the United Kingdom tries to uphold and defend is not persuasive.

#### IV. CONCLUSION

Geo-strategic objectives and priorities can be achieved forcefully but the means used must not necessarily be military. They can be evolutive and the Chagos case is telling for showing how environmental strategies can become excellent tools for such ends. The consequences can be ironical: while it has been feared that environmental degradation might lead to a population exile and to the advent of environmental refugees<sup>89</sup>, the MPA established in the Chagos is likely to have the adverse effect of preventing a population from returning to and resettling on its native lands. Environmental law and human rights have been brought into a conflictual relationship and so have been the values they protect. Many aspects of the Chagossian MPA potentially prove its illegality. The final say over this question now rests on the Permanent Court of Arbitration's analysis of the Chagossian MPA's value in law.

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<sup>87</sup> Peter Sand, no.24 above, at 236; Robertson QC, no.14 above, at 24. Note that the Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction (1997), to which the United Kingdom is a party, prohibits stockpiling of mines (article 1(b)) [available at: [http://www.un.org/Depts/mine/UNDocs/ban\\_trty.htm](http://www.un.org/Depts/mine/UNDocs/ban_trty.htm)]. The U.K.'s Department for International Development has itself produced a document entitled DFID Programme Strategy 2010 - 2013 Creating a safer environment: clearing landmines and other explosive remnants of war (available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/67692/de-mining-strat-16march2010.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67692/de-mining-strat-16march2010.pdf)).

<sup>88</sup> Jerry Hansen, "Cleanup Plan for Fuel Spills at Air Operations Ramp, Diego Garcia, British Indian Ocean Territory", Airforce Center for Environmental Excellence (1999), 1-17; Peter Sand, no.24 above, at 236.

<sup>89</sup> Hicham-Stéphane Afeissa, "L'éthique environnementale", in, Jean-Baptiste Jeangène Vilmer and Ryoa Chung (eds.), *Éthique des relations internationales* (2013), 414.



# *Exploration, Exploitation and Protection of the Mediterranean Continental Shelf*

NATHALIE ROS\*

**Summary:** I. Introduction; II. Legal regime of the Mediterranean continental shelf; A. Specificity of the Mediterranean continental shelf; B. Rights and obligations of coastal States; III. New offshore challenges in the Mediterranean Sea; A. Coastal States strategies; B. Mediterranean regional cooperation.

## I. INTRODUCTION

The Mediterranean is the largest and deepest semi-enclosed sea<sup>1</sup>, with twenty-one bordering States and the United Kingdom, as far as Gibraltar and the bases on Cyprus are concerned; eight of these Mediterranean States are also members of the European Union: Croatia, Cyprus, Greece, France, Italy, Malta, Slovenia, and Spain<sup>2</sup>.

The Mediterranean is a strategic area, the meeting-point of three continents, a vital axis of maritime communication, by far the largest global tourism destination, a unique and interdependent ecosystem<sup>3</sup>, and one of the world's thirty-four biodiversity hot spots. The Mediterranean Sea houses eight per cent of known marine species in only 0,8% of the global sea surface. Furthermore, as a semi-enclosed sea the Mediterranean closely relies on the three straits ensuring the connection to another sea or the ocean, Gibraltar to the Atlantic Ocean, the Turkish Straits to the Black Sea, and

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<sup>1</sup> With a surface of 2.51 million km<sup>2</sup> and a maximum depth of 5120 meters at Cape Matapan, off Greece.

<sup>2</sup> The other Mediterranean States are: Albania, Algeria, Bosnia and Herzegovina, Egypt, Israel, Lebanon, Libya, Montenegro, Monaco, Morocco, Syria, Tunisia, and Turkey.

<sup>3</sup> Maurizio Würtz, *Mediterranean Pelagic Habitat. Oceanographic and Biological Processes, An Overview*, Gland & Malaga, IUCN (2010).

the Suez Canal to the Red Sea. This is a geographical and oceanographic constraint, and one of the main characteristics of the Mediterranean basin whose waters consequently need almost a hundred years to be completely renewed. For these reasons, the Mediterranean can be defined not only as a semi-enclosed sea but as a fragile sea.

Currently offshore activities are growing in the Mediterranean, and the potential for resulting risks appears more and more worrying. Offshore exploration and exploitation activities include oil and gas extraction, as well as renewable energy generation and seabed mining for minerals, sand and gravel. Obviously the oil and gas industry is the most important part of the activities developed on the continental shelf; more than two hundred offshore platforms are already active, and more are under consideration due to recent discovery of large but deep and even ultra-deep fossil fuels reserves in the Mediterranean. Due to its semi-enclosed configuration, special hydrodynamics and seismic zones, these current prospects of offshore exploitation rise great concern, furthermore because of the recent and dramatic precedent of the Gulf of Mexico; if a similar accident took place in the Mediterranean Sea, it would have immediate and irreversible consequences.

Exploration and exploitation of the Mediterranean continental shelf are very important issues for the future, first because of the correlative necessity to protect the continental shelf and the particularly vulnerable environment of the Mediterranean from the accidental and functional impacts of offshore activities. Coastal States must take all the necessary measures in order to prevent exploration and exploitation from polluting the sea and destroying marine ecosystems; due to the *legal regime of the Mediterranean continental shelf* (II), they have all the jurisdiction and powers to cope with *new offshore challenges in the Mediterranean Sea* (III), but unfortunately it seems they'd sooner give priority to exploration and exploitation rather than to protection of the continental shelf...

## II. LEGAL REGIME OF THE MEDITERRANEAN CONTINENTAL SHELF

From the vantage point of International Law, the *specificity of the Mediterranean continental shelf* (A) is self-evident<sup>4</sup>; because of the geographical

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<sup>4</sup> On the different legal aspects of the global specificity of the Mediterranean Sea, Nathalie Ros, "Environmental protection of the Mediterranean Sea", 11 *Revista*

configuration of the sea, all the submarine space is under jurisdiction, submitted to the *rights and obligations of coastal States* (B).

### A. Specificity of the Mediterranean continental shelf

Indeed, the Mediterranean is a semi-enclosed sea, with a very particular topography; the size of the basin is small, with a lot of islands, promontories and peninsulas delineating separated basins, and the distance between the shores is nowhere over 400 nautical miles. Thus, *all the soil and subsoil are under national jurisdiction* (1), but *the continental shelf is not always delimited* (2) because of the difficulty induced by this special configuration.

#### 1. *All the soil and subsoil are under national jurisdiction*

Obviously this legal particularity of the Mediterranean is two-fold; it relates to both waters and submarine spaces. Probably the most evident aspect is that it is the only sea in the world where States initially refrained from systematically extending their jurisdiction up to 200 nautical miles, with the original tacit agreement not to proclaim exclusive economic zones (EEZs). But as far as the soil and subsoil are concerned, the situation is totally different because of the inherent nature of the continental shelf. In the Mediterranean, the configuration implies *a wholly appropriated and shared continental shelf* (b) and *neither Area nor extended continental shelf* (a).

##### (a) *Neither Area nor extended continental shelf*

Under the United Nations Convention on the Law of the Sea (UNCLOS), the Mediterranean belongs to the category of “enclosed and semi-enclosed seas” as defined by Part IX. The Mediterranean is an emblematic example

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de Estudios Jurídicos (2011), 95, 127 (at <http://revistaselectronicas.ujaen.es/index.php/rej/article/view/630>); “La mer Méditerranée: cas particulier et modèle avancé de gestion de la haute mer”, XVI Annuaire du Droit de la Mer (2011), 33, 62; “Régimes juridiques et gouvernance internationale de la mer Méditerranée”, in Mélanges offerts à Habib Slim, Du droit de la coopération internationale au droit de la communauté internationale, Paris Pédone (2014), forthcoming.



of this typology<sup>5</sup> it contributed to found and denominate<sup>6</sup>. Obviously all the criteria of definition laid down by Article 122 of UNCLOS are satisfied: the geographic criterion, *i.e.* “an ‘enclosed or semi-enclosed sea’ means a gulf, basin or sea”; the political criterion, *i.e.* “surrounded by two or more States”; and two alternative criteria: one geographic, *i.e.* “and connected to another sea or the ocean by a narrow outlet”, the other legal, *i.e.* “or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more States”.

Beneath the sea, the compliance of the Mediterranean configuration with the conventional definition implies a very particular situation, and the inapplicability of some of the dispositions of UNCLOS. According to the new Law of the Sea, the provisions of Part VI relating to the extended continental shelf, especially Article 76 and its dedicated paragraphs, can't provide a basis for States claims beyond 200 nautical miles. Indeed the size and configuration of the basin, with a lot of islands and peninsulas delineating separated basins, prevent any State submission to the Commission on the Limits of the Continental Shelf. Furthermore, Part XI as a whole is *a fortiori* deprived of application; there is no Area in the Mediterranean and no possible competence of the International Seabed Authority, because all the soil and subsoil are under national jurisdiction and constitute *a wholly appropriated and shared continental shelf*.

*(b) A wholly appropriated and shared continental shelf*

As regards superjacent waters beyond 12 nautical miles<sup>7</sup>, coastal States have to proclaim their exclusive economic zone in order to enjoy the sovereign rights and jurisdiction provided for by the 1982 Convention, especially Article 56 *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*. This explains why there still exist high seas by default in the Mediterra-

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<sup>5</sup> Jesús González Giménez, “La evolución del Derecho del mar desde el punto de vista de un mar semicerrado como el Mediterráneo”, 14 *Revista electrónica de estudios internacionales* (2007) at <http://www.reei.org/index.php/revista/num14/articulos/evolucion-derecho-mar-desde-punto-vista-mar-semicerrado-como-mediterraneo>.

<sup>6</sup> The concept and its conventional consecration are of Mediterranean origin; the notion was introduced on the basis of a proposal made by Algeria, and then supported by several delegations at the second session of the Conference; Madjid Benchikh, “La mer Méditerranée, mer semi-fermée”, *Revue générale de droit international public* (1980), 284, 297.

<sup>7</sup> Exceptions of Greece and Turkey, with territorial seas up to 6 miles, and of the very special case of United Kingdom with regard to Gibraltar and its military basis of Akrotiri and Dhekelia, in Cyprus, with a breadth of 3 miles.

nean, due to the initial reticence of coastal States to proclaim national zone, conventional and even non-conventional, up to 200 nautical miles<sup>8</sup>.

Beneath the sea, the legal situation has, of course, always been different, with continental shelves in fact existing *ipso facto et ab initio*, pursuant to Article 77 par. 3 of UNCLOS: “The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation”. The legal consequence is that all the Mediterranean continental shelf is appropriated and shared by the coastal States. Thus, notwithstanding the fact that the frontiers are not always delimited, the situation should be considered less uncertain than in the vast oceanic spaces where coastal States currently compete with each other beyond 200 miles.

Indeed, the entire Mediterranean soil and subsoil is under national jurisdiction with the disadvantage of a potentially fragmented legal regime, due to the exclusive competence of each coastal State in order to decide the conditions of exploration, exploitation and protection of its continental shelf. Some Mediterranean States being too permissive in the definition of the conditions of exploitation, the legal fragmentation can be a danger due to the interdependent nature of the semi-enclosed basin of the Mediterranean Sea; and the *cooperation of States bordering enclosed or semi-enclosed seas*<sup>9</sup>, stated by UNCLOS, is a necessity in order to prevent the efforts of some coastal States to be annihilated by the permissiveness of the others. Thereby, Article 123 specifies that “States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention”, especially “to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment”. This probably explains the existence, unique in the world, of the Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from

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<sup>8</sup> On the development of non-conventional zones, Tullio Treves, “Rapport général Action commune pour la protection de l’environnement marin”, in *Convergences méditerranéennes*, 3 *Revue de l’INDEMER* (1995), 82 ff.; “Les zones maritimes en Méditerranée: compatibilité et incompatibilité avec la Convention sur le droit de la mer de 1982”, in *Les zones maritimes en Méditerranée*, 6 *Revue de l’INDEMER* (2003), 23 ff.; Angela Del Vecchio, “In Mayore Stat Minus: A Note on the EEZ and the Zones of Ecological Protection in the Mediterranean Sea”, 39 *Ocean Development and International Law* (2008), 287, 297; and José Manuel Sobrino Heredia, “L’approche nationale en matière des zones maritimes en Méditerranée”, 13 *Anuario de la Facultad de Dereito da Universidade da Coruna* (2009), 753, 771.

<sup>9</sup> Article 123 UNCLOS.

Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, adopted in 1994, in the context of the Barcelona Convention, and entered into force on 24 March 2011.

Nevertheless, if some joint and transnational protection seems always possible, provided that some political will exists, the legal situation appears to be more complicated, in terms of exploration and exploitation, because *the continental shelf is not always delimited*.

## 2. *The continental shelf is not always delimited*

A better governance of the Mediterranean Sea should be a priority for the coastal States<sup>10</sup>, nevertheless in the case of a space so constricted with a lot of challenges, in terms of politics and geostrategy, but also of living and non-living resources, the determination of marine boundaries may be regarded as a Pandora Box; so *very few delimitations are performed* (a) and *many delimitation conflicts exist* (b).

### (a) *Very few delimitations are performed*

In a general way, relatively few maritime frontiers are determined in the Mediterranean, not only regarding the continental shelf but also the superjacent waters. Italy seems to have been very active in order to determine its maritime limits<sup>11</sup>, but Monaco and Bosnia and Herzegovina are the two only coastal States to have determined all of their maritime frontiers; however their geographical specificity, as coastal States, largely explains this legal exemplarity. Only five territorial seas are delimited: between Cyprus and United Kingdom as regards the sovereign base areas of Akrotiri and Dhekelia; Italy and Yugoslavia in the Bay of Trieste; France and Monaco; France and Italy in the Strait of Bonifacio; Bosnia and Herzegovina and Croatia. As regards EEZs, only Cyprus and Egypt, and Cyprus and Israel have concluded *sui generis* agreements that have entered into force<sup>12</sup>.

<sup>10</sup> IUCN, *Vers une meilleure gouvernance de la Méditerranée/Towards a better Governance of the Mediterranean*, Gland & Malaga, IUCN (2010).

<sup>11</sup> Tullio Scovazzi, "The delimitation of national coastal zones: the agreement concluded by Italy", in *Les implications juridiques de la ratification de la Convention des Nations Unies sur le droit de la mer*, Symposium international Agadir, Institut universitaire de la recherche scientifique Rabat (2010), 137, 168.

<sup>12</sup> Emmanuella Doussis, "L'Accord du 17 février 2003 entre Chypre et l'Égypte sur la délimitation de leurs zones économiques exclusives", IX *Annuaire du Droit de la Mer*

With regard to the continental shelf, Italy had defined its limits with Yugoslavia in the Adriatic Sea, as well as with France, Spain, Tunisia and Greece; henceforth, new problems have appeared in the case of the Adriatic Sea with the geopolitical changes subsequent to the emergence of new independent States in the region. Libya has set its delimitation with Tunisia and Malta in application of two decisions of the International Court of Justice, the judgments of 24 February 1982<sup>13</sup> and 3 June 1985<sup>14</sup> in the two *Continental Shelf* cases. The continental shelf limits are also defined between France and Monaco, and Croatia and Bosnia and Herzegovina, two specific cases from the vantage point of coastal geography.

Except Italy, Mediterranean coastal States have so far preferred not to delimit their continental shelf in the absence of identified offshore deposits; *a contrario*, the case of Libya can certainly be considered as confirming this analysis. In fact, *many delimitation conflicts exist*, as evidenced by recent States strategies dedicated to offshore exploitation and paradoxically founded on the EEZ.

(b) *Many delimitation conflicts exist*

The initial reticence of Mediterranean States to proclaim exclusive economic zones, and even non-conventional zones, combined with the functional primacy of the principle of the single line of delimitation<sup>15</sup>, seems to have highly contributed to this situation. States wanted to reserve their rights and jurisdiction both over the continental shelf and in the superjacent waters, generally not yet declared and claimed. Furthermore, as the continental shelf doesn't need to be proclaimed, the identification of overlapping zones appears less obvious and their existence can be managed more easily than in the case of the exclusive economic zone. But the situation is changing now, especially in the Eastern part of the Mediterranean where the delimitation of EEZs is used in order to permit offshore exploitation, even before proclaiming the zone, and without any delimitation of the corresponding continental shelf.

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(2004), 143, 156; and Haritini Dipla, "Ressources énergétiques et limites maritimes en Méditerranée orientale", XVI Annuaire du Droit de la Mer (2011), 63, 85.

<sup>13</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982, p. 18.

<sup>14</sup> Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985, p. 13.

<sup>15</sup> Giuseppe Cataldi, "La ligne unique de délimitation? Application en Méditerranée", VII Annuaire du Droit de la Mer (2002), 227, 238.

The scarcity of the delimitations is notably due to the risks of conflict resulting from the geographical configuration of the Mediterranean, not only the relative narrowness of the basin but more concretely the existence of possible tripoints and the presence of islands. But it's obvious that some geopolitical problems specific to the Mediterranean are also involved: disputes between Morocco and Spain in the Alboran Sea, between Greece and Turkey in the Aegean Sea, Cyprus and Israel cases, etc... They are mere examples but show that the fear to open the Pandora Box is not the only reason of the situation.

Delimitation conflicts exist and uncertainties remain in areas of overlapping jurisdictions and pretensions; this is probably going to change under the pressure of operational necessities, but as of today the legal situation of the Mediterranean continental shelf is thus not totally determined spatially, especially as regards *rights and obligations of coastal States*.

## **B. Rights and obligations of coastal States**

A fundamental principle of any legal system is that there are no rights without obligations. In the spirit of UNCLOS, *coastal States rights of exploration and exploitation* (1), pursuant to Part VI *Continental Shelf*, imply that *coastal States correlative obligations of protection* (2) also exist, according to some of its dispositions and *a fortiori* to Part XII *Protection and preservation of the marine environment*.

### **1. Coastal States rights of exploration and exploitation**

The dynamic of territorialisation of the sea is self-evident in the case of the continental shelf, although the soil and subsoil are not a zone of sovereignty but an area of jurisdiction, where coastal States have *sovereign and exclusive rights* (a) but *economic and functional rights* (b).

#### *(a) Sovereign and exclusive rights*

As stated by Article 77 of UNCLOS, “the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources” (par. 1); furthermore, these “rights [...] are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without [its] express consent” (par. 2).

In other words, there exists a State monopoly as regards exploration and exploitation of the continental shelf and its resources. As frequently provided in national constitutions and legislations, they are the property of the nation or the State, in the sense of International Law, that is to say federal or even regional States.

The coastal State is the one and only authority competent to explore, exploit or authorize offshore exploration and exploitation. It delivers licenses, permits and any kind of authorizations, defines the procedural, formal and material requirements. Furthermore, pursuant to Articles 60 (*Artificial islands, installations and structures in the exclusive economic zone*) and 80 (*Artificial islands, installations and structures on the continental shelf*) of UNCLOS, the coastal State has the exclusive right to construct, and to authorize and regulate the construction, operation and use of artificial islands, and other installations and structures, with exclusive jurisdiction over them.

Even in the case of a State whose constitution recognizes autonomy, as Spain for example, the central government enjoys all these rights. Thus the permits published by the Spanish Government in 2013, even before the proclamation of the Mediterranean EEZ, in the northwestern part of the coast, and half of them in the grey zone<sup>16</sup>, appear to be not only the affirmation of the sovereign and exclusive rights of Spain *vis-à-vis* France, but also undoubtedly, in the current context of the Catalan separatist claims, *vis-à-vis* the Catalan Generality<sup>17</sup> and people who are very environmentally concerned and reluctant towards the exercise of these *economic and functional rights*<sup>18</sup>.

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<sup>16</sup> Boletín Oficial del Estado, Núm. 15, Jueves 17 de enero de 2013, Sec. V-B. Pág. 2208-2211, Anuncio 1673 Resolución de la Dirección General de Política Energética y Minas por la que se publican las solicitudes de los Permisos de Investigación de Hidrocarburos denominados “Nordeste 1”, “Nordeste 2”, “Nordeste 3”, “Nordeste 4”, “Nordeste 5”, “Nordeste 6”, “Nordeste 7”, “Nordeste 8”, “Nordeste 9”, “Nordeste 10”, “Nordeste 11” y “Nordeste 12”, expedientes n.º 1.674 a 1.685; <http://www.boe.es/boe/dias/2013/01/17/pdfs/BOE-B-2013-1673.pdf>.

<sup>17</sup> “El Govern tem les possibles conseqüències de la cerca d’hidrocarburs a la Costa Brava”, Diari de Girona, 16 de juny de 2013; <http://www.diaridegirona.cat/catalunya/2013/06/11/govern-tem-possibles-consequencies-cerca-dhidrocarburs-costa-brava/621530.html>.

<sup>18</sup> The projects raised great concern and opposition in Catalonia, not only from ecologists but also from citizens and municipalities of the Costa Brava; Nota de premsa, 21 de febrer de 2013, Dinou entitats catalanes s’uneixen per recollir signatures contra les prospeccions marines a la costa catalana, <http://www.iaeden.cat/Adocs/tecnica/2013/alegacionsprospeccions2.pdf>. Appeals were even submitted to the Sub-delegation of the Spanish State in Girona; “Al·legacions con-

(b) *Economic and functional rights*

The coastal State's rights are not only sovereign and exclusive, but also economic and finalized, in that they are oriented towards the exploration and exploitation of the "natural resources" of the continental shelf, which "consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species" (article 77 par. 4).

Obviously, the most important part of the natural resources of the continental shelf are mineral resources and especially hydrocarbons, oil and gas; but seabed mining for other minerals may also be involved particularly outside the Mediterranean, as well as exploitation of underwater sand deposits to replenish beaches. As far as living resources are concerned, only sedentary species are expressly mentioned, such as some species of lobsters and crabs, oysters, abalones, sponges and clams, but also deep-water corals and other sedentary species inhabiting seamounts and hydrothermal vents; so, some experts and stakeholders now raise the question of biological resources, *i.e.* marine genetic resources<sup>19</sup>, although it makes sense only on the extended continental shelf and thus not in the Mediterranean.

The coastal State's rights are functional and especially dedicated to the economic exploitation of these resources. They obviously include exploration and even the preliminary phase of prospection. In other words, the coastal State is exclusively competent to define the legal regime of exploitation of the resources on the continental shelf, and more and more in correlation with the EEZ. The national legislation may encourage economic activities or on the contrary be more precautionary, in order to protect national resources and/or the environment. To enjoy its rights, the State has to adopt a legislation dedicated to the exploration and exploitation of the continental shelf; the rules can also be partly or wholly integrated in the legislation relative to mining activities in general, as in France with the *Code minier*. The legal regime includes the authority competent to deliver authorizations, the procedural and material conditions of the permits, including obligations of security and obligations relating to the environment, the material and le-

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tra les prospeccions d'hidrocarburs a la costa", *Diari de Girona*, 14 de març de 2013, <http://www.diaridegirona.cat/comarques/2013/03/14/allegacions-contraprospiccions-dhidrocarburs-costa/608565.html>.

<sup>19</sup> Gérard Grignon, *L'extension du plateau continental au-delà des 200 milles marins: un atout pour la France*, *Avis du Conseil économique, social et environnemental*, *Journal officiel de la République française* (2013), 27 and 143.

gal conditions of production and extraction, transport and storage but also, generally, some monetary and fiscal legislation aspects.

But a coastal State can also authorize offshore exploration and exploitation without any financial compensation, such as France under a legal framework now applicable in the Mediterranean Sea. Indeed, in 1993 an amendment was adopted, the so-called “*amendement Auberge*”, named after its promoter<sup>20</sup>, which has modified the *Code minier* in order to prevent the collection of taxes and fees in the case of offshore deposits<sup>21</sup>. In 2011, a new amendment has been introduced, instigated by overseas communities, in order to allow the introduction of a tax, but not exceeding 12% and allocated 50% to the State and 50% to the region or collectivity<sup>22</sup>; integrated in the *Code minier*<sup>23</sup>, this text should enter into force on 1<sup>st</sup> January 2014 but it supposes an application decree officially not expected before 2015<sup>24</sup>, and officiously not assumed to be effectively adopted, given the sensitivity of a part of the French political class to the strong lobby of the oil and gas industry...

Obviously, this kind of attitude is not in favor of the effective exercise of *coastal States correlative obligations of protection* of their continental shelf.

## 2. Coastal States correlative obligations of protection

Under contemporary International Law of the Sea, coastal States' rights are associated with *general and particular environmental obligations* (a), especially *to cope with pollution from exploration and exploitation* (b) of the continental shelf.

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<sup>20</sup> Article 27 of the Loi n° 93-1352 du 30 décembre 1993 de finances pour 1994; <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069145>.

<sup>21</sup> Article 31 of the Code minier; [http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=7A3FC952D336661ACD13FE593C7C7A1E.tpdjo02v\\_3?cidTexte=LEGITEXT000006071785&idArticle=LEGIARTI000006627163&dateTexte=20131210&categorieLien=id#LEGIARTI000006627163](http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=7A3FC952D336661ACD13FE593C7C7A1E.tpdjo02v_3?cidTexte=LEGITEXT000006071785&idArticle=LEGIARTI000006627163&dateTexte=20131210&categorieLien=id#LEGIARTI000006627163).

<sup>22</sup> Article 52 of the Loi n° 2011-1978 du 28 décembre 2011 de finances rectificative pour 2011; <http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=?cidTexte=JORFTEXT000025045613&dateTexte&oldAction=rechJO&categorieLien=id>.

<sup>23</sup> Article L132-16-1 of the Code minier (nouveau); [http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=3DECB92476040D76D178B6D78754AAA5.tpdjo08v\\_2?cidTexte=LEGITEXT000023501962&idArticle=LEGIARTI000025067949&dateTexte=](http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=3DECB92476040D76D178B6D78754AAA5.tpdjo08v_2?cidTexte=LEGITEXT000023501962&idArticle=LEGIARTI000025067949&dateTexte=)

<sup>24</sup> Echéancier de mise en application de la Loi n° 2011-1978 du 28 décembre 2011 de finances rectificative pour 2011; <http://www.legifrance.gouv.fr/affichLoiPubliee.do?idDocument=JORFDOLE000024807893&type=echeancier>.



(a) *General and particular environmental obligations*

Obviously, the right to exploit resources should not prevent States from protecting the continental shelf. On the contrary, both aspects have to be balanced in the new Law of the Sea, as Part XII of UNCLOS imposes the legal objective of *Protection and preservation of the marine environment* in accordance with the economic purpose of exploitation and human activities.

The general obligation is a well-known principle of Environmental Law, transposed into the Law of the Sea and stated at Article 192 of UNCLOS: “States have the obligation to protect and preserve the marine environment”. It implies that “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment”, as provided for in Article 193.

Part XII recognizes the legal obligation to protect and preserve the marine environment, but essentially within a utilitarian logic, finalized and functional, and in connection with economic usages of the sea. This is the sense of all the *measures to prevent, reduce and control pollution of the marine environment* detailed in Article 194. In the same spirit, Article 206 also requires *assessment of potential effects of activities*: “when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments”. In contemporary International Law, conventional and customary, regional and universal, an environmental impact assessment is now generally required, and can be defined as “a process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human health impacts, both beneficial and adverse”<sup>25</sup>; this is particularly important and desirable in order to assess the risks related to offshore exploration and exploitation.

Actually, Part XII calls for States to fight against the various forms of pollution that may affect the marine environment, and thus to contain and limit as much as possible the potentially harmful effects of corresponding

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<sup>25</sup> Voluntary Guidelines on biodiversity-inclusive impact assessment, Annex to Decision VIII/28 on Impact Assessment of the Convention on Biological Diversity (CBD), 8<sup>th</sup> Conference of the Parties (COP), par. 5; <https://www.cbd.int/decision/cop/default.shtml?id=11042>.

activities. Six different kinds of pollution are identified in UNCLOS: *pollution from land-based sources* (Article 207), *pollution from seabed activities subject to national jurisdiction* (Article 208), *pollution from activities in the Area* (Article 209), *pollution by dumping* (Article 210), *pollution from vessels* (Article 211), and *pollution from or through the atmosphere* (Article 212).

Navigation and offshore exploitation are generally considered the most important and dangerous forms of marine pollution. Article 208, dedicated to *pollution from seabed activities subject to national jurisdiction*, provides in particular that “coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction”. It directly refers to the so-called offshore activities, the development of which imposes the effectiveness of the correlative obligations *to cope with pollution from exploration and exploitation* of the continental shelf.

*(b) To cope with pollution from exploration and exploitation*

So, coastal States have the legal obligation and all the necessary jurisdiction and powers to protect the marine environment against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil. If some specific fisheries and use of underwater sand deposits to replenish beaches may be concerned, most of the risks are related to exploitation of hydrocarbons, but also to exploration activities, especially by the oil and gas industry.

Exploration and prospection activities have harmful impacts on the marine and coastal environment. They encompass scientific research concerning the resources of the seabed and its subsoil, seismological activities, surveys of the seabed and its subsoil, sample taking, and exploration drilling. The methods used, such as seismic operations, sonars, air guns and drillings, generate noise, especially underwater noise, a well-known form of pollution; noise is energy introduced into the marine environment with deleterious effects, as harm to living resources and marine life, especially cetaceans. Science is only just beginning to understand the impact that noise disturbances may have on marine life; associated with offshore activities, noise may interfere with communication calls and displace species to new habitats as argued by Catalan citizens, ecologists and municipalities of the Costa Brava region<sup>26</sup>.

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<sup>26</sup> Nota de premsa, n. 18 above.

Obviously, offshore exploitation is even more dangerous for the environment; it includes extraction and production activities generally speaking, *i.e.* establishment of an installation for the purpose of recovering resources, and activities connected therewith, development drilling, recovery, treatment and storage, transportation to shore by pipeline and loading of ships, maintenance, repair and other ancillary operations. The pollution is both functional and incidental, with direct and indirect impacts on the marine and coastal environment, including wetlands and salt marshes. Major incidents such as large oil spills are not the only form of harmful pollution resulting from offshore exploitation; although they receive less attention, frequent smaller spills, including functional pollution, may be more important in the long term.

Actually, there is limited scientific understanding of the effects of oil on marine organisms and biological systems and processes, but direct impacts could include death of a wide variety of marine species, behavioural disturbances, including changes in feeding, reproduction and migration, airborne emissions of chemicals from controlled burns, microbial blooms, hypoxia *i.e.* lowering of oxygen concentrations in water, toxic effects of chemicals used to disperse oil. But potential hazards posed by offshore oil and gas activities may also result from noise, seafloor and geological disturbances caused by explosions and drilling, drill cuttings (barium rich drilling by-products deposited on the seabed), produced water (seawater mixed with oil). At the end of the process, potentially permanent damage may result from the use of explosives in the decommissioning of offshore installations.

Cooperation between the coastal State and the oil and gas industry is required to address the environmental consequences resulting from exploration and exploitation of the continental shelf; this is particularly obvious in a semi-enclosed sea with a very important seismic activity, but also includes awareness raising and international cooperation to meet the *new offshore challenges in the Mediterranean Sea*.

### III. NEW OFFSHORE CHALLENGES IN THE MEDITERRANEAN SEA

Up to now, the oil and gas industry is not as well established in the Mediterranean region as in other parts of the world, but current perspectives exist. The number of offshore exploitation and exploration installations is increasing in the Mediterranean, mostly due to the significant hydrocarbon reservoirs located along Italy's Adriatic coast, the Greek Aegean

Sea, in the Gulf of Gabes close to the coasts of Tunisia, but also in the Eastern and Western Mediterranean. An evaluation is very difficult, there would be 400 wells in Spain and Italy alone<sup>27</sup>, but only about ten research platforms, mainly in Italy and Egypt, and sixty four operating platforms in Italy, Tunisia, and Libya, regardless of Algerian platforms whose number is unknown<sup>28</sup>. In December 2012, the European Union considered that “there are more than 200 active offshore platforms in the Mediterranean and more installations are under consideration”<sup>29</sup>.

Furthermore, new deposits have been discovered that may be exploited, since deep and even ultra-deep drilling<sup>30</sup> is now possible, but the risks involved in a fragile and semi-enclosed sea, as the Mediterranean, are very important. *Coastal States strategies* (A) have become essential, but a balance must be struck between exploration and exploitation on the one hand, and protection on the other hand, what implies *Mediterranean regional cooperation* (B).

## A. Coastal States strategies

Pursuant to Article 77 par. 1 of UNCLOS, “the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and ex-

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<sup>27</sup> Science for Environment Policy, DG Environment News Alert Service, Offshore Exploration and Exploitation in the Mediterranean. Impacts on Marine and Coastal Environments, Future brief, Issue number 3, April 2012, p. 2.

<sup>28</sup> The data communicated by the Institut Français du Pétrole (IFP) is only an evaluation; Roland Courteau, Rapport sur La pollution de la Méditerranée: état et perspectives à l’horizon 2030, Office parlementaire d’évaluation des choix scientifiques et technologiques, France (2011), 44-45.

<sup>29</sup> Council Decision of 17 December 2012 on the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil, (2013/5/EU), Official Journal of the European Union, 9 January 2013, L 4/13, par. 4; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:004:0013:0014:EN:PDF>.

<sup>30</sup> There is no generally accepted definition of deep and ultra-deep drilling. Total considers offshore drilling as “conventional” up to 400 meters, “deep” between 400 meters and 2000 meters, and “ultra-deep” beyond 2000 meters; Jacques Beall & Alain Feretti, De la gestion préventive des risques environnementaux: la sécurité des plateformes pétrolières en mer, Avis du Conseil économique, social et environnemental, Journal officiel de la République française (2012), 10. But according to some sources, the deep offshore is more than 1000 meters, and the ultra-deep beyond 1500 meters; for others, deep offshore is over 500 meters below sea level and ultra-deep more than 1000 meters.

exploiting its natural resources". Paradoxically, both *in the eastern part* (1) and *in the western part of the Mediterranean* (2), coastal States have rather developed strategies founded upon the concept of EEZ, in order to define the legal framework of current and future exploration and exploitation activities.

### ***1. In the eastern part of the Mediterranean***

From the geopolitical point of view, the Eastern Mediterranean is a very complex and conflicting region. *Legal strategies founded on the EEZ* (b) may be seen as a way to outmatch this situation, providing the oil and gas industry with a legal framework for the exploration and exploitation of *the continental shelf resources of the region* (a); but political and delimitation conflicts still exist in the Levantine basin and will be difficult to resolve.

#### *(a) The continental shelf resources of the region*

In the eastern part of the Mediterranean, huge gas fields have been discovered off the coast of Israel and off the southern coast of Cyprus, while increasing explorations are developed in the region, off Syria, Lebanon and Egypt.

Offshore gas reserves also exist off Palestine, in the so-called Gaza Marine fields which are contiguous to several Israeli offshore gas facilities. They were the first gas fields discovered in 2000, jointly to Yam Thetis situated in the Israeli waters.

But the most important gas reserves off Israel were discovered later: in January 2009, Tamar situated 48 nautical miles off Haifa and exploited since April 2013; in December 2010, Leviathan, the most promising site, located further offshore to the West, 72 nautical miles off Haifa, in a very conflicted area, between Israel and Lebanon, near Cyprus waters.

Off the South of Cyprus, lie the Aphrodite gas fields discovered in September 2011 and partly claimed by Turkey.

Due in part to the geopolitical context, and to the legal particularities of the region where Israel, Syria, and Turkey are not parties to UNCLOS, coastal States have chosen very specific strategies, not founded on the continental shelf, but on the exclusive economic zone, *i.e. legal strategies founded on the EEZ*.

#### *(b) Legal strategies founded on the EEZ*

They have negotiated bilateral agreements of delimitation of the exclusive economic zone, before proclaiming their EEZ, when they finally decided to proclaim it<sup>31</sup>.

The first agreement was signed between Cyprus and Egypt on 17 February 2003<sup>32</sup>. Egypt has never officially claimed an EEZ; upon its ratification of UNCLOS, on 26 August 1983, Egypt only states that “the Arab Republic of Egypt will exercise as from this day the rights attributed to it by the provisions of Parts V and VI of the United Nations Convention on the Law of the Sea in the exclusive economic zone situated beyond and adjacent to its territorial sea in the Mediterranean Sea and in the Red Sea”<sup>33</sup>. On the other hand, the proclamation of the Cypriot EEZ took place under the law of 5 April 2004, with a retroactive effect to 21 March 2003<sup>34</sup>. The second agreement was signed between Cyprus and Lebanon in January 2007, but it was never ratified by the Lebanese Parliament; it’s not in force. In July and August 2010, Lebanon, that had not claimed an EEZ before, deposited lists of geographical coordinates with the Secretary-General of the United Nations, in order to define the limits of its EEZ with Israel. On 20 June 2011, Lebanon has officially contested the third agreement concluded between Cyprus and Israel in December 2010, using one point defined in the 2007 agreement, not in force, as starting point<sup>35</sup>. In reaction to the Lebanese pretensions, Israel has communicated its own list of coordinates to the Secretary General, on 12 July 2011; thereby, it defines a delimitation line creating an overlapping with the EEZ of Lebanon that had proposed its own delimitation line in September 2011. In this area, a delimitation conflict exists between Israel and Lebanon, and will be difficult to resolve because the legal dispute is exacerbated by the political problems<sup>36</sup>.

All these three agreements are obviously not recognized by Turkey...<sup>37</sup>

From the vantage point of International Law, coastal States do not need to claim an EEZ to exercise their jurisdiction over the resources of the soil

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<sup>31</sup> H. Dipla, n. 12 above, 63, 85.

<sup>32</sup> E. Doussis, n. 12 above, 143, 156.

<sup>33</sup> Declaration of Egypt, upon ratification, 26 August 1983; [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#Egypt](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Egypt).

<sup>34</sup> Official Gazette of the Republic of Cyprus, n° 3831, 5 April 2004, p 952-955.

<sup>35</sup> With the effect of making this point (33° 38' 40" North, 33° 53' 40" East) a tripoint between Cyprus, Israel and Lebanon.

<sup>36</sup> H. Dipla, n. 12 above, 78-79.

<sup>37</sup> Part of the Turkish arguments is founded on the Law of the Sea, but most of them are political and related to Cyprus, and the protection of the interests of the Turkish Republic of Northern Cyprus; see H. Dipla, n. 12 above, 73-78.

and subsoil; their sovereign rights over the continental shelf provide them with all the necessary competences and powers. Paradoxically in the Levantine basin, they have chosen to develop a legal strategy founded on the EEZ, in order not to deal with fisheries or environmental protection but to define and enhance the legal framework for the exploration and exploitation of the resources of the continental shelf. It's partly due to the political situation, and the existence of sovereignty and delimitation conflicts; maybe other reasons are related to the additional competences offered by the EEZ in order to organize the exploitation, for example the transport of gas or oil, or a joint management of the transboundary resources<sup>38</sup>.

The strategy based on the EEZ is also a way to affirm, or reaffirm, sovereign rights that are inherent from the point of view of the continental shelf<sup>39</sup>. But this entails a legal confusion between the EEZ and the continental shelf, leaving open the question of the single line of delimitation; a trend confirmed by the evolution recently initiated *in the western part of the Mediterranean*.

## 2. *In the western part of the Mediterranean*

In the Western Mediterranean, the problem is not originally geopolitical as in the Levantine basin; but it has contributed to reactivate the frontier dispute between France and Spain. Often presented as mainly environmental, the reasons of the evolution are actually economic in a region, the Gulf of Lions, where the potentialities are great, not only in oil and gas<sup>40</sup>, but maybe also in methane hydrates<sup>41</sup>.

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<sup>38</sup> The two agreements in force state that contracting Parties shall cooperate in order to conclude a framework unitization agreement for the joint development and exploitation of resources.

<sup>39</sup> Article 77 par. 3 UNCLOS: "The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation".

<sup>40</sup> One of the objectives of the Gulf of Lions Drilling project, the so-called GOLD project, is precisely dedicated to the discovery of hydrocarbon reservoirs. Cf. Rabineau and al, "Drilling below the salt in the Western Mediterranean Sea: the GOLD (Gulf of Lion Drilling) Project", [http://www.nsf-margins.org/Planning\\_and\\_review/White\\_Papers/Rabineau\\_etal.pdf](http://www.nsf-margins.org/Planning_and_review/White_Papers/Rabineau_etal.pdf); see also on the IFREMER website, Le forage GOLD (Gulf Of Lions Drilling project), <http://wwz.ifremer.fr/drogm/Activites/Geodynamique#GOLD>.

<sup>41</sup> See, the map Projected distribution of methane hydrate globally, on the JOGMEC (Japan Oil, Gas and Metals National Corporation) website; [https://www.jogmec.go.jp/english/oil/technology\\_015.html](https://www.jogmec.go.jp/english/oil/technology_015.html).

The *French proclamation of EEZ* (a) was considered necessary to explore and above all to exploit the resources of the soil and subsoil, and the *Spanish proclamation of EEZ* (b) is its direct consequence in order to preserve the rights of Spain, *a fortiori* in the domestic political context due to the Catalan separatist claims.

(a) *French proclamation of EEZ*

In the Gulf of Lions, indeed, the challenges are both economic and environmental, as shown by the case of the Melrose permit, South of Marseilles and Toulon, in the *Rhône Maritime* area, close to the Natural Park of the *Calanques* and the PELAGOS Sanctuary, in a deep, ultra-deep, zone (1500-2000 meters) with a very important seismic activity<sup>42</sup>.

When the Scottish company, Melrose, asked for the renewal of the prospecting license granted by the French Government in 2002 and extended until 2010, in order to explore the zone by 2013, the public opinion was aware of the danger of deep drilling, following the Deepwater Horizon disaster in the Gulf of Mexico, in 2010; so, this petition raised great concern in France because of the irreversible consequences an accident on a Mediterranean platform would have on the Mediterranean biodiversity<sup>43</sup>. Finally in April 2012, one month before the presidential elections, the then-President announced the renewal of the permit was refused<sup>44</sup>; but the question is still open for the future, notwithstanding political declarations of the former and current governments<sup>45</sup>.

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<sup>42</sup> In order to have more information on this subject, see <http://permisrhonemaritime.over-blog.com/>.

<sup>43</sup> Assemblée nationale, Question écrite N°: 11780 de M. François-Michel Lambert (Écologiste - Bouches-du-Rhône), Question publiée au Journal Officiel le: 27/11/2012 page: 6891, Réponse publiée au Journal Officiel le: 10/09/2013 page: 9451, <http://questions.assemblee-nationale.fr/q14/14-11780QE.htm>.

<sup>44</sup> "Sarkozy dit "non" à la recherche d'hydrocarbures en Méditerranée", Reuters, 6 avril 2012; <http://fr.reuters.com/article/idFRL6E8F60Y520120406>.

<sup>45</sup> A contentious appeal of Melrose is still underway; Réponse conjointe des Ministères de l'Écologie, du Développement durable et de l'Énergie, et du Redressement productif, 11 juin 2013, <http://permisrhonemaritime.over-blog.com/>.



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- <sup>46</sup> On the French Ecological Protection Zone, see Loi n° 2003-346 du 15 avril 2003 relative à la création d'une zone de protection écologique au large des côtes du territoire de la République, Journal Officiel de la République française, n° 90, 16 avril 2003, page 6726, texte n° 1, [http://www.legifrance.gouv.fr/affichTexte.do?sessionId=1A5A95ABB679FBE25709EA19EA06CFA7.tpdjo11v\\_2?cidTexte=JORFTEXT000000236767&categorieLien=id](http://www.legifrance.gouv.fr/affichTexte.do?sessionId=1A5A95ABB679FBE25709EA19EA06CFA7.tpdjo11v_2?cidTexte=JORFTEXT000000236767&categorieLien=id); Décret n° 2004-33 du 8 janvier 2004 portant création d'une zone de protection écologique au large des côtes du territoire de la République en Méditerranée, Journal Officiel de la République française, n° 8, 10 janvier 2004, page 844, texte n° 19, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000431632&dateTexte=&categorieLien=id>.
- <sup>47</sup> Opening Speech of Delphine Batho, Minister of Ecology, Sustainable Development and Energy, International Conference La Haute mer, avenir de l'humanité. Quelle gouvernance pour une gestion durable de l'océan ?, Conseil économique, social et environnemental (CESE), Paris 11 avril 2013: "On m'interroge souvent sur un projet en particulier qui inquiète, en mer Méditerranée: il s'agit du permis exclusif de recherches d'hydrocarbures dit permis « Rhône Maritime », dont était détentrice la société Melrose. La société titulaire de ce permis en a demandé le renouvellement le 15 juillet 2010 à un moment où les dispositions du code minier n'étaient pas applicables sur cette zone qui relevait alors de la zone de protection écologique (la ZPE) instituée en Méditerranée à titre provisoire dans l'attente de la délimitation de la zone économique exclusive française. Or, dans une zone de protection écologique - dont l'objet je le rappelle était de lutter contre les dégazages sauvages - l'exploration et l'exploitation des ressources naturelles sont interdites. Donc, au moment de la demande, le ministre compétent était tenu de rejeter cette demande. Ce rejet est intervenu implicitement au bout de deux mois, de même qu'a été rejeté le recours gracieux formé par la société. L'état du droit est donc que la demande de prolongation de ce permis était irrecevable, qu'elle a été rejetée. Rien ne saurait me faire légalement obligation de revenir sur cette position. On m'interroge parfois sur cet ancien permis de recherche d'hydrocarbure. La situation est parfaitement claire et je vous le confirme: les craintes n'ont plus lieu d'être". This interpretation was confirmed, five months later, to the French Assemblée nationale: "Il a bien été statué sur ces demandes de prolongation puis de mutation qui sont intervenues dans un contexte juridique particulier. En effet, le périmètre de ce permis portait sur une zone qui se trouvait, à l'époque où ces demandes ont été formées, comprise dans la zone de protection écologique (ZPE) instituée, à titre provisoire, afin de lutter contre les dégazages sauvages des navires en Méditerranée. Or, à la différence d'une zone économique exclusive (ZEE), l'État français ne détenait, dans cette zone de protection, aucun droit de souveraineté lui permettant d'autoriser l'exploration, à fortiori l'exploitation, des ressources du sous-sol. En outre, dans cette zone de protection écologique, les activités minières étaient interdites. Au moment où les demandes ont été faites, les autorités françaises étaient en conséquences tenues de rejeter ces demandes comme irrecevables, au regard du droit applicable dans cette zone. Les règles du code minier n'étant par définition pas applicables à ce permis, ce sont les règles

Indeed, in the legal context at the moment of this decision, exploration and exploitation of natural resources were impossible in the Mediterranean because they were prohibited in the ecological protection zone<sup>46</sup>, where the *Code minier* was inapplicable<sup>47</sup> pursuant to Article L133-4<sup>48</sup>.

But the legal situation is now totally different. France has proclaimed an EEZ, where the exploitation of resources is not only allowed but facilitated... More than three years after the first announcement, on 24 August 2009, by the then-Minister of Environment<sup>49</sup>, France finally took the decision to declare an EEZ in the Mediterranean, on 12 October 2012<sup>50</sup>, in order to facilitate the exploitation of the Mediterranean continental shelf. Of course the official reasons have not been made public by the Government<sup>51</sup>; several objectives are mentioned in the text<sup>52</sup>: exploration, exploitation, conservation

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de rejet de droit commun qui s'y appliquaient. Il y a donc lieu de retenir que ces demandes ont fait l'objet d'un rejet implicite dans un délai de deux mois suivant leur dépôt. Aucune circonstance de fait ou de droit, en particulier le fait qu'un précédent permis ait été délivré ou que la zone économique exclusive sur laquelle l'État français peut exercer des droits économiques ait été finalement délimitée postérieurement à ces demandes, n'est de nature à changer le statut de ces demandes rejetées implicitement. C'est pourquoi ce permis a été retiré de la liste des permis en cours de validité disponible sur le site du ministère"; Assemblée nationale, Question écrite, n. 43 above.

<sup>48</sup> [http://www.legifrance.gouv.fr/affichCodeArticle.do?sessionId=201ACE02352F-6BE0C7430B8B811327F9.tpdjo06v\\_2?cidTexte=LEGITEXT000023501962&idArticle=LEGIARTI000023504368&dateTexte=20110905&categorieLien=id](http://www.legifrance.gouv.fr/affichCodeArticle.do?sessionId=201ACE02352F-6BE0C7430B8B811327F9.tpdjo06v_2?cidTexte=LEGITEXT000023501962&idArticle=LEGIARTI000023504368&dateTexte=20110905&categorieLien=id).

<sup>49</sup> Jean-Louis Borloo had declared to the AFP (Agence France Presse): "Le gouvernement français a décidé de décréter une ZEE en Méditerranée [...] sur le périmètre approximatif de 70 milles qui correspond à la zone actuelle de protection écologique que nous avons déjà"; he had mainly justified this "prochaine proclamation" by the protection of the fishery resources, but without excluding mineral resources... "La France va décréter une zone économique exclusive (ZEE) en Méditerranée", AFP, 25 août 2009; <http://euro-mediterranee.blogspot.com/2009/08/la-france-va-decreter-une-zone.html>.

<sup>50</sup> Décret n° 2012-1148 du 12 octobre 2012 portant création d'une zone économique exclusive au large des côtes du territoire de la République en Méditerranée, Journal Officiel de la République française, n° 0240, 14 octobre 2012, page 16056, texte n° 5; <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026483528&dateTexte=&categorieLien=id>.

<sup>51</sup> N. Ros (2014), n. 4 above.

<sup>52</sup> See, the notice of the décret: "le décret crée une zone économique exclusive (ZEE) au sens de la convention des Nations unies sur le droit de la mer du 10 décembre 1982, dite « convention de Montego Bay », ce qui a pour effet de: – conférer à l'Etat des droits souverains pour l'exploration, l'exploitation, la conserva-

and management of natural resources, fighting the various forms of pollution, offshore wind farms developments, but marine scientific research and the protection and preservation of the marine environment expressly stated by UNCLOS and the law creating the ecological protection zone are not listed... Between the lines, and given the prospects existing in the Gulf of Lions, exploration and exploitation of the Mediterranean continental shelf appear to be the real *raisons d'être* of this proclamation, made unilaterally and in the limits of the former ecological protection zone, *i.e.* beyond the median line.

Thereby the first consequence of the French proclamation of EEZ was the *Spanish proclamation of EEZ*.

*(b) Spanish proclamation of EEZ*

Actually, the Spanish reaction confirms the analysis of the French strategy, not only because Spain has also claimed an exclusive economic zone in the Northwestern Mediterranean, on 5 April 2013<sup>53</sup>, but also because the Government had initiated the procedure for granting several hydrocarbons exploration licenses before creating an EEZ in the area.

On 17 January 2013<sup>54</sup>, the Spanish Ministry of Industry, Energy and Tourism, has published twelve permits requested by the Capricorn Spain Limited Company<sup>55</sup> in order to search for hydrocarbons off the Costa Brava; half of them are located in the overlapping zone, *i.e.* the disputed maritime area between France and Spain<sup>56</sup>.

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tion et la gestion des ressources naturelles, biologiques ou non, se trouvant dans les eaux, sur le fond de la mer et dans le sous-sol de la zone considérée; – renforcer sa capacité à lutter contre toutes les formes de pollutions; – lui permettre d’y mener d’autres activités tendant à l’exploration et à l’exploitation de cette zone maritime à des fins économiques, telles que la production d’énergie à partir de l’eau, des courants et des vents; – l’autoriser à mettre en place et à utiliser des îles artificielles et autres installations ou ouvrages, telles que des plates-formes de forage et des éoliennes”.

<sup>53</sup> Real Decreto 236/2013, de 5 de abril, por el que se establece la Zona Económica Exclusiva de España en el Mediterráneo noroccidental, Boletín Oficial del Estado (BOE) Núm. 92, Miércoles 17 de abril de 2013, Sec. I. 4049 Pág. 29146-29148; <https://www.boe.es/boe/dias/2013/04/17/pdfs/BOE-A-2013-4049.pdf>.

<sup>54</sup> See Resolución, n. 16 above.

<sup>55</sup> Capricorn Spain Limited is a wholly owned subsidiary of Cairn Energy PLC, based in Edinburgh; <http://www.cairnenergy.com/>.

<sup>56</sup> Papers and maps, in Henri Vaudoit, “France - Espagne: le bras de fer”, La Provence, mardi 28 mai 2013, <http://www.laprovence.com/article/edition-marseille>.

The situation is quite different from the political context of the Levantine basin; France and Spain are both European Union Members and have good neighbourhood relations. But, the French proclamation forced Spain to adopt also a legal strategy founded on the notion of EEZ, in order to enhance its legal competences over the continental shelf and its resources. On 5 April 2013, the Spanish Government claimed its own EEZ on the limits of its former Fishery Protection Zone<sup>57</sup>. The decree legally establishes the EEZ of Spain in the Northwestern Mediterranean, pursuant to the relevant provisions of UNCLOS and especially to Article 58 par. 1, as regards the competences and jurisdiction of the coastal State<sup>58</sup>. The decision is justified by the increasing importance of the use of the resources of the EEZ in the Mediterranean, and by virtue of its sovereign rights as a coastal State<sup>59</sup>. But the political objective is obvious, as far as the rights and interests of Spain are concerned, given the delimitation dispute with France.

Although the long-term goal of these proclamations may be to facilitate the operational exploitation of the resources of the continental shelf, the first utility of the EEZ is here to found and confirm the sovereign rights

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le/2375811/.html; and “Du pétrole dans une zone disputée entre l’Espagne et la France ?”, *Le Marin*, mercredi 29 mai 2013, <http://www.lemarin.fr/articles/detail/items/du-petrole-dans-une-zone-disputee-entre-lespagne-et-la-france.html>.

<sup>57</sup> Real Decreto 1315/1997, de 1 de agosto, por el que se establece una zona de protección pesquera en el mar Mediterráneo, *Boletín Oficial del Estado* (BOE) Núm. 204, de 26 de agosto de 1997, página 25628; <http://www.boe.es/buscar/doc.php?id=BOE-A-1997-18926>. Eva Maria Vázquez Gómez, “Problèmes de conservation et de gestion des ressources biologiques en Méditerranée. La zone de protection de la pêche espagnole”, in G. Cataldi (Dir.), *La Méditerranée et le droit de la mer à l’aube du 21<sup>ème</sup> siècle/The Mediterranean and the Law of the Sea at the Dawn of the 21<sup>st</sup> Century*, Bruxelles Bruylant (2002), 183, 191.

<sup>58</sup> Real Decreto 236/2013, de 5 de abril, por el que se establece la Zona Económica Exclusiva de España en el Mediterráneo noroccidental, *Boletín Oficial del Estado* (BOE) Núm. 92, Miércoles 17 de abril de 2013, Sec. I. 4049 Pág. 29146; <https://www.boe.es/boe/dias/2013/04/17/pdfs/BOE-A-2013-4049.pdf>. Unlike the French text, it mentions *de facto* the protection and preservation of the marine environment, by virtue of Article 58 par. 1 b iii.

<sup>59</sup> “Pues bien, en el ejercicio de la facultad que confiere al Gobierno la Ley 15/1978, de 20 de febrero, dada la creciente importancia del aprovechamiento de los recursos existentes en la ZEE en el Mediterráneo y a los efectos previstos en la CNUDM, esto es, el ejercicio de los derechos soberanos del Estado ribereño, procede establecer por España una ZEE propia en el Mediterráneo noroccidental, lo que no obsta para su extensión en el futuro a otras costas españolas”; Real Decreto, n. 53 above.

and States claims over the above-mentioned oil and gas resources, in the context of a well-known delimitation conflict and in the perspective of a future negotiation<sup>60</sup>.

Nevertheless, other Mediterranean States could follow their example, and use the same legal strategy... which makes a *Mediterranean regional cooperation* even more necessary in the near future.

## **B. Mediterranean regional cooperation**

In a fragile and semi-enclosed sea as the Mediterranean, a regional cooperation appears to be the one and only solution in order to protect and preserve the environment from the consequences of the exploitation. Indeed, a disaster on a platform in the region would have a dramatic effect and consequences we can't ever imagine, because of the small size of the basin and the low rate of water renewal, near one century for the whole Mediterranean.

Such cooperation already exists *in the context of the Barcelona System* (1) but *the need to better cooperation and environmental protection* (2) is real, given the current offshore prospects in the Mediterranean.

### **1. In the context of the Barcelona System**

*The existence of the Offshore Protocol* (a) is a specificity of the Mediterranean system based on the Barcelona Convention. Indeed, *the contribution of the Offshore Protocol* (b) is directed against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil; but it's still underway, because it entered into force lately and only few Mediterranean States have so far ratified it.

#### *(a) The existence of the Offshore Protocol*

By the fact, the Mediterranean is the region where exist the first-ever plan and the most comprehensive system adopted as a Regional Seas Programme

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<sup>60</sup> France refutes the application of the equidistance principle and relies on the concept of equitable principles; on the contrary Spain claims an equidistant projection of Cape Creus.

under UNEP's umbrella<sup>61</sup>; as of today, the twenty-one States bordering the Mediterranean are Parties to the system, as well as the European Union<sup>62</sup>.

The first Barcelona Convention adopted in 1976, the Convention for the Protection of the Mediterranean Sea against Pollution<sup>63</sup>, was amended and renamed Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean in 1995<sup>64</sup>. The Barcelona Convention now integrates all the Rio outcomes<sup>65</sup> and addresses all the forms of marine pollution<sup>66</sup>, in particular *Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil* (Article 7)<sup>67</sup>. But it's an umbrella convention that has given rise to seven protocols

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<sup>61</sup> N. Ros (2011)1, n. 4 above, 109-117; and (2011)2, n. 4 above, 47-54.

<sup>62</sup> The 22 Contracting Parties to the Barcelona Convention are: Albania, Algeria, Bosnia and Herzegovina, Croatia, Cyprus, Egypt, the European Union, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Slovenia, Spain, Syria, Tunisia, and Turkey.

<sup>63</sup> Convention for the Protection of the Mediterranean Sea against Pollution, adopted on 16 February 1976 and entered into force on 12 February 1978; [http://195.97.36.231/dbases/webdocs/BCP/BC76\\_Eng.pdf](http://195.97.36.231/dbases/webdocs/BCP/BC76_Eng.pdf).

<sup>64</sup> Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, adopted on 10 June 1995 and entered into force on 9 July 2004; [http://195.97.36.231/dbases/webdocs/BCP/bc95\\_Eng\\_p.pdf](http://195.97.36.231/dbases/webdocs/BCP/bc95_Eng_p.pdf).

<sup>65</sup> The Barcelona Convention sets out the general principles applicable "to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that Area so as to contribute towards its sustainable development" (Article 4 par. 1). It refers especially to "the precautionary principle" (Article 4 par. 3 alinea a), "the polluter pays principles" (Article 4 par. 3 alinea b), and to "environmental impact assessment" (Article 4 par. 3 alinea c and d), "integrated management of the coastal zones" (Article 4 par. 3 alinea e), "best available techniques" and "best environmental practices" (Article 4 par. 4 alinea b).

<sup>66</sup> Pollution caused by Dumping from Ships and Aircraft or Incineration at Sea (Article 5); Pollution from Ships (Article 6); Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (Article 7); Pollution from Land-Based Sources (Article 8); Pollution Resulting from the Transboundary Movements of Hazardous Wastes and their Disposal (Article 11). It also provides Cooperation in Dealing with Pollution Emergencies (Article 9), and Conservation of Biological Diversity (Article 10).

<sup>67</sup> Article 7: "The Contracting Parties shall take all appropriate measures to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil".

addressing the different forms of pollution and environmental challenges<sup>68</sup>; they are all in force since 24 March 2011.

The Barcelona Convention and all its Protocols may be useful to enhance the regional cooperation in order to strike a balance between exploitation and protection of the Mediterranean continental shelf; but one of the seven protocols is especially dedicated to offshore challenges: the Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil. It was adopted in Madrid on 14 October 1994, but entered into force only on 24 March 2011<sup>69</sup>.

It's the only conventional act in the world to address these specific challenges; but actually *the contribution of the Offshore Protocol* is underway.

*(b) The contribution of the Offshore Protocol*

Twenty years after its adoption the Offshore Protocol still appears pioneering, global and ambitious, and characterized by a high level of requirements for the Parties and operators. There is nothing comparable, neither at universal nor at regional level.

The Protocol was adopted in 1994 to be part of the new framework integrating the Rio outcomes, and given the increase in offshore exploration and exploitation activities of the Mediterranean seabed and its subsoil, and the pollution that may result therefrom and represents a serious danger to the marine and human environment. In addition to the Barcelona Convention, it also refers to two of its Protocols: the Protocol concerning Mediterranean Specially Protected Areas, adopted on 3 April 1982, and replaced by

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<sup>68</sup> Protocol for the Prevention and Elimination of Pollution in the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea; Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea; Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities; Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean; Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil; Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal; Protocol on Integrated Coastal Zone Management in the Mediterranean.

<sup>69</sup> [http://195.97.36.231/dbases/webdocs/BCP/ProtocolOffshore94\\_eng.pdf](http://195.97.36.231/dbases/webdocs/BCP/ProtocolOffshore94_eng.pdf).

the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, adopted on 10 June 1995<sup>70</sup>; and the Protocol Concerning Cooperation in Combating Pollution of the Mediterranean Sea by Oil and other Harmful Substances in Cases of Emergency, adopted on 16 February 1976, and replaced by the Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea, adopted on 25 January 2002<sup>71</sup>. Furthermore, the Offshore Protocol gives an operational role to the Regional Marine Pollution Emergency Response Center for the Mediterranean Sea (REMPEC) in cases of emergency<sup>72</sup>; in practice, and despite the financial difficulties encountered by the UNEP/MAP<sup>73</sup>, REMPEC seems intended to play an important role in the implementation of the Protocol<sup>74</sup>.

Contrary to Directive 2013/30/EU of the European Parliament and the Council of 12 June 2013, only focused on safety of offshore oil and gas operations<sup>75</sup>, the Offshore Protocol adopts a broader and holistic approach of offshore exploration and exploitation of the continental shelf, not limited to the safety aspects of offshore oil and gas operations, but including all the process (building and removal of installations, and operations of exploration and exploitation) and all the mineral resources of the continental shelf.

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<sup>70</sup> Point 6 of the Preamble, and Article 21; [http://195.97.36.231/dbases/webdocs/BCP/ProtocolSPA95\\_eng.pdf](http://195.97.36.231/dbases/webdocs/BCP/ProtocolSPA95_eng.pdf).

<sup>71</sup> Point 6 of the Preamble, and Articles 16 and 18; [http://195.97.36.231/dbases/webdocs/BCP/ProtocolEmergency02\\_eng.pdf](http://195.97.36.231/dbases/webdocs/BCP/ProtocolEmergency02_eng.pdf).

<sup>72</sup> Offshore Protocol, n. 69 above, Article 18.

<sup>73</sup> Nathalie Ros, “17<sup>ème</sup> Conférence des Parties contractantes à la Convention pour la protection du milieu marin et du littoral de la Méditerranée et ses protocoles (Programme des Nations Unies pour l’Environnement – Plan d’Action pour la Méditerranée), Paris 8-10 février 2012”, <http://www.indemer.org/data/actualite/docs/17e-conference-pam.pdf>.

<sup>74</sup> Nathalie Ros, “La dixième réunion des Correspondants du REMPEC”, XV *Annuaire du Droit de la Mer* (2010), 317-319. 1<sup>st</sup> Offshore Protocol Working Group Meeting, Valletta (Malta), 13-14 June 2013, <http://www.rempec.org/rempecnews.asp?NewsID=260> and <http://www.rempec.org/rempecnews.asp?NewsID=271>.

<sup>75</sup> Directive 2013/30/EU of the European Parliament and the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, *Official Journal of the European Union*, 28 June 2013, L 178/66, L178/106; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:178:0066:0106:EN:PDF>.



Although the Protocol is now twenty years old and, therefore, can't integrate the latest technological innovations, its ratification and implementation are key elements to better the legal framework of Mediterranean offshore exploitation. Its high level of requirements is still to be pointed out: written authorization for exploration and exploitation; use of the best available techniques and standards to minimize the risk of pollution; sanctions for breaches of conventional obligations; environmental impact assessments; mutual assistance in cases of emergency; insurance and other financial security to cover liability.

Actually, this high level of requirements is the reason of the low level of ratifications, particularly by the European States, and it explains the late entry into force, especially because of the compulsory insurance. Indeed, adopted in 1994, the Offshore Protocol only entered into force in March 2011, with the six ratifications of Albania, Cyprus (prior to its membership of European Union), Libya, Morocco, Syria, and Tunisia. Although the European Union has now accessed to the Protocol, its Member States don't manifest their intention to ratify the Protocol in the near future, with the exception of France that should launch the ratification process shortly.

In this context, *the need to better cooperation and environmental protection* appears quite obvious.

## ***2. The need to better cooperation and environmental protection***

Undoubtedly, *the recent adhesion of the European Union* (a) is a step forward, but given current short-term economic prospects, it'll be very difficult *to strike a balance between exploitation and protection* (b).

### *(a) The recent adhesion of the European Union*

Until recently, the European Union has neither signed nor ratified the Offshore Protocol. On the 22 September 1994, prior to its adoption by the Conference of Madrid, the Commission has proposed to the Council the signature of the Protocol<sup>76</sup>. But it was then deemed more appropriate to

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<sup>76</sup> Commission of the European Communities, Proposal for a Council Decision concerning the Signature of a Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, COM(94) 397 final, Brussels 22 September

work further on a Community regime for environmental liability rather than anticipate it through an international agreement.

Nevertheless, after the accident in the Gulf of Mexico, on the Deepwater Horizon, and in the context of the requirements of the Marine Strategy Framework Directive 2008/56/EC<sup>77</sup>, the European Union became more aware of all the potential for resulting risks of offshore activities in the Mediterranean and immediate adverse transboundary consequences on the economy and fragile marine and coastal ecosystems, especially due to the semi-enclosed nature and special hydrodynamics of the basin. A Commission Communication on the safety of offshore oil and gas activities was adopted on 12 October 2010<sup>78</sup>; it recommended to re-launch the process towards bringing into force the Offshore Protocol, in close collaboration with the Member States concerned. In its resolution of 13 September 2011 on facing the challenges of the safety of offshore oil and gas activities<sup>79</sup>, the European Parliament stressed the importance of bringing fully into force the un-ratified 1994 Mediterranean Offshore Protocol, targeting protection against pollution resulting from exploration and exploitation. On 27 October 2011, the Commission published a proposal for a Council Decision to approve the accession of the European Union to the Offshore Protocol<sup>80</sup>; on 20 November 2012, the Europe-

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1994; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1994:0397:FIN:EN:PDF>.

<sup>77</sup> Especially in terms of “good environmental status”. Article 9 of Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), Official Journal of the European Union, 25 June 2008, L 164/19, L 164/40; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:164:0019:0040:EN:PDF>.

<sup>78</sup> Communication from the Commission to the European Parliament and the Council, Facing the challenge of the safety of offshore oil and gas activities, COM(2010) 560 final, Brussels 12 October 2010, p. 12; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0560:FIN:EN:PDF>.

<sup>79</sup> European Parliament resolution of 13 September 2011 on facing the challenges of the safety of offshore oil and gas activities (2011/2072(INI)), P7\_TA(2011)0366, p 14, point 83; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0366+0+DOC+XML+V0//EN>.

<sup>80</sup> Proposal for a Council Decision on the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil, COM(2011) 690 final, 2011/0304 (NLE), Brussels 27 October 2011;

an Parliament consented to this accession<sup>81</sup>; and the final Council Decision was adopted on 17 December 2012<sup>82</sup>, according to which “the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil is hereby approved on behalf of the Union”<sup>83</sup>, provided that “this Decision shall enter into force on the day of its adoption”<sup>84</sup>.

The accession of the European Union is undoubtedly a first step; it is hoped that it may help Mediterranean States to strike a balance between exploitation and protection.

*(b) To strike a balance between exploitation and protection*

As underlined by European Environment Commissioner Janez Potocnik, during the accession procedure to the Offshore Protocol: “This proposal complements the legislative proposal for the safety of offshore oil and gas activities. It will allow us to work hand in hand with our non-EU Mediterranean partners, ensuring better protection of this sea for all its users”<sup>85</sup>.

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<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0690:FIN:EN:PDF>.

<sup>81</sup> EU accession to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil, European Parliament legislative resolution of 20 November 2012 on the draft Council Decision on the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil (09671/2012 – C7-0144/2012 – 2011/0304(NLE)), P7\_TA(2012)0415; <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0415&language=EN>.

<sup>82</sup> Council Decision, n. 29 above, L 4/13, L4/14.

<sup>83</sup> Council Decision, n. 29 above, Article 1.

<sup>84</sup> Council Decision, n. 29 above, Article 3.

<sup>85</sup> The complementarity between the European Directive and the accession to the Offshore Protocol is also pointed out in the Decision of 17 December 2012: “(11) The Commission is also proposing a Regulation on safety of offshore oil and gas prospection, exploration and production activities (the ‘proposed Regulation’). (12) The Offshore Protocol concerns a field which is in large measure covered by Union law. This includes, for instance, elements such as the protection of the marine environment, environmental impact assessment and environmental liability. Subject to the final decision of legislators on the proposed Regulation, the

The EU accession may indeed be considered in close relation with Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations<sup>86</sup> and the EU *acquis* already regulating these issues. Pursuant to Article 41, “Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive by 19 July 2015”.

As regards the Offshore Protocol, the EU accession would encourage Member States to ratify the Protocol. According to the Decision of accession, “in addition to Cyprus, some other Member States that are Contracting Parties to the Barcelona Convention have announced recently their intention to also ratify the Protocol”<sup>87</sup>; but more than one year later the *statu quo* remains... Only 7 of the 22 Parties to the Barcelona System have ratified, and Cyprus is still the only EU Member. However France is going to initiate the ratification process; the text should be deposited before the Parliament shortly and the procedure last roughly two years. Anyway, after the accession of the European Union, and the integration of the Offshore Protocol in EU Law, the obligations are not only incumbent upon the European Union but also largely upon Member States for the implementation of the Protocol. Although the Offshore Protocol may be considered to enter into the legal framework of Article 216 of the Treaty on the Functioning of the European Union (TFEU), and to be an agreement “binding upon the institutions of the Union and on its Member States”<sup>88</sup>, the ratification of the Protocol by Mediterranean EU Member States is not unnecessary, furthermore at the Mediterranean level where the Protocol needs more ratifications, and a better balance between EU and non-EU Members, to become

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Offshore Protocol is furthermore consistent with the objectives thereof, including those concerning authorisation, environmental impact assessment and technical and financial capacity of operators”.

<sup>86</sup> Directive, n. 75 above, L 178/66, L 178/106.

<sup>87</sup> Council Decision, n. 29 above, L 4/13, par. 3.

<sup>88</sup> Article 216 of TFEU: “1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States”; Treaty on the Functioning of the European Union (consolidated version), Official Journal of the European Union, 9 May 2008, C 115/47, C 115/199; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>.

more effective and enhance cooperation and environmental protection of the Mediterranean, develop a real *mutual assistance in cases of emergency*<sup>89</sup>, provide *scientific and technical assistance to developing countries*<sup>90</sup>, and share *mutual information*<sup>91</sup> in order to fight against *transboundary pollution*<sup>92</sup>.

The EU Decision of accession to the Offshore Protocol recalls that: “It is estimated that there are more than 200 active offshore platforms in the Mediterranean and more installations are under consideration. Hydrocarbon exploration and exploitation activities are expected to increase after the discovery of large fossil fuels reserves in the Mediterranean. Due to the semi-enclosed nature and special hydrodynamics of the Mediterranean Sea, an accident of the kind that occurred in the Gulf of Mexico in 2010 could have immediate adverse transboundary consequences on the Mediterranean economy and fragile marine and coastal ecosystems. It is likely that in the medium term other mineral resources contained in the deep sea, seabed and subsoil will be the subject of exploration and exploitation activities”<sup>93</sup>.

Without waiting for the occurrence of an ecological disaster, it would be time for Mediterranean States, and especially European Union Members, to change their mind, not only to ratify the Offshore Protocol, but above all to adopt a vision no longer based only on the short term prospects of economic exploitation but also on the long term objectives of environmental protection.

But, unfortunately, in the current context of crisis, given the lobbying power of the oil and gas industry, and as already evidenced by coastal States strategies in the Eastern and Western Mediterranean, it is unlikely that wisdom may prevail over greed...

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<sup>89</sup> Offshore Protocol, n. 69 above, Article 18.

<sup>90</sup> Offshore Protocol, n. 69 above, Article 24.

<sup>91</sup> Offshore Protocol, n. 69 above, Article 25.

<sup>92</sup> Offshore Protocol, n. 69 above, Article 26.

<sup>93</sup> Council Decision, n. 29 above, L 4/13, par. 4.

# *Regional Approaches to Maritime Spatial Planning in the EU: The Case of the Mediterranean Sea*

ANTONIA ZERVAKI\*

**Summary:** I. Introduction; II. Maritime spatial planning: from national management strategies to international principles and practice; A. The conceptual framework; B. MSP spatial application; III. MSP in the European Union: from standard setting to hard legalization; A. The European Commission's approach; B. General principles of MSP to be introduced by the Directive; IV. The case of the Mediterranean Sea; A. The institutional framework for EU MSP development in the Mediterranean; B. Introducing MSP in the Mediterranean; V. Concluding remarks.

## I. INTRODUCTION

Maritime spatial planning (MSP) constitutes a novel practice for the international scientific community and a rather controversial issue among policy-makers and national officials. Introduced as one of the horizontal cross-cutting policy tools by the European Commission's Blue Paper and its Action Plan on the Integrated Maritime Policy in 2007, it was further developed, based on non-binding texts comprising sets of principles and technical guidelines, in the Commission's Communications "Roadmap for Maritime Spatial Planning: achieving common principles in the EU" of 2008 and "Maritime Spatial Planning and the EU - achievements and future development" of 2010. In March 2013 the European Commission launched a legislative procedure for the adoption of a directive establishing a framework for MSP and integrated coastal zone management (ICZM). European Commission's proposal has raised much controversy among member states and other EU institutions in relation to its conformity with the subsidiarity and proportionality principles. Apart from the institutional ambivalence, the inclusion of MSP in the *corpus* of EU law has triggered further reactions due to its significant operational, geopoliti-

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tical and economic implications for member states. This paper presents the provisions of the proposed directive in relation to (a) the existing institutional framework of international and European maritime governance and (b) the implications of MSP implementation in the Mediterranean region.

## **II. MARITIME SPATIAL PLANNING: FROM NATIONAL MANAGEMENT STRATEGIES TO INTERNATIONAL PRINCIPLES AND PRACTICE**

### **A. The conceptual framework**

MSP was initially conceived and applied by national authorities as a management tool for the protection of the marine environment. Introduced in the early 80s in Australia for the protection of the Great Barrier Reef marine area<sup>1</sup>, its use proliferated impressively after the 90s, as an integral part of national marine strategies<sup>2</sup>, shifting the emphasis from nature conservation to the comprehensive management of the marine environment, in an effort to balance the impact of anthropogenic activities and natural processes on the marine ecosystem. Along with

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<sup>1</sup> The Great Barrier Reef Marine Park was established in 1975 as a “multiple-use marine park”. In order to accommodate different uses of the marine environment, a management scheme was adopted in 1981 introducing spatial planning techniques and practices, comprising a multiple zoning system as well as continuous monitoring and adaptation processes. See Jon Day, “The need and practice of Monitoring, Evaluating and Adapting Marine Planning and Management – Lessons from the Great Barrier Reef”, 32 *Marine Policy* (2008).

<sup>2</sup> Reference should be made to the incorporation of spatial planning, through the establishment of special zones of limited use in the USA, namely, in Florida Keys National Marine Sanctuary and Tortugas Ecological Reserve in 1997 as well as the significant spatial planning component developed in the management plans of Channel Islands National Marine Sanctuary (an area granted special protection status in 1980) in 1999-2000. Fanny Douvère, “The importance of maritime spatial planning in advancing eco-system based sea use management” 32 *Marine Policy* (2008). See also <http://floridakeys.noaa.gov/zones/welcome.html> and <http://channelislands.noaa.gov/focus/about.html> (accessed 10 Nov 2013). The Eastern Scotian Shelf Integrated Ocean Management Plan under Canada’s Oceans Act of 1997 was also initiated in 1998 and completed in 2008, furnishing a comprehensive maritime spatial plan for an area covering 325,000 km<sup>2</sup> including maritime transport, renewable and conventional energy production and supply as well as fishing and aquaculture. The plan’s approval by Canada’s competent authority is still pending. See [http://www.unesco-ioc-marinesp.be/msp\\_practice/canada\\_essim](http://www.unesco-ioc-marinesp.be/msp_practice/canada_essim) (accessed 14 Feb 2014).

the national approaches, the first transboundary projects emerged<sup>3</sup> making evident the need for the development of a common conceptual framework as well as for the elaboration of principles for the implementation of MSP at regional level.

UNESCO was the first organization that attempted to codify existing national and regional practices, contributing to the elaboration of a comprehensive definition for spatial planning development for the sustainable management of the marine environment<sup>4</sup>. According to the latter, MSP constitutes “a [public]<sup>5</sup> process of analyzing and allocating

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<sup>3</sup> Reference is made to the Trilateral Wadden Sea Plan developed jointly by Germany, the Netherlands and Denmark. This tripartite cooperation, launched in the late 70s, aimed at the protection of the ecological unity of the Wadden Sea. It was inaugurated with the adoption of the Joint Declaration on the Protection of the Wadden Sea in 1982, as the basis for the coordinated development of MSP activities in relation to ecosystem and biodiversity protection, through the prioritization of “the protection of the Wadden sea region as a whole including its fauna (marine, terrestrial and avian) and flora with special emphasis on resting and breeding areas for seals, areas being important as resting, feeding, breeding, or moulting grounds for waterfowl, both in themselves and in their interdependencies”; the Declaration was updated in 2010 making explicit reference to ICZM and MSP activities. See *Joint Declaration on the Protection of the Wadden Sea*, 9 December 1982 and *Sylt Declaration and 2010 Joint Declaration, 11<sup>th</sup> Trilateral Governmental Conference on the Protection of the Wadden Sea*, Westerland/Sylt 18 March 2010 in <http://www.waddensea-secretariat.org/trilateral-cooperation/organisational-structure> (accessed 14 Feb 2014). Another significant project of transboundary character was developed in the Baltic Sea, an area with a significant history, culture and institutions related to cooperation in maritime affairs. The Bothnia Plan project (2010-2012) was coordinated by the HELCOM Secretariat and it was implemented in the Bothnia Sea between Sweden and Finland. The final deliverable was a maritime spatial plan for the Bothnian Sea area (corresponding to 60,000 km<sup>2</sup>), to be used as a case study of Baltic transboundary MSP. See <http://planbothnia.org/about/> (accessed 14 Feb 2014). Similarly, the project Maspnose (2010-2012) aimed at achieving cross-boundary coherence in MSP in the North Sea region, focusing on two cross-border case studies: the Dutch-Belgian border and the Dogger Bank. See <http://orbit.dtu.dk/en/projects/eu-preparatory-action-on-maritime-spatial-planning-in-the-north-sea-maspnose-38895%2896dff395-c839-41c5-b31a-4e978fa4eaea%29.html> (accessed 14 Feb 2014).

<sup>4</sup> In 2006, UNESCO’s Intergovernmental Oceanographic Commission (IOC) and the Man and Biosphere Programme organized the first international workshop on the use of marine spatial planning as a tool to implement ecosystem-based, sea use management. See [http://www.unesco-ioc-marinesp.be/msp\\_workshop\\_2006](http://www.unesco-ioc-marinesp.be/msp_workshop_2006) (accessed 14 Feb 2014).

<sup>5</sup> From another version of the same definition in Charles Ehler and Fanny Douvere, *Marine Spatial Planning: a step-by-step approach toward ecosystem-based management*. In-



parts of three-dimensional marine spaces to specific uses, to achieve ecological, economic and social objectives that are usually specified through the political process; the MSP process usually results in a comprehensive plan or vision for a marine region. MSP is an element of [ecosystem-based]<sup>6</sup> sea use management”<sup>7</sup>.

Hence, MSP should be perceived as a multi-dimensional and multi-level process, comprising the following features:

### ***1. MSP as a tool for ecosystem-based management***

In spite of the fact that there is no “no universally agreed definition of an ecosystem approach”<sup>8</sup>, there is a general agreement on the basic components the latter encompasses, namely, the emphasis on integrated and holistic approach to nature management<sup>9</sup>, taking into account: the needs of geographically specific areas but also a number of factors originating outside the boundaries of the defined management area that may have an impact thereto; the related societal objectives as well as the impact of human activities on the environment; the participation of stakeholders and local communities in the planning and management processes; the use of both traditional and scientific knowledge for the conduct of management activities; and the efforts for ecological restoration<sup>10</sup>.

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*tergovernmental Oceanographic Commission and Man and the Biosphere Programme. IOC Manual and Guides No. 53, ICAM Dossier No. 6. Paris: UNESCO (2009), at 18.*

<sup>6</sup> *Ibid* at 7, 10.

<sup>7</sup> Charles Ehler and Fanny Douvere, *Visions for a Sea Change. Report of the First International Workshop on Marine Spatial Planning. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme. IOC Manual and Guides, 46: ICAM Dossier, 3. Paris: UNESCO (2007), at 13.*

<sup>8</sup> *Report on the Work of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea at its Seventh Meeting, A/61/156 17 July 2006, at 2, par. 6.*

<sup>9</sup> Howard I. Browman, Konstantinos I. Stergiou (coord.), “Politics and socio-economics of eco-system based management of marine resources”, 300 *Marine Ecology Progress Series* (2005).

<sup>10</sup> According to the Report of the United Nations Informal Consultative Process on Oceans and the Law of the Sea, “an ecosystem-based approach should, inter alia (a) Emphasize conservation of ecosystem structures and their functioning and key processes in order to maintain ecosystem goods and services; (b) Be applied within geographically specific areas based on ecological criteria; (c) Emphasize the interactions between human activities and the ecosystem and

These dimensions are either explicitly mentioned or reflected in the majority of the environmental or maritime related *corpus juris* at international and regional level; the reference made at the Preamble of the United Nations Convention on the Law of the Sea (UNCLOS) that “the problems of ocean space are closely interrelated and need to be considered as a whole”, further specialized in the provisions concerning the preservation of fragile ecosystems<sup>11</sup>, the duty of states not to transfer damage or hazards or transform one type of pollution into another<sup>12</sup> and the cooperation of states on a global or regional level<sup>13</sup>, constitutes an illustrative example. The Conference of the Parties to the Convention on Biological Diversity has also attempted to define the concept and practice of ecosystem-based approach through the adoption of

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among the components of the ecosystem and among ecosystems; (d) Take into account factors originating outside the boundaries of the defined management area that may influence marine ecosystems in the management area; (e) Strive to balance diverse societal objectives; (f) Be inclusive, with stakeholder and local communities” participation in planning, implementation and management; (g) Be based on best available knowledge, including traditional, indigenous and scientific information and be adaptable to new knowledge and experience; (h) Assess risks and apply the precautionary approach; (i) Use integrated decision-making processes and management related to multiple activities and sectors; (j) Seek to restore degraded marine ecosystems where possible; (k) Assess the cumulative impacts of multiple human activities on marine ecosystems; (l) Take into account ecological, social, cultural, economic, legal and technical perspectives; (m) Seek the appropriate balance between, and integration of, conservation and sustainable use of marine biological diversity; and (n) Seek to minimize adverse impacts of human activities on marine ecosystems and biodiversity, in particular rare and fragile marine ecosystems”. See n. 8 above, at 2-3, par. 6.

<sup>11</sup> According to article 194 par. 5 of UNCLOS “[t]he measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.

<sup>12</sup> Article 195 stipulates that states “[i]n taking measures to prevent, reduce and control pollution of the marine environment, [...] shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another”.

<sup>13</sup> According to article 197 “[s]tates shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features”.

a set of principles<sup>14</sup> and guidelines<sup>15</sup> for their implementation. At regional level, the Baltic Marine Environment Protection Commission (HELCOM) and the Commission for the Protection of the Marine Environment of the North East Atlantic (OSPAR Commission) jointly defined the ecosystem approach as “the comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity”<sup>16</sup>.

MSP contributes to the implementation of ecosystem-based management practices since it caters for: the preservation of the integrity of the marine ecosystems, taking due consideration of the impact of management practices outside of the given areas’ administrative borders; the integration of human pop-

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<sup>14</sup> “Principle 1: The objectives of management of land, water and living resources are a matter of societal choices. Principle 2: Management should be decentralized to the lowest appropriate level. Principle 3: Ecosystem managers should consider the effects (actual or potential) of their activities on adjacent and other ecosystems. Principle 4: Recognizing potential gains from management, there is usually a need to understand and manage the ecosystem in an economic context. Any such ecosystem-management programme should: 1. Reduce those market distortions that adversely affect biological diversity; 2. Align incentives to promote biodiversity conservation and sustainable use; 3. Internalize costs and benefits in the given ecosystem to the extent feasible. Principle 5: Conservation of ecosystem structure and functioning, in order to maintain ecosystem services, should be a priority target of the ecosystem approach. Principle 6: Ecosystem must be managed within the limits of their functioning. Principle 7: The ecosystem approach should be undertaken at the appropriate spatial and temporal scales. Principle 8: Recognizing the varying temporal scales and lag-effects that characterize ecosystem processes, objectives for ecosystem management should be set for the long term. Principle 9: Management must recognize the change is inevitable. Principle 10: The ecosystem approach should seek the appropriate balance between, and integration of, conservation and use of biological diversity. Principle 11: The ecosystem approach should consider all forms of relevant information, including scientific and indigenous and local knowledge, innovations and practices. Principle 12: The ecosystem approach should involve all relevant sectors of society and scientific disciplines”. COP 5 Decision V/6, Part B, at par. 6.

<sup>15</sup> COP 5 Decision V/6, Part C and COP 7 Decision VII/11.

<sup>16</sup> This definition was adopted in the first common ministerial meeting of the Helsinki and OSPAR Conventions in 2003. See *Statement on the Ecosystem Approach to the Management of Human Activities* “Towards and Ecosystem Based Approach to the Management of Human Activities”, First Joint Ministerial Meeting of the Helsinki and OSPAR Commissions (JMM), Bremen 25-26 June 2003, Agenda item 6, at 1-2, par. 5.

ulations and their respective economic and social needs to the perception of the marine ecosystem; the balance between protection and use of natural and biological marine resources; the use of good governance practices through participatory and decentralized management; and the use of both scientific knowledge and traditional practices in the management processes.

## **2. Governance and political processes related to MSP**

Effective coordination of different governance sectors, transparency and public participation are considered to be the elements favoring the conduct, implementation and assessment of maritime spatial planning. According to UNESCO best practices, there are three governance principles prevailing in successful MSP<sup>17</sup>:

(i) the *integration principle*, which refers to the achievement of administrative coherence and the development of institutional synergies through the coordination among different levels and sectors of government. The challenges to be addressed in this domain are related primarily to the fragmentation of competences at national level; MSP development involves activities falling under different ministries' competences (i.e. related to environmental, fiscal, transport etc. policies) with conflicting sectoral and/or -often- political interests. Another delicate issue is the effective decentralization of management schemes applied on the marine environment encompassing a two-fold process: the transfer of institutional competences as well as of expertise from the central state to the periphery;

(ii) the *transparency principle*, according to which the decisions taken by authorities in relation to MSP should be open to public scrutiny, while the right of access of the public to relevant information should be ensured;

(iii) the *public trust principle*, relating to the development of local communities' or societal confidence in the competent authorities as far as the outcome of the MSP process is concerned. More specifically, in the case of marine areas management, citizens should be convinced that their rights (including intergenerational rights) over the marine space should be pro-

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<sup>17</sup> See Charles Ehler and Fanny Douvere, n. 5 above, at 40. For the policy dimensions of MSP development see also Kathy Plasman, "Implementing marine spatial planning: a policy perspective" 32 *Marine Policy* (2008).

tected through the preservation of the latter's public nature<sup>18</sup> on the one hand and sound environmental quality on the other.

### *3. Integration of different uses of the sea in MSP*

Another element of MSP is the incorporation of various sectoral policies, corresponding to the different uses of the marine space, into a comprehensive strategic plan, which is the tangible output of the spatial planning process (see below). These policies may refer to conflicting uses of the sea, but also to activities of different nature and temporal pace. The conflictual character of human activities at sea usually concerns spatial competition, including competition related to the use of the same marine location but also competition "experienced by the effects caused by another activity, [...] not necessarily carried out on the same location"<sup>19</sup>. In terms of the different nature of the activities to be taken into consideration, MSP deals with activities of a permanent character, related to ports, offshore platforms, aquaculture and wind farms, pipelines and cables, but also with activities of a temporal nature, such as navigation or fisheries, which bear great significance for the sustainable use of the marine environment.

### *4. The output of the MSP process*

The objective of the spatial allocation of different policy objectives is the delivery of a comprehensive strategic spatial plan (SSP) for a specific marine area or ecosystem. An SSP is discerned by its three-dimensional character since it addresses activities taking place on the sea-bed and subsoil, the water column and the surface of the sea. According to the European Commission, "[t]ime should also be taken into account as a fourth dimension, as the compatibility of uses and the 'management need' of a particular maritime region might vary over time"<sup>20</sup>. An SSP contains the general objectives to be realized

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<sup>18</sup> According to UNESCO's guide on MSP "[m]arine space should be managed as a 'commons', i.e., as part of the public domain, not owned exclusively or to be benefited by any one group or private interest". Charles Ehler and Fanny Douvère, n. 5 above, at 40.

<sup>19</sup> See Policy Research Corporation, *Final report "Exploring the potential of Maritime Spatial Planning in the Mediterranean Sea"*, Framework contract FISH/2007/04, Specific contract No 6, February 2011, at 32.

<sup>20</sup> Commission of the European Communities, *A Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU*, COM (2008) 791 final, Brussels, 25.11.2008, at 9.

in a time span of 10-20 year horizon, describes the management, assessment and review procedures and makes use of existing or introduces new -where necessary- institutional provisions for the management of competing human activities in specific marine areas, usually through the introduction of zoning methodology and/or of a permit system<sup>21</sup>.

## B. MSP spatial application

This three-dimensional management tool, either conducted and implemented at national level or regionally, has to be consistent with international law allocating states' rights and obligations at sea<sup>22</sup>. Hence, states' competence in relation to MSP depends on the regime and the extent of maritime zones falling under their jurisdiction<sup>23</sup>. More specifically:

### 1. Internal waters

In internal waters<sup>24</sup>, as well as in ports<sup>25</sup>, states' jurisdiction in relation to MSP is complete, with the exception of the right of innocent passage in cases where the establishment of a straight baseline has the effect of encl-

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<sup>21</sup> Charles Ehler and Fanny Douvère, n. 5 above, at 22. See also Hermanni Backer, "Transboundary Maritime Spatial Planning: A Baltic Sea Perspective", 15 *Journal of Coastal Conservation* (2011), at 280.

<sup>22</sup> For a comprehensive analysis of the international legal regime on maritime spatial planning see Frank Maes, "The International Legal Framework for Marine Spatial Planning", 32 *Marine Policy*, (2008), MRAG, "Legal Aspects of Maritime Spatial Planning", *Final Report to DG Maritime Affairs and Fisheries*, Framework Service Contract, No. FISH/2006/09-LOT-2, October 2008 and HELCOM, *Joint HELCOM-VASAB Maritime Spatial Planning Working Group Report 2010-2013*, 2013.

<sup>23</sup> For the purpose of this paper no reference is made to the regime of archipelagic waters, since it is not related to the existing maritime zones in the Mediterranean, and the contiguous zone since the latter does not have an impact on MSP.

<sup>24</sup> Defined as "waters on the landward side of the baseline of the territorial sea" according to article 8 par. 1 UNCLOS.

<sup>25</sup> UNCLOS (article 11) regards "permanent harbor works" which constitute an integral part of the harbor system "as forming part of the coast". As such, along with the most significant activities taking place in ports, such as the reception of vessels and cargo, in the case of MSP a series of "terrestrial" operations should be taken into account, such as customs and road or rail transport services and infrastructure. See UNCTAD Secretariat, *Legal Aspects of Port Management*, UNCTAD/SHIP/639, 11 February 1993, at 16 par. 32.

sing as internal waters areas which had not previously been considered as such (UNCLOS article 8 par. 2).

## 2. *Territorial Sea*

In the territorial sea<sup>26</sup> coastal states have full jurisdiction with the limitation of the right of innocent passage<sup>27</sup> and the obligations stemming from the latter<sup>28</sup>. Still, MSP authorities may make use of the right of the coastal states to formulate the conditions under which innocent passage is conducted (UNCLOS article 21) in respect to the safety of navigation, the regulation of maritime traffic, the protection of navigational aids and facilities and other facilities or installations, the protection of cables and pipelines, the conservation of the living resources of the sea, the prevention of infringement of the fisheries laws and regulations of the coastal state, the preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof, marine scientific research and hydrographic surveys. Vessels exercising the right of innocent passage through the territorial sea are obliged to comply with national legislation in relation to the above mentioned policy areas, as well as all generally accepted international regulations relating to the prevention of collisions at sea. Additionally, UNCLOS already provides a constituent element of MSP when referring to coastal states' right to defining sea-lanes and traffic separation schemes<sup>29</sup> (article 22) and clearly indicating such sea lanes and traffic separation schemes on charts (to which due publicity is given).

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<sup>26</sup> According to UNCLOS, “[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea [...] [t]his sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil” (article 2 par. 1-2). “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention” (article 3).

<sup>27</sup> The meaning and the practice of innocent passage is defined in articles 17-20 UNCLOS.

<sup>28</sup> According to which, coastal states shall not: “(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State” (UNCLOS article 24 par. 1).

<sup>29</sup> Taking into account “(a) the recommendations of the competent international organization [referring to IMO]; (b) any channels customarily used for international navigation; (c) the special characteristics of particular ships and channels; and (d) the density of traffic” (article 22 par. 3).

### 3. Straits used for international navigation

UNCLOS makes the following categorization<sup>30</sup> of straits used for international navigation: (a) straits that fall under the regime defined in article 37, that is “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone’ and where coastal states’ MSP jurisdiction is conditioned by the right of transit passage<sup>31</sup>; (b) straits where the regime of “reinforced”<sup>32</sup> innocent passage is applied (according to article 45), that is straits “formed by an island of a state bordering the strait and its mainland” (article 38 par. 1) and straits “between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state” (article 45 par. 1b); and (c) straits “in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits” (article 35 par. c). Thus, in the case of MSP in maritime areas constituting international straits the designation of sea lanes and traffic separation schemes (approved by IMO) constitutes the main condition for the allocation of other uses and activities taking place therein.

### 4. Continental shelf

States’ MSP jurisdiction in their continental shelf<sup>33</sup> is related to their exercise of sovereign rights for the purpose of exploring and exploiting

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<sup>30</sup> See Haritini Dipla, “The Greek Territorial Sea and the Straits for International Navigation” in H. Dipla, C. Rozakis (eds.), *The Law of the Sea and its Implementation in Greece* (2004), at 37-39, Krateros Ioannou, Anastasia Strati, *Law of the Sea* (4<sup>th</sup> ed., 2013), at 107 (in Greek) and Ana G. López Martín, *International Straits. Concept, Classification and Rules of Passage* (2010).

<sup>31</sup> According to article 38 par. 1. The content of the right to transit passage is defined in the 2<sup>nd</sup> par. of the same article as “[...] the exercise [...] of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State”.

<sup>32</sup> Since the suspension of the right of innocent passage is prohibited. H. Dipla, n. 30 above, at 37.

<sup>33</sup> According to article 76 par. 1 “[t]he continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the



mineral and other non-living resources of the seabed and subsoil, as well as over sedentary species (UNCLOS article 77), including species falling into the category of “marine genetic resources”<sup>34</sup>. In the case of energy resources related activities, it should be mentioned that both conventional sources, such as oil and natural gas<sup>35</sup>, as well as emerging sources of energy, related to the activity of mud volcanoes, hydrothermal vents or gas hydrates should be taken into account in MPS<sup>36</sup>. Artificial islands, installations and structures as well as drilling activities and subsoil exploitation by means of tunneling, which constitute exclusive rights of the coastal states (as stipulated in UNCLOS articles 80, 81 and 85 respectively) may also be incorporated in spatial plans. Another important element of MSP is coastal states’ right to establish the conditions, in reasonable terms, for the laying of cables and pipelines entering their territory, or used in connection to the exploitation of the continental shelf or the exploitation of its resources, and the operations of artificial islands, installations and structures under their jurisdiction (UNCLOS article 79). Activities related to the coastal states’ obligation to protect and preserve the marine environment should also be taken into account, especially when exploiting their natural resources (UNCLOS article 194) through the adoption of measures in order “to prevent, reduce and control pollution of the marine environment arising from or in

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continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance”. No reference is made to the provisions of UNCLOS in relation to cases where the continental shelf extends beyond the 200 n.m. since they do not apply in the Mediterranean Sea.

<sup>34</sup> Such as sponges, cold water corals etc. The definition for genetic resources is provided in article 2 of the Convention on Biological Diversity: “organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity”. See also Ad Hoc Open Ended Group on Access and Benefit Sharing, Convention on Biological Diversity, *The Concept of “Genetic Resources” in the Convention on Biological Diversity and how it relates to a Functional International Regime on Access and Benefit Sharing*, UNEP/CBD/WG-ABS/9/INF/1 19 March 2010. Reference to marine genetic resources is also made in relation to their status in the EEZ (see below).

<sup>35</sup> See Haritini Dipla, “The Aegean and Southeast Mediterranean: Contemporary Challenges and Perspectives for the Exploitation of Underwater Energy Resources. The Institutional Framework of the Exploration and Exploitation of Underwater Natural Resources of the Continental Shelf” in G.I. Tsaltas, C.L. Anagnostou (eds.), *The Aegean and South East Europe. Contemporary Challenges and Exploitation Perspectives of Underwater Natural Energy Resources* (2014), (in Greek).

<sup>36</sup> Krateros Ioannou, Anastasia Strati, n. 30 above, at 152.

connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction” and the establishment of “global and regional rules, standards and recommended practices and procedures” (UNCLOS article 208 par. 1 and 5). Last but not least, the conduct of marine scientific research activities according to article 246 (especially in relation to the conditions for scientific equipment installment on the seabed specified in articles 260-262) and the protection of underwater heritage in line with article 303 should also be considered in spatial planning processes. However, coastal states MSP jurisdiction is conditioned by their obligation not to infringe or cause any unjustifiable interference to navigation or other freedoms rights and freedoms of other states (UNCLOS article 78 par. 2).

### **5. Exclusive Economic Zone (EEZ)**

MSP jurisdiction of coastal states that have declared an EEZ<sup>37</sup> includes<sup>38</sup> the activities related to

(i) the exploration, exploitation, conservation and management of the natural resources, both living and non-living: the latter mainly encompass mineral resources such as oil or natural gas, but also new sources of energy originating from mud volcanoes, hydrothermal vents or gas hydrates mentioned above. The former, include the biological resources of the continental shelf but also those found in the super-adjacent water column. Hence, in the case of living resources, fisheries management through the allocation of fishing areas, periods and quotas, is the major component of MSP, conditioned by coastal states’ obligation to preserve the biological resources in their EEZ (see UNCLOS articles 61-62)<sup>39</sup>. It should be mentioned that apart from the traditional species falling under the category of living resources, the advent of (bio)technology has brought to the fore the significance of marine genetic resources, whether found in the water column or on the seabed and its subsoil, both in relation to the protection of biolo-

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<sup>37</sup> “The Exclusive Economic Zone is an area beyond and adjacent to the territorial sea” (UNCLOS article 55) which does “not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured” (article 57).

<sup>38</sup> See UNCLOS article 56 on rights, jurisdiction and duties of coastal states in their EEZs.

<sup>39</sup> These articles refer to the conservation and the exploitation of living resources in the EEZ respectively.

gical biodiversity<sup>40</sup> as well as within the framework of bioprospecting<sup>41</sup>. In terms of their legal status, the exploration, exploitation, conservation and management of marine genetic resources, as part of the living resources found in the EEZ mentioned in UNCLOS, constitutes a sovereign right of the coastal state. Nevertheless, unlike the traditional living resources, it seems that the “duty to provide access to the surplus of marine resources does not apply in the case of marine genetic resources”<sup>42</sup>. Thus, depending on the profile of the marine ecosystem, the development of MSP by coastal states is likely to cater for traditional and cutting-edge activities of environmental and economic nature.

(ii) the conduct of other economic activities such as the production of energy from water, currents and wind. Renewable energy, especially wind energy, has a significant impact for MSP since it requires implementing maritime zoning schemes and, if necessary, it may alter the spatial application of other activities, such as navigational routes<sup>43</sup> or fishing areas. MSP implemented in an EEZ may also include the construction and use of artificial islands, installations and structures as well as the establishment of safety zones around them (UNCLOS articles 56 and 60), conditioned by the obligation not to establish the latter where “interference may be caused to the use of recognized sea lanes essential to international navigation” (UNCLOS article 60 par. 7), the conduct of marine scientific research (UN-

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<sup>40</sup> See Jesús M. Arrieta, Sophie Arnaud-Haond, Carlos M. Duarte, “What lies underneath: Conserving the oceans’ genetic resources”, 107 (43) *Proceedings of the National Academy of Sciences of the United States of America (PNAS)* (2010), doi: 10.1073/pnas.0911897107.

<sup>41</sup> The process of searching of living resources to be used as a source of commercially exploitable products. According to the World Health Organization, the concept of bioprospecting has also been related to the exploration and research on indigenous knowledge related to the utilization and management of biological resources and the rights of local and indigenous communities. See <http://apps.who.int/medicinedocs/en/d/Jh2996e/6.3.html#Jh2996e.6.3> (accessed 10 March 2014).

<sup>42</sup> Bevis Fedder, *Marine Genetic Resources, Access and Benefit Sharing. Legal and Biological Perspectives* (2013), at 54. See also Charles Lawson, *Regulating Genetic Resources: Access and Benefit Sharing in International Law* (2012), at 97-98.

<sup>43</sup> In the case of changing the existing routeing system in areas “presenting economically and technical advantages for the deployment of offshore renewable energy activities”, the proposal of the new shipping lanes is submitted to IMO’s Sub-Committee of Safety and Navigation that will make a recommendation to the Maritime Safety Committee to adopt a relevant decision for international use. See Seanergy2020, *Existing International Maritime Spatial Planning Instruments Affecting the Deployment of Renewable Energies*, IEE/09/898/SI2.558294, January 2011, at 14.

CLOS articles 56 and 246), including the use of equipment such as drifters and floats<sup>44</sup>, and the protection of the environment (UNCLOS article 56) mainly through the establishment of marine protected areas.

### III. MSP IN THE EUROPEAN UNION: FROM STANDARD SETTING TO HARD LEGALIZATION

#### A. The European Commission's approach

MSP was initially introduced as one of the horizontal policy tools, along with marine knowledge and maritime surveillance, within the framework of the EU integrated maritime policy; it was considered as “a fundamental tool for the sustainable development of marine areas and coastal regions, and for the restoration of Europe’s seas to environmental health”<sup>45</sup>, through the management of competing uses of the seas. Hence, the main objective underlying the development of MSP at European level was environmental, focusing on the transboundary challenges regional marine ecosystems face. From an institutional standpoint, the European institutions were lacking decision-making competence in this area; thus, the European Commission decided to codify common principles and guidelines and to reinforce member states’ commitment toward their implementation<sup>46</sup>.

In this context and, within the timeline set by the Action Plan accompanying the Blue Paper on Integrated Maritime Policy<sup>47</sup>, the European

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<sup>44</sup> For the international legal status of floats and gliders see Katharina Bork et al., “The Legal Regulation of Floats and Gliders – In Quest of a New Regime?” (39) *Ocean Development & International Law* (2008).

<sup>45</sup> Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An Integrated Maritime Policy for the European Union*, COM (2007) 575, Brussels 10.10.2007, at 6.

<sup>46</sup> According to the 2007 Communication, “[d]ecision-making competence in this area lies with the Member States. What is needed at European level is a commitment to common principles and guidelines to facilitate the process in a flexible manner and to ensure that regional marine ecosystems that transcend national maritime boundaries are respected”, *ibid.*

<sup>47</sup> In line with the Action Plan accompanying the 2007 Communication, the Commission “[b]uilding on existing EU initiatives with a strong maritime spatial planning dimension, including the ICZM Recommendation and the proposed Marine Strategy Directive, which introduces elements of maritime spatial planning, [...] will propose a road map in 2008 to facilitate and encourage the further develop-

Commission published a roadmap for MSP defining the latter as “a tool for improved decision-making” since it “provides a framework for arbitrating between competing human activities and managing their impact on the marine environment. Its objective is to balance sectoral interests and achieve sustainable use of marine resources in line with the EU Sustainable Development Strategy”<sup>48</sup>. This definition, whilst preserving the environmental objectives and emphasizing the comprehensive character of maritime spatial planning in the EU, provides a more managerial approach, perceiving the latter as a governance tool.

Apart from the definition, the 2008 roadmap has codified ten key principles for the development of a common approach to maritime spatial planning, derived from existing practices at national level but also considering the role of EU institutions and relevant international instruments for the development of spatial planning in the European regional seas. These principles evolve around the following thematic pillars:

(i) the local character of MSP deployment: MSP should be based on the specificities of individual marine regions or sub-regions;

(ii) the implementation of the ecosystem-based approach: MSP should cater for coherence among marine ecosystems as well as among marine and terrestrial ecosystems. Hence cross border cooperation as well as consistency between terrestrial and maritime spatial planning should be promoted;

(iii) the operational character of maritime spatial plans: MSP should be linked to the nature of planned or existing activities and structured around well-defined objectives; it should also encompass monitoring and assessment procedures that will allow for its revision and necessary adjustments in the future;

(iv) the governance framework for spatial planning in maritime areas: MSP should be based on a legally binding framework and an appropriate administrative structure, while the decision-making processes should en-

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ment of maritime spatial planning in the Member States. In 2008, it will examine the needs and different options, including for zoning, to making compatible different maritime activities, including the maintenance and strengthening of biodiversity”. See Commission of the European Communities, *Commission staff working document - Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An Integrated Maritime Policy for the European Union*, SEC/2007/1278 final, Brussels, 10.10.2007, at -9.

<sup>48</sup> Commission of the European Communities, n. 20 above, at 2.

sure transparency and stakeholder involvement. In the 2010 Communication on MSP in the EU, the Commission further notices that MSP must be applied in accordance with international law<sup>49</sup>;

(v) the contribution of marine knowledge to MSP activities: national or local authorities should make the best use of the evolving multidisciplinary knowledge related to the environmental or socio-economic dimensions of maritime governance.

However, the non-binding character of the roadmap hampered the harmonization of member states' practices in this field, the latter ranging from no action at all to the development of policy guidelines and the adoption of elaborate<sup>50</sup> legal frameworks<sup>51</sup>. This variable institutional geometry resulted in differentiated approaches at regional level as well; certain regional efforts in the European Union have made significant progress, through the implementation of transboundary spatial planning projects in the Baltic and the North Sea<sup>52</sup>, while the Mediterranean region lagged behind both in terms of institutionalization processes undertaken at national level, as well as in relation to the operational dimensions of MSP. In this context, in 2013, the European Commission launched a legislative procedure for the adoption of a Directive establishing a framework for MSP and ICZM<sup>53</sup>.

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<sup>49</sup> European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Maritime Spatial Planning in the EU – Achievements and Future Development*, COM (2010) 771 final, Brussels, 17.12.2010, p. 4. Explicit reference to UNCLOS is made in the Commission's Directive proposal establishing a framework for ICZM and MSP, as well as in the explanatory memorandum accompanying the latter, see n. 53 below.

<sup>50</sup> As in the case of Germany that has adopted a comprehensive legislation covering MSP activities both in the territorial waters (falling under the Länder competence) and the EEZ (falling under federal competence). See European Commission, *Commission staff working document - Accompanying document Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal zone management*, SWD (2013), Brussels, 12.3.2013, at 7.

<sup>51</sup> Commission of the European Communities, n. 49 above, at 6.

<sup>52</sup> Reference is made to the projects Bothnia Plan and Maspnose, mentioned in n. 3 above.

<sup>53</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal zone management*, COM (2013) 133 final, Brussels, 12.3.2013.

The Commission supports that the proposed act does not create a new policy, since operational<sup>54</sup> spatial planning is not foreseen in the Treaty of Lisbon<sup>55</sup>. Instead, it attempts to establish a framework for the facilitation of existing EU policy initiatives related to maritime affairs to be implemented in the next 10 to 20 years<sup>56</sup>. Accordingly, the proposed Directive's legal basis is founded on existing policies<sup>57</sup> falling under the category of shared<sup>58</sup> or exclusive<sup>59</sup> competences of the organization. The proposal is based on articles 43 par. 2 TFEU<sup>60</sup> concerning the pursuit of the objectives of the common fisheries policy, 100 par. 2 TFEU<sup>61</sup> on sea transport, 192 par. 1

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<sup>54</sup> Juxtaposed to “strategic” spatial planning, a concept related to spatial development and territorial cohesion. See Andreas Faludi, “Beyond Lisbon: Soft European Spatial Planning”, 46 (182) *The Planning Review* (2010), 14, Stephanie Dühr, Claire Colomb, Vincent Nadin, *European Spatial Planning and Territorial Cooperation* (2010) and Neil Adams, Giancarlo Cotella, Richard Nunes (eds.), *Territorial Development, Cohesion and Spatial Planning. Knowledge and Policy Development in an Enlarged EU* (2011).

<sup>55</sup> With the exception of reference made to “measures affecting: town and country planning [...] and land use, with the exception of waste management” in article 192 par. 2(b) TFEU.

<sup>56</sup> See the Explanatory Memorandum of the Directive's proposal, n. 53 above.

<sup>57</sup> A practice also used in other acts adopted within the framework of the integrated maritime policy, such as the Regulation establishing a programme for the support of the integrated maritime policy adopted in 2011. See *Regulation (EU) 1255/2011 of the European Parliament and of the Council of 30 November 2011 establishing a programme to support the further development of an Integrated Maritime Policy*, OJ L 321 of 5.12.2011, at 1-10.

<sup>58</sup> According to article 4 TFEU.

<sup>59</sup> The conservation of marine biological resources under the common fisheries policy constitutes the only exclusive competence of the organization in the domain of maritime spatial planning according to article 3 TFEU.

<sup>60</sup> “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organization of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy”.

<sup>61</sup> “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions”.

TFEU<sup>62</sup> on the organization's environmental policy and 194 par. 2 TFEU<sup>63</sup> on the Union's energy policy.

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<sup>62</sup> "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191". Article 191 TFEU sets the common environmental objectives and policy framework: "1. Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. In this context, harmonization measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union. 3. In preparing its policy on the environment, the Union shall take account of: available scientific and technical data, environmental conditions in the various regions of the Union, the potential benefits and costs of action or lack of action, the economic and social development of the Union as a whole and the balanced development of its regions. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organizations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned. The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements".

<sup>63</sup> "Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)". The first paragraph of article 194 TFEU refers to the objectives of the Union's energy policy: "(a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks".



Hence, the proposed Directive introduces the obligation for member states to furnish maritime spatial plans, integrating objectives and provisions of relevant European and national sectoral policies, that cater for the following common objectives (article 5):

- (a) to secure energy supply of the Union;
- (b) to promote maritime transport;
- (c) to foster sustainable development and growth of the fisheries and aquaculture domains;
- (d) to preserve the environment and promote prudent use of natural resources;
- (e) to ensure climate change resilience of marine areas.

The European Parliament, in its first reading of the proposal has also added a series of national objectives the Directive may further, namely, the sustainable extraction of raw materials, the promotion of sustainable tourism, the preservation and protection of cultural heritage, the safeguard of the recreational and other uses for the public and the preservation of traditional and social characteristics of the maritime economy<sup>64</sup>.

The proposed Directive also specifies the minimum requirements for MSP (article 7) that include mapping of the marine area concerned and provisions for the following activities, infrastructure and sites: installations for the extraction of energy and the production of renewable energy; oil and gas extraction sites and infrastructure; maritime transport routes; submarine cable and pipeline routes; fishing areas; sea farming sites; nature conservation sites. In the same context with the amendments concerning the directive objectives, the European Parliament has extended the scope of the minimum MSP requirements by adding the activities related to raw materials (other than gas and oil) exploration and extraction, the inclusion of potential fishing and military training areas, marine and coastal tourism and cultural heritage protection sites<sup>65</sup>.

Pending a reaction from the Council, one can discern the delicate balance between the European Commission's approach that has reversed its

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<sup>64</sup> European Parliament, *Amendments adopted by the European Parliament on 12 December 2013 on the proposal for a directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal zone management*, COM (2013) 0133 – C7-0065/2013 – 2013/0074(COD), Strasbourg, 12.12.2013.

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

priorities in the Directive proposal, moving environmental concerns and climate change mitigation in the last lines of MSP objectives, and the European Parliament's perception of maritime spatial planning that reinforces the concept of sustainable development and public nature of the marine space, introduces the protection of cultural heritage both in its tangible as well as in its intangible forms (through the preservation of traditional socio-economic practices) whilst catering for the main preoccupation of the European coastal (electoral) constituencies, the promotion of sustainable tourism.

## **B. General principles of MSP to be introduced by the Directive**

### ***1. Relation to UNCLOS***

According to the Commission's explanatory memorandum of the Directive proposal, member states will carry out maritime spatial planning [...] in accordance with national and international law<sup>66</sup>. Explicit reference to UNCLOS is made in the preamble of the directive (par. 7) according to which "[p]lanning of ocean space is the logical advancement and structuring of the use of rights granted under UNCLOS and a practical tool in assisting Member States to comply with their obligations". The fact that both member states as well as the EU are contracting parties to UNCLOS (although the organization's rights and obligations in relation to the latter are conditioned by the extent of its competences —whether exclusive, shared or complementary—) is considered by the Commission as an asset for the development and implementation of spatial planning activities at national and transboundary level in the European Union<sup>67</sup>.

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<sup>66</sup> Explanatory memorandum of the Directive's proposal, see n. 53 above, at 5.

<sup>67</sup> According to the Community's Declaration submitted upon accession to UNCLOS, a distinction is made between the organization's exclusive competences on the one hand, and shared competences with member states on the other. In terms of MSP implementation, the following EU competences should be mainly taken into account: (a) the conservation and management of sea fishing resources, which fall into the first category; (b) research and technological development and development cooperation with regard to fisheries which constitutes a shared competence; (c) with regard to maritime transport, in relation to "safety of shipping and the prevention of the marine pollution contained inter alia in Parts II, III, V, VII and XII of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Com-

## 2. *Fundamental principles of EU law*

The Directive proposal affirms that it remains in line with the proportionality and subsidiarity principles. According to par. 13 of its preamble “[t]he transposition and the implementation of this Directive should, to greatest extent, build upon existing national rules and mechanisms”. As mentioned above, maritime spatial planning is introduced as a management tool for the effective implementation of sectoral EU policies with a maritime dimension. The necessity of legislating at EU level in this domain however has raised much controversy among member states and European institutions as well.

The Committee of Regions, in its opinion, whilst supporting the general aims of the proposed legislative act, has openly questioned whether the EU should legislate in this domain and, if the answer would be positive, the way it should legislate; furthermore, it underlined that the Directive should not define the content of maritime spatial plans and suggested in this regard, that the proposal as currently worded breaches the proportionality principle<sup>68</sup>. Furthermore, within the framework of the enhanced subsidiarity control mechanism introduced by the Treaty of Lisbon<sup>69</sup>, eight national

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munity. When Community rules exist but are not affected, in particular in cases of Community provisions establishing minimum standards, member states have a competence, without prejudice to the competence of the Community to act in this field. Otherwise, competence rests with the member states”. The Declaration also mentions the case of the organization’s complementary competences in relation to the promotion of cooperation on research and technological development with non-member countries and international organizations, with regard to the provisions of UNCLOS Parts XIII and XIV. Last but not least, the Declaration stipulates the evolving character of the organization’s competences, which is a significant parameter in the relation between EU and UNCLOS *vis à vis* the former’s rights and obligations in the marine space in relation to MSP, both in terms of its internal as well as its external policies. See *Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention*, [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm) (accessed 20 Feb 2014).

<sup>68</sup> Committee of the Regions, *Opinion, Proposed Directive for Maritime Spatial Planning and Integrated Coastal Zone Management*, NAT-V-030, 103<sup>rd</sup> Plenary Session, 7-9 October 2013.

<sup>69</sup> According to article 12 TEU and Protocol 1 TEU on the Role of the National Parliaments in the European Union, if the conformity of a proposed legislation at EU level with the subsidiarity principle is contested by one third of the votes allocated to national parliaments, the Commission was to review its proposal and maintain,

parliaments have submitted negative reasoned opinions<sup>70</sup> challenging the conformity of the proposed legislative act with the principle of subsidiarity. It should be mentioned that the objections were raised from parliamentary institutions of member states that have already made progress in MSP; there was no objection submitted by the parliaments of the Mediterranean countries that have not yet systematically developed and implemented maritime spatial planning tools. A relevant parliamentary question on the subsidiarity objections raised by national parliaments in several EU member states was submitted to the European Parliament<sup>71</sup>. The Commission argued that the draft Directive respects the subsidiarity principle since it consists of provisions of procedural nature and does not prescribe member states' choices in terms of (spatial) maritime activities in their waters<sup>72</sup>.

### 3. Evolving EU legislation

The Directive's implementation should take into consideration the objectives of relevant instruments of secondary EU law concerning sectoral policies that have an impact on maritime space<sup>73</sup>. The Marine Strategy Directive<sup>74</sup>, along with the Water Directive<sup>75</sup>, the Habitats Directive and the NATURA 2000 network<sup>76</sup>, constitute the environmental pillar of MSP. The

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amend or withdraw the proposed act. In the case of the MSP and ICZM directive only 8 parliaments submitted negative opinions in due time, failing to initiate the so-called yellow-card procedure mentioned above. See n. 70 below.

<sup>70</sup> Poland, Sweden, Germany, Ireland, Belgium, Finland, Lithuania and the Netherlands. See <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/0074%28COD%29&l=en#tab-0> (accessed 12 Feb 2014).

<sup>71</sup> See *Question for written answer to the Commission, Rule 117, Patricia van der Kammen (NI)*, E-010797-13, Parliamentary Questions, 23 September 2013.

<sup>72</sup> See *Answer given by Ms Damanaki on behalf of the Commission*, E-01078/2013, Parliamentary Questions, 25 November 2013.

<sup>73</sup> See Wanfei Qiu, Peter J.S. Jones, "The Emerging Policy Landscape for marine spatial planning in Europe", 39 *Marine Policy* (2012), 182.

<sup>74</sup> *Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of environmental policy (Marine Strategy Directive)*, OJ L 164, 25.6.2008, at 19-40.

<sup>75</sup> *Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy*, OJ L 327, 22.12.2000, at 1-75.

<sup>76</sup> *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora*, OJ L 206 of 22<sup>nd</sup> July 1992, at 7-50. In terms of the latter's implementation in the marine environment, it should be mentioned that

new Fisheries Regulation<sup>77</sup> along with existing instruments addressing regional specificities such as the 1967/2006 Regulation concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea<sup>78</sup>, or targeted challenges such as illegal fisheries<sup>79</sup>

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although the text of the Directive refers to “natural habitats and [...] wild fauna in the European territory of the member states” (article 2 par. 1), the ECJ ruled that the Directive applies not only to the territory and the territorial sea but to the EEZ as well. According to its Judgment in the *Commission v. the United Kingdom* case, “the United Kingdom exercises sovereign rights in its exclusive economic zone and on the continental shelf and that the Habitats Directive is to that extent applicable beyond the Member States” territorial waters. It follows that the directive must be implemented in that exclusive economic zone”. See Judgment of the Court (Second Chamber), Case-6/04, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, 20 October 2005, at par. 117. The same position was also adopted by the Commission in its 1999 Communication on Fisheries Management: “The provisions of the ‘Habitats’ Directive automatically apply to the marine habitats and marine species located in territorial waters (maximum 12 miles). However, if a member state exerts its sovereign rights in an exclusive economic zone of 200 nautical miles (for example, the granting of an operating license for a drilling platform), it thereby considers itself competent to enforce national laws in that area, and consequently the Commission considers in this case that the ‘Habitats’ Directive also applies, in that Community legislation is an integral part of national legislation”. *Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, Fisheries Management and Nature Conservation in the Marine Environment*, COM (1999) 363 final, 14.6.1999, at 10.

<sup>77</sup> *Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) 1224/2009 and repealing Council Regulations (EC) No 2371/2202 and (EC) No 639/2004 and Council Decision 2004/585/EC*, OJ L 354, 28.12.2013, at 22-61.

<sup>78</sup> *Council Regulation (EC) No 1967/2006 of 21 December 2006 concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea, amending Regulation (EEC) No 2847/93 and repealing Regulation (EC) No 1626/94*, OJ L 409, 30.12.2006, at 11-85. The Regulation provides for the establishment of fishing protected areas by member states “both in waters under their jurisdiction and beyond where the protection of nursery areas, of spawning grounds or of the marine ecosystem from harmful effects of fishing requires special measures” (see article 5). *Council Regulation (EC) No 676/2007 of 11 June 2007 establishing a multi-annual plan for fisheries exploiting stocks of plaice and sole in the North Sea*, OJ L 157, 19.6.2007, at 1-6, constitutes another example of regionalized institutionalization of fisheries management within the European Union.

<sup>79</sup> *Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amend-*

and aquaculture development<sup>80</sup>, lay the foundations for the incorporation of fisheries activities in MSP. In the energy sector, the main activities to be included in MSP concern energy production and transmission (including energy infrastructure); thus, legislation concerning trans-European networks<sup>81</sup> or renewable energy<sup>82</sup> is an important parameter that should be taken into account. Last but not least, leaving aside the content of member states' obligation in relation to the above mentioned EU legislation, MSP authorities should also consider the timetables set by the latter such as the attainment of the objective of good environmental status of the Marine Directive by 2020 (article 1 par. 1), the Directive on EU renewable energy targets until 2020, that requires that member states shall ensure that the share of energy from renewable sources in 2020 will be at least 20% (article 3) or the objective provided in the 2013 Fisheries Regulation concerning "the progressive restoration and preservation of fish stocks above biomass levels capable of producing maximum sustainable yield", the latter to be achieved "by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks" (article 2 par. 2).

#### 4. Application of ecosystem-based and adaptive management

According to article 5 of the draft Directive, MSP shall apply an ecosystem-based approach, in line with article 1 par. 3 of the Marine Strategy Directive and its overall objective of achieving good environmental status of the European marine ecosystems as well as article 2 par. 3 of the new

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ing Regulations (EEC) No 2847/94, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EEC) No 1093/94 and (EC) No 1447/1999, OJ L 286 29.10.2008, at 1-32. The provisions of this Regulation that have an impact on MSP concern the designation by member states of ports, or places close to the shore, where landings or transshipment operations of fishery products and certain port services are permitted (article 5 par. 1)

<sup>80</sup> Commission Regulation (EC) No 710/2009 of 5 August 2009 amending Regulation (EC) No 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007, as regards laying down detailed rules on organic aquaculture animal and seaweed production, OJ L 204. 6.8.2009, at 15-34.

<sup>81</sup> Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, OJ L 262, 22.9.2006, at 1-23.

<sup>82</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, at 16-62.

Fisheries Regulation referring to fisheries management. In addition, there are provisions for the implementation of adaptive management, consisting of monitoring, continuous assessment and adaptation of existing maritime spatial plans (article 18).

### 5. *Transboundary cooperation*

According to the proposed Directive's preamble (par. 20) member states "should consult and coordinate their plans and strategies with the relevant member states and third countries of the marine region or sub-region or coastal zone concerned in conformity with the rights and obligations of these member states and third countries under European and international law". Namely, the draft Directive fosters the coherence and coordination of MSP implemented in member states' maritime zones belonging to the same maritime sub-region (article 12) while it introduces an obligation for member states to pursue coordination when bordering with third states ("member states [...] shall make every effort to coordinate") (article 13). The Directive proposal however, does not define any criteria concerning the appropriate fulfillment of this obligation, leaving space for different interpretations that may undermine MSP implementation and jeopardize -under certain conditions- neighborly relations.

### 6. *EU MSP governance framework*

Once the proposed Directive enters into force, member states should designate the competent national authorities for its implementation in the maritime areas concerned (article 14) as well as foster public participation of stakeholders in the design of MSP (article 9) involving public<sup>83</sup> consultation<sup>84</sup> with authorities, legal entities and individuals for the preparation of

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<sup>83</sup> The proposed directive uses the same definition of "public" (article 3, par. 5) with Directive 2003/35, n. 84 below.

<sup>84</sup> According to the White Paper on European Governance, the European Commission should "establish and publish minimum standards for consultation on EU policy"; however, "the principal responsibility for involving the regional and local actors in preparing their position in EU policy remains and should remain with national administration [...] Each Member State should foresee adequate mechanisms for wide consultation when discussing EU decisions and implementing EU policies with a territorial dimension". Commission of the European Communities, *European Governance. A White Paper*, COM (2001) 428 final, Brussels, 25.7.2001, at. 4, 12. In the Communication adopted in 2002 the Commission made

maritime spatial plans. Regional Fisheries Councils as well as environmental NGOs, the shipping and tourist industry, the scientific community and local councils/authorities constitute the main stakeholders to be involved in MSP deliberations.

#### IV. THE CASE OF THE MEDITERRANEAN SEA

##### A. The institutional framework for EU MSP development in the Mediterranean

###### 1. *Spatial application of the proposed Directive*

According to article 2 par. 1 on the scope of the proposed Directive, its provisions will apply to “marine waters” and “coastal zones”, defining the latter as “the geomorphologic area on both sides of the seashore area with as the seaward limit the external limit of the territorial seas of Member

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clear that the process of consultation should “supplement” and not “replace” the legitimized decision-making processes in the EU. See Commission of the European Communities, *Communication from the Commission -Towards a reinforced culture of consultation and dialogue. General principles and minimum standards for consultation of interested parties by the Commission*, COM (2002) 704 final, Brussels, 11.12.2002, at 4-5. In the Directive proposal on MSP and ICZM (par. 22 of the preamble), the European Commission characterizes the provisions of Directive 2003/35 concerning the conditions for public participation in respect of environmental plans and programmes as an example of good practice in this domain. The latter defines the term “public” as “one or more natural or legal persons and, in accordance to national legislation or practice, their associations, organizations, or groups” (article 2 par. 1) and stipulates that member states “shall ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions required to be drawn up under the provisions listed in Annex I” (concerning waste, batteries and accumulators containing certain dangerous substances, water pollution caused by nitrates from agricultural sources, hazardous waste, packaging waste etc.). Directive 2003/35 further specifies the conditions states shall ensure for the fulfillment of this objective, namely public information activities, the expression of comments and opinions by the public before the decisions are taken, taking due account of the results of public participation and informing the public about the decisions taken and the rationale behind them (article 2 par. 2). See *Directive 2003/35/EC of the European Parliament and of the Council of 16 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relation to the environment and amending with regard to public participation and access to justice Council Directives 85/337 and 96/61/EC*, OJ L 156, 25.6.2003, at 17-24.



States and as the landward limit, the limit as defined by the Member States in their integrated coastal management strategies” (article 3 par. 1). Marine waters (article 3 par. 4) refer to “the waters, the seabed and the subsoil as defined in article 3(1) of Directive 2008/56/EC”, encompassing “waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with UNCLOS, with the exception of waters adjacent to the countries and territories mentioned in Annex II to the Treaty and the French Overseas Departments and Collectivities; and coastal waters as defined by article 2 of the Water Framework Directive 2000/60/EC, their seabed and their subsoil, in so far as particular aspects of the environmental status of the marine environment are not already addressed through that Directive or other Community legislation”. From the definitions provided, there is an overlap in the scope of application of MSP and ICZM activities in the territorial sea, which leaves the option for the integration of spatial planning activities in coastal management strategies or maritime spatial plans to the discretion of the coastal state, depending on the latter’s policy priorities, maritime jurisdictional rights and the environmental needs of different marine areas.

## 2. *MSP and the Mediterranean maritime spatial variable geometry*

Considering the definitions provided in the Directive proposal, Mediterranean coastal states’ jurisdiction in relation to spatial planning activities (either MSP or ICZM) that have an impact on the marine environment, depends on the nature and the extent of national maritime zones (as presented above). In terms of the latter, the following apply in the Mediterranean basin<sup>85</sup>:

### *(a) Internal Waters*

Spatial planning in internal waters, including ports and historical bays, should be incorporated in the ICZM strategy of coastal states, providing a

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<sup>85</sup> For the legal regime of the Mediterranean Sea, see Tullio Scovazzi, “Les zones côtières en Méditerranée: évolution ou confusion”, 6 *Annuaire du Droit de la Mer* (2001) and Tullio Treves, “Les zones maritimes en Méditerranée: compatibilité et incompatibilité avec la Convention sur le droit de la mer de 1982”, 6 *Revue de l’Indemer* (2003). In relation to the current developments in the Eastern Mediterranean see Haritini Dipla, “Ressources énergétiques et limites maritimes en Méditerranée orientale”, 16 *Annuaire du Droit de la Mer* (2011), at 66-85.

framework for the sustainable management of these areas based on the concept of land-sea interface. The only differentiation among member states in terms of spatial planning activities implementation in this case relates to the methodology used for the adoption of baselines. In the Mediterranean Sea 6 EU member states use the straight baseline system (Croatia<sup>86</sup>, Cyprus<sup>87</sup>, France<sup>88</sup>, Italy<sup>89</sup>, Malta<sup>90</sup>, Spain<sup>91</sup>) as well as other 8 non-EU members (Albania<sup>92</sup>, Algeria<sup>93</sup>, Egypt<sup>94</sup>, Libya<sup>95</sup>, Morocco<sup>96</sup>, Montenegro<sup>97</sup>, Tunisia<sup>98</sup> and Turkey<sup>99</sup>). Another element to be taken into account is the historical bays claimed by

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<sup>86</sup> In 1994 Croatia enacted its Maritime Code adopting, among other, the straight baseline system introduced by former Yugoslavia's legislation. See *The Maritime Code*, 27 January 1994, Official Gazette of the Republic of Croatia, No. 75, 1994 and *Law on Marginal Seas, Contiguous Zone and Continentals Shelf*, 22 May 1965, as amended by the *Law on Marginal Seas and the Continental Shelf of the Socialist Federal Republic of Yugoslavia of 30 March 1979*.

<sup>87</sup> Office of Legal Affairs, *Law of the Sea Bulletin No. 24*, December 1993, at 6-9.

<sup>88</sup> *French Decree on Delimitation of Territorial Waters*, 19 October 1967, *Journal Officiel* 99e année, No. 255, 1er novembre 1967.

<sup>89</sup> *M.Z.N. 1996 LOS 19 April 1996*.

<sup>90</sup> *Territorial Waters and Contiguous Zone Act to extend the territorial waters of Malta and to make provision for a contiguous zone*, 10 September 1971.

<sup>91</sup> *Act No. 10/1077*, 4 January 1977 and *Royal Decree No. 2510/1977*, 5 August 1977.

<sup>92</sup> *Decree No. 4650*, as amended by *Decree No. 7366*, dated 9 March 1990, on the State Border of the People's Socialist Republic of Albania. See also the relative map in Office of Legal Affairs, *The Law of the Sea – Baselines: National Legislation with Illustrative Maps*, Division for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, at 2.

<sup>93</sup> *Decree No. 84-181 of 4 August 1984 defining the baselines for measuring the breadth of the maritime zones under national jurisdiction*.

<sup>94</sup> *Decree of the President of the Arab Republic of Egypt No. 27 (1990) concerning the baselines of the maritime areas of the Arab Republic of Egypt*, 9 January 1990.

<sup>95</sup> *General People's Committee Decision No. 104 of the year 1373 from the death of the Prophet (AD 2005) concerning straight baselines for measuring the breadth of the territorial sea and maritime zones of the Libyan Arab Jamahiriya*, in Office of Legal Affairs, *Law of the Sea Bulletin No. 59*, Division for Ocean Affairs and the Law of the Sea, United Nations, 2005, at 15-18

<sup>96</sup> *Act No 1.73.211 establishing the limits of the Territorial Waters and the Exclusive Fishing Zones of Morocco*, 2 March 1973.

<sup>97</sup> *Law on Marginal Seas, Contiguous Zone and Continentals Shelf*, 22 May 1965, as amended by the *Law on Marginal Seas and the Continental Shelf of the Socialist Federal Republic of Yugoslavia of 30 March 1979*, n. 86 above.

<sup>98</sup> *Decree No. 73-527 of 3 November 1973 concerning baselines*.

<sup>99</sup> *Territorial Waters Law*, *Law No. 476*, 15 May 1964 in Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea. Baselines: National Legislation with Illustrative Maps*, United Nations, New York, 1989, at 313-314.

coastal states such as the Gulf of Taranto by Italy<sup>100</sup> and the Gulf of Sidra by Libya<sup>101</sup>.

(b) *Territorial sea*

All Mediterranean coastal states have established a 12 n.m. territorial sea<sup>102</sup>, with the exception of Greece (6 n.m.)<sup>103</sup> and Turkey only in the Aegean (6 n.m.)<sup>104</sup> as well as the UK (3 n.m.) in Gibraltar<sup>105</sup> and the sovereign bases of Akrotiri and Dekelia in Cyprus<sup>106</sup>. The territorial sea may be either incorporated in the ICZM strategy (in line with the definition of the “coastal zone” provided in article 3 of the proposed Directive) or be part of a broader MSP strategy. The criteria to be used by national authorities in specifying the spatial planning approach are jurisdictional, related to the existence of an EEZ beyond the territorial sea, and functional, related to the activities (and their intensity) taking place therein (e.g. offshore installations for energy production, fisheries, marine protected areas etc).

(c) *Straits used for international navigation*

There is a significant number and various types of straits used for international navigation in the Mediterranean Sea, due to the latter’s geographic features, such as the proximity of the coasts or the plethora of islands. The impor-

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<sup>100</sup> *Decree of the President of the Republic No. 816 of 26 April 1977*, see <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm> (accessed 10 March 2014).

<sup>101</sup> *Information concerning the jurisdiction of the Gulf of Surt, 1973*, see <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/LBY.htm> (accessed 10 March 2014).

<sup>102</sup> Syria’s excessive claim for a 35 n.m. territorial sea was abandoned in 2003 when Syria adopted a law that reduced its territorial sea to 12 n.m. See *Law No. 28, Definition Act of Internal Waters and Territorial Sea Limits of the Syrian Arab Republic*, 19 November 2003.

<sup>103</sup> *Law No. 230*, 17 September 1936, Government Gazette 450 A of 17 September 1936.

<sup>104</sup> *Act No. 2674 on the territorial sea of the Republic of Turkey*, 20 May 1982.

<sup>105</sup> There is a longstanding dispute between Spain and the UK concerning Gibraltar and its entitlement, among other, to a territorial sea. Diplomatic tension has recently escalated over fishing rights in the area after the creation of an artificial reef by Gibraltar.

<sup>106</sup> *Treaty concerning the establishment of the Republic of Cyprus*, 19 August 1960, Annex I, Section 3.

tance of MSP development is attributed to the challenges arising from these areas” natural features (e.g. the presence of rocks or islets) that render these areas rich in biodiversity or natural phenomena (like strong currents) that make conditions for navigation difficult; thus, regulating -usually- heavy maritime traffic, decreasing the risk of accidents and avoiding the destabilization of the environmental equilibrium, constitute the core strategic axes of maritime spatial activities in international straits. The challenges for the implementation of spatial planning are accentuated in cases involving more than one coastal states and, as a consequence coordination of national institutions and policies are required (as in the case of the Straits of Bonifacio between Sardinia and Corsica)<sup>107</sup>; and where existing disputes in the area may hinder regional cooperation (as in the case of Gibraltar)<sup>108</sup>. Last but not least, another parameter should also be taken into account when conducting long-term planification projects in the region: the evolving jurisdictionalisation<sup>109</sup> of the Mediterranean Sea that may change the status of the right of passage and, therefore, the content of spatial plans (the prospect of the extension of Greek territorial waters to 12 n.m. constitutes an illustrative example)<sup>110</sup>.

(d) *Continental shelf*

MSP in the Mediterranean coastal states’ continental shelf is related to the national policy priorities formulated taking into account the latter’s natural features and resources within the framework of the rights and obligations of the coastal states in accordance to international law<sup>111</sup>, the regional *acquis* (re-

<sup>107</sup> See Tullio Treves, “Transit Passage and Protection of the Environment in the Strait of Bonifaccio” in Alexander Kiss, Françoise Burhenne-Guilmin (eds.), *A Law for the Environment. Essays in Honour of Wolfgang E. Burhenne*, Gland, IUCN, 1994.

<sup>108</sup> See Jesús Verdú Baeza, “The Law of the Sea and Environmental Problems in the Strait of Gibraltar”, 14 (1) *Journal of International Wildlife and Policy* (2011).

<sup>109</sup> A term used in order to depict the increase of newly established maritime zones in the Mediterranean, in Gemma Andreonne, “Observations sur la ‘juridictionnalisation’ de la mer Méditerranée”, 9 *Annuaire du Droit de la Mer* (2004).

<sup>110</sup> Greece, one of the countries with a 6 n.m. territorial sea reserves its right, according to the law of the sea, to expand its territorial sea to 12 n.m. For the changes in the status of the existing international straits in the case of the expansion of the Greek territorial sea, see, Haritini Dipla, n. 30 above, at 44-47 and Krateros Ioannou, Anastasia Strati, n. 30 above, at 115.

<sup>111</sup> Referring to customary international law, UNCLOS as well as other international instruments regulating sectoral issues that may have an impact on coastal states’ continental shelf management such as the World Heritage Convention, the Underwater Cultural Heritage Convention, the Biodiversity Convention etc.

gional conventions<sup>112</sup> and bilateral agreements<sup>113</sup>, as well as EU legislation<sup>114</sup> and policies<sup>115</sup>) and national legislation<sup>116</sup>. National policies related to the

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<sup>112</sup> The Barcelona Convention and its Protocols constitute the regional environmental pillar of marine environmental protection of the Mediterranean, including provisions that are directly related to MSP activities development on the continental shelf, especially in the case of the establishment of marine protected areas and the management of pollution resulting from offshore activities (although the relevant Protocol is not yet in force). For the text of the Barcelona Convention and its Protocols, as well as their ratification status, see <http://www.unepmap.org/> (accessed 10 March 2014).

<sup>113</sup> As in the case of the provisions (article 2) of the continental shelf delimitation agreement between Greece and Italy concerning mineral deposits split by the boundary line (“[i]f a mineral deposit, including sand and gravel, is split by the boundary line and if that part of the deposit which is situated on one side of the boundary line can be mined wholly or in part by means of installations situated on the other side of the line, the two Governments shall endeavour, in conjunction with the holders of mining licenses, if any, to reach agreement on how to mine the deposit in order to ensure that such mining is as profitable as possible and that each Party preserves its full rights over the mineral resources of the sea-bed and subsoil of its continental shelf”). See *Agreement between the Hellenic Republic and the Italian Republic on the delimitation of the respective Continental Shelf Areas of the two States*, 24 May 1977. A similar provision has been incorporated in the respective agreements between Albania and Italy, Spain and Italy, See article II, *Agreement between Albania and Italy for the determination of the continental shelf of each of the two countries*, 18 December 1992; article 2, *Convention between Spain and Italy on the Delimitation of the Continental Shelf between the two States*, 19 February 1974.

<sup>114</sup> Legislation related to the marine environment such as the Marine Strategy Directive or more targeted needs such as the safety from offshore oil and gas operations. See *Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC*, OJ L 178, 28.6.2013, at 66-106.

<sup>115</sup> Policy guidelines provided by the European Union addressing different sectors of the integrated maritime policy constitute reference documents for the development of member states’ priorities at national level, since they are usually used by the European Commission as precursors of future legislative initiatives or they are linked to EU funding opportunities. The Blue Growth Communication codifies EU policy priorities related to the economic added value of the seas and oceans, some of which are related to activities taking place on the continental shelf of member states, such as the extraction of marine mineral resources or the creation of the necessary knowledge infrastructure delivering, among others, a multi-resolution digital seabed map of European waters by 2020. See Commission of the European Union, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Blue Growth. Opportunities for marine and maritime growth*, COM (2012) 494 final, Brussels 13.9.2012.

continental shelf, however, are also conditioned by the tools provided by science and technology; the advance of the latter has improved national authorities' and private sector's understanding of the ecological and economic bearing capacity of this maritime area, leading to an increase of activities (and accident risks) related to Mediterranean coastal states' continental shelf<sup>117</sup>. The developments concerning natural gas and oil resources in the eastern Mediterranean constitute an illustrative example of the latter<sup>118</sup>. This reality is reflected in the provisions of the proposed Directive of the European Commission when reference is made to the relation of MSP with energy production and transfer. Thus, MSP in the Mediterranean EU member states' continental shelf is expected to address the following activities: (i) research and exploration policies of coastal states (including detailed mapping of the area by 2020)<sup>119</sup>, (ii) the exploitation activities of natural gas and oil reserves, including construction and operation of the required installations toward this aim<sup>120</sup>; (iii) the safeguard of navigational

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<sup>116</sup> Such as the *Greek Law 4001/2011 for the operation of Electricity and Gas Energy Markets, for Exploration, Production and transmission networks of Hydrocarbons and other provisions*, Government Gazette 179 A of 22 August 2011, the *Italian Act No 613 on the Surveying and Production of Oil and Gas in the Territorial Sea and the Continental Shelf, and amendments to Act No. 6 of 11 January 1967 on the Surveying and Production of Oil and Gas*, 21 July 1967 or the *French Act No. 77-485 of 11 May 1977 amending Act No. 68-1181 of 30 December 1968 relating to the exploration of the Continental Shelf and the exploitation of its natural resources* in the domain of marine energy resources; the *French Code du Patrimoine du 14 février 2013* or the *Greek Law 3028 on the Protection of Antiquities and Cultural Heritage in general*, Official Gazette 153 A of 28 June 2002 in the domain of underwater cultural heritage.

<sup>117</sup> For the evolution of the uses of the continental shelf and the emerging challenges in relation to its institutional regime see Myron H. Nordquist, John Norton Moore, Aldo Chircop, Ronán Long (eds.), *The Regulation of Continental Shelf Development: Rethinking International Standards* (2013).

<sup>118</sup> For an account of the prospects of oil and gas energy resources exploitation as well as of the state practice in terms of new zones declaration and delimitation in the Eastern Mediterranean, see Haritini Dipla, n. 85 above, at 63-85. See also US Energy Information Administration, *Overview of oil and gas in the Eastern Mediterranean region*, August 15 2013.

<sup>119</sup> Commission of the European Union, see n. 115 above and European Commission, *Green Paper, Marine Knowledge 2020*, COM (2012) 473 final, 29.8.2012.

<sup>120</sup> Offshore oil and natural gas production in the EU originating from the Mediterranean region is mainly taking place in the Italian but also in the Spanish, Croatian and Greek continental shelves, see <http://euoag.jrc.ec.europa.eu/node/63> (accessed 12 March 2014). Appraisal drilling activity is currently taking place offshore Cyprus in Block 12, see <http://www.subseaiq.com/data/Project.aspx?pro>

safety and environmental security related to the latter; (iv) other offshore mining activities of minerals such as tin, gravel and sand; (v) fisheries management in relation to sedentary species; (vi) other ecosystem and biodiversity protection measures (excluding accident risk management mentioned above); (vii) cable and pipeline networks development<sup>121</sup>; (viii) underwater cultural heritage protection and related activities, such as excavations.

### (e) Exclusive Economic Zone

Apart from the activities taking place in the continental shelf, coastal states that have declared an EEZ in the Mediterranean can extend the implementation of MSP in the water column above it. The European Commission considers the existence of an EEZ as an important parameter for the effective enforcement of MSP<sup>122</sup>, since it contributes to the extension of national jurisdiction in the fields of environmental protection, management of biological

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ject\_id=1008&AspxAutoDetectCookieSupport=1#history (accessed 12 March 2014). Exploration drilling activities also take place in Malta's "Area 14" and are scheduled to be completed in July 2014, see <http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail.html?announcementId=11828195> (accessed 12 March 2014).

<sup>121</sup> MSP should incorporate the strategic energy infrastructure projects' implementation provided in *Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines provided for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009*, OJ L 115, 25.4.2013, at 39-75. The Regulation provides guidelines for the identification and the implementation of such projects, as well as the eligibility criteria for EU financial assistance (article 1). In October 2013, the European Commission adopted 248 key energy infrastructure projects including those to be implemented in the Mediterranean region, such as the implementation of the electricity cluster Israel-Cyprus-Greece consisting of a 600kV underwater electric cable and the necessary equipment and/or installations aiming to connect the above mentioned countries' electricity markets, as well as the construction of the Southern Gas Corridor including on shore and offshore pipelines connecting Greece, Turkey and Italy (via Albania through the Trans-Adriatic pipeline and via the Adriatic Sea through the "Interconnector Turkey-Greece-Italy" (ITGI) pipeline) and the pipeline from offshore Cyprus to Greece mainland via Crete. For the full list of the approved projects see [http://ec.europa.eu/energy/infrastructure/pci/pci\\_en.htm](http://ec.europa.eu/energy/infrastructure/pci/pci_en.htm) (accessed 12 March 2014).

<sup>122</sup> According to the 2010 Communication on MSP in the EU, the Commission noticed that an Exclusive Economic Zone (EEZ) provides "more favorable conditions for an efficient implementation of MSP, as it makes it easier to enforce". European Commission, n. 49 above, at 4.

resources and the exploitation of renewable sources of energy, establishment of artificial islands and installations, but also ensures the coherence of MSPs in other maritime zones, such as the territorial sea and the continental shelf, rendering the implementation of legislative measures and policies more efficient<sup>123</sup>. The example of Germany that has established MSP in its EEZ in the Baltic and the North Sea constitutes an illustrative example of the latter<sup>124</sup>. The existence of an EEZ may ensure the spatial continuity in the areas falling under the jurisdiction of one state; however, the question that arises in the case of the Mediterranean relates to the fulfilment of the objective of transboundary coherence as well, since (i) not all coastal states have declared EEZs. There are currently eight Mediterranean coastal states that have declared EEZs (Morocco –although the Mediterranean is not explicitly mentioned in the relevant Act<sup>125</sup>, Tunisia<sup>126</sup>, France<sup>127</sup>, Egypt<sup>128</sup>, Cyprus<sup>129</sup>, Lebanon<sup>130</sup>, Israel<sup>131</sup> and Lib-

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<sup>123</sup> The reports conducted on behalf of the European Commission on the prospects of MSP implementation and the costs and benefits from the establishment of maritime zones in the Mediterranean, also perceive the existence of EEZs in the region as the most convenient environment for the implementation of comprehensive MSP. See Policy Research Corporation, see n. 19 above, and MRAG Ltd, *Costs and benefits arising from the establishment of maritime zones in the Mediterranean Sea - Final Report*, Call for tenders No. MARE/2010/05, June 2013, at 205.

<sup>124</sup> See n. 50 above.

<sup>125</sup> *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.*

<sup>126</sup> *Act No. 50/2005 dated 27 June 2005 concerning the exclusive economic zone off the Tunisian coasts.*

<sup>127</sup> France established an ecological protection zone in the Mediterranean in 2003, substituted by an EEZ in 2012. *Décret n° 2012-1148 du 12 octobre 2012 portant création d'une zone économique exclusive au large des côtes du territoire de la République en Méditerranée*, JORF n°0240 du 14 octobre 2012, at 16056.

<sup>128</sup> *Declaration concerning the exercise by Egypt of its rights in the exclusive economic zone*, 26 August 1983, See *Declarations of the Government of Egypt made upon ratification of UNCLOS*, [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#Egypt%20Upon%20ratification](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Egypt%20Upon%20ratification) (accessed 10 March 2014).

<sup>129</sup> Cyprus adopted a law establishing an EEZ in 2004; the law has been applied retroactively since 21.3.2003. See *A Law to Provide for the Proclamation of the Exclusive Economic Zone by the Republic of Cyprus*, 2 April 2004.

<sup>130</sup> Although Lebanon had concluded negotiations for a delimitation agreement with Cyprus in 2007 (an agreement that was not ratified by the former), has formally declared an EEZ by a law of 2011. See *Law No. 163 dated 18 August 2011 - Delineation and Delimitation of the Maritime Regions of the Republic of Lebanon*.

<sup>131</sup> *List of Geographical Coordinates for the Delimitation of the Northern Limit of the Territorial Sea and Exclusive Economic Zone of the State of Israel* (transmitted by a communication



ya<sup>132</sup>); and (b) many states have established zones characterized as partial or derivative EEZs<sup>133</sup> such as Croatia's Ecological and Fisheries Protection Zone<sup>134</sup>, Spain's Fishing Protection Zone<sup>135</sup>, Algeria's Exclusive Fishing Zone<sup>136</sup>, Slovenia's Ecological Protection Zone<sup>137</sup>, Italy's Ecological Protection Zone<sup>138</sup>.

## B. Introducing MSP in the Mediterranean

### 1. *The state of play*

The European Commission has incorporated MSP both in the general and operational objectives of the 2011 Regulation<sup>139</sup> for the financial

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dated 12 July 2011 from the Permanent Mission of Israel to the United Nations addressed to the Secretariat of the United Nations).

<sup>132</sup> *General People's Committee Decision No. 260 of A.J. 1377 (A.D. 2009) concerning the declaration of the exclusive economic zone of the Great Socialist People's Libyan Arab Jamahiriya.*

<sup>133</sup> Evident of the "inherent flexibility" of the concept of EEZ "both in terms of spatial delimitation and of substantive content". Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (2007), at 95.

<sup>134</sup> Croatia established an Ecological and Fisheries Protection Zone in the Adriatic Sea but suspended its application to EU member states after the reactions of Slovenia and Italy and the implication the latter would have on Croatia's accession to the EU. It is worth mentioning that the European Council that granted membership to Croatia in June 2004, made explicit reference to the "Croatian decision not to apply to EU member states any aspect of the Ecological and Fisheries Protection Zone". See *Decision on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea*, 3 October 2003 and *Decision on Amending the Decision on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea of 3 October 2003*, 3 June 2004, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/HRV.htm> (accessed 10 March 2014) and Council of the European Union, *Presidency Conclusions, Brussels European Council 17-18 June 2004*, at par. 38.

<sup>135</sup> *Royal Decree 1315/1997, of 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean Sea.*

<sup>136</sup> *Legislative Decree No. 94-13 of 17 Dhu'lhijjah 1414, corresponding to 28 May 1994, establishing the general rules relating to fisheries*, 22 June 1994.

<sup>137</sup> *Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act*, 22 October 2005.

<sup>138</sup> *Act No. 61 of 8 February 2006*, Gazzetta Ufficiale della Repubblica Italiana No. 52, 3 March 2006. The Italian Ecological Protection zone also provides for archaeological and historical heritage protection.

<sup>139</sup> Article 2 stipulating the general objectives of the Regulation mentions that the programme shall contribute to "the development of cross-sectoral tools, namely

support of the EU integrated maritime policy. The eligible actions for the Mediterranean (according to the relevant call released in 2012<sup>140</sup>) focused on the development of MSP in line with the methodological framework proposed in the feasibility study conducted for the implementation of MSP in the Mediterranean on behalf of the European Commission in 2011. The proposed methodology was structured around concrete criteria and pre-conditions, namely: (i) the intensity of activities taking place in the area, (ii) the availability of scientific data or knowledge and tools to generate spatial plans, (iii) the national or regional institutional framework in relation to maritime affairs, and (iv) the openness of the countries involved for cross-border cooperation<sup>141</sup>.

The study indicated as the most convenient areas for the development of cross-border MSP the northern part of the Adriatic (with the participation of Italy, Slovenia and Croatia), the area surrounding Malta (Malta, Italy, Tunisia, Libya -in theory due to operational difficulties in cooperation with the latter-) and Western Mediterranean (Spain, France, Monaco and Italy). Thus, the recommendations of experts although not excluding, consider the development of cross-border MSP less feasible in the broader area of the Eastern Mediterranean, although it is an area that fulfills certain of the above mentioned criteria in relation (i) to the competing activities of sea use (including fisheries and maritime transport) and their intensification due to the recent natural gas discoveries in the region, and (ii) to the existence of national and regional institutional arrangements, considering the EEZ declarations and delimitation agreements concluded in the area (e.g. between Cyprus and Israel and Cyprus and Egypt). Accordingly, the project proposal awarded DG MARE's financial support for the Mediterra-

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maritime spatial planning...”, while article 3 on the operational objectives refers to the development of “maritime spatial planning and integrated coastal zone management, both important tools for the sustainable development of marine areas and coastal regions and both contributing to the aims of ecosystem-based management and the development of land-sea links, as well as facilitating Member State cooperation, for example as regards the development of experimental and other measures combining the generation of renewable energy and fish farming”. See *Regulation (EU) 1255/2011 of the European Parliament and of the Council of 30 November 2011 establishing a Programme to support the further development of an Integrated Maritime Policy*, OJ L 321, 5.12.2011, at 1-10.

<sup>140</sup> *Project on Maritime Spatial Planning in the Mediterranean Sea and/or the Black Sea*, Call for Proposals MARE/2012/25, 14.12.2012.

<sup>141</sup> See Policy Research Corporation, see n. 19 above, at 30-31.

nean was AdriPlan<sup>142</sup>, that aims at developing MSP for the Adriatic-Ionian macroregion within the framework of the respective future EU strategy<sup>143</sup>, while MSP in the Eastern Mediterranean involving methodology and pilot projects development will be implemented bilaterally, with the collaboration of Greece and Cyprus under the INTERREG programme<sup>144</sup>.

## 2. *MSP governance challenges in the Mediterranean region*

In introducing MSP in the Mediterranean region, national authorities and EU institutions will have to address a series of challenges that hinder the coherence of marine areas management:

### *(a) Lack of institutional coherence*

There is no uniform participation of Mediterranean coastal states in international and regional instruments of maritime governance. Although adherence to UNCLOS by all EU member states as well as the EU *acquis* constitute a decisive parameter for the development of common perceptions, policies and tools for spatial management in marine areas, the case is not the same with the ratification of other international and regional instruments catering for different dimensions of maritime governance<sup>145</sup>. The situation becomes more complex when non-EU member states are taken into account in MSP activities if we consider the fact that the unifying

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<sup>142</sup> <http://www.adriplan.eu> (accessed 10 March 2014).

<sup>143</sup> The concept of “macroregions” was introduced by DG REGIO in an effort to address targeted challenges faced by member states and third countries sharing the same region, through the introduction of an integrated framework adopted by the European Council and supported by the Structural Funds or other EU financial instruments (depending on the eligibility criteria of the proposed projects). The Baltic Sea Region was the first macroregion to be established, followed by the Danube Region. The Strategy for the Adriatic and Ionian Sea is expected to be adopted by the end of 2014. [http://ec.europa.eu/regional\\_policy/cooperate/macro\\_region\\_strategy/index\\_en.cfm](http://ec.europa.eu/regional_policy/cooperate/macro_region_strategy/index_en.cfm) (accessed 15 March 2014).

<sup>144</sup> <http://www.cyprusremotesensing.com/laboratory/80-research-grants/141-development-of-a-maritime-spatial-planning.html> (accessed 15 March 2014).

<sup>145</sup> The status of ratifications the Barcelona Convention’s Protocols is indicative. See <http://www.unepmap.org/index.php?module=content2&catid=001001004> (accessed 10 March 2014). The Convention on the Protection of Underwater Cultural Heritage has been ratified by Italy, France, Spain, Slovenia and Croatia, but not Greece, Cyprus and Malta. See <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha> (accessed 10 March 2014).

effect of the EU law is missing (or affects differently these countries depending on the degree of relations developed with the organisation); additionally, there are four states, all situated in the Eastern Mediterranean, that are not contracting parties to UNCLOS<sup>146</sup>. Thus, since one of the main principles of the proposed Directive is cooperation among member states and among member states and third states under European and international law, the institutional variable geography in the Mediterranean *vis à vis* states' participation in different legal instruments constitutes a factor that will definitely determine its effective implementation.

*(b) Differentiated coastal states' jurisdiction over maritime space*

The existence of a non-uniform regime in terms of the nature and the extent of maritime zones falling under EU member states' jurisdiction may hinder the effective implementation of EU legislation on sectoral policies functioning as the constituent parts of MSP<sup>147</sup>. The implementation of the Marine Strategy Directive, for example, in member states that have declared EEZ compared to other countries that have not yet exercised their right to declare an EEZ or to make use of the full extent of their maritime zones according to international law, constitute illustrative examples. The same applies in the domain of fisheries and the implementation of measures of a general or geographically focused character such as the reformed fisheries policy or the 2006 Mediterranean Regulation respectively. Thus, the need for spatial and jurisdictional uniformity should be considered as a decisive factor for MSP's effectiveness<sup>148</sup>.

*(c) Pending institutional arrangements and existing disputes among coastal states*

The Mediterranean region, compared to other EU regional seas, is discerned by the limited number of delimitation agreements in force and the existing disputes pending for settlement. The conclusion of the delimitation

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<sup>146</sup> Libya, Israel, Syria and Turkey.

<sup>147</sup> The significance of legal uniformity beyond the territorial sea through the proclamation of (partial) EEZs has also been discussed in the domain of environmental protection, see Nathalie Ros, "Environmental Protection of the Mediterranean Sea", 11 *Revista de Estudios Jurídicos* (2011), at 7.

<sup>148</sup> See European Commission, n. 49 above, at 4 and MRAG Ltd, n. 123 above.

tation agreements between Cyprus and Egypt in 2003<sup>149</sup> and Cyprus and Israel in 2010<sup>150</sup> has boosted optimism in relation not only to the enhancement of good neighborly relations in the Eastern Mediterranean, but also in terms of the economic prospects of a permanent settlement of the maritime borders in the area. However, the lack of progress in relation to the implementation of the delimitation agreements between Cyprus and Lebanon<sup>151</sup> and Greece and Albania<sup>152</sup> has moderated the aforementioned expectations. In terms of the existing disputes among Mediterranean coastal states, the longstanding disputes between Greece and Turkey concerning the Aegean dispute<sup>153</sup>, the UK - Spanish dispute over the maritime area of Gibraltar<sup>154</sup> or the pending dispute between Slovenia and Croatia<sup>155</sup>

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<sup>149</sup> *Agreement between the Republic of Cyprus and the Arab Republic of Egypt on the Delimitation of the Exclusive Economic Zone*, 17 February 2003.

<sup>150</sup> *Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone*, signed in Nicosia on 17 December 2010.

<sup>151</sup> Concluded in 2007, ratified by Cyprus but not by Lebanon since the latter objects the relevant delimitation agreement between Cyprus and Israel. See *Letter dated 20 June 2011 from the Minister for Foreign Affairs and Emigrants of Lebanon addressed to the Secretary-General of the United Nations concerning the Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, signed in Nicosia on 17 December 2010*.

<sup>152</sup> Signed but not ratified by the countries involved. In 2010 the Albanian Constitutional Court ruled that the agreement was in breach of the Albanian Constitution. The Greek Government has repeatedly reiterated that the process should be completed once the Albanian part resolved this internal issue that came up after the two countries signed the agreement. Krateros Ioannou, Anastasia Strati, n. 30 above, at 135.

<sup>153</sup> The most recent verbal notes concerning the Greek protest on the granting of licenses by Turkey for hydrocarbon exploration and exploitation activities in areas falling within Greek continental shelf and the reply of Turkey were sent to the Secretary General in 2013. *Communication dated 20 February 2013 from the Permanent Mission of Greece to the United Nations addressed to the Secretary-General and Communication dated 12 March 2013 from the Permanent Mission of Turkey to the United Nations with reference to the Verbal Note from the Permanent Mission of Greece dated 20 February 2013*.

<sup>154</sup> See n. 105 above.

<sup>155</sup> In 2009 Slovenia and Croatia signed an arbitration agreement concerning their dispute on (a) the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia; (b) Slovenia's junction to the High Sea; and (c) the regime for the use of the relevant maritime areas. [http://www.pca-cpa.org/showpage.asp?pag\\_id=1443](http://www.pca-cpa.org/showpage.asp?pag_id=1443) (accessed 13 March 2014). See Giuseppe Cataldi, "Prospects for the Judicial Settlement of the Dispute between Croatia and Slovenia Over Piran Bay" in N. Boschiero, T. Scovazzi, C. Pitea, C. Ragni (eds.), *International Courts and the Development of International Law* (2013).

are typical cases that are expected to undermine the effectiveness of national and cross-border MSP.

(d) *Plurality of domestic policy and institutional arrangements*

EU member states pursue different approaches in terms of domestic institutional provisions for MSP development, adapted to national or local specificities and objectives. France for example, has developed an overall maritime strategy incorporating spatial planning related initiatives implemented since the 80s, the so called “schémas de mise en valeur de la mer” translated as “sea enhancement plans”<sup>156</sup>. Cyprus is in the process of developing a national strategy, which simply makes reference to the competent authorities’ intention to use MSP as one of the tools of maritime governance<sup>157</sup>. Greece on the other hand has not adopted an integrated national policy to maritime affairs or a consistent approach toward MSP, while provisions that could be applied to spatial planning in maritime areas are fragmentary in character and can be traced in different parts of the Greek spatial planning legislation<sup>158</sup>. In Spain, the Marine Environment Protection Law, adopted for the transposition of the EU Marine Strategy Directive into national law, incorporates maritime spatial planning as a tool for achieving good environmental status, providing no further directions toward its implementation<sup>159</sup>. In Malta, no marine spatial plans have been

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<sup>156</sup> See Brice Trouillet et al., “Planning the sea: The French experience. Contribution to marine spatial planning perspectives”, 35 *Marine Policy* (2011).

<sup>157</sup> The Cypriot authorities have launched a public consultation on the Government’s initial proposal that ended in December 2013. See *Draft Strategy of Cyprus for an Integrated Maritime Policy*, <http://www.mcw.gov.cy/mcw/dms/dms.nsf/All/7C0F3D-B469C0A640C2257C24002C1DAD?OpenDocument> (accessed 15 Dec 2013).

<sup>158</sup> The General Framework for Spatial Planning adopted in 2008 provides for the sustainable use and management of the maritime space (article 4). *General Framework for Spatial Planning and Sustainable Development*, Official Gazette A 128 of 3 July 2008. At regional level, regional spatial plans adopt different approaches *vis à vis* the maritime areas while special plans have been adopted for specific activities such as aquaculture or the development of renewable energy production. See *Special Framework for Spatial Planning for Aquaculture*, Official Gazette B 2505 of 4 November 2011 and *Special Framework for Spatial Planning and Sustainable Development for Renewable Energy*, Official Gazette B of 3 November 2008.

<sup>159</sup> See Juan Luis Suárez de Vivero, Juan Carlos Rodríguez Mateos, “The Spanish approach to marine spatial planning. Marine Strategy Framework Directive vs. EU Integrated Maritime Policy”, 36 *Marine Policy* (2012).

developed at the moment<sup>160</sup>. In Slovenia the Spatial Planning Act of 2007 gives to state authorities the competence over MSP<sup>161</sup>. In Italy<sup>162</sup> and Croatia there is no specialized institutional framework and no national ICZM/MSP strategy. Croatia however is preparing its national strategic document for the Croatian Adriatic Region that will integrate both the coastal and the marine dimensions of spatial management<sup>163</sup>.

Additionally, there are significant differences in the administrative framework and culture of Mediterranean member states, ranging from highly decentralized governance for ICZM to the assignment of most of the offshore marine competences to the central administration as in the case of Spain<sup>164</sup> or the shift of the main coastal competences from the state to the regions that took place in Italy after the recent changes Italian legislation has undergone<sup>165</sup>. France had already established centrally located inter-ministerial structures, as the Secrétariat Général de la Mer<sup>166</sup>, while other states opt for the division of labor among different ministries under more loose patterns of coordination, as in the case of the Greek inter-ministerial Commission on the Integrated Maritime Policy<sup>167</sup>.

Last but not least, member states' approaches are differentiated *vis á vis* stakeholders' participation in decision-making processes, an important factor for the effective implementation of MSP. The establishment in France in 2009<sup>168</sup> of the *Grenelle de la Mer* bringing together representatives of government, politicians, scientists, unions and NGOs in order to define a common framework to integrate maritime and coastal activities is, for

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<sup>160</sup> See <http://mti.gov.mt/en/Pages/Continental%20Shelf/Maritime-Governance-Unit.aspx> (accessed 3 March 2014).

<sup>161</sup> According to article 11. See *Spatial Planning Act*, Official Gazette of RS, no. 33/2007.

<sup>162</sup> See PAP/RAC, *National Report on Current Policy, Procedures, Legal Basis and Practice of Marine Spatial Planning in Emilia-Romagna region - Italy*, Bologna, 2007.

<sup>163</sup> Emiliano Ramieri, Elisa Andreoli, Angiola Fanelli, Giovanni Artico, Roberto Bertaggia, *Methodological Handbook on Maritime Spatial Planning in the Adriatic Sea, Final Report of SHAPE project*, 14 February 2014, at 22.

<sup>164</sup> See Juan Luis Suárez de Vivero, Juan Carlos Rodríguez Mateos, n. 159 above.

<sup>165</sup> PAP/RAC, n. 162 above.

<sup>166</sup> <http://www.gouvernement.fr/gouvernement/le-secretariat-general-de-la-mer-0> (accessed 10 March 2014).

<sup>167</sup> Established by *Law 4150 on the reform of the Ministry of Mercantile Marine and the Aegean*, Official Gazette A 102 of 29 April 2013.

<sup>168</sup> <http://www.developpement-durable.gouv.fr/-Le-Grenelle-de-la-mer-de-2009-a,6309-.html> (accessed 10 March 2014).

the moment, the most advanced example of public participation in policy formulation in the Mediterranean region.

## V. CONCLUDING REMARKS

MSP implementation, according to the provisions of the relevant Directive proposal, constitutes a challenging venture for the Mediterranean region. Apart from the ecological specificities due to its semi-enclosed character, the extensive coast lines and island agglomerations, the variety of social and eco-systemic conditions, the alterations in its ecological profile due to the impact of maritime transport, fisheries activities and climate change, there is a number of emerging activities that bring the necessity of MSP in the region into the fore more urgently than before, namely:

- (a) the increase of offshore installations for the extraction of energy resources and the environmental risks that go in hand with it;
- (b) the promotion of “blue” renewable energy production, mainly through the construction of wind-farms and its impact on other sea uses including maritime transport;
- (c) the prioritization of energy and transport networks development through the implementation of Trans-European Networks (TENs);
- (d) the advent of marine biotechnology and its implications for maritime economy; and
- (e) the changing features of fishing activities caused by the delocalization of fishing fleets from the Black Sea to Eastern Mediterranean, the reduction of the fishing areas in the region as a result of the limitation of the area under the high seas regime and the implementation of protected marine areas management schemes and legislation.

Rendering MSP a legal obligation for member states by the means of a directive, leaves enough space for incorporating tailor-made solutions in order to accommodate the needs of different maritime regions and sub-regions. However, there are two main challenges to be addressed. First of all, the differences in the national institutional and administrative frameworks and cultures may undermine the effective implementation of EU MSP legislation. Secondly, the obligation for cross-boundary cooperation among member states and member states and third states in this domain, in line with the ecosystem approach, raises certain questions and may create frictions in the case of the Mediterranean region due to existing maritime dis-



putes and the variation in international instruments' adherence by coastal states.

Undoubtedly, the Union's *acquis*, especially the new generation of secondary EU legislation where quantified objectives (timeframes and tangible results) are incorporated, constitutes a significant factor for the homogenization of states' practice. This applies both for member states as well as third states; in the case of the latter, the impact of the Union's *acquis* to third countries unfolds in three levels: through the accession process for countries that have the status of candidate states, that is Turkey and Montenegro; through the association process with countries that have been granted the status of potential candidate states, such as Albania and Bosnia-Herzegovina; and through the bilateral partnerships established within the framework of the European Neighbourhood Policy<sup>169</sup>.

Additionally, once the proposed Directive is adopted, the role of the ECJ should not be neglected, taking into account the text's woolly expressions concerning delicate issues such as cross border cooperation and the competing nature of maritime activities and interests that MSP processes will have to allocate. The contribution of EU's Court may be decisive in interpreting the provisions of a legislative act whose content may constitute the cutting edge of marine ecosystems' management but not an embedded practice at national and regional level.

In spite of the turbulence caused in the legislative procedure triggered by the issue of the proposed act's conformity with the subsidiarity and proportionality principles, the European Commission has recently welcomed the "*positive outcome of the informal trilogue on the draft for a Framework Directive for Maritime Spatial Planning*"<sup>170</sup>. Implementing the Directive however, will require political will, good faith, administrative capacity, institutional arrangements and the creation of a culture of cooperation within and across borders. The question that arises is whether the institutional and political dynamism of the European Union can still contribute toward this direction in the Mediterranean region.

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<sup>169</sup> Algeria, Egypt, Israel, Lebanon, Libya, Syria, Tunisia and Palestine are the Mediterranean partners that fall into the scope of ENP. Algeria is currently negotiating an ENP Action Plan, while Libya and Syria do not fully participate in ENP structure. See [http://eeas.europa.eu/enp/index\\_en.htm](http://eeas.europa.eu/enp/index_en.htm) (accessed 18 March 2014).

<sup>170</sup> "Commission welcomes agreement on Maritime Spatial Planning" 7 March 2014, [http://ec.europa.eu/information\\_society/newsroom/cf/mare/itemdetail.cfm?item\\_id=15072&subweb=342&lang=en](http://ec.europa.eu/information_society/newsroom/cf/mare/itemdetail.cfm?item_id=15072&subweb=342&lang=en) (accessed 12 March 2014).

**II. REGIONAL COOPERATION:  
ENVIRONMENT, NATURAL  
RESOURCES AND  
ENFORCEMENT AT SEA**



# *Our “Planet Ocean” and marine renewable energies: Shouldn’t someone be responsible for their management in Areas Beyond National Jurisdiction?*

MONTSERRAT ABAD CASTELOS\*

**Summary:** I. Kinds of marine renewable energies; II. The need to adopt a sustainable development perspective; III. The advantages and disadvantages of using marine renewable energies; A. The advantages; B. The disadvantages; IV. Applicable norms of international law; V. Recent institutional developments; VI. Should renewable energies be managed internationally?; VII. Conclusions.

## I. KINDS OF MARINE RENEWABLE ENERGIES

Marine renewable energies are a form of renewable energy deriving from the various natural processes that take place in the marine environment. There are four kinds of such energy, namely ocean energy; wind energy from turbines located in offshore areas, geothermal energy derived from submarine geothermal resources; and bioenergy derived from marine biomass<sup>1</sup>, particularly ocean-derived algae. In turn, renewable ocean energy comes from six distinct sources, each with different origins and requiring different technologies for conversion, but having in common the fact that they are all obtained from the potential, kinetic, thermal and

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<sup>1</sup> IPCC, *Special Report on Renewable Energy Sources and Climate Change Mitigation* (2011), p. 164.

chemical energy of seawater. These six distinct sources are waves, tidal range, tidal currents, ocean currents, ocean thermal energy conversion and, finally, salinity gradients. More specifically, waves, which are generated by the action of wind on water, produce energy that can be harnessed. With regard to tides, their amplitude generates energy through the cyclical rise and fall in the height of the ocean. The same is true of tidal currents, which are generated by horizontal movements of water, their flows resulting from the rise and fall of the tide. Ocean currents, which exist in the open ocean, are another source of energy. Ocean thermal energy conversion, on the other hand, is a technology for taking advantage of the solar energy absorbed by the oceans, based on the temperature difference between the top layers of water and those at a greater depth, which are much colder. However, a minimum temperature difference of 20°C between layers is needed in order to harness this energy, which can therefore only be produced in certain parts of the world, such as equatorial and tropical regions. Finally, salinity gradients arise from the mixing of freshwater and seawater, which takes place at river mouths and releases energy as heat. This energy can be harnessed through a process of inverse electrodialysis, based on the difference in chemical potential between freshwater and seawater, or through an osmotic power process based on the natural tendency of the two types of water to mix together<sup>2</sup>.

The development status of these technologies differs widely, although most of them are still either embryonic or in their infancy, ranging as they do from the conceptual stage to the prototype stage, taking in the pure research and development stage on their way<sup>3</sup>. The IPCC highlights tidal range technology as being the most advanced, and in fact as the only form of ocean energy technology (excluding marine wind energy technology) that can currently be considered “mature”<sup>4</sup>. Although marine energy technologies are still generally at an early stage of development, it has to be said that they could make much swifter progress if investment in them were higher. Prominent among the leaders in the development and commercialisation of marine renewable energy technologies are nations such as the United Kingdom, Ireland, the United States, Australia, New Zealand, Finland, Denmark, Belgium, France, Germany and Japan<sup>5</sup>. However,

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<sup>2</sup> *Ibid.*, pp. 503 ff.

<sup>3</sup> *Ibid.*, Chap. 6.3.1.

<sup>4</sup> *Ibid.*

<sup>5</sup> Nevertheless, the list of leading countries in this sector varies according to the source consulted. For example, the countries mentioned in the Report of the UN Secretary-General on marine renewable energies, published in 2012, do not exactly

the economic crisis currently affecting a number of the world's developed countries will necessarily have a negative effect on the flow of investment towards technologies of this kind.

Although forecasts vary widely, depending on who is making the prediction, a prudent approach indicates that any significant deployment of ocean energy technologies is unlikely to occur before 2030, whilst commercial deployments are expected to continue expanding beyond 2050<sup>6</sup>. It remains to be seen, therefore, when these technologies will be able to make a significant contribution to the global energy supply. At the moment, only marine wind energy can be considered to be relatively close to beginning to be competitive with fossil fuels or nuclear energy. However, it must be said that in spite of the incipient status of all marine renewable energies forecasts of their potential are on the whole clearly optimistic. According to the IPCC, the potential for technically exploitable marine renewable energies, marine wind power excluded, is estimated at some 7,400 exajoules (EJ) per year<sup>7</sup>. This figure is considered to be more than enough to meet human energy needs not only at present, but also well into the future<sup>8</sup>.

Marine renewable energies, like all renewable energies in general, therefore appear to be the ideal solution to two fundamental problems that affect developing and developed countries in different ways, at least in part. These are, on the one hand, how to guarantee access to energy, which mainly affects developing countries (we are talking purely in terms of *access* to energy, not energy *security*), and on the other, how to reduce greenhouse gas emissions, which until recently has been a problem concerning above all developed countries, although things have now started to change in this regard. Whatever the situation, these are two problems for which we have been unable to find a solution to date, or for which solutions have not been forthcoming due to a lack of the necessary political will.

Taking all the above into account, it is worth insisting in this introduction on the capacity of marine renewable energies to provide solutions to problems such as those we have just outlined. The range of difficulties that energies of this nature can help to surmount is enormous. Indeed, as the

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coincide with those that appear in other places, such as specialist websites. See, in any case, the above-mentioned report, UN Doc. A/67/79, dated 4 April 2012, p. 8.

<sup>6</sup> IPCC, *Special Report on Renewable Energy Sources and Climate Change Mitigation* (2011), p. 527.

<sup>7</sup> *Ibid.*, p. 501.

<sup>8</sup> *Ibid.* and UN Doc. A/67/79 (note 5 above), pp. 6-7.

twenty-first century progresses there is growing awareness that the energy potential of the seas and oceans may be so vast that it surpasses our current understanding, and the latter are steadily rising up the rankings to become undisputed contributors in a near-term sustainable energy scenario<sup>9</sup>. However, it also seems to be true that marine renewable energies are not without their disadvantages, and certain issues will undoubtedly arise regarding their deployment. The matter is thus one of enormous complexity, and not only from the technical point of view: it is indeed far more multifaceted than it appears to be at first sight.

## II. THE NEED TO ADOPT A SUSTAINABLE DEVELOPMENT PERSPECTIVE

The pros and cons of marine renewable energies must be examined from the standpoint of the three dimensions of sustainable development, these being economic, environmental and social in nature. Although a significant proportion of the principle of sustainable development still remains within the realm of *soft law*, it is by no means negligible from the perspective of international law, because it contains elements that can in fact be classified as legal, as is well known. This is not only because it raises expectations in accordance with the principle of good faith, and States are usually very careful to avoid having to withdraw from previously acquired commitments, or having to retrace their steps, but because it can project a much wider scope. Indeed, soft law now not only looks like law, but also often functions like law because it effectively guides the behaviour of states, international organizations, and even private entities<sup>10</sup>.

Furthermore, the principle of sustainable development may also have far-reaching legal consequences, since certain international jurisdictional organisations have started to unravel and clarify the practical implications of its content, a process which commenced in the mid nineteen-nineties. In this regard, the International Court of Justice has applied the principle of sustainable development on several occasions in order to resolve

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<sup>9</sup> J.K. Sterne, T.C. Jensen, J. Keil, and R. Roos-Collins, "The Seven Principles of Ocean Renewable Energy: A Shared Vision and Call for Action" (2009) 14 *Roger Williams University Law Review*, pp. 600 ff.; p. 600.

<sup>10</sup> M. Goldmann, "Soft Law and Other Forms of International Public Authority – The View from Discourse Theory: A Reply to Jaye Ellis" (2012) 25 *Leiden Journal of International Law* pp. 373-378; p. 373.

conflicts between States over the use of a shared resource<sup>11</sup>, whilst an international court of arbitration has also gone down the same road<sup>12</sup>. Similarly, the International Tribunal for the Law of the Sea adopted a crucial dictum in 2011, when it considered the concept of the common heritage of mankind to be an integral part of the promotion of sustainable global development<sup>13</sup>. In the light of this evolution we must be aware that one of the major challenges facing us today is to operationalize the principle of integration of the economic, social and environmental aspects of sustainable development, which can now be considered a norm of general international law<sup>14</sup>. Bearing this in mind, the sphere of marine renewable energies should be a sector in which care must be taken that any new regulation (or the development of an existing one) does not ignore this principle.

In coherence with what now seems to be an irreversible trend, sustainable development is considered to be a pillar of a variety of strategies adopted within the United Nations (although this situation, unfortunately, is still more theoretical than real). Thus, a significant proportion of the "Sustainable Energy For All" initiative, launched by the UN Secretary-General in 2012 to mobilize action from all sectors of society in support of three interlinked objectives to be achieved by 2030: providing universal access to modern energy services; doubling the global rate of improvement in energy efficiency; and doubling the share of renewable energy in the global energy mix. Similarly, the objective of sustainable development is

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<sup>11</sup> See, for example, the following cases: *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia; 1997 ICJ, pp. 7 ff; pp. 70 & 75); *Kasikili / Sedudu Island* (Botswana v. Namibia; 1999 ICJ, pp. 1045 ff.; pp. 1087 and 1088; in particular the dissenting opinion of Judge Weeramantry); *Pulp Mills on the River Uruguay* (Argentina v. Uruguay; 2010 ICJ, pp. 135 ff.; p. 180).

<sup>12</sup> See the award of the arbitral tribunal in the *Iron Rhine ("Ijzeren Rijn") Railway Case* (Belgium v. Netherlands; Perm. Ct. Arb., pp. 28-29, 49 (at <http://www.pca-cpa.org/upload/files/BE-NL%20Award%20240505.pdf>).

<sup>13</sup> *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Case Number 17*, International Tribunal for the Law of the Sea, Advisory Opinion, paras. 159 and 163 (downloadable from <http://www.itlos.org/index.php?id=109>). See P. Holcombe Henley, "Minerals and mechanisms: The legal significance of the notion of the "Common Heritage of Mankind" in the Advisory Opinion of the Seabed Disputes Chamber" (2011) *Melbourne Journal of International Law*, pp. 373-395; p. 394.

<sup>14</sup> See M.C. Cordonier Segger, "The Role of International Forums in the Advancement of Sustainable Development" (2009) 10 *Sustainable Development Law & Policy*, p. 10.



one of the main foundations of a number of significant Reports issued by the United Nations Secretary-General, of which we will mention some of the most relevant for our purposes. Thus, the principle of sustainable development to a greater or lesser extent permeates the structure of the following documents: the *United Nations Secretary-General's Report on marine renewable energies*, 2012; the *Climate Change Expert Group's Report on renewable energies*, published some months previously; or the report on *new and emerging technologies*<sup>15</sup>. Additionally, the United Nations General Assembly's open-ended informal consultative process on the Oceans and the Law of the Sea (UNICPOLOS), whose mandate is precisely to deal with matters relating to oceans within the context of sustainable development, devoted its thirteenth meeting, held in 2012, to discussing above all the subject of marine renewable energies, with a focus that can generally be considered to be highly positive<sup>16</sup>.

### III. THE ADVANTAGES AND DISADVANTAGES OF USING MARINE RENEWABLE ENERGIES

#### A. *The advantages*

From an environmental standpoint, one of the most indisputable aspects of marine renewable energies is the significant contribution they can make to reducing our tremendous dependence on traditional non-renewable sources of energy. This positive aspect in turn generates a wide range of additional benefits in the environmental, economic, social and strategic spheres, the most important of these being a reduction in the emission of greenhouse gases<sup>17</sup>. This firmly places marine renewable energies, like all other renewable sources of energy, as a powerful resource in the sphere of climate change mitigation<sup>18</sup>.

In the economic sphere the main opportunities lie in the potential for job creation, an aspect recently supported by the International Renewable

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<sup>15</sup> "New and emerging technologies: renewable energy for development", UN Doc. E/CN.16/2010/4.

<sup>16</sup> See [http://www.un.org/Depts/los/consultative\\_process/consultative\\_process.htm](http://www.un.org/Depts/los/consultative_process/consultative_process.htm).

<sup>17</sup> UN Doc. A/67/79 (note 5 above), p. 19.

<sup>18</sup> For other advantages, such as the virtue of marine renewable energy installations in dissuading fishing vessels from carrying out certain destructive practices, such as bottom-trawling, in their immediate vicinity, see *Ibid.*, p. 20.

Energy Agency (IRENA)<sup>19</sup>. A further possible advantage that can be singled out is the progressive reduction in the cost of the majority of the technologies involved, not only as a consequence of the increasing maturity of the market but also of the advances made in recent years<sup>20</sup>.

Turning now to social benefits, emphasis must be placed on the fact that access to modern energy services is in fact an "important precondition for many fundamental determinants of human development, including health, education, gender equality and environmental safety"<sup>21</sup>. It must also be stressed that experience always shows a correlation between sufficiently high levels of energy consumption and higher levels of development<sup>22</sup>. The very achievement of the Millennium Development Goals and of more equitable socio-economic development depends on providing the poor with increased access to modern energy services<sup>23</sup>. At the same time, marine renewable energy sources may be "a viable and sustainable solution for coastal communities that have limited or no access to modern energy services"<sup>24</sup>, although certain by no means trivial technical obstacles have to be overcome, commencing with the cabling of the power generated by the various kinds of marine energy devices to shore and connection to existing energy grids<sup>25</sup>.

### ***B. The disadvantages***

The most common environmental impacts of marine renewable energy technologies include, amongst others, the alteration of benthic habitats

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<sup>19</sup> According to an IRENA working paper, gross employment in the renewable energy industry in 2010 was estimated at over 3.5 million jobs; IRENA, "Renewable energy jobs: status, prospects and policies" (2011), p. 4 (at [www.irena.org/DocumentDownloads/Publications/RenewableEnergyJobs.pdf](http://www.irena.org/DocumentDownloads/Publications/RenewableEnergyJobs.pdf)).

<sup>20</sup> UN Doc. A/67/79 (note 5 above), pp. 19-20.

<sup>21</sup> *Ibid.*, p. 21 and IPCC, *Special Report on Renewable Energy Sources and Climate Change Mitigation* (2011) (note 1 above), p. 120.

<sup>22</sup> UN Doc. A/67/79 (note 5 above), p. 21 and UN Doc. A/64/277, para. 6.

<sup>23</sup> UN Doc. A/67/79 (note 5 above), p. 21 and UN Doc. A/62/208, para. 7.

<sup>24</sup> UN Doc. A/67/79 (note 5 above), p. 21.

<sup>25</sup> In this regard, during the thirteenth meeting of UNICPOLOS a significant proportion of the discussion focussed on highlighting the specific potential of this kind of energy for Small Island Developing States (SIDS). See in particular the statement made by the US delegation, referring to its potential benefit not only for SIDS; but also for "remote areas", and the summary in *Earth Negotiations Bulletin*, Vol. 25, Number 88, 4 June 2012, pp. 4 ff.

and sediment transport or deposition by the construction activities and continuous presence of devices and structures; killings or changes in the behaviour of fish and mammals as a result of noise and electromagnetic fields; interference with the movement, feeding, spawning and migration paths of fish, mammals and birds; the release of toxic chemicals as a result of accidental spill or leaks or the accumulation of metals or organic compounds; and the reduction of the velocity of marine currents and decrease in wave height resulting from the extraction of wave or tidal energy<sup>26</sup>. Consideration must therefore be given to possible measures aimed at preventing or compensating for such problems. The starting point should be marine spatial planning, in order to avoid protected areas, sensitive habitats, migratory pathways or feeding, spawning or nursery grounds and the like, followed by the introduction of specific measures for the different types of devices, installations or sites used to generate energy<sup>27</sup>.

The only way to fill the existing knowledge gap is, in short, by testing the devices in situ “and monitoring and evaluating their impacts, taking into account the precautionary approach”<sup>28</sup>. Even so, it is essential to carefully check all the relevant assessments, subjecting them to as many verification processes as may be necessary, since we are dealing with a field in which it is possible to find evaluations that not only differ, but are at times wholly contradictory. A good example of this is given by the widely differing estimations of the environmental impact of the La Rance tidal barrage in France, which obtains energy from the amplitude of the tide. Thus, whilst one source refers to the impact as “negligible”<sup>29</sup>, another draws our attention to the “fairly serious” environmental impact it has produced, including sedimentation in the river, changes in the salinity of the waters in and around the estuary and disturbance to the aquatic ecosystem<sup>30</sup>.

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<sup>26</sup> UN Doc. A/67/79, (note 5 above), p. 22.

<sup>27</sup> *Ibid.*, pp. 22-23.

<sup>28</sup> *Ibid.*, p. 22

<sup>29</sup> In [www.oceanenergycouncil.com](http://www.oceanenergycouncil.com).

<sup>30</sup> IUCN, *Greening Blue Energy: Identifying and managing the biodiversity risks and opportunities of offshore renewable energy*, Edited by D. Wilhelmsson *et al.* (2010), pp. 69-70. For its part, the Spanish Renewable Energies Plan admits that, in addition to the “visual and structural impact” on the coastal landscape of power generating installations of this kind, and the magnitude of the civil engineering work involved in their construction, they usually cause a three-hour delay in the tidal cycle, with all the implications that this entails; *Plan de Energías Renovables 2011-20*, IDAE, Madrid, p. 193 (at [http://www.idae.es/index.php/mod.documentos/mem.descarga?file=/documentos\\_11227\\_PER\\_2011-2020\\_def\\_93c624ab.pdf](http://www.idae.es/index.php/mod.documentos/mem.descarga?file=/documentos_11227_PER_2011-2020_def_93c624ab.pdf)).

As far as the economic problems are concerned, these can easily be imagined, since the scientific and technological development needed to produce energy in this way requires massive investments as a result of the enormous costs involved. This expenditure is particularly high in the near-term, especially if compared to that needed by traditional methods of energy production nowadays<sup>31</sup>.

Equally necessary is a strategic association between the public and private sectors, since the latter requires a framework of incentives provided by the former. However, the difficulties arising as a result of the current economic crisis are compounded by the problems and conflicts caused by the diversity of legal, administrative and political frameworks involved. The absence of institutional coordination introduces barriers that are often difficult to overcome. The very novelty of the technologies concerned means that developers and investors are faced with inadequate fiscal and licensing policies precisely due to the lack of any kind of centralised authority or competent government agency<sup>32</sup>. In the awareness of all the difficulties of this kind, during the 2012 UNICPOLOS meeting it was even proposed to consider the possibility of using instruments like the Green Climate Fund<sup>33</sup>.

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<sup>31</sup> Furthermore, it must be noted that costs can differ according to the variables involved. Thus, for example, the cost of wind energy depends on the area where the turbines are located. Another problem affecting renewable energies in general is the lack of reliability in supplying energy to the grid, at least when compared to fossil fuel energy sources. Electricity generation fluctuates according to factors such as the time of day, the season of the year or weather events. This intermittence, characterised by peaks and troughs in the flow of energy, creates a series of problems and obstacles, although innovative measures are being taken to alleviate such effects; M. Esteban, M. & D. Leary, "Current developments and future prospects of offshore wind and ocean energy" (2012) 90 *Applied Energy*, pp. 128-136; pp. 134-135.

<sup>32</sup> UN Doc. A/67/79, (note 5 above), p. 23 and E. Schroeder, "Turning Offshore Wind On" (2010) 98 *California Law Review*, p. 1659.

<sup>33</sup> *Earth Negotiations Bulletin*, Vol. 25, Number 88, 4 June 2012, p. 3. However, it must be born in mind that the Green Climate Fund, which was first announced in Copenhagen and subsequently included in the Cancun Agreements, was set up in 2011 with an initial contribution from Germany and Denmark, although doubts remain about how it will receive annual funding in the medium term. This ambiguity regarding its funding may well endanger the chances of it fulfilling its initial goals: see R. K. Lattanzio, *International Climate Change Financing: The Green Climate Fund (GCF)*, CRS Report for Congress, Congressional Research Service, April 16, 2013 (at <http://www.fas.org/sgp/crs/misc/R41889.pdf>). Up-to-date information is also available at <http://gcfund.net>.

The social challenges surrounding marine renewable energies are related above all with the opposition or concern felt by local communities over the deployment in their vicinity of the structures and devices needed to obtain energy from such sources. All too often this lack of willingness is motivated by prejudices that are to a certain extent completely unfounded, and it is therefore important that these communities should take part in the process of deciding the sites for such devices and their associated cabling<sup>34</sup>. There are also certain problems relating to possible conflicts arising from pre-existing uses of the seas, which can be many and varied. As a result, pressure may be exerted by all the sectors that could be negatively affected against the deployment of energy-generating installations. The former would include, for example, the shipping and fishing industries, since sailing (and thus transport) and fishing rights could be prejudiced. Another sector often mentioned with regard to its misgivings is the tourist industry, concerned about the impact on beaches, landscapes and other amenities. A case in point in this regard would be Cape Cod, and indeed the whole of the state of Massachusetts, in the USA<sup>35</sup>. Nevertheless, it is also possible to come across the opposite point of view, one example being that of Denmark, where offshore wind farms are seen as a valuable tourist attraction for their design as much as for the engineering skills they exemplify<sup>36</sup>. Be that as it may, the problems referred to above are not the only possible challenges marine renewable energies have to face: there may well be others, such as those deriving from the potential conflict between such energies and the submerged cultural heritage<sup>37</sup>.

#### IV. APPLICABLE NORMS OF INTERNATIONAL LAW

Various areas of international law are of relevance to the development of marine renewable energies: the principal norms derive above all from the law of the sea, with others coming from closely connected nearby areas

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<sup>34</sup> In this regard, in the case of the USA it is reckoned that over half the total population lives on or near the coast; U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century. Final Report* (2004), p. 1.

<sup>35</sup> E. Feo, & J. Ludmir, "Challenges in the Development and Financing of Offshore Wind Energy" (2009) 14 *Roger Williams University Law Review*, pp. 672 ff; p. 677.

<sup>36</sup> *Ibid.*, p. 686.

<sup>37</sup> See A. Evans, A. Firth, & M. Staniforth, "Old and New Threats to Submerged Cultural Landscapes: Fishing, Farming and Energy Development" (2009) *Conservation and Management of Archeological Sites*, pp. 1-43.

such as international environmental law, international development law and even international civil aviation law. In this regard, international law is not only a key factor for ensuring harmony between the rights and obligations of States and the interests of the various users of marine spaces and the resources they contain, but also for guaranteeing the transport of the energy so generated and conserving the marine environment against known and possible future negative impacts. For all these reasons one of the key issues is to determine whether the international legal system is able to cover, under the umbrella of its existing norms, not only normal activities but also possible problems that may arise, or on the contrary reveals shortcomings or possible incompatibilities that need making good.

It is clear that the law of the sea is one of key aspects in this regard. The main legal instrument is that contained in the United Nations Convention on the Law of the Sea (UNCLOS), which in 2012 celebrated the thirtieth anniversary of its adoption. This convention contains the basic legal regime, since although some states have still to adhere to it (some of them of particular relevance, such as the US<sup>38</sup>), it is widely accepted, having 165 Parties, amongst them the European Union, as of mid-2013<sup>39</sup>. And, to some extent as a result of this, many of its provisions are applicable under customary law. The norms applicable to marine renewable energies are summarised in the following paragraphs, albeit very briefly.

However, it must first be noted that until now the devices used to obtain renewable energy in or from the sea have principally been located in areas subject to national jurisdiction. What is more, the majority of them have been deployed in inland and territorial waters<sup>40</sup>. Indeed, a look at the world map included in the document published in 2012 by UNEP on marine renewable energies, showing offshore wind farms and tidal and wave

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<sup>38</sup> Nevertheless, the Obama Administration has expressed its intention to ratify the Convention. In this sense, see the statement of H. Clinton before the Senate Foreign Relations Committee in May 2012, when she was Secretary of State, and that of L. Panetta, at the time Defence Secretary; "The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification".

<sup>39</sup> At <http://treaties.un.org/Pages/ParticipationStatus.aspx> (last consulted on 25 May 2013).

<sup>40</sup> As far as inland waters are concerned, these technologies are usually deployed in rivers, river mouths and estuaries; D. Leary & M. Esteban, "Recent Developments in Offshore Renewable Energy in the Asia-Pacific Region" (2011) 42 *Ocean Development & International Law*, pp. 94-119; p. 108.

energy plants, reveals that all the installations are on or close to the coastline of the countries concerned<sup>41</sup>. However, there is no obstacle, as we shall see, to their being located in waters outside State jurisdiction.

As far as territorial waters are concerned, the question arises as to whether renewable energy production technologies can interfere with the right to innocent passage enjoyed by a third State's vessels. This issue, which had previously been posed with regard to oilrigs, can be resolved by means of a conciliatory interpretation, in other words it would be possible to construct such installations that do not wholly obstruct or interfere unreasonably with foreign ships' right of innocent passage<sup>42</sup>. This interpretation, initially provided by doctrine in the case of oilrigs, has been applied through analogy (in the academic sphere also), and in my view correctly so, in the specific case of marine renewable energy plants<sup>43</sup>. It should also be borne in mind that in accordance with Article 22 of the Convention, a coastal State may designate sea lanes or traffic separation schemes to permit foreign ships to exercise their right of innocent passage by means of their use, in order to ensure the safety of navigation. The first State to apply such a provision because of its marine renewable energy installations was the United Kingdom. It did so in 2008, coming into force the following year, between the coast of Cornwall and the Isles of Scilly, which indicate the westernmost limits of the English Channel<sup>44</sup>. In 2012, the Netherlands followed the same route by proposing a variety of traffic separation measures before the IMO Sub-Committee on the Safety of Navigation, taking into account not only its offshore oil and gas production platforms but also its renewable energy installations<sup>45</sup>.

Within the exclusive economic zone, the Convention on the Law of the Sea contains a provision that explicitly states that the coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and

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<sup>41</sup> UNDP (2012), *Green Economy in a Blue World. Synthesis Report*, p. 12.

<sup>42</sup> H. Esmali, *The Legal Regime of Offshore Oil Rigs in International Law*, Aldershot, Ashgate Dartmouth, 2001, p. 73.

<sup>43</sup> D. Leary & M. Esteban, "Recent Developments in Offshore Renewable Energy in the Asia-Pacific Region" (note 40 above), p. 109.

<sup>44</sup> "Routing of Ships, Ship Reporting and Related Matters. Amendments to the Traffic Separation Scheme "Off Lands End, Between Longships and Seven Stones"; IMO Doc. NAV 54/3/5, 28 March, Sub-Committee on Safety of Navigation, IMO.

<sup>45</sup> "Address of the Secretary-General at the Opening of the Fifty-Eighth Session of the Sub Committee on Safety of Navigation, July 2, 2012" (available on the IMO website).

managing the natural resources, whether living or non-living, of the waters suprajacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds"<sup>46</sup>. This provision lays no claim to exhaustiveness, and thus provides an umbrella for the harnessing of types of marine energy not expressly mentioned, such as geothermal energy, bioenergy, tidal barrages, the conversion of oceanic thermal energy or salinity gradients. This, at least, has been the commonly accepted interpretation, with no doubts having been raised in this regard to date<sup>47</sup>. Similarly, the coastal State has jurisdiction with regard to the "establishment and use of artificial islands, installations and structures"<sup>48</sup>, of whose construction due notice must be given<sup>49</sup>, this being of fundamental importance for any activity relating to the exploitation of marine renewable energies. Additionally, the coastal State has the right to establish reasonable safety zones around such installations and structures, of which due notice must obviously also be given, and thus be respected by all ships. The breadth of such safety zones is in principle to be determined by the coastal State itself, but should be reasonably related to the nature and function of such installations. Nevertheless, these safety zones are not to exceed a distance of 500 metres around the installations and structures, measured from each point of their outer edge, except as authorised by generally accepted international standards or as recommended by the competent international organisation. The IMO, however, has yet to adopt any kind of standard in this regard. In 2008 the USA and Brazil, followed later by other States, proposed the drafting of the standards contemplated in Article 60 of the Convention and their inclusion in the Sub-Committee on the Safety of Navigation (NAV). Likewise, the Secretary-General of the Organisation, as a consequence of several specific proposals put forward by the Netherlands, in 2012 encouraged member States to revise "their existing ship routing systems for future use of their coastal areas for sustainable development which includes development of large renewable energy projects (...), whilst maintaining the safety of navigation"<sup>50</sup>.

However, it has to be remembered that no kind of installation or structure, nor any safety zone around them, may be established if they may in-

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<sup>46</sup> Art. 56a).

<sup>47</sup> UN Doc. A/67/79, (note 5 above), p. 10.

<sup>48</sup> Art. 56b)i).

<sup>49</sup> Art. 60.3.

<sup>50</sup> See Address of the Secretary-General of IMO, n. 45 above.



terfere with the use of recognised sea lanes essential to international navigation<sup>51</sup>. Furthermore, as is logically the case, the coastal State must always carry out such activities in accordance with the provisions of the Convention, and therefore respecting the right of all States, whether coastal or land-locked, to enjoy the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms<sup>52</sup>. It is appear important to point out that in cases where the Convention does not explicitly attribute rights or jurisdiction to the coastal State or other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved “on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole”<sup>53</sup>.

It must also be considered that all States, whether coastal or land-locked, have the right to lay and maintain submarine cables and pipelines on the continental shelf, provided they comply with the guidelines and requirements outlined in the Convention, a fact that is also of relevance to marine renewable energies. In particular, the course for the laying of such cables or pipelines must logically be subject to the consent of the coastal State<sup>54</sup>, which has the exclusive right to authorize and regulate drilling on the continental shelf for all purposes<sup>55</sup>. Similarly, newly laid cables or pipelines must have due regard to cables or pipelines already in position in every regard, including possibilities for their repair. However, the coastal State always has the right to establish conditions for cables or pipelines entering its territory or territorial sea, and jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf, the exploitation of its resources or the operations of installations and structures under its jurisdiction<sup>56</sup>.

Furthermore, and as far as the high seas are concerned, it should be pointed out that amongst the freedoms to be found there is, obviously, that of laying submarine cables and pipelines, which any State can lay in connection with a renewable energy device. As previously mentioned, the

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<sup>51</sup> Art. 60, paras. 4-7.

<sup>52</sup> Arts. 58 and 87 of the Convention.

<sup>53</sup> Art. 59.

<sup>54</sup> Art. 79, paras. 1 and 2.

<sup>55</sup> Art. 81.

<sup>56</sup> Art. 79.4.

normal state of affairs is for renewable energy installations to be located in areas subject to national jurisdiction, although in reality there is nothing to prevent them from being deployed beyond these. In fact, although references to this kind of situation are few and far between, at least one indirect allusion has been made to their viability, such as a recent mention from the sphere of the UNEP<sup>57</sup> or that made on the occasion of the 2012 UNICPOLOS meeting, where the question arose simply as to whether it was possible to deploy such installations in areas beyond national jurisdiction. The experts indicated that although no renewable energy projects were currently being developed in such areas, it is a theoretical possibility and that the energy potential of these areas was noted<sup>58</sup>. In this regard, it may be appropriate here to mention that one of the obstacles commonly associated with devices connected to a specific form of marine renewable energy, namely submarine geothermal energy, is precisely the fact that they have to be installed at a distance from the shore<sup>59</sup>.

A further point to be taken into account is that States have the specific obligation to protect and preserve the marine environment. This duty is expressed and developed in Part XII of the Convention<sup>60</sup>, and implies that States have to take, individually or jointly as appropriate, the measures necessary "to prevent, reduce and control pollution of the marine environment from any source". It is clear that these duties are closely related with activities having to do with research into renewable energies and their development and exploitation. Indeed, as we have seen, some of the operations required may be harmful to the environment, and this requires analysis at a much deeper level. In any event, and according to the United Nations Convention on the Law of the Sea and pursuant to current law, States must take all measures necessary to ensure that activities "under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment". This in fact is one of the Convention's "Achilles" heels, since it does not impose certain obligations on States be-

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<sup>57</sup> T. Nakamura (Coordinator, Marine and Coastal Ecosystems Unit, United Nations Environment Programme), "Overview of emerging and new uses of the Ocean areas beyond national jurisdiction", UNEP (at [http://www.un.org/Depts/los/biodiversityworkinggroup/workshop2\\_nakamura.pdf](http://www.un.org/Depts/los/biodiversityworkinggroup/workshop2_nakamura.pdf); last consulted on 25 June 2013).

<sup>58</sup> UN Doc. A/67/120, para. 44.

<sup>59</sup> T. Nakamura, "Overview of emerging and new uses of the Ocean areas beyond national jurisdiction", (note 57 above).

<sup>60</sup> Arts. 192 ff.

yond their national jurisdiction, particularly on the high seas (since in the EEZ the coastal State does have certain duties in relation, amongst others, to the protection and preservation of the marine environment).

Remaining within the same sphere of maritime law, there are other relevant instruments and rules that can be applied to marine renewable energies, such as the norms concerning ships' routing, the safety of navigation around offshore installations and structures or even the removal of the latter. These matters are all regulated in the 1974 Convention for the Safety of Life at Sea and in various Resolutions adopted by the International Maritime Organisation<sup>61</sup>. Of equal relevance are the norms relating to the transmission and transport of energy.

A further series of rules that need to be taken into account are those applicable to international civil aviation, given the height reached by marine wind farms in the air space suprajacent to the sea area they occupy, which has already started to cause certain issues of confusion, and even the creation of dead zones, to radars currently used for aerial navigation or other purposes. This creates complications that the ICAO and other Organisations have to deal with, and in this regard in 2009 the ICAO agreed on the need to perform an impact assessment whenever a wind turbine is located within a radius of 15 km from a radar facility<sup>62</sup>. Similarly, Eurocontrol has produced a series of guidelines which, among other points, proposes the existence of different geographical zones, in one of which, the "safeguarding" zone, wind turbines are not to be built<sup>63</sup>. The World Meteorological Organisation has also adopted a series of general guidelines for the construction of wind turbines in the vicinity of weather radars, which foresee a minimum safety distance of 5 kilometres between the former and the latter. Furthermore, the same document states that proposals for wind farm

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<sup>61</sup> Res. A 572 (14), General Provisions on Ships' Routing, 1985; Res. A 671(16) on Safety Zones and Safety of Navigation around Offshore Installations and Structures, 1989; and Res. A 672 (16) on Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone, 1989. It should be noted that some of these have been amended; see <http://www.imo.org/OurWork/Safety/Navigation/Pages/Default.aspx>.

<sup>62</sup> "European Guidance Material on Managing Building Restricted Areas", *Technical Report*, ICAO Eur Doc 015, The European and North Atlantic Office of ICAO, ICAO, Paris, 2009.

<sup>63</sup> M. Borely, "Guidelines on How to Assess the Potential Impact of Wind Turbines on Surveillance Sensors", *Technical Report Eurocontrol Guide 130*, Eurocontrol, Brussels, 2010.

projects within a radius of 20 kilometres from a radar facility of this kind should be submitted to an impact study<sup>64</sup>. Without casting any doubt on the positive nature of such measures, experts in these matters have drawn attention not only to the need to comply with the guidelines in question and negotiate all the relevant aspects with the stakeholders concerned, but also to the need for more accurate and detailed guidelines<sup>65</sup>.

At the same time, we should not forget the purely environmental regulatory dimension, which has two sides to it as far as these matters are concerned. On the one hand, there is the positive preventive side, in the sense that harnessing marine renewable energies can contribute to the avoidance of anthropogenic interferences with a negative impact on the climate system and stabilise greenhouse gas concentrations. Quite conveniently, marine renewable energy projects can be carried out as Clean Development Mechanism activities within the United Nations Framework Convention on Climate Change, the relevant norms being fully applicable. On the other hand, however, we have to consider the environmental impact of such schemes, in other words the negative side, analysed above, of the damaging effects that can ensue from their construction. In this regard, the existing regulations governing environmental impact assessment apply, one of the main provisions being that contained in the Convention on Biological Diversity, which requires each Contracting Party to perform such an assessment for activities carried out under its jurisdiction or control, regardless of where the effects may occur. In turn, other treaties also contain specific provisions in this regard<sup>66</sup>, it being important for our purposes to highlight those concerning a regional sea, for example the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, adopted in Barcelona in 1995. And, as has already been mentioned, in this regard the United Nations Convention on the Law of the Sea is incomplete, since although it provides a framework for supervi-

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<sup>64</sup> Technical Report, WMO-No. 1046; Commission for Instruments and Methods of Observation, WMO, Helsinki, 2010 and "Statement of the OPERA Group on the Cohabitation between Weather Radars and Wind Turbines". ([http://www.knmi.nl/opera/opera3/OPERA\\_2010\\_14\\_Statement\\_on\\_weather\\_radars\\_and\\_turbines.pdf](http://www.knmi.nl/opera/opera3/OPERA_2010_14_Statement_on_weather_radars_and_turbines.pdf)).

<sup>65</sup> D. De la Vega, J.C.G. Matthews, L. Norin & I. Angulo, "Mitigation Techniques to Reduce the Impact of Wind Turbines on Radar Services" (2013) 6 *Energies*, pp. 2859-2873; p. 2869.

<sup>66</sup> See, for example, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, drafted by the United Nations Economic Commission for Europe (CEPE) in 1991.

sing the risks or impact of pollution and assessing the potential impact of activities on the high seas<sup>67</sup>, the mechanisms included in these provisions are clearly inadequate<sup>68</sup>, and their application is in practice also far from being ideal<sup>69</sup>. This deficiency, however, does not only apply to UNCLOS, but is a vacuum that is to be found in international treaty law in general, although not in customary international law, as evidenced by the clear dictums emanating from international courts and tribunals<sup>70</sup>.

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<sup>67</sup> Arts. 204-206.

<sup>68</sup> In this regard, Article 206 of the Convention states, under the heading “Assessment of potential effects of activities”, that “[w]hen States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments (...)”.

<sup>69</sup> During the 2012 meeting of UNICPOLOS a question was raised on whether impact assessment reports for marine renewable energies were publicly available in the light of articles 205 and 206 of the Convention. A panellist clarified that although examples of publicly available assessments do exist, others were carried out by private companies, it being considered that the e results were commercially sensitive, this being the reason why this information was not made publicly available; UN Doc. A/67/120 (note 58 above), para. 60.

<sup>70</sup> The International Court of Justice is firmly of the view that there is an obligation to conduct a transboundary environmental impact assessment, expressed in the case between Argentina and Uruguay over the Paper Mills in the River Uruguay, in which judgment was issued in 2010. However, in its judgement it nevertheless recognised the lack of any clear definition of the scope and content of such an assessment (*CIJ Report* 2010, para. 205). For its part, the International Tribunal for the Law of the Sea has also expressed its views on this matter, acknowledging both aspects, i.e. that the obligation to conduct an environmental impact assessment is a general obligation under customary international law (and is also “a direct obligation under the Convention” [UNCLOS]) and that there is little clue as to the scope and content of an EIA (“...the Convention gives only few indications of this scope and content”). Nevertheless, the Tribunal’s Seabed Disputes Chamber did point out that the indications in the Regulations, and especially in the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area made it possible to determine the content and obligation as it applies to activities in the International Seabed Area (these recommendations had been published by the ISA’s Legal and Technical Commission in 2000). See *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, (note 13 above).

In the light of all the above, it is evident that renewable energies are not covered by a single piece of legislation. Their regulation is dispersed not only across various areas of international law, but also in a variety of internal regulations. Although it is true to say that the most significant area of international law in this case, namely, maritime law, does make explicit reference to marine renewable energies, this is by no means complete<sup>71</sup>. Even so, the fact that the United Nations Convention on the Law of the Sea envisages the use of marine renewable energies indicates a difference in comparison with the treatment afforded to marine biological resources, another highly topical issue nowadays, but regarding which the Convention contains no provisions.

Neither should the possibility of conflict between different sectors be ignored since what at any given time might be advantageous for mitigating climate change need not necessarily be so for protecting biodiversity; similarly, driving forward scientific research in certain areas may have a negative impact on the environment<sup>72</sup>. This is something we have already seen earlier in this article, when we considered the negative implications that ocean energy technologies might have in this regard.

To sum up, there is a multitude of challenges to be faced and issues in need of clarification, some of them not only from a legal perspective, but above all, or at least previously, from a political standpoint. A suitable paradigm could be the issue of technology transfer, of vital importance for ensuring a much-needed global systemic approach to the matter and for capacity building at local level in developing countries<sup>73</sup>. Be that as it may, though, it should be noted that the international legal instruments currently applicable to marine renewable energies are already, in the words

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<sup>71</sup> Nevertheless, during the 13th UNICPOLOS meeting China stated that States should increase cooperation and collaboration in relation to the opportunities and challenges currently presented by marine renewable energies, "as specified in the current international legal framework"; *Earth Negotiations Bulletin*, Vol. 25, Number 88, 4 June 2012, p.5.

<sup>72</sup> A.M. Hubert, "The New Paradox in Marine Scientific Research: Regulating the Potential Environmental Impacts of Conducting Ocean Science" (2011) 42 *Ocean Development & International Law*, pp. 329-355.

<sup>73</sup> UN Doc. A/67/79 (note 5 above), pp. 10 and 27. This matter was put on the table during a plenary of the 2012 UNICPOLOS meeting, logically after the General-Secretary's report. In particular, several national delegations supported this approach, notably Denmark, Argentina, South Africa, Mexico, Morocco, the Philippines, the Pacific Islands Forum and UNEP. See *Earth Negotiations Bulletin*, Vol. 25, Number 88, 4 June 2012 (on line: <http://www.iisd.ca/oceans/icp13/>).

of Professor Alain Piquemal, a conciliatory factor between such energies and the legitimate uses of the seas, as well as a factor for the development and promotion of international scientific cooperation<sup>74</sup>.

## V. RECENT INSTITUTIONAL DEVELOPMENTS

Let us turn now to a recent development in the institutional sphere of relevance to renewable energies in general, including marine renewable energies. This is none other than the creation of an international organisation in this field, namely the International Renewable Energy Agency (IRENA), officially founded in 2009 and with its headquarters in Abu Dhabi since 2011, which currently has 118 Member States<sup>75</sup>. Its principal objective is precisely to promote “the widespread and increased adoption and the sustainable use” of all forms of renewable energies<sup>76</sup>, including of course marine renewable energies<sup>77</sup>. To this end, the Agency aims to become a “centre of excellence” for technology and to act as a “facilitator and catalyst, providing experience for practical applications and policies”. Similarly, its most important activities include helping countries to benefit from the transfer of knowledge and technology<sup>78</sup>, since the challenges posed by renewable energies in the economic, technological, research and capacity building sense are particularly daunting for developing States. However, its scope for action is nevertheless extremely limited, since, as it explicitly acknowledges in its own Statute, it performs its functions “without obligations on Members’ policies”<sup>79</sup>. This may well be part of the reason why IRENA has not shown any notably active involvement in the field of marine renewable energy, but, it must be said, only part. Be that as it may, this lack of initiative on the part of IRENA in relation to marine energies was also highlighted during the thirteenth UNCPOL meeting in 2012<sup>80</sup>. Indeed, in the same

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<sup>74</sup> A. Piquemal, “An Overview of the Current Implementation Frameworks for the Marine Renewable Energies: an Evolving Context” (2012) UN ICP 29 May - 1 June 2012; at [http://www.un.org/Depts/los/consultative\\_process/icp13\\_presentations-abstracts/2012\\_icp\\_presentation\\_piquemal.pdf](http://www.un.org/Depts/los/consultative_process/icp13_presentations-abstracts/2012_icp_presentation_piquemal.pdf).

<sup>75</sup> As of 8 August 2013 (<http://www.irena.org/adsw/index.aspx>).

<sup>76</sup> IRENA Statute, Art. II, available at <http://www.irena.org/menu/index.aspx?menu=cat&PriMenuID=13&CatID=126>

<sup>77</sup> Art. III.

<sup>78</sup> Art. IV.

<sup>79</sup> Art. IV.A.1.a).

<sup>80</sup> *Ocean Earth Negotiations Bulletin*, Vol. 25, Number 88, 4 June 2012, p. 3.

forum it was pointed out that the IEA was more actively engaged in marine renewable energies than IRENA itself. Additionally, attention was drawn to the desirability of adopting a specific agreement in this regard between both agencies (IEA and IRENA)<sup>81</sup>, as well as that establishing channels of cooperation between IRENA and the Division for Ocean Affairs and the Law of the Sea at the United Nations<sup>82</sup>.

## VI. SHOULD RENEWABLE ENERGIES BE MANAGED INTERNATIONALLY?

In the light of everything that has been said above, there still remains one important issue to be discussed from the standpoint of international law: should there be an international institution responsible for managing, or having some specific power of control over, marine renewable energies, at least in marine areas beyond national jurisdiction? If so, could this be an existing institution that would be granted new powers? Or, on the other hand, would it be better to create an entirely new institution? Does it in fact seem feasible for an international organisation to assume responsibility for managing marine renewable energies in areas not subject to the jurisdiction of any State?

At this juncture, it is worth pointing out that the number of marine areas beyond national jurisdiction that are suitable and fit for the purposes of exploration and exploitation of renewable energies nowadays seems to be considerable, and are currently untouched. Inter-State cooperation, as envisaged in international law as a solution for potential conflicts, not to mention the political and legal means available under the international legal system for settling disputes, can therefore be seen as a proper catalyser of States' legitimate interests. But what will be the case in the future? What will occur if the use of marine renewable energies, as seems foreseeable, continues to expand? Will there then be, as also seems foreseeable, a much greater risk of interference with the freedom of navigation, or with other freedoms? Will certain spaces become saturated? Will they also expand be-

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<sup>81</sup> See UN Doc. A/67/120 (note 58 above), para. 27. We must also remember the existence of an agreement between IRENA and the IEA in the general sphere, concerning global policies, the creation of a joint database and cooperation in matters of technology and innovation; further information is available from the websites of both institutions.

<sup>82</sup> *Ocean Earth Negotiations Bulletin* (note 80 above), p. 4.



yond areas under national jurisdiction? Will the number of conflicts increase? In all probability, the answer to all these questions will be in the affirmative. This being the case, would a situation like the current one, based on the United Nations Convention on the Law of the Sea (grounded, therefore, on the simple obligation of cooperation between States, and supported by no institutional framework other than the International Seabed Authority and the International Tribunal for the Law of the Sea), suffice to keep order? The foreseeable answer to this question, however, would appear to be a negative one.

Acknowledgement must therefore be made of the transcendence that Marine Spatial Planning (MSP) may have in this regard<sup>83</sup>. Although when UNESCO took the initiative in 2006 to propose a public procedure of this nature the original intention was to achieve a rational organisation of spaces subject to national jurisdiction (planning of the Area came under the competences of the Seabed Authority, but only in relation to activities envisaged in its mandate), as from 2008 arguments have rightly been put forward to se extend its scope to the high seas<sup>84</sup>. The underlying reason for proposing this extension is the same one that justifies its application to spaces subject to the competences of States, namely the need to avoid conflicts between the various human uses of the sea, as well as between such uses and the protection of the marine environment<sup>85</sup>. To which we can add the introduction and use of key principles such as the ecosystem approach and sustainable development<sup>86</sup>. Planning in the high seas and the Area should

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<sup>83</sup> This is “a public process of analyzing and allocating the spatial and temporal distribution on human activities in marine areas to achieve ecological, economic, and social objectives that are usually specified through a political process”; Intergovernmental Oceanographic Commission, *Marine Spatial Planning. A Step-by-Step Approach toward Ecosystem-based Management*, Manual and Guide No. 53. ICAM Dossier No. 6, p. 18.

<sup>84</sup> J. Ardron, K. Gjerde, S. Pullen, & V. Tilot, “Marine spatial planning in the high seas” (2008) 32 *Marine Policy*, pp. 832-839.

<sup>85</sup> Taking this into account, “the full application of MSP in the high seas will be a challenge, but one which the international community will need to address to ensure long-term productivity and resilience of high seas ecosystems and services”; *Ibid.*, p. 832.

<sup>86</sup> Intergovernmental Oceanographic Commission, *Marine Spatial Planning. A Step-by-Step Approach toward Ecosystem-based Management*, Manual and Guide (note 83 above), pp. 10, 18 and 20. In the words of the Intergovernmental Oceanographic Commission, for planning of this kind to be effective it must be “ecosystem based (...); integrated, across sectors and agencies, and among levels of government; place-based or area based; adaptive, capable of learning from experience; strate-

take into account, when it becomes technically possible to do so, marine renewable energy technologies. Indeed, "the best time to begin planning is before problems arise". In this sense, it has been said with regard to the Arctic, using an argument that can easily be extrapolated to the present case, that "once new economic activities begin (...), it will be difficult for policy makers and managers to put limits on them. Planning for the future begins today"<sup>87</sup>.

The starting point should in any case be, in addition to the considerations outlined above, the nature of the high seas and the Area as a common good. This is a point that in my view calls for an international institution to be responsible, at least in part, for the management required by research into marine renewable energies and their harnessing in such spaces. It would thus be possible to progress towards global governance of marine renewable energy and the regulation of crucial aspects such as, eventually, planning for specific spaces to be excluded from activities of this kind or even introducing mechanisms for protecting investment within a multilateral framework. Nevertheless, and despite the obvious attractions of such an idea, it has to be acknowledged that at the present moment it may generate more uncertainties than guarantees. Indeed, even though it may be feasible from a legal point of view, it could encounter obstacles at a political level, due to the opposition of certain States. Nevertheless, it should be clearly stated that international law offers powerful arguments in favour of a regime of genuinely international, rather than merely multilateral, management of renewable energies in areas beyond the limits of national jurisdiction, in both the high seas and the Area. For this management to be truly international it must be endowed with institutional elements that confer on its administration a vocation of universality, permanence, predictability and legal certainty. The institution chosen to perform such tasks of managing marine renewable energies in spaces not subject to the jurisdiction of any State could either be an existing one, possible candidates being the Area Authority, the IMO, the UNESCO Intergovernmental Commission, an IRENA with wider competences, an institution reporting to the General Assembly or some other institution, or a new international organisation created specifically for the purpose.

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gic and anticipatory, focused on the long-term; participatory, stakeholders actively involved in the process"; *Ibid.*, p. 18.

<sup>87</sup> C.N. Ehler, "Perspective: 13 Myths of Marine Spatial Planning" (2012) 5 *Marine Ecosystems and Management* p. 3 (at [www.meam.net](http://www.meam.net)).

Although the choice of specific institution is logically a matter of crucial importance, we nevertheless have to consider whether other obstacles would first have to be overcome. Thus, in the first place it would be necessary to decide whether States are willing to accept management of this kind, and as a result forfeit their capacity to act unilaterally in the high seas. Could this really be the case? Would it really introduce a change in the legal regime of some of the freedoms of the high seas? It could to a certain degree be argued that it would even mean a transformation, in that it would imply States having to forego some of the freedom they have enjoyed for centuries. As things currently stand, States have the freedom to engage in scientific research, to lay submarine cables and pipelines and to construct artificial islands and other installations permitted under international law, in the high seas. Nevertheless, the prerogatives included in the United Nations Convention on the Law of the Sea concerning these freedoms are by no means absolute. As it states, "(t)hese freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area"<sup>88</sup>. To which it should be added that, fortunately, there appears to be growing awareness of the existence of other limits.

At first sight it would appear that water, air, currents, tides or salinity gradients are resources that do not share the same characteristics as the valuable minerals that can be found on or in the deep seabed, such as the prized polymetallic nodules, rich in manganese, copper, nickel, cobalt, molybdenum and zinc<sup>89</sup>, or other minerals such as gold, platinum, silver and iron. It is well known that these resources, and above all the upright intention that such wealth should be considered the common heritage of mankind and only used in its benefit, were behind the revolutionary proposal put forward by Ambassador Arvid Pardo in 1967, for the international area of the seabed to be subject to a regime governed by such principles. A regime which, although initially established in the Convention on the Law of the Sea, would over time be emptied of content with the introduction of the principles of market economics and free enterprise through the 1994 amendment. Nevertheless, the Area is still a space subject to an international management regime as far as the exploration and exploitation of its

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<sup>88</sup> Art. 87.2.

<sup>89</sup> J.M. Markussen, "Deep Seabed Mining and the Environment: Consequences, Perceptions, and Regulations" (1994) *Deep Seabed Mining and the Environment: Green Globe Yearbook of International Cooperation on Environment and Development*, pp. 31-39.

resources are concerned, giving rise to obligations for all the States party to the Convention. And furthermore, as has already been mentioned, the International Tribunal for the Law of the Sea revitalised the principle of the common heritage of mankind in 2011, a topic we will return to below. For this reason, one may legitimately wonder whether there are sufficient similarities between the resources in question to justify the international management of marine renewable energies.

Many of today’s political leaders may at first sight think that marine renewable energies are unable to provide economic benefits as tangible as those that could be generated through the mining of the Area’s most valuable minerals. However, amongst experts in international legal matters there is a growing tide of opinion in favour of the view that certain natural resources shared by all, precisely because they are a common heritage, deserve to be protected and administered by means of an international regime<sup>90</sup>. Along the same lines, it should be noted that the International Tribunal for the Law of the Sea’s Seabed Disputes Chamber, in its first ever advisory opinion, given in answer to three specific questions put to it by the Council of the ISA regarding the legal responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, issued the legal opinion referred to earlier, noteworthy for its legal implications concerning the notion of common heritage of mankind. Its effect has also been highlighted by doctrine, which concludes that this advisory opinion represents “a milestone in the life of Seabed Authority and the Law of the Sea”<sup>91</sup> and that “[c]ommon heritage may have become a rather historic and iconic idea in international politics –indeed, a little like deep seabed mining itself- but the Chamber has done much to present it as very much an active principle of international law, as well as being a fundamental, if a discrete, element of the promotion of global sustainable

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<sup>90</sup> As expressed by J. Yu, & W. Ji-Lu, “safeguarding the common heritage of mankind is the common responsibility of the international community. Each member of the international community, including coastal states, landlocked states, and geographically disadvantaged states as well as relevant international organizations have the responsibility to care and safeguard the Area against infringements”, “The Outer Continental Shelf of Coastal States and the Common Heritage of Mankind” (2011) *Ocean Development & International Law*, pp. 317-328; p. 326.

<sup>91</sup> D. Freestone, “Advisory Opinion of the Seabed Disputes Chamber” (2011) 15 *ASIL Insights* (disponible en <http://www.asil.org/pdfs/insights/insight110309.pdf>). *Press Release (14 July 2011): Seabed Council discusses Recent Advisory Opinion* (<http://www.isa.org.jm/files/documents/EN/Press/Press11/SB-17-5.pdf>).

development”<sup>92</sup>. In this regard, it has been acknowledged that it is essential to recognise the Chamber’s contribution to general international law, and “the impact this may have on international environmental law, international law on sustainable development and specifically the protection of the global commons”<sup>93</sup>.

In short, there are various reasons of different kinds that support the idea of a truly international entity endowed with competences for managing the exploration and exploitation of marine renewable energies, at least in areas beyond national jurisdiction. Firstly, I am of the opinion that simply establishing an international institution with broad authority would bring with it a wide range of significant benefits: it would reduce fragmentation and bring order to the matter; it would institutionalise the exchange of information, which in turn would increase the transparency of States’ actions, clarity and legal certainty; following on from this, and thanks to a guaranteed exchange of information, it would be possible to avoid duplication of effort, going ahead with failed projects and bring down costs; international management with a vocation of universality would be guaranteed and respect for the principle of non-discrimination in the assignment of zones and for the currency of an equitable regime would be ensured; care would be taken to avoid interfering with other freedoms of the seas such as fishing or navigation; it would be possible to ensure the protection of the marine environment and its biodiversity, and to apply the principles of precaution and the ecosystem approach; specific guidelines concerning technology transfer could be introduced, which would provide additional criteria of justice with regard to the current situation, even though no spe-

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<sup>92</sup> D. French, “From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – The Seabed Disputes Chamber’s 2011 Advisory Opinion” (2011) 26 *The International Journal of Marine and Coastal Law*, pp. 525-568; p. 567.

<sup>93</sup> *Ibid.* The Chamber stated that the obligation of sponsoring States in the Area is one of “due diligence”. Its standard may therefore vary and depend, amongst other factors, on the risks involved in the activity. Nevertheless, among the most important of the direct obligations incumbent on such States are some that are closely connected with the Authority’s actions, such as the obligation to assist this international organisation, to apply best environmental practices, or to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)* (note 13 above), paras. 117 and 122.

cific obligation were to be introduced<sup>94</sup>; and it would help to ensure that States act with "due diligence" in the fulfilment of their obligations. Secondly, I consider that the potential for investment in marine renewable energies not only to act as a mitigating factor in climate change, but also to contribute to the sustainable development of States and of mankind, is also sufficient justification for calling for the intervention of an international institution in the management of the exploration and exploitation of renewable energies, particularly in marine areas beyond any national jurisdiction.

Furthermore, however, one could also add an argument used by internationalists to defend the creation of an international organisation with powers in other areas beyond the jurisdiction of any State, in this case outer space. In this regard, the establishment of an international institution with management powers in outer space was first put forward in the late nineteen-sixties, and has repeatedly been insisted on with particular intensity at different times. Thus, Courteix refers to the role that an outer space "authority" would play in establishing international rules, in applying existing legislation, in transferring technology to less developed countries or in promoting the development of cooperation programmes. These are all reasons that appear to be transposable to the case we are dealing with here, despite the differences in legal regime between the areas in question<sup>95</sup>.

Certain possible advantages deriving from the involvement of an international entity endowed with a specific mandate concerning marine renewable energies have already been pointed out in this article. Logically enough, the extent of such benefits would be in direct relation to the scope of the powers enjoyed by the entity with responsibility for their management. To this end it seems appropriate to recall that when the International Seabed Authority was first established several different degrees of intensity were proposed regarding the attribution of powers to it by States. Although these had immediately agreed as to the convenience of creating a new international organisation with a specific mandate for the Area, they

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<sup>94</sup> Just as there is now no longer any obligation in this sense regarding activities performed in the Area, since the 1994 Agreement, which amended the United Nations Convention on the Law of the Sea, suppressed the prior obligation concerning technology transfer.

<sup>95</sup> S. Courteix, "Towards a World Space Organization?", *Outlook on Space Law over the Next 30 years. Essays published for the 30<sup>th</sup> Anniversary of the Outer Space Treaty*, Kluwer Law International, The Hague, 1997, pp. 424 and 425.

differed as to the scope of its powers<sup>96</sup>. It would be perfectly possible to make an analogy with regard to the matter under discussion here, in that one can also potentially detect the existence of a possible range of attributions for the entity that would have powers relating to the management of marine renewable energies<sup>97</sup>.

It should be pointed out, along these lines, that during the thirteenth meeting of UNICPOLOS the possibility was also mooted of considering marine renewable energy as a “bio-derived resource”, in order to justify extending the scope and jurisdiction of the International Seabed Authority<sup>98</sup>. If such an option were to prosper, it could have the effect of extending the Authority’s current supervisory mandate, which refers only to the extraction of mineral resources, to allow it to also include the exploitation of marine renewable energies. This proposal is undoubtedly an interesting one, and would have the effect of making good the institutional shortcomings on a global level regarding activities carried out in spaces within the Area, and at the same time, the limited means of action in principle enjoyed by IRENA. But to begin with, the Authority currently only

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<sup>96</sup> States basically fell into one of two opposing camps: on the one hand, States such as the US, Germany or Japan, which saw the Authority merely as an office for registering and granting licences, with a limited regulatory capacity for authorising exploration and exploitation activities in the Area; and on the other, the G-77 and other States such as, to a certain extent, Sweden or Spain, which championed the idea of an organisation with full powers over any kind of activity in the Area, including the direct exploitation of its resources. See V. Game de Fontbrune, “L’enregistrement des investisseurs pionniers devant la commission préparatoire de l’Autorité internationale des fonds marins” (1987) 3 *RGDIP*, pp. 881 ff. The truth is that although the organisation that finally came into being, the Authority, could act through the medium of the Enterprise, a body created for this purpose, it has to be said that in the end the 1994 Agreement considerably reduced the Authority’s powers.

<sup>97</sup> The most important of these, which are also to a certain extent scalable in magnitude, would include the following: the consideration of the most suitable areas for research and exploitation; a registry of applications; the granting of licences; connection between areas located within and beyond State jurisdiction; the settlement of disputes; possible direct action in research activities and possible intervention in exploitation activities, amongst others.

<sup>98</sup> *Ocean Earth Negotiations Bulletin* (note 80 above), p. 3. More indirectly, in UN Doc. A/67/120 (note 58 above), para. 25. According to Article 133 of the United Nations Convention on the Law of the Sea, “a) ‘resources’ means all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules; b) resources, when recovered from the Area, are referred to as ‘minerals’”.

has powers over mineral resources, not genetic ones, and although it is true to say that a number of States propose that the Authority should also be responsible for genetic resources (and that the idea is also well received in doctrine)<sup>99</sup> instead of creating a new international organisation with powers in this sphere, agreement has yet to be reached on this matter. Not only is there a lack of consensus as to the institution that could assume the management of the activities in question, nor is there even any as to the need to adopt an international agreement in the near term.

Furthermore, although the Authority is a good model for the purposes of the exploitation of marine renewable energies in areas beyond national jurisdiction, in my view another major difference between the regime governing mineral resources in the Area and the current situation regarding marine renewable energies should be taken into account, namely that commercial exploitation in the strict sense is closer to becoming a reality in the case of renewable energies (and that of marine wind energy in particular) than in that of the Area's mineral resources. The Enterprise, in fact, has still to be brought into being. Indeed, in early 2013 negotiations on the rules governing exploitation activities in the Area had not even begun, there only being a regulatory framework governing exploration and prospecting activities<sup>100</sup>. Nevertheless, it is clear that the whole of the new legal framework for the Area in this regard, negotiation of which seems to be imminent, will undoubtedly be taken as a useful model for the purposes being discussed in this article.

Even if all the above obstacles can be overcome, we still need to ask ourselves whether there can be any justification for the Authority being the international organisation responsible for managing all activities relating to marine renewable energies in areas beyond national jurisdiction, in other words, with respect also of activities taking place in suprajacent waters in the high seas, as well as in the Area itself. During the above-mentioned meeting of UNICPOLOS there was no discussion of whether or not the Authority could extend its mandate to include activities taking place in suprajacent waters. The matter was not even mentioned. However, it by no means seems unreasonable to simply raise such a question, although the

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<sup>99</sup> T. Scovazzi, "Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority" (2004) 19 *The International Journal of Marine and Coastal Law*, pp. 383-409.

<sup>100</sup> See "Special Issue on Marine Areas Beyond National Jurisdiction (ABNJ)", May 4, 2012 *Global Ocean Forum News* (at <http://www.globaloceans.org/sites/udel.edu.globaloceans/files/GOF-ABNJ-Newsletter-SpecialIssue.pdf>).



truth is that there are substantial differences between the evolution and legal regimes of the two spaces, the Area and the high seas, in spite of their both being common spaces of international interest. Nevertheless, and although the Authority's powers are much wider than is usually believed<sup>101</sup>, it must be acknowledged that extending its mandate to a space other than the Area would mean introducing a qualitative change to the scope of its spatial application, a change that would undoubtedly affect its nature, in other words its own identity. This may well create added difficulties, apart from the very probable obstacle of being able to count on the political will of the States themselves for this to happen.

But let us look now a little more deeply at the idea put forward at the 2012 UNICPOLOS meeting, i.e. if the hypothesis that the Authority could *simply* extend its powers to include the management of marine renewable energies in, but not above, the Area. What would happen then to the management of the suprajacent waters in the high seas with regard to marine renewable energies? Could it be possible to justify the intervention of two different entities, namely the Authority and another organisation (according to whether the activities envisaged were to take place on the seabed in the Area or in the waters of the high seas, respectively)? Apart from any further legal arguments, common sense itself would, if not dictate a negative answer to such a question, at least point out some of the possible inconveniences. Leaving any presumable legal difficulties aside, problems may well arise for reasons of coherence, efficiency and safety. Many projects carried out beyond national jurisdiction might impinge on both spaces simultaneously, and it would be artificial, not to mention counterproductive, to divide something that for all practical purposes would be indissoluble. Furthermore, it is only reasonable to assume that a satisfactory outcome for the processing of many projects will depend on being able to deal with them comprehensively and systematically, precisely in order to ensure the necessary coordination of the activities taking place in the waters of the high seas and those taking place on the seabed in the Area.

I fear, in brief, that these pages pose more questions than they answer, and neither do they aim to propose, at this juncture, a specific institution

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<sup>101</sup> Indeed, they not only refer to activities relating to mineral resources, but also include the protection of the underwater cultural heritage, the protection of the marine environment and marine scientific research; for a detailed explanation of its broad mandate, see T. Scovazzi, "Mining, Protection of the Environment, Scientific Research and Bioprospecting" (note 99 above), pp. 391 ff.

to oversee marine renewable energies, either in general or more specifically in areas beyond national jurisdiction. The article does suggest, of course, the convenience of the existence of an entity with responsibilities in this sphere, but does not venture at this stage to propose which it should be, not even at the ideal level of theory. The reason for this is that, however paradoxical it may seem, in my view this is a matter that at the present moment (and I stress the word "moment") is not yet sufficiently mature for such a decision. This may indeed sound somewhat contradictory, since one of the initial steps, if not the very first one, in marine spatial planning should be precisely to identify or create the competent authority or authorities<sup>102</sup>. There is, however, as I see it, a fundamental reason for deducing that the time is not yet ripe for deciding what the ideal authority should be, at least as far as areas beyond national jurisdiction are concerned. And obviously, in accordance with the ideas already expressed above, this has nothing to do with the fact that at the present moment no marine renewable energy projects in areas beyond national jurisdiction are as yet envisaged. The motive is entirely different, and lies in the interrelation between the matter analysed here and others for which a solution is still pending, and whose outcome should in my view be taken into consideration. Or with whose future evolution such a decision should be linked, at least to a certain extent. Indeed, it should be noted that what *could* or *should* be the *competent* or *ideal* authority is currently a question that is being discussed on a number of fronts, all related to marine spaces. The use of the term "a number of fronts" reflects the plural nature of the matter, not only in one, but in two different aspects: on the one hand, our starting point must be the existence of proposals put forward in a variety of forums in the academic, political and paradiplomatic spheres, amongst others; and on the other, we need to be aware of the existence of other material spheres, in principle alien to that of renewable energies, or with which the latter do not necessarily have any connection, but which nevertheless are projected in the same marine spaces, and which require the entrance of further institutional elements. This, in synthesis, is one of the key points to be born in mind, in my opinion, in relation to this matter.

To put it another way, the starting point should be the fact that our seas and oceans need some kind of institution (not necessarily a new one) to carry out the mission of their governance. In other words, to perform cer-

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<sup>102</sup> Intergovernmental Oceanographic Commission, *Marine Spatial Planning. A Step-by-Step Approach* (note 83 above), p. 18.

tain general international administrative activities regarding marine spaces, which at the very least entails a task of coordination. And at the same time, to be more specific, this starting point should be fact that certain areas (those beyond national jurisdiction) and certain aspects or sectors (the protection of biodiversity or the management of genetic resources, amongst others) are also in need of management, or at least coordination, at international level that currently does not exist, but towards which efforts are being made. And for this reason the management of marine renewable energies in such spaces should not be left out of this process. In much the same way we have to recognise that the fate of certain aspects now seems to be to some extent interrelated on the diplomatic stage, a good example being the minutes of the sessions of the Working Group established to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, as decided by the UN General Assembly in 2005<sup>103</sup>.

Accordingly, it is well worth highlighting the consensus that appears to have been reached on the main premise, i.e. on the fact that UNCLOS is based on a structure of cooperation devoid of institutional elements, which are nevertheless becoming increasingly necessary. This is a question to which much attention has been drawn at doctrinal level<sup>104</sup>, and which

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<sup>103</sup> Resolution 59/24, para. 73.

<sup>104</sup> To cite but one example: "UNCLOS is premised on the duty of cooperation, but it did not create a mechanism to coordinate and discuss substantive implementation issues, share best practices, or promote compliance", J. Ardrón, K. Gjerde, S. Pullen & V. Tilot, "Marine spatial planning in the high seas" (note 84 above), p. 833. The need has also been highlighted for an institutional authority with regard to the principles that should govern areas beyond national jurisdiction, acknowledging that whilst in reality the rules already exist (the need to comply with the Law of the Sea, in particular the 1982 Convention; the protection and preservation of the marine environment; the precautionary principle; the ecosystem approach or a sustainable and equitable use, amongst others), it would be convenient to draft an instrument that bring them all together. This instrument does not necessarily have to be a new agreement for applying the Convention (which would imply a series of disadvantages, including difficulties in its drafting, possible delays in its coming into force or a lack of ratification by States, amongst others), but could better take the form of a declaration adopted by the General Assembly. A resolution of this nature would have significant advantages, one of these being the introduction of the concept of "common concern" or "public trust" as a common principle for the governance of areas beyond national jurisdiction. In this regard, it has been argued that the UN General Assembly would be the ideal institution to undertake the most important tasks concerning the principles to be applied:

also comes to the fore from time to time at interstate level and on which growing emphasis is being placed within the orbit of the United Nations. With regard to the latter, it is interesting to note that the starting point for marine spatial planning in UNESCO's blueprint is the necessary coordination between authorities at all the levels concerned. Similarly, one can point to the fact that the *Oceans Compact*, launched by the UN Secretary-General in the second half of 2012<sup>105</sup>, whose goal is "to strengthen United Nations system-wide coherence"<sup>106</sup> with the aim of using and conserving the oceans in a sustainable way, underpinned by "pragmatic [...] strategies to increase cross sectoral coordination and cooperation" at all levels. What I find striking, however, is that it makes no mention whatsoever of marine renewable energies, especially when one considers that this Compact was launched by the Secretary-General himself only two months or so after his report to the General Assembly on the subject<sup>107</sup>. Nevertheless, and curious though this omission may seem, it should be noted that he at least managed to acknowledge, however indirectly, the nature of the oceans as "an energy source" and the need to encourage a green economy approach "in the context of sustainable development and poverty eradication"<sup>108</sup>.

In view of the above, it is therefore not only foreseeable, as well as desirable, that internationalised governance of the seas and oceans will gradually take shape. It is essential that marine renewable energies are not left on the sidelines, above all as far as areas beyond national jurisdiction are concerned.

## VII. CONCLUSIONS

When one analyses the principal aspects of marine renewable energies, what emerges is a mainly positive view of their use. It is also true that there

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the drafting of guidelines, supervision of the application of the legal regime or guaranteeing its coherence; A.G. Oude Elferink, "Governance Principles for Areas Beyond National Jurisdiction" (2012) 27 *The International Journal of Marine and Coastal Law*, pp. 205-259; pp. 209, 257 and 258 in particular. Also see R.A. Barnes, "Consolidating Governance Principles for Areas beyond National Jurisdiction" (2012) 27 *The International Journal of Marine and Coastal Law*, pp. 261-290.

<sup>105</sup> At [http://www.un.org/Depts/los/ocean\\_compact/SGs%20OCEAN%20COMPACT%202012-SP-low%20res.pdf](http://www.un.org/Depts/los/ocean_compact/SGs%20OCEAN%20COMPACT%202012-SP-low%20res.pdf).

<sup>106</sup> UN Doc. A/67/79/Add.1, p. 35.

<sup>107</sup> UN Doc. A/67/79 (note 5 above).

<sup>108</sup> In the Introduction and Objective 1, respectively.

are a series of risks, challenges and enormous obstacles to be overcome, and for this to happen investment in research needs to increase. But if we take into account all the relevant factors, and given our current state of knowledge, the advantages clearly outweigh the disadvantages. Reducing greenhouse gases and mitigating climate change are without doubt two powerful reasons that speak for themselves, to which we can add the other reasons referred to in the body of this article. Amongst the latter, the most outstanding have to do with the need to use secure non-polluting sources of energy that can supply a population that is expanding by the second, and whose demand for energy is predicted to greatly multiply over the coming years. For this reason, the first message contained in this article is that a commitment to the use of marine renewable energies is wholly justified, even though we should always remain aware of the weaknesses and challenges that have to be overcome, and ensure that each and every decision taken in the political sphere is always based on sound scientific grounds.

International law provides a regulatory framework that is broadly suitable for the generalised development of these energies, although it does have its gaps and loopholes. These difficulties derive to a great extent from two interrelated factors: the absence of an institutional framework that can take responsibility for these matters at a global level, and, ultimately, the lack of political will amongst States.

There is a lack of governance mechanisms prepared to assume responsibility for aspects of international scope in the sphere of marine renewable energies. Although IRENA is a newly-created international organisation, with a mandate covering all forms of renewable energy, marine ones included, its powers are enormously limited. Nevertheless, it should be born in mind that this lack of institutions or mechanisms for general governance is not restricted to marine renewable energies, but is a more widespread deficiency that affects the management of other aspects of the seas and oceans. So much so, in fact, that there is currently an ongoing discussion in various forums as to the convenience (and even the need) of having an authority, whether new or already in existence, which will carry out or take part in tasks relating to their governance and management. This is now a burning issue, to take a case in point, with regard to aspects such as the protection of marine biodiversity or areas beyond national jurisdiction. Who knows, therefore, if on the basis of the multiple initiatives already under way there may be some kind of institutional convergence in the near term that would also include marine renewable energies? Such an option may well be a positive one.

# *Transfers of Piracy Suspects - A Crucial Element of the Regional Prosecution Strategy in Light of International Law of the Sea*

GIORGIA BEVILACQUA\*

**Summary:** I. A Consolidating Trend in the Context of International Law of the Sea; II. The General Duty of Article 100 UNCLOS vis-à-vis the Contemporary Need to Criminalise Piracy; III. The Principle of Universal Jurisdiction in relation to the Regional Prosecution of Piracy; IV. Alternative Legal Instruments to Prosecute Modern-Day Piracy; V. Concluding Remarks.

## I. A CONSOLIDATING TREND IN THE CONTEXT OF INTERNATIONAL LAW OF THE SEA

Historically, the States that seized piracy suspects on the high seas were typically the only ones that would have tried and executed the captured pirates<sup>1</sup>. However, in the modern era, in addition to the several options examined by the international community for promoting prosecution of alleged pirates, more and more States are fostering solutions which focus on judicial co-operation with third States from regions prone to piracy (so-

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\* LLM, PHD in International and EU Law on Socio-Economic Development, University of Naples "Parthenope" (Italy). The issue of transfers of piracy suspects to third States for their criminal prosecution is governed by both international law, namely the law of the sea and human rights law, and domestic law. While this contribution analyzes the legality of transfers from a law of the sea perspective, the article by Dr. Anna Petrig entitled "Transfers of Piracy Suspects - A Crucial Element of the Regional Prosecution Strategy in Light of Human Rights Law", which is included in the book at hand, covers the issue from a human rights perspective. The two articles are part of a larger project of the study group on law enforcement at sea, which is part of Working Group 3 on International Maritime Security and Border Surveillance of COST Action IS1105, MARSAFENET (NETwork of experts on the legal aspects of MARitime SAFETy and security; [www.marsafenet.org](http://www.marsafenet.org)).

<sup>1</sup> See Harvard Research on International Law, "Piracy", 26 *American Journal of International Law*, Supplement: Codification of International Law (1932), 853 - 856.

called regional States)<sup>2</sup>. A first test case of judicial co-operation was experimented between the United States and Kenya in 2006<sup>3</sup>. While this experiment occurred without major complications, transfer of piracy suspects become regular procedure following the Somali piracy surge in 2008. After the surge, several patrolling States and international organisations, such as the United Kingdom<sup>4</sup>, the European Union (EU)<sup>5</sup>, Denmark<sup>6</sup> and, more recently, Norway<sup>7</sup>, signed numerous bilateral arrangements with Kenya and various regional States which were willing to receive piracy suspects for the purpose of criminal prosecution.

The consolidation of this growing State practice led regional States to become primary destinations for the prosecution of Somali piracy and, in turn, increased the overall number of criminal prosecutions against alleged pirates. As of January 2013, according to the Counter Piracy Programme of the United Nation Office on Drugs and Crimes (UNDOC),

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<sup>2</sup> Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia [...], UN Doc. S/2010/394. For a thorough analysis of the prosecutorial options, see Douglas Guilfoyle, "Prosecuting Somali Pirates. A Critical Evaluation of the Options", 10 *Journal of International Criminal Justice* (2012), 767, at 778.

<sup>3</sup> As reported by Eugene Kontorovich, "A Guantánamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists", 98 *California Law Review* (2010), 243, at 254.

<sup>4</sup> See the Memorandum of Understanding between the UK and Kenya on Piracy along the Coast of Somalia, available on line at the website of Kenyan Ministry of Foreign Affairs: [http://www.mfa.go.ke/mfacms/index.php?option=com\\_content&task=view&id=305&Itemid=62](http://www.mfa.go.ke/mfacms/index.php?option=com_content&task=view&id=305&Itemid=62).

<sup>5</sup> See the exchange of Letters between the EU and Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the EUNAVFOR, and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, OJEU L79/52 (2009); Exchange of Letters between the EU and Seychelles, OJEU L 315/37, (2009); Agreement between the EU and Mauritius, OJEU L 254/3 (2011).

<sup>6</sup> See the memorandum of Understanding between Denmark and Kenya on the Condition of Transfer of Suspected Pirates and Seized Property to Kenya, signed on 9 July 2009.

<sup>7</sup> For the Agreement between Norway and Seychelles, see "Norway and Seychelles enter into agreement on transfer of pirates", published by the news of the Norway Ministry of Foreign Affairs during Stoltenberg's 2<sup>nd</sup> Government, Oslo, 1 July 2013, available on line at [http://www.regjeringen.no/en/archive/Stoltenbergs-2nd-Government/Ministry-of-Foreign-Affairs/Nyheter-og-pressemeddelinger/nyheter/2013/piracy\\_africa.html?id=731974](http://www.regjeringen.no/en/archive/Stoltenbergs-2nd-Government/Ministry-of-Foreign-Affairs/Nyheter-og-pressemeddelinger/nyheter/2013/piracy_africa.html?id=731974).

around three-hundred pirates had been prosecuted or were awaiting trial in the region<sup>8</sup>. Even when piracy has been posing direct threats to national interests, governments have often preferred to rely on transfer agreements with regional States, rather than prosecute piracy suspects in their domestic tribunals. What appears to be more important is that jurisdiction over piracy is effectively exercised and not that it is exercised in the country holding the traditional interest in prosecution. To date the United Kingdom has not brought any suspected pirates to its territory for trial, even though piracy poses a considerable threat to the United Kingdom's national interests<sup>9</sup>. In the same vein, even though the Italian domestic fleet has been seriously threatened by piracy attacks and Italian citizens have often been taken hostage by both Somali and Nigerian pirates, only very recently have some piracy suspects been tried and sentenced before Italian penal courts<sup>10</sup>.

On 29 January 2014 five alleged pirates were apprehended by the EU naval force flagship and transferred to the Seychelles for criminal prosecution<sup>11</sup>. From this scenario follows the need to ascertain whether the use

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<sup>8</sup> The UNODC *Counter-Piracy Programme* was launched in 2009 to enhance criminal justice capacity among Somalia's neighbors and ensure that the trial and imprisonment of suspected pirates passed to them is humane and efficient and takes place within a sound rule of law framework. More recently, in January 2014 the Seychelles launched the EU-UNODC Maritime Security Programme, which is aimed at providing a wide array of crucial support to prosecutions of piracy and wider maritime crime in Seychelles and the region.

<sup>9</sup> With respect to the damages caused to the British shipping industry, see High Court of Justice, Queen's Bench Division, Commercial Court, *Cosco Bulk Carrier Co. Ltd. v. Team-Up Owning Co. Ltd.*, Case No. 2009 1301, judgment issued on 11 June 2010.

<sup>10</sup> With respect to the damages caused to the Italian shipping industry, see Giorgia Bevilacqua, "Counter Piracy Armed Services, the Italian System and the Search for Clarity on the Use of Force at Sea", 22 *The Italian Yearbook of International Law* (2012), 40. For the Italian case-law see II Penal Section, the "*Montecristo case*", judgment published on 20 June 2013, No. 26825, *A.A.M., Ab.Ah.Ma., A.M., and D.A.M. v. Corte di Appello di Roma*; Tribunale di Roma, Juvenile Section, the "*Valdarno case*", judgment closed through a plea bargain on 4 December 2008, sentencing eleven Somali citizens to three and half years of imprisonment for the attempted hijacking of the Italian tanker Valdarno. For a brief description of the Italian case-law, see Mark Lowe, "Italy Jails More Somali Pirates", *Maritime Security Review*, 4 December 2012, available on line at <http://www.marsecreview.com/2012/12/italy-jails-more-somali-pirates/>.

<sup>11</sup> See EU NAVFOR Somalia, *Suspect Pirates Apprehended by EU Naval Force Flagship Transferred to the Seychelles*, 30 January 2014, available on the website of EU NAV-



of transfer agreements is consistent with the general law of the sea and, in particular, with the 1982 UN Convention on the Law of the Sea (UNCLOS). For this purpose, we will first verify whether Article 100 UNCLOS, in certain circumstances, may impose seizing States a specific obligation to prosecute and, consequently, prevent them from releasing suspects captured on the high seas. Then, we will proceed to ascertain whether, according to Article 105 UNCLOS, the criminal jurisdiction of a prosecuting State may equally be applicable in cases where alleged offenders caught on the high seas are handed over into another State's jurisdiction on the basis of a transfer agreement. We will see the main reasons why all States and, also regional States, may exercise their jurisdiction to try pirates irrespective of any link between the pirate attack and the State claiming jurisdiction. On this basis, we will argue that transfer agreements of piracy suspects to third States are not in contrast with the general law of the sea provisions. However while this latter point covers only piracy on the high seas, in 2013 the largest part of attacks involved vessels in territorial waters of coastal States. And thus, against this evolving background, it becomes useful to verify whether there is any other legal instrument, including provisions which fill UNCLOS legal gaps, obliging seizing States to prosecute and conclude transfer agreements. Solutions will be found in existing conventional instruments, however, their application cannot be generally assessed and a case-by-case evaluation will be necessary.

## II. THE GENERAL DUTY OF ARTICLE 100 UNCLOS *VIS-À-VIS* THE CONTEMPORARY NEED TO CRIMINALISE PIRACY

The criminal prosecution of modern-day piracy appears problematic in many respects. It is commonly reported that the law enforcement authorities of seizing States may find it more convenient to release suspected pirates without trial, after confiscating their equipment and the illicit cargo. Once alleged criminals have been caught on the high seas, it can be difficult to decide whether and where to prosecute them. If the intention is to bring them to justice in the State of the seizing vessel, this may give rise to certain practical and legal challenges: first, significant financial resources may be required to transfer the suspects to the home territory of the seizing State; second, the State concerned must have the necessary legal

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FOR at <http://eunavfor.eu/suspect-pirates-apprehended-by-eu-naval-force-flag-ship-transferred-to-the-seychelles/>.

framework and capacity to conduct the investigations, the trials and have the necessary resources to detain convicted pirates; third, if human rights standards are not duly respected, the national competent authority will be exposed to serious risks of being accused of violating international human rights law<sup>12</sup>.

The fact that many alleged criminals captured at sea are often released rather than prosecuted, appears to be in tension with Article 100 UNCLOS, which broadly stipulates that “[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”. Article 100 UNCLOS is the first of a group of provisions (Articles 100 to 107 and 110) which provides the primary legal framework to counter piracy at sea. By virtue of this provision, numerous transfer agreements have been adopted to overcome the prosecution problem of piracy suspects<sup>13</sup>. Whilst it is understood that Article 100 UNCLOS provides all States with a strong obligation to co-operate in the eradication of piracy, the international community has not yet agreed the specific minimum content of the duty to co-operate nor has it agreed the forms and methods of co-operation that the States should undertake to eradicate this offence. Of great interest, in this controversial backdrop, is the need to clarify whether States may violate international law when regularly engaging in catch-and-release practice and, therefore, whether pursuant to Article 100 UNCLOS warships of States capturing alleged pirates on the high seas have a positive obligation to prosecute and possibly transfer them to regional State courts.

On the one hand, it could be considered that the drafting history of Article 100 UNCLOS seems to support the opinion that this provision does not oblige States to prosecute piracy<sup>14</sup>. This assertion is firstly based on

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<sup>12</sup> On the obstacles to effective prosecution, UNSC, “Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia” (25 January 2011) UN Doc S/2011/30, at paragraph 44. With respect to the international human rights perspective, see Anna Petrig, “Transfers of piracy suspects - a crucial element of the regional prosecution strategy in light of human rights law”, in E. M. Vázquez Gómez and C. Cinelli (eds.), *Regional Strategies to Maritime Security: A Comparative Perspective* (2014).

<sup>13</sup> See the Exchange of Letters between the EU and Kenya and the Agreement between the EU and Mauritius (preamble), n. 5 above.

<sup>14</sup> See Robin Geiss, Anna Petrig, *Piracy and Armed Robbery at Sea. The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, 2011, 152; Saiful Karim, “Is There an International Obligation to Prosecute Pirates?”, 58 *Netherlands International Law Review* (2011), 387 - 407.

Article 18 of the 1932 Harvard Draft Convention on Piracy which does not impose on the signatories an obligation to seize or prosecute all pirates, but only imposes a *general discretionary obligation* to discourage piracy by exercising their rights of prevention and punishment as far as is expedient<sup>15</sup>. In the same vein, at its 24<sup>th</sup> Conference held at The Hague in 1970, the International Law Association observed that: “[the High Seas Convention] does not determine the obligation of States to punish piracy nor does it stipulate that they should include and punish the crime of piracy in their Codes and Laws [...]”<sup>16</sup>. This consideration may be easily extended to article 100 UNCLOS, as the two Treaties have an identical content as regards the piracy related provisions. A year later, at the Diplomatic Conference on the Law of the Sea, the Malta delegation suggested to amend the text of Article 100 in setting out that “[a]ll States have the obligation to prevent and punish piracy and fully to co-operate in its repression in ocean space and in the superjacent atmosphere”<sup>17</sup>. The proposal to broaden the scope of this provision was rejected and this has led some modern scholars to argue that the provision does not include an obligation to prosecute persons suspected of having committed acts of piracy at sea<sup>18</sup>. The reasoning followed is that a very general duty to co-operate to combat the phenomenon of piracy, even if expressed with very strong wording, would not be sufficient to identify a clear breach of an international obligation. In the opinion of many scholars, the language of the clause is too general, especially if compared with various provisions of other international Treaties which include an explicit obligation to prosecute or extradite suspected criminals<sup>19</sup>. What’s more, this approach can be confirmed by the post UNCLOS State practice, as many States have often considered this duty to

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<sup>15</sup> See Jerry Bingham (reporter), “Harvard Research in International Law: Draft Convention on Piracy”, 20 *American Journal of International Law*, Supp. (1926), 760.

<sup>16</sup> See International Law Association, *Report of the Fifty-fourth Conference held at The Hague: 23 August to 29 August 1970*, (London, ILA 1971), 738.

<sup>17</sup> See A/AC.138/53, Article 17, reproduced in SBC Report 1971, at 105, 123 (Malta).

<sup>18</sup> For the modern doctrine see, R. Geiss, A. Petrig, n. 14 above, at 152; S. Karim, n. 14 above, at 396; Douglas Guilfoyle, “Piracy off Somalia and the Gap between International Law and National Legal Systems”, Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, New Orleans, 17 February 2010, available on line at [http://citation.allacademic.com/meta/p413520\\_index.html](http://citation.allacademic.com/meta/p413520_index.html); E. Kontorovich, n. 3 above, at 253; Natalino Ronzitti, “Pirateria (diritto vigente)”, 33 *Enciclopedia del diritto* (1983), 912.

<sup>19</sup> Eg. Article 10 SUA Convention and Article 8 Hostage Convention.

be discretionary and have not criminalized international piracy under their national legal systems.

On the other hand, other facts and arguments may lead to a more persuasive meaning to Article 100 UNCLOS, at least in certain circumstances<sup>20</sup>. In this respect, it is first worth recalling a Commentary of the International Law Commission's (ILC) 1956 draft Articles on the law of the sea. At Article 38, which formed the subsequent basis for Article 100 UNCLOS, the ILC observes expressly that: "any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law"<sup>21</sup>. The ILC comment could be interpreted as including a proper duty to prosecute piracy suspects if the seizing State has at its disposal a sufficient package of admissible evidence pointing towards the commission of the offence. The International Maritime Organization's Legal Committee, more recently, recalled the ILC Commentary in the context of a document aimed at assisting States in the uniform and consistent application of UNCLOS provisions<sup>22</sup>. Furthermore, this interpretation appears to be supported by the operational approach of some military forces, which take actions to prosecute only when individuals have been caught *in the act* of committing piracy and, do not prosecute individuals who are merely suspected of it<sup>23</sup>. After all, this operational approach has also a logical rationale. Piracy, as with most criminal activities at sea, is extremely difficult to prove and, as a consequence, the competent authorities usually decide to prosecute the suspects only when sufficient evidence is available. It is probably for this reason that certain transfer agreements concluded within the EU include a specific clause which gives the receiving country a certain amount of time and discretion "to decide on the sufficiency of the available evidence in view of prosecution," before definitively accepting the transferred persons for trial<sup>24</sup>.

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<sup>20</sup> In the sense that Article 100 is not discretionary, see J. Ashley Roach, "Countering Piracy off Somalia: International Law and International Institutions", 104 *American Journal of International Law* (2010), 397, at 403.

<sup>21</sup> See Document A/CN.4/104, at 282.

<sup>22</sup> IMO (Legal Committee), Piracy: Elements of National Legislation pursuant to the United Nations Convention on the Law of the Sea, 1982, LEG 98/8/3, 18 February 2011.

<sup>23</sup> Oral evidence given to the House of Lords European Committee, *Combating Somali Piracy: the EU's Naval Operation Atalanta*, 14 April 2010, §34; and Oral evidence, 14 January 2010, questions 113 and 148; Report Atalanta 36.

<sup>24</sup> Eg. for the Exchange of Letters between the EU and Seychelles, its preamble prescribes at least ten days from the date of transfer to decide on the sufficiency of the

Another relevant aspect to be taken into account, to attribute a stronger significance to Article 100 UNCLOS, is that State practice has been quickly evolving in the last few decades. Several contracting Parties of the UNCLOS have decided to take an active role in anti-piracy measures and, some, especially those in the affected regions, have taken steps to enhance their domestic legal systems to criminalize acts of piracy at sea. This is the case for Mauritius, which has recently enacted a new criminal law - the Piracy and Maritime Violence Act – in order to prosecute Somali pirates within its jurisdiction<sup>25</sup>. Once States have the applicable anti-piracy laws in force, it is more likely that they will prosecute piracy. In January 2013, a few months after the new anti-piracy law came into force, Mauritius started the first investigations and the first trials against piracy suspects.

Various UN bodies have attempted to give a more literal interpretation to Article 100 UNCLOS, which has increasingly encouraged States to prosecute piracy<sup>26</sup>. With specific emphasis on the situation in Somalia, the UN Security Council (UNSC) has repeatedly issued Resolutions, most of which have been adopted under Chapter VII of the UN Charter, urging all States to take significant steps to investigate, prosecute and punish suspects captured at sea as well as “anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who plan, organize, facilitate, or illicitly finance or profit from such attacks.” Moreover, according to the UNSC, if suspects are not prosecuted, this circumstance constitutes a failure that undermines the anti-piracy efforts made by the international community<sup>27</sup>. Similar Resolutions have

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available evidence; and, similarly, for the Agreement between the EU and Mauritius, its Article 3, refers to five working days as of the date of receipt of evidence as forwarded by EUNAVFOR.

<sup>25</sup> See Nataraj J. Muneesamy, “Counter-Piracy State Practice in Mauritius. In G. Andreoene, G. Bevilacqua, G. Cataldi, C. Cinelli (eds.), *Insecurity at Sea: Piracy and Other Risks to Navigation* (2013), 173.

<sup>26</sup> A first alarm of dangers to shipping was made by the UN General Assembly in a 1998 Resolution, see *Oceans and the law of the sea*, UNGA (6 January 1999) UN Doc A/RES/53/32 (1998), at 2.; and afterwards, UNGA (18 December 2013) UN Doc A/68/L.18, at 19; UNGA (11 December 2012) UN Doc A/RES/67/78, at 19; UNGA (5 May 2011) UN Doc A/RES/65/37, at 18; UNGA (12 February 2009) UN Doc A/RES/63/111, at 13.

<sup>27</sup> For Somalia, see e.g. UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125, at 13; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077, at 12, UNSC Res 2015 (24 October 2011) UN Doc S/RES/2015, at 3; UNSC Res 1950 (23 November 2010) UN Doc. S/RES/1950, at 3. For the doctrine, see Tullio Treves,

been adopted with the purpose of counteracting transitional crimes at sea in West and Central Africa. In many of these recent Resolutions, the UNSC invited States to prosecute and punish acts of piracy, having due regard for internationally recognized rules and principles of international law<sup>28</sup>. Similarly, in its 2013 Report, the UN Secretary-General recommended international partners to “[s]upport regional cooperation mechanisms involved in investigating and prosecuting cases pertaining to illicit trafficking and organized crime, including the seizure and confiscation of criminal assets”<sup>29</sup>.

Putting the pieces together, notwithstanding the general language used in Article 100 UNCLOS, it seems very difficult to comprehend that, against the contemporary need to criminalise piracy, States having collected sufficient evidence to prosecute and States having in force at national level the necessary legal framework, may easily decide to release apprehended suspects captured on the high seas. Even if it is not seen as a breach of a positive obligation, neglecting piracy prosecution is at least in contrast with the anti-piracy efforts made by several States to counter criminal activities at sea. Neglecting piracy prosecution is also in contract with the consolidated approach of the UN bodies to strengthen and reiterate the existing obligations set out in the UNCLOS provisions. Therefore, as clarified by Mr Jack Lang<sup>30</sup>, the duty to co-operate “to the fullest possible extent in the repression of piracy” should be interpreted with a certain degree of flexibility, but not as a pretext to a failure to prosecute.

### III. THE PRINCIPLE OF UNIVERSAL JURISDICTION IN RELATION TO THE REGIONAL PROSECUTION OF PIRACY

If, as seen above, under Article 100 UNCLOS, transfer agreements are to be used to bring additional piracy prosecutions, then, the specific yard-

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“Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia”, 20 *The European Journal of International Law* (2009), 399, at 402.

<sup>28</sup> For the Gulf of Guinea, see Peace consolidation in West Africa, UNSC Res 2039 (29 February 2012) UN Doc S/RES/2039, at 3; Peace and security in Africa, UNSC Res 2018 (3 October 2011) UN Doc S/RES/2018, at 2.

<sup>29</sup> UNSC, “Report of the Secretary-General on transnational organized crime and illicit drug trafficking in West Africa and the Sahel region” (17 June 2013) S/2013/359.

<sup>30</sup> Special UN Adviser reporting on the legal issues related to piracy off the coast of Somalia.

stick to be used to assess their legality under international law of the sea is Article 105. It does not make any explicit reference to transfer agreements but determines, in essence, which State has the competence to exercise jurisdiction over piracy on the high seas. What makes this provision commonly known is the fact that it codifies the customary principle of universal jurisdiction. However, of greater importance in the context of the growing use of transfer agreements, is that Article 105 first and second sentences mention a significant distinction between two different types of jurisdiction. While the first one is about enforcement jurisdiction and prescribes that *every State* has the power to seize a pirate ship, arrest the persons and seize the property on board, the second one is about adjudicative jurisdiction and prescribes that “the courts of the State which carried out the seizure have the power to decide upon the penalties to be imposed [...]”<sup>31</sup>. Therefore, the consequent legal question to be solved here is whether, according to Article 105, a State without any traditional link with the criminal conduct may prosecute piracy suspects, even if it did not itself seize them. In other words, it must be clarified whether the criminal jurisdiction over piracy may be equally applicable in cases where suspected criminals caught on the high seas are handed over for prosecution into another State’s jurisdiction on the basis of bilateral transfer agreements.

At first glance, according to a literal interpretation of Article 105 UNCLOS, it appears that every State is granted with enforcement jurisdiction to seize the suspected pirate vessel, whereas adjudicative jurisdiction to prosecute piracy concerns exclusively the seizing State. This theory - the so-called theory of the limited universality principle - finds support in a short Commentary of the ILC on the draft provision of Article 43, which first became Article 19 of the High Seas Convention and then Article 105 UNCLOS<sup>32</sup>. According to the ILC Commentary:

“this article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. This right cannot be exercised at a place under the jurisdiction of another State. The

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<sup>31</sup> Article 105 UNCLOS.

<sup>32</sup> For a throughout description of the limited universality theory, see R. Geiss, A. Petrig, n: 14 above, at 150; Ryan P. Kelley, “UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy”, 95 *Minnesota Law Review* (2011), 2287.

Commission did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by courts”<sup>33</sup>.

The scholars who endorse this theory maintain that not every State, only the seizing State, is entitled to exercise its jurisdiction over piracy suspects. As seen above, however, transfer agreements of piracy suspects stipulate that the State which exercises the authority to prosecute the alleged offender is different from the patrolling naval State which exercises the authority to seize the suspected pirate vessel and arrest the suspects on board. Therefore, should the second sentence of Article 105 UNCLOS be read as being in line with the theory of the limited universality principle, the use of transfer agreements would derogate from the provision contained in the second sentence of Article 105 UNCLOS<sup>34</sup>.

Similar conclusions would also be reached where the second sentence of Article 105 UNCLOS would be interpreted as having the effect of a mere conflict-of-law rule. Should the case of competing jurisdictional claims be solved by granting priority to the jurisdiction of the seizing State, the current practice of transfer agreements would be potentially in contrast with this interpretation of Article 105 UNCLOS in all cases of competing jurisdictional claims<sup>35</sup>.

In our opinion, neither the theory of the limited universality jurisdiction principle nor the conflict-of-law rule, appears sufficiently persuasive. Firstly, the just recalled conflict-of-law rule does not find any confirmation in the wording used in other UNCLOS provisions including conflict-of-law rules. Totally different is for instance the wording used in Article 27 UNCLOS, which establishes the criminal jurisdiction on board a foreign ship passing through the territorial waters of a coastal State, and in Article 97 UNCLOS, which establishes the penal jurisdiction in matters of collision or any other incident of navigation on the high seas. Secondly, with regard to the theory of the limited universality jurisdiction principle, the ILC Com-

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<sup>33</sup> Int'l Law Comm'n, Yearbook of the International Law Commission art. 43 cmt. (1956).

<sup>34</sup> In this regard, Andreas Fischer-Lescano, Lena Kreck, “Piraterie und Menschenrechte Rechtsfragen der Bekämpfung der Piraterie im Rahmen der europäischen Operation Atalanta”, 47 *Archiv des Völkerrechts* (2009), 481 at 514; Eugene Kontorovich, “International Legal Responses to Piracy off the Coast of Somalia”, 13 *American Society of International Law (Insight)* (2009), available on line at: <http://www.asil.org/insights/volume/13/issue/2/international-legal-responses-piracy-coast-somalia>.

<sup>35</sup> This theory is reported in R. Geiss, A. Petrig, n. 14 above, at 151.



mentary corroborating such theory does not clearly explain whether the *enforcement* or the *adjudicative* jurisdiction must be exclusively conferred to the seizing State. On the contrary, much clearer in this regard is the more recent Commentary on Article 105 UNCLOS which clarifies that: [t]he second sentence of Article 105 implies that the courts of the State which carried out the seizure will apply national law, including, where appropriate, the national rules governing the conflict of laws<sup>36</sup>.

On this basis, we argue that Article 105 provides the general legal framework to establish criminal jurisdiction over piracy on the high seas and, domestic provisions should provide the specific procedures and the possible penalties to punish and prosecute the offence. This interpretation is also consistent with the general nature of UNCLOS provisions, which normally follow a programmatic approach. Normally its provisions are not directly effective and need to be integrated at national level by domestic legal systems. Importantly, in a recent domestic case - *The "Cygnus" Case* - the Rotterdam Court concluded that the language of Article 105 did not, either explicitly or implicitly, vest exclusive jurisdiction in the seizing State (Denmark) so as to preclude the exercise of universal jurisdiction by another country (the Netherlands)<sup>37</sup>. Additionally, it must be said that the interpretation given to Article 105 in the UNCLOS Commentary appears to be in line with the practical idea that universal jurisdiction may serve as a powerful tool to counter impunity<sup>38</sup>. This is also the rationale behind transfer of piracy suspects. As indicated above, a bilateral transfer agreement constitutes a proper device to find a solution to the contemporary problem of piracy prosecution.

The analysis above reveals that the true meaning of Article 105 UNCLOS is that every State has both adjudicative and enforcement jurisdiction over piracy, even in the absence of any traditional nexus. The current tendency

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<sup>36</sup> See Myron H. Nordquist, et al. (eds.), 3 *United Nations Convention on the Law of the Sea 1982: A Commentary* (1995), at 212-216. For the doctrine, against the idea that only the seizing State has the international jurisdiction to try piracy, see R. Geiss, A. Petrig, n. 14, above, at 151, J. A. Roach, n. 20 above, at 402.

<sup>37</sup> Rb. Rotterdam, 17 June 2010, Case No. 10/600012-09, reprinted and translated in 145 *International Law Reports* 491. See also D. Guilfoyle's comment on the case in the same issue.

<sup>38</sup> In general, on the principle of universal jurisdiction, see Maria Rosaria Mauro, *Il principio di giurisdizione universale e la giustizia penale internazionale*, 2012, at 25; Sienho Yee, "Universal Jurisdiction: Concept, Logic, and Reality", 10 *Chinese Journal of International Law* (2011), 503, at 527; Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 *Harvard International Law Journal* (2004), 183.

to recognize the competence to prosecute by both the seizing State and the regional State was recently confirmed by a decision of the Appeals Court of Kenya. It overturned a first degree decision of the High Court of Mombasa, recalling the idea that everyone has an interest in fighting piracy. Specifically, the Court of Nairobi confirmed Kenyan jurisdiction over the offence of piracy, even if committed outside of its own territorial waters and, *de facto*, even if the suspects were captured by a German frigate and then handed over to Kenyan authorities. According to the opinion of the Court, its jurisdiction is justified by the fact that “the offence of piracy on the coast of Somalia is of great concern to the international community as it has affected the economic activities and thus the economic well-being of many countries, including Kenya”<sup>39</sup>. This reasoning is clearly consistent with the common opinion that piracy on the high seas is a paradigmatic universal jurisdiction offence as everyone has an interest in fighting this atrocious offence<sup>40</sup>.

#### IV. ALTERNATIVE LEGAL INSTRUMENTS TO PROSECUTE MODERN-DAY PIRACY

UNSC Resolutions, with respect to both the situation in Somalia and the Gulf of Guinea, often mention piracy together with armed robbery at sea, which include all acts of violence the purposes of which are identical or similar to those of piracy but are not covered by the UNCLOS definition of it<sup>41</sup>. Namely, this latter permits States to act against piracy suspects exclusively on the high seas and in the Exclusive Economic Zone<sup>42</sup>. This is a significant geographic limitation considering that, according to the figures of the International Maritime Bureau, the largest part of current attacks

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<sup>39</sup> See Appeal Court of Kenya (Nairobi), decision of 18 October 2012, paragraph 36, available on line at: <http://piracylaw.files.wordpress.com/2012/10/kenya-hashii-appeal-opinion.pdf>.

<sup>40</sup> See Permanent Court of International Justice, the “*Lotus case*”, *France v. Turkey*, decision of 7 September 1927, in Permanent Court of International Justice Reports, No. 10, 1927, paragraph 70.

<sup>41</sup> See T. Treves, n. 27 above, at 403.

<sup>42</sup> The Exclusive Economic Zone is included by virtue of Article 58, paragraph 2. This is also consistent with the regime applicable to this maritime zone, since in this area a coastal State has jurisdiction only with respect to the matters set out in Article 56 UNCLOS, paragraph 1 (b) and Article 60 UNCLOS. See M. H. Nordquist, et al. (eds.), n. 36 above, at 170.

occur inside the territorial waters of coastal States<sup>43</sup>. This is particularly true in West and Central Africa where pirates cause serious harm to life and property in the Gulf of Guinea as well as in South East Asia where attacks remain low-level opportunistic thefts in internal waters or ports of coastal States. Moreover, this is similarly true in relation to the business model adopted by Somali pirates who launch attacks in international waters and then quickly return to the Somali territorial sea<sup>44</sup>. The restricted application of the general law of the sea makes useful to verify whether there is any alternative legal instruments containing provisions that provide States with the authority to prosecute acts of piracy committed in territorial seas and, eventually, to conclude transfer agreements with coastal States.

It is easy to imagine that the peculiar system which authorised States cooperating with Somalia to take law-enforcement actions within Somalia's territorial waters<sup>45</sup> (or on Somalia's soil)<sup>46</sup> is well far from being replicated to repress illicit activities at sea in other piracy hotspots. It has been expressly pointed out that the case of Somalia shall not represent a precedent for future decisions<sup>47</sup> and, indeed, to date neither subsequent regional instruments to counter piracy and armed robbery at sea, nor the UNSC Resolutions concerning the alarming situation in the Gulf of Guinea have mentioned the possibility to take measures in territorial waters of other coastal States<sup>48</sup>. However, effective and efficient alternative sources can

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<sup>43</sup> International Maritime Bureau (IMB), *Piracy Armed Robbery against Ships*, Report for the period 2013, published on January 2014. The IMB is a non-profit organisation established in 1981 in accordance with International Maritime Organization Resolution A 504 (XII) (5) and (9). This was adopted on 20 November 1981 to urge, *inter alia*, governments and organizations to cooperate and exchange information with each other. The IMB Reporting Centre makes information and figures on piracy available, found at: <<http://www.icc-ccs.org/piracy-reporting-centre>>.

<sup>44</sup> On the *modus operandi* of Somali pirates, see Antonello Tancredi, "Di pirati e stati "falliti": il consiglio di sicurezza autorizza il ricorso alla forza nelle acque territoriali della Somalia", 91 *Rivista di diritto internazionale* (2008), 937.

<sup>45</sup> See UNSC Res 1816 (2 June 2008) UN Doc. S/RES/1816 and UNSC Res 1846 (2 December 2008 UN Doc. S/RES/1846.

<sup>46</sup> See UNSC Res 1851 (16 December 2008) UN Doc. S/RES/1851.

<sup>47</sup> Analogous precedent which may be recalled is the Exchange of Notes of 25 March 1997 between Albania and Italy, where Albania agreed that Italian naval forces could in Albanian territorial waters stop ships flying whatever flag and carrying Albanian citizens which had evaded controls exercised by the authorities of Albania in the latter's territory. See 163 *Gazzetta Ufficiale della Repubblica Italiana*, Suppl. of 15 July 1997.

<sup>48</sup> See UN Doc. S/RES/2039 (2012); UN Doc. S/RES/2018 (2011), n. 28 above.

already be found in some criminal law Treaties, such as the Convention for the 1988 Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA Convention) and the 1979 International Convention against the Taking of Hostages (Hostages Convention). While these Treaties are typically referred to target respectively the conduct of terrorism and taking of hostage, some acts constituting piracy under UNCLOS may also be offences under the SUA and the Hostage Convention. Both Treaties, therefore, can be used to fill some of the legal gaps on the piracy definition provided by the general law of the sea and, above all, to promote additional prosecution of illicit activities at sea<sup>49</sup>.

More in detail, these Treaties are particularly useful as they cover offences committed in territorial waters and, what more, they place express obligations upon State Parties to extradite or prosecute suspects captured in their territory irrespective of where the criminal acts were performed. In particular, the SUA Convention creates a legal framework that authorizes masters of ships to deliver suspected SUA offenders to a coastal State Party. That Party, in turn, shall both accept custody, unless it can articulate why the Convention is not applicable, and submit the case to its own authorities for prosecution or extradite the offenders to an interested State<sup>50</sup>. In the same vein, the Hostage Convention provides an analogous obligation to (extradite or) prosecute the suspected offenders<sup>51</sup>.

From this analysis follows that while Articles 100 and 105 UNCLOS respectively contain a general duty to co-operate in the suppression of piracy and a mere faculty to prosecute piracy on the high seas (and in the Exclusive Economic Zone), both the SUA and the Hostage Convention also make reference to offences in territorial waters and provide a proper obligation to (extradite or) prosecute the related offenders. On the basis of these Treaties, if the criminal conduct falls under these provisions, States are required to (extradite or) prosecute. As a result we can conclude that the use of transfer agreements - as a crucial element of the regional prosecution strategy - can be further encouraged in light of the SUA and the Hostage Convention. However, what is possible and seems reasonable in theory is not always supported by State practice. Notwithstanding several invitations of the UN bodies, these international Treaties are dormant and

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<sup>49</sup> See D. Guilfoyle, "Piracy off Somalia and the Gap between International Law and National Legal Systems", n. 18 above, at 8.

<sup>50</sup> See Articles 7, 8, and 10.

<sup>51</sup> See Article 8.

very rarely applied. This could be because many States prone to piracy, such as Somalia, have not yet ratified these Treaties<sup>52</sup>. Furthermore, even when States have ratified them, other issues may arise. It is doubtful whether these legal instruments are applicable to the attacks which are not very violent and do not cause the seizure of the attacked vessel, such as those in South East Asia<sup>53</sup>. For these reasons, we would conclude that the application of these Conventional instruments to prosecute piracy suspects is possible in principle, but they are to be verified in practice on the basis of a case-by-case assessment.

## V. CONCLUDING REMARKS

The foregoing analysis reaches the following conclusion. While the growing trend of transfer agreements of piracy suspects does not find explicit authority in the general law of the sea, it does not prevent patrolling States from making use of such judicial co-operation with regional States. In practical terms, this conclusion is extremely important. Transfer agreements have been an effective and efficient means to overcome the legal and practical challenges related to piracy prosecution before the domestic tribunals of the seizing States. It is very unlikely that modern-day piracy can be stopped if pirates are not prosecuted and punished. Moreover, the above conclusion has a certain importance also in terms of legal certainty. The growing use of such agreements is in line with Article 100 and 105 UNCLOS and it is in line with the customary principles codified thirty years ago. On this basis, it can be asserted that general State practice continues to be accepted as law<sup>54</sup>.

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<sup>52</sup> With respect to the ratification of the SUA Conventions, IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions*, 28 February 2014, available on line at: <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202014.pdf>; and with respect to the ratification of the Hostage Convention see the website of the United Nation Treaty Collection at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVI-II-5&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-II-5&chapter=18&lang=en).

<sup>53</sup> D D. Guilfoyle, "Piracy off Somalia and the Gap between International Law and National Legal Systems", n. 18 above, at 8; E. Kontorovich, "International Legal Responses to Piracy off the Coast of Somalia", n. 34 above.

<sup>54</sup> See Article 38(1) (b) of the International Court of Justice Statute.

# *Regional Cooperation and Joint Management of Underwater Cultural Heritage*

MARIA PAPAIOANNOU\*

**Summary:** I. Introduction: UCH and maritime security; a tale of two stories; II. Cultural Cooperation...; A... as a means to protect cultural heritage in general; B. ...as a means to protect underwater heritage; 1....in the Law of the Sea Regime; 2....under the 2001 UNESCO Convention on Underwater Cultural Heritage; III. Regional Synergies for UCH; IV. Conclusions

## **I. INTRODUCTION: UCH AND MARITIME SECURITY; A TALE OF TWO STORIES**

Shipping, marine environmental protection, economic activities at sea, border surveillance and protection of fragile and semi enclosed seas have monopolized the international maritime security and safety agenda<sup>1</sup>. However, the seabed is rich in cultural elements<sup>2</sup> which represent a unique and invaluable source of information for the past. Shipwrecks, sunken cities, airplanes and other cultural treasures which form Underwater Cultural Heritage (UCH), are subject to the same challenges as the rest of the “terrestrial” cultural elements, namely environmental degradation, illicit theft and pillage, commercialization, while these activities pose threats to maritime safety and the freedom of the seas.

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<sup>1</sup> [www.marsafenet.org](http://www.marsafenet.org).

<sup>2</sup> The term “elements” is more appropriate to signify particular components of material heritage, than “property” or “object” closely that denotes an economic approach and a proprietarian understanding. See C.Bories, *Le patrimoine culturel en droit international*, (2011), 35. For the significance of UCH, see G. Bailey, “The Significance of Underwater Cultural Heritage”, in UNESCO, Scientific Colloquium on the Factors impacting the underwater cultural heritage, (2011), 5-11. Found at [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/uch\\_Brussels\\_papers.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/uch_Brussels_papers.pdf).

First and foremost, underwater heritage is subject to illicit and commercial exploitation either performed beyond state jurisdiction or in violation to the respective regime. Moreover these activities are linked to transnational organized crime<sup>3</sup> which poses several threats for maritime security.

Trawl and fishing activities also damage cultural elements at sea. In this context, regional cooperation would enable the establishment of marine safe areas around underwater sites and/or the indication of fishing areas especially between adjacent countries<sup>4</sup>. Further, seabed development through mineral extraction or pipe-lines, technical installations as well as coastal constructions may also have a severe effect at cultural elements at the sea. Not only these activities affect directly cultural elements but they have also a significant environmental impact. Thus, cultural parameters should be integrated in the implementation of such projects.

Nonetheless, the protection of underwater cultural heritage may create significant opportunities for a state, considering that tourism may develop around underwater sites if properly managed and interpreted in on-site museums. What's more diving could enhance the enjoyment of submerged archaeological sites<sup>5</sup>. In this context, CPUCH promotes responsible public access to underwater cultural heritage, as already created in various states such as the Florida Maritime Heritage Trail (United States), Nordic Blue Parks (Sweden), Maritime Heritage Trails (Australia) etc. Despite difficulties to access greater depths, Titanic is a typical example of possible application of CPUCH. The sustainable use of underwater heritage has been lately on the spotlight of the Scientific and Technical Advisory Body since it may have a significant impact on states' sustainable development<sup>6</sup>.

Given this short analysis of factors and parameters which affect greatly UCH, it becomes apparent that a holistic approach of maritime security

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<sup>3</sup> See United Nations Convention against Transnational Organized Crime, Preamble, paragraph 10. UNGA55/25(2000).

<sup>4</sup> M.L. Brennan, "Quantification of Trawl Damage to Pre-modern Shipwreck Sites: Case Studies from the Aegean and Black Seas", in UNESCO, n. 2 above. See also T. Scovazzi, "A Second Italian Case on Cultural Properties Enmeshed in Fishing Nets", *MEPIELAN E-Bulletin* (2010). Found at <http://www.mepielan-ebulletin.gr/default.aspx>.

<sup>5</sup> J.P. Delgado, "The Impact on and Opportunities Arising from Tourism to Submerged Sites", in n. 2 above. See also, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/divers/>

<sup>6</sup> UCH/13/4.STAB/220/2.

would enhance its overall effectiveness and advance the protection of underwater cultural heritage through international and regional cooperation. Since UCH and maritime security are closely linked, maritime policy set a base for common action.

This paper argues for the integration of cultural parameters in all maritime policies, as a holistic approach of maritime governance based on state cooperation strengthens regional capacities in this field. Firstly, it sets briefly the legal base for cultural cooperation in general and it then moves to the *lex specialis* regime (Section II). Further, it seeks to identify successful regional paradigms for UCH protection (Section III). Finally, it attempts to draw conclusions on sustainable and comprehensive management of UCH within maritime policies.

## II. CULTURAL COOPERATION...

The complexity of current challenges in the field of culture calls for coordinated interstate action with a view to enhance protection of cultural elements. Given this, the analysis starts with the general framework of cultural heritage cooperation which applies for all material cultural elements and then turns to the *lex specialis* for UCH.

### A. ... as a means to protect cultural heritage in general<sup>7</sup>

International cooperation for cultural affairs has been proclaimed as one of the purposes of the United Nations under the Charter<sup>8</sup>. In this context, the UN advances international cultural cooperation<sup>9</sup> while all mem-

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<sup>7</sup> “...the international obligation to cooperate is not a completely empty shell. And it can also be concluded that in the process of developing international obligations to cooperate a number of specific duties to cooperate have reached the status of hard law. But it must also be admitted that the hard law obligations to cooperate share the fate of other binding rules of international law, i.e. that some states still prefer not to comply with the hard law obligations..” J. Delbruck, “The International Obligation to Cooperate—An Empty Shell or a Hard Law Principle of International Law?— A Critical Look at a Much Debated Paradigm of Modern International Law”, in H. P. Hestermeyer et al (eds.), *Coexistence, Cooperation and Solidarity, Liber Amicorum Rüdiger Wolfrum*, (Martinus Nijhoff, 2011) vol. I, 3-16.

<sup>8</sup> UN Charter, art. 1 (1).

<sup>9</sup> Art. 55 (b).



ber states should take joint and/or separate action in this field<sup>10</sup>. The duty to cooperate in the cultural field is also highlighted in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (1970)<sup>11</sup>. Indeed, the ICJ assessed the normative value of Resolution 2625 in the “Nicaragua Case”<sup>12</sup> and concluded that

the effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves... It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules)<sup>13</sup>.

After all, international solidarity set the ground a new understanding in international relations according to which “*No one wins unless everyone wins*”<sup>14</sup> whereas

more extensive subregional, regional, interregional and international co-operation and understanding in cultural matters are pre-conditions for the achievement of a climate of respect, confidence, dialogue and peace among the nations<sup>15</sup>.

The scope of cultural cooperation varies given the regulatory framework. Thereby, the obligation to cooperate stems from bilateral or multilateral conventions<sup>16</sup>, universal or regional ones, hard and “soft” law instruments. Its objective may be general, such as the “cultural progress,” or specialized with a view to address specific problems eg. illicit trafficking of material cultural elements. Accordingly, cultural cooperation entails different duties for states depending on the maritime zone and the jurisdictional rights of the states therein. Finally, the obligation to cooperate imposes on states an obligation regarding their conduct, but not regarding the outcome.

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<sup>10</sup> Article 56.

<sup>11</sup> A/RES/25/2625.

<sup>12</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, at 100.

<sup>13</sup> *Ibid.*

<sup>14</sup> R. St. J. MacDonald, “Solidarity in the Practice and Discourse of Public International Law”, 8 *Pace Int’l L. Rev.* (1996) 259, at 281.

<sup>15</sup> UNESCO, *Mexico City Declaration on Cultural Policies (MONDIACULT)*, World Conference on Cultural Policies, Mexico City, 26 July - 6 August 1982, paragraph 44.

<sup>16</sup> See also the classification of international cultural conventions in L. Galenskaya, “International Co-operation in cultural Affairs”, *RCADI* (1986), at 278.

UNESCO stands as the institutionalized forum for international cultural cooperation<sup>17</sup> while it has advanced cultural protection within the “International Law of Cooperation” as eloquently described by G. Abi-Saab<sup>18</sup>. In 1966, the General Conference adopted the Declaration of Principles of International Cultural Co-operation and acknowledged cultural cooperation as a right and a duty for all peoples and all nations (art. V) which should be carried on for the mutual benefit of all the nations practicing it (art. VIII). Although it has been sidelined<sup>19</sup>, it sets forth principles of great and lasting importance<sup>20</sup>. Similarly, UNESCO Declaration 2003 proclaims cooperation for the protection of cultural heritage from intentional destruction (art. VIII). According to the text, cooperation entails as a minimum exchange of information, consultations, general assistance, judicial and administrative assistance, awareness-raising and capacity-building.

International cooperation has been regarded as a pillar for effective protection in all cultural conventions. UNESCO 1970 declares cooperation as the most efficient means against illicit trafficking (art. 2). World Heritage Convention goes one step further. Not only does it establish a system for assistance and cooperation within states (art. 7), but it also recognizes that international community as a whole has a duty to cooperate for the protection of world heritage (art. 6). In the same way, UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 links cooperation with solidarity (art. 1.i).

UNESCO Recommendations<sup>21</sup> fostered further international cooperation. Pursuant to these texts, cooperation may take the form of exchange of

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<sup>17</sup> UNESCO’s role is not restricted to the adoption of various legal instruments. It has also advanced cultural cooperation through World Conferences e.g. Helsinki (1972), Yogyakarta (1973), Accra (1975), Bogota (1978), Bagdad (1981), Mexico (1982).

<sup>18</sup> G. Abi-Saab, “General Conclusions” in A.A.Yusuf (ed.), *Normative Action in Education, Science and Culture*, (vol.I 2007), at 396.

<sup>19</sup> J. Wouters et al, “UNESCO and the Promotion of Cultural Exchange and Cultural Diversity”, in A.A.Yusuf, n. 18 above, at 153-4.

<sup>20</sup> Report of the Commission on Human Rights, United Nations document E/3616/Rev. I, paragraph 105, eighteenth session, Economic and Social Council, 19 March -14 April 1962, United Nations, New York.

<sup>21</sup> See indicatively Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas 1976 paragraph 54, Recommendation on the Historic Urban Landscape 2011 paragraph 28, Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage 1972 paragraph 66.

information on scientific and technical publications, of scientific, technical and administrative capacity, joint action to tackle pollution, joint implementation of large-scale projects for the preservation, reconstruction and restoration of historic sites, the creation of networks for sharing knowledge (knowledge-sharing) and empowerment (capacity-building), while the necessity for legal assistance between states and prevention of offenses is underlined. Since Recommendations have a *sui generis* legal value<sup>22</sup>, they reflect UNESCO's standard setting role for the promotion of international dialogue and mutual assistance within states.

The obligation to cooperate was highlighted recently by the ICJ in the Temple of Preah Vihear Case. More concretely, the Court underlined its religious and cultural significance for the peoples of the region and called the states to *co-operate between themselves and with the international community in the protection of the site*<sup>23</sup>. In addition, the Court *wished to emphasize the importance of ensuring access to the Temple from the Cambodian plain*<sup>24</sup>. Since the Temple of Preah Vihear bears unique importance for the whole region this wording enhances the humanization of cultural

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<sup>22</sup> In brief, UNESCO recommendations should be submitted without exception to the competent national authorities within a year), *even if measures of ratification or acceptance are not contemplated in a particular case*. The General Conference has underlined the distinction *between the obligation to submit an instrument to the competent authorities, on the one hand, and the ratification of a convention or the acceptance of a recommendation, on the other. Their submission to the competent authorities does not imply that conventions should necessarily be ratified or that recommendations should be accepted in their entirety*, CPG. 63/VI 12/A p. 147. UNESCO Constitution art. 4B paragraph 4 and Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution. In brief, UNESCO recommendations should be submitted without exception to the competent national authorities within a year), *even if measures of ratification or acceptance are not contemplated in a particular case*. The General Conference has underlined the distinction *between the obligation to submit an instrument to the competent authorities, on the one hand, and the ratification of a convention or the acceptance of a recommendation, on the other. Their submission to the competent authorities does not imply that conventions should necessarily be ratified or that recommendations should be accepted in their entirety*, CPG. 63/VI 12/A p. 147.

<sup>23</sup> ICJ, Request for Interpretation of the Judgments of 15 June 1962 in the Case Concerning the Temple of Preah Vihear, (Cambodia v. Thailand), Judgment of 11 November 2013, paragraph 106.

<sup>24</sup> Ibid.

heritage law<sup>25</sup>. As cited by Judge Cancado Trindade, it is the human factor as well as the cultural and spiritual heritage of humankind that lies beyond the classic “territorialist” outlook of heritage protection<sup>26</sup>. After all, cultural elements draw their significance as symbols of the past through their interrelation with the individuals and bear a definitive impact on their identity.

Interstate cooperation is particularly crucial in the event of serial, transnational and trans-boundary (STT) cultural elements. Under WHC, close cooperation and a common understanding is required as nominations of STT are submitted by a single state which acts as the coordinator<sup>27</sup>. Similarly a common management system or mechanism is required in order to harmonize protection of separate components<sup>28</sup>. In this context<sup>29</sup>, the “Struve Geodetic Arc” which includes 34 cultural elements in ten countries was inscribed successfully in the World Heritage List in 2005<sup>30</sup>, while the “Struve Arc Coordinating Committee” has been established by member states to act as the “Coordinator”<sup>31</sup>.

Given this short analysis, it becomes apparent that the states have a duty to cooperate in order to ensure cultural heritage protection, in general, as its destruction affects the international community as a whole<sup>32</sup>.

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<sup>25</sup> See Francioni F., “The Human Dimension of International Cultural Heritage Law: An Introduction”, 22:1 *EJIL* (2011), A.F. Vrdoljak, “Human Rights and Culture Heritage in International Law” found at SSRN: <http://ssrn.com/abstract=2200186>

<sup>26</sup> Separate Opinion of Judge Cançado Trindade, n. 23 above, paras. 96-113.

<sup>27</sup> Operational Guidelines for the Implementation of the World Heritage Convention, WHC. 13/01, July 2013, paragraph 61.

<sup>28</sup> *Ibid*, paragraph 114.

<sup>29</sup> The World Heritage List includes 29 transboundary properties. <http://whc.unesco.org/en/list/>

<sup>30</sup> WHC, 29COM 8B.35 - Nominations of Cultural Properties to the World Heritage List (the Struve Geodetic Arc).

<sup>31</sup> <http://struvearc.wikidot.com/start>.

<sup>32</sup> UNESCO Declaration 2003. See also Francioni F., “Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity”, (2003-2004) 25 *Mich. J. Int'l L.* 1209.

## B. ...as a means to protect underwater cultural heritage<sup>33</sup>

The technological developments brought marine archaeology and underwater heritage into focus. Although the problem was identified early enough, the international community missed the opportunity to introduce cultural clauses in the 1958 Geneva Conventions on the Law of the Sea<sup>34</sup>. This issue was raised anew during the preparatory work of UNCLOS III. Despite the intense efforts of interested states to introduce detailed obligations for UCH protection, the UN Convention on the Law of the Sea is limited to two general – if not incomplete –<sup>35</sup> provisions while it allows for a future specialized agreement on underwater heritage<sup>36</sup>. In spite of the long debate on its consistency and compatibility<sup>37</sup>, the UNESCO 2001 Convention recently established a specialized framework for UCH founded on the obligation to cooperate.

### 1. ...in the Law of the Sea Regime

In the UNCLOS, the first provision arise with regard to the Area, meaning the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction<sup>38</sup>. As cited,

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<sup>33</sup> For the protection of underwater cultural heritage see inter alia. A. Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, (1995), S. Dromgoole, (ed.), *Legal Protection of the Underwater Cultural Heritage: National and International perspectives*, (2001), R. Garabello, *La Convenzione UNESCO sulla Protezione del Patrimonio culturale subacqueo*, (2004), J. A. Yturriaga Barberán, “Convención sobre la protección del patrimonio cultural subacuático”, in Drnas de Clément (coord.), *Estudios de Derecho Internacional en homenaje al Profesor Ernesto J. Rey Caro*, 2003, T. Scovazzi, “The Law of the Sea Convention and Underwater Cultural Heritage” in D. Freestone (ed.) *The 1982 Law of the Sea Convention at 30: successes, challenges and new agendas*, (Martinus Nijhoff, 2013), S. Dromgoole, *Underwater cultural heritage and international law*, (CUP, 2013).

<sup>34</sup> See T. Treves, “The 1958 Geneva Conventions on the Law of the Sea”. Found at <http://legal.un.org/avl/ha/gclos/gclos.html>.

<sup>35</sup> Y-J. Zhao, “The Relationships among the Three Multilateral Regimes concerning the Underwater Cultural Heritage” in J. Nafziger, et al (eds), *The Cultural Heritage of Mankind*, (2008), 601-641, at 603.

<sup>36</sup> UNCLOS 303 (4).

<sup>37</sup> C.J.S. Forrest, et al, “Consistent: the Convention on the Protection of the Underwater Cultural Heritage and the United Nations Convention on the Law of the Sea”, (2013) 2 *CJICL* 3, 536-561, M. Risvas, “The Duty to Cooperate and the Protection of Underwater Cultural Heritage”, (2013) 2 *CJICL* 3, 562-590 at 583.

<sup>38</sup> UNCLOS, Article 1(1).

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin<sup>39</sup>.

The wording allows for a limited interpretation of the scope of application only to archaeological and historical objects found in a certain zone which can be perceived as objects of a given specified time period. Its scope of application is vague and unclear as it is subsequently counterbalanced with the preferential rights of certain states. Even though the “benefit of mankind” may be interpreted in the light of the general terms of Chapter XI on the Area as *the equitable sharing of financial and other economic benefits derived from activities*<sup>40</sup>, there is no guarantee on the how to strike the balance between competing interests. Besides, the economic evaluation or exploitation of cultural objects differs significantly from that of the other maritime resources which can be monetized. Inevitably, cooperation is the only mechanism which ensures this common interest and mutual benefit.

Further, Article 303 explicitly imposes the obligation not only to protect, but also to cooperate for all the archaeological and historical objects found at sea. This provision applies in general and extends protection to all maritime zones<sup>41</sup>. Although there is no specification on the methods, necessary steps, or forms of cooperation, this obligation must be interpreted broadly<sup>42</sup> as it follows the general principles of cooperation under international law. Accordingly, a state which cause damage or destroys underwater heritage, avoids or refuses to cooperate may be held responsible for an internationally wrongful act<sup>43</sup>.

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<sup>39</sup> UNCLOS, Article 149.

<sup>40</sup> UNCLOS, Article 140. As Strati notes “the commonness of the common heritage is a commonness of ownership and benefit”. A.Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, (Martinus Nijhoff, 1995), at 303.

<sup>41</sup> C.J.S.Forrest et al., n. 36 above, at 540.

<sup>42</sup> According Strati, *Article 303 (1) may be read as the obligation to report the accidental discovery of archaeological sites, the obligation to take the necessary interim protective measures for the preservation of an underwater site..the need to preserve in situ the located remains and to avoid unnecessary excavation, the need for conservation etc.* Consequently, cooperation may touch upon the whole range of actions. A. Strati, n. 40 above, at 124.

<sup>43</sup> Responsibility of States for Internationally Wrongful Acts, Article 2, UNGA 56/83 (2001).

Looking closely to article 303 in conjunction to article 33, an archaeological zone is *de facto* created<sup>44</sup> and allows for its autonomous declaration<sup>45</sup>. The state enjoys functional jurisdiction so as to protect cultural objects<sup>46</sup> while it can regulate<sup>47</sup>, authorize or/and control on research activities and traffic of such objects within its zone. In this regard, the obligation to cooperate is implied as the coastal states' approval is a precondition for a third state to operate in the 12-24 mile zone; beyond the territorial waters, where the coastal state exercise exclusive jurisdiction and up to the outer limit of the archaeological zone.

Given the shortcomings, it comes to no surprise that in the aftermath of the UNCLOS adoption, initiatives were undertaken (eg. ILA<sup>48</sup>) for a specialized treaty and led progressively to the new 2001 UNESCO Convention.

## 2. ...under the he 2001 UNESCO Convention on Underwater Cultural Heritage

After long and strenuous efforts<sup>49</sup> and compromises<sup>50</sup>, the Unesco Convention on the Protection of Underwater Cultural Heritage (CPUCH) was adopted in 2001 and entered into force in 2009. Until today 45 states have

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<sup>44</sup> A. Strati, n. 40 above, at 166-9. See also S. Karagiannis, "Une nouvelle zone de juridiction: la zone archéologique maritime", (1990) *Collection Espaces et Ressources maritimes* 4, 1-26, P. Sioussiouras, "The contiguous zone as a mechanism for protecting the underwater cultural heritage", in A. Strati et al (eds.), *Unresolved Issues and New Challenges to the Law of the Sea Time Before and Time After*", (Martinus Nijhoff, 2006), 63-71.

<sup>45</sup> Ibid, at 167.

<sup>46</sup> M. Gavouneli, *Functional Jurisdiction in the Law of the Sea*, (Martinus Nijhoff, 2007), at 10.

<sup>47</sup> With regard to the enforcement of national regulations on heritage protection, in the recent M/V "Louisa" Case, the Court concluded that "*the M/V "Louisa" was detained in the context of criminal proceedings relating to alleged violations of Spanish laws on "the protection of the underwater cultural heritage" and not the UNCLOS*". ITLOS, *Saint Vincent and the Grenadines v. Kingdom of Spain*, Case No. 18, paras. 104, 113.

<sup>48</sup> Analytically J. Blake, *The Protection of the Underwater Cultural Heritage*, (1996)<sup>45</sup> *ICLQ* 819-843.

<sup>49</sup> Ibid.

<sup>50</sup> "CPUCH is a compromise text, a package satisfactory to most states". G. Carducci, "New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage", (2002) *96AJIL* 2, 419-434, at 433.

deposited their respective instruments on ratification, acceptance, approval or accession.

Despite numbers, the significance of this Convention is much greater. As cited in its Preamble, the Convention was adopted by the General Conference of UNESCO. Following the adoption, all UNESCO conventions follow a dual process. First of all, conventions are subject to ratification, acceptance or accession pursuant the law of the treaties<sup>51</sup>, but no to signature. UNESCO Conventions adopted by the General Conference, are authenticated by the signatures of the President of the General Conference and of the Director-General<sup>52</sup> and not by the states<sup>53</sup>. Thereinafter, they are subject to ratification, acceptance or approval by member states, and accession by third states<sup>54</sup>. This innovative procedure entails for UNESCO member states the obligation to refrain from acts which would defeat the object and the purpose of the treaty until its entry into force<sup>55</sup>.

On second grounds, states are bound by an internal procedure, according which each state is obliged to submit the convention to its competent authorities within a period of a year<sup>56</sup> and report on their status and measures adopted in domestic level<sup>57</sup>. This obligation is particularly important as it applies to all member states, even if a convention is adopted by a two-third majority. In addition, it fosters awareness and implementation of UNESCO instruments within domestic level.

CPUCH sets minimum standards and introduces a detailed cooperation system founded on the shared responsibility of states to protect UCH. Since CPUCH gives priority to *in situ* protection<sup>58</sup>, meaning preservation in its original location, and aims at the preservation of underwater cultural

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<sup>51</sup> Vienna Convention on the Law of Treaties, 1969. Analytically see M.Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (2009), O. Corten et al (eds.) *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP, 2011).

<sup>52</sup> Op. cit, art. 14.

<sup>53</sup> A. A. Yusuf, "UNESCO Practices and Procedures for the Elaboration of Standard setting Instruments", in A.A. Yusuf, n. 18 above, at 46.

<sup>54</sup> CPUCH, article 26.

<sup>55</sup> VCLT art. 18 in conjunction with art. 11, 12 and 24. See n. 52 above.

<sup>56</sup> UNESCO Constitution, Article IV(4).

<sup>57</sup> UNESCO Constitution Article IV (6), VIII and Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution, art. 17.

<sup>58</sup> CPUCH Art. 2(5).



heritage for the benefit of humanity<sup>59</sup>, joint action is regarded as the most effective mechanism to enhance cultural preservation. The obligation to cooperate is specified in each maritime zone and varies according the jurisdictional rights of coastal states<sup>60</sup>.

CPUCH affirms, in total conformity with UNCLOS<sup>61</sup>, the jurisdictional rights of coastal states on territorial waters and the archaeological zone. Even in those, the Rules<sup>62</sup>, which set international professional standards<sup>63</sup> for protection, apply in the exercise of coastal state's rights and encourage for international cooperation and the exchange of experts in this field<sup>64</sup>. It should be noted, however, that the relevant provision extends the scope of application beyond UNCLOS. More analytically, CPUCH includes a broad definition of UCH that contains

all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years<sup>65</sup>.

This time criterion set for the first time an objective basis for the identification of these elements beyond state discretionary power and the "significance's criterion"<sup>66</sup> while it embraces a more anthropocentric approach of cultural heritage. Given the technological verification process, the lapse of centenary entails the enrichment of its scope of application yearly<sup>67</sup>.

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<sup>59</sup> CPUCH Art. 2(3).

<sup>60</sup> As noted by T. Scovazzi, the "horror jurisdictionis" on creeping competences of coastal states beyond the territorial waters had a decisive impact on UCH protection under UNCLOS. Thus, in CPUCH, references to coastal states are omitted. R. Garabello, et al (eds.), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, (Martinus Nijhoff, 2003), at 18.

<sup>61</sup> Art. 3.

<sup>62</sup> The rules are annexed in the Convention and form an integral part of it. Art. 33

<sup>63</sup> U. Koschtial, "The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: advantages and Challenges", (2008) 60 *Museum International* at 64.

<sup>64</sup> Rule 8.

<sup>65</sup> Art. 1(1)a.

<sup>66</sup> Traditionally, cultural protection is limited to the most significant cultural objects, denoting the most unique, representative and irreplaceable elements, defined as such in domestic law.

<sup>67</sup> That is particularly significant with regard to underwater findings of World War I. See <http://www.unesco.org/new/index.php?id=66407>

In respect to the duty to cooperate, the states are further obliged to report and rapidly notify on any discovery or activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf of another State Party<sup>68</sup>. The Convention provides detailed notification and consultations” procedures between interested states<sup>69</sup> designed to protect the common interest. The coastal state coordinates joint action while it bears enhanced responsibility<sup>70</sup> for the protection of cultural elements against immediate danger.

The shared responsibility to protect UCH and the duty to cooperate apply also for cultural elements found at the Area<sup>71</sup>. In this case, UNESCO’s Director General acts as the coordinator until the appointment of the “Coordinating State”, whereas the International Seabed Authority participates in the consultations. In both occasions, cooperation entails consultations and joint action for conducting research, project design, activities directed at UCH upon authorization, conservation and site management, documentation etc<sup>72</sup>. More generally, CPUCH calls for advanced cooperation and assistance in the conservation and management of UCH, including in the investigation, excavation, documentation, conservation, study and presentation of such heritage<sup>73</sup> and information- sharing<sup>74</sup>.

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<sup>68</sup> Art. 9

<sup>69</sup> According CPUCH interested states are those that declare their interest based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned. In the case of state vessels, the agreement of the flag state is also necessary. Articles 9(5), 11(4) etc. On possible claimants over cultural objects at sea see P. Vigni, “The enforcement of Underwater Cultural Heritage by Courts”, in F. Francioni et al (ed.), *Enforcing International Cultural Heritage Law*, (OUP, 2013) 125- 149, at 126.

<sup>70</sup> See also A. Strati, “Protection of the underwater cultural heritage: From the shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention” in A. Strati, et al(eds.), n. above 45, 21-62, at 62.

<sup>71</sup> Art. 11.

<sup>72</sup> Analytically on these activities see annexed Rules.

<sup>73</sup> Art. 19(1).

<sup>74</sup> Art. 19(3).

The peaceful settlement of disputes also represents a significant aspect of the states<sup>75</sup> duty to cooperate under CPUCH<sup>76</sup>. Negotiations, mediation, and the means set out in UNCLOS set the base for dispute resolution<sup>77</sup>.

Last but not least, the Convention enables regional cooperation for the preservation of UCH. More specifically, states are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements so as to improve protection<sup>78</sup>. Although multilevel cooperation has been regarded as a sign of weakness of the new heritage regime<sup>79</sup>, the adoption of advanced protection standards in regional level is a common practice in international law (eg. human rights, environmental law etc.). As Scovazzi noted, increased cooperation could have a decisive effect on enclosed or semi-enclosed seas such as the Mediterranean, the Baltic and the Caribbean<sup>80</sup> as enshrined in the “Siracusa Declaration on the Submarine Cultural Heritage of the Mediterranean Sea”<sup>81</sup>. This illustrates the added value of CPUCH as an instrument that empowers regions to act jointly and achieve effective protection of UCH.

### III. REGIONAL SYNERGIES FOR UCH

Functional cooperation lies at the heart of regionalism<sup>82</sup> with a view to address more effectively common problems. Regional states share com-

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<sup>75</sup> Private disputes lie beyond CPUCH. J. Nafziger, “Cultural Heritage Law: The International Regime” in J. Nafziger, et al (eds.), n. 35 above, at 183.

<sup>76</sup> The principle of peaceful settlement of disputes is based on the UN Charter art. 2(3) and art. 33. See among other I. Brownlie, “The Peaceful Settlement of International Disputes”, 8:2 *Chinese Journal of International Law* (2009) 267-283, J.G. Merrills, “The Means of Dispute Settlement” in M. D. Evans (ed.), *International Law*, 2010, Chr. J. Tams, A. Tzanakopoulos, *The settlement of international disputes: basic documents*, (Hart, 2012).

<sup>77</sup> Art. 25.

<sup>78</sup> Art. 6.

<sup>79</sup> C.Forrest *International Law and the Protection of Cultural Heritage*, (2010), at 356-7.

<sup>80</sup> T. Scovazzi, “Convention on the Protection of Underwater Cultural Heritage”, (2002) 32 *Environmental Policy and Law* at 155. See also R Garabello, “Sunken warships in the Mediterranean. Reflections on some relevant examples in state practice relating to the Mediterranean Sea” in T Scovazzi (ed), *La protezione del patrimonio culturale sottomarino nel mare Mediterraneo* (Giuffrè, 2004) 171, 197.

<sup>81</sup> Siracusa, 10 March 2001. Annexed in R. Garabello, et al (eds.), n. 62 above, at 274.

<sup>82</sup> See J.-U. Wunderlich, *Regionalism, Globalisation and International Order: Europe and Southeast Asia*, (Ashgate, 2013).

mon interests, traditions and cultural routes in time; factors that in principle enable cooperation. Indeed, the duty to cooperate reinforces regional synergies for increased<sup>83</sup> UCH protection, while standards are comparable to that granted by other UNESCO Conventions or national legislation on cultural heritage on land<sup>84</sup>. Since CPUCH is relatively new, existing practice is indicated hereafter to serve as a paradigm for future regional action.

Accordingly, UCH is enacted more effectively in regional level as geographical vicinity enables a common understanding between states. On some occasions, this is an imperative need because many cultural elements lay in the territorial zone of two or more states (trans-boundary underwater sites), whereas in other jurisdictional zones, states perform limited functional jurisdictions, or enjoy a shared responsibility to protect heritage e.g. international waters. In addition, in regional level, states share a common history and cultural roots. Consequently, a verifiable link - cultural, historical or archaeological link - arises and regional action could prove a useful tool for heritage protection. Last but not least, states may not have sufficient means to protect adequately underwater cultural heritage due to its high cost. Thus, synergies are required and well implemented in this level as confirmed by practice.

Given the above, cultural cooperation is promoted through regional institutions. Despite the failures of the past for the elaboration of a European convention on the protection of the underwater cultural heritage<sup>85</sup> CoE's Parliamentary Assembly remains seized on this matter<sup>86</sup> with a view to protect the common heritage of Europe<sup>87</sup>.

European underwater heritage has also been a matter of interest within EU. For this reason, various projects are implemented and funded by the EU. In 2002, the STACHEM (Science and technology for archaeology and cultural heritage in the eastern Mediterranean) was launched with a view

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<sup>83</sup> T. Scovazzi, "The Merits of the Unesco Convention on the Protection of the Underwater Cultural Heritage", in S. Borelli et al (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, (Martinus Nijhoff, 2012), 267-278 at 276.

<sup>84</sup> Chapter I.A.1(2), Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage, 2013. CLT/CEH/CHP/2013/OG/H/1.

<sup>85</sup> Recommendation 848 (1978) on the underwater cultural heritage, Parliamentary Assembly, Council of Europe.

<sup>86</sup> See also Resolution 1168 (1998), Recommendation 1387 (1998), Recommendation 1486 (2000), Parliamentary Assembly, Council of Europe.

<sup>87</sup> Recommendation 1465 (2000).

to develop a regional strategic plan for research infrastructures for underwater heritage, closely adapted to the regional needs and integrated in the euro-mediterranean environment, and promote transnational activities. In addition, the Managing Cultural Heritage Underwater project (2006-2009) facilitated, through the creation of information tools<sup>88</sup>, cultural dialogue between member states, mutual knowledge and better understating of the culture and history of the countries involved. More significantly, in 2007 underwater heritage was integrated in EU maritime policy. The Integrated Maritime Policy (IMP) Blue Paper Action Plan of 2007 cites that IMP *should also promote Europe's maritime heritage, supporting maritime communities, including port-cities and traditional fisheries communities, their artefacts and traditional skills, and promoting links between them that enhance their knowledge and visibility*<sup>89</sup>. In this regard, the Action Plan for a Maritime Strategy in the Atlantic area adopted in 2013 included maritime heritage protection within its objectives<sup>90</sup>.

Similar initiatives have been launched around the world. More than eleven regional and sub-regional meetings and workshops have taken place under the auspices of UNESCO<sup>91</sup> or upon states' initiative. These meetings serve as the platform for common action, the adoption of Action Plans<sup>92</sup>, and even the establishment of Regional Groups<sup>93</sup>, while awareness on CPUCH is raised<sup>94</sup>.

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<sup>88</sup> <http://www.machuproject.eu/>.

<sup>89</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An Integrated Maritime Policy for the European Union, COM(2007) 575.

<sup>90</sup> Action Plan for a Maritime Strategy in the Atlantic area Delivering smart, sustainable and inclusive growth, COM/2013/0279.

<sup>91</sup> [www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/research-and-training/capacity-building/](http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/research-and-training/capacity-building/).

<sup>92</sup> As in the case of the Asia – Pacific Region. <http://www.apconf.org/>

<sup>93</sup> For instance, the Sub-Saharan Africa regional collaboration, Indian Ocean sub regional capacity building proposal, the Sub-Regional Meeting on the 2001 Convention for the protection of the Underwater Cultural Heritage in Dar es Salaam (2011) found at

[http://www.heritage-activities.nl/projects/MUCH\\_Africa/resource\\_centre](http://www.heritage-activities.nl/projects/MUCH_Africa/resource_centre)

<sup>94</sup> 1st Meeting for the Gulf on the Convention on the Protection of the Underwater Cultural Heritage. Manama, Bahrain, 16-17 October 2012, found at [http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/dynamic-content-single-view/news/sub\\_regional\\_meeting\\_for\\_the\\_gulf\\_on\\_the\\_convention\\_on\\_the\\_protection\\_of\\_the\\_underwater\\_cultural\\_heritage/](http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/dynamic-content-single-view/news/sub_regional_meeting_for_the_gulf_on_the_convention_on_the_protection_of_the_underwater_cultural_heritage/)

Finally, bilateral and multilateral agreements have been concluded for the protection of culturally significant shipwrecks outside their territory as in the case of the ANCODS bilateral agreement between the Netherlands and Australia<sup>95</sup> or the RMS Titanic Agreement<sup>96</sup>.

This short analysis briefly describes current trends and practices for UCH protection and reflects the range of available instruments and mechanisms, which can serve as the paradigm for future action. Therefore, cooperation varies from mere technical cooperation to a broader concept of shared management of cultural elements at sea.

#### IV. CONCLUSIONS

Cooperation stands as the most effective mechanism for UCH protection. Preservation of cultural heritage of mankind not only represents a common interest, but also a shared responsibility. Thus, joint action enables the preservation of underwater cultural heritage for future generations as its *ultima ratio* and ensures intergenerational equity<sup>97</sup>. Based on that, the duty to cooperate under general cultural heritage law as well as the *lex specialis*, binds states regarding their conduct which allows them to choose the means and not regarding the outcome *per se*.

CPUCH forms a concrete legal framework for coordinated action while emphasis is given on the regions. Regional synergies, a key for maritime governance, become indispensable to UCH protection. The development of regional strategic plans for research and joint management of underwater

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<sup>95</sup> M. Manders, "The Netherlands towards ratification: activities in the light of the Convention", in G. Henderson et al (eds.), *Towards Ratification: Papers from the 2013 AIMA Conference Workshop* (Australasian Institute for Maritime Archaeology, 2014) at 23.

<sup>96</sup> The RMS Titanic Agreement was concluded in 2003 between USA, France, UK and Canada. The text can be accessed at <http://www.gc.noaa.gov/documents/titanic-agreement.pdf>. For the legal framework that applies to Titanic and its protection under CPUCH see M.J.Aznar et al. "The 'Titanic' as Underwater Cultural Heritage: Challenges to Its Legal International Protection", (2013) 44 *Ocean development and international law* 96-112.

<sup>97</sup> A.F. Vrdoljak, "Intentional Destruction of Cultural Heritage and International Law" in K. Koufa (ed.), *Multiculturalism and International Law: XXXV Theasaurus Acroasium*, (Sakkoulas, 2007), 377-396. Available at SSRN: <http://ssrn.com/abstract=1142806> at 13. E. B. Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Pub. 1989).

heritage advance protection and safeguard the common interest of mankind. To this end, the challenge that rests for the future is to pursue a holistic maritime approach that integrates underwater heritage protection clauses in maritime policies. In this regard, the EU Integrated Maritime Policy paths the way and sets a precedent for regional maritime cooperation for UCH protection in Europe and beyond.

# *Transfers of Piracy Suspects - A Crucial Element of the Regional Prosecution Strategy in Light of Human Rights Law*

ANNA PETRIG\*

**Summary:** I. Transfers for prosecution: rationale and current procedure; II. A conditional right not to be transferred flowing from non-refoulement; III. Current transfer procedure and the procedural dimension of non-refoulement; A. Necessity of individual non-refoulement assessment despite transfer agreement; B. Assessment of reliability and effectiveness of transfer agreements; C. No procedural framework for carrying out a non-refoulement assessment; IV. Reconciling human rights prescripts with operational constraints.

## I. TRANSFERS FOR PROSECUTION: RATIONALE AND CURRENT PROCEDURE

The United Nations Security Council's call to fully<sup>1</sup> and durably<sup>2</sup> eliminate Somali-based piracy has been heeded by an unprecedented number of actors. States from all over the world and three multi-national missions - Operation Atalanta conducted by the European Union Naval Force (EU-

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\* Dr. Anna Petrig, LL.M., is a post-doc researcher at the University of Basel (Switzerland). The issue of transfers of piracy suspects to third States for their criminal prosecution is governed by both international law, namely the law of the sea and human rights law, and domestic law. While this contribution analyzes the legality of transfers from a human rights perspective, the article by Dr. Giorgia Bevilacqua entitled "Transfers of piracy suspects - a crucial element of the regional prosecution strategy in light of international law of the sea", which is included in the book at hand, covers the issue from a law of the sea perspective. The two articles are part of a larger project of the study group on law enforcement at sea, which is part of Working Group 3 on International Maritime Security and Border Surveillance of COST Action IS1105, MARSAFENET (network of experts on the legal aspects of maritime safety and security; [www.marsafenet.org](http://www.marsafenet.org)).

<sup>1</sup> UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 (UNSC Res 1846), preambular, paragraph 10.

<sup>2</sup> UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 (UNSC Res 2125), preambular, paragraph 30.



NAVFOR), the North Atlantic Treaty Organization's (NATO) Operation Ocean Shield and the Combined Task Force 151 operated by the Combined Maritime Forces - currently implement the counter-piracy law enforcement framework off the coast of Somalia and the Indian Ocean<sup>3</sup>.

The natural goal of every law enforcement operation is to bring alleged criminals to justice. However, as regards counter-piracy operations, the implementation of this basic tenet has proven difficult. Patrolling naval States taking piracy suspects captive are often unwilling or unable to prosecute them in their domestic courts. In such cases, the seizing State generally works towards surrender for prosecution of the suspects to a third State, mainly located in the region prone to piracy (so-called regional States)<sup>4</sup>. This implies that with each seizure, the path to prosecution has to be paved anew: a decision must be taken whether to release the seized person or to submit the case for investigation and prosecution to either the competent authorities of the seizing State or a third State. This process is referred to as "disposition procedure". To facilitate this task, various States, as well as the European Union (EU), have entered into transfer agreements with regional States in which the latter declare their general willingness to accept piracy suspects for prosecution, subject to their consent in each individual case and the fulfilment of specific conditions laid down in the respective agreement<sup>5</sup>. If a prosecuting State can be successfully identified in a spe-

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<sup>3</sup> UNSC, "Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia" (21 October 2013) UN Doc S/2013/623, paragraph 37 *seq.*; UNSC Res 2125, preambular, at paragraph 14.

<sup>4</sup> Between the start of the operation in December 2008 and the end of January 2014, EUNAVFOR has, for example, transferred a total of 47 piracy suspects to the Seychelles: EUNAVFOR Somalia, "Suspect Pirates Apprehended by EU Naval Force Flagship Transferred To The Seychelles" (30 January 2014) <<http://eunavfor.eu/suspect-pirates-apprehended-by-eu-naval-force-flagship-transferred-to-the-seychelles/>> accessed 30 April 2014.

<sup>5</sup> Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfers of Piracy Suspects* (Martinus Nijhoff Publishers, forthcoming), Part 1/III/B: Kenya was the first State to conclude a transfer agreement with the EU in March 2009: Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer [2009] OJ L79/49 (EU-Kenya Transfer Agreement). Despite expiration of the agreement in September 2010, Kenya has declared its continued readiness to accept piracy suspects for prosecution on an *ad hoc* basis; in these cases, the provisions of the

cific case, transfers<sup>6</sup> (rather than extraditions) are the prevalent means by which to surrender the suspects to that State.

Neither NATO nor the Combined Maritime Forces have adopted their own detain-and-transfer scheme for their respective counter-piracy operations. Rather, States contributing to these multinational missions revert back to national control for arrest and detention of piracy suspects and the disposition of their cases, i.e. the decision whether to prosecute piracy suspects in the seizing State, to opt for a transfer to a third State or to release them. This is different from EUNAVFOR, which is the sole multinational counter-piracy mission pursuing a unique transfer policy. Within this framework, the decision whether and where to prosecute the captured suspects is not a matter falling solely within the national competence of the contributing States nor is the process entirely controlled by EUNAVFOR. Rather, the disposition of these cases is characterized by a rather complex interplay between various actors, namely EUNAVFOR and the seizing State<sup>7</sup>.

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terminated transfer agreements were applied *mutatis mutandis*: UNSC, “Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region” (20 January 2012) UN Doc S/2012/50, paragraph 78. The Seychelles was the second regional State to enter into a transfer agreement with the EU: Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer [2009] OJ L315/37 (EU-Seychelles Transfer Agreement). Since 2011, a transfer agreement between the EU and Mauritius is in place: Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer [2011] OJ L254/3 (EU-Mauritius Transfer Agreement). A number of regional States concluded transfer agreements with patrolling naval States; these agreements will not be discussed here since they are not publicly available (see below III.B).

<sup>6</sup> The notion of “transfer” is not of a technical nature with a precise meaning. Rather, it is an umbrella term referring to the various techniques and procedures used to bring a piracy suspect within the jurisdiction of a third State for prosecution *without* having to resort to formal extradition proceedings. As we will see later in this article, the procedures in which transfers of piracy suspects are decided vary depending on the actors involved and sometimes even from one situation to another; however, they feature some common characteristics, which will be presented in this article and based on which the present human rights analysis rests.

<sup>7</sup> Petrig, n. 5 above, at Part 2, contains two case studies based on expert interviews, which describe in detail two disposition frameworks: that of Denmark, which contributes to NATO and the Combined Maritime Forces, as an example for disposi-

The disposition practices of the various actors contributing to counter-piracy operations off the coast of Somalia and the region differ. And yet, the procedure in which transfers of piracy suspects to third States are evaluated, negotiated and decided upon has some common features, regardless of the framework in which it takes place. First of all, the decision to transfer is issued in a procedure that fundamentally differs from extradition, which is the traditional and formal mechanism to surrender an alleged criminal for prosecution. A transfer is the result of negotiation and cooperation between two States or between a State and EUNAVFOR, rather than a surrender in execution of a decision issued by an administrative and/or judicial body in a formalized procedure described in a legal act. Another common feature is that the decision to transfer is not subject to judicial review. Moreover, the potential transferee is not party to the process that may ultimately result in his transfer. Consequently, he does not benefit from any procedural safeguards before the seizing State's authorities, such as the right to submit reasons against his transfer or to be represented by counsel. At most, the piracy suspect is informed of the fact that attempts are being made to identify a prosecution venue or that his surrender is imminent. A second important characteristic of the current transfer process is that no individual non-refoulement assessment takes place. Rather, it is argued that suspects are only transferred to States with which transfer agreements have been concluded. Such agreements, in turn, are only concluded if the respective State's human rights record in the relevant fields does not give rise to any concerns. Put differently, it is argued that the global non-refoulement assessment carried out when concluding a transfer agreement makes an individual non-refoulement assessment regarding a specific piracy suspect to be transferred obsolete. What is more, transferring States generally do not request individual assurances from the receiving State requiring, for instance, that a specific transferee is actually detained in one of the prisons specifically refurbished for the purpose of hosting alleged pirates<sup>8</sup>. Rather, it is maintained that the respective transfer agreement in combination with the exercise of monitoring rights are sufficient to ensure

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tion taking place in an interstate setting and that of EUNAVFOR, which provides insights into disposition occurring in a multinational context. The article at hand focuses on the EUNAVFOR transfer framework.

<sup>8</sup> The UNODC played an active role in the refurbishment of prisons used to house persons suspected or convicted of acts of piracy: UNODC, "Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects" (March 2013) <[www.unodc.org/documents/easternafrika//piracy/UNODC\\_Brochure\\_Issue\\_11\\_wv.pdf](http://www.unodc.org/documents/easternafrika//piracy/UNODC_Brochure_Issue_11_wv.pdf)> accessed 30 April 2014.

that transferred persons are not subject to human rights violations in the receiving State during investigation, trial and the potential enforcement of their sentences<sup>9</sup>.

This article explores - from a human rights perspective - the legality of transfers of piracy suspects *as such* (II.) and, in greater detail, the legality of the transfer *procedure* currently being pursued in counter-piracy operations off the coast of Somalia and the region (III.). The main legal yardstick applied is the principle of non-refoulement in its substantive and procedural dimensions as granted by the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT)<sup>10</sup>. The conclusion will be that human rights law (similar to the law of the sea<sup>11</sup>) does not offer an absolute right not to be transferred for prosecution at all, but that the principle of non-refoulement can bar the transfer of a specific suspect to a specific destination. We will further assert that the current transfer procedure is not necessarily in line with the procedural requirements flowing from the principle of non-refoulement. In light of this, a discussion follows whether and how respect for these procedural precepts granted by virtue of the prohibition of refoulement can be reconciled with the operational constraints and specificities of counter-piracy operations, most notably that suspects are detained on board law enforcement vessels and never enter the land territory of the transferring State (IV).

## II. A CONDITIONAL RIGHT NOT TO BE TRANSFERRED FLOWING FROM NON-REFOULEMENT

Human rights law – specifically the ECHR, ICCPR and CAT – does not confer alleged criminals an absolute right not to be surrendered for prose-

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<sup>9</sup> Petrig, n. 5 above, at Part 2/III.

<sup>10</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (1950) 213 UNTS 221 (ECHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 113 (CAT).

<sup>11</sup> See Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011), 148-149 and 197.

cution to a third State<sup>12</sup>. Consequently, transfers of piracy suspects are not *per se* in breach of human rights law. Both the European Commission of Human Rights and the European Court of Human Rights have repeatedly opined that the right not to be surrendered for prosecution is not included as such among the rights and freedoms of the ECHR<sup>13</sup>. Rather, the Strasbourg organs have recognized the “beneficial purpose of extradition in preventing fugitive offenders from evading justice” and have held that it is in the interest of all nations that fugitives are brought to justice<sup>14</sup>. Similarly, the ICCPR does not contain an absolute right against surrender for prosecution. In the words of the Human Rights Committee: “There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country”<sup>15</sup>. On the contrary, extradition is considered to be “an important instrument of cooperation in the administration of justice”, which aims at preventing so-called safe havens “for those who seek to evade fair trial for criminal offences”<sup>16</sup>. Finally, an absolute right not to be surrendered for prosecution is also absent from the CAT<sup>17</sup>.

While there is no absolute right not to be surrendered to a third State for prosecution under human rights law, transfers do not fall outside the material scope of the mentioned human rights treaties either. For instance, the European Court of Human Rights decided that “in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee”<sup>18</sup>. Hence, under certain circumstances, the ECHR indirectly prohibits a specific transfer if its effects would potentially vio-

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<sup>12</sup> Geoff Gilbert, *Responding to International Crime* (2006), 139-140.

<sup>13</sup> For the European Commission on Human Rights see, e.g., *Lynas v Switzerland*, App no 7317/75 (ECom Decision, 6 October 1976), 1. of the legal considerations; for the Court see, e.g., *Soering v the United Kingdom*, App no 14038/88 (ECtHR, 7 July 1989), paragraph 85; and *Shamayev and others v Georgia and Russia*, App no 36378/02 (ECtHR, 12 April 2005), paragraph 427.

<sup>14</sup> *Soering v the United Kingdom*, n. 13 above, at paragraphs 86 and 89.

<sup>15</sup> *MA v Italy*, Comm no 117/1981 (HRC, 10 April 1984), paragraph 13.4.

<sup>16</sup> *Cox v Canada*, Comm no 539/1993 (HRC, 31 October 1994), paragraph 13.4.

<sup>17</sup> Isabelle Moulrier, “Extraordinary Renditions and the United Nations Convention against Torture”, in M. Nowak and R. Schmidt (eds.), *Extraordinary Renditions and the Protection of Human Rights* (2010), 151.

<sup>18</sup> See, e.g., *Soering v the United Kingdom*, n. 13 above, at paragraph 85; and *Gonzalez v Spain*, App no 43544/98 (ECtHR, 29 June 1999), 4. of the legal considerations.

late one or several rights guaranteed by it. Similarly, different provisions of the ICCPR may operate to the effect that a transfer is prohibited in a concrete case. Emphasizing that “extradition as such does not fall outside the protection of the Covenant”<sup>19</sup>, the Human Rights Committee found communications to be admissible *ratione materiae* where the author did “not claim that extradition *as such* violates the Covenant, but rather that the particular circumstances related to the *effects* of his extradition would raise issues under specific provisions of the Covenant”<sup>20</sup>. On the merits, the Human Rights Committee has decided in various cases that extradition is prohibited where substantial grounds exist for believing that the individual to be surrendered faces a real risk of irreparable harm in the receiving State, such as those risks prohibited by the right to life<sup>21</sup> and the right not to be subjected to torture and other forms of ill-treatment<sup>22</sup>. Thus, while the ICCPR does not outlaw surrenders for prosecution as such, a specific transfer may be prohibited if it would violate specific rights under the Covenant. Lastly, similar to the ECHR and ICCPR, a concrete measure of removal for the purpose of criminal prosecution in the receiving State may be prohibited because it violates Article 3(1) CAT stipulating that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”<sup>23</sup>.

In sum, human rights law does not provide piracy suspects with an absolute right against surrender for prosecution. But various human rights provisions implicitly or explicitly prohibit the seizing entity from transferring a specific piracy suspect to a specific destination if there is a real risk that certain of his rights and freedoms will be violated in the receiving State<sup>24</sup>. This conditional right not to be surrendered for prosecution is embodied in what is referred to as the prohibition of refoulement.

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<sup>19</sup> *Everett v Spain*, Comm no 961/2000 (HRC, 9 July 2004), paragraph 6.4.

<sup>20</sup> See, e.g., *Kindler v Canada*, Comm no 470/1991 (HRC, 30 July 1993), paragraph 6.1 (emphasis added); and *Cox v Canada*, n. 16 above, at paragraph 10.3 (emphasis added).

<sup>21</sup> Article 6 ICCPR.

<sup>22</sup> Article 7 ICCPR.

<sup>23</sup> Moullet, n. 17 above, at 151.

<sup>24</sup> While Article 3 CAT mentions the principle explicitly, various provisions of the ICCPR and ECHR have been interpreted as containing a refoulement prohibition.

### III. CURRENT TRANSFER PROCEDURE AND THE PROCEDURAL DIMENSION OF NON-REFOULEMENT

Essentially, the principle of non-refoulement prohibits the forced removal of a person to a State or territory where he risks being subjected to certain human rights violations. Which potential human rights violations may bar a specific surrender for prosecution depends on the specific treaty; among them are the risks of being subjected to ill-treatment and torture - notably by exposure to harsh prison conditions or corporal punishment - or to the death penalty. The risk may be present in the State receiving the suspect for prosecution (direct removal: transfers) or in any other State he may ultimately be transferred to, notably for the enforcement of his sentence (indirect removal: re-transfers)<sup>25</sup>. The latter type of surrender is important against the background that various regional States accepting piracy suspects for prosecution require convicted pirates to be transferred to another State to serve their sentences<sup>26</sup>. For instance, the Seychelles entered into a transfer for enforcement agreement with the Somali Transitional Federal Government, Puntland and Somaliland<sup>27</sup>.

This substantive obligation of the principle of non-refoulement is complemented by a procedural dimension<sup>28</sup>, which is a *création purement prétorienne*<sup>29</sup> and quintessential to the actual implementation of the protection afforded by the prohibition of refoulement. The gist of it is that national authorities of the State exercising effective control over the person subject to removal are under an obligation to determine whether there is a risk of the person being subjected to certain human rights violations upon surrender<sup>30</sup>. This obligation has to be discharged *proprio motu* and on an

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<sup>25</sup> Kees Wouters, *International Legal Standards for the Protection from Refoulement* (2009), 25-26.

<sup>26</sup> UNSC, "Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia", n. 3 above, at paragraph 48.

<sup>27</sup> UNSC, "Report of the Secretary-General pursuant to Security Council resolution 1950 (2010)" (25 October 2011) UN Doc S/2011/662, paragraph 67.

<sup>28</sup> Cordula Droege, "Transfers of detainees: legal framework, non-refoulement and contemporary challenges", 90 *International Review of the Red Cross* (2008), 669, 679.

<sup>29</sup> The notion is used by Frédéric Sudre, "Article 3", in E. Decaux, P. H. Imbert and L. Pettiti (eds.), *La Convention européenne des droits de l'homme: Commentaire article par article* (2nd edn., 1999), 161, regarding the interpretation of Article 3 ECHR as to include a non-refoulement component.

<sup>30</sup> Emanuela-Chiara Gillard, "There's no place like home: States' obligations in relation to transfers of persons", 90 *International Review of the Red Cross* (2008), 703, 731.

individual basis, that is with regard to the specific person to be removed and regarding a specific removal destination. This, in turn, requires the establishment of respective assessment procedures, including the review of a negative removal decision.

Up to now, there is no specific case law by the European Court of Human Rights, the Human Rights Committee or the Committee against Torture on the procedural dimension of the principle of non-refoulement in the context of transfers of piracy suspects. In light of this, it is important to note that the prohibition of refoulement found in the ECHR, ICCPR and CAT respectively applies to all forms of removal. Furthermore, the principle of non-refoulement as it has developed in relation to one form of removal (e.g. expulsions in the realm of immigration) also applies *mutatis mutandis* to other forms of removal (e.g. extradition), including rather new forms such as “renditions to justice” occurring in counter-terrorism operations or transfers of piracy suspects<sup>31</sup>.

#### **A. Necessity of individual non-refoulement assessment despite transfer agreement**

The transfer procedure as currently pursued does not grant piracy suspects an individual non-refoulement assessment. Transferring entities take the stance that by concluding transfer agreements with prosecuting States of the region, which prohibit ill-treatment, torture and the imposition of the death penalty on transferred piracy suspects, respect for the principle of non-refoulement is sufficiently ensured. They argue that such agreements are only concluded if the State or the EU respectively deems the prison conditions and the manner in which criminal cases are investigated and prosecuted by the receiving State to be in line with international human rights law generally and the guarantees protected by the prohibitions of refoulement specifically. Such a general assessment of the human rights situation in the receiving State makes a non-refoulement assessment with regard to a specific piracy suspect to be transferred obsolete. In other words, according to EUNAVFOR, an individual non-refoulement assessment ta-

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<sup>31</sup> Manfred Nowak and Elisabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (2008), 195-196; Wouters, n. 25 above, at 29 (in general) and 317-318 (on Article 3 ECHR specifically); Droegge, n. 28 above, at 671; Jacques Hartmann, “The European Convention on Human Rights and Extradition”, in K. H. Kaikobad and M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (2009), 25-26.



king into account the specificities of a given case is not deemed necessary in light of the global non-refoulement assessment, which is carried out before the conclusion of a transfer agreement with regard to the whole country and all persons potentially transferred to it in the future<sup>32</sup>.

Any discussion surrounding the argument that an individual non-refoulement assessment can be dispensed with because of the existence of a transfer agreement first necessitates a thorough understanding of the content of such agreements. As a general rule, transfer agreements concluded between patrolling naval entities and regional States contain a clause in which the latter declares its willingness to accept piracy suspects for prosecution, subject to its consent in each individual case<sup>33</sup>. Moreover, they determine the obligations of the seizing entity, most notably that it provides assistance to the regional State in the investigation and prosecution of transferred piracy suspects, and contains technical rules on the implementation of transfer decisions<sup>34</sup>. Of greater interest in the context of the non-refoulement principle is that transfer agreements generally stipulate that transferred persons must be treated humanely and not be subjected to torture or other forms of ill-treatment, notably while detained, and must be granted certain rights regarding the investigation and prosecution of their cases<sup>35</sup>. Furthermore, various transfer agreements, particularly those with retentionist States, contain a clause prohibiting the imposition of the death penalty<sup>36</sup>. Finally, the agreements regulate the issues of tracing and monitoring<sup>37</sup> and re-transfer to States other than the prosecuting State<sup>38</sup>.

Actors involved in the transfer of piracy suspects generally do not label transfer agreements as diplomatic assurances<sup>39</sup>. However, these agreements are concluded specifically to prevent transfers from taking place in violation of the principle of non-refoulement. This is evidenced by Article 12(3) CJA Operation Atalanta, which is invoked as the legal basis for the

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<sup>32</sup> Petrig, n. 5 above, at Part 2/III.

<sup>33</sup> See, e.g., Article 1 EU-Mauritius Transfer Agreement.

<sup>34</sup> See, e.g., Articles 3 and 7 EU-Mauritius Transfer Agreement.

<sup>35</sup> See, e.g., Article 4 EU-Mauritius Transfer Agreement.

<sup>36</sup> Even though Mauritius is an abolitionist State, Article 5 EU-Mauritius Transfer Agreement prohibits imposition of the death penalty against transferred persons.

<sup>37</sup> See, e.g., Article 6 EU-Mauritius Transfer Agreement.

<sup>38</sup> See, e.g., Article 4(8) EU-Mauritius Transfer Agreement.

<sup>39</sup> For an exception where transfer agreements are explicitly designated as diplomatic assurances, see *Re 'MV Courier'*, 25 K 4280/09 (Verwaltungsgericht Köln, 25. Kammer, 11 November 2011), paragraph 23.

transfer agreements entered into by the EU<sup>40</sup>, stipulating that “[n]o persons ... may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment”<sup>41</sup>.

The rationale of transfer agreements - especially their clauses stipulating the human rights obligations of the receiving State - is to exclude or minimize the risk of transferred piracy suspects being subjected to human rights violations upon surrender that amount to a violation of the principle of non-refoulement. Since transfer agreements are concluded in order to enable surrender for prosecution to regional States and thus appear to have the same function and purpose as diplomatic assurances, we must apply the principles developed for evaluating the latter as regards their reliability and their effectiveness in preventing a violation of the principle of non-refoulement. The same holds true for the question whether a transfer agreement can replace an individual non-refoulement assessment, as entities engaging in transfers of piracy suspects suggest.

The case law of the European Court of Human Rights suggests that the mere receipt of diplomatic assurances does not allow a removing State to claim compliance with the principle of non-refoulement. This holds true even if the receiving State is party to international human rights treaties. In *Saadi v Italy*, as well as in more than a dozen subsequent cases, the Court refused to allow the removing State to discharge its obligations flowing from the principle of non-refoulement by simple reference to the diplomatic assurances it obtained. The same follows from the views of the Committee against Torture. Rather, diplomatic assurances are but *one piece of evidence* to be taken into account when assessing whether there is a real risk that

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<sup>40</sup> See third preambular consideration of Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer [2011] OJ L254/1 (Council Decision 2011/640/CFSP).

<sup>41</sup> Article 12(3) Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) [2008] OJ L330/19 (Council Decision 2008/918/CFSP).

certain human rights of the person subject to removal will be violated upon surrender<sup>42</sup>.

From this follows that the assessment of whether a real risk exists that the human rights of a transferee will be violated upon his transfer and whether assurances received can remove such a risk must both be assessed with regard to a *specific* person subject to removal<sup>43</sup>. Against this background, we must reject the proposition of actors involved in transfers of piracy suspects that no individual non-refoulement assessment is necessary in light of the global non-refoulement assessment carried out prior to concluding a transfer agreement. Rather, the seizing State must determine with regard to each piracy suspect subject to transfer whether there is a risk that certain of his human rights will be violated post-transfer and whether the respective transfer agreement can remove such a risk<sup>44</sup>. Answering the latter question requires an evaluation of the assurances in transfer agreements in terms of their reliability and effectiveness in securing the human rights of the transferee upon surrender.

## **B. Assessment of reliability and effectiveness of transfer agreements**

As regards the assessment of the reliability and effectiveness of diplomatic assurances - which transfer agreements essentially are when looking at their function and purpose - various criteria have been developed in the

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<sup>42</sup> For the ECtHR, see *Saadi v Italy*, App no 37201/06 (ECtHR, 28 February 2008), paragraphs 147-148; Alice Izumo, "Diplomatic Assurances against Torture and Ill Treatment: European Court of Human Rights Jurisprudence", 42 *Columbia Human Rights Law Review* (2010-2011), 233, 258-259; Alexander Lorz and Heiko Sauer, "Wann genau steht Art. 3 EMRK einer Auslieferung oder Ausweisung entgegen?: Eine Systematisierung der Rechtsprechung des EGMR zu den Beweisanforderungen für die Konventionswidrigkeit aufenthaltsbeendender Massnahmen", 37 *Europäische Grundrechte-Zeitschrift* (2010), 389, 404; Gillard, n. 30 above, at 743. For the Committee against Torture, see Nowak and McArthur, n. 31 above, at 150.

<sup>43</sup> Lorz and Sauer, n. 42 above, at 404.

<sup>44</sup> In *Re 'MV Courier'*, n. 39 above, at paragraph 23, Germany, the respondent State, refers to the EU-Kenya Transfer Agreement and states that diplomatic assurances are, in principle, an appropriate and effective means to exclude a certain type of treatment that could potentially violate certain human rights upon transfer; however, it then states that this would not relieve the State of the obligation to assess whether the assurances provide sufficient protection *in the individual case*.

jurisprudence of human rights supervisory bodies, some of which are internal and others external to the assurances<sup>45</sup>.

One external factor of utmost importance for the assessment of the reliability and effectiveness of diplomatic assurances is the human rights situation in the receiving State<sup>46</sup>. An evaluation of whether regional States investigating and prosecuting piracy cases or enforcing sentences against convicted pirates generally respect human rights in these fields goes beyond the scope of the present article, but is an important piece of the overall assessment.

Among the internal factors for the assessment of the reliability and effectiveness of diplomatic assurances is their consistency and content, which must be sufficiently specific, explicit and clear<sup>47</sup>. Yet transfer agreements are not without ambiguities, notably in terms of their scope of application. For instance, the wording of the EU-Kenya Transfer Agreement suggests that it only applies to persons suspected of piracy but not those persons suspected of armed robbery at sea - even if such distinction does not appear to be made in practice<sup>48</sup>. Moreover, the scope of application of the EU-Mauritius Transfer Agreement can be read in different ways. Article 1(a) defines the conditions and modalities for “the transfer of persons suspected of attempting to commit, committing or having committed acts of piracy within the area of operation of EUNAVFOR, on the high seas off the territorial seas of Mauritius, Madagascar, the Comoros Islands, Seychelles and Réunion Island, and detained by EUNAVFOR”.

This provision can be understood as encompassing persons involved in pirate attacks carried out on the high seas in general and, if so, the transfer agreement would then have a broad scope of application. However, if read this way, the specification “off the territorial seas of Mauritius, Madagascar, the Comoros Island, Seychelles and Réunion Island” would be superfluous. This suggests a narrower interpretation, according to which the provision aims at delimiting the area covered by the agreement to a specific part of the high seas. This latter interpretation would be in line with the Govern-

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<sup>45</sup> Izumo, n. 42 above, at 260.

<sup>46</sup> *Ibid*, at 264-273; Lorz and Sauer, n. 42 above, at 406.

<sup>47</sup> Izumo, n. 42 above, at 264; Lorz and Sauer, n. 42 above, at 405.

<sup>48</sup> Geiss and Petrig, n. 11 above, at 200-201.

ment of Mauritius' reading of the clause, taking the view that the defined area covers the exclusive economic zones of the mentioned States<sup>49</sup>.

Another ambiguity relates to the important issue whether the consent of the seizing State (or the EU) is necessary in cases of re-transfer of suspected pirates to a third State for investigation and prosecution or the re-transfer of convicted pirates from the regional prosecuting State to a third State for the enforcement of their sentences. The answers are not clearly found in any of the publicly available transfer agreements. The EU-Kenya Transfer Agreement stipulates that transfers for the purpose of investigation or prosecution from Kenya to any other State are subject to prior written consent from EUNAVFOR<sup>50</sup>. However, the agreement does not contain a similar provision requiring the consent of EUNAVFOR in order to transfer a convicted pirate to another jurisdiction for enforcement of his sentence. The re-transfer clause in the agreement between the EU and the Seychelles is formulated in a broader fashion and stipulates that the latter "will not transfer any transferred person to any other State without prior written consent from EUNAVFOR". As a result, the consent requirement is not explicitly limited to transfers for the purpose of investigation or prosecution<sup>51</sup>. The provision can thus be read as subjecting transfers for enforcement of sentences to the consent of EUNAVFOR, which is important since the Seychelles is generally unwilling to enforce the sentences of transferred persons and concluded transfer for enforcement agreements with Somalia, Puntland and Somaliland<sup>52</sup>. Finally, the EU-Mauritius Transfer Agreement includes a clause on transfers of suspects to a third State for enforcement of their sentences<sup>53</sup>, but none regarding re-transfers for investigation or prosecution. While under the other two transfer agreements "prior written consent from EUNAVFOR" is necessary in order to transfer persons to a third State<sup>54</sup>, the threshold is lower in the EU-Mauritius Transfer Agreement which reads: "Mauritius may, *after consultation with the EU*, transfer such persons convicted and serving sentence in Mauritius to another State ... with a view to serving the remainder of the sentence in that other

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<sup>49</sup> UNSC, "Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region", n. 5 above, at paragraph 96.

<sup>50</sup> Article 3(h) Annex to EU-Kenya Transfer Agreement.

<sup>51</sup> Article 3(h) EU-Kenya Transfer Agreement.

<sup>52</sup> See above text relating to FN 27.

<sup>53</sup> Article 4(8) EU-Mauritius Transfer Agreement.

<sup>54</sup> Article 3(h) EU-Kenya Transfer Agreement; EU-Seychelles Transfer Agreement.

State”<sup>55</sup>. Should the human rights situation in the receiving State raise serious human rights concern, no transfer shall take place “before a *satisfactory solution* will have been found *through consultations* between the Parties to address the concerns expressed”<sup>56</sup>. How this actually works in practice remains to be seen, but the EU assumes that if it were to oppose a transfer for enforcement to a specific State, Mauritius would (for political rather than legal reasons) not engage in doing so<sup>57</sup>.

Another important factor for evaluating the effectiveness and reliability of diplomatic assurances is whether their provider is in a capacity to actually ensure their respect<sup>58</sup>. In the context of piracy, the internal actor responsible for negotiating and concluding transfer agreements is generally the executive branch (Ministry of Foreign Affairs). Thus, it is notably questionable whether the assurance that the death penalty will not be imposed is binding upon the judiciary ultimately sentencing convicted pirates.

An additional crucial factor to consider regarding the reliability and effectiveness of diplomatic assurances is the possibility of monitoring compliance with such assurances post-surrender<sup>59</sup>. In this context, it bears mentioning that the EU-Seychelles Transfer Agreement does not contain any provisions on tracing and monitoring and that they can only be found in a Declaration issued by the European Union<sup>60</sup>. Since the Declaration was neither explicitly refused nor openly accepted by the Seychelles, it is, however, unclear whether the Seychelles considers itself bound by it<sup>61</sup>. Furthermore, from a law of treaties perspective, it seems obvious that a treaty may not impose an obligation on a State not party to it absent consent (*pacta tertiis nec nocent nec prosunt*)<sup>62</sup>. However, against the background that a prosecuting State may re-transfer convicted pirates to third States for en-

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<sup>55</sup> Article 4(8) EU-Mauritius Transfer Agreement (emphasis added).

<sup>56</sup> Article 8(4) EU-Mauritius Transfer Agreement (emphasis added).

<sup>57</sup> Petrig, n. 5 above, at Part 2/II/B/6/b.

<sup>58</sup> Izumo, n. 42 above, at 261; Lorz and Sauer, n. 42 above, at 405.

<sup>59</sup> Izumo, n. 42 above, at 262-263; Lorz and Sauer, n. 42 above, at 405-406.

<sup>60</sup> Declaration by the European Union on the Occasion of the Signature of the Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after Such Transfer [2009] OJ L315/43 (Declaration).

<sup>61</sup> Petrig, n. 5 above, at Part 2/II/B/6/a/aa.

<sup>62</sup> Malcolm Shaw, *International Law* (6th edn., 2008), 928.

forcement of their sentences, the limitation that monitoring rights only apply vis-à-vis the prosecuting State, with whom the transfer agreement has been concluded, bears mentioning. For transfers by EUNAVFOR to Kenya, this may be even more problematic since (as we have just seen) re-transfers do not seem to require EUNAVFOR's consent. An added ambiguity regarding monitoring ensues from the fact that the transfer agreements entered into by the EU do not explicitly mention the transferring State as a beneficiary of the monitoring rights in addition to the EU and EUNAVFOR. Furthermore, not all of these transfer agreements specify who may exercise the monitoring rights once Operation Atalanta is terminated and EUNAVFOR dissolved<sup>63</sup>.

The doubts expressed so far about the reliability and effectiveness of the assurances contained in transfer agreements concluded in the context of counter-piracy operations pertains to *publicly available* agreements. However, not all transfer agreements are public. While those entered into between the EU and regional States are published in the Official Journal of the European Union, the agreements concluded bilaterally between two States are not public, with the exception of the agreement between Denmark and Kenya, which was released upon its termination. This contradicts the requirement formulated by various supervisory bodies that the issuance of diplomatic assurances must not involve any secrecy and that they must be open to judicial control<sup>64</sup>.

We rejected earlier the proposition that transfer agreements can replace an individual non-refoulement assessment. The transferring entity must rather assess in each specific case whether there is a real risk of human rights violations upon transfer and whether the assurances contained in the respective transfer agreement can remove such risk. In order to answer the latter question, assurances must be evaluated in terms of their reliability and effectiveness. Without reaching a definite conclusion in this respect, it must be stressed that the criteria speaking in favour of reliable and effective assurances are not always fulfilled regarding transfer agreements concluded between the EU and regional States. In other words, whether they can in fact remove the risk of human rights violations upon transfer must be questioned at the very least.

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<sup>63</sup> Petrig, n. 5 above, at Part 2/II/B/6/a/bb.

<sup>64</sup> Nowak and McArthur, n. 31 above, at 150.

### C. No procedural framework for carrying out a non-refoulement assessment

An individual non-refoulement assessment (part of which pertains to the question whether the assurances in transfer agreements can remove the risk of human rights violations upon surrender) can only be carried out if an appropriate procedural framework is in place. In cases where alleged offenders are surrendered by means of extradition, these proceedings provide an appropriate framework for arguing against surrender based on non-refoulement considerations<sup>65</sup> and for a non-refoulement assessment. Similarly, appropriate procedures for carrying out an initial non-refoulement assessment are generally also in place in the realm of immigration law: most States provide for a refugee status determination procedure by a specific authority during which a non-refoulement claim can be formulated and assessed<sup>66</sup>. Yet, in the context of piracy where surrender for prosecution is obtained by transfer rather than extradition and where transferees usually do not qualify as refugees<sup>67</sup>, it may not be readily obvious within which framework, by whom and how the required non-refoulement assessment must be carried out. Generally, no specific procedural framework exists.

However, seizing States are, by virtue of the procedural component of the principle of non-refoulement (and the broader obligation to respect and ensure human rights)<sup>68</sup>, under an obligation to provide for an appropriate framework for an initial non-refoulement assessment. This implies that they must establish appropriate procedures and designate an authority competent to carry out the initial non-refoulement assessment<sup>69</sup>.

Generally speaking, piracy suspects are likely unaware of the existence of the prohibition of refoulement and how to avail themselves of its protection. In light of this, it is important to stress that transferring States must arguably undertake a non-refoulement assessment *ex proprio motu* - that is,

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<sup>65</sup> An argument against removal based on non-refoulement considerations can be made by either invoking human rights provisions containing a non-refoulement component (Sibylle Kapferer, *The Interface Between Extradition and Asylum* (2003), 41-43) or by relying on a ground for refusal of extradition, which incorporates the idea of non-refoulement (see, e.g., Sections 5 and 6 UNODC, "Model Law on Extradition" (2004) <[www.unodc.org/pdf/model\\_law\\_extradition.pdf](http://www.unodc.org/pdf/model_law_extradition.pdf)> accessed 30 April 2014) during extradition proceedings.

<sup>66</sup> Gillard, n. 30 above, at 731.

<sup>67</sup> Petrig, n. 5 above, at Part 3/II.

<sup>68</sup> See, e.g., Article 2(1) ICCPR.

<sup>69</sup> Wouters, n. 25 above, at 411; Gillard, n. 30 above, at 731.



regardless of whether a person expresses his fears concerning a potential transfer or formulates a non-refoulement claim. This has been stressed by the Grand Chamber of the European Court of Human Rights in *Hirsi Jamaa and others v Italy*, a case concerning a push-back operation at sea involving more than 200 persons<sup>70</sup>. At the very least, the seizing State is under an obligation to inform piracy suspects in a timely manner about the existence of the non-refoulement principle and how to claim protection from it<sup>71</sup>.

Furthermore, the individual has a right to challenge his removal decision<sup>72</sup>. Under the ECHR and ICCPR, the right to have a transfer decision reviewed follows from a combined reading of the respective prohibitions of refoulement and the right to an effective remedy<sup>73</sup>. Even though the CAT does not contain a free-standing right to an effective remedy, the Committee against Torture interprets Article 3 CAT - the non-refoulement provision of the convention - as implicitly containing a right to an effective remedy<sup>74</sup>. All three human rights treaties provide indications as to the

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<sup>70</sup> *Hirsi Jamaa and Others v Italy*, App no 27765/09 (Grand Chamber, ECtHR, 23 February 2012), paragraphs 132-33, where the Grand Chamber rejected the proposition of the respondent State that the persons removed did not expressly request asylum and held that “it was for the national authorities, faced with a situation in which human rights were being systematically violated ... to find out about the treatment to which the applicants would be exposed after their return”. It then concluded that the absence of an express claim for protection does not exempt the removing State from its obligations flowing from the principle of non-refoulement. See also Gillard, n. 30 above, at 731; and Droege, n. 28 above, at 679.

<sup>71</sup> For a summary of the obligation to provide information about the existence of rights (notably the principle of non-refoulement) and procedural aspects in the context of asylum procedures, see, e.g., UNHCR, “Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures: Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Luxembourg Administrative Tribunal regarding the interpretation of Article 39, Asylum Procedures Directive (APD), and Articles 6 and 13 ECHR” (21 May 2010) <[www.unhcr.org/4deccc639.pdf](http://www.unhcr.org/4deccc639.pdf)> accessed 30 April 2014, paragraphs 14-15.

<sup>72</sup> Wouters, n. 25 above, at 412; Gillard, n. 30 above, at 731.

<sup>73</sup> For the ECHR, see Wouters, n. 25 above, at 331-342; for the ICCPR, see Wouters, n. 25 above, at 412. Arguably, Article 13 ICCPR, which explicitly stipulates a right to have a removal decision reviewed, applies to piracy suspects subject to transfer: Petrig, n. 5 above, Part 5/III/C/2/a.

<sup>74</sup> CAT Committee, “Conclusions and Recommendations of the Committee against Torture: United States of America” (25 July 2006) UN Doc CAT/C/USA/CO/2, paragraph 20; *Agiza v Sweden*, Comm no 233/2003 (CAT Committee, 20 May 2005), paragraph 13.7; *Akauz v France*, Comm no 63/1997 (CAT Committee, 9 November 1999), paragraph 11.5.

characteristics such review procedures must feature. Above all, the right to review must be “effective”<sup>75</sup>. Effectiveness notably implies that the remedy must be granted prior to removal and have suspensive effect<sup>76</sup>. In the context of piracy, two interests potentially clash with respect to granting a right to lodge an appeal with suspensive effect prior to surrender. On the one hand, patrolling naval States are interested in keeping detention on board their ships short in duration, not only because warships generally lack facilities specifically designed for detention or only have adequate detention facilities for a modest amount of suspects, but also because detention absorbs the already scarce resources, notably in terms of personnel. On the other hand, transferring piracy suspects before their non-refoulement claims are thoroughly assessed may expose them to a risk of irreparable harm, which cannot (or can only partially) be compensated with a remedy only available in the receiving State, the exercise of which is more illusory than real in the context of Somali-based piracy. Another component of the effectiveness of the remedy is that it must be accessible, i.e. available in both law and practice<sup>77</sup>. Special efforts may be necessary in the context of piracy in order to make the remedy accessible - such as providing piracy suspects subject to transfer not only with sufficient information about the existence of such remedy, but with translation services and access to free legal representation as well<sup>78</sup>.

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<sup>75</sup> See, e.g., *Agiza v Sweden*, n. 74 above, at paragraph 13.8.

<sup>76</sup> For the ECHR, see *Wouters*, n. 25 above, at 341-342, citing *Gebremedhin [Gaberamadhien] v France*, App no 25389/05 (ECtHR, 26 April 2007), paragraph 66. Domestic authorities must thus provide a remedy capable of preventing the execution of a removal measure, either by setting forth that the ordinary appeal proceedings have automatic suspensive effect or by enabling the person subject to removal to apply for a provisional measure, i.e. an urgent procedure that brings the execution of a removal order to a halt. For the ICCPR, see, e.g., *Alzery v Sweden*, Comm no 1416/2005 (HRC, 25 October 2006), paragraph 11.8, where the Human Rights Committee emphasized that the opportunity to appeal the removal decision must be granted *prior* to surrender. The remedy would otherwise be ineffective because it could not “avoid irreparable harm to the individual” - rather, it would be “otiose and devoid of meaning”.

<sup>77</sup> HRC, “General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant”, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*: Vol. I (2008), paragraph 15.

<sup>78</sup> *Wouters*, n. 25 above, at 413: in concluding observations, the Committee has stated that asylum-seekers must have full access to early and free legal representation so that their rights under the Covenant receive full protection.

#### IV. RECONCILING HUMAN RIGHTS PRESCRIPTS WITH OPERATIONAL CONSTRAINTS

Human rights law, and specifically the procedural component of the principle of non-refoulement, is unequivocal: States are under an obligation to carry out an initial non-refoulement assessment on an individual basis and they must grant an effective remedy against the removal decision. The existence of transfer agreements, which contain clauses that are tantamount to diplomatic assurances, does not release transferring entities from these obligations. Neither does the special maritime context alter these requirements *per se*. The ECHR, ICCPR and CAT apply extraterritorially and in a maritime context based on the exercise of *de jure* jurisdiction by the seizing State through the flag State principle and/or the exercise of *de facto* jurisdiction by virtue of effective control wielded over piracy suspects<sup>79</sup>. The same holds true for the principle of non-refoulement contained in these treaties. Since the decision to transfer, i.e. the phase of disposition where the principle of non-refoulement is of utmost importance, is generally taken vis-à-vis piracy suspects held on board the law enforcement vessel of the seizing State, the prohibition of refoulement applies extraterritorially *qua* the flag State principle. Furthermore, when a State is in a position to transfer a person to a third State for prosecution, it can be said to exercise the requisite level of effective control over such a person for its human rights obligations to apply extraterritorially based on the exercise of *de facto* jurisdiction<sup>80</sup>. In *Hirsi Jamaa and others v Italy*, the European Court of Human Rights applied Article 3 ECHR to applicants held on board a warship on the high seas<sup>81</sup>. While the Grand Chamber discussed the extraterritorial application of the rights and freedoms of the Convention on board vessels in general<sup>82</sup>, Judge Pinto de Albuquerque explicitly stated in his concu-

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<sup>79</sup> Petrig, n. 5 above, at Part 3/III/A.

<sup>80</sup> Anja Klug and Tim Howe, "The Concept of State Jurisdiction and the Applicability of the *Non-Refoulement* Principle to Extraterritorial Interception Measures", in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010) 91-96 ("4. The applicability of the non-refoulement principle in the context of extraterritorial interception measures"). For Article 3 CAT, see, e.g., *Sonko v Spain*, Comm no 368/2008 (CAT Committee, 25 November 2011), paragraphs 10.2 and 10.3, and *JHA v Spain*, Comm no 323/2007 (CAT Committee, 21 November 2008), paragraph 8.2. On the extraterritorial application of the non-refoulement provisions of the ECHR, see Wouters, n. 25 above, at 217-221, specifically with regard to persons held on board ships, see 219.

<sup>81</sup> *Hirsi Jamaa and Others v Italy*, n. 70 above, at paragraphs 110-138.

<sup>82</sup> *Ibid*, at paragraphs 70-82.

ring opinion that “[t]he prohibition of refoulement is not limited to the territory of a State, but also applies to extra-territorial State action, including action occurring on the high seas”<sup>83</sup>.

Despite the clearly formulated procedural obligations arising from the principle of non-refoulement and their applicability to persons subject to surrender, who are held on board a warship and who will never enter the land territory of the removing State, operational challenges arise in the implementation of these prescripts. The question thus arises how and whether the human rights prescripts set out in this article can be reconciled with the operational constraints and specificities of counter-piracy operations.

Among the operational challenges are that the case is in limbo during disposition, the very objective of which is to determine whether and, if so, in which criminal forum the criminal prosecution of the particular piracy suspect will take place. Only once the latter issue is decided, will it be clear whether and to which destination a transfer will take place and a non-refoulement assessment can begin. Until such a decision is taken, a considerable amount of time may pass<sup>84</sup>. Then, the assessment and review of the removal decision as such may be time consuming, notably due to the difficulty in establishing the facts - such as the identity and personal situation of the suspects and the situation in the receiving entity (especially as regards Somalia, Somaliland and Puntland). This implies that the suspects could potentially be detained on board the warship for a rather long period of time - a situation for which most deployed ships are not equipped since their intended use is for conduct of hostilities rather than law enforcement operations. Some States contributing to the counter-piracy operations, however, have adapted their ships specifically for counter-piracy operations. For instance, Norway constructed cells on board its frigate *Fridtjof Nansen*<sup>85</sup>.

Another challenge may arise from the fact that the personnel on board a warship is not necessarily trained to properly carry out non-refoulement

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<sup>83</sup> *Ibid*, concurring opinion, at 68-69 (regarding the CAT and ICCPR) and 78 (regarding the principle of non-refoulement under the ECHR).

<sup>84</sup> For instance, in the case of the piracy suspects seized by Danish forces on 2 January 2009 and physically handed over to the Netherlands on 10 February 2009, 40 days elapsed between arrest and transfer: *Re ‘MS Samanyolu’ (Judgment)*, LJN: BM8116 (Rotterdam District Court, 17 June 2010), English translation provided by UNICRI.

<sup>85</sup> Petrig, n. 5 above, at Part 4/I/A/2/a/aa.

assessments and that there may be language barriers between them and the transferee. Thus, the Grand Chamber criticized the respondent State in *Hirsi Jamaa and others v Italy* because “the personnel on board the military ship were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers”<sup>86</sup>. An alternative to providing specific training to military personnel deployed to counter-piracy operations - as States seem to be under an obligation to do regarding every person tasked with carrying out a non-refoulement assessment<sup>87</sup> - consists of deploying civilian officers (and translators), who are responsible for conducting the relevant procedures if they take place on dry land. Instead of deploying civilian officers, there is the option of using video-link. Spain and Denmark have used video-link not for non-refoulement assessments, but in order “to bring” the piracy suspects before a judge within hours after seizure and thus as a means to safeguard the right to liberty<sup>88</sup>.

In the realm of transfers of piracy suspects, the procedural dimension of the principle of non-refoulement currently has little effect. Arguably, the exceptionality of the circumstances in which surrenders for prosecution of piracy suspects are decided - notably that the alleged offenders are often detained on board law enforcement vessels and never enter the land territory of the transferring State - require some concessions regarding the granting of procedural rights. However, a lower standard seem unjustified where the failure to grant procedural safeguards flowing from the prohibition of refoulement is essentially due to a lack of planning and preparation because of missing practice, legal bases or political will.

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<sup>86</sup> *Hirsi Jamaa and Others v Italy*, n. 70 above, at paragraph 185.

<sup>87</sup> The Committee against Torture has stressed that State officials carrying out the initial assessment must be adequately trained: Wouters, n. 25 above, at 515.

<sup>88</sup> For Denmark, see *Re ‘MV Elly Mærsk’*, U.2011.3066H, TfK2011.923/1 (Højesteret - Supreme Court of Denmark); for Spain, see Petrig, n. 5 above, at Part 2/II/C/3/a.

# *The European Space Agency and Regional Strategies to Maritime Security*

KATARZYNA POGORZELSKA\*

**Summary:** I. Introduction; II. Post-Lisbon European Space Scene; III. Engagement in Maritime Security Lies Within the Scope of the ESA's Objectives; IV. The ESA's Activities; V. Conclusions.

## I. INTRODUCTION

On 25 February 2012 the Kiera Maersk from Maersk Tankers Singapore was caught by an Envisat satellite while discharging in the waters between Land's End and the Sicilly Isles. A satellite image provided by Envisat was then used as primary evidence in a maritime pollution prosecution resulting in imposing a fine on the vessel. The data fed by the satellite enabled adequate legal response to the wrongful act<sup>1</sup>. Although important in responding to such ad-hoc situations, the real value of the data collected by satellites can be appreciated in the context of drawing long-term strategies aiming to enhance maritime security and sustainability of the marine environment. The whole new spectrum of tools brought along by space-based systems helps to better address the issues of vessels security, depleting fish stocks, destruction of natural marine and coastal habitats, human dimension of maritime safety and the impact of climate change on marine ecosystems.

International cooperation in the space sector is a key to maritime security. Entry into force of the Lisbon Treaty has established a new political and legal framework for the cooperation in space by bringing in the European Union (EU) as a third player along with the EU Member States and the European Space Agency (ESA, The Agency). On the European space scene the ESA plays a pivotal role. Out of the three actors only the

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<sup>1</sup> The UK pollution case, Truro Magistrates' Court, 4 October 2013, 1300265417 (*Kiera Maersk case*)..

ESA pools expertise and financial capability to carry out space programs. The EU lacks expertise and most of the EU Member States (either due to lack of expertise or the financial capability) rely on the ESA for their space programs. The ESA links the European States in their space endeavours enabling the synergetic effects through the regional cooperation.

The article analyzes the European space scene and outlines the ESA's initiatives aiming at improvement of maritime security.

## II. POST-LISBON EUROPEAN SPACE SCENE

When the Treaty on the Functioning of the European Union (TFEU)<sup>2</sup> entered into force in 2009, European space cooperation gained a new legal and political framework. Article 3.4 of the TFEU states that “in the areas of research, technological development *and space*, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.” On the virtue of this Article, the Treaty has attributed to the EU a new direct competence in the space domain, providing the political and juridical basis for its engagement in the full range of space activities. The competence is shared with that of its Member States but its nature is unlike an ordinary shared competence, where the Member States are prevented from legislating once the EU “annexed” the field<sup>3</sup>. This competence is parallel. Further down, however, Article 189 TFEU specifically excludes any form of legislative harmonisation<sup>4</sup>, which is rather typical for the so-called “supporting” competence, which gives a priority to the national activity<sup>5</sup>. Along with the EU and its Member States, the ESA is a third important player in the space domain. Article 189(3) stipulates that “the Union shall establish any appropriate relations with the European Space Agency”, recognising thereby the significance of the ESA as a partner in space-related initiatives. The precise nature of the relations between the ESA and the EU is left to the discretion of the two organisations.

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<sup>2</sup> Consolidated Version of the Treaty on the Functioning of the European Union (2010), OJ C83/47 (“TFEU”).

<sup>3</sup> Article 2(2) TFEU provides a definition of a “shared competence”.

<sup>4</sup> TFEU 189(2).

<sup>5</sup> For the example of the supporting competence see Art. 6 TFEU.

In practice, therefore, the governance in the domain of outer space takes the shape of a triangle formed by the EU, the EU Member States and the ESA<sup>6</sup>. Each of the institutional players has its own interests and competences. Depending on the configuration, some of their competences can overlap, which may be problematic when it comes to the clear identification of roles. Nevertheless, it is possible to single out a few distinctive characteristics of each player's role. The ESA's underlying role is to conduct research and development of space programmes. This role was strengthened by the Lisbon Treaty. Through their national space agencies, the EU Member States coordinate and carry out space activities at a national level, also in cooperation with other States and the ESA<sup>7</sup>. The EU has embraced the role of a political and regulatory body. It bears the primary responsibility for drawing up a European Space Policy<sup>8</sup>. In addition, it initiates, coordinates and provides political guidance for its own programmes, but entrusts their technical development and implementation to the ESA, as it does not have the necessary expertise and resources within its own structures.

The EU, ESA and the EU Member States cooperate within the framework of jointly developed European Space Policy<sup>9</sup>. The engagement in the series of initiatives has brought the European space sector closer together, in particular linking the EU and ESA in a more complementary manner and bringing in other space stakeholders, including industrial players and end users.

### **A. The EU and ESA Relations**

In the context of this study, the cooperation between the EU and ESA deserves a closer look, primarily because two of the most significant space programmes in the context of maritime security, Galileo and Copernicus, have been developed as a joint initiative of these organisations.

The ESA's role as a space player is well established in Europe and globally. The ESA was created in 1975, merging the European Space Research

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<sup>6</sup> See e.g.: F. Mazurelle, J. Wouters and W. Thiebaut, "The evolution of European Space Governance: Policy, Legal and Institutional Implications", 6 *International Organizations Law Review* (2009) 26-29.

<sup>7</sup> Although most European nations have their own, separate space programs in most cases the ESA contributes to the vast majority of space spending.

<sup>8</sup> Article 189 TFEU.

<sup>9</sup> Communication from the Commission to the Council and the European Parliament: European Space Policy, COM(2007) 212 (final).



Organisation and the European Organisation for the Development and Construction of Space Vehicle Launchers, two existing European organisations concerned with the use of outer space<sup>10</sup>. The rationale behind creating the new organisation was that the human, technical and financial resources required for performing space activities are beyond the means of any single European country. The consolidation of the existing entities into one organisation was a natural step towards creating an integrated and comprehensive approach to the use of space. The ESA is an intergovernmental organisation based on a large international collaboration. Since 1975 the number of ESA Member States has doubled and there are now twenty. Canada holds the status of a Cooperating State. There are also a few European countries participating in the Plan for European Cooperating States (PECS), which will most likely lead to full membership of the ESA<sup>11</sup>. The representatives of the Member States and Canada form the Council, the ESA's governing organ<sup>12</sup>. The second of two ESA's organs, the Director General, is appointed by the Council<sup>13</sup>. The ESA's objective is to "provide for and to promote, for exclusively peaceful purposes, cooperation among European States in space research and technology and their space applications"<sup>14</sup>. Through the ESA, hence, the Member States cooperate in space research, technology and space applications by elaborating and implementing a long-term European space policy<sup>15</sup>, by elaborating and implementing space activities and pro-

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<sup>10</sup> Convention for the Establishment of a European Space Agency ESA Convention and Council Rules of Procedure (2010), ESA SP-1317 (the ESA Convention). The ESA Convention was signed by 10 founding Member States in 1975 and entered into force in 1980. The conventions creating ESPRO and ELDO were signed in 1962 and entered into force in 1964.

<sup>11</sup> Founding Member States: Belgium, Germany, Denmark, France, United Kingdom, Italy, the Netherlands, Sweden, Switzerland and Spain. Next years they have been joined by Ireland, Austria, Norway, Finland, Portugal, Greece, Luxembourg, the Czech Republic, Romania and Poland. Canada holds a status of a Cooperating State. Hungary, Estonia, Latvia and Slovenia are participating in the Plan for European Cooperating States (PECS) that most likely will lead to a full membership. Several other European countries have also expressed interest in joining ESA in the near future.

<sup>12</sup> The Council meets when required either at ministerial or delegate level [The ESA Convention, Article XI (1) and (2)]. For the functions of the Council see Article XI(5) of the ESA Convention.

<sup>13</sup> The Director General is the chief executive of the Agency and its legal representative [See the ESA Convention, Article XII].

<sup>14</sup> The ESA Convention, Article II.

<sup>15</sup> *Ibid.*, Article II(a).

grammes<sup>16</sup>, by integrating the national space programmes into a European space programme and by developing appropriate industrial policies<sup>17</sup>. The Agency's activities include both the mandatory science programme, to which all the Member States contribute, and optional programmes in which countries may choose to participate<sup>18</sup>. The latter include, *inter alia*, Earth observation programmes, navigation, telecommunications, the International Space Station and technology development.

The entrance into force of the TFEU in 2009 formally established the EU as a player on the European space scene. With the rapid development of the space sector and its strategic importance for Europe, the EU could no longer afford to not include space in its competences. Art. 189(1) TFEU sets up three main objectives of the EU space initiatives: the promotion of scientific and technical progress, the promotion of industrial competitiveness, and the implementation of the EU's policies<sup>19</sup>.

Although the TFEU formally established the EU as a space actor in 2009, the EU emerged on the European space scene in the late 90's, when the idea of creating a European navigation system started taking shape. Back then, the first meaningful rapprochement between the EU and the ESA took place. The increased cooperation between the institutions led in 2004 to the signing of the Framework Agreement<sup>20</sup>, which was originally intended as a provisional mechanism to regulate cooperation on the two flagship programmes, Galileo and GMES (Copernicus)<sup>21</sup>. Under this agreement, the European Commission (EC) and the ESA coordinate their actions through the Joint Secretariat, a small team consisting of the EC's administrators and the ESA executive. The Agreement established the Spa-

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<sup>16</sup> Ibid., Article II(b).

<sup>17</sup> Ibid., Article II(c) (d).

<sup>18</sup> Ibid., Article V(1).

<sup>19</sup> Article 189 (1) TFEU reads: "To promote scientific and technical progress, industrial competitiveness and the implementation of its policies, the Union shall draw up a European space policy. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space."

<sup>20</sup> Framework Agreement between the European Community and the European Space Agency (2004), OJ L 261/64, ("The Framework Agreement").

<sup>21</sup> See Jan Wouters and Rik Hansen "The Other Triangle in European Space Governance: The European Union, the European Space Agency and the United Nations: Working Paper No. 130", KU Leuven, Institute for International Law (2013), <[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp121-130/wp130-wouters-hansen.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp121-130/wp130-wouters-hansen.pdf)>.

ce Council, a meeting of the EU and ESA Councils at ministerial level. In May 2007, the Space Council adopted a Resolution on the European Space Policy, aligning the ESA's vision of space with these of the EU and its Member States<sup>22</sup>. The Resolution provided a common basis for the coherent and progressive development of a European Space Policy.

Despite the progress that has been made in the relations between the two organisations, the ESA's legal status with regard to the EU has been the subject of many political discussions. The EC Communication "Establishing appropriate relations between the EU and the European Space Agency" of November 2012<sup>23</sup> gives some insight into the subject. The document was preceded by the April 2011 Communication<sup>24</sup> where the Commission put forward initial ideas regarding the evolution of relations between the EU and the ESA. The Communication of November 2012 underlines that "the growing importance of EU space programmes and the European Union's reliance on ESA's technical expertise have not yet translated into an evolution of the governance of space matters at European level" in line with the provision of Article 189 TFEU. The Communication points to five main structural obstacles: a mismatch of funding rules; an asymmetry in membership; an asymmetry in the defence mandate; the absence of mechanisms for policy coordination; and the fact that the ESA, because it has no link with the European Parliament, lacks democratic legitimacy. The Commission would probably prefer to see the ESA integrated within the EU's structures, especially if the EU pursues the idea of common defence.

These obstacles, however, do not seem to impact the cooperation of the organisations with regard to maritime security, including the partnership for the development of Galileo and Copernicus<sup>25</sup>. On the other hand the relations between the organisations have not evolved much, if not at all, beyond the Framework Agreement of 2004, despite the entrance into force of the TFEU in 2009.

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<sup>22</sup> Resolution on the European Space Policy (2007), DS 471/07.

<sup>23</sup> Communication from the Commission to the Council and the European Parliament: Establishing Appropriate Relations Between the EU and the European Space Agency, COM(2012) 671.

<sup>24</sup> Communication from the Commission to the Council and the European Parliament: Towards a space strategy for the EU that benefits its citizens" COM(2011) 152.

<sup>25</sup> Galileo and Copernicus are two flagship space programs of the EU in cooperation with the ESA. See *infra*.

### III. ENGAGEMENT IN MARITIME SECURITY LIES WITHIN THE SCOPE OF THE ESA'S OBJECTIVES

The Agency's involvement in keeping seas safe lies within the scope of its statutory objectives. The seas are considered important for the European economy and the ESA's mission "is to shape the development of Europe's space capability and ensure that investment in space continues to deliver benefits to the citizens of Europe and the world"<sup>26</sup>. Article 7(1)(b) of the ESA Convention states that the ESA's objective is to "improve the worldwide competitiveness of European industry by maintaining and developing space technology"<sup>27</sup>. The ESA has consolidated its position in regard to the cooperation for wellbeing of Europe by adopting the "Resolution on the role of ESA on sustaining competitiveness and growth in Europe"<sup>28</sup> at the last ESA Council meeting at ministerial level in November 2012. In the resolution, the Agency explicitly committed itself to supporting competitiveness and growth in Europe.

In the light of the aforementioned Resolution, the ESA's engagement in maritime security does not come as a surprise. The "Blue Growth" report considers the sea an integral part of both the European identity and economy<sup>29</sup>. Waters and coasts harbour potential to tackle today's global challenges, which include growth, environmental protection, climate change, poverty, increasing scarcity of natural resources, urbanisation and demographic change<sup>30</sup>. Recent Communication from the Commission based on the Report recognises the strategic importance of the seas and highlights the fact that seas and oceans are drivers for the European economy with great potential for innovation and growth<sup>31</sup>. The Communication's objec-

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<sup>26</sup> See: <[http://www.esa.int/About\\_Us/Welcome\\_to\\_ESA/What\\_is\\_ESA](http://www.esa.int/About_Us/Welcome_to_ESA/What_is_ESA)>.

<sup>27</sup> The ESA Convention, Article 7(1)(b).

<sup>28</sup> Resolution on the Role of ESA on Sustaining Competitiveness and Growth in Europe (2012), ESA/C-M/CCXXXIV/Res.(1) Final.

<sup>29</sup> "Blue Growth: Scenarios and drivers for Sustainable Growth from the Oceans, Seas and Coasts. Final Report", ECORYS (for European Commission, DG MARE), Call for tenders No. MARE/2010/01 (2012), <<https://webgate.ec.europa.eu/maritimeforum/system/files/Blue%20Growth%20Final%20Report%2013082012.pdf>>. The Blue Growth project forms a part of the Europe 2020 strategy. It is concerned with sustainable growth from the oceans, seas and coasts.

<sup>30</sup> *Ibid.* at 7.

<sup>31</sup> Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Blue Growth Opportunities for Marine and Maritime Sustainable Growth,

tive is to launch a joint initiative with Member States, regions, and all relevant stakeholders in order to “unlock the potential of the blue economy”<sup>32</sup>. The Communication identifies areas in the maritime sector that can help to deliver growth and jobs in the blue economy and face the above mentioned challenges. These areas include: renewable energy, aquaculture and fisheries, tourism, maritime spatial planning, marine knowledge and integrated surveillance<sup>33</sup>. Due to its strategic importance, as well as being aligned with the ESA’s purposes<sup>34</sup> and industrial policies<sup>35</sup>, the maritime sector has had the Agency’s strong support.

The cooperation between the ESA and the European Maritime Safety Agency (EMSA) is the institutional manifestation of the support for the maritime sector in Europe. On 7 July 2010 both Agencies signed the Cooperation Agreement that replaced the previous agreement, which expired in March 2010. The new arrangement “further strengthens cooperation between the ESA and the EMSA for the development and use of space-based technologies with respect to keeping European seas safe”<sup>36</sup>.

#### IV. THE ESA’S ACTIVITIES

The ESA undertakes various activities that can be divided into at least three groups. First, the ESA develops and maintains the fundamental infrastructure which space programmes depend for its implementation. This includes access to space, development of technology and ground facilities, launch and maintenance of space systems and industrial capabilities. The second group comprises inspirational activities aiming at contributing to the existing stock of knowledge. These activities often are linked to space exploration and space science. Utilitarian-oriented and user-driven

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COM(2012) 494 final, Introduction. At the very beginning it states that “If we count all economic activities that depend on the sea, then the EU’s blue economy represents 5.4 million jobs and a gross added value of just under €500 billion per year<sup>2</sup>. In all, 75% of Europe’s external trade<sup>3</sup> and 37% of trade within the EU is seaborne. Much of this activity is concentrated around Europe’s coasts, but not all. Some landlocked countries host very successful manufacturers of marine equipment.”

<sup>32</sup> *Ibid.*, p.6.

<sup>33</sup> *Ibid.*

<sup>34</sup> The ESA Convention, Article II.

<sup>35</sup> *Ibid.*, Article 7

<sup>36</sup> See <[http://www.esa.int/Our\\_Activities/Observing\\_the\\_Earth/Agreement\\_between\\_ESA\\_and\\_EMSA\\_further\\_maritime\\_safety](http://www.esa.int/Our_Activities/Observing_the_Earth/Agreement_between_ESA_and_EMSA_further_maritime_safety)>.

initiatives are another group of the ESA's activities. They are focused on the development of space systems in order to support public services and meet industry demands<sup>37</sup>. Most of the activities rely on the cooperation with other institutions. To this end, the ESA encourages collaboration, forges industrial partnerships, supports education and works towards a better understanding and awareness of space-related issues and benefits.

The ESA's activities on the European and international stage foster innovation and growth in Europe and are considered strategic for a healthy European economy and maritime sector. Space has the ability to influence and facilitate innovation through the intrinsic requirement for complex technologies and a highly skilled workforce. Innovation from space comes about in a number of ways. The first is the creation of novel downstream services based on the data provided by space infrastructure. The second is through the transfer, adaptation and use of space technologies in non-space applications (spin-offs). The third is through more general transfers of knowledge to non-space actors<sup>38</sup>. These three ways also represent the channels through which the maritime sector benefits from space, either in a direct or an indirect way.

## **A. The ESA's Activities and Programmes which Support Maritime Security**

The ESA's activities which are relevant in the context of maritime security are concentrated around three main areas: Earth observation, navigation, and telecommunications.

### ***1. Earth Observation Programmes***

Satellite Earth observation is about gathering of information about planet Earth's physical, chemical, biological and other systems via remote sensing satellites. It accounts for the largest part of the ESA's budget<sup>39</sup>. The satellites' output constitutes data that can subsequently be translated into high-resolution or wide-frame images. Depending on the instrument

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<sup>37</sup> See Jean-Jacques Dordin, *"The Impact of Space Activities upon Society"*, ESA BR-237 (2005).

<sup>38</sup> "Space Exploration and Innovation: Summary Report", Technopolis Group for the European Commission, (2010), at 5-6.

<sup>39</sup> See ESA's budget: < [http://www.esa.int/For\\_Media/Highlights/ESA\\_budget\\_2014](http://www.esa.int/For_Media/Highlights/ESA_budget_2014)>.

used, the images can reveal features such as the planet's landscape, gravitational forces, chemical features, and land and sea heights, to name just a few<sup>40</sup>. For ten years Europe's Earth observation capability rested on the shoulders of Envisat, the largest civilian Earth observation mission to date, now inoperative<sup>41</sup>. The data acquired by Envisat contributed to better understanding of the marine environment and enhanced maritime security. The data was used to study *biological oceanography*, ocean temperature and colour, *wind waves*, snow and ice and to monitor maritime traffic<sup>42</sup>.

(a) *Copernicus*

Copernicus<sup>43</sup> is an Earth observation programme, which is currently being developed by the EC in cooperation with the ESA<sup>44</sup>. As stated in the EC Communication: "The command of information on environ-

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<sup>40</sup> See: <[http://www.esa.int/Our\\_Activities/Observing\\_the\\_Earth/How\\_does\\_Earth\\_Observation\\_work](http://www.esa.int/Our_Activities/Observing_the_Earth/How_does_Earth_Observation_work)>.

<sup>41</sup> Envisat: Mission Overview: <[http://www.esa.int/Our\\_Activities/Observing\\_the\\_Earth/Envisat/Mission\\_overview](http://www.esa.int/Our_Activities/Observing_the_Earth/Envisat/Mission_overview)>. For Envisat product summary, science & applications documents, system & mission documents see Supporting Documents at <[https://earth.esa.int/support-docs/#Science & Applications Documents](https://earth.esa.int/support-docs/#Science_and_Applications_Documents)>.

<sup>42</sup> Ibid.

<sup>43</sup> Copernicus Regulation: COM(2013) 312 final/2.

<sup>44</sup> The cooperation between the EU and the ESA in the field of Earth observation was confirmed in the Framework Agreement, n. 20 above, Article 3(1)]. In February 2004 Communication from the Commission has outlined the strategic role of GMES in the development of the EU's role as a global actor and identified elements for its

Implementation [Global Monitoring for Environment and Security (GMES): Establishing a GMES capacity by 2008 – Action Plan 2004-2008 (COM (2004) 65 Final)]. The European Parliament has expressed support for the introduction of GMES [B5-0045/2004 European Parliament resolution on the action plan for implementing the European space Policy]. The second Space Council has confirmed that GMES will be the second EU flagship of space policy after Galileo [2<sup>nd</sup> Space Council, Orientations from the 2<sup>nd</sup> Space Council, Council of the European Union (2005), 9440/05 RECH 120 COMPET 111. In 2012 the GMES name was changed to Copernicus [European Commission Copernicus: New Name for European Earth observation programme (2012), IP/12/1345, <[http://europa.eu/rapid/press-release\\_IP-12-1345\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1345_en.htm)>].

ment and security has geostrategic implications”<sup>45</sup>. Copernicus aims to establish the European capability of autonomous and sustained Earth observation. It is an ambitious joint initiative. The ESA is responsible for the development and coordination of the space component, the EMSA and the EU Member States are responsible for an in situ component of the programme. The latter component consists of a multitude of sensors on the ground, in the air and in the sea. The space component consists of a fleet of satellites that includes “contributing missions”, which have already been operated by national, European or international organisations, and the Sentinels, which are presently being developed by the ESA for the specific needs of the Copernicus programme<sup>46</sup>. Of the five families of Sentinel missions, Sentinel-1<sup>47</sup> and Sentinel-3<sup>48</sup> are the most relevant for maritime security.

Sentinel-1 provides radar images to generate maps of sea-ice conditions for safe passage in busy Arctic waters. It also provides data on wind, waves and currents. The data is used in applications to improve shipping efficiency or in wave-energy applications, which have the potential to lead to economic benefits and track down sea polluters<sup>49</sup>.

The aim of Sentinel-3 is “to provide [...] measurement capability in Europe to determine sea, ice and land surface topography, temperature, ocean and land surface radiance/reflectance, and atmospheric measurements with high accuracy, timely delivery and in a sustained operational manner”<sup>50</sup>. It will provide near-real-time data for ocean forecasting, sea-ice charting, and maritime safety services which require accurate and timely

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<sup>45</sup> EC (2005) Communication from the Commission to the Council and the European Parliament: GMES: From Concept to Reality, COM(2005) 565 Final, point 1, at 4.

<sup>46</sup> First of the Sentinels is scheduled for launch for 3 April 2014: <[http://www.esa.int/Our\\_Activities/Observing\\_the\\_Earth/Copernicus/Overview4](http://www.esa.int/Our_Activities/Observing_the_Earth/Copernicus/Overview4)>. The rest of the missions are expected to be launched by the end of 2015 [“Sentinels Facts & Figures”:<[http://esamultimedia.esa.int/docs/EarthObservation/sentinels\\_facts\\_copernicus.pdf](http://esamultimedia.esa.int/docs/EarthObservation/sentinels_facts_copernicus.pdf)>].

<sup>47</sup> See Sentinel-1: ESA’s Radar Observatory Mission for GMES Operational Services (ESA SP-1322/1, March 2012), [http://esamultimedia.esa.int/multimedia/publications/SP-1322\\_1/](http://esamultimedia.esa.int/multimedia/publications/SP-1322_1/)

<sup>48</sup> See “Sentinel-3: ESA’s Global Land and Ocean Mission for GMES Operational Services” (2012), ESA SP-1322/3.

<sup>49</sup> See: <[http://www.esa.int/Our\\_Activities/Observing\\_the\\_Earth/Copernicus/Sentinel-1/Oceans\\_and\\_ice](http://www.esa.int/Our_Activities/Observing_the_Earth/Copernicus/Sentinel-1/Oceans_and_ice)>.

<sup>50</sup> Donlon, C. J. The Sentinel-3 Mission Requirements Traceability Document (MRTD), version 1. EOP-SM/2184/CD-cd. European Space Agency (2011), avail-



measurements of the state of the ocean surface, including surface temperature, ocean ecosystems, water quality and pollution monitoring, salinity and sea levels<sup>51</sup>.

Sentinel-1 and 3 are the core of the Copernicus Marine Service<sup>52</sup>. The service provides regular and systematic information on the state of the oceans and seas. This valuable data fosters the creation of marine applications, which, in turn, has the potential to support various public and entrepreneurial initiatives. The service is currently delivered in a pre-operational mode through the EU-funded project *MyOcean2*<sup>53</sup>. *MyOcean2* is a transition project that will lead to an operational Copernicus Marine Service by the end of 2014. The four areas of the services it provides are: marine safety (e.g. marine operations, oil spill combat, ship routing, search & rescue), marine resources management (e.g. fish stock management), climate and seasonal forecasting (e.g. climate change monitoring, ice seasonal forecasting), and marine and coastal environment (e.g. ice sheet surveys, water quality, coastal activities, pollution control, coastal erosion)<sup>54</sup>.

My Ocean is a direct answer to the postulate expressed in the Integrated Maritime Policy for the European Union (“The Blue Book”), which stresses the need for cross-cutting policy tools including data and information, which should be the basis for strategic decision-making on maritime policy for better governance, expansion of added-value services and sustainable maritime development<sup>55</sup>.

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able at: <[http://download.esa.int/docs/EarthObservation/GMES\\_Sentinel-3\\_MRTD\\_Iss-1\\_Rev-0-issued-signed.pdf](http://download.esa.int/docs/EarthObservation/GMES_Sentinel-3_MRTD_Iss-1_Rev-0-issued-signed.pdf)>.

<sup>51</sup> See: <[http://www.esa.int/Our\\_Activities/Observing\\_the\\_Earth/Copernicus/Sentinel-3](http://www.esa.int/Our_Activities/Observing_the_Earth/Copernicus/Sentinel-3)>.

<sup>52</sup> See: <[http://www.esa.int/Our\\_Activities/Observing\\_the\\_Earth/Copernicus/Marine\\_services](http://www.esa.int/Our_Activities/Observing_the_Earth/Copernicus/Marine_services)>.

<sup>53</sup> See: <<http://www.myocean.eu/>>. *MyOcean2* is a 30 Month project from 1 April 2012 until September 2014, it was preceded by *MyOcean* project, which was undertaken in 2009 and came to an end on 31 March 2012.

<sup>54</sup> See: <<http://www.myocean.eu/>>.

<sup>55</sup> Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Integrated Maritime Policy for the European Union, COM(2007) 574 final), Point 3.2.3. Further down the Communication says that “the Commission will take steps towards a European Marine Observation and Data Network, building *inter alia* on the GMES initiative”.

*(b) ESA's Living Planet Programme*

The Living Planet Programme has been developed by the ESA under the auspices of the Earth Observation Programmes Directorate. The Programme is dedicated to collecting data about planet Earth in order to better understand the processes our planet undergoes so that we can ultimately be better equipped to protect the environment. While it is directly concerned with environmental protection, the Programme indirectly impacts on maritime security<sup>56</sup>.

The Programme is the ESA's response to the growing need for better environmental governance. ESA's Living Planet Programme has a science and research element, which consists of the Earth Explorer missions, and an Earth Watch element, which is designed to facilitate the provision of data for use in operational services. There are seven Earth Explorer missions of which GOCE, SMOS and, CryoSat<sup>57</sup> seem to be the most relevant for marine and maritime issues. The Explorers' data are a large contribution to the existing stock of knowledge.

GOCE (Gravity Field and Steady-State Ocean Circulation Explorer)<sup>58</sup> mapped Earth's gravity field with unprecedented accuracy. In the maritime and marine context, the data collected has contributed to a better understanding of ocean currents and heat transportation. The data has led to a global height-reference system, which serves as a reference for the study of topographic processes and sea-level changes. Finally, it has helped to more accurately estimate the thickness of polar ice-sheets and their movement<sup>59</sup>.

SMOS (Soil Moisture and Ocean Salinity)<sup>60</sup> has been designed to observe soil moisture over the Earth's landmasses and salinity over the oceans. The data collected will lead to more accurate weather, extreme-event and seasonal-climate forecasting. SMOS also provides observations

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<sup>56</sup> See: <[http://www.esa.int/Our\\_Activities/Observing\\_the\\_Earth/The\\_Living\\_Planet\\_Programme/ESA\\_s\\_Living\\_Planet\\_Programme](http://www.esa.int/Our_Activities/Observing_the_Earth/The_Living_Planet_Programme/ESA_s_Living_Planet_Programme)>.

<sup>57</sup> The remaining missions are: Swarm (magnetic field mission), EarthCARE (Earth, Clouds, Aerosols and Radiation Explorer), ADM-Aeolus (Atmospheric Dynamics Mission).

<sup>58</sup> Launched in March 2009, decayed in November 2013.

<sup>59</sup> GOCE Scientific Objectives: <[http://www.esa.int/Our\\_Activities/Observing\\_the\\_Earth/The\\_Living\\_Planet\\_Programme/Earth\\_Explorers/GOCE/Objectives](http://www.esa.int/Our_Activities/Observing_the_Earth/The_Living_Planet_Programme/Earth_Explorers/GOCE/Objectives)>.

<sup>60</sup> Launched in November 2009, nominal life 3 years. Still in operation mode.

of snow and ice, contributing to studies of the cryosphere. It helps to assess the correlation between climate change and the water cycle<sup>61</sup>.

Cryosat<sup>62</sup> is acquiring accurate measurements of the thickness of floating sea-ice in order to detect inter-annual variations. The data will help determine regional trends in Arctic perennial sea-ice thickness and mass, and determine the Antarctic and Greenland ice sheets' contribution to global sea level rises.

## 2. *European Global Navigation Satellite Systems (EGNSS)*

EGNOS and Galileo are the European navigation systems and consist of satellites and a network of ground stations<sup>63</sup>.

The aim of the Galileo programme, one of two flagship European space programmes along with Copernicus, is “to establish and operate the first global satellite navigation and positioning infrastructure specifically designed for civilian purposes, which can be used by a variety of public and private actors in Europe and worldwide. The system established under the Galileo programme functions independently of other existing or potential systems, thus contributing amongst other things to the strategic autonomy of the Union, as emphasised by the European Parliament and the Council”<sup>64</sup>.

The Galileo programme is run under the aegis of the EC; the ESA is responsible for the implementation<sup>65</sup>. The fully deployed complete Galileo constellation will consist of 30 satellites<sup>66</sup>. The first two Galileo satellites

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<sup>61</sup> SMOS Scientific Objectives: <[http://www.esa.int/Our\\_Activities/Observing\\_the\\_Earth/The\\_Living\\_Planet\\_Programme/Earth\\_Explorers/SMOS/Objectives](http://www.esa.int/Our_Activities/Observing_the_Earth/The_Living_Planet_Programme/Earth_Explorers/SMOS/Objectives)>.

<sup>62</sup> Launched in April 2010, nominal life three years with a possible two-year extension.

<sup>63</sup> Regulation (EU) No 1285/2013 of the European Parliament And of the Council of 11 December 2013 on the Implementation and Exploitation of European Satellite Navigation Systems and Repealing Council Regulation (EC) No 876/2002 and Regulation (EC) No 683/2008 of the European Parliament and of the Council, OJL 347/1, Introduction, Point (1).

<sup>64</sup> *Ibid.*, Point (2).

<sup>65</sup> The Galileo programme was agreed upon officially on 26 May 2003 by the EU and the ESA [<[www.esa.int](http://www.esa.int)>] and a year later the cooperation in the field of navigation was confirmed in the Framework Agreement, Article 3(1).

<sup>66</sup> Galileo fact sheet: <[http://download.esa.int/docs/Galileo\\_IOV\\_Launch/Galileo\\_factsheet\\_2012.pdf](http://download.esa.int/docs/Galileo_IOV_Launch/Galileo_factsheet_2012.pdf)>.

were launched in October 2011, followed by another two a year later, reaching the in-orbit validation phase. In 2015 the system is expected to be in initial operational capability phase (18 satellites), and by 2020 it should reach its full operational capability<sup>67</sup>.

The European Geostationary Navigation Overlay Service (EGNOS) has been operational since 2009<sup>68</sup>. It is the first European satellite navigation system and a precursor to Galileo. It augments and improves the signals from existing global navigation<sup>69</sup>.

Positioning data provided by EGNOS, and in the future by Galileo, is and will be crucial for transport. The maritime sector is one of the beneficiaries. The system will increase maritime security in Europe through the EGNOS-based maritime applications, providing more accurate and reliable positioning services and resulting in better navigation, improved operations, traffic management, seaport operations, inland waterways, offshore exploration and exploitation and fisheries. In addition, Galileo will further enhance the positioning system and will provide Search and Rescue services<sup>70</sup>.

### ***3. Satellite communications***

Satellite communications are the pillar of space industry, with more than half of the space business stemming from building and launching communication satellites<sup>71</sup>. More than 75% of space revenue is generated by the downstream services rooted in satellite communication. Satellite communications services and applications are the largest space sector and are a major driver of space technology and developments<sup>72</sup>. This is because

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<sup>67</sup> Ibid. See also: <[http://www.esa.int/Our\\_Activities/Navigation/The\\_future\\_-\\_Galileo/What\\_is\\_Galileo](http://www.esa.int/Our_Activities/Navigation/The_future_-_Galileo/What_is_Galileo)>.

<sup>68</sup> ESA: <[http://www.esa.int/Our\\_Activities/Navigation/The\\_present\\_-\\_EGNOS/EGNOS\\_Open\\_Service\\_available\\_a\\_new\\_era\\_for\\_European\\_navigation\\_begins\\_today](http://www.esa.int/Our_Activities/Navigation/The_present_-_EGNOS/EGNOS_Open_Service_available_a_new_era_for_European_navigation_begins_today)>.

<sup>69</sup> Regulation, n. 63 above, Point (3). See also: <[http://www.esa.int/Our\\_Activities/Navigation/The\\_present\\_-\\_EGNOS/What\\_is\\_EGNOS](http://www.esa.int/Our_Activities/Navigation/The_present_-_EGNOS/What_is_EGNOS)>.

<sup>70</sup> EGNOS for Maritime: Trusted Position, Extensive Availability: European GNSS Agency: <<http://www.gsa.europa.eu/news/egnos-maritime-trusted-position-extensive-availability>>.

<sup>71</sup> The ESA ATRES Programme: From Satcom products to services, p.2, <<http://esamultimedia.esa.int/multimedia/publications/BR-305/>>.

<sup>72</sup> See: <<http://esamultimedia.esa.int/multimedia/publications/BR-295/>>.

the communications domain is where space meets daily life. Many areas of our everyday life rely on technological solutions made possible thanks to the conquest of space. Modern television and radio, internet routing, navigation, credit card authorisation, and automated teller banking services would not be possible without satellite communication<sup>73</sup>. Communication satellites also enable air traffic control and broadband internet use. They can also reach people in remote areas where on-ground communication is not available and enable providing of education via radio and television and medical services such as remote operations performed through special robots and computers<sup>74</sup>.

(a) *European SAT-AIS*

Telecommunication satellites also play an important role in maritime security. An example is ESA's SAT-AIS initiative (Satellite Automatic Identification System)<sup>75</sup>. This initiative is implemented through three ARTES (Advanced Research in Telecommunications Systems) programmes. ARTES 21, exclusively dedicated for SAT-AIS, covers the initial steps of system design and implementation. ARTES 5 covers technology activities and ARTES 20 handles full data integration into SafeSeaNet services. The ARTES programme<sup>76</sup> is an example of the ESA's engagement in the transformation of research and development investment into successful commercial products. ARTES helps to translate the satellite communication products into services that can benefit a wide range of individual users. Through ARTES, the ESA offers both expertise and financial support to various projects that can be submitted within its framework. ARTES 21 is an initiative in partnership with the EMSA<sup>77</sup> which aims to design a sustainable Euro-

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<sup>73</sup> J.N. Pelton, *The Basics of Satellite Communications*, IEC Publications (2006), at 3.

<sup>74</sup> See: <[http://www.esa.int/Our\\_Activities/Telecommunications\\_Integrated\\_Applications/Telecommunications\\_satellites](http://www.esa.int/Our_Activities/Telecommunications_Integrated_Applications/Telecommunications_satellites)>.

<sup>75</sup> See: <<http://telecom.esa.int/telecom/www/object/index.cfm?fobjectid=30922>>.

<sup>76</sup> ESA's Advanced Research in Telecommunications Systems (ARTES) programme helps to create operational applications by funding feasibility studies and demonstration projects. See: <<http://artes-apps.esa.int/>>, ESA ARTES Programme brochure: <<http://esamultimedia.esa.int/multimedia/publications/BR-305/>>, Space for Daily Life: Services based on space technology: <<http://esamultimedia.esa.int/multimedia/publications/BR-295/offline/download.pdf>>.

<sup>77</sup> ESA and EMSA have signed a cooperation agreement on 2 July 2010. The Agreement strengthens the framework for cooperation between the two organisations in the field of maritime monitoring and surveillance.

pean space-based system providing AIS data. AIS is a short-range coastal tracking system currently used on ships. SAT-AIS will provide AIS data via satellite to allow the detecting of seafaring vessels. It will support European entities and organisations with a range of benefits. It has the potential to enhance (a) Maritime Security services: support of security operations, maritime security threats; (b) Law-enforcement services: anti-piracy, illegal fishing, enforcement of international /national regulations; (c) Search and Rescue (SAR); (d) Maritime surveillance services: monitoring of vessels in sensitive areas (international waters), anti-drug smuggling, border control; (e) Environmental services: hazardous cargos monitoring, prevention of pollution caused by ships, pollution response, (f) Maritime Safety services: vessel traffic/navigation monitoring, vessel traffic management, support of safety operations; (g) fleet management services for commercial users<sup>78</sup>.

## V. CONCLUSIONS

The ESA's engagement in maritime security is important for the European economy as the waters and coasts harbour potential to tackle today's global challenges. The ESA's activities in the areas of Earth observation, navigation and telecommunications directly and indirectly contribute to the enhancement of maritime security not only in Europe but also globally. Earth observation missions provide data, which is primarily used by the policy makers who rely on it for drawing the long-term strategies aiming to improve maritime security. Navigation and satellite telecommunications are the mainstay of the space industry. They bring profit to the industry including the maritime sector. They also provide direct benefits to the citizens. The ESA fosters cooperation among a whole range of the European institutions, which are directly or indirectly linked to maritime security. Thanks to the ESA Europe has a leading edge capability in space based maritime services, including satellite based maritime surveillance, water quality assessment, marine environment monitoring, Arctic monitoring and vessel tracking. "The seas are Europe's lifeblood"<sup>79</sup> and ESA helps to keep them healthy.

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<sup>78</sup> A. Ginati, "Advanced Research in Telecommunications Systems (ARTES)" ESA Thematic Information Day June (2012), Brussels, available at: < [https://www.belspo.be/belspo/space/doc/euPolicy/2012\\_06\\_25/ARTES-2of2.pdf](https://www.belspo.be/belspo/space/doc/euPolicy/2012_06_25/ARTES-2of2.pdf) >, at 65.

<sup>79</sup> Communication, n. 55 above.



# *Environmental Security and Shipping Safety in Antarctica*

ROSER PUIG-MARCÓ\*

**Summary:** I. Introduction; II. Antarctic governance; III. Antarctic shipping; A. Nature, risks and impacts; B. Recent shipping incidents and reporting requirements under the Antarctic Treaty System; IV. International legal framework for shipping in Antarctica; A. Special area for the prevention of sea pollution; B. Ban on the use of carriage of heavy grade oils; C. Ballast water exchange; D. Oil spill response in ice and snow conditions; E. Guidelines for ships operating in polar waters; F. Guidelines and voyage planning for passenger ships operating in remote areas; G. International code of safety for ships operating in polar waters; V. Antarctic Treaty framework for ships operating in Antarctica; A. Exchange of information, prior notification and environmental impact assessment; B. Prevention of marine pollution; C. Insurance and contingency plans for tourism and non-governmental activities; D. Search and rescue operations in Antarctic waters; E. Port State control of vessels bound to Antarctica; VI. Cooperation between the Antarctic Treaty Consultative Meeting and the International Maritime Organization; VII. Conclusion.

## I. INTRODUCTION

Traffic has increased significantly in Antarctic waters over the past decade both in terms of overall numbers and the different types of vessels operating in the area, raising a number of intrinsic environmental and marine safety challenges. Ships operating in the Antarctic environment are exposed to a number of unique risks: extreme weather conditions; the relative lack of good charts and communication systems; the remoteness of the area, etc. It is argued that the growth in ships operating in the Antarctic Treaty area has led to an upward trend in the number of incidents. It is not, however, only the risk of accident that represents a matter of concern; the operational impacts of shipping have the potential to be equally destructive to the Antarctic environment. As trends and forecasts indicate that polar shipping will grow in volume and diversify in nature over the coming years, it is important that this growth be managed without compromising either the safety of life at sea or the sustainability of the polar environments.

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This chapter seeks to explore particular legal issues associated with the challenges of environmental security and shipping safety that arise in shipping operations in Antarctica<sup>1</sup>, taking into account the nature of the Antarctic Treaty System (ATS) and the range in international legal instruments that also apply to the Antarctic Treaty area. Legal issues regarding fishing safety and marine pollution (from fishing vessels) will not be addressed in this chapter.

To begin, a brief consideration of the Antarctic governance will be undertaken, and a list of recent shipping incidents in Antarctic waters will be provided. Then the existing reporting requirements on shipping incidents under the ATS will be considered. It will follow an examination of the instruments adopted under the umbrella of the International Maritime Organization (IMO) regarding shipping, and then Antarctic shipping will be considered in the framework provided by the Antarctic Treaty and in its development in the context of the Antarctic Treaty Consultative Meetings (ATCMs). Selected issues will be identified and explored under both global and regional regimes. The final section, relating to the cooperation between the ATCM and the IMO, identifies ways by which the ATCM has operated with the purpose of ensuring that international regulatory actions relating to shipping in the Antarctic area are in consistency with the objectives of the ATS. To conclude, the uncertainty about the presence of coastal States in Antarctica will be linked to challenges on the implementation, enforcement and control of shipping regulations in the Antarctic Treaty area.

## II. ANTARCTIC GOVERNANCE

The waters surrounding Antarctica are subject to all international agreements regarding the oceans, in addition to the agreements specific to the Antarctic region<sup>2</sup>. The regional multilateral system that governs Antarctica is

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<sup>1</sup> For the purposes of this chapter, “Antarctica” will be taken to mean the “Antarctic Treaty area”, the entire marine and land area comprised south of 60° South latitude. This area excludes part of the Convention on the Conservation of Antarctic Marine Living Resources area, which extends its application beyond these limits to the area between that latitude and the Antarctic Convergence. Several global regimes have to date chosen the political (60°S) rather than the ecological boundary (the Antarctic Convergence) for determining the Antarctic area.

<sup>2</sup> See generally Donald R. Rothwell, “A Maritime Analysis of Conflicting International Law Regimes in Antarctica and the Southern Ocean”, 15 *Australian Yearbook of International Law* (1994), 155, 181.

known as the ATS. At the heart of the ATS is the 1959 Antarctic Treaty<sup>3</sup>. Its preamble recognises that “it is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord’ and that cooperation on the basis of scientific investigation in Antarctica “accords with the interest of science and the progress of all mankind”. For this purpose, the Antarctic Treaty prohibits activities of a military nature —except in support of scientific research— (Article I), nuclear explosions and the disposal of nuclear waste (Article II); promotes scientific investigation and the exchange of data (Article III); and, importantly, holds all territorial claims in abeyance (Article IV).

The other agreements making up the system are: the Protocol on Environmental Protection to the Antarctic Treaty (Protocol)<sup>4</sup>, the Convention for the Conservation of Antarctic Seals (CCAS)<sup>5</sup>, the Convention on the Regulation of Antarctic Mineral Resources Activities (CRAMRA, not in force), the Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention)<sup>6</sup>, and the many recommendations that have been adopted under these instruments.

The Antarctic Treaty has led to the creation of a regime for governing human activities in Antarctica<sup>7</sup>. At present, 29 States participate under the Antarctic Treaty as decision-makers, the Antarctic Treaty Consultative Parties (ATCPs)<sup>8</sup>. In accordance with Article IX, representatives of ATCPs gov-

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<sup>3</sup> Antarctic Treaty, 1 December 1959, 402 UNTS 71.

<sup>4</sup> Protocol on Environmental Protection to the Antarctic Treaty, 4 October 1991, 30 ILM 1461. The Protocol designates Antarctica as a “natural reserve, devoted to peace and science” and sets forth basic principles applicable to human activities in Antarctica. It has six Annexes: Annex I on *Environmental Impact Assessment*, Annex II on *Conservation of Antarctic Fauna and Flora*, Annex III on *Waste Disposal and Waste Management*, Annex IV on *Prevention of Marine Pollution*, Annex V on *Area Protection and Management* and Annex VI on *Liability Arising from Environmental Emergencies* (adopted in 2005, not yet effective).

<sup>5</sup> Convention for the Conservation of Antarctic Seals, 1 June 1972, 1080 UNTS 175.

<sup>6</sup> Convention on the Conservation of Antarctic Marine Living Resources, 20 May 1980, 1329 UNTS 48.

<sup>7</sup> See generally Christopher Joyner, *Governing the Frozen Commons. The Antarctic Regime and Environmental Protection* (1998).

<sup>8</sup> The Antarctic Treaty distinguishes between Consultative Parties and non-Consultative Parties. The former comprise the original members of the Treaty and other States that have acceded to the Antarctic Treaty and have qualified for ATCPs status by conducting substantial scientific activity in Antarctica. The latter are Contracting Parties that have acceded to the Treaty.

ernments convene annually to exchange information, consult together on matters of common interest pertaining to Antarctica, and formulate, consider and recommend to their governments, measures in furtherance of the principles and objectives of the Treaty. This forum is called the Antarctic Treaty Consultative Meeting<sup>9</sup>. Measures, Decisions and Resolutions<sup>10</sup>, which are adopted at the ATCM by consensus, give effect to the principles of the Antarctic Treaty and its Protocol, and provide regulations and guidelines for the management of the Antarctic Treaty area and the work of the ATCM.

### III. ANTARCTIC SHIPPING

#### A. Nature, risks and impacts

Traffic has increased significantly in Antarctic waters over the past decade both in terms of overall numbers and the different types of vessels operating in the area, raising a number of intrinsic environmental and marine safety issues.

Ships operating in Antarctica range from research vessels, vessels supplying Antarctic scientific research stations, fishing vessels, both large and small commercial tourism vessels, private yachts and whaling fleets. As opposed to what happens in the Arctic, there is a lack of merchant shipping routes in high southern latitudes, and trans-Antarctic shipping routes have never been seriously contemplated or assessed<sup>11</sup>.

Shipping taking place in support of Antarctic scientific activities is largely limited to the austral summer. Only authorized fishing vessels are permitted to participate in fishing activities inside the Antarctic Treaty area; however it happens occasionally that some fishing vessels operating in the

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<sup>9</sup> Only the ATCPs take part in decision-making; non-Consultative Parties are invited to attend the ATCM but do not participate in decision-making; see Rule 29 of the “Revised Rules of Procedure (2011)”, Annex I to the ATCM Decision 2 (2011), in the ATS, *Final Report of the Thirty-fourth Antarctic Treaty Consultative Meeting*, Buenos Aires, 20 June-1 July 2011.

<sup>10</sup> Decisions, which address internal organizational matters of the ATCM, and Resolutions, which are hortatory texts, are not legally binding on ATCPs. In contrast, Measures are legally binding on ATCPs once they have been approved by all of them; see ATCM Decision 1 (1995) “Measures, Decisions and Resolutions”, in the ATS, *Final Report of the Nineteenth ATCM*, Seoul, 8-19 May 1995.

<sup>11</sup> XXXI ATCM ASOC/IP 58 *Antarctic Shipping*.

area are not licensed to do so<sup>12</sup>. Antarctic tourism, much of which remains ship-borne, is gradually growing<sup>13</sup>. During the 2012/13 Antarctic tourism season a total of 54 ships registered with the International Association of Antarctic Tour Operators (IAATO) visited Antarctica, undertaking a total of 258 voyages to and from the region and carrying over 35,000 persons<sup>14</sup>. In recent years there has also been an increasing operation of yachts in the Antarctic Treaty area -some operate under charter while others are own-operated and used for personal adventure<sup>15</sup>.

Ships operating in the Antarctic environment are exposed to a number of unique risks. Extreme weather conditions; the relative lack of good charts and communication systems; and the remoteness of the area pose challenges for mariners and make search and rescue and cleaning up operations difficult and costly<sup>16</sup>. It is not, however, only the risks of accidents that represent a matter of concern. Operational impacts of shipping have the potential to be equally destructive to the Antarctic environment given

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<sup>12</sup> To operate inside the CAMLR Convention Area, members must issue a licence to their flagged vessels detailing the specific areas, species and time periods that fishing is authorised. A list of licensed vessels operating in the CAMLR Convention Area is available at <http://www.ccamlr.org/en/compliance/licensed-vessels>. The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) annually reviews available information on Illegal, Unreported and Unregulated (IUU) fishing activities and has established the Contracting Party IUU Vessel List and the Non-Contracting Party IUU Vessel List; both available at <http://www.ccamlr.org/en/compliance/illegal-unreported-and-unregulated-iuu-fishing>.

<sup>13</sup> On Antarctic tourism regulation see generally Julia Jabour, "Would you like Ice With That? Antarctic Tourism and Climate Change", in A. Jones and M. Philips (eds.), *Disappearing Destinations. Climate Change and Future Challenges for Coastal Tourism* (2011), 177, 190 and K. Bastmeijer and M. Lamers, "Reaching Consensus on Antarctic Tourism Regulation", in D.K. Müller, L. Lundmark, R.H. Lemelin (eds.), *New Issues in Polar Tourism: Communities, Environments, Politics* (2013), 67, 86.

<sup>14</sup> XXXVI ATCM IAATO/IP 99 *Report of the International Association of Antarctica Tour Operators 2012-13* and XXXVI ATCM IAATO/IP 103 *IAATO Overview of Antarctic Tourism: 2012-13 Season and Preliminary Estimates for 2013-14*. During the 2012/13 season tourism continued well below the 2007-08 season, when IAATO operators transported 45,213 visitors to the continent.

<sup>15</sup> During the 2012-13 season an overall number of 32 yachts was recorded, see XXXVI ATCM United Kingdom-IAATO/IP54 *Data Collection and Reporting on Yachting Activity in Antarctica in 2012-13*.

<sup>16</sup> IMO website: <http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx> (accessed on 18 January 2014).

the sensitivity of Antarctic ecosystems and the vulnerability of its marine wildlife and habitats<sup>17</sup>.

The increasing number and size of ships operating in Antarctica; the more frequented areas and waters bordering the continent<sup>18</sup>; the declines in the extent and thickness of sea ice due to the effects of climate change<sup>19</sup>; the possible access to unchartered areas<sup>20</sup>; and the continent generally becoming more accessible in the future<sup>21</sup>, are some of the facts to consider when thinking about the inherent risks and impacts of shipping around Antarctica<sup>22</sup>.

## B. Recent shipping incidents and reporting requirements under the Antarctic Treaty System

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<sup>17</sup> XXXI ATCM ASOC/IP 58 *Antarctic Shipping*; these threats include “illegal discharges of oils and chemicals, leaks from refuelling operations, discharges of treated and untreated sewage and grey water, illegal discharges of garbage, introduction of alien species through ballast water discharges and on ships” hulls, emissions from anti-fouling systems, air emissions, and underwater noise”. See also XXXII ATCM ASOC/IP 34 *Managing Antarctic vessels - Avoiding future disasters*.

<sup>18</sup> Karen N. Scott, “Maritime Security and Shipping in the Southern Ocean”, in N. Klein, J. Mossop and D.R. Rothwell (eds.), *Maritime Security. International Law and Policy Perspectives from Australia and New Zealand* (2010), at 117.

<sup>19</sup> See generally John Turner et al. (eds.), *Antarctic Climate Change and the Environment*, SCAR, Cambridge, 2009.

<sup>20</sup> Reliable hydrographic data and nautical charts are essential to safe maritime operations and can improve navigational safety and support scientific research. The risk of harm to ships, persons and the environment can increase in inadequately charted waters in Antarctica. The International Hydrographic Organization estimates that “less than 1% of the sea area within the 200m contour has been adequately surveyed to meet the needs of contemporary shipping entering Antarctic waters”, see XXX ATCM COMNAP/IP 50 *International Coordination of Hydrography in Antarctica: Significance to Safety of Antarctic Ship Operations*. The ATCPs have designated the absence and inadequate nature of navigational data about the Southern Ocean a priority issue in connection with maritime security and safety in the region. K.N. Scott, n. 18 above, at 129, points out that it is not apparent as to who bears responsibility for providing hydrographic services in the Antarctic under International law.

<sup>21</sup> Marcus Haward, “The Southern Ocean, Climate Change and Ocean Governance”, in C. Schofield, S. Lee and M.S. Kwon (eds.), *The Limits of Maritime Jurisdiction* (2014), at 519-520.

<sup>22</sup> See generally Julia Jabour, “Maritime security. Investing in safe shipping operations to help prevent marine pollution”, in A. Hemmings, D.R. Rothwell and K.N. Scott (eds.), *Antarctic Security in the Twenty-First Century. Legal and Policy Perspectives* (2012), 238, 256.

A non-exhaustive list of shipping incidents occurring in the past seven years in Antarctic waters follows<sup>23</sup>, involving a range of vessels including cruise ships, fishing vessels, whaling fleets and yachts. A distinction is made between incidents occurring in West Antarctica, mainly off the Antarctic Peninsula, and close to other ships and shore-based search and rescue capabilities; with incidents occurring in East Antarctica, a more remote area<sup>24</sup>, with a reduced volume of shipping and a limited shore-based infrastructure, which turns shipping into a more risky activity.

As regards West Antarctica, in January 2007 the Norwegian flagged cruise ship *MS Nordkapp* was grounded at Deception Island<sup>25</sup>; in November the Liberian flagged tourism vessel *MS Explorer* sank, with passengers and crew forced to abandon the ship<sup>26</sup>; and in December the same year the Norwegian flagged cruise ship *MS Fram* lost power along the Antarctic Peninsula and hit a glacier<sup>27</sup>. In December 2008 the Panamanian flagged cruise ship *MV Ushuaia* ran aground, as did the cruise ships *MV Ocean Nova* in February 2009 and the *MV Clelia II* in December 2009. In December 2010 a large wave crashed into the *MV Clelia II*, leaving the ship with electrical malfunctions in rough weather. Later on, in January 2011 the Barbadian flagged cruise ship *MV Polar Star*<sup>28</sup> struck an un-surveyed rock while anchoring at the Antarctic Peninsula. In February 2012 a Brazilian oil barge capsized and sank near King George Island; and in April 2012 the Brazilian flagged yacht *Mar Sem Fim*<sup>29</sup> beset in ice and sank in the same area. More

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<sup>23</sup> In general see XXXV ATCM ASOC/IP 53 *Follow-up to Vessel Incidents in Antarctic waters* and XXXVI ATCM ASOC/IP 59 *Update to Vessel Incidents in Antarctic waters*. Antarctic and Southern Ocean Coalition (ASOC) has developed a Google Earth interactive map of recent vessel incidents, with the location and basic details of the incidents. The map can be viewed using Google Earth (which is a free program downloadable from the Internet) at <http://www.asoc.org/explore/google-earth-layer/682> (accessed 7 February 2014).

<sup>24</sup> The Antarctic continent is compact and nearly circular in shape, except for an out flaring of the Antarctic Peninsula and the indentations of the Ross and Weddell Seas, and it is divided by the Trans-Antarctic Mountains into two geological portions of unequal size, East and West Antarctica.

<sup>25</sup> XXX ATCM Norway/WP 37 rev.1 *The M/S Nordkapp incident*.

<sup>26</sup> XXXII ATCM Belgium/IP 120 *Report by Liberia on Sinking of MS Explorer*.

<sup>27</sup> XXXI ATCM Norway/IP 121 *The Fram incident*.

<sup>28</sup> XXXIV ATCM Norway/IP 59 *The grounding of the Polar Star*.

<sup>29</sup> XXXVI ATCM Brasil//BP 13 *Operación Rescate del yate "Mar Sem Fim"*.

recently, in 2013, a fire began on board the Chinese flagged vessel *Kai Xin*, which sank, but no lives were lost<sup>30</sup>.

Among the incidents that have been seen in the waters off East Antarctica, in 2007 there was an explosion and fire on the Japanese flagged whaling processing ship *Nisshin Maru*<sup>31</sup>, which resulted in the loss of one life; the collision between the Japanese whaling ship *Kaiko Maru Nr 3* and Sea Shepherd vessel *MY Robert Hunter*; and the UK flagged trawler *FV Argos Georgia* was adrift in the ice pack after losing power while fishing in the Ross Sea<sup>32</sup>. In 2009, the Japanese whaling ship *MV Kyoshin Maru 2* lost a crewmember overboard, and the absence of near-by aerial and maritime search assistance provided a very low probability of success for the mission, resulting in two lost lives. In 2010, the Sea Shepherd protest vessel *Ady Gil* was scuttled following a collision with the whaling vessel *Shonan Maru No 2*; and the Korean fishing vessel *FV No 1 Insung* capsized and sank in the Ross Sea, the deadliest incident in the Antarctic in the past decade, with twenty-one lost lives<sup>33</sup>.

In February 2011, the Norwegian flagged yacht *SV Berserk* sunk near McMurdo station, with the loss of three lives<sup>34</sup>, and in December the same year the Russian fishing vessel *FV Sparta* was holed by ice in the Ross Sea. In January 2012, there was a fire on board the Korean fishing fleet *FV Jeong Woo 2* which resulted in the loss of three lives<sup>35</sup>. More recently, in December 2013, the vessel *MV Akademik Shokalskiy* was trapped in the Antarctic ice 100 nautical miles east of French Antarctic station Dumont D'Urville and the Chinese icebreaker *Xue Long* became trapped itself while trying to help<sup>36</sup>. On 16 February 2014, a Japanese Antarctic research icebreaker was

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<sup>30</sup> XXXVI ATCM Chile/IP 90 SAR-WG: *Fire and Sinking of Fishing Vessel "Kai Xin"*.

<sup>31</sup> XXX ATCM New Zealand/IP 40 *Fire on Board the Japanese Whaling Vessel Nisshin Maru*.

<sup>32</sup> XXXI ATCM United Kingdom/IP 52 *Report of Main Engine Failure of FV Argos Georgia in the Ross Sea on 24 December 2007*.

<sup>33</sup> CCAMLR XXX/BG/34 submitted by the Republic of Korea to the meeting of the CCAMLR. It was reported that the emergency response and evacuation during the incident were complicated by the fact that the crew spoke multiple languages and could not communicate with each other easily.

<sup>34</sup> XXXIV ATCM New Zealand-Norway-United States/IP18 *The Berserk Incident, Ross Sea, February 2011*; XXXIV ATCM Norway/IP 75 *The legal aspects of the Berserk Expedition*.

<sup>35</sup> XXXV ATCM New Zealand/WP 49 *ATCM Response to CCAMLR Fishing Vessel Incidents*.

<sup>36</sup> Australian Government. Australian Maritime Safety Authority. Media Release 8 January 2014 available at [http://www.amsa.gov.au/media/documents/080114\\_](http://www.amsa.gov.au/media/documents/080114_)

crippled by an underwater rock and freed itself from the reef at high tide two days later<sup>37</sup>.

The ATS contains provisions potentially placing reporting requirements and other responsibilities to the ATCPs following an incident. Among the provisions in the Protocol that could make up the basic standards by which the ATCPs are obliged to notify and report to the ATCM on all aspects of a vessel incident are: the environmental principles set out in Article 3; the requirements for cooperation of Article 6; the compliance and notification requirements of Article 13; the emergency response action in Article 15; and annual reporting requirements of Article 17. In addition, Article 7 of Annex IV establishes the obligation of all Parties to circulate immediately the notification of activities undertaken in cases of emergency. There are other relevant requirements in Articles 4 and 5 of Annex VI, however this Annex is not yet in force<sup>38</sup>.

On the basis of these provisions, the ATCM has required the Parties to report annually to the Committee for Environmental Protection (CEP) on responses to environmental emergencies involving vessels that are flagged to Parties and that operate in the Antarctic Treaty area<sup>39</sup>; and has asked Parties with relevant links to incidents (especially flag or authorising States) to provide information when incidents involve tourist vessels<sup>40</sup>.

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Rescueoperationscomplete.pdf.

<sup>37</sup> See some media news at [http://ajw.asahi.com/article/behind\\_news/social\\_affairs/AJ201402180070](http://ajw.asahi.com/article/behind_news/social_affairs/AJ201402180070); [http://www3.nhk.or.jp/nhkworld/english/news/20140218\\_35.html](http://www3.nhk.or.jp/nhkworld/english/news/20140218_35.html) (accessed 18 February 2014).

<sup>38</sup> Attached to ATCM Measure 1 (2005) “Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty: liability arising from environmental emergencies”, in the ATS, *Final Report of the Twenty-eight ATCM*, Stockholm, 6-17 June 1995. Annex VI will enter into force after its approval by the Consultative Parties that participated in the XXVIII ATCM. Annex VI deals with “environmental emergencies related to scientific research programmes, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII(5) of the Antarctic Treaty”. The operators of such activities will be required to undertake reasonable preventative measures and to establish contingency plans for responses to incidents with potential adverse impacts on the Antarctic environment. In case of environmental emergencies, operators will be required to take prompt and effective response action; if they don’t they will be liable for their costs.

<sup>39</sup> ATCM Resolution 7 (2012) “Vessel safety in the Antarctic Treaty area”, in the ATS, *Final Report of the Thirty-fifth ATCM*, Hobart, 11-20 June 2012.

<sup>40</sup> Antarctic Treaty Meeting of Experts (ATME) Recommendation 1 (2009), in the ATS, *Chair’s Report to the Antarctic Treaty Meeting of Experts on the Management of Ship-*



Appealing to some of these provisions and recommendations, the ATCPs have been submitting documents to the ATCM reporting on vessel incidents<sup>41</sup>.

#### IV. INTERNATIONAL LEGAL FRAMEWORK FOR SHIPPING IN ANTARCTICA

Among the international instruments that are applicable globally, ships operating in the harsh, remote and vulnerable Antarctic Treaty area are specifically subject to the provisions of the United Nations Convention on the Law of the Sea (UNCLOS)<sup>42</sup> and to the instruments approved under the umbrella of IMO. Over the last 20 years or so, the IMO has developed a number of requirements, guidelines and recommendations regarding navigation in polar waters relating to maritime safety (construction, search and rescue, navigation, life-saving, etc.), marine pollution prevention (designation of special areas, carriage of heavy fuel oil, etc.) as well as certification

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*borne Tourism in the Antarctic Treaty Area*, Wellington, 9-11 December 2009.

<sup>41</sup> In XXXIV ATCM New Zealand-Norway-United States/IP 18 *The Berserk Incident, Ross Sea, February 2011*, the submitting Parties referred to Article 13(4) of the Protocol, to ATME Recommendation 1 (2009), and to Resolution 6 (2010). In XXXI ATCM Norway/IP 121 *The Fram incident*, Norway considered the need for circulating a notification about the incident to the Parties based on the requirements of Article 7(2) of Annex IV to the Protocol. ASOC has analysed the follow-up to a number of recent incidents, focusing in particular on reporting on the incident, environmental response and monitoring of impact, subsequent investigation, and implementation of recommendations arising from the investigation, see XXXV ATCM ASOC/IP 53 *Follow-up to Vessel Incidents in Antarctic water*. In A. Hemmings et al., "Broadening the duty in relation to Environmental Impact Assessment across the legal instruments applying in Antarctica", 15th Annual Conference of the Australian and New Zealand Society of International Law (2007), there is a comparison in the manner in which two ATCPs handled and reported on vessel incidents occurred in the Antarctic Treaty area, and where involved States (flag, operating and responding) were ATCPs.

<sup>42</sup> United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397. UNCLOS establishes rules governing all uses of the oceans and their resources, but as a "framework convention", many of its general provisions need to be implemented through specific operative regulations in other international agreements. About the relationship between UNCLOS and IMO shipping regulations, see IMO Doc. LEG/MISC.7, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization: Study by the Secretariat of the International Maritime Organization* (19 January 2012).

and qualification of seafarers on ships operating in polar areas<sup>43</sup>. These regulations are to be found, *inter alia*, in the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)<sup>44</sup>; in the International Convention for the Safety of life at Sea (SOLAS Convention)<sup>45</sup>; in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention)<sup>46</sup>, and in the International Convention on Maritime Search and Rescue (SAR Convention)<sup>47</sup>.

Even though these instruments are not specifically designed for the Antarctic environment, the IMO has in recent years developed a number of non-mandatory recommendations, requirements and guidelines to address the specific needs of polar navigation<sup>48</sup>. Some of them are going to be explored in more detail.

By way of example, the STCW Convention, which sets the standards of competence for seafarers internationally, has included new training guid-

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<sup>43</sup> See generally Heike Deggim, “Ensuring safe, secure and reliable shipping in the Arctic Ocean” (2010), NATO Advanced Research Workshop on “Environmental security in the Arctic Ocean” Cambridge, Scott Polar Research Institute, 13-15 October; Laura Boone, “International Regulation of Polar Shipping”, in E.J. Molenaar, A.G. Oude Elferink and D.R. Rothwell (eds.), *The Law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes* (2013); R. Davis and E. Lee, “Marine Environmental Protection and the Southern Ocean: The Maritime Jurisdictional Dimension of the Antarctic Treaty System”, in A.G. Oude Elferink and D.R. Rothwell (eds.), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (2008), 201, 224, and K.N. Scott, n. 18 above, at 120.

<sup>44</sup> International Convention for the Prevention of Pollution from Ships, 2 November 1973, 1340 UNTS 184, as amended by the Protocol relating to the International Convention for the Prevention of Pollution from Ships, 17 February 1978, 1340 UNTS 61. MARPOL 73/78 is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes.

<sup>45</sup> International Convention for the Safety of life at Sea, 1 November 1974, 184 UNTS 3.

<sup>46</sup> International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 7 July 1978, 1361 UNTS 190. See generally I. Christodoulou-Varotsi and D.A. Pentsoy (eds.), “The STCW Convention and related instruments” in *Maritime Work Law Fundamentals: Responsible Shipowners, Reliable Seafarers* (2008), 422, 639.

<sup>47</sup> International Convention on Maritime Search and Rescue, 27 April 1979, 1405 UNTS 97.

<sup>48</sup> See L. Boone, n. 43 above and K. Scott, n. 18 above.

ance for personnel serving on board ships operating in polar waters<sup>49</sup> and recommendatory measures to ensure the competency of masters and officers of ships operating in polar waters<sup>50</sup>. In chapter V of the SOLAS Convention on safety of navigation, there are safety requirements that apply to ships operating in polar regions: Regulation V/5, on meteorological services and warnings, requests governments to encourage the collection of meteorological data by ships at sea and to arrange the dissemination and exchange of weather information containing data, analyses, warnings and forecasts of weather, waves and ice; Regulations V/31 and V/32, on danger messages, oblige the master of every ship which meets with dangerous ice to communicate the information required by all means at his disposal to ships in the vicinity, and also to the competent authorities. The International Code on Intact Stability<sup>51</sup> contains mandatory (Part A) and recommendatory (Part B) provisions concerning the intact stability of all types of ships covered by IMO instruments and provides stability criteria and other measures to ensure safe operation and to minimize the risk to ships, crew and the environment.

Moreover, vessels operating in the Antarctic Treaty area must also meet standards set by classification societies and for insurance purposes<sup>52</sup>. The International Association of Classification Societies (IACS) has special unified minimum requirements on the construction and equipment of so called Polar Class ships<sup>53</sup>.

### A. Special area for the prevention of sea pollution

MARPOL 73/78 defines certain sea areas as “Special Areas” in which, for technical reasons relating to their oceanographical and ecological condition and to their sea traffic, the adoption of special mandatory methods for the prevention of sea pollution is required<sup>54</sup>.

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<sup>49</sup> IMO Doc. STCW/CONF.2/34, 3 August 2010, Resolution 2 “The Manila Amendments to the Seafarers’ Training, Certification and Watchkeeping (STCW) Code”, Section B-V/g.

<sup>50</sup> IMO Doc. STCW/CONF.2/32, 1 July 2010, Resolution 11.

<sup>51</sup> International Code on Intact Stability, adopted by resolution MSC.267(85), 4 December 2008.

<sup>52</sup> See K.N. Scott, n. 18 above, at 121.

<sup>53</sup> IACS Req. 2011 “Requirements Concerning Polar Class”, available online at [http://www.iacs.org.uk/document/public/Publications/Unified\\_requirements/PDF/UR\\_I\\_pdf410.pdf](http://www.iacs.org.uk/document/public/Publications/Unified_requirements/PDF/UR_I_pdf410.pdf).

<sup>54</sup> For a list of Special Areas under MARPOL 73/78 visit IMO website at <http://www.imo.org/OurWork/Environment/PollutionPrevention/SpecialAreasUnder>

Having considered the objective that all waste was to be removed from the Antarctic area due to the ecological importance of the fragile ecosystems of the area, in 1990 the IMO, on the initiative of the ATCM<sup>55</sup>, amended Annexes I and V of MARPOL 73/78 and designated the major part of Antarctic waters<sup>56</sup> as a Special Area, thus deserving greater environmental protection<sup>57</sup>. MARPOL 73/78 Annex I, on prevention of pollution by oil, prohibits any discharge into the sea of oil or oily mixtures from any ship in the Antarctic area. Annex V, on prevention of pollution by garbage from ships, prohibits the disposal into the sea of all plastics and all other garbage; and requires reception facilities, with special rules for the Antarctic area. In addition, in 1992, the Special Area status was extended to the same area under MARPOL 73/78 Annex II<sup>58</sup>, on control of pollution by noxious liquid substances, prohibiting any discharge into the Antarctic area of noxious liquid substances or mixtures containing such substances.

## B. Ban on the use or carriage of heavy grade oils

In 2010 the MARPOL Marine Environment Protection Committee (MEPC) adopted a new regulation to protect the Antarctic area from pollution by heavy grade oils, by adding a new chapter on “Special requirements for the use or carriage of oils in the Antarctic Area” to MARPOL Annex 1<sup>59</sup>. It establishes a

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<sup>55</sup> ATCM Recommendation XV-4 “Human impact on the Antarctic environment: prevention, control, and response to marine pollution”, in the ATS, *Final Report to the Fifteenth ATCM*, Paris, 9-20 October 1989.

<sup>56</sup> The “Antarctic area” Special Area defined in Annex I, regulation 1.11.7; the “Antarctic area” Special Area defined in Annex II, regulation 13.8.1; and the “Antarctic area” Special Area defined in Annex V, regulation 5.1.g of MARPOL 73/78 define this area (Antarctic Special Area) as the “sea area south of latitude 60° S”. There have been some proposals to the ATCM to recommend the extension of IMO’s Antarctic Special Area northward to the Antarctic Convergence. See ATCM Resolution 1 (2009) “Urging Parties to Enhance Environmental Protection for the Antarctic Ecosystem Northward to the Antarctic Convergence”, in the ATS, *Final Report of the Thirty-Second ATCM*, Baltimore, 6-17 April 2009. For previous inquiries on amending the boundary of the Antarctic Special Area under MARPOL 73/78 see Davor Vidas, “The polar marine environment in regional cooperation”, in D. Vidas (ed.), *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention* (2000), at 98.

<sup>57</sup> IMO Resolution MEPC.42(30), 16 November 1990.

<sup>58</sup> IMO Resolution MEPC.57(33), 30 October 1992.

<sup>59</sup> IMO. Resolution MEPC.189(60), 26 March 2010. The amendments add a new chapter 9 to MARPOL 73/78 Annex I with a new regulation 43 which prohibits

ban on the use or carriage as cargo of heavy grade oils in the Antarctic area on board ships, except those engaged in securing the safety of ships or in search and rescue operations. The amendments, which were developed in response to the request from the ATCM to the IMO<sup>60</sup>, entered into force on 1 August 2011.

### C. Ballast water exchange

Aware of the measures adopted under the Antarctic Treaty to protect the Antarctic environment and dependent and associated ecosystems<sup>61</sup>, in 2007 the MEPC adopted the *Guidelines for ballast water exchange in the Antarctic Treaty area*<sup>62</sup> and invited governments to apply the guidelines as soon as possible, as an interim measure for all ships entering Antarctic Treaty area before the International Convention for the Control and Management of Ships' Ballast Waters and Sediments (BWMC)<sup>63</sup> comes into force.

### D. Oil spill response in ice and snow conditions

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the carriage, in bulk as cargo, or carriage and use as fuel, of: crude oils having a density, at 15°C, higher than 900 kg/m<sup>3</sup>; oils, other than crude oils, having a density, at 15°C, higher than 900 kg/m<sup>3</sup> or a kinematic viscosity, at 50°C, higher than 180 mm<sup>2</sup>/s; or bitumen, tar and their emulsions.

<sup>60</sup> In 2005 the ATCM requested the IMO to examine mechanisms for restricting the use of heavy fuel oil in Antarctic waters due to the high potential for adverse marine environmental impacts associated with a spill and emission, and the potential for fuel spills in the Antarctic Treaty area due to operational risks, see ATCM Decision 8 (2005) "Use of Heavy Fuel Oil (HFO) in Antarctica", in the ATS, *Final Report of the Twenty-eight ATCM*, Stockholm, 6-17 June 2005.

<sup>61</sup> Under Annex II of the Protocol, n. 4 above, precautions must be taken to prevent the introduction of non-native species to the Antarctic Treaty area. ATCPs, following these requirements, and aware of the potential for invasive marine organisms to be transported into, or moved between biologically distinct regions within Antarctic Treaty area by ships in their ballast water, in 2006 recommended the use by all ships in the Antarctic Treaty area of the "Practical Guidelines for Ballast Water Exchange in the Antarctic Treaty", annexed to the ATCM Resolution 3 (2006) "Ballast water exchange in the Antarctic Treaty area", in the ATS, *Final Report of the Twenty-ninth ATCM*, Edinburgh, 12-23 June 2006.

<sup>62</sup> IMO Resolution MEPC.163(56), 13 July 2007.

<sup>63</sup> IMO Doc. BWM/CONF/36, 16 February 2004.

In the context of spills in ice-covered waters, the OPRC<sup>64</sup>-HNS<sup>65</sup> Technical Group operating under the MEPC is preparing a guide on oil spill response in ice and snow conditions which is intended to address all aspects of oil spill response<sup>66</sup>. The proposed draft timelines establishes January 2015 as the date of discussing the final draft at IMO Sub-Committee on Pollution Prevention and Response.

At the regional level, the Council of Managers of National Antarctic Programs (COMNAP) and the ATCM have been active on this issue for some while already<sup>67</sup>.

### E. Guidelines for ships operating in polar waters

Navigation in polar waters was first addressed in 2002 by the *Guidelines for ships operating in Arctic ice-covered waters*<sup>68</sup>, which provided additional requirements to those of the SOLAS and MARPOL 73/78 Conventions, taking into account the specific climatic conditions in that area in order to meet appropriate standards of maritime safety and pollution prevention.

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<sup>64</sup> International Convention on Oil Pollution, Preparedness, Response and Co-operation (OPRC), 30 November 1990, 1891 UNTS 51.

<sup>65</sup> International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), 3 May 1996, 35 ILM 1406.

<sup>66</sup> For an update on the progress on the development of the guide see IMO Doc. OPRC-HNS/TG 16/3/1, 19 December 2013. Norway offered to lead the development of the guide within the IMO, supported by several Arctic countries and some other organizations. The draft table of contents contains different parts: Oil Spill Planning; Oil Fate and Effects in Ice and Snow; Methods for response in Ice and Snow; Shoreline Clean-up Technologies; Developing Response Plans; Determining Oil Spill Response Technologies; and Oil Spill Response Operations Safety.

<sup>67</sup> On the work of COMNAP regarding oil spill prevention and response see J.N. Barnes and C.W. Webb, "Implementing the Protocol: State-practice and the role of non-governmental organizations", in F. Francioni and T. Scovazzi (eds.), *International Law for Antarctica* (1996), at 494. ATME Recommendation 14 (2009), in the ATSC, *Chair's Report to the ATME on the Management of Ship-borne Tourism in the Antarctic Treaty Area*, Wellington, 9-11 December 2009 proposes that the ATCM consider developing guidelines for responding to large-scale marine oil spills in the Antarctic Treaty area. See ATME Ship-borne Tourism New Zealand/WP 6 *Oil spill response* and XXXI-II ATCM New Zealand/IP 7 *Marine oil spills in the Antarctic Treaty Area – Environmental considerations regarding oil spill behaviour and potential for impacts*.

<sup>68</sup> IMO MSC/Circ.1056 – MEPC/Circ.399.

In 2009, as requested by the ATCM<sup>69</sup>, the IMO adopted the new *Guidelines for ships operating in Polar Waters*<sup>70</sup>, which aim at mitigating the additional risk imposed on shipping due to the harsh environmental and climatic conditions existing in polar waters. They address, *inter alia*, the fact that the polar environment imposes additional demands on ship systems, including navigation; communications; life-saving appliances; main and auxiliary machinery; environmental protection and damage control; and recognize that safe operation in such conditions requires specific attention to human factors including training and operational procedures<sup>71</sup>.

The guidelines are recommendatory, and concerned governments were invited to take appropriate steps to put them into effect for ships constructed on or after 1 January 2011.

#### **F. Guidelines and voyage planning for passenger ships operating in remote areas**

In 2006, the IMO Maritime Safety Committee (MSC), in order to provide enhanced guidance for passenger ships operating in areas remote from search and rescue (SAR) facilities, which are required in accordance with the relevant provisions of the SOLAS and SAR Conventions and the International Management Code for the Safe Operation of Ships and for Pollution Prevention<sup>72</sup>, approved the *Enhanced contingency planning guidance for passenger ships operating in areas remote from SAR facilities*<sup>73</sup>. The guidelines recommend that SAR cooperation planning arrangements should be enhanced for ships operating in areas remote from SAR facilities, and that the risks of remote area operation should be assessed and planned.

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<sup>69</sup> In 2004 the ATCM, conscious of the increasing levels of shipping, including tourist vessels operating in the waters of the Antarctic Treaty area, requested the IMO to consider amending the guidelines so that they would also be applicable to ships operating in ice-covered waters in the Antarctic Treaty Area; see ATCM Decision 4 (2004) "Guidelines for ships operating in Arctic and Antarctic ice-covered waters", in the ATS, *Final Report of the Twenty-seventh ATCM*, Cape Town, 24 May-4 June 2004.

<sup>70</sup> IMO Resolution A.1024(26), 2 December 2009.

<sup>71</sup> H. Deggim, n. 43 above.

<sup>72</sup> IMO Resolution A.741(18), 4 November 1993.

<sup>73</sup> IMO MSC.1/Circ.1184, 31 May 2006. Factors which may make an area remote from SAR services are set out in its Appendix.

At the same session, the MSC approved the revised *Guide for Cold Water Survival*<sup>74</sup>, with a view to providing enhanced guidance for passengers on how to prevent or minimize hazards of cold exposure, emphasizing individual responsibility to effect survival in cold water and advising on simple self-help techniques.

In addition, in response to the increasing numbers of passenger ships operating in remote areas, in 2007 the IMO Assembly adopted the *Guidelines on voyage planning for passenger ships operating in remote areas*<sup>75</sup>. These guidelines stress that when developing a plan for voyages to remote areas, special consideration should be given to the environmental nature of the area and to the navigational information available. They also indicate that the detailed voyage and passage plan should include different factors, *inter alia*: safe areas and no-go areas; contingency plans for emergencies in the event of limited support being available for assistance in areas remote from SAR facilities; conditions when it is not safe to enter areas containing ice or icebergs because of darkness, swell, fog and pressure ice; safe distance to icebergs; and safe speed in such areas.

### **G. International code of safety for ships operating in polar waters**

The IMO is currently developing a draft International Code of Safety for Ships Operating in Polar Waters (the Polar Code), which is intended to cover the full range of shipping related-matters relevant to ships operating in the polar oceans: ship design, construction and equipment; operational and training concerns; SAR; and environmental protection. It would represent a mandatory international code to replace the existing voluntary guidelines with the objective that the Polar Code will supplement relevant instruments -including SOLAS and MARPOL 73/78 Conventions- for ships operating in polar waters in order to address the risks that are specific to operations in these regions, taking into account the extreme environmental conditions and the re-

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<sup>74</sup> IMO MSC.1/Circ. 1185, 31 May 2006. The guide has appendixes on “Checklist for cold water survival” and “Checklist for rescuers”.

<sup>75</sup> IMO Resolution A.999(25), 27 November 2007.



moteness of operation<sup>76</sup>. The aim of the IMO is to finalize the draft Code in 2014 for its adoption by the MSC and the MEPC<sup>77</sup>.

The ATCM has expressed their awareness of the increased numbers of ships operating in the waters of the Antarctic Treaty area and of the incidents that have occurred, and has transmitted to the IMO the need to start working on the development of mandatory requirements for ships operating in Antarctic waters, and up to now has endorsed the Polar Code as a mechanism for ensuring safer shipping and minimizing incidents<sup>78</sup>.

## V. ANTARCTIC TREATY FRAMEWORK FOR SHIPPING IN ANTARCTICA

A few binding provisions exist under the ATS and a number of specific requirements for vessels navigating and operating in the Antarctic Treaty area have been developed on the non-mandatory or voluntary level within the ATS<sup>79</sup>.

### A. Exchange of information, prior notification and environmental impact assessment

As general requirements, following Article VII(5) of the Antarctic Treaty, all Contracting Parties shall give notice in advance of “all expeditions

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<sup>76</sup> See generally Anne Choquet, “Towards a common Polar navigation Code—When the Antarctic and the Arctic converge”, in C. Pélaudeix, A. Faure and R. Griffiths (eds.), *What Holds the Arctic Together?* (2012), 123, 136.

<sup>77</sup> Information available at <http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx>.

<sup>78</sup> ATCM Resolution 8 (2009) “Mandatory shipping code for vessels operating in Antarctic waters”, in the ATS, *Final Report of the Thirty-second ATCM*, Baltimore, 6-17 April 2009 and ATCM Resolution 7 (2012) “Vessel Safety in the Antarctic Treaty Area”, in the ATS, *Final Report of the Thirty-fifth ATCM*, Hobart, 11-20 June 2012. See XXXVI ATCM ASOC/IP 66 *Discharge of sewage and grey water from vessels in Antarctic Treaty waters*, where on the basis of the progress made on the Code and with the experience of the past incidents in mind, ASOC provides a set of additional rules that would strengthen the effectiveness of the Code (inclusion of fishing vessels in the Code; new measures to address grey water discharges or specific requirements for the equipment used in oil spill response). Without its inclusion, it is the view of ASOC that the Polar Code will have limited value for Antarctic waters.

<sup>79</sup> See L. Boone, n. 43 above, at 200-202.

to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory”<sup>80</sup>. Furthermore, the Protocol adds important information exchange obligations on environmental matters. Accordingly, ships proceeding to the Antarctic Treaty area are subject to these prior notification requirements.

These requirements have been further developed by the ATCM. Of special relevance is Resolution 6 (2001)<sup>81</sup>, which recommends that, in the most efficient and timely way, Parties exchange information in accordance with a standardized form. The information is to be submitted through an Electronic Information Exchange System (EIES)<sup>82</sup>, and it is divided into three categories: pre-season information, annual report, and permanent information.

For instance, in the pre-season information exchange, Parties should provide information on:

- National expeditions: name of vessels; country of registry of vessels; number of voyages; planned departure dates; areas of operation; ports of departure and arrival to and from Antarctica; and purpose of voyage (e.g. science deployment, resupply, change-over, oceanography, etc.).
- Vessel-based operations of non-governmental expeditions<sup>83</sup>: name of operator; name of vessel; country of registry of vessel; number of voya-

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<sup>80</sup> And ships shall be open at all times to inspection at point of discharging or embarking cargoes or personnel in Antarctica according to Article VII(3) Antarctic Treaty, n. 3 above.

<sup>81</sup> ATCM Resolution 6 (2001) “Information Exchange to be carried out through central website according to Information Exchange Requirements”, in the ATS, *Final Report of the Twenty-fourth ATCM*, St. Petersburg, 9-20 July 2001.

<sup>82</sup> In ATCM Decision 4 (2012) “Electronic Information Exchange System”, in the ATS, *Final Report of the Thirty-fifth ATCM*, Hobart, 11-20 June 2012; it was decided that Parties use the EIES to fulfil their information exchange obligations under the Antarctic Treaty and its Protocol. The EIES functions as a central repository of information regarding activities of the Parties in Antarctica.

<sup>83</sup> As regards reporting tourism and non-governmental activities in Antarctica by ATCPs, a Decision was adopted to ensure consistent reporting of types of tourist activity information currently being exchanged, by providing an update (supplementing) of the requirements already asked for in previous resolutions; see ATCM Decision 6 (2013) “Information Exchange on Tourism and Non-Governmental Activities”, in the ATS, *Final Report of the Thirty-sixth ATCM*, Brussels, 20-29 May 2013. And ATCM Resolution 6 (2005) “Antarctic Post Visit Site Report Form”, in the ATS, *Final Report of the Twenty-eight ATCM*, Stockholm, 6-17 June 2005, recommended the use of a revised standard post-visit site report form for tourism and non-governmental activities in Antarctica. See also ATCM Resolution 3 (1997)

ges; planned departure dates; ports of departure and arrival to and from Antarctica; areas of operation including the names of proposed visited sites and the planned dates at which these visits will take place; type of activity; and the number of visitors that participate in each of the specific activities.

In the permanent information, and as regards vessels, the following information should be submitted: name of vessels; flag state; ice strength; length; beam and gross. It is also required to report on the contingency plan(s) for oil spills and other emergencies.

In addition, according to Article 3 of the Protocol, “activities in the Antarctic Treaty area shall be planned and conducted so as to limit adverse impacts on the Antarctic environment” and the undertaking of an environmental impact assessment must be ensured following Article 8 and Annex I of the Protocol.

## B. Prevention of marine pollution

The key provisions relevant for shipping in Antarctica are located in Annex IV to the Protocol, on prevention of marine pollution, which addresses, at the regional level, protection of Antarctic waters from vessel-source pollution. Annex IV prohibits discharge of oil (Article 3) and noxious liquid substances (Article 4); and the disposal of garbage (Article 5) in the Antarctic Treaty area. It also contains rules, *inter alia*, for the discharge of sewage (Article 6)<sup>84</sup>; for ship retention capacity and reception facilities (Article 9); and preventive measures and emergency preparedness and response (Article 12).

Annex IV applies to ships entitled to fly the flag of the Parties to the Protocol, and to “any other ship engaged in or supporting its Antarctic operations, while operating in the Antarctic Treaty area”<sup>85</sup>. A rule on sovereign immunity is contemplated in Article 11, which asserts, “the annex shall not apply to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service”. Still, as provided for in the same article, Parties are obligated to ensure that such ships act in a manner consistent with the Annex, by the

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“Standard form for Advance Notification and Post-Visit reporting on Tourism and Non-Governmental activities in Antarctica”, in the ATS, *Final Report of the Twenty-first ATCM*, Christchurch, 19-30 May 1997.

<sup>84</sup> The provisions on discharge of sewage do not apply if that would “unduly impair Antarctic operations”.

<sup>85</sup> Annex IV to the Protocol, n. 4 above, Article 2.

adoption of appropriate measures not impairing the operations or operational capabilities of such ships. Many vessels will be affected by this qualified exception of sovereign immunity, as many operating in Antarctic waters are state-owned or operated<sup>86</sup>.

Annex IV contains several cross-references and has an overlap with MARPOL 73/78 regulations. Regardless, MARPOL 73/78 takes priority, as Article 14 of Annex IV states that “[w]ith respect to those Parties which are also Parties to MARPOL 73/78, nothing in this Annex shall derogate from the specific rights and obligations thereunder”<sup>87</sup>. The close connection between MARPOL 73/78 and Annex IV is further confirmed in Article 13 of Annex IV, which provides that the Parties are to keep under continuous review the provisions of the Annex, including any amendments and new regulations adopted under MARPOL 73/78<sup>88</sup>.

### C. Insurance and contingency plans for tourism and non-governmental activities

Vessel operators licensed in State Parties to the Protocol must develop emergency response and contingency action plans in order to cope with environmental emergency at sea. In 2004, the ATCM adopted Measure 4 (2004)<sup>89</sup> –not yet in force-, where they recommend that Parties shall require those under their jurisdiction organising or conducting tourist or other non-governmental activities in the Antarctic Treaty area, to demonstrate compliance with some requirements: that appropriate contingency plans and sufficient arrangements for health and safety, SAR, and medical care and evacuation have been drawn up and are in place prior to the start of the activity; and that adequate insurance or other arrangements are in place to cover any costs associated with SAR and medical care and evacuation.

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<sup>86</sup> In Christopher C. Joyner, *Antarctica and the Law of the Sea* (1992), at 174, the author argues that the condition of compliance is principally left to the discretion of vessel operators, thus the possibility of violations is widened and the prospects for enforcement compliance narrowed.

<sup>87</sup> Donald R. Rothwell, “Global environmental protection instruments and the polar marine environment”, in D. Vidas (ed.), *Protecting the polar marine environment. Law and policy for pollution prevention* (2000), at 75.

<sup>88</sup> See D. Vidas, n. 56 above, at 96.

<sup>89</sup> ATCM Measure 4 (2004) “Insurance and Contingency Planning for Tourism and non-governmental activities in the Antarctic Treaty area”, in the ATS, *Final Report of the Twenty-seventh ATCM*, Cape Town, 24 May-4 June 2004.

In order to promote the objectives of Measure 4 (2004), and with the desire to ensure that tourist or other non-governmental activities undertaken in Antarctica are carried out in a safe and self-sufficient manner, the ATCM adopted at the same meeting the *Tourism Guidelines*<sup>90</sup>. These guidelines are designed to be followed by those organising or conducting activities without the supervision or support in the field of another operator or a national programme.

With regard to yachts, in 2012 the ATCM adopted a *Checklist of yacht specific items for preparing safe Antarctic voyages*<sup>91</sup> with the aim to bring forward safety issues for yacht operators and private sailors, to promote good practices, and to further protect the environment. As stated in the checklist, it does not replace, but rather supplement the requirements of governmental authority, flag States or international regulations. All yachts are to comply with all relevant IMO regulations under SOLAS Convention and MARPOL 73/78, with all relevant provisions under the Protocol and ATCM resolutions, and also with appropriate national requirements.

#### **D. Search and rescue operations in Antarctic waters**

Following SAR Convention, the IMO divided the Antarctic area into five maritime SAR Regions -Argentina, Australia, Chile, New Zealand and South Africa- managed by seven Rescue Coordination Centres<sup>92</sup>.

The promotion of safety with regard to activities taking place within the Antarctic Treaty area has been a priority of all Antarctic Treaty Parties, and

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<sup>90</sup> Annexed to ATCM Resolution 4 (2004) "Guidelines on contingency planning, insurance and other matters for tourist and other non-governmental activities in the Antarctic Treaty area", in the in the ATS, *Final Report of the Twenty-seventh ATCM*, Cape Town, 24 May-4 June 2004.

<sup>91</sup> The ATCPs recommend the utilization of the checklist when assessing proposed yacht visits to Antarctica. Annexed to ATCM Resolution 10 (2012) "Yachting guidelines", in the ATS, *Final Report of the Thirty-fifth ATCM*, Hobart, 11-20 June 2012. It is advertised that "[y]achts heading towards Antarctica must be completely self-sufficient for very extended periods of time, capable of withstanding heavy storms and prepared to meet serious emergencies without the expectation of outside assistance".

<sup>92</sup> See a COMNAP map of Antarctica and surrounds, showing Maritime and Aeronautical Rescue Coordination Centres and Maritime Search and Rescue Region Boundaries, at <https://www.comnap.aq/Publications/Comnap%20Publications/Forms/Publications.aspx?Category=Maps%20and%20Charts>. Argentina, Australia, Chile, New Zealand and South Africa are responsible for maritime SAR within the region and its responsibility for SAR regions is not based upon, or connected with, the exercise of sovereignty over Antarctica; see K.N. Scott, n. 18 above, at 130.

so the issue of safety has been under discussion since the first ATCM back in 1961. It is also of the ATCPs concern that anticipated increases in human activity in the Antarctic, including national program operations, shipping, fishing and tourism, will add to the challenges and risks associated with Antarctic SAR operations. As a consequence, discussions have taken place under the auspices of the ATCM and within the IMO as to how contingency planning and SAR facilities and procedures can be improved in the region<sup>93</sup>.

In 2013, aiming to increase the success and efficiency of SAR operations in the Antarctic, the ATCM adopted Resolution 4 (2013)<sup>94</sup>, in which they recommend the continuing cooperation between Parties on SAR in the Antarctic Treaty area; they commit to sharing best practices related to SAR in Antarctica; to cooperate as appropriate with international organizations to promote the implementation of SAR protocols and practices that would be beneficial in the Antarctic context; and to support COMNAP to continue to foster collaborative discussions and vital sharing of information regarding SAR matters<sup>95</sup>.

### **E. Port State control of vessels bound to Antarctica**

In 2010, conscious that many passenger vessels operating in the Antarctic Treaty area are not flagged to States which are Parties to the Antarctic Treaty or to its Protocol, and concerned about incidents involving passenger vessels, the ATCM adopted Resolution 7 (2010)<sup>96</sup> requiring the Parties to proactively apply, through their national maritime authorities, the existing regime of port State control to passenger vessels bound for the Antarctic Treaty area. Port State control “is particularly challenging in the

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<sup>93</sup> See generally K.N. Scott, n. 18 above, at 131-132.

<sup>94</sup> ATCM Resolution 4 (2013) “Improved Collaboration on Search and Rescue (SAR) in Antarctica”, in the ATS, *Final Report of the Thirty-Sixth ATCM*, Brussels, 20-29 May 2013. See previous resolutions regarding SAR in Antarctica: Resolutions 6 (2008), 6 (2010), 7 (2012) and 8 (2012).

<sup>95</sup> In accordance with Resolution 8 (2012) a Special Working Group on SAR was convened at the XXXVI ATCM to discuss means of improving SAR coordination in Antarctica. In 2006 COMNAP began discussions with SAR authorities that confirmed opportunities for greater collaboration. This led to two COMNAP SAR Workshops, in 2008 in Viña del Mar, Chile and in 2009 in Buenos Aires, Argentina. See ATCM COMNAP/ WP 17 SAR-WG - *Update on actions resulting from the two COMNAP SAR workshops, “Towards Improved Search and Rescue Coordination and Response in the Antarctic”*.

<sup>96</sup> ATCM Resolution 7 (2010) “Enhancement of port State control for passenger vessels bound for the Antarctic Treaty area”, in the ATS, *Final Report of the Thirty-third ATCM*, Punta del Este, 3-14 May 2010.

Antarctic region, and the burden of enforcement tends to fall on the very few States from which Antarctic-bound vessels depart”<sup>97</sup>.

## VI. COOPERATION BETWEEN THE ANTARCTIC TREATY CONSULTATIVE MEETING AND THE INTERNATIONAL MARITIME ORGANIZATION

The cooperation of the ATCM with other international organizations has been especially intense with the IMO<sup>98</sup>. The ATCM has acknowledged the role of the IMO in aspects of maritime safety and security and the prevention of pollution from ships in the Antarctic Treaty area. Furthermore, wishing to ensure that international regulatory actions relating to shipping in the Antarctic area are consistent with the objectives of the ATS, the ATCM has requested the IMO to take steps relating to diverse Antarctic maritime matters<sup>99</sup>.

Some examples of the cooperation between the ATCM and the IMO are the ATCM’s regular invitations to the IMO to attend as an expert<sup>100</sup>; the transmission of decisions of the ATCM through the Chair of ATCM to the Secretary General of the IMO<sup>101</sup>; through providing input to IMO via their national maritime authorities<sup>102</sup>; or by requesting that the Executive Secretary of the Antarctic Treaty Secretariat provides a copy of the ATCM Resolutions and Fi-

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<sup>97</sup> See K.N. Scott, n. 18 above, at 129.

<sup>98</sup> See generally Mel Weber, “Cooperation of the Antarctic Treaty System with the International Maritime Organization and the International Association of Antarctica Tour Operators”, 2(2) *The Polar Journal* (2012), 372, 390.

<sup>99</sup> See paragraph 55 of the ATS, *Final Report of the Eighteenth ATCM*, Kyoto, 11-22 April 1994. D. Vidas, n. 56 above, at 95, argues that “[t]he origin of this adaptation of global standards to Antarctic circumstances lies in Antarctic regional cooperation which requires coordinated action of its members, not in individual or joint initiatives of several parties only”.

<sup>100</sup> ATCM Resolution 5 (2010) “Co-ordination among Antarctic Treaty Parties on Antarctic proposals under consideration in the IMO”, in the ATS, *Final Report of the Thirty-third ATCM*, Punta del Este, 3-14 May 2010, emphasising the importance of representatives to the ATCM working closely with their national IMO representatives on matters relating to the Antarctic Treaty area.

<sup>101</sup> ATCM Decision 4 (2004) “Guidelines for ships operating in Arctic and Antarctic ice-covered waters”, in the ATS, *Final Report of the Twenty-seventh ATCM*, Cape Town, 24 May-4 June 2004.

<sup>102</sup> ATCM Resolution 3 (1998) “Draft Polar Shipping Code”, in the ATS, *Final Report of the Twenty-second ATCM*, Tromsø, 25 May-5 June 1998.

nal Reports to the Secretary General of the IMO for information<sup>103</sup>. Thus for quite some time already, coordination of positions has been a notable trend in the external behaviour of the Consultative Parties when Antarctic matters have been discussed in fora other than within the ATS<sup>104</sup>.

## VII. CONCLUSION

Even though there seems to be a considerable effort underway to improve the standards of shipping in Antarctica, and that challenges associated with shipping safety and environmental security are in the process of being addressed both at the international level and at the regional level, it has to be said that not all proposed measures apply to all vessels operating in the region; that some shipping instruments still need to be ratified; and that many of the adopted recommendations, guides and guidelines are of a non-mandatory nature<sup>105</sup>.

The ambiguity regarding the existence of coastal states in Antarctica and the absence of recognized national maritime zones<sup>106</sup>, results in a situation whereby Antarctic waters with flag State jurisdiction predominate over coastal State jurisdiction; and where flag State measures and flag State enforcement predominantly regulate Antarctic shipping. These unique characteristics constrain the implementation and enforcement of both international and regional shipping rules in the Antarctic Treaty area. To overcome these constraints, potential options under consideration are seeking to enhance port State controls through the ports which provide access to Antarctica; and to foster international cooperation and national legislation harmonization to assure that international regulatory actions relating to shipping in the Antarctic area are consistent with the objectives of the ATS.

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<sup>103</sup> ATCM Resolution 4 (2013) “Improved Collaboration on Search and Rescue (SAR) in Antarctica”, in the ATS, *Final Report of the Thirty-sixth ATCM*, Brussels, 20-29 May 2013.

<sup>104</sup> See D. Vidas, n. 56 above, at 95.

<sup>105</sup> L. Boone, n. 43 above, at 204, considers that international standard setting with regard to shipping safety, maritime security and the protection of the marine environment is, and should be, the primary responsibility for the IMO. K.N. Scott, n. 18 above, at 136, emphasises that measures developed by the ATCPs, even they would not only bond over 50% of vessels operating within the region, they would send a clear message to the international community about the importance of maritime security and shipping safety in Antarctica.

<sup>106</sup> See specially Patrizia Vigni, “Antarctic Maritime Claims: “Frozen Sovereignty” and the Law of the Sea”, in A.G. Oude Elferink and D.R. Rothwell (eds.), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (2008), 85, 104.



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