The Geopolitics of the Marine Archaeological Heritage within the Context of the United Nations Convention for the Law of the Sea: The Hellenic Civilization and the Aegean Sea

Petros Siousiouras*

RÉSUMÉ

Le patrimoine est intiment lié à l'importance historique de certains endroits de telle sorte que plusieurs civilisations et leur histoire se trouvent liées au statut et à l'importance de certains Etats -nations a l'intérieur de la communauté internationale. Il existe des cas où l'Etat tente de créer l'histoire afin d'améliorer son statut et de prolonger son existence. Ainsi, l'étude d'un patrimoine culturel ou historique possède une dimension nettement géographique. La communauté internationale a essayé de faire face aux problèmes géographiques du patrimoine lors de la Troisième conférence sur le droit maritime (1982). Cette conférence a constitué le premier pas fait vers l'institutionnalisation des règlements juridiques relatifs à la protection du patrimoine archéologique maritime. Dans l'article qui suit, l'auteur définit les prérogatives légales de l'Etat littoral, selon le droit maritime international, surtout en ce qui a trait à la protection de l'archéologie maritime. L'auteur propose une analyse des zones envisagées par la Convention de 1982. Il fait aussi une esquisse du concept définitionnel des termes 'objets archéologiques et historiques' et 'objets archéologiques et historiques retrouvés dans la mer'. Ce sont d'ailleurs deux concepts qui restent non -définis dans la Convention de 1982.

ABSTRACT

Cultural heritage is inextricably linked to the historical importance of certain areas in the same way that certain civilizations and their historical course, are closely linked to the status and specific importance of certain national states within the international community. There are cases of states that endeavour to create history in order to enhance their stature and prolong their existence. This gives a geopolitical dimension to the study of cultural-historical heritage. A successful attempt, on behalf of the international community, to deal with the issue was the Third Conference for the Law of the Sea (1982). This conference constituted the first successful attempt to institutionalize legal rules regarding the protection of marine archaeological heritage. Herein we define the jurisdictional rights of a coastal state, according to the international law of the sea in terms of the protection of marine archaeology, we will examine separately the sea zones envisaged by the 1982 Convention. We will also attempt a

* University of the Aegean

first level conceptual definition of the terms "archaeological and historical objects" and "archaeological and historical objects found at sea", which are not defined in the 1982 Convention and are extensively used in the ensuing analysis.

Cultural heritage remains inextricably linked to the historical importance of certain areas just as certain civilizations and their historical course are closely linked to the status and specific importance of certain national states within the international community. There are cases of states endeavouring to create history in order to increase their stature and prolong their existence. On the other hand, there are states trying to safeguard their cultural heritage against those trying to usurp their cultural characteristics. This gives a geopolitical dimension to the study of cultural-historical heritage. The issue of the protection of cultural heritage is of particular interest nowadays – especially in the context of the conflictual environment created in the Middle East and the Mediterranean region, as the need to preserve cultural heritage should rank among the first in the list of priorities of the international community. The looting of the Iraqi museums after the fall of Bagdad pointed in this exact direction.

A successful attempt, on behalf of the international community, to deal with the issue was the Third Conference for the Law of the Sea. This conference constituted the first successful attempt to institutionalize legal rules regarding the protection of marine archaeological heritage. Two articles, namely article 149 "archaeological and historical objects" and article 303 including "archaeological and historical objects found at sea" were adopted by the UN Convention for the law of the sea (1982 Convention hereafter)[1], a Convention which further comprises several points of importance to Greece, such as the issue of the breadth of the territorial sea to 12 nautical miles and the issue of its possible extension up to that limit.

In this article, and in order to define the jurisdictional rights of a coastal state according to the international law of the sea regarding the protection of marine archaeology, we will examine separately the sea zones envisaged by the 1982 Convention. In particular, we will analyze the rights and jurisdiction of a coastal state on the territorial sea, the contiguous zone, the Exclusive Economic Zone (EEZ) and the continental shelf, the high seas and the international seabed (Area). We will also attempt a first-level conceptual definition of the terms "archaeological and historical objects" and

"archaeological and historical objects found at sea", which are not defined in the 1982 Convention and are extensively used in the ensuing analysis.

Conceptual Demarcations

As mentioned, article 149 is entitled "archaeological and historical objects" whereas article 303 "objects of archaeological and historical nature found at sea". The fact that there are two distinct titles illustrates the communication gap among the commissioners who had undertaken the task of drafting the convention during the Third UN Convention for the Law of the Sea (hereafter Third Convention). It is worth noting that the former article was drafted by the Committee responsible for Part XI of the convention; whereas, the latter by the commission responsible for Part XVI (General Clauses). What is more, in the text of article 149 the term "objects" are not defined, but neither are the terms "archaeological" or "historical" which are related to those objects. Consequently, the conceptual domain of the term "object" could also comprise abandoned shipwrecks or shiploads; whereas, for the definition of the term "archaeological" we could refer to a previous convention[2], according to which the term "archaeological" relates to all aspects of the human existence, constituting a testimony of past times or civilizations, the excavation or discovery of which is one of the main sources of scientific research[3]. As a result, objects which chronologically belong to earlier phases of important historical periods and events, such as the fall of the Byzantine Empire, for example, or more recent objects, even those belonging to the last century, should be termed "archaeological and historical". However, the definition of the term "historic" proves rather arduous, due to inherent conceptual breadth. In this sense any object, whether it dates from the distant to the recent past could be termed *historical*[4]. The word *historical*, in several cases, relates to the future. For example we use the phrase, "this convention took decisions of historical importance for the future". [*Editor's note: This is a misuse of historical for historic.*] A certain vagueness also appears in article 303. The term "archaeological nature" is not clarified further yet was adopted, according to Professor Oxman, during the Third Convention following the intervention of the Tunisian delegation, which aimed to narrow down the interpretation of the term archaeological object so as to not include Byzantine items[5].

The type of remark and attitude mentioned above underscores the importance of concepts and definitions in this area.

Territorial Sea

We define *territorial sea* as the sea zone that follows the baseline within which the coastal state exercises absolute sovereignty (executive-legal-judicial)[6]. According to the 1982 Convention, each state has the right to extend its territorial sea up to 12 nautical miles[7], while the sovereignty of the coastal state extends beyond its land territory and internal waters to the air space over the territorial sea as well as to its seabed and subsoil[8]. The absolute sovereignty enjoyed by a coastal state within its territorial sea, allows it to exercise freely any kind of protection for the marine historical and archaeological heritage. Article 2 (3) of the 1982 Convention, however, imposes certain restrictions. According to the relevant provision, the sovereignty of the coastal state on the territorial sea is exercised subject to the rules of the 1982 Convention, but also to other rules of international law. Indicative of this point is the case of the rule of innocent passage[9]. Exactly because the coastal state has the authority to suspend innocent passage, the freedom of the coastal state within the territorial sea is reduced to the extent that the 1982 Convention recognizes the right of innocent passage in favour of third states[10]. In this sense, while at first the coastal state enjoys absolute freedom within its territorial sea, this freedom, nevertheless, can be reduced for the sake of the protection of the marine archaeological heritage. It is reduced to the extent that it is difficult to connect the hauling up of archaeological objects with the security of the coastal states[11].

Contiguous Zone

Contiguous zone is the sea zone that runs along the territorial sea and can be extended up to 24 nautical miles from the baselines from which the breadth of the territorial sea is measured[12]. Within the contiguous zone, the coastal state, according to article 33 of the 1982 Convention can exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations that were committed within its territory or territorial sea[13]. It is pointed out that the advantages provided to the coastal

state by the contiguous zone are of particular interest in the exceptional case that a state has not expanded its territorial sea to 12 nautical miles, according to the 1982 Convention. Greece does fall into this category.

In the opposite case, however, there exists the issue of protection of marine archaeological heritage in the contiguous zone as opposed to the territorial sea. The jurisdictional rights of the coastal state are given, as far as its territorial sea are concerned. However, exactly because of the existing legal framework, in the case of the contiguous zone, the whole issue is put forward in a totally different manner and needs further analysis. We mention initially Article 303 of the 1982 Convention, which refers to the archaeological and historical objects found at sea. According to the first paragraph of the Article "States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose". In the second paragraph, the coastal state, aiming to control the traffic of such objects and applying Article 33 "may presume that their removal from the sea-bed in the zone referred to it in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in this article."

The above quote makes obvious the need for the provision of a new jurisdiction in favour of the coastal state within the contiguous zone, apart from those envisaged in Article 33 is evident. In Article 303, an overall obligation is created for coastal states "to protect the objects of archaeological and historical nature found at sea". This very provision has an autonomous nature in relation to the jurisdiction rights that Article 33 recognises for the coastal state, for it directly refers to antiquities that lie within the contiguous zone. In that sense, Article 303 attempts to demarcate the field for the implementation of a new competence for the coastal state[14]. For this very reason we believe that the jurisdiction rights of the coastal state for the protection of archaeological objects functions independent of its declaration. Consequently, the independence the lawmaker wishes to attribute, based on Article 303, to the jurisdictional rights of the coastal state, effectively leads to the establishment of a body of law[15] according to which, in the case that the archaeological and historic objects are found in the contiguous zone, they will be considered as if found within the territorial sea. As far as the jurisdiction rights envisaged in Article 33 are concerned, let it be noted that they are not exercised independently but are of monitorial nature[16], as far as

the rights exercised by the coastal state within the territorial sea are concerned[17]. Thus, the rights of the coastal state within the contiguous zone aim to safeguard the rights to the territorial sea or the terrestrial part of the state without, nevertheless, the contiguous zone constituting a body of independent rights, which are restrictively[18] envisaged in article 33[19]. According to this interpretation, the criterion of competence established by the provision for the coastal state within the contiguous zone, leads in practice, to the equation of the territorial sea with the contiguous zone, as far as the "control and traffic of archaeological and historical objects"[20] are concerned.

It is evident that the 1982 Convention provides considerable advantages to a coastal state within the contiguous zone, whether the latter moved towards its adoption or not. In any event, the adoption of a contiguous zone consolidates the jurisdiction status of a coastal state within its boundaries. In this sense, it is obvious that it is to the interest of Greece to move forwards with the adoption of a contiguous zone. All the more, given the fact that it played a leading role for its institutionalization during the Third Convention.

The Exclusive Economic Zone

With the adoption of the Exclusive Economic Zone (EEZ)[21], one of the most important demands of the coastal states in the Third Convention was satisfied. These demands dealt with the adoption of zones – apart from the territorial sea – within which the coastal state would have authority, primarily of economic nature (for example, exclusive fishing)[22]. Due to this fact, the need for the creation of a *sui generis*[23] zone, within which coastal states would be able to exploit their recourses, while the third states would not be excluded from the exercise of freedoms emanating from the institution of the freedom of the seas. In a sense, the EEZ, appeared to counterbalance the financial needs of the coastal states without extending the breadth of the territorial sea, which presented the tendency to stabilize at the 12 nautical mile point.

The EEZ, however, was limited by the 36 % area that was covered by the high seas, which accumulated in favour of the coastal states a percentage of

almost 95 % of the international fisheries, more than 80 % of the known submarine oil reserves (corresponding to one-third of international production) and 10 % of the international polymetalic nodules. In addition, almost 80 % of marine scientific research is conducted in the area of the EEZ[24].

For the protection of marine archeology within the EEZ, as well as within the continental shelf [25], it is impossible, according to the 1982 Convention, to justify special jurisdiction in favour of a coastal state. The reason behind this state of affairs is that the sovereignty rights are granted to the coastal state by the 1982 Convention to the living and non-living resources of the EEZ and to the non-living ones of the continental shelf, cannot be related to marine archeology. Hence, as early as 1956, the International Law Commission had excluded shipwrecks from the continental shelf. The Commission pointed out that "it is obvious that the authority of the coastal state does not extend to objects, such as shipwrecks or shiploads (including precious metals) that lie on the seabed or are covered by the sand of the subsoil"[26].

For the exact same reason, marine archaeological research is also excluded from the sovereignty rights of coastal states in the EEZ or continental shelf. This follows the logic that the archaeological research cannot be related to the research and exploitation of natural resources in the EEZ or the continental shelf. On the other hand, however, no third state has the capability to move forward with such a venture, all the more because of the capability of the coastal state within the EEZ – which has declared[27]– to put in operation installations or artificial islands for marine scientific research. In this sense, it should be accepted that the authorities of the coastal state in the EEZ or continental shelf override any other activity by third states. This holds true, especially in the case for the protection of marine archeology, in which instance the status of the high seas, for example for the removal of historical or archaeological objects, does not apply. This follows from Article 58 (1), which exhaustively enumerates – and does not refer indicatively as does the relevant Article for the high seas does – to the liberties of states within the EEZ. It is noteworthy that among these liberties, the protection of marine archaeological heritage is not included.

Consequently, should a coastal state adopt an EEZ "and a conflict of interests arises between a coastal state and another state or a number of states", the protection of marine archeology would be governed by Article 59

of the 1982 Convention, which mentions all those cases in which the Convention "does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone." In this case, the conflict should be resolved on the basis of sound judgment and equity "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"[28].

High Seas

The term *high seas* was always defined in a negative manner. According to Article 86 of the 1982 Convention, high seas, which is free to all states coastal or landlocked, is that part of the sea not included in the EEZ, the territorial sea and the internal waters of a state, or in the archipelagic waters of an archipelagic state. The negative conceptual approach of high seas stems from the fact that the extension of the territorial sea (up to 12 nautical miles) and the adoption of the EEZ (up to 200 nautical miles) in the 1982 Convention had a negative influence on its expanse. After three centuries of full acceptance, the principle of freedom of the seas was re-examined. The 1982 Convention did not abolish this principle but confined the area of application to sea and air 'acceding' the seabed and subsoil of the high seas to the new principle of the "common heritage of mankind". The components, however, of the freedom of the seas increased. Thus, while the 1958 Geneva Convention comprised, based on the principle of the freedom of the seas for all states, coastal and landlocked, inter alia, the freedom of navigation, the freedom of fishing, the freedom of installation of submarine cables and pipelines and the freedom of fly-over of the high seas, the 1982 Convention recognized further on the basis of "common heritage", the freedom of construction of artificial islands and other installations that are allowed by the international law and the freedom of scientific research[29].

Let it be noted further, that Article 87 of the 1982 Convention is indicative in nature, as far as freedoms recognized in favour of the coastal or landlocked states and not exhaustive as the relevant with the EEZ article. In this sense the protection of marine archaeological objects constitutes a freedom that the Convention recognizes in favour of all the states, coastal or landlocked. The only restriction is that of Article 87 (2), according to which

"these 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"[30]. Subsequently, within the high seas, every third state has the right to remove any object with the exception of the shipwrecks for which this right is restricted in favour of the flag state and is put under the condition that this can be confirmed[31].

The International Seabed or Area

The International Seabed or Area, mentioned in the 1982 Convention, comprises that part of the seabed which lies beyond the EEZ and continental shelves of the coastal states[32]. The "Area" and resources that exist within it do not belong to anyone but constitute a "common heritage of mankind"[33]. According to Article 136 "the Area and its resources are the common heritage of mankind". According to Article 133, as resources we consider all the "solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including the polymetalic nodules." As far as the activities related with the exploitation of the Area[34], Article 140 envisages that the "[a]ctivities in the Area shall…be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or landlocked, and taking into particular consideration the interests and needs of the developing States…[while] the Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis." From the aforementioned, obviously the concept of "historical and archaeological objects" does not fall into the conceptual field of "common heritage of mankind". Furthermore, the task of the Commission of International Seabed, which is referred to as Authority, is directly related to the exploitation of the resources that exist within it and for which the definition of the 1982 Convention is explicit. As a result, since "historical and archaeological objects" are found on the international seabed, then the status that will have to be put into effect is that of the high seas, which was previously mentioned.

Also noteworthy is Article149, which recognized preferential rights to "the State or country of origin, or the State of cultural origin, or the State of the

historical or archaeological origin". Some interpretational problems may arise from this last article because the 1982 Convention does not distinguish among "state of origin", "state of cultural origin" or "state of historical and archaeological origin" of the objects[35]. Furthermore, because it does not specifically designate an international organization which will be charged with the management of marine archaeological heritage (e.g. UNESCO) or the settlement of disputes that might eventually arise, we must point out that Article 187 entitled "Jurisdiction of the Sea-Bed Disputes Chamber" deals only with disputes regarding the "common heritage of mankind"; that is, with the resources of the Area and not with the marine archaeological and historical heritage[36].

Concluding Remarks

As mentioned earlier, the 1982 Convention remains of crucial importance to Greece for it comprises a series of arrangements, which in their entirety work in Greece's favour. Expansion of the territorial sea to the limit of 12 nautical miles could be seen as the most beneficial arrangement, without underestimating the other arrangements, such as those that have to do with the protection of marine archaeological heritage, which are of particular interest to Greece. The protection of the marine archaeological heritage is treated by the 1982 Convention with the recognition of jurisdictional rights in favour of the coastal states within the contiguous zone (without the latter having to declare a contiguous zone) as well as on the international seabed with the recognition of preferential rights to the state of origin of the archaeological and historical objects, despite the interpretative definitions of the relevant clauses.

Ten years after the conclusion of the 1982 Convention, Greece has neither extended its territorial sea nor adopted straight baselines. It does not close its bays at 24 nautical miles in order to fortify the protection of marine archaeological heritage. In addition, Greece does not exercise in practice any jurisdiction rights of those the 1982 Convention recognizes for the protection of marine archaeological and historical heritage within the boundaries of the contiguous zone. Furthermore, it has not moved forward with the internal act for the adoption of the contiguous zone, which would shield Greece's security since it would add important advantages in the

Aegean related to the monitoring of illegal migration, trafficking of commodities and the supervision of the overall sea space that surrounds us.

NOTES

1. The Convention for the law of the sea was signed in Montego Bay, Jamaica on October 10, 1982. On November 16, 1993 it was ratified by the 60th state and was put into force the following year according to article 308 par. 1. Up to August 30, 2002, 138out of 157 states had ratified it. See UN Doalos/Ola, Table showing the states of the Convention and of the Agreement Relating to the Implementation of Part XI of the Convention. www.un.org.

2. See R.J. Dupuy & D. Vignes, *A Handbook on the New Law of the Sea,* Martinus Nijhoff Publishers, 1991, pp. 564-5.

3. See article 1 of the European Convention for the protection of the archaeological heritage, 1969.

4. See R.J. Dupuy & D. Vignes, *ibid.*

5. See H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)", 75 *American Journal of International Law*, pp. 211-256.

6. See article 2 (1) of the 1982 Convention. Furthermore, the coastal state, according to article 27 exercises criminal jurisdiction and according to article 28 civil jurisdiction on foreign ships passing through its territorial sea.

7. See article 3 of the 1982 Convention.

8. See article 2 (2) of the 1982 Convention.

9. See article 17 of the 1982 Convention.

10. See article 25 (3) of the 1982 Convention.

11. See R.J. Dupuy & D. Vignes, *op.cit,* p.. 566.

12. See article 33 (2) of the 1982 Convention.

13. See article 33 (1) of the 1982 Convention.

14. See G. Georgakopoulos, *Greece's Territorial Sea*, *Legal Status, Evolution and Perspectives for the new law of the sea*, Doctoral Thesis, University of Athens Law

School, Athens, 1988, p. 279.

15. See E.D. Brown, *The International Law of the Sea*, Vol. I (Introductory Manual), Dartmouth Publishing Company, 1994, p. 135 – Th. Halkiopoulos, "Questions Juridiques de base de la Convention Européenne pour la Protection du Patrimoine Culturel Subaquatique", *Rapport Préparé, dans le cadre du Séminaire*, La Protection du Patrimoine Culturel Subaquatique en Méditerranée, Qui a lieu à Capri, Le 1er Octobre 1994.

16. See Ar. Papathnasiou, "Adoption of Archaeological Zones" found in the Minutes of the Rhodes Symposium (4-6 November) entitled *The Aegean Sea and the New Law of the Sea.* A. Sakkoulas publications, Athens-Komotini, 1996, p. 153.

17. The view that even in the case that the violation (e.g. removal of an archaeological objects) by a third state in the contiguous zone of a coastal state, that the latter, based on article 303 (2) can exercise the right of hot pursuit, despite the fact that article 303 is not directly related to article 111 on hot pursuit but only with article 33. The basic argument formulated is that provision 111 (1) on hot pursuit allows its exercise provided that the violation begun within the contiguous zone of the injured state. The removal of archaeological objects constitutes an infringement against a coastal state according to articles 303 (2) and 33 of the 1982 Convention. See D. Brown, *ibid.*

18. The opposite view, according to which the exposition of the jurisdiction rights of the coastal states in article 33, is not exhaustive. The fact that many coastal states have expanded their jurisdiction rights in the contiguous zone without facing any reaction by other states is supportive of that view. According to the same view, based on common law, the jurisdiction rights of the coastal state within the contiguous zone are broader than those recognised by the 1982 Convention. See more in R.R. Churchill and A.V. Lowe, *The Law of the Sea*, Manchester University Press, 1988, p.117.

19. See Ar. Papathanasiou, *ibid.*

20. The Turkish view, as expressed by H. Pazarsi, is different. According to this view, as the contiguous zone constitutes a sea zone that does not include a seabed, it should not authorise the removal of antiquities. See G. Georgakopoulos, *ibid.*

21. See Part V of the 1982 Convention, pp. 55-75.

22. See L. Alexander & R. Hodgson, "The Impact of the 200 mile Economic Zone on the Law of the Sea", 12 (3) *San Diego Law Review*, pp. 572–7.

23. See D.P. O'Connell, *The International Law of the Sea*, Vol. I, 1982, p. 577.

24. See B. Karakostanoglou, "The Rights of the Coastal States Within the Exclusive Economic Zone: Challenges and Prospects for the Aegean" in Minutes of the Rhodes Symposium (4-6 November 1994) entitled *The Aagean Sea and the New Law of the Sea*, A. Sakkoulas publications, Athens-Komotini, 1996, p. 179.

25. The coastal state exercises sovereignty rights on the natural resources of the continental shelf, which are recognised by the Geneva Convention for the Continental Shelf (1958). These rights were also recognised by the 1982 Convention, which, however, differentiated its definition (legal continental shelf) altering also the fields of enforcement of these rights. See articles 77and 246 of the 1982 Convention.

26. See II ILC Yaerbook, 1956 p. 298 in A. Stratis, "Submarine Archaeology and the New Law of the Sea", ENALIA, v. 4, issue ό, 1992, p. 27.

27. Let it be noted that while for the EEZ its adoption is necessary by the coastal state, the sovereignty rights of the latter on the continental shelf exist ipso jure and ab initio. See Aegean Sea Continental Shelf Case (Greece v. Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports Aegean Sea Continental Shelf, Judgment I.C.J. Reports 1978.

28. See R.J. Dupuy & D. Vignes, *op.cit.,* p. 571.

29. See article 87 of the 1982 Convention.

30. For the protection of marine archaeology, especially in the Area, see next paragraph.

31. See A. Stratis, "Submarine Archaeology…", *ibid.*.

32. For the discussion and the final voting on the International Seabed during the Third Convention see. S. Sremic–Slat, "The Common Heritage of Mankind Concept in the Law of the Sea", *Thesaurus Acroasium,* XVII, 1991, p. 752.

33. See article 136 of the 1982 Convention.

34. For the articles related to the research and exploitation of the Area see M. Sulaiman, "Free Access: The Problem of Landlocked States and the 1982 United Nations Convention on the Law of the Sea", 10 *South Africa Yearbook of International Law*, 1984, p. 160–2.

35. See A. Stratis, "Submarine Archaeology…", *ibid.*

36. See R.J. Dupuy & D. Vignes, *op.cit.,* p. 569.