ENVIRONMENTAL PROTECTION OF THE MEDITERRANEAN SEA

PROTECCIÓN DEL MEDIO AMBIENTE EN EL MAR MEDITERRÁNEO

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I. INTRODUCTION

From the legal point of view, and *a fortiori* as far as international spaces are concerned, the protection of the environment in the Mediterranean Sea is a matter of jurisdiction.

Under the United Nations Convention on the Law of the Sea (UNCLOS), and saving the case of the Area, *i.e.* "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction"[2], that is *res communis* and under the jurisdiction of the International Seabed Authority[3], all the maritime international spaces are still governed by the freedom of the high seas and its components: "(a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines [...]; (d) freedom to construct artificial islands and other installations [...]; (e) freedom of

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[2] Article 1 of UNCLOS: *Use of terms and scope*: "1. For the purposes of this Convention: (1) "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

[3] Article 136 *Common heritage of mankind* states: "The Area and its resources are the common heritage of mankind"; then Article 137 defines the Legal status of the Area and its resources:"1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized. 2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority. 3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized".

fishing [...]; (f) freedom of scientific research [...]"[4]. According to Article 89, "no State may validly purport to subject any part of the high seas to its sovereignty"[5], and international spaces so remain outside of any State jurisdiction. That is the reason why the protection of the marine environment, especially in the high seas is so difficult, since it is only based on the effectivity of flag State jurisdiction and control.

To face these challenges, one of the solutions seems to be the generalization of Marine Protected Areas (MPA) in the high seas, as called by international law and institutions. But from the legal point of view, then there are two main problems to deal with. The first is related to the creation of Marine Protected Areas, that is generally the work of a regional organization or system, geographically competent over the spaces concerned. The second concerns the opposability and enforcement of the MPA, *i.e.* not only to members of the regional body that have accepted it, but to the other States... and that is the main legal and practical problem.

From this point of view, the protection of the environment in the high seas of the Mediterranean Sea can be considered a special case.

First of all because the new law of the sea may be regarded as "ocean law", when Mediterranean is an enclosed sea and especially a particular case dealing with its legal regime, the only one in the world where States were initially reluctant to extend their jurisdiction over the superjacent waters to the continental shelf and still not proclaiming their jurisdiction pursuant to UNCLOS, by reference to EEZ. Besides, if the Mediterranean coastal States decided to extend their jurisdiction over the superjacent waters, there would no longer exist any high seas in the Mediterranean: so they can be defined as high seas by default, because these waters are recessive and supposed to pass under jurisdiction one day or another.

The second reason is related to the Mediterranean Action Plan, the Barcelona System, the first-ever plan and the most comprehensive system adopted as a Regional Seas Programme under United Nations Environment Programme's umbrella. Actually, the Barcelona Convention and Protocols is the only regional sea system to provide coastal States with a legal basis for environmental protection in the high seas, thanks to its Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean.

So, the situation of the Mediterranean appears to be special, both from the point of view of universal law and regional law: as the Mediterranean sea is *a particular case*

[4] Article 87 *Freedom of the high seas:* "1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII".

[5] Article 89 of UNCLOS *Invalidity of claims of sovereignty over the high seas*.

under universal law (II), coastal States may achieve the protection of the environment in the high seas by default *thanks to some specific legal approaches* (III).

II. THE MEDITERRANEAN SEA AS A PARTICULAR CASE UNDER UNIVERSAL LAW

From this point of view, the particularism of our regional sea results in *the implementation of UNCLOS in the Mediterranean Sea* (1) and induces *the legal strategies of marine environmental protection* (2).

1. The implementation of UNCLOS in the Mediterranean Sea

The specificity of the Mediterranean (B) appears to be related to the reluctance of the coastal States to extend their national jurisdiction pursuant to UNCLOS, which would result in the end of the high seas, the Mediterranean being *an enclosed or semi-enclosed sea* (A).

A) An enclosed or semi-enclosed sea

The new law of the sea, as defined by the 1982 Convention, is generally considered an "ocean law". So, Part IX of UNCLOS deals with the special case of enclosed and semi-enclosed seas and comprises only two dispositions, *Article 122: the conventional definition* (a) and *Article 123: the necessary cooperation (b).*

a) Article 122: the conventional definition

According to Article 122: "For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States" .

Obviously, the Mediterranean meets all the conditions of the conventional definition: the geographical criterion, *i.e.* "enclosed or semi-enclosed sea" means a gulf, basin or sea, with no juridical distinction between enclosed or semi-enclosed sea; the political criterion, *i.e.* "surrounded by two or more States", the english version[6] being more precise than the french one[7]; and the two alternative criteria: the second geographical condition: "connected to another sea or the ocean by a narrow outlet", and

[6] The Spanish version also states (Artículo 122 *Definición*): *"*Para los efectos de esta Convención, por "mar cerrado o semicerrado" se entiende un golfo, cuenca marítima o mar rodeado *por dos o más Estados* y comunicado con otro mar o el océano por una salida estrecha, o compuesto entera o fundamentalmente de los mares territoriales y las zonas económicas exclusivas de *dos o más Estados ribereños".*

[7] Article 122 *Définition*: « Aux fins de la Convention, on entend par « mer fermée ou semi-fermée » un golfe, un bassin ou une mer *entourée par plusieurs Etats* et relié à une autre mer ou à l'océan par un passage étroit, ou constitué, entièrement ou principalement, par les mers territoriales et les zones économiques exclusives de *plusieurs Etats »*.

the legal one: "or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States".

By the way, it is not only the Mediterranean Sea that meets the conventional conditions but some of its basins and sub-basins too, that may be considered as semi-enclosed seas, for instance Adriatic Sea or Aegean Sea.

Given the specificities resulting from the physical geography, *Article 123* of the Convention lays down the principle of *the necessary cooperation* of States bordering enclosed or semi-enclosed seas.

b) Article 123: the necessary cooperation

In an enclosed or semi-enclosed sea, maritime areas are small enough for States to have converging interests and develop solidarities, but on the other hand there are always potential disputes arising from vicinity.

So is the case in the Mediterranean, and the need for cooperation is obvious between the twenty-one States bordering it[8]. Cooperation is imperative not only because it is an enclosed sea, but also a strategic area: cradle of many civilizations, at the meeting point of three continents, and one of the thirty-four biodiversity hotspots.

The problem is conventional law is not very prescriptive. Article 123 *Cooperation of States bordering enclosed or semi-enclosed seas*[9] sounds like soft law, material soft law, either for the formulation of the principle or for the means of implementation.

As regards the principle of cooperation: "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". But they also have "to invite, as appropriate, other interested States or international organizations to cooperate with them" (alinea d).

[8] F. SIMARD, "Le scientifique, le juriste et la gestion: Coopération et Droit de la Mer en Méditerranée", 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, p. 339; also published in *Annuaire du Droit de la Mer* 2009, Tome XIV, p. 499.

[9] Article 123 reads as follows: "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. To this end they shall endeavour, directly or through an appropriate regional organization: (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea; (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area; (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article".

As far as the modalities are concerned, UNCLOS calls for a mere coordination between States, "directly" or indirectly, *i.e.* "through an appropriate regional organization".

In terms of the matters involved, cooperation is first of all necessary to the protection of the environment *lato sensu*, in order "(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea", and "(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment".

But in pratice, cooperation is a matter of fact, depending on the issues and interests of States bordering the enclosed sea and the political will they have to work together to preserve their biological resources, marine environment and biodiversity, all of their common heritage. Our regional sea is quite a good example, and this is part of *the specificity of the Mediterranean*.

B) The specificity of the Mediterranean

Actually, the main specificity is that there is *no general proclamation of exclusive economic zones* (a) in the Mediterranean Sea, but *a dynamic of jurisdictionalisation* (b).

a) No general proclamation of exclusive economic zones

The size of the basin is so small that the distance between the shores is nowhere over 400 nautical miles. As a matter of fact, extensions of offshore jurisdiction would eradicate the high seas of the Mediterranean.

In fact, the Mediterranean is the one and only sea in the world where coastal States have being so reluctant to claim any exclusive economic zone, at least after the adoption of UNCLOS.

The practical reasons are related to the particular topography of the sea, with a lot of islands and promontories, delineating separated basins. So, Mediterranean States were afraid of the consequences, in terms of maritime delimitations and geostragy issues.

Lest political problems and contestations from maritime powers, especially about the freedom of the high seas, but above all not to open the Pandora Box of delimitation disputes, Mediterranean States preferred not to exercise their sovereign rights over the superjacent waters of the sea pursuant to UNCLOS, *i.e.* claiming for an EEZ.

But an evolution seemed necessary, in order to protect the living resources of the sea and the marine environment; and the Mediterranean began to be the scene of *a dynamic of jurisdictionalisation*[10].

b) A dynamic of jurisdictionalisation

The change occurred because of practical necessities and in a pragmatic way[11].

For political reasons, the first initiative took place on the south shore of the Mediterranean: Morocco in 1981[12], although the EEZ could not be efficient in the Mediterranean because of the territorial problems with Spain[13]; Tunisia in 2005[14]. Then, States of the east shore have claimed EEZ too, but without any implementation: Syria in 2003[15]; Cyprus in 2004[16].

On the north shore, coastal States are still reluctant to proclaim their jurisdiction pursuant to UNCLOS, maybe because most of them are members of the European Union[17]. So they have extended their jurisdiction over 200 nautical miles, but without proclaiming an EEZ. They have declared *sui generis* functional zones, pursuant to the

[10] In the words of Gemma Andreone; *cf*. G. ANDREONE, "Observations sur la « juridictionnalisation » de la mer Méditerranée", *Annuaire du Droit de la Mer* 2004, Tome IX, p. 7.
[11] *Cf. Les zones maritimes en Méditerranée, Revue de l'INDEMER* n° 6, 2003.
[12] Dahir n° 81-179 of April 8th, 1981 promulgating Law n° 1-81 of December 18th, 1980 establishing an Exclusive Economic Zone of 200 miles off the Moroccan coast.
[13] On these issues, *cf*. J. M. FARAMIÑÁN GILBERT, "La délimitation du plateau continental en Méditerranée et les relations entre l'Espagne et le Maroc", 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, p. 127; V. L. GUTIÉRREZ CASTILLO, *Le conflit hispano-marocain de l'île de Persil: Etude des titres de souveraineté et de son statu quo*, *Annuaire du Droit de la Mer* 2003, Tome VIII, p. 83; V. L. GUTIÉRREZ CASTILLO: "Estudio del régimen jurídico del Estrecho de Gibraltar: conflictos de soberanía, espacios marinos y navegación", in A. DEL VALLE GÁLVEZ y R. EL HOUDAIGUI (dirs.): *Las dimensiones internacionales del Estrecho de Gibraltar*, Serie Estudios Internacionales y Europeos de Cádiz, Madrid 2005, p. 265; V. L. GUTIÉRREZ CASTILLO: *El Magreb y sus fronteras en el mar. Conflictos de delimitación y propuestas de solución*, Barcelona, Huygens, 2009; V. L. GUTIERREZ CASTILLO: "Réflexions sur la délimitation des espaces maritimes dans la mer d'Alboran", 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, p. 225; S. IHRAÏ: "Le contentieux Maroco-Espagnol en matière de délimitation maritime", *Annuaire du Droit de la Mer* 2002, Tome VII, p. 199; S. IHRAÏ: "Le conflit maroco-espagnol relatif à l'îlot de Toura/Perejil: titres de souveraineté et délimitation des espaces maritimes", *Annuaire du Droit de la Mer* 2005, Tome X, p. 245; S. IHRAÏ: "La législation marocaine relative à la zone économique exclusive au Maroc et les difficultés de sa mise en oeuvre en Méditerranée", in J. M. FARAMIÑAN GILBERT y V. L. GUTIERREZ CASTILLO (coords.): *La Conferencia de Algeciras y las Relaciones Internacionales*, Fundación Tres Culturas del Mediterráneo, Sevilla 2007, p. 187.
[14] Law n° 2005-50 of June 27th, 2005 on the Exclusive Economic Zone of Tunisia.
[15] Law n° 28 of November 19th, 2003 on the Maritime Areas of the Arab Republic of Syria.
[16] Law of April 2nd, 2004 proclaiming the Exclusive Economic Zone of the Republic of Cyprus.
[17] France, Greece, Italia, Slovenia and Spain.

adage "who can do more can do less"[18]; thus they enjoyed only part of the rights they could exercise in an EEZ[19].
The first was Spain in 1997 proclaiming a Fisheries Protection Zone[20]; then France in 2004 claiming an Ecological Protection Zone[21], and Italia too in 2006[22]; we can add the special case of Croatia with a Fisheries and Ecological Protection Zone decided in 2003 but never implemented because of the European Union and above all Italian objections[23].

Of the twenty-one States bordering the Mediterranean Sea, fourteen have proclaimed or designated new maritime zones beyond their territorial seas, which represent two-thirds of the Mediterranean, a *ratio* comparable to the situation in other seas around the world, except that most of these offshore zones are not EEZ, but characterized by their diversity and low degree of integration[24].

On the other hand, we can wonder if generalized proclamations of EEZ would be the best solution for the Mediterranean, especially because of the integrated legal situation of the seven coastal States that are members of the European Union[25]. Maybe the most relevant strategy to protect the marine environment, beyond territorial waters, would be the declaration of biodiversity protection zones, by all the Mediterranean States, to support *the legal strategies of marine environmental protection*.

[18] In the words of Tullio Treves; *cf*. T. TREVES: "Rapport général-Action commune pour la protection de l'environnement marin", in *Convergences méditerranéennes, Revue de l'INDEMER* n° 3, 1995, p. 82; et T. TREVES: "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, Revue de l'INDEMER* n° 6, 2003, p. 23.
[19] On the south shore, Libya appears a special case proclaiming a Fisheries Protection Zone in 2005; General People's Committee Decision n° 37 of February 24th, 2005 relating to the declaration of a Libyan Fisheries Protection Zone in the Mediterranean, supplemented by the decisions of the General People's Committee n° 104 of June 20th, 2005 on the straight baselines established to measure the width of the territorial sea and maritime areas of Libya, and n° 105 of June 21st, 2005 on the delimitation of the Libyan Fisheries Protection Zone.
[20] Royal Decree 1.315/1997 of August 1st, 1997 establishing a Spanish Fisheries Protection Zone in the Mediterranean Sea.
[21] Decree n° 2004-33 of January 8th, 2004 creating an Ecological Protection Zone off the coast of the territory of the Republic in the Mediterranean, adopted pursuant to Law n° 2003-346 of April 15th, 2003 on the establishment of an Ecological Protection Zone off the coast of the territory of the Republic.
[22] Law n° 61 of February 8th, 2006 on the creation of an Ecological Protection Zone beyond the outer limit of the territorial sea.
[23] Parliament's Decision dated October 3rd, 2003 extending the jurisdiction of the Republic of Croatia in the Adriatic Sea and Parliament's Decision dated June 3rd, 2004 amending the Decision of October 3rd, 2003 to extend the jurisdiction of the Republic of Croatia in the Adriatic Sea.
[24] *Cf*. UICN, *Vers une meilleure gouvernance de la Méditerranée/Towards a better Governance of the Mediterranean*, Gland & Malaga, UICN 2010, especially p. 15.
[25] Cyprus, France, Greece, Italy, Malta, Slovenia, Spain.

2. The legal strategies of marine environmental protection

Indeed, marine environmental protection may be considered to have two dimensions in contemporary international law: *the prevention of pollution* (A) and *the preservation of biodiversity* (B).

A) The prevention of pollution

UNCLOS only deals with marine pollution; it devotes *Part XII: Protection and preservation of the marine environment* (a) to this sole aspect and refers to *IMO* as *the competent international organization* (b).

a) Part XII: Protection and preservation of the marine environment

The Third United Nations Conference on the Law of the Sea began in 1973, that is to say one year after the first United Nations Conference on the Human Environment, held in Stockholm in 1972. So, in this context, the Third Conference may be considered as an innovative experience.

First of all, the Third Commission agenda included *Protection and preservation of the marine environment*, then the subject of Part XII of the Montego Bay Convention. By the way, environmental matters were introduced in the law of the sea.

The Convention is an umbrella treaty, so Part XII[26] appears to be the starting point of all the evolutions. It defines the legal frameworks, and sets the principles, some of them specific to environmental law and others to international law.

But if Part XII recognizes the necessity to protect and preserve the marine environment, it is only in conjunction with the economic uses of the sea[27].

So, Article 192 transfers the well-known principle of environmental law in international law of the sea: "States have the obligation to protect and preserve the marine environment". But this general obligation is supposed to be understood in accordance with the global philosophy of Part XII, that is to say in a utilitarian logic, functional and defined by reference to economic purposes and human activities.

In the 1982 Convention, environmental concerns are first of all related to the prevention of, preparedness for and response to marine pollution[28]; and Part XII intends

[26] Articles 192 to 237.

[27] *Cf.* for example, Article 193 *Sovereign right of States to exploit their natural resources*: "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".

[28] *Cf.* Article 194 *Measures to prevent, reduce and control pollution of the marine environment*: "1. 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

to fight against the various forms of pollution that may affect the marine environment: *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); *Pollution from or through the atmosphere* (Article 212).

The anthropocentric approach is self evident, and International Maritime Organization (*IMO*) is the "competent international organization".

b) IMO: the competent international organization

When the United Nations Convention on the Law of the Sea refers to the "competent international organization"[29], in the field of the protection and preservation of the marine environment, it speaks about International Maritime Organization, specialized agency of the United Nations family, specially dedicated to international navigation and maritime safety and security[30].

IMO conventions and recommandations develop the general principles and tend to achieve the goals of Part XII of UNCLOS.

First of all, MARPOL 73-78 and its Annexes define certain sea areas as "*Special Area*", that is to say "*a sea area where for recognised technical reasons in relation to its oceanographical and ecological conditions and to the particular character of its traffic,*

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they shall endeavour to harmonize their policies in this connection. 2. States shall 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, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention. 3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent: (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping; (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels; (c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices; (d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices. 4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention. 5. The 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".

[29] *Cf.* Articles 211, 217, 218, 220, 223 of Part XII of UNCLOS; for references to "*competent international organizations*", *cf.* Articles 197 to 208 and 212 to 214, 216, 222.

[30] www.imo.org/Pages/home.aspx.

the adoption of special mandatory methods for the prevention of sea pollution by oil, noxious liquid substances, or garbage, as applicable, is required"[31]. Under the Convention, and today only under Annex I *Regulations for the prevention of pollution by oil* and Annex IV *Regulations for the Control of Pollution by Garbage from Ships*, *i.e.* in relation to the type of pollution, these Special Areas are provided with a higher level of protection than other areas of the sea.

And, in both cases, pollution by oil and pollution by garbage, the Mediterranean Sea is designed as a "*Special Area*" under MARPOL.

Another concept, entirely independent of IMO conventions, but developed by the competent international organization, and especially by the Marine Environment Protection Committee (MEPC) of IMO is the notion of "*Particularly Sensitive Sea Area*" (PSSA).

A Particularly Sensitive Sea Area "is an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities. At the time of designation of a PSSA, an associated protective measure, which meets the requirements of the appropriate legal instrument establishing such measure, must have been approved or adopted by IMO to prevent, reduce, or eliminate the threat or identified vulnerability"[32].

The PSSA is to provide a better protection for marine areas most vulnerable to the impact of international shipping, with the adoption by IMO of associated protective measures, such as ships' routeing and reporting systems, prohibition of certain activities, special discharge restrictions, or designation of a Special Area under MARPOL Annexes[33].

PSSA have to be designed by IMO but may be situated within and beyond the limits of the territorial sea. So, PSSA is likely to be an additionnal and sectoral mean of protection of the Mediterranean marine environment[34], dealing also with *the preservation of biodiversity*.

[31] IMO Resolution A.927(22), adopted on 29 November 2001 (Agenda item 11), *Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, Annex I *Guidelines for the Designation of Special Areas under MARPOL 73/78*, § 2.1.

[32] IMO Resolution A.982(24), adopted on 1 December 2005 (Agenda item 11), *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, Annex *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, § 1.2.

[33] IMO Resolution A.982(24), adopted on 1 December 2005 (Agenda item 11), *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, Annex *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, § 6 *Associated Protective Measures*.

[34] In July 2011, The Marine Environment Protection Committee (MEPC, 62nd Session) designated the Strait of Bonifacio (France/Italy) as the first Mediterranean Particularly Sensitive Sea Area (PSSA); www.imo.org/mediacentre/pressbriefings/pages/43%20mepc62ends.aspx.

B) The preservation of biodiversity

The protection of marine biodiversity raises the question of the relationship not only between the *Convention on Biological Diversity and Marine Protected Areas* (b) but also between *UNCLOS and biodiversity* (a).

a) UNCLOS and biodiversity

Indeeed, UNCLOS and biodiversity appear to be interrelated in view of the global preservation of the marine environment. But, UNCLOS does not refer to biodiversity, obviously, because biodiversity, as a concept, appeared later than the adoption of the Convention. Although the term "biological diversity" was used first in 1968, it appears to be widely adopted, in science and environmental policy, only in the 1980s. The term's contracted form *biodiversity* seems to have been coined in 1985; more communicative, it began to be employed in 1986 and first appeared in a publication in 1988. So, it would have been very difficult for this concept to be enshrined in the 1982 Convention.

In fact, there was no legal consecration of biodiversity till the adoption of the Biological Diversity Convention in 1992, and with respect to the conventional law of the sea, the first mention of biodiversity dated from 1995, and was enshrined in the United Nations 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; indeed, Article 5 alinea g was the first to provide "biodiversity in the marine environment" with specific and effective legal protection[35].

UNCLOS deals with the protection and preservation of the marine environment mainly in terms of pollution, but does not take biodiversity challenges into account. The 1982 Convention considers conservation of the living resources not to preserve species, which diversity is a component of biodiversity, but in order to assure the optimum utilization[36] with the maximum sustainable yield[37]. So the new Law of the Sea

[35] Article 5 *General principles*: "In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention [...] (g) protect biodiversity in the marine environment".

[36] Article 62 *Utilization of the living resources*: "1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61".

[37] Article 61 *Conservation of the living resources*: "2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end. 3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global"; and Article 119 Conservation of the living

Convention does not seek to preserve the environment as such and for itself, by reference to the biological diversity that is its ecological richness and future in terms of sustainable development, and not in the least through an ecosystem approach and in accordance with the precautionary principle. And that is precisely why the protection of the marine environment must also rely on the *Convention on Biological Diversity and Marine Protected Areas*.

b) Convention on Biological Diversity and Marine Protected Areas

Indeed, biodiversity has emerged as a legal concept, and a component of sustainable development, thanks to the Convention on Biological Diversity, adopted in 1992 by the United Nations Conference on Environment and Development held in Rio.

Biodiversity simply means biological diversity, that is to say the variety of life forms, within time and space, and at all levels of biological organization: species diversity, ecosystems diversity, genetic diversity. But from the conventional point of view, Article 2 of the Convention on Biological Diversity defines "biological diversity" as "the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems"[38].

"Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat", the Preamble of the Convention enshrines the precautionary principle. With regard to marine biodiversity, it also obviously refers to biological resources over which States have sovereign rights[39] and responsibility for their conservation and using in a sustainable manner[40].

Article 22 of the 1992 Convention is specially dedicated to *Relationship with Other International Conventions*. Generally speaking, and in accordance with Article 22 § 1, "the provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity". But in the special case of UNCLOS and the new law of the sea,

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resources of the high seas: "1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall: (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global".

[38] The same disposition states: "Ecosystem means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit".

[39] Preamble: "Reaffirming *that States have sovereign rights over their own biological resources*".

[40] Preamble: "Reaffirming also *that States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner*".

Article 22 § 2 expressly provides that "Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea". So the sovereign rights to exploit biological resources, especially fishing activities, have to be taken into account and respected, although Marine Protected Areas are being designated.

Indeed, the concept of protected areas, in this case Marine Protected Areas identified to establish a network, directly applies the conventional principle of *In-situ Conservation* established by Article 8: "Each Contracting Party shall, as far as possible and as appropriate: (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; […] (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use".

Anyway, MPA seems to be the best instrument to protect and preserve marine biodiversity, in the Mediterranean as in the oceans[41]. Besides, MPA may be designed in a cross-sectoral way, and so conforted by other legal means of protection, as PSSA or FAO's Vulnerable Marine Ecosystems (VME) established in the particular field of deep-sea high seas fisheries[42].

But in the Mediterranean Sea, the protection of the marine environment, including beyond national jurisdiction, relies not only on all the legal instruments of universal law but is also effective *thanks to some specific legal approaches*.

III. THE PROTECTION OF THE ENVIRONMENT THANKS TO SOME SPECIFIC LEGAL APPROACHES

The Mediterranean system is the most developed among regional seas systems. Currently, it derives primarily *from the protection offered by the Barcelona System* (1) but the way seems already potentially open *towards heritage protection of the marine environment* (2).

[41] *Cf.* CBD, CoP 9, Decision IX/20 *Marine and Coastal Biodiversity*, and especially Annex I *Scientific Criteria for identifying Ecologically or Biologically Significant Marine Areas in need of Protection in Open-ocean waters and Deep-sea habitats*, www.cbd.int/doc/decisions/cop-09/cop-09-dec-20-en.doc. On the EBSAs criteria, *cf.* www.cbd.int/marine/doc/azores-brochure-en.pdf, Azores Scientific Criteria and Guidance for identifying Ecologically or Biologically Significant Marine Areas and designing representative Networks of Marine Protected Areas in Open ocean waters and Deep sea habitats, CBD 2009; and Global Ocean Biodiversity Initiative. Working Towards High Seas Conservation, GOBI 2010, www.gobi.org/Library/gobi-literature/brochure/view.

[42] *Cf.* United Nations General Assembly Resolution A/RES/61/105 *Sustainable fisheries, including through the 1995 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, and related instruments*, adopted on 8 December 2006; and International Guidelines for the Management of Deep-Sea Fisheries in the High Seas, www.fao.org/docrep/011/i0816t/i0816t00.htm.

1. From the protection offered by the Barcelona System

In 1975, that is to say only three years after the Stockholm Conference, sixteen Mediterranean States and the European Community adopted the Mediterranean Action Plan (MAP)[43], the first-ever plan adopted as a Regional Seas Programme under United Nations Environment Programme's umbrella[44].

Although it also now aims *to preserve biodiversity* (B), the main objectives of the MAP were initially to protect the Mediterranean *against pollution* (A).

A) Against pollution

The Mediterranean Action Plan and, from the legal point of view, the Barcelona Convention and its Protocols form *a global system* (a) *with specific aspects* (b) equally dedicated to the environmental protection of the Mediterranean.

a) A global system

In 1976, the seventeen Parties adopted the Convention for the Protection of the Mediterranean Sea Against Pollution, *i.e.* the first Barcelona Convention[45]. But in 1995, the Contracting Parties adopted an amended version of the Barcelona Convention of 1976, renamed Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean[46], to integrate the Rio outcomes and especially sustainable development requirements. Today MAP involves the twenty-one States bordering the Mediterranean as well as the European Union[47].

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 § 1)[48].

It refers especially to "the precautionary principle"[49] (Article 4 § 3 alinea a), "the polluter pays principles" (Article 4 § 3 alinea b)[50], and to "environmental impact

[43] www.unepmap.org/index.php.
[44] www.unep.org/regionalseas/about/default.asp.
[45] Convention for the Protection of the Mediterranean Sea Against Pollution, adopted on 16 February 1976 and entered into force on 12 February 1978.
[46] 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.
[47] 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, Turkey.
[48] Article 4 § 1: "The Contracting Parties shall individually or jointly take all appropriate measures in accordance with the provisions of this Convention and those Protocols in force to which they are party 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".
[49] Article 4 § 3: "In order to protect the environment and contribute to the sustainable development of the Mediterranean Sea Area, the Contracting Parties shall: (a) apply, in accordance with their capabilities, the

assessment" (Article 4 § 3 alineas c and d)[51], "integrated management of the coastal zones" (Article 4 § 3 alinea e)[52], "best available techniques" and "best environmental practices" (Article 4 § 4 alinea b)[53].

But the Convention also addresses each of the forms of marine pollution: *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).

But, particularly thanks to its Protocols, the Barcelona System also deals *with specific aspects* of Mediterranean environmental conservation.

b) With specific aspects

Indeed, the Barcelona Convention has given rise to seven Protocols addressing the different forms of pollution and environmental challenges. They are all in force since March 24th, 2011.

The so-called Dumping Protocol is the Protocol for the Prevention of Pollution in the Mediterranean Sea by Dumping from Ships and Aircraft, adopted in 1976 and entered into force in 1978[54]; indeed, the amended Protocol for the Prevention and

precautionary principle, by virtue of which where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

[50] Article 4 § 3: "In order to protect the environment and contribute to the sustainable development of the Mediterranean Sea Area, the Contracting Parties shall: [...] (b) apply the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter, with due regard to the public interest".

[51] Article 4 § 3: "In order to protect the environment and contribute to the sustainable development of the Mediterranean Sea Area, the Contracting Parties shall: [...] (c) undertake environmental impact assessment for proposed activities that are likely to cause a significant adverse impact on the marine environment and are subject to an authorization by competent national authorities; (d) promote cooperation between and among States in environmental impact assessment procedures related to activities under their jurisdiction or control which are likely to have a significant adverse effect on the marine environment of other States or areas beyond the limits of national jurisdiction, on the basis of notification, exchange of information and consultation".

[52] Article 4 § 3: "In order to protect the environment and contribute to the sustainable development of the Mediterranean Sea Area, the Contracting Parties shall: [...] (e) commit themselves to promote the integrated management of the coastal zones, taking into account the protection of areas of ecological and landscape interest and the rational use of natural resources".

[53] Article 4 § 4: "In implementing the Convention and the related Protocols, the Contracting Parties shall: [...] (b) utilize the best available techniques and the best environmental practices and promote the application of, access to and transfer of environmentally sound technology, including clean production technologies, taking into account the social, economic and technological conditions".

[54] Adoption: 16 February 1976 (Barcelona, Spain); entry into force: 18 February 1978.

Elimination of Pollution in the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea adopted in 1995 is now the only one of the new Barcelona Protocols not to be in force[55].

The so-called Prevention and Emergency Protocol is the Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea; it was adopted in 2002 and entered into force in 2004[56], replacing the 1976 Protocol[57].

The so-called Land-Based Sources Protocol is the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities; it was adopted in 1996 and entered into force in 2008[58], replacing the 1980 Protocol[59].

The so-called Specially Protected Areas and Biodiversity Protocol is the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean; it was adopted in 1995 and entered into force in 1999[60], replacing the 1982 Protocol concerning Mediterranean Specially Protected Areas[61].

The so-called Offshore Protocol is 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, adopted in 1994[62] and entered into force on March 24th, 2011.

The so-called Hazardous Wastes Protocol is the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal, adopted in 1996 and entered into force in 2008[63].

The so-called Integrated Coastal Zone Management Protocol (ICZM) is the Protocol on Integrated Coastal Zone Management in the Mediterranean, adopted in 2008[64] and entered into force on March 24th, 2011.

So, at least one of these protocols appears to be specially dedicated to the second dimension of the protection of the marine environment, that is to say *to conserve biodiversity*.

[55] Adoption: 10 June 1995 (Barcelona, Spain); not yet in force.
[56] Adoption: 25 January 2002 (Malta); entry into force: 17 March 2004.
[57] 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 (Barcelona, Spain) and in force since 12 February 1978.
[58] Adoption: 7 March 1996 (Syracuse, Italy); entry into force: 11 May 2008.
[59] Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources, adopted on 17 May 1980 (Athens, Greece) and in force since 17 June 1983.
[60] Adoption: 10 June 1995 (Barcelona, Spain); entry into force: 12 December 1999.
[61] Protocol concerning Mediterranean Specially Protected Areas, adopted on 3 April 1982 (Geneva, Switzerland) and in force since 23 March 1986.
[62] Adoption: 14 October 1994 (Madrid, Spain).
[63] Adoption: 1 October 1996 (Izmir, Turkey); entry into force: 19 January 2008.
[64] Adoption: 21 January 2008 (Madrid, Spain).

B) To conserve biodiversity

The *1995 Protocol* (a), especially with the *SPAMI List* (b), appears to be a very original instrument, both from the legal and environmental point of view.

a) The 1995 Protocol

In fact, thanks to this Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, the Mediterranean Sea is the first and only regional sea to be protected as specifically in terms of biodiversity.

Article 10 *Conservation of Biological Diversity* of the 1995 Barcelona Convention states that "the Contracting Parties shall, individually or jointly, take all appropriate measures to protect and preserve biological diversity, rare or fragile ecosystems, as well as species of wild fauna and flora which are rare, depleted, threatened or endangered and their habitats, in the area to which this Convention applies"; and all the Mediterranean States are Parties to this text except Bosnia and Herzegovina and Libanon, although in the case of Libanon the process of acceptance is alleged to be in progress.

Supplemented by three Annexes adopted in Monaco in 1996[65], the Protocol aims to develop this principle and to implement it at regional level, pursuant to the outcomes of Rio, taking into account issues of sustainable development and universal obligations arising from the adoption of the Convention on Biological Diversity. Actually, the scope of these instruments for the protection of biodiversity in the Mediterranean is innovative and wide, and it includes but unfortunately not all the coastal States. So general ratification should be encouraged, since Bosnia and Herzegovina, Greece, Israel and Libya are to date still not Parties to the 1995 Protocol.

The Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean aims to go beyond purely declaratory principles and develop a functional approach to biodiversity protection which is mainly based on the concept of Specially Protected Areas and especially on Specially Protected Areas of Mediterranean Importance (SPAMI).

To preserve biodiversity, the Protocol provides for the *Protection of Areas* (Part II and Annex I[66]) and the *Protection and Conservation of Species* (Part III and Annexes

[65] The three Annexes to the Specially Protected Areas and Biodiversity Protocol were adopted on 24 November 1996 in Monaco.

[66] Annex I *Common Criteria for the Choice of Protected Marine and Coastal Areas that could be included in the SPAMI List*.

II[67] and III[68]). It seeks to promote international cooperation too, especially thanks to the Regional Activity Center for Specially Protected Areas (RAC-SPA) based in Tunis[69].

Thus, the 1995 Protocol takes into account the ecosystems, habitats and species, and is therefore an essential scientific and legal instrument, *a fortiori* because in addition to Specially Protected Areas[70] already provided by the 1982 Protocol, it now allows the creation and networking of Specially Protected Areas of Mediterranean Importance (SPAMI)[71], throughout the Mediterranean Sea area, that is to say including beyond the national jurisdictions, in the high seas by default. And, from this point of view, the most original and innovative concept is probably *the SPAMI List*.

b) The SPAMI List

Indeed, Article 8 of the Protocol introduces the principle of the *Establishment of the List of Specially Protected Areas of Mediterranean Importance* (the SPAMI List), *"*in order to promote cooperation in the management and conservation of natural areas, as well as in the protection of threatened species and their habitats" (Article 8 § 1).

Three classes of sites may be included in this list: those which "are of importance for conserving the components of biological diversity in the Mediterranean", those which "contain ecosystems specific to the Mediterranean area or the habitats of endangered species" and those which "are of special interest at the scientific, aesthetic, cultural or educational levels" (Article 8 § 2).´

The strategy and objective are to confer real functional protection to SPAMI; not only "to recognize the particular importance of these areas for the Mediterranean" (Article 8 § 3 alinea a), but also to require the Parties to the conventional system "to comply with the measures applicable to the SPAMIs and not to authorize nor undertake any activities that might be contrary to the objectives for which the SPAMIs were established" (Article 8 § 3 alinea b).

Article 9 *Procedure for the Establishment and Listing of SPAMIs* goes much further and appears to be the most innovative and interesting of the whole Protocol, in terms of biodiversity protection, as from the point of view of international law of the sea and of the marine environment in general[72].

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[67] Annex II *List of Endangered or Threatened Species*.
[68] Annex III *List of Species whose Exploitation is Regulated*.
[69] www.rac-spa.org.
[70] Part II *Protection of Areas*, Section One *Specially Protected Areas*, Articles 4 to 7.
[71] Part II *Protection of Areas*, Section Two *Specially Protected Areas of Mediterranean Importance*, Articles 8 to 10.
[72] Article 9 *Procedure for the Establishment and Listing of SPAMIs*: "1. SPAMIs may be established, following the procedure provided for in paragraph 2 to 4 of this Article, in: (a) the marine and coastal zones subject to the sovereignty or jurisdiction of the Parties; (b) zones partly or wholly on the high seas. 2. Proposals for inclusion in the List may be submitted: (a) by the Party concerned, if the area is situated in a zone already delimited, over which it exercises sovereignty or jurisdiction; (b) by two or more

Given that the Protocol applies to "the seabed and its subsoil" as well as to "the waters" (Article 2)[73], Article 9 § 1 provides that "SPAMIs may be established" not only "in [...] the marine and coastal zones subject to the sovereignty or jurisdiction of the Parties" (alinea a), but also "in [...] zones partly or wholly on the high seas" (alinea b).

This legal disposition is an innovation, unique all over the world and very significant because it provides the whole Mediterranean with a global and potentially effective protection, including in the international waters. Indeed, in the Mediterranean Sea, there is no place where the coasts are separated by more than 400 nautical miles; so all the residual international waters have the status of high seas by default, because they are by destination called to be integrated in any national jurisdiction zones, one day or another...

Although international cooperation seems to be necessary and very important, the real issue deals with practical effectiveness of SPAMIs.

Actually there are two problems: first, there is always a risk for SPAMIs to remain paper parks, because of a lack of logistical means or political will; second, there

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neighbouring Parties concerned if the area is situated, partly or wholly, on the high sea; (c) by the neighbouring Parties concerned in areas where the limits of national sovereignty or jurisdiction have not yet been defined. 3. Parties making proposals for inclusion in the SPAMI List shall provide the Centre with an introductory report containing information on the area's geographical location, its physical and ecological characteristics, its legal status, its management plans and the means for their implementation, as well as a statement justifying its Mediterranean importance; (a) where a proposal is formulated under subparagraphs 2 (b) and 2 (c) of this Article, the neighbouring Parties concerned shall consult each other with a view to ensuring the consistency of the proposed protection and management measures, as well as the means for their implementation; (b) proposals made under paragraph 2 of this Article shall indicate the protection and management measures applicable to the area as well as the means of their implementation. 4. The procedure for inclusion of the proposed area in the List is the following: (a) for each area, the proposal shall be submitted to the National Focal Points, which shall examine its conformity with the common guidelines and criteria adopted pursuant to Article 16; (b) if a proposal made in accordance with subparagraph 2 (a) of this Article is consistent with the guidelines and common criteria, after assessment, the Organization shall inform the meeting of the Parties, which shall decide to include the area in the SPAMI List; (c) if a proposal made in accordance with subparagraphs 2 (b) and 2 (c) of this Article is consistent with the guidelines and common criteria, the Centre shall transmit it to the Organization, which shall inform the meeting of the Parties. The decision to include the area in the SPAMI list shall be taken by consensus by the Contracting Parties, which shall also approve the management measures applicable to the area. 5. The Parties which proposed the inclusion of the area in the List shall implement the protection and conservation measures specified in their proposals in accordance with paragraph 3 of this Article. The Contracting Parties undertake to observe the rules thus laid down. The Centre shall inform the competent international organizations of the List and of the measures taken in the SPAMIs. 6. The Parties may revise the SPAMI List. To this end, the Centre shall prepare a report".

[73] Article 2 *Geographical Coverage*: "1. The area to which this Protocol applies shall be the area of the Mediterranean Sea as delimited in Article 1 of the Convention. It also includes: – the seabed and its subsoil; – the waters, the seabed and its subsoil on the landward side of the baseline from which the breadth of the territorial sea is measured and extending, in the case of watercourses, up to the freshwater limit; – the terrestrial coastal areas designated by each of the Parties, including wetlands".

is legally a real problem related to the *res inter alios acta* clause because of the relative effect of treaties, that is to say their inopposability on third States[74].

In the case of Contracting Parties, the opposability and enforcement of SPAMIs are regulated by Articles 9 § 4 alinea c and 9 § 5: whether the SPAMI "is situated [...] on the high sea" (Article 9 § 2 alinea b) or "in areas where the limits of national sovereignty or jurisdiction have not yet been defined" (Article 9 § 2 alinea c), "the decision to include the area in the SPAMI list shall be taken by consensus by the Contracting Parties, which shall also approve the management measures applicable to the area" (Article 9 § 4 alinea c) and in any case "the Contracting Parties undertake to observe the rules thus laid down" (Article 9 § 5).

But this provisions say nothing about the four Mediterranean States that have not ratified the 1995 Protocol, and above all about the non Mediterranean States which are not Contracting Parties to the Barcelona System. Article 28 *Relationship with Third Parties*, however, seems to be innovative because it provides that "the Parties shall invite States that are not Parties to the Protocol and international organizations to cooperate in the implementation of this Protocol" (§ 1), but over all that "the Parties undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the principles or purposes of this Protocol" (§ 2). But actually, Mediterranean States have limited instruments of action, in law, and only pure incentive means.

Anyway, the fact remains that this is the only system in the world to provide a legal basis for the creation of Marine Protected Areas in the high seas and legal elements for their enforcement. With respect to high seas by default, the issue of enforcement could easily find a practical solution if coastal States proclaimed, in one way or another, their national jurisdiction over the surjacent waters of the Mediterranean Sea.

Nevertheless, the way seems to be potentially already open in the Mediterranean *towards heritage protection of the marine environment*.

2. Towards heritage protection of the marine environment

Actually it is necessary to go further than positive law, to imagine new legal solutions thinking in a dynamic and prospective way, to enhance the protection already afforded by the Barcelona System and completed by a cross-sectoral approach thanks to initiatives of the General Fisheries Commission for the Mediterranean[75] (for example, Fisheries Restricted Areas-FRA's)[76] and in part by some legal instruments of the European Union[77].

[74] *Cf.* Article 34 of the Vienna Convention on the Law of Treaties *General rule regarding third States*: "A treaty does not create either obligations or rights for a third State without its consent".
[75] www.gfcm.org/gfcm/en.
[76] *Cf.* General Fisheries Commission for the Mediterranean, Report twenty-ninth Session, Rome Italy 21-25 February 2005, Report GFCM, N° 29, Rome FAO 2005, Annex G, p 37-38. General Fisheries

For this purpose, it is necessary to think *pursuant to a general systemic approach* (A) but *in accordance with a heritage approach* (B).

A) Pursuant to a general systemic approach

Indeed, the Mediterranean may be considered as a whole and unique ecosystem[78], thus reluctant to legal concepts of differentiation and fragmentation of spaces, and determination and delimitation of boundaries.

But nothing is possible except in the framework of positive international law as provided by the Convention on the Law of the Sea, that is to say *without prejudice to the jurisdiction of the coastal States* (a); nevertheless improvements may be achieved, especially *thanks to biodiversity protection zones* (b).

a) Without prejudice to the jurisdiction of the coastal States

Indeed, it is necessary to respect both the territorial jurisdiction of the coastal States and their sovereign rights over the resources of the so-called national spaces.

In terms of territorial jurisdiction, the question is different depending on the spaces considered. The territorial sea[79] is obviously outside of the study, but beyond 12 nautical miles the legal status is not the same in the case of the seabed and subsoil[80] and for the superjacent waters[81].

Indeed, in the Mediterranean, there is no seabed under the legal regime of Part XI of the 1982 Convention[82], that is to say no Area and no positive internationalization in terms of "common heritage of mankind" (Article 136)[83]. All the seabed and subsoil is

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Commission for the Mediterranean, Report thirtieth Session, Istanbul Turkey 24-27 January 2006, Report GFCM N° 30, Rome FAO 2006, Annex E, p 31-32. General Fisheries Commission for the Mediterranean, Report thirty-third Session, Tunis Tunisia 23-27 March 2009, Report GFCM N° 33, Rome FAO 2009, Annex G, p 37-38.

[77] For instance, the Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ L 206, 22.7.1992, p 7.

[78] *Cf.* M. Würtz: Mediterranean Pelagic Habitat. Oceanographic and Biological Processes, An Overview, Gland & Malaga, UICN 2010.

[79] *Cf.* Article 2 of UNCLOS *Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil*: "1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil. 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law".

[80] Part VI of UNCLOS *Continental Shelf*, Articles 76 to 85.

[81] Part V of UNCLOS *Exclusive Economic Zone*, Articles 55 to 75.

[82] Part XI of UNCLOS *The Area*, Articles 133 to 191.

[83] Article 136 *Common heritage of mankind*: "The Area and its resources are the common heritage of mankind"; cf. also Article 137 Legal status of the Area and its resources: "1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or

continental self of coastal States, and the sovereign "rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation" (Article 77 § 3); they are existing *ipso facto et ab initio*[84]. So, coastal States have 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, not only thanks to the Convention on the Law of the Sea but potentially because there is a specific Protocol in the Mediterranean system now in force[85]; and obviously coastal States could be encouraged to ratify more generally the so-called 1994 Offshore Protocol.

Regarding the superjacent waters, the legal situation is totally different. There are no conventional rights *ipso facto et ab initio*, and coastal States have to proclaim their jurisdiction over the "area beyond and adjacent to the territorial sea" (Article 55), within 200 nautical miles[86], to enjoy the related sovereign rights and the necessary powers to protect the marine environment[87]. From this point of view, the legal situation has evolved considerably from a *res nullius* status to a progressive jurisdictionalisation.

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sovereign rights nor such appropriation shall be recognized. 2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority. 3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized".

[84] Article 77 *Rights of the coastal State over the continental shelf*: "1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. 2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State. 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation. 4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil".

[85] 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, entered into force on March 24th, 2011, but between six Mediterranean States only: Albania, Cyprus, Libya, Morocco, Syria, Tunisia.

[86] Article 57 *Breadth of the exclusive economic zone*: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured".

[87] Article 56 *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*: "1. In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention. 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI".

Some States have proclaimed exclusive economic zones but most have extended their jurisdiction by the way of *sui generis* functional zones, such as ecological protection zones or fisheries protection zones...

Actually, the relationship with the sovereign rights of States over the resources seems quite obvious. Indeed, most of these zones under national jurisdiction aim to an economic purpose and tend to the legal appropriation of the living and, to a lesser extent, non living resources of the sea by the coastal States. This is one of the most important outcomes of the new law of the sea.

Obviously, the rights to exploit biological resources should not prevent States from protecting species. On the contrary, as stated by the Preamble of the Convention on Biological Diversity, because "States have sovereign rights over their own biological resources", they "are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner". In the same way, Article 11 § 1 of the 1995 Barcelona Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean states that "the Parties shall manage species of flora and fauna with the aim of maintaining them in a favourable state of conservation".

In practice, both aspects -right to exploit resources and need for conservation of biodiversity- have to be balanced. Coastal States should be more aware of the exhaustibility of living resources of the sea and adopt an ecosystemic approach, in order to develop a proactive dynamic for the environment of the Mediterranean *thanks to biodiversity protection zones*.

b) Thanks to biodiversity protection zones

The Mediterranean is an enclosed sea where the space is constrained by the physical geography; the shores are nowhere separated by more than 400 nautical miles. So, the legal qualification of the Mediterranean in terms of high seas is recessive and that is why it seems appropriate to speak of high seas by default.

By the fact, it is very difficult to protect, effectively and efficiently, the marine environment in such a context. And it is one of the very reasons why the coastal States have begun a process of jurisdictionalisation of the Mediterranean Sea, proclaiming *sui generis* functional zones instead of exclusive economic zones.

But States only enjoy fragmented legal powers in such zones, which are specially devoted to one particular sectoral aspect and leave all the others characterizations of the high seas. It is not sufficient and the Mediterranean environment needs a more global and uniform protection.

Obviously, and despite the reluctance of States, a general proclamation of exclusive economic zones could be considered as a solution in the Mediterranean as elsewhere in the world. In Agust 2009, France has declared to be going to proclaim an

EEZ in the Mediterranean[88], now only an Economic Zone, and maybe this could be the starting point of the generalization pursuant to the 1982 Convention, especially on the north shore of the Mediterranean Sea.

But in fact, nothing happens and this option appears not to be the easier and best solution for the Mediterranean.

States are still reluctant, because proclaiming EEZ previously assume to solve maritime delimitation problems and legal disputes involved.

Furthermore, the real question is the opportunity and desirability of widespread EEZ proclamation, especially on the European shore. Indeed, if the seven Mediterranean States also members of the European Union declared an EEZ, they would automatically lose most of their jurisdiction over the superjacent waters beyond 12 nautical miles, which would be transferred to Brussels. This cannot be a good solution to protect efficiently the Mediterranean environment, because only seven of the twenty-one coastal States are members of the European Union and above all because the Mediterranean States are a minority among the twenty-seven members of the European Union; so issues specifically Mediterranean are perceived as peripheral and therefore marginalized.

In practice, such legal developments present a lot more disadvantages than advantages, in terms of protecting the marine environment of the Mediterranean. But it would be different if States rather proclaimed biodiversity protection zones.

The law of the European Union has an integrative purpose, but a biodiversity protection zone would not allow its exercise over the surperjacent waters, to the same extent as it would be the case in an EEZ. Besides, the marine environment and its resources would not be considered only in terms of economic exploitation and human activities, but ontologically as being part of the Mediterranean biodiversity it would aim to protect, pursuant to sustainable development issues. Another advantage is that biodiversity protection zones would not really jeopardize the traditional freedoms of the high seas, provided they would be exercised in accordance with the Mediterranean biodiversity. Maritime delimitation issues would also be less critical from a political and legal point of view, since biodiversity protection zones are not conventional zones; the need for precise jurisdictional lines would be less strong than between EEZ. Overlapping areas would be more admissible and likely to be more easily managed

[88] On August 24th, 2009, Jean-Louis Borloo, then the Minister of Ecology, Energy and Sustainable Development, has announced the forthcoming proclamation of a French Exclusive Economique Zone in the Mediterranean; *cf.* AFP: La France va décréter une zone économique exclusive (ZEE) en Méditerranée, August 25th, 2009; *cf.* also, Sénat: Création d'une zone économique et exclusive en Méditerranée, 13ème législature, Question orale sans débat n° 0611S de M. Roland Courteau (Aude - SOC) publiée dans le JO Sénat du 03/09/2009, page 2079, & Réponse du Secrétariat d'État auprès du ministre d'État, ministre de l'écologie, de l'énergie, du développement durable et de la mer, en charge des technologies vertes et des négociations sur le climat publiée dans le JO Sénat du 14/10/2009, page 8494, www.senat.fr/questions/base/2009/qSEQ09090611S.html. This declaration remained a dead letter and no new area has so far been proclaimed by the French Government.

jointly, in terms of conservation of the marine environment, protection against pollution and biodiversity preservation, *in accordance with a heritage approach*.

B) In accordance with a heritage approach

Protecting the marine environment of the Mediterranean supposes to go beyond legal fragmentation of jurisdictions and spaces, and to comprehend the high seas by default as a global area, forming *the Mediterranean common heritage* (a) of coastal States, while trying to conciliate *States responsibility and shared governance* (b).

a) The Mediterranean common heritage

A heritage approach of the Mediterranean biodiversity seems to be necessary to protect effectively the common marine environment of the high seas by default.

In an enclosed sea, with a unique ecosystem and a biology marked by interdependance, a common culture and civilizational heritage, the idea is almost self-evident but in practice, however and so far, has no more than a marginal dimension in legal terms.

It is mainly included in the Preamble of the 1995 Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, which refers expressly to "the Mediterranean natural and cultural heritage" and to the necessity of "improving [its] state, in particular through the establishment of specially protected areas and also by the protection and conservation of threatened species".

In the universal law, the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, adopted in 1972[89], first established the principle of the legal existence of a "natural heritage", defined in Article 2 as including "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty".

Even before the invention of the concept of biodiversity, a decade later, the idea of its heritage dimension seems to have thus benefited, even subsidiarily, from a conventional legal basis, as also evidenced by the reference to the "*World Heritage List*" (Article 11)[90].

[89] Adopted by the General Conference at its seventeenth Session, Paris, November 17th, 1972; entered into force on December 17th, 1975.

[90] Article 11: "1. Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory,

But the 1995 Barcelona Protocol is the only conventional text specifically dedicated to biodiversity to refer expressly to the concept of "Mediterranean heritage"[91], that is to say to adopt a heritage approach of biodiversity, with a broad conception including both natural and cultural aspects[92]. Despite, the heritage dimension of Mediterranean biodiversity and ecosystem is so far almost remained a dead letter in law. States are still very reluctant to adopt such an approach, especially in an enclosed sea like the Mediterranean. Indeed, if there is a "Mediterranean cultural and natural heritage", it is necessarily a common heritage, the management of which is supposed to conciliate *States responsibility and shared governance*.

b) States responsibility and shared governance

Contemporary international law confers on the coastal States a primary responsibility made of rights and duties: rights over spaces and resources, as provided by the United Nations Convention on the Law of the Sea; duties of protection and preservation of the marine environment, pursuant to Part XII and environmental law subsequent developments in terms of biological diversity.

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which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance. 2. On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of "World Heritage List" a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years. 3. The inclusion of a property in the World Heritage List requires the consent of the State concerned. The inclusion of a property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State shall in no way prejudice the rights of the parties to the dispute. 4. The Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of "list of World Heritage in Danger", a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. This list shall contain an estimate of the cost of such operations. The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves. The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately. 5. The Committee shall define the criteria on the basis of which a property belonging to the cultural or natural heritage may be included in either of the lists mentioned in paragraphs 2 and 4 of this article. 6. Before refusing a request for inclusion in one of the two lists mentioned in paragraphs 2 and 4 of this article, the Committee shall consult the State Party in whose territory the cultural or natural property in question is situated. 7. The Committee shall, with the agreement of the States concerned, co-ordinate and encourage the studies and research needed for the drawing up of the lists referred to in paragraphs 2 and 4 of this article".

[91] Preamble: "The Contracting Parties to the present Protocol, [...] Stressing the importance of protecting and, as appropriate, improving the state of the Mediterranean natural and cultural heritage, in particular through the establishment of specially protected areas and also by the protection and conservation of threatened species".

[92] *Cf.* also, Articles 4 et 8 § 2 and Annex I points A alinea a and B § 2.

State is ontologically decisive in the international legal system, but this does not prevent coastal States to comprehend the Mediterranean common heritage in terms of biodiversity and shared governance based on their individual and collective responsibility. The evolution of legal conceptions should on the contrary help to define coastal States as the trustees of the Mediterranean biodiversity that involved the spaces and resources over which they have jurisdiction. Thus, and regarding the protection of the marine environment, all the States bordering the Mediterranean must be regarded as the custodians, in space and time, of a true common heritage.

As in the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, the primary responsibility of the territorial State does not exclude the shared governance of which it constitutes on the contrary the legal basis. The approach conventionally adopted for the "*World Heritage*", in particular by reference to the "*World Heritage List*" (Article 11) and the "*World Heritage Committee*" (Articles 8 and following), is *in fine* also likely to be applicable in the Mediterranean. The 1995 Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean recognizes the legal concept of "*Mediterranean heritage*" and the SPAMI List appears to be a potential instrument of protection of the marine environment. By the way, positive law provides Mediterranean States with means of action, but most of them are not yet sufficiently used.

Even without considering the adoption of new texts, both universal and regional law provide a genuine legal basis for the protection of the marine environment of our Mediterranean Sea, even beyond 12 nautical miles[93]. But it is obvious that the current system has to be improved so as to become more operational and effective.

First of all, the Barcelona Convention and its Protocols have to be more generally ratified by coastal States, especially the 1995 Protocol in order to ensure the Mediterranean enforcement of SPAMIs.

Biodiversity protection zones must be generally declared in the Mediterranean as a minimal legal basis to support the rights and duties of the coastal States regarding the protection of the marine environment beyond 12 nautical miles, so as to give an operational and juridical status to the high seas by default.

The principle of shared governance, and individual and collective States responsibility, should be clarified in terms of trusteeship, that is to say by balancing the respect of the jurisdiction of coastal State over the spaces and resources and the need for conservation and protection of the ecosystem and environmental heritage.

The SPAMI List should become an effective multilateral framework of shared governance with a management system of variable geometry, depending on the area, its

[93] For an example of possible application, *cf.* N. ROS, *Legal Governance of Mediterranean Submarine Canyons, in Mediterranean Submarine Canyon Ecosystems: a Review for Conservation*, Gland & Malaga, UICN 2012 (to be published).

purpose, location and characteristics (unilateral, bilateral, trilateral, sub-basin, basin, whole Mediterranean).

It would also be necessary to give an organic or institutional dimension to the shared governance of the Mediterranean, either within the RAC/SPA or creating a new instance; furthermore it might be necessary to create a body likely to ensure the representation of all the stakeholders in accordance with the principle of governance.

Obviously, a new protocol specifically dedicated to the Mediterranean heritage could also be considered, although the current economic crisis does not seem to create a political climate conducive to the establishment of new legal commitments.

But it could nevertheless appear justified if the new protocol to the Barcelona Convention incorporated natural and cultural heritage issues, in order to provide Mediterranean solution of shared governance, beyond 12 nautical miles, to address challenges of environmental protection but also to protect the unique underwater, historical and archaeological, heritage of the Mediterranean.

In fact, the case of the Mediterranean is not different from that of the high seas in general, nor of any other international spaces.

It is just easier to solve and can be used as a model. In this enclosed sea, the international space is recessive to the extent that it is still high seas by default and will one day or another disappear to give way to national jurisdiction zones, all together constituting the common heritage of the coastal States and likely to be managed and protected as such.

As shown by the example of the Mediterranean, enhancing the status of common heritage of international spaces seems to be currently the only real way to protect their environment.

ENVIRONMENTAL PROTECTION OF THE MEDITERRANEAN SEA

Abstract: The environmental protection of the Mediterranean appears to be a special case, both from the point of view of universal and regional law, but it can certainly be used as a model. Under universal law, the Mediterranean is an enclosed sea and there would no longer exist any high seas if the coastal States decided to extend their jurisdiction over the superjacent waters. But *Mare Nostrum* is precisely the only one in the world where States remain reluctant to extend their jurisdiction pursuant to UNCLOS and still not generally proclaim exclusive economic zones. At the regional level, the Mediterranean Action Plan and the Barcelona Convention and its Protocols form the most comprehensive system ever adopted as a Regional Seas Programme under UNEP's umbrella. Furthermore, it is the only regional sea system to provide

coastal States with a legal basis for environmental protection in the high seas, thanks to the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean. But the protection of the Mediterranean environment can and should be improved so as to become more operational and effective, thanks to the proclamation of biodiversity protection zones and in accordance with a common heritage approach, conciliating States responsibility and shared governance.

Keywords: Barcelona Convention and Protocols. Biodiversity. Biodiversity Protection Zone. Common Heritage. Environmental Protection. High Seas. International Maritime Organization. Marine Protected Areas. Mediterranean Sea. Prevention of Pollution. Specially Protected Areas of Mediterranean Importance. United Nations Convention on the Law of the Sea.

PROTECCIÓN DEL MEDIO AMBIENTE EN EL MAR MEDITERRÁNEO

Resumen: la protección del medio ambiente del Mediterráneo parece ser un caso especial, tanto desde el punto de vista del Derecho general y particular, pero, sin duda, se puede utilizar como modelo. Bajo el Derecho general, el Mediterráneo es un mar cerrado y ya no existiría el alta mar, si los Estados ribereños decidieran extender su jurisdicción sobre las aguas supradyacentes. Pero el *Mare Nostrum* es, precisamente, el único en el mundo donde los Estados siguen siendo renuentes a extender su jurisdicción de conformidad con la CONVEMAR y, en general, todavía no han proclamado las zonas económicas exclusivas. A nivel regional, el Plan de Acción para el Mediterráneo y el Convenio de Barcelona y sus Protocolos constituyen el sistema más completo que se haya adoptado como Programa de Mares Regionales en el ámbito del PNUMA. Además, es el único sistema marítimo regional que ha proporcionado a los Estados costeros una base jurídica para la protección del medio ambiente en alta mar, gracias al Protocolo sobre Zonas Especialmente Protegidas y la Diversidad Biológica en el Mediterráneo. Sin embargo, la protección del medio ambiente mediterráneo puede y debería ser mejorada para ser más operativa y eficaz, gracias a la proclamación de las zonas de protección de la biodiversidad y de acuerdo con un enfoque de patrimonio común, que concilie la responsabilidad de los Estados conciliación y la gobernanza compartida.

Palabras clave: Convenio de Barcelona y sus Protocolos. Biodiversidad. Zona de Protección de la Biodiversidad. Patrimonio Común. Protección del Medio Ambiente. Alta Mar. Organización Marítima Internacional. Áreas Marinas Protegidas. Mar Mediterráneo. Prevención de la Contaminación. Zonas Especialmente Protegidas de Importancia para el Mediterráneo. Convención de Naciones Unidas sobre el Derecho del Mar.

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