Section 4
Contiguous zone

Article 33
Contiguous zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) **prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;**

(b) **punish infringement of the above laws and regulations committed within its territory or territorial sea.**

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

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Cases: *Church v. Hubbart* (1804), U.S. Supreme Court, 6 U.S. 2 Cranch 187 (1804); *Croft v. Dunphy* [1933] AC 156 (UK); *El Salvador v. Nicaragua*, Central American Court of Justice, Judgment of 9 March 1917, AJIL 11 (1917), 674; *Le Louis* [1817] 165 ER 1464 (UK); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Owners, Officers and Men of the Wanderer* (Great Britain *v.* United States), Award of 9 December 1921, RIAA VI, 68; *Petit Jules* [1850] 39 FOCP 2633 (UK); *Re Martinez* (1959), Court of Cassation (Italy), ILR 28 (1963), 170; *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS; Judgement of 1 July 1999, ITLOS Reports (1999), 10; *United States v. F/V Taiyo Maru*, 395 F.Supp. 413 (D. Me. 1975); *United States v. Gonzalez*, 776 F.2 d 931 (11th Cir. 1985)

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I. Purpose and Function

1 Debates on law of the sea issues have always very much revolved around just one, albeit complex question: Do States dispose of jurisdictional prerogatives in waters adjacent to their coast, and if so, what is the nature of these prerogatives and for which purpose(s) and to what outer limits may they be exercised? Art. 33 is part of the *de lege lata* answer by which UNCLOS III undertakes to balance the various conflicting interests which oscillate in the tension between 'control by the littoral State' and 'liberty of the sea'.

2 In this epic controversy, issues and problems regarding the area and subject-matter today covered by the single article contained in Part II Section 4 of the Convention, soon emerged into the very core of the intellectual battlefield. What caused such conflict was not so much the big issues of principle, which 'waxed and waned through the centuries'[1] ever since the early 17th century when Hugo Grotius and John Selden became the main protagonists in probably the first great doctrinal dispute in the history of international law.[2] Rather, what remained in limbo and caused increasing doubts was whether such a clear-cut but rather simple bipartite 'all or nothing' legal regime really provided an adequate response to the legitimate interests of all relevant stakeholders, in particular those of coastal States. And in fact, from its very beginning, the law of the sea landscape was very much dominated by questions concerning the grey area in between the Territorial Sea ("State Domain") and the (remote parts of the) High Sea ("res omnium commune"). After a long (political and law-making) process, it was only in the second half of the twentieth century that in these 'intermediate waters' three zones, in which coastal States may possibly exercise jurisdiction for limited purposes only, gained general recognition: The contiguous zone, the exclusive economic zone (EEZ) (→ Part V) and the continental shelf (→ Part VI). Whereas the latter two maritime zones have found a rather elaborate treatment in the Convention, the codification of the legal regime of the contiguous zone remains amazingly concise, and perhaps imprecise, thus leaving several issues open to debate.

II. Historical Background

1. The Origin of the Concept

3 The shaping of what today constitutes the legal essence of Art. 33 is not the result of a 'battle of books'.[3] This provision rather owes its existence to almost 300 years of claims and counter-claims by States, seconded and driven by hard, primarily economic facts: At times, smuggling seriously impaired revenues from customs, offshore fishing by ships under foreign flags endangered local income and tax revenues, the uncontrolled influx of merchandise constituted a considerable threat to national health and economic stability, unregulated immigration, for various reasons, ran counter to national politics, and finally, the approach of unrecognized vessels constituted a potential threat to national security.

4 Although history knows of a number of early attempts to bring parts of the sea beyond a generally accepted narrow off-shore belt under the control or jurisdiction of the littoral State,[4] with good reasons one may fix the origins of the development of the modern concept

[1] *Daniel P. O'Connell*, The International Law of the Sea, vol. I (1982), 1.

[2] Triggered by *Hugo Grotius*' seminal work 'The Freedom of the Seas' (1608) and countered by *John Selden's* 'De mare clausum' (1635, translated 1663).

[3] The expression ('bataille des livres') for the Grotius/Selden controversy was coined by *Ernest Nys*, Les origines du droit international (1894), 262.

[4] E. g. Venice in the Adriatic, symbolized by an annual picturesque ceremony of 'espousing', see *Giulio Pace*, De dominio maris adriatico (1619); Genoa on part of the Ligurian Sea, see *Petri B. Borgo*, De dominio serenissimae genuinsis reipublica in mari ligustico (1641); for details *Jan Hendrik W. Verzijl*, International Law

of the contiguous zone to the early eighteenth century, when Great Britain unilaterally claimed functional legislation for very precise purposes in clearly defined waters adjacent to its territorial sea. The 1719 Act for Preventing Frauds and Abuses in the Public Revenues of Excise, Customs, Stamp Duties, Post Office, and House Money, effective as of 1 August 1720, was the first[5] in a whole series of legislation on the subject and authorized the search and seizure of small-size[6] smuggling ships 'found at anchor or hovering within two Leagues from the Shore'.[7] It is interesting to note that in 1802 a statutory provision extended the respective distance to eight leagues,[8] thus bringing it exactly to the 24 NM line which today constitutes the outermost limit of the contiguous zone, in accordance with. Art. 33 (2).

From an international law perspective, these so-called Hovering Acts[9] always stood on 5
shaky ground, as did all other forerunners of the legal regime enshrined in Art. 33.[10] As early as 1817, the most carefully argued landmark decision in the *Le Louis*[11] case vigorously rejected the escalating State practice of visitation and search of foreign ships on the open sea as running contrary to positive international law. Furthermore, the court stated that it could not find any proper legal basis for 'our hovering laws, which […] within certain limited distances more or less moderately assigned, subject foreign vessels to such examination', and was thus constrained to resort to the rather sweeping concept of 'the common courtesy of nations'.[12] By the mid-nineteenth century, ancient claims under the Hovering Acts encountered not only sharp criticism by scholars,[13] but also growing resistance by other States. In the case of the seizure in 1850 of the French smuggling lugger *Petit Jules* 23 miles off the Isle of Wight, the British Government also saw itself deprived of the hitherto steadfast support on the part of its own legal authorities.[14] Finally, and probably most importantly, 'that very embarrassing international question'[15] proved more and more obstructive to the hegemonic aspirations of the rising British Empire itself. Therefore, it is not surprising that at this stage the leading seafaring nation of the time, in a startling volte-face, not only gave up its former claims to extra-territorial jurisdiction,[16] but went on to become one of the most fervent

in Historical Perspective, vol. IV (1971), 11 *et seq*.; on the so-called King's Chambers and other claims to the Dominion of the British Seas, see still unmatched *Thomas W. Fulton*, The Sovereignty of the Sea (1911), offering amazingly rich insights into relevant 17th to 19th century State practice.

[5] The very earliest acts on the subject from the first decade of the 18th century, such as 8 Anne cap. 7 (1709), still lacked any specification with regard to distance.

[6] Up to a tonnage of 50 tons, see also *Christopher J. French*, Eighteenth-Century Shipping Tonnage Measurements, Journal of Economic History 33 (1973), 434 *et seq*.

[7] 6 Geo. I cap. 21, XXXI. LXII; in the English usage, a league was equivalent to three nautical miles (5,556 km). For subsequent legislation see in particular Act of 1736 (now also applying to bigger ships), the preamble of which recalls 'several laws already made to prevent the unlawful importing and clandestine landing and running of prohibited and uncostomed goods' (9 Geo. II cap. 35); Acts of 1763, 1784, 1802, 1825 and 1833; for exact references, see *Philip C. Jessup*, The Law of Territorial Waters and Maritime Jurisdiction (1927), 77 *et seq*.

[8] 42 Geo. III cap. 82; see also Chief Justice *Marshall* in *Church v. Hubbart* (1804), U.S. Supreme Court, 6 U.S. 2 Cranch 187, 234 (1804): "state's power to secure itself from injury may certainly be exercised beyond the limits of its territory" as an "universally acknowledged" principle.

[9] *Bill Gilmore*, Hovering Acts, MPEPIL, available at http://www.mpepil.com (with further references).

[10] For references from State practice, including in particular US liquor laws, *cf. Jessup* (note 7), 80 *et seq* and for a concise analysis of the (U.S.) jurisprudence on the extent and limits of visit and search rights beyond the 3 mile limit under the National Prohibition Act: *Wesley A. Sturges*, National Prohibition and International Law, Yale Law Journal 32 (1923), 259–266.

[11] *Le Louis* [1817] 165 ER 1464 (UK).

[12] *Ibid.*

[13] *Henry Wheaton*, Enquiry into the Validity of the British Claim to a Right of Visitation and Search of American Vessels Suspected to be Engaged in the African Slave-Trade (1842), 145 *et seq*.: 'The assertion of Lord Stowell, that no […] authority can be found [which gives any right of visitation or interruption over the vessels of foreign States] must be considered as conclusive against its existence'.

[14] *Petit Jules* [1850] 39 FOCP 2633 (UK), the Queen's Advocate held that 'the seizure of the French vessel the "Petit Jules" upon the high seas […] was not warranted by the Law of Nations'; see further *Alan V. Lowe*, The Development of the Concept of the Contiguous Zone, BYIL 52 (1981), 109, 111.

[15] Then British Foreign Secretary Lord Palmerston, cited after *Lowe* (note 14), 112.

[16] It was, however, only in the 1952 Customs and Excise Act (15 & 16 Geo. 6 & 1 Eliz. 2 c. 44), a complete rewrite of the pertinent law, that the 'Hovering Acts' were formally repealed; in this regard incorrect *Hugo*

advocates of the three-mile rule as the only legitimate limit of maritime jurisdiction – and clung to this position for almost a century. The 1921 arbitral award in the *Wanderer* case is a perfect reflection of the Anglo-American position on the issue, and it was at the time highly influential for the law-making process in the international arena:

> 'The fundamental principle of the international maritime law is that no nation can exercise a right of visitation and search over foreign vessels pursuing a lawful vocation on the high seas, except in time of war or by special agreement.'[17]

6 However, in the real world, this 'fundamental principle' had already become increasingly strained. British practice itself, shared by a number of other States, always allowed for at least two more exceptions to the strict three-mile interception limit: a) ships were held liable for unlawful acts committed by boats sent within that limit (doctrine of constructive presence),[18] and b) ships suspected for good reasons of having violated local law may be pursued and arrested (doctrine of hot pursuit)[19]. Lively controversies among scholars and learned societies,[20] ambiguities in both national as well as international[21] jurisprudence[22], and finally – probably again most importantly – State practice far from uniformity, had always kept the entire issue on the international legal and political agenda.[23] By the 1930s, the still somewhat contourless concept of a 'contiguous zone', e. g. a zone of jurisdiction for limited purposes adjacent to the territorial sea, had become widely accepted in academia and jurisprudence.[24] However, a number of important maritime States, including *inter alia* Great Britain and Japan, were not (yet) prepared to make the first step on the path into a legal future, which would see a scramble for State control over great parts of the open sea, hitherto free for the use of all. Thus, the state of law on the matter remained unsettled, and no 'international custom, as evidence of a general practice accepted as law' could be established yet.[25] On the contrary, late nineteenth and early twentieth century State practice witnessed a confusing variety of claims of different width to maritime areas adjacent to the territorial zone for security reasons, customs control and other purposes.[26]

Caminos, Contiguous Zone, MPEPIL, para 4 (available at: http://www.mpepil.com), who holds that these Acts were already 'repealed in 1876 by the Customs Consolidation Act', available at: http://www.mpepil.com.

[17] *Owners, Officers and Men of the Wanderer* (Great Britain *v.* United States), Award of 9 December 1921, RIAA VI, 68, 71; probably the most prominent of such treaty exceptions was the Convention between the United States of America and Great Britain for the Prevention of Smuggling of Intoxicating Liquors, 23 January 1924, LNTS 27, 182; similar treaties followed e. g. with Chile on 27 May 1930 and with Poland on 19 June 1930, where the Contracting Parties 'declare their firm intention to uphold the 3 marine miles principle'.

[18] See with complete references *Nicholas M. Poulantzas*, The Right of Hot Pursuit in International Law (2nd edn. 2002), 243 *et seq*.

[19] *Ibid*.; and see further *Guilfoyle* on Art. 111 MN 4–14.

[20] The 'Institut de Droit International' dealt with the subject since 1891, see Hamburg Session, Annuaire 11 (1891), 133 *et seq*.; and the International Law Association since its 27th Session (Paris, 1912, ILA Report (1912), 81 *et seq*.).

[21] In favor of the existence of a 'contiguous zone', see Central American Court of Justice, *El Salvador v. Nicaragua*, Judgment of 9 March 1917, AJIL 11 (1917), 674, 706; and already in 1891 *Manchester v. Massachusetts*, 139 U.S. 240, 258.

[22] The contiguous zone does not hold a prominent place in the more recent jurisdiction of national and international Courts. The quite extensive listing of ICJ rulings on the subject by *Barbara Kwiatkowska*, Decisions of the World Court Relevant to the UN Convention on the Law of the Sea: A Reference Guide (2010), 33–34, is somewhat misleading, since references provided here are primarily to opinions of Judges (Individual/Separate/Dissenting) or statements of Counsel before the Court rather than to actual findings of the Court itself.

[23] For a meticulous account, see *Lowe* (note 14), 133 *et seq*.

[24] See e. g. the *obiter dictum* of the Privy Council in *Croft v. Dunphy* [1933] AC 156 (UK): '[…] it has long been recognized that for certain purposes, notably those of policy, revenue, public health, and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory.'; see also *James L. Brierly*, The Doctrine of the Contiguous Zone and the Dicta in Croft *v.* Dunphy, BYIL 14 (1933), 155 *et seq*.; it is reported that the British Foreign Office tried (in vain) to have this passage omitted before the Award was officially published in the Law Reports, *cf. Lowe* (note 14), 149.

[25] *Cf.* Art. 38 Statute of the Permanent Court of International Justice and Art. 38 Statute of the International Court of Justice respectively.

[26] *Caminos* (note 16), MN 6 *et seq*.

2. Legislative History

a) The Hague Codification Conference (1930). In a questionnaire for the Conference's agenda item 'Territorial Sea'[27], States were asked to answer *inter alia* the following questions: 7

> 'Does the state claim to exercise rights outside the territorial waters subject to its sovereignty? If so, what precisely are those rights? On what are they founded? Are they claimed within a belt of fixed width or within an indeterminate area of the waters adjacent to the coast but outside the territorial sea? Does the state admit any claim by any foreign state to exercise such rights outside the territorial waters subject to the sovereignty of the latter state?'[28]

Whereas some States, among them notably Great Britain and the United States, took an unambiguously negative stance on the matter ('there is no jurisdiction outside the 3-mile limit'), several others were more sympathetic to the proposal made by the Rapporteur, Walther Schücking, according to which '[b]eyond the zone of sovereignty, states may exercise administrative rights on the ground either of custom or of vital necessity. There are included the rights of jurisdiction necessary for their protection.'[29] This draft, though rudimentary, anticipated essential elements of the future 'contiguous zone.'[30] Despite long and learned discussions,[31] it proved impossible to reconcile (often diametrically opposed) positions on crucial issues. Reaching far beyond the fundamental 'to be or not to be'-question, disaccord included namely the list of matters of possible rights of States in the envisaged zone as well as the nature of rights, which might eventually be conceded to littoral States (only enforcement or also legislative jurisdiction), and finally, the width of the zone under discussion. 8

Although the 1930 Conference produced no immediate results on the issue, but rather explicitly postponed the elaboration of a draft convention to a later date,[32] intellectual work done both in the preparatory phase and during the Conference itself, was not at all wasted: The discussions not only identified the general direction in which the law would very likely develop[33] and had a strong influence on subsequent State practice,[34] but also provided most valuable material for future deliberations on the subject.[35] 9

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[27] For a summary of the Conference and its results, see *Hunter Miller*, The Hague Codification Conference, AJIL 24 (1930), 674 *et seq*.; for important preliminary studies with an extensive account of State practice, see Harvard Law School, Draft Convention and Comments on Territorial Waters, AJIL 23, Suppl. No. 2 (Codification of International Law) (1929), 243, 333 *et seq*.

[28] League of Nations, LN Doc. C.74.M.39.1929.V (1929), 22; replies printed in: AJIL 22, No. 1 Suppl. (Codification of International Law) (1928), 8 *et seq*.

[29] League of Nations, LN Doc. C.196.M.70.1927.V (1927), Annex to Questionnaire No. 2.

[30] Although occasionally used already before, this terminology gained general recognition at the 1930 Conference only; *Gilbert Gidel*, Le droit international public de la mer: Tome 3: La mer territoriale et la zone contiguë (1934, reprinted 1981), 361 *et seq*.

[31] League of Nations, LN Doc. C.351(b).M.145(b).1930.V (1930), 11 *et seq*.; the British Delegate *Sir Maurice Gwyer* complained about the strong academic presence of no less than thirty professors of law: 'The presence of these learned Gentlemen' being 'curiously ineffective in debate and lacking readiness and tactical sense […] is not always conducive to the expeditious conduct of business.', cited after *Lowe* (note 14), 146. *Gilbert Gidel* (France), however, was expressly exempted from this critique. The lesson was learnt for future conferences on the topic.

[32] League of Nations, LN Doc. C.351(b).M.145(b).1930.V (1930), 221 (Appendix 4).

[33] 'The states which did not express a desire for a contiguous zone for one purpose or another formed a small minority.', *Jesse S. Reeves*, The Codification of the Law of Territorial Waters, AJIL 24 (1930), 486, 494.

[34] *Cf.* e. g. Declaration of Panamá of 3 Oct. 1939, Consultative Meeting of Foreign Ministers of the American Republics, AJIL 34, Suppl. No. 1 (1940), 1, 17–19, which proclaimed a non-combatant zone of vast extent in waters adjacent to the American continent. Highly controversial, the measure was justified with the 'principle of protective jurisdiction', which was deemed to be firmly anchored in the *opinio juris*, see *Philip Marshall Brown*, Protective Jurisdiction, AJIL 34 (1940), 112, 114 *et seq*., with express reference to the 1930 conference and earlier statements of scholars and learned societies.

[35] The 1956 ILC commentary on Art. 66 (Contiguous Zone) makes twice explicit reference to the 'Preparatory Committee of The Hague Codification Conference (1930)', see ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 39–40.

10 **b) The International Law Commission and UNCLOS I (1958).** Immediately after World War II, the international legal community resumed work on a new and comprehensive law of the sea regime. At its very First Session (1949), the International Law Commission (ILC) took up the topic of the high seas, including the issue of possible rights of States in a zone adjacent to the territorial sea.[36] Clearly basing its work on the presumption that the concept of the contiguous zone as such had already grown into the corpus of customary international law,[37] at its 1950 (Second) Session already the Commission agreed as follows:

> 'CONTIGUOUS ZONES. 195. The Commission took the view that a littoral State might exercise such control, as was required for the application of its fiscal, customs and health laws, over a zone of the high seas extending for such a limited distance beyond its territorial waters as was necessary for such application.'[38]

11 Other proposals, at least in part heralding the upcoming scramble for extended State control over the oceans, were in particular directed at a broadening of the prerogatives of coastal States to further areas (fishing, conservation of living resources, immigration and emigration, security).[39] However, none of these proposals found a majority in the Commission[40] and it was thus the (rather narrow) substance of the early 1950 accord which eventually entered the 1956 draft text for presentation to the Geneva Conference (UNCLOS I):

> '1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to
>
> (a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea;
>
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.'[41]

12 An attempt by the British Government to further narrow the State's enforcement jurisdiction in the zone by omitting the right to 'punish' (para. 1 (b)) remained unsuccessful.[42] Indeed, in conceding to British pressure, the Commission would have inevitably marginalized the entire concept, not only from a legal, but probably even more so from a policy perspective.

13 At the time, the granting of a twelve mile 'control' zone (also) served as some sort of outlet for the increasing pressure of States to extend their offshore jurisdiction, in particular through the enlargement of their territorial seas. However, the Commission made it unambiguously clear that it was not prepared to allow the concept of a zone of limited jurisdiction to encroach upon the traditional legal dichotomy of maritime spaces:

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[36] Designation of *J. P. A. François* as Special Rapporteur, who eventually delivered six reports, which served as the basis for deliberations on the entire topic at seven consecutive ILC-Sessions (1950–1956).

[37] 'International law accords States the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea.', ILC Law of the Sea Articles with Commentaries (note 35), 39 (para. 1).

[38] ILC, Report of the International Law Commission, UN Doc. A/1316 (1950), GAOR 5th Sess. Suppl. 12, reproduced in: ILC Yearbook (1950), vol. II, 364, 384.

[39] ILC Law of the Sea Articles with Commentaries (note 35), 39–40 (paras. 4–7); for an insightful account of pre-1930 State practice regarding jurisdiction and control on the high seas adjoining territorial waters, see *Jessup* (note 7), 75 *et seq*.

[40] In the case of 'security', objections were raised in particular with regard to the 'extreme vagueness' of the term, which would 'open the way for abuses'. And it was argued that 'the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to secure the security of the State', ILC Law of the Sea Articles with Commentaries (note 35), 39–40 (para. 4).

[41] ILC Law of the Sea Articles with Commentaries (note 35), 39.

[42] '[…] cannot accept that the coastal State is entitled to exercise anything more than purely preventive control in its contiguous zone.', ILC, Comments by Governments on the Provisional Articles Concerning the Régime of the High Seas and the Draft Articles on the Régime of the Territorial Sea adopted by the International Law Commission at its Seventh Session in 1955, UN Doc. A/CN.4/99/ADD.1 (1956), reproduced in: ILC Yearbook (1956), vol. II, 80, 88.

> 'It is, of course, understood that this power of control does not change the legal status of the waters over which it is exercised. These waters are and remain a part of the high seas and are not subject to the sovereignty of the coastal State […].'[43]

14 Although initially intended as an interim solution only (until a consensus was reached on the extent of the territorial sea),[44] reference to the baseline (para. 2) was to turn into a pioneering concept for the measurement of all maritime zones alike. The very idea underlying the manner in which the maximum breadth of the zone was to be defined is of enduring relevance, too: 'States which have claimed extensive territorial waters have in fact less need for a contiguous zone than those which have been more modest in their delimitation.'[45] However, the formula eventually adopted did nothing to clarify the exact nature and juridical character of the rights granted to the coastal State.[46] On this crucial point, the Commission was simply unable to produce a united view.

15 The manner in which the contiguous zone regime was shaped at the 1958 Geneva Conference (UNCLOS I) to some extent foreshadowed the rather non-transparent UNCLOS III negotiation process.[47] When being addressed by the Conference's First Committee, ILC-Draft Art. 66 suffered considerable changes, in particular resulting from a Polish amendment, adopted by a narrow majority of 33 to 27 with 15 abstentions.[48] However, following a last-minute American proposal,[49] the plenary, with the overwhelming majority of 60 votes to 0 with 13 abstentions, reversed the First Committee text and again came back to something very close to the original draft.

16 In its final version, Art. 24 of the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ) contained indeed but two new elements: The inclusion of 'immigration' into the catalogue of para. 1 (a) and – following a Yugoslav proposal – a new third paragraph:

> 'Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.'

Art. 24 (2) CTSCZ confirmed the ILC Draft's twelve mile limit, which – in view of the futile efforts to reach consensus on the maximum breadth of the territorial sea – may have been considered at the time as some sort of provisional or substitute arrangement for the determination of a generally acceptable outer limit of State control over coastal waters.

17 **c) UNCLOS III (1982).** Not surprisingly, the general recognition of a twelve mile territorial sea under Art. 3[50] and the emergence of the EEZ (→ Part V) raised the question whether these legal developments would not render the continued existence of a contiguous zone superfluous at all.[51] It was also argued that an extension of the contiguous zone beyond the twelve mile limit would seriously encroach upon international communication and the freedom of naviga-

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[43] ILC Law of the Sea Articles with Commentaries (note 35), 39 (para. 1).

[44] *Ibid.*, 40 (para. 9).

[45] *Ibid.*

[46] For a comprehensive account of views expressed and positions taken on this issue, see *Shigeru Oda*, The Concept of the Contiguous Zone, ICLQ 11 (1962), 131, 138 *et seq.*

[47] It is believed that the contiguous zone regime was earmarked to become part of a package deal on the territorial sea, a deal which in the end did not materialize, *cf. Lowe* (note 14), 165.

[48] For references, see First Committee UNCLOS I, Annexes, UN Doc. A/CONF.13/L.28/REV. 1 (1958), OR II, 116 *et seq.* (para. 26); the revised Article in its entirety, however, was adopted by the rather vast majority of 50 votes to 18 with 8 abstentions.

[49] First Committee UNCLOS I, Annexes, UN Doc. A/CONF.13/L.31 (1958), OR II, 126.

[50] See *Trümpler* on Art. 3 MN 11–13.

[51] Very explicit in this sense e. g. the Cameroon position: '[T]he extension of the zone of national jurisdiction […] rendered the concept of a contiguous zone void and superfluous', Second Committee UNCLOS III, 9th Meeting, UN Doc. A/CONF.62/C.2/SR.9 (1974), OR II, 122; similar Kenya, *ibid.*, 121; however, among African States, too, opinions were split on this issue, for full references, see *Nasila S. Rembe*, Africa and the International Law of the Sea (1980), 112 *et seq.*

tion.[52] The prevailing view at the Conference, however, was that, first, an enlarged territorial sea would in no way compromise the rationale of creating an adjacent 'prevent and punishment zone', and second, the envisaged legal regime of the EEZ was intended to cover entirely different subjects, and that there were thus no overlap in substance between these two maritime zones.[53] Whereas the latter reasoning is rather convincing, this is not the case with the argument in favour of the coexistence of an enlarged territorial sea and a contiguous zone: As the essential *raison d'être* of the contiguous zone being the protection of the shore and its hinterland from certain threats, one may with very good reasons argue that the full sovereign powers accorded to coastal States in the new twelve mile zone do in effect provide adequate and sufficient space and means to accomplish these protective tasks.[54] With no more than 90 States – including a number of non-States Parties to UNCLOS[55] – having made a respective claim in the last more than 30 years, one may indeed wonder whether States really consider the contiguous zone as an essential element in the modern law of the sea.

18 In order to make the legal blueprint for the contiguous zone of Art. 24 CZSCZ fit into the new and complex law of the sea regime established by UNCLOS III, three modifications were deemed necessary:[56] (a) adaption of the maximum extent of the zone to 24 NM; (b) deletion of the words 'of the high seas'; and (c) deletion of para. 3. Unfortunately, the Conference did not seize the opportunity to remove another major ambiguity, which lies in the phrase 'within its territory or territorial sea' used in both para. (a) and (b) of the provision.[57]

19 The duplication of the maximum outer limit of the contiguous zone from 12 to 24 NM under Art. 33 (2) and the deletion of the reference to the 'high seas' in the provision's headline were direct and imperative consequences of the evolution of the law of the sea: Given the extension of the territorial sea to 12 NM, the contiguous zone (delimited pursuant to Art. 24 (2) CTSCZ) would have otherwise lost virtually its entire territorial scope, and the recognition of the EEZ had – subject only to very special circumstances – resulted in a cutting of the contiguous zone's former connection with the high sea (*cf.* Art. 86).[58]

20 The motives for the omission of a provision regarding the delimitation of the contiguous zone between States with opposite of adjacent coasts (Art. 24 (3) CTSCZ) are far less clear: It has been suggested that – 'since the nature of control to be exercised in the contiguous zone does not create any sovereignty over the zone or its resources'[59] – a possible overlap of control

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[52] Second Committee UNCLOS III, 30th meeting, UN Doc. A/CONF.62/C.2/SR.31 (1974), OR II, 234 (paras. 34–36 [German Democratic Republic]); for a brief account of the UNCLOS III discussion of the contiguous zone, *cf. Louis B. Sohn/John E. Noyes*, Cases and Materials on the Law of the Sea (2004), 447 *et seq.*

[53] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 270 (MN 33.4), with further references.

[54] *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 114 *et seq.*; this was obviously also the gist of the argument put forward by the representative of the (former) GDR during the negotiation process, UNCLOS III, Second Committee/30th meeting (note 51), 234 (para. 34); a position which was also shared by many African States, see *Rembe* (note 51), 113.

[55] For Cambodia, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KHM_1982_Decree.pdf; for Islamic Republic of Iran, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_1993_Act.pdf; for Syrian Arab Republic, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/syr_2003e.pdf; for United Arab Emirates, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ARE_1993_Law.pdf; for the USA, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1999_Proclamation.pdf, for Venezuela, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VEN_1968_Decree.pdf.

[56] See also *Janusz Symonides*, Origin and Legal Essence of the Contiguous Zone, ODIL 20 (1989), 203, 207 *et seq.*

[57] See *infra*, MN 22; and *Tommy T. B. Koh*, The Territorial Sea, Contiguous Zone, Straits and Archipelagos under the 1982 Convention on the Law of the Sea, Malaya Law Review 29 (1987), 163, 174 *et seq.*, with further references.

[58] Although under no obligation whatsoever either to extent their coastal waters to the maximum breadth of twelve miles (Art. 3) or to claim an EEZ at all (Arts. 55 *et seq.*), with very few exceptions States have made use of their enlarged range of action to its fullest extent.

[59] Commonwealth Secretariat, Ocean Management: A Regional Perspective – The Prospects for Commonwealth Maritime Cooperation in Asia and Pacific (1984), 39; in the same vein, *Moritaka Hayashi*, Japan: New Law of the Sea Legislation, IJMCL 12 (1997), 570, 572.

activities by two (or more) States was not only acceptable, but was *de facto* perfectly legally sound.[60] It is further argued that the lack of a provision corresponding to Art. 16 (publication and notification of claims to territorial waters), also aptly demonstrates the functional rather than territorial character of the legal regime enshrined in Art. 33. One may wonder whether this very academic approach really stands the test of practice, and States are actually poised to accept neighbouring States exercising control rights emanating from the legal regime of the contiguous zone on the 'wrong' side of a (virtual) median line. Hence, it is probably more correct (and realistic) to assume that the drafters of UNCLOS III, guided by the desire to streamline the voluminous text of the Convention, simply considered Arts. 74 and 75 a sufficient substitute for the deleted paragraph. And, in fact, the delimitation of the EEZ routinely includes delimitation of the contiguous zone, if only implicitly.[61] However, although it is highly recommendable to establish one single delimitation line in disputed waters, the resource oriented quest for an 'equitable solution' (Art. 74 (1))[62] is obviously not the most appropriate approach for the delimitation of the contiguous zone. One should thus seriously consider and, if occasion arises, possibly even give preference to the Yugoslav position on the issue:

> 'Due to the fact that the provisions of the Convention relating to the contiguous zone (article 33) do not provide rules on the delimitation of the contiguous zone between States with opposite or adjacent coasts, […] Yugoslavia considers that the principles of the customary international law, codified in article 24, paragraph 3 of the [1958 Convention], will apply […].'[63]

The non-existence of a specific and explicit delimitation technique – or probably even better so, a *de jure* equidistance rule – is regrettable: Due to the resource-oriented character of both the legal regimes governing the EEZ and the continental shelf, the delimitation of these maritime zones is all too often subject of disagreement and conflict between adjacent or opposite States. Lengthy and arduous negotiations are the best case scenario, belligerent confrontation the worst. Unfortunately, the question of the lateral or seaward delimitation of the contiguous zone – although virtually irrelevant from an economical or strategic perspective – becomes inextricably bound to the solution of conflicts which have in fact nothing to do with the (limited) purposes for which a contiguous zone may be established. Thus, unfortunately enough, in order not to prejudice or otherwise weaken their legal position in an actual or potential conflict over EEZ or continental shelf claim lines, the drawing of 'mere' contiguous zone lines, also remains undone. **21**

III. Elements

1. Territorial Scope of the Contiguous Zone

According to Art. 33 (2), the maximum breadth of the contiguous zone is 24 NM measured from the baselines (→ Art. 5; Art. 7; Art. 9; Art. 10; Art. 11; Art. 13). However, Art. 33 (1) further explains this maritime zone to comprise only a belt of water 'contiguous to its territorial sea' in a seaward direction. Since the vast majority of States has exercised their right under Art. 3 to claim a territorial sea of 12 NM, the *de facto* breadth of the contiguous zone thus amounts – as a rule – to no more than 12 NM.[64] A contiguous zone may not only **22**

[60] See also *Umberto Leanza*, Le régime juridique international de la méditerranée, RdC 236 (1994), 127, 249.

[61] As *Nuno Marques Antunes*, Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process (2003), 101 *et seq*., rightly remarks: 'State practice on contiguous zone delimitation is virtually negligible', with an insightful critical discussion on the entire issue.

[62] See *Tanaka* on Art. 74 MN 16–24.

[63] UN, UNCLOS Declaration made by Yugoslavia upon ratification of the UNCLOS, which has been explicitly confirmed upon succession by Serbia and Montenegro and again by Montenegro, available at: http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSONLINE&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#Participants.

[64] From the outer limit of the territorial sea to the 24 NM line. The respective table published by the UN Division for Ocean Affairs and the Law of the Sea ('Breadth of the zone in nautical miles: 24 nm') is therefore

be proclaimed with respect to mainland territory and islands, but, in pursuance of Art. 121 (2),[65] but also around rocks (*argumentum e contrario* Art. 121 (3)).[66]

2. Legal Status

23 The contiguous zone does not form part of State territory (*argumentum e contrario* Art. 2 (1)).[67] Therefore, unanimity prevails that in the maritime belt adjacent to its territorial sea, States may only exercise limited jurisdictional powers. Given the manner in which the provision is constructed, one must even come to the conclusion that in case of doubt a presumption exists in favor of the freedom of the seas and the non-existence of coastal State jurisdiction in that very zone. The nature of the jurisdictional prerogatives enumerated exhaustively in Art. 33 (1) (a) and (b), however, is less clear.[68] According to the unambiguous wording of the provision (and its forerunner Art. 24 CTSCZ), States are merely entitled to 'prevent and punish' infringements committed within the territory of the coastal State (including its territorial sea).[69] Accordingly, the legal regime established by Art. 33 accords no right whatsoever to extend to or enact specific regulations for the contiguous zone itself, let alone to enforce such regulations against those (ships) suspected of having violated them beyond the seaward limit of the territorial sea. A literal reading in accordance with generally recognized rules of interpretation (*cf.* Art. 31 (1) VCLT: 'ordinary meaning rule') leaves no doubt: UNCLOS allows for no legislative powers at all,[70] but only for a limited enforcement jurisdiction in the contiguous zone. The object and purpose underlying the normative concept of Art. 33 provides further support for this restrictive interpretation: Preventive and punitive measures were deemed to protect the (onshore) public order against very specific dangers emanating from inward or outward movement of ships. Maritime traffic in mere transit beyond the twelve mile limit was (and is) indeed very unlikely to have such a negative impact. Hence, although the presence of foreign naval vessels in the contiguous zone, for example of (disputed) islands and rocks, may well be perceived as a serious threat to national security, it certainly does not in itself constitute an infringement of the rights of the littoral State under Art. 33.[71]

24 However, State practice has not always been in compliance with this strict reading of the legal regime contained in Art. 33:[72] Practice in national court is far from uniform in this

somewhat misleading (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf. See also *Trümpler* on Art. 3.

[65] *Cf. Talmon* on Art. 121 MN 53–55.

[66] *Cf.* e. g. *Jonathan I. Charney*, Rocks That Cannot Sustain Human Habitation, AJIL 93 (1999), 863, 866, with further references.

[67] See *Barnes* on Art. 2 MN 16–19.

[68] For a full discussion see *Churchill/Lowe* (note 54), 116–118.

[69] *Lowe* (note 14), 167, commenting on the 1958 formula, which suffered no changes at UNCLOS III, was undoubtedly right when concluding: 'The final treaty text on the contiguous zone has a plain meaning when its words are read in their ordinary sense. This is that the "crimes" in relation to which the powers of prevention and punishment are given to the coastal State must be committed within the territory or territorial sea of the coastal State'.

[70] In this sense also *John E. Noyes/William J. Clinton*, Current Legal Developments: United States – Establishment of a 24-Mile US Contiguous Zone, IJMCL 15 (2000), 269, 271.

[71] Although the passage on June 9, 2016 of a Chinese naval frigate through the contiguous zone in the area of the disputed Senkaku/Diaoyu Islands (*cf.* LOSIC No. 28, October 2008, 17: Chinese protest against depictions on charts deposited by Japan pursuant to Art. 16 (2) [http://www.un.org/Depts/los/LEGISLATIONAND TREATIES/PDFFILES/mzn_s/mzn61.pdf], Japanese reply: LOSIC No. 28, October 2008, 18) provoked an immediate and harsh diplomatic reaction from Japan ('[…] vehemently protest[s] the Chinese side's stance of unilaterally heightening tension'), under UNCLOS in general (and Art. 33 in particular) there was absolutely no basis to protest the presence of the Chinese vessel – and reference to hard law was thus carefully avoided by the Japanese authorities.

[72] In fact, in the early years, e. g. before the entry into force of UNCLOS III, many unilateral claims to a contiguous zone did not (explicitly) differentiate between enforcement and legislative jurisdiction and claims to the latter were not unusual at all.

respect[73] and it also seems that the occasional claim to and exercise of some sort of (limited) legislative jurisdiction by coastal States in their contiguous zone has met with little resistance in the international community – in particular when generally outlawed activities are at stake (traffic in illegal narcotics, smuggling of arms, terrorist activities, (eco-) "piracy" etc.).[74] In recent years, the emergence of an ever denser network of international legal rules entitling States to intervene in offshore waters on behalf and in the common interest of all States (in relation to piracy, terrorism, pollution), may have contributed to a blurring of the rather clear conventional limits of jurisdictional prerogatives in the contiguous zone. A further obstacle to the rigorous observance of the limits of jurisdictional powers enshrined in Art. 33 results from the fact that, as the law stands today, States do in fact dispose of and exercise quite extensive legislative powers in the area at stake, deriving, however, from other legal regimes (EEZ and continental shelf, Arts. 56 and 70 respectively).[75] Hence, it has become increasingly difficult if not, at least in certain constellations, virtually impossible, to always apply a bright-line test for distinguishing permissible and impermissible legislative activities of States in the contiguous zone.[76] Potential disputes on this and other competence-related issues under Art. 33 fall within the scope of Part XV (Arts. 279–299).

One of these latter issues is the lingering ambiguity of the formula 'within its territory or territorial sea', used in both paras. (a) and (b). A more restrictive reading of these provisions confines the scope of application of para. (b) ('jurisdiction to punish') to outgoing ships. Since 'no offence against the laws of the coastal State is actually being committed at the time' of an intervention by costal State authorities, to subject incoming maritime traffic heading towards the territorial sea to punitive measures (arrest, fines, imprisonment etc.) would, according to this view, be in blatant disregard of the clear wording of Art. 33 (1)(b).[77] Mere preventive measures under para. (a) – visit, search and eventually a refusal to let a suspicious ship enter the territorial sea – were thus the only lawful remedies the Convention has placed at the disposal of coastal States *vis-à-vis* ships not yet having entered the territorial sea. Protagonists of a more liberal interpretation advocate for the application of Art. 33 (1)(b) to outgoing and incoming ships alike, arguing both with the legislative history and a long-standing State practice, demonstrating a clear tendency towards the equal treatment of inbound and outbound traffic.[78] Whereas practical needs and State practice may possibly speak in favor of this liberal interpretation,[79] the problem with the legislative history is not 25

[73] A number of (controversial) rulings of national Courts even suggest that Art. 24 CTSCZ and Art. 33 may not have eliminated preexisting rights under customary law wider than those granted by the conventional regime, see e. g. *United States v. F/V Taiyo Maru*, 395 F.Supp. 413 (D. Me. 1975) (US); *United States v. Gonzalez*, 776 F.2 d 931 (11th Cir. 1985) (US); Court of Cassation, *Re Martinez* (1959), ILR 28 (1963), 170 (Italy).

[74] See, however, *infra*, MN 34 on excessive claims relating to security.

[75] See also *Maria Gavouneli*, Functional Jurisdiction in the Law of the Sea (2007), 61 *et seq*.

[76] A more recent example of the uncertainties which still prevail in this respect is found in the ITLOS, *The M/V 'SAIGA' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgement of 1 July 1999, Separate Opinion of Judge Vukas, ITLOS Reports (1999), para. 3: 'Guinea proclaimed also its contiguous zone; in the proceedings, it even claimed that the Saiga supplied gas oil to the fishing boats in its contiguous zone off the coast of the island of Alcatraz. However, in the course of the proceedings, its reference to its contiguous zone became sporadic and inconsistent. It finally based its claims only on its alleged rights to enforce its customs legislation in its exclusive economic zone'; and thus Judge Laing in his Separate Opinion, *ibid*., para. 2 concludes: '[i]n view of the uncertainty attending Guinea's apparent invocation of the Convention's provisions on the contiguous zone in support of its actions, the Tribunal has not made a decision about that question.' He further on his part addresses in a singularly careful manner some key issues regarding the scope and limits of the powers granted under Art. 33, *ibid*., paras. 9–16; see also *David Anderson*, Coastal State Jurisdiction and High Sea Freedoms in the EEZ in the Light of the Saiga Case, in: Clive R. Symmons (ed.), Selected Contemporary Issues in the Law of the Sea (2011), 105.

[77] *Gerald Fitzmaurice*, Some Results of the Geneva Conference on the Law of the Sea, ICLQ 8 (1959), 73, 114. Fitzmaurice served as vice-president of the UK delegation to the 1958 Geneva Conference and his position concurs with the official British position on the subject.

[78] See in particular, most carefully argued, *Oda* (note 46), 131 *et seq*.

[79] See e. g. The Netherlands Understanding of Art. 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: '[…] to the extent that vessels navigating in the contiguous zone act in infringement of the Coastal State's customs and other regulations, the Coastal State is entitled to exercise,

resolved: The issue was in fact discussed extensively at the 1958 Conference, but an initiative to delete the words 'within its territory or territorial sea'[80] did not find the necessary majority and thus the original wording of the ILC draft prevailed. If one takes the basic rules of interpretation seriously (Art. 31 (1) VCLT), it seems indeed difficult to extend para. (b) to ships not yet having committed any infringements within the meaning of that provision.

3. Catalogue of Purposes

26 The jurisdictional prerogatives which a coastal State may exercise in the contiguous zone are limited to a narrow band of laws, namely those in respect of customs, fiscal matters, immigration and sanitary matters. This catalogue is exhaustive.[81] It finds an equivalent in Art. 19 (2)(g) and Art. 21 (1)(h). The Proliferation Security Initiative (PSI), a multinational response to the challenge posed by the threat of the proliferation of weapons of mass destruction launched in 2003[82] and today (2016) actively run by 21 States[83] ("the Operational Experts Group (OEG)") and politically supported by 105 States (October 2015), gives rise to a number of legal questions, including the respect for the limits imposed by Art. 33 on the authority of coastal States in their contiguous zone.[84] Para. 4 (d) of the 2003 Interdiction Principles[85] calls upon participating States *inter alia*

> '[t]o take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified […].'

The bundling together in this provision of three distinct geographical areas (internal waters, territorial sea, contiguous zone), each governed by a decisively different legal regime, is certainly unfortunate. Of course, from a policy perspective, the strengthening of the combined efforts of the world community to combat trafficking of weapons of mass destruction (and related materials) is legitimate. However, it was always a key understanding of participating States, and should continue to be so in the future, that interception activities must scrupulously respect the limits imposed by relevant international legislation. Indeed, in order to secure consistency with UNCLOS rules in general, and Art. 33 in particular, the wording of para. 4 (d) of the 2003 PSI Statement allows for a (narrow) interpretation of the 'right' to impede and stop shipments. The correct understanding of the above paragraph is thus that reference made to maritime zones is not only to geographical areas but also to the legal regime intimately and inseparably connected with it. Undoubtedly, the PSI itself has no

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in conformity with the relevant rules of the international law of the sea, jurisdiction to prevent and/or punish such infringement', the full text of the Understanding is available at: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=VI-19&chapter=6&lang=en#EndDec.

[80] Advanced, *inter alia*, by the Italian Government, ILC, Comments by Governments on the Provisional Articles Concerning the Régime of the High Seas and the Draft Articles on the Régime of the Territorial Sea adopted by the International Law Commission at its Seventh Session in 1955, UN Doc. A/CN.4/99/Add. 8 (1956), reproduced in: ILC Yearbook (1956), vol. II, 60.

[81] Misleading or at least unclear therefore the Preamble of the Act of the Kingdom of the Netherlands Relative to the Establishment of a Contiguous Zone, Staatsblad No. 387 (2005), 1: '[…] Whereas We have considered that, mainly [sic] in order to prevent the infringement of regulations governing customs, taxation, immigration, public health or historic objects'.

[82] US Department of State, Proliferation Security Initiative (PSI): Statement of Interdiction Principles of 4 September 2003, available at: http://www.state.gov/t/isn/c27726.htm; for a brief account of the background of the initiative, *cf. Michael Byers*, Policing the High Seas: The Proliferation Security Initiative, AJIL 98 (2004), 526 *et seq.*; and for up to date information, see http://www.psi-online.info.

[83] At present OEG comprises: Argentina, Australia, Canada, Denmark, France, Germany, Greece, Italy, Japan, Republic of Korea, The Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Singapore, Spain, Turkey, United Kingdom, United States.

[84] *Christer Ahlström*, The Proliferation Security Initiative: international law aspects of the Statement of Interdiction Principles, SIPRI Yearbook (2005), 741–767.

[85] PSI: Statement of Interdiction Principles (note 82).

law-making power and due to the persistent resistance of major sea faring nations (including in particular China and India), a customary law-making process aiming at a modification (and thus expansion) of State prerogatives in the contiguous zone has not been set into motion.[86] It has rightly been pointed out that ultimately such a change in the law would also run counter to the well-understood interests of States participating in the initiative.[87]

Some 300 years ago, smuggling activities were the very point of departure for the establishment of contiguous zones and the development of their legal regime.[88] Therefore, it is not surprising that there has never been any serious discussion, neither in the ILC nor later at UNCLOS I or III, that customs and fiscal regulations constitute core elements on the list of subjects for which a contiguous zone could be established. 27

The same unanimity prevailed when it came to add to the list 'health' or, as this item was later named for purely linguistic reasons, 'sanitary' purposes.[89] Although there can be no doubt as to the traditional and rather narrow meaning and purpose of this term (protection of a coastal State's public health against disease), in recent years attempts were made to extend the meaning of the term to include in particular pollution, as at least an indirect threat to public health. This discussion was fueled by statements and national legislation accompanying the 1999 US Contiguous Zone proclamation, which suggests an interpretation of US government authorities equating sanitary with 'pollution'. The ordinary meaning of the term 'sanitary' and the legislative history cast serious doubts on the *de lege lata* admissibility of such a broad understanding.[90] However, the discussion shows that with respect to certain areas and new challenges there might indeed exist a lack of fine-tuning between the legal regimes of the contiguous zone on the one hand and the EEZ and others, such as the International Convention for the Prevention of Pollution from Ships (MARPOL) on the other. An all too narrow interpretation of the purposes enumerated in Art. 33 should therefore not stand in the way of effectively combatting new and serious threats, for example those originating in vessel-source pollution. 28

The question as to whether or not to explicitly include 'immigration' as a separate item on the list lead to lengthy and controversial discussions during the mid-1950s deliberations on the subject by the ILC. At that time, many members were not at all at ease with the traditional proposition that immigration was sufficiently covered by the term 'customs regulation' and the view prevailed that a future legal regime should no longer equate the movement of people and the trading of goods. However, the majority of the Commission, driven by human rights considerations, was not willing to accept the idea, launched *inter alia* by Hersch Lauterpacht,[91] that the concept of immigration should (implicitly) cover the notion of emigration, too.[92] Clearly, for many members tragic experiences from an all too recent past were still very much alive. In the words of Sir Gerald Fitzmaurice: 29

[86] For an in-depth discussion and obviously a slightly different approach, see *Byers* (note 82), 532 *et seq.*

[87] *Ibid.*, 527: 'That [UNCLOS high seas] regime forms the legal foundation for the global mobility of U.S. forces.', with further references.

[88] See *supra*, MN 3–5 with further references.

[89] On the initiative of *Manley Hudson*, see ILC, Summary Records of the Meetings of the 2nd Session, ILC Yearbook (1950), vol. I, 204–205 (paras. 111–112): 'Mr. Hudson said that within that zone a sovereign State had also the right to protect its sanitary interests. A number of American States set great store by that principle. He asked Mr. Amado to agree to the word "sanitary" being inserted in his text ['principles' which constituted the basis for discussion in the Commission on the topic]. Mr. Amado agreed to the insertion'.

[90] See in particular *James Carlson*, Presidential Proclamation 7219: Extending the United States' Contiguous Zone – Didn't Someone Say This Had Something to Do with Pollution?, University of Miami Law Review 55 (2001), 487, 496 *et seq.* and 520 *et seq.*, with further references; further *Noyes/Clinton* (note 70), 272; see also *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 281, who, however, comes to the conclusion: 'The regime for the contiguous zone in the LOSC seems irrelevant for coastal State jurisdiction over vessel-source pollution.'

[91] ILC, Summary Records of the Meetings of the 5th Session, ILC Yearbook (1953), vol. I, 167.

[92] The comment on the article did indeed comprise an explicit reference to emigration. See also ILC, Report of the International Law Commission, UN Doc. A/2456 (1953), GAOR 5th Sess., reproduced in: ILC Yearbook (1953), vol. II, 200, 220 (para. 111): '[…] in addition, the Commission thought it necessary to amplify the formulation previously adopted by referring expressly to immigration – a term which is also intended to include emigration'.

> 'While it will be reasonable to control immigration, regulation of emigration may lead to abuse – for example, to the arrest, outside the territorial sea, of political refugees leaving a country on a foreign ship.'[93]

30 The proposal to include 'immigration' was eventually rejected by the narrow majority of 10 votes to 8 with 1 abstention: The time was not yet ripe to take a decision with unpredictable implications[94] on such a human rights sensitive issue. It was thus only at the 1958 Conference that, adopting a proposal made by the Philippines and Ceylon, 'immigration' was added to the catalogue of Art. 24 (1)(a) CTSCZ, which was eventually – in 1982 – to become Art. 33 (1)(a). Migration having evolved into one of the most pressing problems on today's international agenda, the prevention of illegal immigration has become a matter of top priority for the legislative and law enforcement activities of many coastal States, particularly in the developed world.[95] Unfortunately, for a number of States interception operations in the contiguous zone have become a suitable means to prevent migrants from claiming refugee status under national or international legislation. As John Howard, then Prime Minister of Australia, frankly admitted in the context of the 2001 *MV Tampa/HMS Manoora* incident off the Australian coast:

> 'At no stage did this latest vessel reach Australian territorial waters. It did enter the contiguous zone, but it did not enter the territorial waters and as a result questions of application for asylum status do not arise.'[96]

That being said, it follows from the wording and the context of Art. 33 that the coastal State is not authorized to exercise sovereign rights in the field of immigration but is restricted to exercising control over the contiguous zone.[97] From a refugee law standpoint this might result in an unsatisfactory situation, but the relevant prerequisites of international refugee law do not address this situation in positive terms.[98]

4. Hot Pursuit

31 In codifying a well-established rule of customary international law, Art. 111 provides that hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of

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[93] ILC, Summary Records of the Meetings of the 8th Session, ILC Yearbook (1956), vol. I, 75; support by *A. E. F. Sandström*: 'In the case of emigration […] what was involved was the liberty of the individual, whose right to leave his country as he wished should not be infringed, as was clearly stated in Article 13 of the Universal Declaration of Human Rights', *ibid*., 76.

[94] *Cf. Shushi Hsu*: 'To assimilate emigration to immigration would certainly involve a violation of human rights. In view of the disturbed state of the world, the question could not yet be finally settled, however.', *ibid*., 76.

[95] See for just one example, New Zealand Department of Labour, Immigration Operational Manual (updated 24 March 2014), available at: http://www.immigration.govt.nz/opsmanual/, Y3.60 Powers of entry and search by immigration officers, members of the Police, and Customs officers: '[…] d. A member of the Police or a Customs officer undertaking immigration duties may enter and search any ship or other sea-borne vessel within the contiguous zone or territorial sea of New Zealand, if they believe on reasonable grounds that there is on board a person who, if they land in New Zealand, will commit an offence against the Immigration Act 2009, or be liable for deportation, or be or likely to be liable for turnaround.'

[96] Cited after: http://articles.cnn.com/2001-09-09/world/aust.immigrants_1_manoora-asylum-seekers-indonesians?_s=PM:WORLD; for a detailed discussion on the various legal issues involved, in particular the highly controversial practice of towing back vessels out of the contiguous zone or even back to the waters of the origin of the vessels, which may indeed hardly be justified with the rights emanating from the Art. 33 legal regime, see the contributions in: *Bernard Ryan/Valsamis Mitsilegas* (eds.), Extraterritorial Immigration Control: Legal Challenges (2010), with a rich account both of the applicable legal regime and State practice; on interception operations in the contiguous zone, see in particular *Anja Klug/Tim Howe*, The Concept of State Jurisdiction and the Applicability of the *Non-refoulement* Principle to Extraterritorial Interception Measures, in: *Ryan/Mitsilegas* (eds.), Extraterritorial Immigration Control: Legal Challenges (2010), 69, 93; and *Richard Barnes*, The International Law of the Sea and Migration Control, in: Ryan/Mitsilegas (eds.), Extraterritorial Immigration Control: Legal Challenges (2010), 103, 126 *et seq*.

[97] *Alexander Proelss*, Rescue at Sea Revisited: What Obligations Exist Towards Refugees?, SIMPLY 376 (2008), 1, 29.

[98] *Ibid*., 33.

that State.[99] This provision makes a twofold reference to the contiguous zone: It provides, first, that such (uninterrupted) pursuit may not only be commenced when the foreign ship is (still) in the territorial (or archipelagic) waters, but also when it is within the contiguous zone of the pursuing State according to Art. 111 (1) cl. 2. And, second, Art. 111 (1) cl. 4 makes it unambiguously clear that in the latter scenario the pursuit may only be undertaken if a violation of the rights for the protection of which the contiguous zone was established has actually already been committed.[100] Thus, in accordance with a long series of case-law,[101] a prior violation of local law (including legislation under the legal regime of the EEZ and the continental shelf under Art. 111 (2)) constitutes an indispensable premise for the taking of enforcement measures via hot pursuit beyond the seawards limits of the territorial sea. Ships in transit within the contiguous zone or inbound ships merely suspected of a possible future violation of local laws (e. g. migrant vessels) may thus under no circumstances be made subject to measures under Art. 111.[102]

5. Article 33 and Article 303

As technological progress in marine archaeology opens access to ever deeper, previously virtually inaccessible sites, for a number of States, the protection of the underwater cultural heritage has evolved into one of the major incentives to establish a contiguous zone.[103] Due to the rather cryptic reference in Art. 303 (2) to Art. 33, it is difficult to determine the precise relationship between the former provision, aiming at granting coastal States certain prerogatives regarding archaeological and historical objects found at sea, on the one hand and the legal regime of the contiguous zone on the other. This question is not only subject of a lively doctrinal debate,[104] but uncertainty also prevails regarding State practice on the issue. 32

6. State Practice

Unlike the legal regime governing the territorial sea (→ Art. 16) and other maritime zones (→ Arts. 75 and 84), the Convention knows of no publicity requirements regarding the existence, the territorial extent and the exact purposes for which a contiguous zone is established. It is hardly surprising, therefore, that difficulties arise in a number of cases when it comes to verifying the actual state of the law.[105] At present, around 90 States have 33

[99] For details, see *Guilfoyle* on Art. 111 MN 4–5 and *Hildebrando Accioly*, La zone contiguë et le droit de poursuite en haute mer, in: Melanges en l'honneur de Gilbert Gidel (Paris 1961), 1 *et seq*.

[100] Arguably, the term 'violation' may comprise – in accordance with the national law at stake and within the limits flowing from generally recognized rule of law principles – criminal liability for preparatory acts as well.

[101] See *Poulantzas* (note 18), 62 *et seq*.

[102] For recent developments, which cast some doubts on the enduring unanimous acceptance of this rigid position in State practice, see *ibid*., ix *et seq*.: 'Recent Developments Relating to Hot Pursuit at Sea'.

[103] See e. g. *Marina Vokić Žužul/Valerija Filipović*, Vanjski pojas Republike Hrvatske (The Contiguous Zone of the Republic of Croatia), Poredbeno pomorsko pravo (Comparative Maritime Law) 49 (2010), 73 *et seq*.; it is, however, highly doubtful whether the legal regime of the contiguous zone authorizes States to use their competences arising from Arts. 33 and 303 to extend the geographical scope of the relevant national legislation, as was done e. g. by the Netherlands, see *Harm M. Dotinga/Alex G. Oude Elferink*, The Netherlands: Establishment of a Contiguous Zone, IJMCL 22 (2007), 317, 323 *et seq*.; and for further details *Scovazzi* on Art. 303 MN 9–11.

[104] See also *Scovazzi* on Art. 303 MN 11–15; and for an in-depth discussion, *cf. Rainer Lagoni*, Marine Archäologie und sonstige auf dem Meeresboden gefundene Gegenstände, AVR 44 (2006), 328, 331 *et seq*., with further references.

[105] E. g. Belgium's claim to a contiguous zone 'hidden' in Art. 47 of the Act Concerning the Exclusive Economic Zone of Belgium in the North Sea of 22 April 1999, Belgian Official Journal of 10 July 1999 and France's insertion by virtue of Art. 9 of the Act Concerning the Campaign Against Drug Trafficking and Amending Certain Provisions of the Penal Code of an Art. 44*bis* in the Customs Code of 31 December 1987, Official Gazette 5 January 1988, 159; see also *Jean-Pierre Quéneudec*, La France et le droit de la mer, in: Tullio Treves/Laura Pineschi (eds.), The Law of the Sea: The European Union and its Member States (1997), 151, 167 *et seq*.; although comprised in the DOALOS list, no pertinent legislation at all could be proved to exist in the case of the Republic of Congo, Somalia and Tunisia.

claimed a contiguous zone,[106] which, in view of a total of about 150 coastal States, is still a rather modest number.[107] However, since the adoption in 1982 of UNCLOS, the number of claimant States having tripled,[108] a clear trend towards a growing awareness and acceptance of the contiguous zone can be discerned. It is noteworthy that in recent times even a considerable number of States not party to the Convention have decided to make a claim to a contiguous zone extending beyond the twelve mile limit from coastal state baselines, including, in particular, the United States.[109] This must be seen as a clear indicator that the concept of an enlarged contiguous zone has grown into the corpus of customary international law.

34 The overwhelming majority of States making claims to a contiguous zone do so to the maximum breadth permissible under Art. 33 (83 out of 90 States). None of the claims of the remaining (seven) States exceeds the 24 NM limit.[110] With the exception of North Korea,[111] the few other earlier pretensions of jurisdictional prerogatives beyond this line have been given up, not at least due to strong and explicit protest by other States.[112] However, what is still a matter of concern on the international agenda are the excessive claims made by certain States with respect to security matters. For fear of possible abuse, this matter was explicitly excluded from the catalogue of purposes for which the contiguous zone may be established.[113] Nonetheless, a number of States have included (certain aspects of) national security interests in their national legislation regarding the contiguous zone.[114] These claims are

[106] The overwhelming majority of these claims is available under: http://www.un.org/Depts/los/index.htm; see further States with a full 12 NM Contiguous Zone, Georgia: http://faolex.fao.org/faolex/index.htm (key words: 'contiguous zone Georgia'), Ireland: http://faolex.fao.org/docs/pdf/ire66426.pdf, Japan: http://faolex.fao.org/docs/pdf/jap1703.pdf, Mozambique: http://faolex.fao.org/docs/pdf/moz22054.pdf, New Zealand: http://www.legislation.govt.nz/act/public/1977/0028/latest/DLM442579.html?search=ts_act%40bill%40regulation%40deemedreg_-Territorial+Sea_resel_25_h&p=1, Nicaragua: http://legislacion.asamblea.gob.ni/Normaweb.nsf/ (Ley de Espacios Marítimos de Nicaragua – Ley No. 420), Oman: http://www.wipo.int/wipolex/en/other_treaties/remarks.jsp?cnty_id=6724C, Portugal: http://faolex.fao.org/docs/pdf/por65641.pdf, Tuvalu: http://faolex.fao.org/docs/pdf/tuv2191.pdf; for states with a Contiguous Zone of less than 12 NM, see Bangladesh: http://faolex.fao.org/docs/pdf/bgd4587.pdf.

[107] It has been suggested that many States have not claimed contiguous zones 'possibly relating to a lack of understanding or appreciation of the utility of the powers enjoyed therein […]', *Aldo Chircop et al.*, The Maritime Zones of East African States in the Law of the Sea: Benefits Gained, Opportunities Missed, African JICL 16 (2008), 121, 132; the long list of absentees includes, *inter alia*, States such as Germany, Greece, Poland, Sweden, and the United Kingdom, as well as Indonesia and the Philippines (with a coastline of 54.716 KM and 36.289 KM, respectively, information available at: https://www.cia.gov/library/publications/the-world-factbook/.

[108] *J. Ashley Roach/Robert W. Smith*, Excessive Maritime Claims (3rd edn. 2012), 151.

[109] See also *Noyes/Clinton* (note 70), 272.

[110] For Finland (2 NM), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN_1995_Decree.pdf; for Gambia (6 NM), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/GMB_1969_Act.pdf; for Saudi Arabia (6 NM), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SAU_1958_Decree.pdf; for Sudan (6 NM), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SDN_1970_Act.pdf; for Venezuela (3 NM), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VEN_1968_Decree.pdf; for Lithuania (defined by coordinates), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/doalos_publications/LOSBulletins/bulletinpdf/bulletin61e.pdf; for Bangladesh (6 NM), see: http://faolex.fao.org/docs/pdf/bgd4587.pdf.

[111] By virtue of a proclamation of 1 August 1977 by the Supreme Command of the Korean People's Army North Korea claimed a 50-mile military maritime boundary, see for the English text *Choon-Ho Park*, The 50-Mile Military Boundary Zone of North Korea, AJIL 72 (1978), 866 (footnote 1); this excessive claim was unanimously rejected by all interested States, for references see *Roach/Smith* (note 108), 157 (footnote 20); and *Park Hee Kwon*, The Law of the Sea and Northeast Asia: A Challenge for Cooperation (2000), 33 *et seq.*; however, North Korea has still not formally given up this claim, which is 'without precedent in international law, and has no counterparts in other areas of the world', *Lewis M. Alexander*, International Perspective on Maritime Boundary Disputes Involving Korea, Japan and China, Korea Observer 30 (1999), 1, 6.

[112] For details *Roach/Smith* (note 108), 156 *et seq.*

[113] See *supra*, note 40.

[114] In particular Bangladesh, Burma, China (see as just one concrete example from Chinese State practice: Art. 13 of the 1992 Law on the Territorial Sea and the Contiguous Zone of 25 Feb. 1992, Collection of the Sea Laws and Regulations of the People's Republic of China, Office of Policy, Law and Regulation, State Oceanic Administration (1998), 189), India, Haiti, Iran, Pakistan, Sri Lanka, Sudan, Syria, Venezuela, Vietnam, Yemen.

obviously not only inconsistent with Art. 33, but are also widely and consistently protested against,[115] so that these States cannot invoke an authorization under customary international law. Although having an immediate effect on the territorial scope and thus the legality of the exercise of rights under Art. 33, too, the fact that coastal States quite frequently draw baselines that are inconsistent with the relevant provisions of the Convention is not a problem that is specific to the legal regime of the contiguous zone.

[115] For a meticulous account of U.S. State practice, *Roach/Smith* (note 108), 154 *et seq.* (footnote 16), with occasional references to protests by other States, too.

PART III
STRAITS USED FOR INTERNATIONAL NAVIGATION

Section 1
General provisions

Article 34
Legal status of waters forming straits used for international navigation

1. The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.

2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.

Bibliography: *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989), 159–204; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Donat Pharand*, The Arctic Waters and the Northwest Passage: A Final Revisit, ODIL 38 (2007), 3–69; *Michael C. Stelakatos-Loverdos*, The Contribution of Channels to the Definition of Straits Used for International Navigation, IJMCL 13 (1998), 71–89; *Sir Ian Sinclair*, The Vienna Convention on the Law of Treaties (2nd edn. 1984)

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I. Purpose and Function

1 This article is intended to safeguard the coastal sovereignty over territorial waters, above all. In a broader sense, it secures the legal status of any water area that may form part of such a strait as regulated by Part III of the UNCLOS. The effect of this article is that autonomy has been recognised for the regime of straits in relation to other regimes stipulated by the Convention.

2 On its face, the article does not, however, define what a strait used for international navigation is, and no criteria are mentioned. But this is a question that cries out for an answer. While straits are not all identical in terms of geography and usefulness for naviga-