

# The MS Estonia Shipwreck Revisited

## *New Developments in the Protection of Underwater Cultural Heritage in the Northern Baltic Sea*

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### **Abstract**

It is widely believed that international law does not enable to protect effectively the wreck of the MS Estonia against looting. The protection regime established under the 1995 MS Estonia Treaty is binding and violations against it can be effectively sanctioned in respect of only the nationals of its few States Parties, resulting in numerous jurisdictional gaps.

This study argues that the law of the sea and administrative law provide the means for safeguarding the MS Estonia wreck against pilferers. Estonia has repeatedly designated tiny buffer zones around relatively modern shipwrecks outside its territorial sea. Finland can follow this practice in relation to the MS Estonia wreck that lies less than the 19 nm from its baselines. In effect, Finland would be entitled to regulate and authorize activities directed at the shipwreck with the right to exercise its enforcement jurisdiction against persons that disturb the peace of the mass grave.

### **Keywords**

underwater cultural heritage – shipwreck – the MS Estonia – law of the sea – administrative law – contiguous zone – Finland – Estonia

## **1 Introduction**

The Estonian-flagged ro-ro passenger ferry MS Estonia, which was owned jointly by the Swedish Nordström & Thulin and state-owned Estonian Shipping Co.,<sup>1</sup> was on her usual

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\*The author is grateful to Henrik Ringbom and to two anonymous reviewers for their valuable comments on this research.

<sup>1</sup> Although the MS Estonia was partly operated by a State-owned company, she was not subject to sovereign immunity which only applies to warships and other government ships operated for non-commercial

voyage from Tallinn to Stockholm on 27/28 September 1994.<sup>2</sup> After having reached a waypoint and setting a new course, the winds had grown in intensity, reaching about 20 m/s, with gusts at 25 m/s and waves as high as six to seven meters.<sup>3</sup> Halfway in her voyage, the ship suddenly sank in such “normally bad”<sup>4</sup> weather conditions in the middle of the northern Baltic Sea (at 59°22,9' N 21°41,0' E) with a water depth of 85 m at the bow and 74 m at the stern.<sup>5</sup> Of the 989 people (incl. 803 passengers) on board, 852 died because of the accident. They included 501 Swedish, 284 Estonian, 17 Latvian, 11 Russian, ten Finnish, six Norwegian, five Danish, five German citizens, and nationals of nine other states.<sup>6</sup> Jacobsson and Klabbers noted in 2000 that “[t]he catastrophe is still an open wound in Sweden”.<sup>7</sup> This also characterizes public sentiments in Estonia.<sup>8</sup>

Immediately after the accident, a joint Estonian-Finnish-Swedish Accident Investigation Commission was established which concluded in December 1997 that the strong waves broke the visor from the bow. The detached visor, in turn, pulled the ramp “fully open” causing the influx of large amounts of water which led to the sudden capsizing of the ship and sinking at 1.50 am, approximately 30–45 minutes after the opening of the ramp.<sup>9</sup>

The 2006 report of an Estonian expert commission, led by Chief State Prosecutor Margus Kurm, concluded that the causes and sinking sequence of the MS Estonia as established by the Joint Investigation Commission is possible and should be considered as the most probable scenario, while pointing out that based on evidence currently available other causes of the accident, including a hole in the hull, also cannot be ruled out. The 2006 Estonian government’s report maintained that on-site studies are needed

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purposes. See Article 32 of the United Nations Convention on the Law of the Sea. Montego Bay 10 December 1982, e.i.f. 16 November 1994, 1833 U.N.T.S. 397 (hereafter LOSC or Convention).

<sup>2</sup> H. Tiberg, Why Cover the Wreck of a Sunken Ship?, *Scandinavian Studies in Law* (2000) pp. 481–482. The ship had been initially commissioned in 1979 for the Viking Line’s Åbo-Stockholm line and moved to Silja Line’s Umeå-Vasa line in 1989–1993.

<sup>3</sup> E. Hunt, ‘Laevahuku kroonika’, in E. Kreem (ed.), *Eesti laevanduse aastaraamat* (Ilo, Tallinn 1995) p. 111.

<sup>4</sup> ‘The Legacy of the MS Estonia Tragedy’, *The Maritime Executive*, 10 July 2014, <[www.maritime-executive.com/article/The-Legacy-of-the-MS-Estonia-Tragedy--2014-10-07](http://www.maritime-executive.com/article/The-Legacy-of-the-MS-Estonia-Tragedy--2014-10-07)>, visited on 18 June 2020.

<sup>5</sup> The Government of the Republic of Estonia. Final report on the MV ESTONIA disaster of 28 September 1994. Chapter 1, ‘The Accident’, Chapter 8.1, ‘Locating the wreck’. Tallinn, 1997, <[onse.fi/estonia/chapt01.html](http://onse.fi/estonia/chapt01.html)>, visited on 5 June 2020. See *infra* Map 1.

<sup>6</sup> *Ibid.*, Chapter 7, ‘The Rescue Operation’, Table 7.10 ‘Nationalities of passengers and crew’.

<sup>7</sup> M. Jacobsson and J. Klabbers, ‘Rest in Peace? New Developments Concerning the Wreck of the *M/S Estonia*’ 69 *Nordic Journal of International Law* (2000) p. 321.

<sup>8</sup> The accident has also had a personal impact on the author of the present article. Four of the author’s close childhood friends from a small island lost their parents on the night of 28 September 1994. This article is devoted to the memory of Epp and Raivo Makk, Merit and Ago Kukk, and Peep Sadrak.

<sup>9</sup> Joint Commission’s final report, *supra* note 5, Chapter 1, ‘The Accident’. According to other accounts, the first (Finnish-led) research expedition to the wreck on 30 September 1994 established that the ramp was not fully open, but was slightly open by approximately 0.5 metres. See Hunt, *supra* note 3, p. 112. The Swedish maritime consultancy bureau SSPA has estimated that the sinking of the ship lasted approximately nine minutes longer than previously expected, i.e. 43 minutes instead of the previous estimate of 34 minutes. See the report of the expert commission established by the Estonian Government. 1994. aasta septembris reisiparvlaeval Estonia toimunud sõjalise kasutusega seadmete veo asjaolude uurimiseks moodustatud asjatundjate komisjoni aruanne (Report of the expert commission investigating the circumstances of the transport of military equipment on the passenger ferry Estonia in September 1994). Tallinn 2009, p. 3, <[www.just.ee/sites/www.just.ee/files/mlestonia4.aruanne.pdf](http://www.just.ee/sites/www.just.ee/files/mlestonia4.aruanne.pdf)>, visited on 8 June 2020.

to firmly establish that the hull of the ship is not broken or damaged, noting that, to the extent of the commission's knowledge, such systemic studies, the recordings of which would be accessible, have not yet been conducted.<sup>10</sup> Kurm commented in a television appearance in 2019 that, during the accident, the crew members of the MS Estonia saw from a camera pointing at the ramp that while water was leaking around its edges, the ramp was in a closed position.<sup>11</sup> In support of further investigations to the causes of the sinking of the MS Estonia, Kurm further commented in 2020 that the only way to close the case is to conduct a proper on-site study of the wreck.<sup>12</sup>

Speculations about a possible hole in the hull of the MS Estonia have been intertwined with rumours about arms smuggling on board the ship. These rumours were confirmed in 2004 and 2005, following a disclosure made by a former Swedish customs official on 30 November 2004 that the Swedish armed forces transported Soviet military equipment on the MS Estonia in September 1994. Sweden's Prime Minister Göran Persson requested a study, led by Judge Johan Hirschfeldt, who confirmed in 2005 that the MS Estonia was used for military electronic shipments on 14 September and 20 September 1994.<sup>13</sup> The Estonian government's expert commission investigating the circumstances of the transport of military equipment on the MS Estonia in September 1994 concluded in 2005 that it "cannot confirm or refute the general argument contained in the government's questions that no military equipment or materials were transported on board the passenger ferry MS Estonia that departed Tallinn on 27 September 1994".<sup>14</sup> The Estonian commission confirmed that in the course of the operation of the Swedish intelligence service, "the military equipment transported on 14<sup>th</sup> and 20<sup>th</sup> of September, which Hirschfeldt has in mind and which he confirms in his investigation, did not contain any explosives and were not parts of weapons systems".<sup>15</sup> The special commission established by the Estonian Parliament to study the alleged Swedish military shipments on the MS Estonia concluded that the operations of the Swedish intelligence service which involved the smuggling of Soviet military equipment from Estonia to Sweden on board the passenger ferry were conducted without the knowledge of or approval from the Estonian

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<sup>10</sup> The Estonian government's 2009 Expert Commission's Report, *supra* note 9, p. 11.

<sup>11</sup> A. Whyte, 'Estonia ferry disaster former investigator says bow visor did not break', *ERR News*, 2 November 2019, <[news.err.ee/998899/estonia-ferry-disaster-former-investigator-says-bow-visor-did-not-break](https://news.err.ee/998899/estonia-ferry-disaster-former-investigator-says-bow-visor-did-not-break)>, visited on 7 June 2020.

<sup>12</sup> S. Brunow, 'Spotlight: Hålen i Estonia-utredningen upprör: "Bryt gravfriden!"', *Svenska Yle*, 27 January 2020, <[arenan.yle.fi/1-50318091](https://arenan.yle.fi/1-50318091)>, visited on 10 June 2020.

<sup>13</sup> 'Sveriges Radio. Report: No Military Shipment on Estonia Ferry', 21 January 2005, <[sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=544415](https://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=544415)>, visited on 8 June 2020. Unfortunately, as reported by the Swedish media and the special commission established by the Estonian Parliament to study the alleged Swedish military shipments on the MS Estonia, the Swedish investigator had destroyed the background materials of his investigation (this led to another public investigation in Sweden). See, e.g. 'Estonia investigator accused of destroying evidence', *The Local*, 27 May 2006, <[www.thelocal.se/20060527/3918](https://www.thelocal.se/20060527/3918)>, visited on 8 June 2020. Parliament of Estonia. Riigikogu Committee of Investigation to Ascertain the Circumstances Related to the Export of Military Equipment from the Territory of the Republic of Estonia on the Ferry Estonia in 1994 FINAL REPORT. Tallinn, 19 December 2006, p. 21, <[www.estoniaferrydisaster.net/pdf/Enclosure39.pdf](https://www.estoniaferrydisaster.net/pdf/Enclosure39.pdf)>, visited on 8 June 2020.

<sup>14</sup> REPORT of the expert committee investigating the circumstances of the transport of military equipment on the passenger ferry Estonia in September 1994. Tallinn, 2005, p. 4, <[estonia.kajen.com/Estonia-ENG.pdf](https://estonia.kajen.com/Estonia-ENG.pdf)>, visited on 8 June 2020.

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

authorities.<sup>16</sup> The experts with whom the special commission carried out its interviews pointed out that in the beginning of 1990s a notable selection of various nuclear technology and Soviet high-tech military electronic devices, including those designed for space studies, were smuggled out from Russia.<sup>17</sup>

In 2016, relatives of the victims of the MS Estonia accident and their representatives requested a new investigation of the causes of the MS Estonia accident from the Estonian Ministry of Justice. The Ministry responded two years later by laconically noting that opening a new investigation does not fall under its competence as it needs to be decided by the Estonian government, but it did not consider it justified to forward the appeal to the government. This matter was brought before the Tallinn Administrative Court which decided in October 2019 that the request was not properly responded to and ordered the Estonian government to provide a reasoned reply to the request.<sup>18</sup> Pursuant to a decision of the Estonian government in January 2020, the minister of justice formed an expert working group to decide on whether to open a new investigation of the MS Estonia accident.<sup>19</sup>

At the same time, reports have emerged of private investigations of and diving operations to the MS Estonia shipwreck, most recently in September 2019 by 11 Swedes, Norwegians and Germans on board a German-flagged ship that was used for filming a documentary of the MS Estonia accident.<sup>20</sup> As examined below, that documentary contributed to launching a new joint Estonian-Finnish-Swedish investigation into the MS Estonia wreck in late 2020. However, there is also a disturbing trend involving pilferers that dive to the shipwreck and trade, without any legal consequences, with items stolen from the wreck.<sup>21</sup> Tiberg notes that: "Diving for wrecks and wreckage has become a widespread hobby to amateurs and correspondingly a growing concern to those interested in the preservation of such objects. ... Diving at the Estonia wreck, which Sweden and other countries concerned with the sinking have sought to protect, has brought these questions to the fore."<sup>22</sup>

This study seeks to establish whether the law of the sea and administrative law provide means to effectively protect the historical wreck of the MS Estonia from pilferers. It will examine the practice of Estonia in protecting underwater monuments, determine

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<sup>16</sup> 2006 Report of the Riigikogu Committee on the Export of Military Equipment on the MS Estonia in 1994, *supra* note 13, p. 21.

<sup>17</sup> The Estonian Government's 2009 Expert Commission's Report, *supra* note 9, pp. 10–11.

<sup>18</sup> A. Whyte, 'Court orders government to respond on MS Estonia investigation application', *ERR News*, 24 October 2019, <[news.err.ee/995774/court-orders-government-to-respond-on-ms-estonia-investigation-application](https://news.err.ee/995774/court-orders-government-to-respond-on-ms-estonia-investigation-application)>, visited on 9 June 2020.

<sup>19</sup> A. Vahtla, 'New working group to decide further Estonia disaster investigation', *ERR News*, 31 January 2020, <[news.err.ee/1030270/new-working-group-to-decide-further-estonia-disaster-investigation](https://news.err.ee/1030270/new-working-group-to-decide-further-estonia-disaster-investigation)>, visited on 9 June 2020.

<sup>20</sup> A. Vahtla, 'Swedish authorities suspect two citizens of disturbing Estonia shipwreck', *ERR News*, 18 December 2019, <[news.err.ee/1015331/swedish-authorities-suspect-two-citizens-of-disturbing-estonia-shipwreck](https://news.err.ee/1015331/swedish-authorities-suspect-two-citizens-of-disturbing-estonia-shipwreck)>, visited on 9 June 2020.

<sup>21</sup> See, e.g. 'Ny dykteknik hot mot Estonia', *Aftonbladet*, 22 September 2014, <[www.aftonbladet.se/senastenytt/ttnyheter/inrikes/a/XwzEqB/ny-dykteknik-hot-mot-estonia](https://www.aftonbladet.se/senastenytt/ttnyheter/inrikes/a/XwzEqB/ny-dykteknik-hot-mot-estonia)>, visited on 9 June 2020.

<sup>22</sup> H. Tiberg, 'Wrecks and Wreckage in Swedish Waters', *Institute of Maritime Law and other Transport Law* (2004) p. 202, <[scandinavianlaw.se/pdf/46-10.pdf](https://scandinavianlaw.se/pdf/46-10.pdf)>, visited on 12 June 2020.

its compatibility with the international law of the sea and underwater cultural heritage law for providing suggestions on the steps that Finland could take to effectively protect the MS Estonia wreck in its maritime area. When examining the current regulatory framework applicable to the protection of the MS Estonia wreck, the study will also touch upon some legal complexities that rose in respect of the recent joint State-led on-site investigation to the MS Estonia shipwreck in response to the appeal of the passengers and relatives of the victims of the MS Estonia accident.

## 2 The Current State of Affairs Regarding the Protection of the MS Estonia Wreck

### 2.1 *The Protection Regime of the 1995 MS Estonia Treaty*

On 23 February 1995, Estonia, Finland and Sweden signed in Tallinn a treaty for protecting the MS Estonia shipwreck, as the final place of rest for the victims of the disaster, from any disturbing activities (hereafter 1995 MS Estonia Treaty).<sup>23</sup> Other coastal States of the Baltic Sea, except Germany, have acceded to the treaty (in addition to e.g. the United Kingdom) pursuant to Article 1 of the 1996 additional protocol.<sup>24</sup> The States Parties have agreed under Article 1 of the treaty that the wreck of the MS Estonia and the surrounding area, as defined in Article 2, is regarded as the final place of rest for victims of the disaster, and as such is afforded appropriate respect.

Under Article 4(1) of the 1995 MS Estonia Treaty, States Parties are required to institute legislation, in accordance with their national procedures, aiming at the criminalisation of any activities disturbing the peace of the final place of rest, in particular any diving or other activities with the purpose of recovering victims or property from the wreck or the sea-bed. However, under general international law and the law of the sea, States lack the legal basis to exercise such criminal jurisdiction outside the scope of the 1995 MS Estonia Treaty. Pursuant to Article 27(1) of the Law of the Sea Convention (LOSC), coastal States can exercise criminal jurisdiction on board a foreign ship, subject to extensive limitations, only if it passes through its territorial sea. The MS Estonia wreck lies on Finland's continental shelf and exclusive economic zone (hereafter EEZ) where the coastal State lacks criminal jurisdiction. Instead, subject to the limits of Article 58(3) of the LOSC, the high seas freedoms of navigation and overflight apply in these maritime zones (Articles 58(1) and 87(1) of the LOSC).

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<sup>23</sup> Agreement between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden regarding the M/S «Estonia». Tallinn 23 February 1995, e.i.f. 26 August 1995, <[treaties.un.org/doc/Publication/UNTS/Volume%201890/volume-1890-I-32189-English.pdf](https://treaties.un.org/doc/Publication/UNTS/Volume%201890/volume-1890-I-32189-English.pdf)>, visited on 9 June 2020.

<sup>24</sup> Protocol Additional To The Agreement Between The Republic Of Estonia, The Republic Of Finland And The Kingdom Of Sweden Regarding The M/S Estonia. Stockholm 23 April 1996. Pursuant to the Protocol's Article 3, it enters into force for a State acceding to the Agreement on the date of the deposition of the instrument of accession with the depository, <[m.likumi.lv/doc.php?id=17733](https://m.likumi.lv/doc.php?id=17733)>, visited on 9 June 2020.

It is generally understood that coastal State's jurisdiction over its continental shelf and EEZ does not include jurisdiction over shipwrecks.<sup>25</sup> As commonly accepted by States and affirmed by the International Law Commission already in 1956, coastal State's jurisdiction over its continental shelf (and EEZ) in respect of living and non-living natural resources does not encapsulate any jurisdiction over shipwrecks located therein or thereunder.<sup>26</sup> A small group of States proposed during the negotiations of the 1982 LOSC and 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage<sup>27</sup> (hereafter UNESCO Convention) to also include shipwrecks under the jurisdiction of coastal States in these maritime zones, but such proposals were rejected on the ground that any extension of the coastal State's jurisdiction outside its territorial sea to objects which do not form part of natural resources would disturb the delicate balance between the rights of coastal States and flag States in maritime areas outside territorial sovereignty.<sup>28</sup> Notably, however, Finland may exercise its right under Article 60(1)(c) of the LOSC to place electronic installations, including cameras and alarms, on its continental shelf which would allow to monitor the diving operations to the MS Estonia wreck.

Therefore, the possibility, as provided in the domestic legal acts of the Baltic Sea coastal States (except Germany), to institute proceedings against persons suspected of pilfering items from the MS Estonia wreck is currently dependent on the 1995 MS Estonia Treaty. This is the only international agreement on a wreck site that includes more than two States Parties,<sup>29</sup> while the 2003 treaty between the United States and the United Kingdom on the protection of RMS Titanic is also open for signature by all States.<sup>30</sup> Due to the special protection regime stipulated under the treaty and the lack of criminal jurisdiction under other legal basis, only such persons that are citizens of a State Party to the 1995 MS Estonia Treaty can be effectively subjected to criminal proceedings on grounds of disturbing the final place of rest for victims of the MS Estonia accident. In other words, the protection regime of the MS Estonia wreck relies on the active personality principle according to which nationality serves as the basis for criminal jurisdiction. This creates jurisdictional gaps as due to the absence of e.g. Germany and Norway from the MS Estonia treaty regime, nationals of Germany or Norway are not subjected to the special protection regime enunciated in the 1995 MS Estonia Treaty. Therefore, of the 11 Swedes, Norwegians and Germans who allegedly breached the 1995 MS Estonia Treaty in September 2019 when filming a documentary of the disaster, only two Swedes were

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<sup>25</sup> S. Dromgoole, 'Reflections on the position of the major maritime powers with respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001', 38 *Marine Policy* (2013) p. 117. B. H. Oxman, 'Marine Archaeology and the International Law of the Sea', 12:3 *Columbia-VLA Journal of Law & the Arts* (1987-1988) pp. 365-366.

<sup>26</sup> M. J. Aznar, 'The Contiguous Zone as an Archaeological Maritime Zone', 29 *The International Journal of Marine and Coastal Law* (2014) p. 6. Dromgoole 2013, *supra* note 25, p. 119. Oxman, *supra* note 25, pp. 365-366.

<sup>27</sup> UNESCO Convention on the Protection of the Underwater Cultural Heritage, Paris 2 November 2001, e.i.f. 2 January 2009, 41 I.L.M. 40 (2002).

<sup>28</sup> Dromgoole 2013, *supra* note 25, pp. 117, 119. See also Aznar, *supra* note 26, p. 16.

<sup>29</sup> See S. Dromgoole, *Underwater Cultural Heritage and International Law* (CUP, Cambridge, 2014) p. 339. See also T. Scovazzi, 'Article 303', in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart/Nomos-Nomos, Munich/Oxford/Baden-Baden 2017), pp. 1960-1961.

<sup>30</sup> Agreement Concerning the Shipwrecked Vessel RMS Titanic, London 6 November 2003, e.i.f. 18 November 2019, UK Treaty Series No. 8 (2019).



charged for this offence.<sup>31</sup> This expedition resulted in the discovery of a four-metre long hole in the hull of the MS Estonia wreck which, pursuant to the hypothesis of an expert interviewed in the documentary, was possibly caused due to the MS Estonia hitting an object with a mass of one to five thousand tons, moving at a relatively low speed.<sup>32</sup>

## 2.2 *New Developments in State-led Investigations of the Wreck*

Following the discovery of a hole in the hull of the wreck of the MS Estonia, Estonia as the flag State decided on 1 October 2020 to start a new investigation of the shipwreck and on 6 October, proposed to Finland and Sweden to co-operate on this matter. In December 2020, the Estonian, Swedish and Finnish safety investigation authorities signed a memorandum of understanding for jointly investigating the shipwreck by means of using a sonar and a survey of the seabed.<sup>33</sup> The safety investigation authorities of the three States decided that the new investigation also needs to include diving operations,<sup>34</sup> which were conducted in July 2021. However, the execution of the investigation operations depended on the progress of the three States in overcoming legal obstacles,<sup>35</sup> resulting in amendments to the relevant domestic laws of Sweden and Finland that regulate diving operations in and around the mass grave.

The 1995 MS Estonia Treaty does not directly regulate flag State's or any other contracting State's right to conduct State-led investigations of the wreck, including examining the causes of the sinking of the ship. Thus, Ringbom has commented that a technical investigation falls outside the scope of the agreement.<sup>36</sup> Yet one may also adopt a contrary interpretation, as a result of which it is possible to conclude that based on, e.g. a systemic interpretation of the 1995 MS Estonia Treaty, the treaty prohibits also diving operations that are undertaken by a contracting State unilaterally for investigating the

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<sup>31</sup> M. Nael, 'Rootsis said kaks inimest süüdistuse Estonia haurahu rikkumises', *ERR Uudised*, 30 June 2020, <[www.err.ee/1107595/rootsis-said-kaks-inimest-suudistuse-estonia-haurahu-rikkumises](http://www.err.ee/1107595/rootsis-said-kaks-inimest-suudistuse-estonia-haurahu-rikkumises)>, visited on 1 July 2020.

<sup>32</sup> T. Erdbrink, 'Documentary Casts Doubt on Official Finding in 1994 Ferry Disaster', *The New York Times*, 30 September 2020, <<https://www.nytimes.com/2020/09/30/world/europe/estonia-ferry-disaster-documentary.html>>, visited on 1 October 2020.

<sup>33</sup> H. Wright, 'Safety authorities: M/S Estonia ferry sinking needs further investigation', *ERR News*, 18 December 2020, <<https://news.err.ee/1212964/safety-authorities-m-s-estonia-ferry-sinking-needs-further-investigation>>, visited on 22 December 2020.

<sup>34</sup> J. Pisoni, Johan Sennerö, 'Regeringen lämnar besked om Estonia', *SVT Nyheter*, 17 December 2020, <<https://www.svt.se/nyheter/svt-erfar-besked-om-nya-dykningar-vid-estonia-vantas-idag>>, visited on 22 December 2020.

<sup>35</sup> H. Wright, 'Sweden seeks new probe of M/S Estonia ferry wreck after 25-year ban', *ERR News*, 19 December 2020, <<https://news.err.ee/1213615/sweden-seeks-new-probe-of-m-s-estonia-ferry-wreck-after-25-year-ban>>, visited on 22 December 2020.

<sup>36</sup> S. Brunow, 'Jurist: Gravfriden inget hinder om Estland vill dyka till Estonia', *Svenska Yle*, 28 January 2020, <<https://svenska.yle.fi/artikel/2020/01/28/jurist-gravfriden-inget-hinder-om-estland-vill-dyka-till-estonia>>, visited on 10 June 2020. Nonetheless, the Swedish government purportedly considers that the three States – Estonia, Finland, and Sweden – need to all agree on whether to initiate a new investigation of the MS Estonia accident. See 'Rootsi valmis alustama Estonia huku uurimist', *Delfi*, 31 March 2006, <[www.delfi.ee/news/paevauudised/eeesti/rootsi-valmis-alustama-estonia-huku-uurimist?id=12585921](http://www.delfi.ee/news/paevauudised/eeesti/rootsi-valmis-alustama-estonia-huku-uurimist?id=12585921)>, visited on 10 June 2020.

wreck to study the causes of the sinking of the MS Estonia.<sup>37</sup> As a third option, it is possible to reach the conclusion that the 1995 MS Estonia Treaty allows to decide on the legality of a State-led technical diving operation based on whether it includes “activities disturbing the peace of the final place of rest” in terms of Article 4(1) of the 1995 MS Estonia Treaty. In this connection, one may presume that a technical investigation of the wreck that is carried out, e.g. by a contracting State to the 1995 MS Estonia Treaty, does not disturb the peace of the mass grave even if it comprises diving operations.

Yet, even if one reaches the conclusion that the 1995 MS Estonia Treaty does not prohibit State-led diving operations to the shipwreck, then this does not exclude the possibility that such operations are prohibited under the Finnish and Swedish domestic law. Section 3 of the Finnish Act on the Protection of the Wreck of the Passenger Ship MS Estonia unequivocally stipulates that: “Diving in the protected area is prohibited.”<sup>38</sup> Section 3 of the Act also prohibits any other activities that disturb the peace of the wreck and stipulates that: “Anyone who intentionally violates the prohibition provided in section 3 shall be sentenced to a fine or imprisonment for a maximum of one year ...”. An analogous regulation is stipulated under the Swedish domestic law, the breach of which may be sanctioned with up to two years of imprisonment.<sup>39</sup> By contrast, Estonia’s domestic criminal law framework does not include a specific clause on the MS Estonia and does not prohibit diving to the wreck per se. Instead, the key provisions are Sections 148–149 of the Estonian Penal Code that regulate, respectively, abuse of corps and debasement of memory of deceased, and provide for a pecuniary punishment or up to one year’s imprisonment.<sup>40</sup> While the Scandinavian countries are, in principle, dualist States, Estonia is a modified monist country where treaties are part of its domestic legislation.<sup>41</sup>

Since the previously mentioned Finnish and Swedish sanctions are clearly directed against private persons who disturb the peace of the mass grave, it would be reasonable to expect that the relevant legal acts do not strictly prohibit the joint governmental investigation operations. Yet in view of avoiding any potential breaches of the Finnish and Swedish domestic legal acts on the protection of the MS Estonia wreck, Finland and Sweden first amended their above-referred domestic legal acts to ensure that they do not prevent the undertaking of joint State-led investigations.<sup>42</sup>

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<sup>37</sup> See L. Mälksoo, Expert opinion on the 1995 MS Estonia Treaty, submitted to the Government of Estonia on 9 June 2006, point 3, <<https://www.delfi.ee/news/paevauudised/eesti/kurm-hauarahuleping-ei-keela-oigetel-eesmarkidel-vraki-juurde-sukeldumist?id=91191397>>, visited on 26 October 2020.

<sup>38</sup> Act on the Protection of the Wreck of the Passenger Ship M/S Estonia, 903/1995, Adopted 30 June 1995, e.i.f. 1 July 1995, <<https://www.finlex.fi/en/laki/kaannokset/1995/en19950903.pdf>>, visited on 2 August 2020.

<sup>39</sup> Lag om skydd för gravfriden vid vraket efter passagerarfartyget Estonia, 1995:732, adopted 8 June 1995, e.i.f. 1 July 1995, <<http://rkrattsbaser.gov.se/sfsr/adv?fritext=estonia&sbet=&%C3%A4bet=&org=&upph=false>>, visited on 26 October 2020.

<sup>40</sup> Penal Code, RT I 2001, 61, 364, Adopted 6 June 2001, e.i.f. 1 September 2002, <<https://www.riigiteataja.ee/en/eli/515072020011/consolide>>, visited on 26 October 2020.

<sup>41</sup> See H. Vallikivi, ‘Status of International Law in the Estonian Legal System under the 1992 Constitution’, 6 *Juridica International* (2001) p. 232.

<sup>42</sup> Oikeusministeriö, ‘Oikeusministeriö pyytää lausuntoja Estonian tutkintatoimet sallivasta lakiluonnoksesta’, Press Announcement, 21 April 2021, <<https://valtioneuvosto.fi/-/1410853/oikeusministerio-pyytaa-lausuntoja-estonian-tutkintatoimet-sallivasta-lakiluonnoksesta>>.



### 2.3 *The Implications of Marine Scientific Research Regime for Coastal State's Jurisdiction over Investigations of the Shipwreck*

Finland is also not entitled to exercise its jurisdiction by regulating and authorizing on-site investigations of the shipwreck based on the legal framework of marine scientific research in its EEZ and on its continental shelf (Article 246(1) of the LOSC). The term “marine scientific research” is left undefined in the Convention. Yet it is generally understood to imply “any form of scientific investigation, fundamental or applied, concerned with the marine environment, i.e. that has the marine environment as its object ... [including] subsoil or seabed in the marine environment”.<sup>43</sup> Soons subdivides it into four categories: physical oceanography, chemical oceanography, marine biology and, finally, marine geology and geophysics.<sup>44</sup> Oxman also finds that marine scientific research is “search for knowledge about the natural marine environment”.<sup>45</sup> One may argue that such research which addresses the impact of shipwrecks to the marine environment *stricto sensu* falls within the broader framework of marine scientific research, e.g. marine pollution that stems from the wreck, the wreck as a harbour of sea life.<sup>46</sup> By contrast, it is not reasonable to expect that on-site technical studies of the MS Estonia shipwreck per se are part of marine scientific research.<sup>47</sup> This conclusion seems to also be in conformity with State practice since it does not appear that Finland has considered diving operations and investigations of the MS Estonia wreck as constituting a breach of its domestic laws on marine scientific research. Instead, Finland investigates such incidents as violations of its Act on the Protection of the Wreck of the Passenger Ship M/S Estonia.

Even if Finland would change its practice and adopt a broad interpretation of the scope of marine scientific research, thereby subjecting any investigations of the MS Estonia wreck to its prior authorization, then it is expected that Finland would still grant its consent for marine scientific research projects in normal circumstances (Article 246(3) of the LOSC). Pursuant to the Convention, Finland could be expected to decline consenting to such research if it is of direct significance for the exploration and exploitation of natural resources, involves drilling into the continental shelf, the use of

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visited on 21 April 2021. On the changes to the Finnish legislation, *see* Oikeusministeriö, ‘Matkustaja-alus Estonian hylyn rauhoittamista koskevan sääntelyn muuttaminen’, <<https://oikeusministerio.fi/hanke?tunnus=OM005:00/2021>>, visited on 1 May 2021, and Laki matkustaja-alus Estonian hylyn rauhoittamisesta annetun lain väliaikaisesta muuttamisesta, HE 81/2021 vp, adopted 18 June 2021, e.i.f. 1 July 2021, <<https://www.finlex.fi/fi/laki/ajantasa/1995/19950903#a18.6.2021-538>>, visited on 1 August 2021. On the changes to the Swedish legislation, *see* Lag om ändring i lagen (1995:732) om skydd för gravfriden vid vraket efter passagerarfartyget Estonia, SFS 2021:557, adopted 10 June 2021, e.i.f. 1 July 2021, <<https://svenskforfattningssamling.se/sites/default/files/sfs/2021-06/SFS2021-557.pdf>>, visited on 1 August 2021.

<sup>43</sup> D. Rothwell and T. Stephens, *The International Law of the Sea* (2<sup>nd</sup> edn, Hart Publishing, Oxford, 2016) p. 321.

<sup>44</sup> A. H. A. Soons, *Marine Scientific Research and the Law of the Sea* (Kluwer, Deventer 1982) p. 6.

<sup>45</sup> Oxman, *supra* note 25, p. 367. *See* Dromgoole 2013, *supra* note 25, p. 117.

<sup>46</sup> *See also, e.g.* S. Dromgoole, ‘2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage’, 18:1 *The International Journal of Marine and Coastal Law* (2003) pp. 80–81.

<sup>47</sup> This view is supported by, *e.g.* R. Liivoja, ‘Eesti karistusõiguslik jurisdiktsioon reisiparvlaeva *Estonia* haurahu häiriva tegevuse üle’, *Acta Societatis Martensius* (2005) p. 113.

explosives or the introduction of harmful substances into the marine environment, the construction, operation or use of artificial islands, installations and structures or if the project's information is inaccurate, or if the researching State or competent international organization has outstanding obligations to the coastal State from a prior research project (Article 246(5) of the LOSC). Diving investigations to the MS Estonia wreck appear not to fall under any of these exceptions and thus presumably would not entitle Finland to decline giving its authorization for investigations of the shipwreck even if Finland would consider such operations as falling within the scope of marine scientific research.

### 3 The Implications of a Contiguous Archaeological Zone for the Protection of the MS Estonia Shipwreck

In the light of the foregoing, it appears at first glance that international law does not enable to effectively protect the wreck of the MS Estonia against looting. Jacobsson and Klabbers have argued in respect of the jurisdictional gap concerning the MS Estonia wreck that: "According to ambassador Rothkirch, the law of the sea offers no explicit basis for prosecution; ... Ambassador Rothkirch's conclusion is surely a correct observation, but it does leave a bitter aftertaste. ... [W]e cannot even guarantee the peace of a maritime grave in a legally plausible manner."<sup>48</sup> However, this claim merits further scrutiny in the light of the possibility to establish a contiguous archaeological zone under Article 303(2) of the LOSC around the shipwreck, as examined next.

#### 3.1 *The Possibility of Establishing a Finnish Buffer Zone around the MS Estonia Wreck*

Until 2004, the wreck of the MS Estonia lay in the Finnish exclusive fishing zone (in addition to the Finnish continental shelf), thereafter replaced by the newly established Finnish EEZ.<sup>49</sup> The wreck's distance to the closest Finnish rock (Grimsörorar/Grimsörarna), which also marks the turning point of Finland's system of straight baselines around the Archipelago Sea, is 19 nm.<sup>50</sup> Thus, the shipwreck falls within the scope of the 24 nm

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<sup>48</sup> Jacobsson and Klabbers, *supra* note 7, pp. 327–329.

<sup>49</sup> Laki Suomen kalastusvyöhykkeestä (Finnish Fishing Zone Act). Adopted 15 November 1974, e.i.f. 1 January 1975, <[http://faolex.fao.org/cgi-bin/faolex.exe?rec\\_id=000127&database=faolex&search\\_type=link&table=result&lang=eng&format\\_name=@ERALL](http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=000127&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL)>, visited on 10 June 2020. Laki Suomen talousvyöhykkeestä (Act on the Exclusive Economic Zone of Finland). Adopted 26 November 2004, e.i.f. 1 January 2005, <<https://www.finlex.fi/fi/laki/ajantasa/2004/20041058>>, visited on 10 June 2020.

<sup>50</sup> Grimsörorar/Grimsörarna is a further 6.5 nm away from the Finnish island Utö. The distances are calculated by the author via Google Maps on the basis of the coordinates of the MS Estonia wreck (59°22,9' N 21°41,0' E) and Finland's official chart depicting its system of straight baselines in the Utö-Helsinki area, as transmitted to the United Nations on 22 August 1997. See Chart No. 912 - "Utö -Helsinki, Helsingfors", Scale 1:200,000, <[www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FIN\\_Deposit\\_MZN16.html](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FIN_Deposit_MZN16.html)>, visited on 10 June 2020. See also M.Z.N. 16.1997. LOS (Maritime Zone Notification), 30 September 1997,

maximum outer limit of a contiguous zone.<sup>51</sup> In its contiguous zone, Finland could exercise the control necessary to prevent infringements of its customs, fiscal, immigration or sanitary laws, as well as to punish infringements of these laws and regulations committed within its territory or territorial sea (Article 33(1) of the LOSC). Within the 24 nm limits of a contiguous zone, Finland is potentially also entitled to exercise prescriptive jurisdiction if it establishes under Article 303(2) of the LOSC a special maritime zone that is aimed at the protection of underwater historical and archaeological objects (hereafter contiguous archaeological zone or buffer zone).<sup>52</sup>

Finland has established its contiguous zone under the Customs Act in 1994, but its functional and spatial scope is limited. The Finnish contiguous zone is up to 2 nm wide as measured from the outer limit of the territorial sea and its function is to only serve as Finland's extended customs area.<sup>53</sup> Subject to its discretion, Finland could broaden the scope of the contiguous zone by establishing a contiguous archaeological zone south of the Finnish Archipelago Sea. This has significance for closing the current jurisdictional gap that has been used by private divers to pilfer items from the MS Estonia shipwreck.

Article 303(1) of the LOSC obliges States to protect objects of an archaeological and historical nature found at sea and expects States to cooperate for this purpose. Oxman has commented that: "While the nature of the duty of protection is left open, it is noteworthy that only with respect to protection of the environment does the Convention introduce a comparably categorical duty applicable everywhere at sea."<sup>54</sup> To be better able to meet this obligation, Article 303(2) of the Convention grants coastal States legislative and enforcement jurisdiction in relation to the protection of shipwrecks located in the contiguous archaeological zone.<sup>55</sup> Notably, Aznar concludes in his thorough study on contiguous archaeological zones that: "State practice – both conventional and unilateral – as summarized in previous sections, shows that a general trend exists among States to expand their rights to the general protection of underwater cultural heritage up to 24 nm. That protection covers not only enforcement jurisdiction to avoid the removal of cultural objects from the contiguous zone, but also general legislative jurisdiction on each and every aspect of the protection of that heritage."<sup>56</sup>

The establishment of such zone, in the spirit of cooperation with the other States Parties to the special protection regime of the MS Estonia wreck, would enable Finland to presume that the removal of objects of an archaeological and historical nature from the seabed without its approval results in an infringement within its territory or territorial sea of its relevant laws and regulations. This would vest Finland, *inter alia*, with the right to potentially decide whether the MS Estonia shipwreck should be raised. However, this

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<[www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn\\_s/mzn16.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn16.pdf)>, visited on 10 June 2020.

<sup>51</sup> See *infra* Map 1.

<sup>52</sup> On the concept of a contiguous archaeological zone, see further, e.g. Aznar, *supra* note 26, pp. 4–9; Scovazzi, *supra* note 29, pp. 1950–1961.

<sup>53</sup> Section 2(5) of the Tullilaki (Customs Act). Adopted 29 April 2016, e.i.f. 1 May 2016, <[www.finlex.fi/fi/laki/ajantasa/2016/20160304](http://www.finlex.fi/fi/laki/ajantasa/2016/20160304)>, visited on 11 June 2020.

<sup>54</sup> Oxman, *supra* note 25, pp. 362–363.

<sup>55</sup> J. E. Noyes, 'Contiguous Zone', in D. R. Rothwell, A. G. Oude Elferink, K. N. Scott, T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (OUP, Oxford, 2015) p. 108.

<sup>56</sup> Aznar, *supra* note 26, p. 38.

right would not have great significance since under Article 3 of the 1995 MS Estonia Treaty, the Baltic Sea coastal States (except Germany) have all agreed that the wreck will not be raised. In addition, while Article 303(3) of the LOSC stipulates that the coastal State's jurisdiction in its contiguous archaeological zone does not affect the rights of identifiable owners, the law of salvage or other rules of admiralty,<sup>57</sup> thus providing title over underwater cultural heritage to the identifiable person(s) who owned the possessions until abandonment,<sup>58</sup> these rights are devoid of practical meaning for nationals of States Parties to the 1995 MS Estonia Treaty in relation to the property inside and around the MS Estonia wreck since Article 4(1)–(2) of the 1995 MS Estonia Treaty prohibits *any* activities with the purpose of recovering property from the wreck or the seabed.

More importantly, Finland could exercise its prescriptive and enforcement jurisdiction within the up to 24 nm limit of contiguous archaeological zone or within pockets of tiny buffer zones within the said spatial limit for regulating and authorizing activities directed at the MS Estonia shipwreck. This is affirmed in Article 8 of the UNESCO Convention. Aznar has found that:

Article 8 of the 2001 UNESCO Convention reflects conventionally what has crystallised customarily over the last thirty years. The visions confronted during the drafting of both the LOSC and the UNESCO Convention have found a lowest common denominator between those legal positions, accepting as a general rule that coastal States can establish an archaeological zone in their declared contiguous zones. In that archaeological zone, coastal States have both enforcement and legislative rights to protect underwater cultural heritage.<sup>59</sup>

Article 8 of the UNESCO Convention uses rather broad terminology that potentially allows a broad set of means to effectively protect underwater cultural heritage, understood as traces of human existence, which have been submerged for at least 100 years,<sup>60</sup> in an archaeological contiguous zone. By contrast, Article 303(2) of the LOSC centres only around the “removal from the seabed” of “objects of an archaeological and historical nature”. Dromgoole has pointed out that albeit the wording of Article 303(2) of the LOSC does not legitimate the regulation of activities on a site that do not involve removal of such objects, it is unlikely that States have, or will, make that distinction.<sup>61</sup> As analysed below,<sup>62</sup> the Estonian practice seems to confirm this hypothesis. According to Carducci, Article 8 of the UNESCO Convention, which, as Aznar and Molenaar have found, forms part of

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<sup>57</sup> On the interpretation of Article 303(3) of the LOSC, *see* Scovazzi, *supra* note 29, pp. 1956–1957.

<sup>58</sup> G. Carducci, ‘New developments in the law of the sea: The UNESCO Convention on the protection of underwater cultural heritage’, 96:2 *American Journal of International Law* (2002) p. 424. Carducci comments that questions of ownership of underwater cultural heritage are not directly regulated under the LOSC and, instead, such matters fall under the scope of private law rules.

<sup>59</sup> Aznar, *supra* note 26, p. 51.

<sup>60</sup> *See further infra* part 4.

<sup>61</sup> Dromgoole 2003, *supra* note 46, p. 79.

<sup>62</sup> *Infra*, part 3.2.

customary international law,<sup>63</sup> covers various activities beyond the unauthorized removal of objects from the contiguous archaeological zone.<sup>64</sup> Therefore, it appears that the establishment of a buffer zone around the MS Estonia wreck under Article 303(2) of the LOSC and customary international law (particularly in the light of Article 8 of the UNESCO Convention) would enable Finland to effectively protect the wreck against pilferers.

In case Finland would broaden the functional and spatial scope of its current contiguous zone for protecting the MS Estonia wreck, then it does not necessarily imply that Finland would have to extend the breadth of its current 2 nm wide contiguous zone to the maximum limit in its whole maritime area. Instead, Finland could stipulate, e.g. under its Antiquities Act<sup>65</sup>, a special buffer zone for the MS Estonia shipwreck in the form of a small enclave within its EEZ south of the Archipelago Sea, as illustrated in the map below (see map 1). The limits of such zone could then overlap with the area constituting the final place of rest established under Article 2 of the 1995 MS Estonia Treaty and delimited by straight lines between points 1–4:

- No. 1: 59°23,500N, 21°40,000E;
- No. 2: 59°23,500N, 21°42,000E;
- No. 3: 59°22,500N, 21°42,000E;
- No. 4: 59°22,500N, 21°40,000E.

Such an approach would principally follow the Estonian practice in establishing tiny buffer zones around its underwater monuments, as examined next.

### ***3.2 Estonian Approach: Tiny Buffer Zones Around Its Underwater Monuments in and Outside Territorial Sea***

Both domestically and internationally, it is commonly believed that Estonia, similarly to Sweden,<sup>66</sup> has not established a contiguous zone. During the drafting of the new Heritage Conservation Act in 2017, the Estonian Ministry of Environment and the Ministry of Culture commented that Estonia has not established a contiguous zone.<sup>67</sup> The Estonian Ministry of Foreign Affairs shares this position.<sup>68</sup> At the same time, stakeholders in

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<sup>63</sup> Aznar, *supra* note 26, p. 51. E. J. Molenaar, 'New Maritime Zones and the Law of the Sea', in H. Ringbom (ed.), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill, Leiden/Boston, 2015) p. 260.

<sup>64</sup> Carducci, *supra* note 58, p. 429.

<sup>65</sup> Muinaismuistolaki (Antiquities Act), adopted on 17 June 1963, 428/2019, <[www.finlex.fi/fi/laki/alkup/1963/19630295](http://www.finlex.fi/fi/laki/alkup/1963/19630295)>, visited on 12 June 2020.

<sup>66</sup> Tiberg 2004, *supra* note 22, p. 202. See also Sweden. – Legislation. United Nations Division for Ocean Affairs and the Law of the Sea, <[www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SWE.htm](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SWE.htm)>, visited on 12 June 2020.

<sup>67</sup> Märkuste tabel UNESCO veealuse kultuuripärandi kaitse konventsiooni ratifitseerimise seaduse eelnõule seisuga 17 May 2017 (Table of Comments to the Draft Legal Act for the Ratification of the UNESCO Underwater Cultural Heritage Convention). Tallinn 2017, p. 7, <[eelvoud.valitsus.ee/main#gM49E0Bg](http://eelvoud.valitsus.ee/main#gM49E0Bg)>, visited on 13 June 2020.

<sup>68</sup> Response to the author's information request of 25 June 2020 from the Estonian Ministry of Culture. Reply of the head of the department of legal affairs of the Ministry of Culture, Ms Merle Pöld of 9 September 2020 forwarding the position of the Estonian Ministry of Foreign Affairs. On file with the author.

Estonia have not voiced any objections to the prospect of establishing a contiguous zone. For example, the Estonian Maritime Administration noted in 2015 that, while it has not dealt with this question before, it does not have any reason to be opposed to the establishment of the contiguous zone in Estonia.<sup>69</sup>

On the other hand, one may argue that Estonia has already established – in all but name – a functionally and spatially limited contiguous archaeological zone under its domestic laws about a decade ago. Since 2006, Estonia has established numerous buffer zones around shipwrecks in its maritime area.<sup>70</sup> The Estonian Heritage Conservation Act<sup>71</sup> was amended in 2011 to broaden its scope of applicability for the protection of underwater monuments in the Estonian EEZ as well.<sup>72</sup> Such protection is granted via the establishment of buffer zones that are usually about 1 km<sup>2</sup> wide. They serve the sole purpose of protecting underwater cultural heritage sites in and outside Estonia's territorial sea.

The Estonian minister of culture is vested with a discretionary right to issue regulations for declaring shipwrecks as underwater monuments. Section 12(1) of the 2019 Estonian Heritage Conservation Act states that an underwater monument is a monument located in internal waters, territorial seas, transboundary water bodies or an EEZ together with the archaeological and natural surroundings.<sup>73</sup> The buffer zones around underwater monuments are aimed at ensuring the preservation of an immovable monument in a suitable and supporting environment and the preservation of the surrounding objects and elements of cultural value associated with the monument, the visual viewability of an immovable monument and the preservation of original views from the monument, and preservation of the archaeological layer surrounding the immovable monument.<sup>74</sup> Section 42(1) of the Estonian Heritage Conservation Act states that diving to an underwater monument and within the buffer zone thereof is allowed with the diving permit issued by the National Heritage Board or under the supervision of an undertaking providing diving services and acting in the scope of economic activities. The Heritage Conservation Act also establishes fines against, *inter alia*, the following misdemeanours:

- Violation of the requirements for diving to underwater monuments;<sup>75</sup>
- Violation of the prohibition to use a search device on a monument, the buffer zone thereof or on a protected archaeological site;<sup>76</sup>

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<sup>69</sup> The author's interview with the representatives of the Estonian Maritime Administration, Tallinn 18 June 2015. I. Kaunis, H. Lindpere, A. Lott, *Project Charter for the Codification of the Estonian Law of the Sea* (Ministry of Economic Affairs and Communications, Tallinn, 2015) p. 191.

<sup>70</sup> Veealuse kultuuripärandi kaitse konventsiooni ratifitseerimise seaduse eelnõu seletuskiri (The Explanatory Note to the Draft Legal Act for the Ratification of the UNESCO Underwater Cultural Heritage Convention). Tallinn 2017, p. 4, <[eelnoud.valitsus.ee/main#gM49E0Bg](http://eelnoud.valitsus.ee/main#gM49E0Bg)>, visited on 13 June 2020. See further *infra* part 4.

<sup>71</sup> Muinsuskaitseseadus (Heritage Conservation Act). Adopted on 27 February 2002, e.i.f. 1 April 2002, <[www.riigiteataja.ee/en/eli/521042014009/consolide](http://www.riigiteataja.ee/en/eli/521042014009/consolide)>, visited on 13 June 2020.

<sup>72</sup> Table of Comments to the Draft Legal Act for the Ratification of the UNESCO Underwater Cultural Heritage Convention, *supra* note 67, p. 5.

<sup>73</sup> Muinsuskaitseseadus (Heritage Conservation Act). Adopted on 20 February 2019, e.i.f. 1 May 2019, <[www.riigiteataja.ee/en/eli/504062019001/consolide](http://www.riigiteataja.ee/en/eli/504062019001/consolide)>, visited on 13 June 2020.

<sup>74</sup> Section 14(2) of the Estonian Heritage Conservation Act.

<sup>75</sup> *Ibid.*, Section 87.

<sup>76</sup> *Ibid.*, Section 86.



- Knowingly removing an archaeological find or part thereof from the place it is found and for knowingly causing damage to an archaeological find, part thereof or a protected archaeological site or an archaeological layer. In addition, such attempts of misdemeanours are punishable.<sup>77</sup>

This regulation clearly proceeds from the understanding that commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage and that such heritage shall not be traded, sold, bought or bartered as commercial goods.<sup>78</sup> In addition, the EEZ Act of Estonia provides that all legal and natural persons operating in the EEZ shall avoid any activities that may deteriorate underwater cultural monuments or the buffer zones thereof, archaeological finds and protected archaeological sites, and inform a competent state authority promptly of any indication of such activities.<sup>79</sup>

As the potential legal basis for the established Estonian buffer zones located outside the territorial sea but within the 24 nm limits as measured from the straight baselines, the Estonian Ministry of Foreign Affairs refers to Article 303(1) of the LOSC which stipulates the duty of States to protect objects of an archaeological and historical nature found at sea and cooperate for this purpose. However, this general obligation does not grant coastal States with any additional means for the protection of such objects, including legislative and enforcement jurisdiction that Estonia has declared under its legal acts in respect of the buffer zones outside its territorial sea. The Ministry also refers to Articles 8 and 10 of the UNESCO Convention, which, however, could not have served as the legal basis for the Estonian buffer zones as Estonia was not a party to the UNESCO Convention until 2021. Even though Estonia recently became a party to the UNESCO Convention, it is still doubtful if Estonia can exercise its legislative and enforcement jurisdiction in the buffer zones outside its territorial sea directly on the basis of Articles 8 and 10 of the UNESCO Convention. As Aznar has found, Article 8 of the UNESCO Convention only crystallizes “a general rule that coastal States can establish an archaeological zone in their declared contiguous zones”.<sup>80</sup> Article 10 of the UNESCO Convention, on the other hand, includes so-called constructive ambiguities that have caused concern among flag States in relation to the coastal State’s powers in taking coordinative measures for the protection of shipwrecks located on its continental shelf and in its EEZ.<sup>81</sup>

Irrespective of this legal debate, it appears that the legal framework of a contiguous archaeological zone, as stipulated in Articles 33 and 303 of the LOSC, can serve as the legal basis for Estonia’s practice and laws on the establishment of buffer zones for protecting shipwrecks located outside its territorial sea. The establishment of a contiguous archaeological zone needs to be declared by the coastal State. An analogous obligation

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<sup>77</sup> *Ibid.*, Section 83.

<sup>78</sup> See Article 33 and Rule 2 of the Annex of the UNESCO Convention on the Protection of the Underwater Cultural Heritage.

<sup>79</sup> Section 13<sup>2</sup> of Majandusvööndi seadus (Exclusive Economic Zone Act), adopted 28 January 1993, e.i.f. 19 February 1993, <[www.riigiteataja.ee/en/eli/510062019002/consolide](http://www.riigiteataja.ee/en/eli/510062019002/consolide)>, visited on 15 June 2020.

<sup>80</sup> Aznar, *supra* note 26, p. 51.

<sup>81</sup> Dromgoole 2013, *supra* note 25, p. 119. See also Aznar, *supra* note 26, pp. 8, 16, 41-42.

applies in relation to the EEZ, whereas the existence of a continental shelf does not require an express proclamation (see Articles 75 and 76(9) of the LOSC). While Estonia's neighbouring States Finland and Sweden have fulfilled their duty to transmit to the United Nations the relevant legislation on their maritime zones and the passage rights of foreign ships and aircraft,<sup>82</sup> Estonia has transmitted to the United Nations only its 1993 Maritime Boundaries Act and an outdated and repealed "Decision of the Government of the Estonian Republic on Navigation of Ships through the Territorial Sea and the Internal Waters of the Estonian Republic".<sup>83</sup> Unfortunately, Estonia has failed to transmit to the United Nations the provisions of its Heritage Conservation Act and EEZ Act that allow extending Estonia's prescriptive and enforcement jurisdiction for protecting underwater cultural heritage to areas outside its sovereignty. Yet this does not render these buffer zones obsolete or illegal. Analogously, Estonia appears not to have transmitted to the United Nations its EEZ Act, but this does not imply that Estonia's EEZ is unlawful. Therefore, one may reach the conclusion that just like Estonia has declared the existence of its EEZ by adopting the EEZ Act, Estonia has also proclaimed the existence of its contiguous zone by adopting the relevant provisions of its Heritage Conservation Act and EEZ Act that allow the establishment of buffer zones for the protection of underwater cultural heritage outside the limits of its territorial sea.

Of its registered 1278 shipwrecks,<sup>84</sup> Estonia has established 13 shipwrecks as its underwater monuments that are located in its EEZ:

- 1) German mine trawl M59 that became part of the Soviet fleet (under the name T-33 Korall) and sank in 1945 5 nm NE of the Tallinn shoal;

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<sup>82</sup> See Sweden. – Legislation, *supra* note 66. Finland. – Legislation, United Nations Division for Ocean Affairs and the Law of the Sea, <[www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FIN.htm](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FIN.htm)>, visited on 15 June 2020.

<sup>83</sup> It would considerably increase domestic and internal awareness of the legal framework of Estonia's maritime zones if Estonia's Ministry of Foreign Affairs would transmit to the United Nations also the parts of the State Borders Act that address the legal regime of its internal waters and territorial sea, Exclusive Economic Zone Act, Earth's Crust Act to the extent that it stipulates the legal regime for Estonia's continental shelf, and Heritage Conservation Act to the extent that it establishes, as discussed in this article, Estonia's contiguous archaeological zone (buffer zones), and the Procedure for Vessels and Recreational Craft to Enter and Exit the Inland Maritime Waters, Ports, and Estonian Waters of Transboundary Water Bodies. Articles 21(3) and 42(3) of the LOSC require States to also duly publicize all laws and regulations adopted by the coastal State relating to innocent passage or transit passage. See further United Nations. Deposit and Due Publicity. – Background Information, <[www.un.org/Depts/los/LEGISLATIONANDTREATIES/backgroud\\_deposit.htm](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/backgroud_deposit.htm)>, visited on 15 June 2020. Merealapiiride seadus, adopted 10 March 1993, e.i.f. 24 March 1993, <[www.riigiteataja.ee/en/eli/508112013008/consolide](http://www.riigiteataja.ee/en/eli/508112013008/consolide)>, visited on 15 June 2020. See Estonia. – Legislation (updated 16.01.2009), United Nations Division for Ocean Affairs and the Law of the Sea, <[www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/EST.htm](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/EST.htm)>, visited on 15 June 2020. Riigipiiri seadus, adopted 30 June 1994, e.i.f. 31 July 1994, <[www.riigiteataja.ee/en/eli/511022019001/consolide](http://www.riigiteataja.ee/en/eli/511022019001/consolide)>, visited on 15 June 2020. Maapõueseadus, adopted 27 October 2016, e.i.f. 1 January 2017, <[www.riigiteataja.ee/en/eli/507022020002/consolide](http://www.riigiteataja.ee/en/eli/507022020002/consolide)>, visited on 15 June 2020. Laevade ja väikelaevade sisemerre, sadamatesse ning piiriveekogude Eestile kuuluvatesse vetesse sisenemise ja neist väljumise kord, adopted 19 May 2004, e.i.f. 15 June 2004, <[www.riigiteataja.ee/akt/117042019014?leiaKehtiv](http://www.riigiteataja.ee/akt/117042019014?leiaKehtiv)>, visited on 15 June 2020.

<sup>84</sup> The oldest shipwrecks found in Estonia date back to approx. 750AD and comprise two pre-Viking-era boats from Scandinavia (likely central Sweden) with rich artefacts and remains of 41 individuals, many of whom were Scandinavian elite soldiers. See T. Douglas Price, J. Peets, R. Allmäe, L. Maldre, E. Oras, 'Isotopic provenancing of the Salme ship burials in Pre-Viking Age Estonia', 90 *Antiquity* (2016) p. 1033.

- 2) German destroyer G90 that sank in 1916 16 nm NW of Osmussaar Island;
- 3) German mine layer T-18 that sank in 1944 16 nm NW of Osmussaar Island;
- 4) German destroyer S59 that sank in 1916 16 nm NW of Osmussaar Island;
- 5) German submarine U679 that sank in 1945 13 nm NE of Osmussaar Island;
- 6) German-built mine trawl Virsaitis that became part of the Soviet fleet and sank in 1941 14 nm N of Prangli Island;
- 7) 18<sup>th</sup> century merchant ship 11 nm NE of Neugrund shoal;
- 8) 20<sup>th</sup> century steamship 13 nm N of Käsmu village;
- 9) 20<sup>th</sup> century merchant ship 12 nm N of Käsmu village;
- 10) Finnish patrol boat Uisko that sank in 1943 6 nm NW of Keri Island;
- 11) German steamship Reinbek that sank in 1939 6 nm N of Naissaar Island;
- 12) Dutch brigantine/schooner Stella Maris that sank in 1905 6 nm N of Keri Island;
- 13) Dutch steamship Alice H that sank in 1914 20 nm NW of Osmussaar Island.<sup>85</sup>

Most of the above-mentioned wrecks have been declared as underwater monuments in respect of which Estonia has established buffer zones. To this list should be added two shipwrecks that are not included in the Estonian wreck register, but in respect of which the minister of culture has established buffer zones in the Estonian EEZ:

- 1) British submarine HMS E18 that sank in 1916 18.5 nm W of Kõpu Peninsula;<sup>86</sup>
- 2) Soviet submarine S-12 that sank in the Second World War 8 nm N of Naissaar Island.<sup>87</sup>

The buffer zones that have been established to protect the previously listed wrecks all remain within the 24 nm limits of a contiguous zone. These buffer zones thus meet the spatial criterion stipulated in Articles 33 and 303 of the LOSC. The Estonian legal framework of heritage conservation thus demonstrates that if the MS Estonia had sunk in the Estonian EEZ – a few miles southwards of its final place of rest – then the wreck and its immediate surroundings (archaeological layer) could be effectively protected under Sections 2, 12(1), 14(2), 42(1), 83, 86 and 87 of the Estonian Heritage Conservation Act.

Notably, on some occasions, the extension of Estonia's jurisdiction for the protection of shipwrecks located in its maritime area outside the territorial sea have been explicitly supported by the flag State of the relevant shipwreck. For example, the United Kingdom favoured the establishment of the buffer zone in the Estonian EEZ around the wreck of the British submarine HMS E18 to protect the peace of the final place of rest of its sailors.<sup>88</sup> This is significant especially in view of the fact that the United Kingdom has been among those maritime States that have opposed the extension of the coastal State's jurisdiction over shipwrecks located outside territorial sea as a threat to the fine balance

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<sup>85</sup> National Registry of Cultural Monuments. Wreck register, <[register.muinas.ee/public.php?menuID=en\\_wreckregistry](http://register.muinas.ee/public.php?menuID=en_wreckregistry)>, visited on 15 June 2020.

<sup>86</sup> See Estonian minister of culture's regulation No 220. Kultuurimälestiseks tunnistamine, 29 August 2014, <[www.riigiteataja.ee/akt/302092014004](http://www.riigiteataja.ee/akt/302092014004)>, visited on 15 June 2020.

<sup>87</sup> See Estonian minister of culture's regulation No 114. Kultuurimälestiseks tunnistamine, 12 June 2019, <[www.riigiteataja.ee/akt/318062019001](http://www.riigiteataja.ee/akt/318062019001)>, visited on 15 June 2020.

<sup>88</sup> Estonian minister of culture's 2014 regulation No 220, *supra* note 86.

reached in the LOSC between the coastal State's and flag State's rights.<sup>89</sup> While the flag State of a sunken warship may claim sovereign immunity over the shipwreck per se, its scope does not cover the adjacent maritime area of approximately 1 km<sup>2</sup> in regard of which Estonia has established its buffer zone. In this context, one may presume that the United Kingdom's support to the Estonian buffer zone in its EEZ is based on the premise that the buffer zone was established in conformity with the legal framework of a contiguous zone under Articles 33 and 303 of the LOSC.

The Estonian example could be used by the Finnish Parliament to adopt a legal framework that would allow, *inter alia*, to effectively protect the shipwreck of the MS Estonia located in its EEZ by enclaving the wreck with a buffer zone under Article 303 of the LOSC. On this legal basis, Finland would also be entitled to exercise its enforcement jurisdiction, if necessary, by means of hot pursuit under Article 111 of the LOSC, against ships carrying on board persons that have breached the protection regime, e.g. via unauthorized diving to and pilfering of items from the MS Estonia wreck. Pursuant to Article 111(1) of the LOSC, the pursuit of such ship could be continued outside the Finnish contiguous archaeological zone (buffer zone around the MS Estonia wreck) if it has not been interrupted.

Notably, at the time when the foreign ship within the Finnish buffer zone receives the order to stop, it is not necessary for the ship or aircraft giving the order to likewise be within the territorial sea or the buffer zone (contiguous archaeological zone; see Art 111(1) and 111(6) of the LOSC). Instead, the pursuing ship may give the order to stop from the Finnish internal waters, including Finnish ports, or EEZ. The pursuing ship or aircraft would also be able to continue the hot pursuit in a foreign States' EEZ, including Swedish or Estonian EEZs adjacent to the location of the MS Estonia shipwreck. Finland's right of hot pursuit would only cease upon the entrance of the ship pursued to another State's territorial sea (Article 111(3) of the LOSC).

In this context, it needs to be examined next if the MS Estonia shipwreck falls within the scope of "objects of an archaeological and historical nature found at sea", for the protection of which the contiguous archaeological zone could be established in terms of Article 303 of the LOSC.

#### **4 The Cultural Value of the MS Estonia Shipwreck and the 'Age Limit' for Shipwrecks to be Granted Protection**

Article 303 of the LOSC enables to grant special protection to "historic and archaeological objects", an undefined legal term subject to various interpretations. Oxman, one of the drafters of the said provision, notes that:

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<sup>89</sup> Dromgoole 2003, *supra* note 46, p. 74.

There was no reference during the negotiations [of Article 303 of the LOSC] to definitions in other contexts. It is important to bear in mind that whatever the justifications for particular definitions in the context of other instruments, in the context of the law of the sea an unduly liberal reading of the term to embrace more modern wrecks and objects could prejudice certain rights and principles that states were unwilling to yield in the negotiation of the Convention. For example, the interpretation automatically affects the scope of coastal state powers in the contiguous zone beyond the territorial sea.<sup>90</sup>

In essence, Oxman claims that the scope of Article 303 of the LOSC is limited to ancient remains of shipwrecks that are hundreds of years old.<sup>91</sup> By contrast, Scovazzi draws a distinction between hundreds of years old wrecks as archaeological objects and artefacts of relatively recent origin that fall under the scope of the broad term “historic objects”, e.g. ships and aircraft that sank during World War II.<sup>92</sup>

State practice in the northern Baltic Sea region demonstrates that States lack a common approach towards the protection of shipwrecks based on their temporal scope. In Sweden, shipwrecks are protected under the Heritage Conservation Act<sup>93</sup> as ancient remains if the ship was wrecked before 1850 (Sections 1(8) 1a of the 2<sup>nd</sup> Chapter of the Act). Section 20 of the Finnish Antiquities Act grants protection to shipwrecks if they are at least hundred years old (analogously to the UNESCO Convention). On this basis, Finland has established only five protection zones around shipwrecks wherein diving and research is permitted subject to Finnish Heritage Agency’s prior approval in order to ensure that “the structures of the wreck or the artefacts within it will not disappear or be destroyed undocumented, and the entirety of the site can be examined as intact as possible in the future”.<sup>94</sup>

By contrast, Estonia has not explicitly drawn a strict borderline in the current, nor in the previous version of the Estonian Heritage Conservation Act between underwater monuments based on their age. Most of the ships listed in the previous chapter and located in the Estonian EEZ sunk less than 100 years ago. Wrecks which are less than 100 years old have been repeatedly declared as underwater monuments in Estonia to ensure their long-term preservation as objects that form part of international heritage. Such decisions are taken on a case-by-case basis in view of the cultural value of the wreck as a source of information of ship-building techniques, navigation, merchandising and international relations in various historical periods.

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<sup>90</sup> Oxman, *supra* note 25, p. 364.

<sup>91</sup> *Ibid.*

<sup>92</sup> Scovazzi, *supra* note 29, pp. 1952–1953.

<sup>93</sup> Kulturmiljölög (Heritage Conservation Act). Adopted 30 June 1988, SFS 2019:864, <[www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/kulturmiljolog-1988950\\_sfs-1988-950](http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/kulturmiljolog-1988950_sfs-1988-950)>, visited on 12 June 2020.

<sup>94</sup> Finnish Heritage Agency. Underwater Cultural Heritage in Finland, “Protected wreck areas in accordance with the Antiquities Act”, <<https://www.museovirasto.fi/en/cultural-environment/archaeological-cultural-heritage/underwater-cultural-heritage-in-finland>>, visited on 12 June 2020.

The regulations of the Estonian minister of culture which stipulate buffer zones around shipwrecks have mostly referred to the practice of the Baltic Sea coastal States according to which the age of a shipwreck serves as the main criterion for deciding on whether to take it under protection.<sup>95</sup> These regulations also note that usually all shipwrecks of over 100 years of age are automatically declared as underwater monuments.<sup>96</sup> Yet sometimes it suffices for a shipwreck to be taken under protection in Estonia as an underwater monument that the ship simply had an interesting and diverse history. This was the case of e.g. the Greek-flagged commercial vessel *Kimolos* that sank in 1963 in the Estonian waters.<sup>97</sup> The most modern shipwreck in Estonia which was taken under protection in 2016 as an underwater cultural monument is a Soviet submarine that sank in 1989 in the Estonian internal waters, 2.5 nm N of the Suurupi Peninsula.<sup>98</sup> At that time, the shipwreck was 27 years old, which is comparable to the period that has by now passed from the sinking of the *MS Estonia* (27 years). In his most recent regulation issued in 2019, the Estonian minister of culture abstained from referring to the 100 year guideline when it took 22 ships under protection that had mostly sank during the Second World War.<sup>99</sup> Therefore, in Estonia, the 100 year criterion clearly serves merely as a guiding principle, derogations from which are commonplace. Instead, the primary criterion for establishing shipwrecks as underwater monuments is their cultural value. This term is left undefined in the Heritage Conservation Act and it is interpreted on a case-by-case basis by the experts of the National Heritage Board, the expert committee of archaeological monuments and the Heritage Council.<sup>100</sup>

Thus, the Estonian practice proceeds from the understanding that shipwrecks, if they are of particular interest due to their archaeological value or for reasons of, *inter alia*, international relations, deserve to be protected even if they are only a couple of decades old. Estonia's practice in taking under its protection shipwrecks, including those which are located outside its sovereign maritime area and are of relatively recent origin, is relatively wide-reaching in comparison with its neighbouring States Sweden and Finland, as well as the UNESCO Convention. Notably, Finland and Sweden are currently not States Parties to the UNESCO Convention.<sup>101</sup>

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<sup>95</sup> Estonian minister of culture's regulation No 126. Kultuurimälestiseks tunnistamine, 2 July 2018, <[www.riigiteataja.ee/akt/306072018002](http://www.riigiteataja.ee/akt/306072018002)>, visited on 16 June 2020. Estonian minister of culture's regulation No 114. Kultuurimälestiseks tunnistamine, 22 June 2016, <[www.riigiteataja.ee/akt/329062016001](http://www.riigiteataja.ee/akt/329062016001)>, visited on 16 June 2020. Estonian minister of culture's regulation No 79. Kultuurimälestiseks tunnistamine, 28 February 2014, <[www.riigiteataja.ee/akt/305032014003](http://www.riigiteataja.ee/akt/305032014003)>, visited on 16 June 2020. Estonian minister of culture's regulation No 160. Kultuurimälestiseks tunnistamine, 14 May 2014, <[www.riigiteataja.ee/akt/320052014005](http://www.riigiteataja.ee/akt/320052014005)>, visited on 16 June 2020. Estonian minister of culture's 2014 regulation No 220, *supra* note 86. Estonian minister of culture's regulation No 299. Kultuurimälestiseks tunnistamine, 27 November 2014, <[www.riigiteataja.ee/akt/302122014001](http://www.riigiteataja.ee/akt/302122014001)>, visited on 16 June 2020.

<sup>96</sup> *Ibid.*

<sup>97</sup> Estonian minister of culture's 2018 regulation No 126, *supra* note 95.

<sup>98</sup> See Estonian minister of culture's 2016 regulation No 114, *supra* note 95.

<sup>99</sup> Estonian minister of culture's 2019 regulation No 114, *supra* note 87.

<sup>100</sup> See, e.g. Estonian minister of culture's 2014 regulation No 220, *supra* note 86.

<sup>101</sup> See the Status of States Parties to the Convention on the Protection of the Underwater Cultural Heritage. Paris, 2 November 2001, <[www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha](http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha)>, visited on 5 January 2021.



In Estonia, the ratification process of the UNESCO Convention was initiated in 2016. The Ministry of Foreign Affairs and Ministry of Justice approved the draft legal act for the ratification of the UNESCO Convention in 2016 and 2017, respectively, and pursuant to the Estonian government's decision of 8 October 2020 Estonia deposited its instrument of approval on 2 November 2020;<sup>102</sup> the Convention became binding for Estonia on 2 February 2021.<sup>103</sup> Initially, the Estonian Ministry of Foreign Affairs found that Estonia's current legal framework is not in conformity with the UNESCO Convention to the extent that the Estonian Heritage Conservation Act does not provide that any wrecks that are at least 100 years old are automatically granted protection.<sup>104</sup> The Estonian Ministry of Culture did not accept that the age limit as provided in the UNESCO Convention serves as the only criterion for granting protection to underwater monuments.<sup>105</sup> In conclusion, Estonia abstained from stipulating the 100 years criterion in its relevant regulations. Under Section 10 of Estonia's 2019 Heritage Conservation Act, the general criteria for the assessment of the prerequisite for granting state protection to an underwater monument are established by a regulation pursuant to which it is necessary to assess the monument's overall scientific, historical, artistic or other cultural value. In this context, the object's age serves as only one criterion amongst numerous others for evaluating the object's cultural value.

The 100 year limit, as stipulated in the UNESCO Convention, has been the subject of different and even conflicting interpretations. The soundness of the 100 year threshold per se has been debated among legal scholars and practitioners.<sup>106</sup> In addition, strict interpretation of the 100-year limit as stipulated in the UNESCO Convention has obstructed the ratification of the UNESCO Convention by other States, e.g. in the case of the United Kingdom. Dromgoole has commented that:

The UK is concerned that ratification of the UNESCO Convention would oblige it to extend its current protective framework so that it covered all wreck sites in the territorial sea that have been underwater for at least 100 years; in effect, it is concerned that it would be required to identify and designate each of the relevant sites. In light of its estimate that this could amount to about 10,000 sites, the suggestion that this would amount to an impossible task is not unreasonable. In fact there is considerable doubt about whether the estimate of 10,000 sites is even broadly accurate. It seems that this may reflect the number of known wreck sites of any age and the number of sites over 100 years of age may be less than 1000. In any

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<sup>102</sup> Reply of 9 September 2020 of the Ministry of Culture to the author's information request (note 68). UNESCO, 'Convention on the Protection of the Underwater Cultural Heritage. Paris, 2 November 2001', <<https://pax.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha>>, visited on 25 November 2020.

<sup>103</sup> Välisministeeriumi teadaanne (Announcement of the Ministry of Foreign Affairs), RT II, 24 November 2020, 2, <<https://www.riigiteataja.ee/akt/224112020002>>, visited on 20 November 2020.

<sup>104</sup> Ministry of Foreign Affairs of Estonia. UNESCO veealuse kultuuripärandi kaitse konventsiooni ratifitseerimise seaduse eelnõu kooskõlastamine. 12 May 2016, Doc No 15.2-2/2360-1, p. 1, <[eelvoud.valitsus.ee/main#juK79eCR](http://eelvoud.valitsus.ee/main#juK79eCR)>, visited on 20 June 2020.

<sup>105</sup> Reply of 9 September 2020 of the Ministry of Culture to the author's information request (note 68).

<sup>106</sup> S. Dromgoole, *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (2<sup>nd</sup> Ed, Leiden/Boston, Brill, 2006) p. 312.

event, whatever the number may be, it is possible that the UK government may have misunderstood the nature of blanket protection by making the assumption that it would be required to designate all sites falling within the UCH [underwater cultural heritage] definition. Article 7 merely requires that a system is in place whereby the Rules in the Annex are applied to activities directed at UCH.<sup>107</sup>

The UNESCO Convention, pursuant to Article 1(1)(a), is aimed at protecting only such traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years. It would not be feasible to apply a blanket protection to each shipwreck that has remained submerged 100 years, even if such a wreck does not have any meaningful value. The problem is that this loosely worded significance criterion calls for different interpretations – it is possible to argue that each shipwreck of at least 100 years of age possesses such character.<sup>108</sup> Nonetheless, Carducci maintains that the UNESCO Convention does not necessarily expect States to adopt such “extreme obligation”.<sup>109</sup>

If a State would apply a blanket protection to all shipwrecks that are at least 100 years old, then it would be obliged to designate numerous buffer zones for the protection of shipwrecks in its maritime area. This would create significant impediments to the future development of the maritime area, particularly for carrying out such industrial projects as the laying of submarine cables and pipelines or the construction of windfarms. In the context of maritime spatial planning, the potential granting of blanket protection to all shipwrecks of at least 100 years of age would create significant tensions with legitimate industrial development plans. These conflicting interests should be balanced on a case-by-case basis when drafting the regulations for establishing buffer zones for the protection of underwater monuments, considering, *inter alia*, the cultural value of the shipwreck and the interests for industrial development as envisaged in the maritime spatial plan.

Notably, the UNESCO Convention does not prevent States from protecting shipwrecks that are less than 100 years old, e.g. the MS Estonia. The Convention’s operational guidelines explicitly note: “The Convention contains minimum requirements. Each State Party, if it so wishes, may choose to develop even higher standards of protection, for example by also protecting on a national level remains submerged less than 100 years.”<sup>110</sup> Therefore, Estonia’s practice in setting higher standards of protection for ships that have remained submerged less than 100 years appears to be in conformity with the UNESCO Convention.

Finland could consider adopting the Estonian practice for protecting the historical wreck of the MS Estonia in its maritime area. In the legal literature, the MS Estonia has

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<sup>107</sup> Dromgoole 2013, *supra* note 25, p. 122.

<sup>108</sup> Dromgoole 2003, *supra* note 46, p. 64.

<sup>109</sup> Carducci, *supra* note 58, p. 423.

<sup>110</sup> UNESCO Doc. No. CLT/HER/CHP/OG 1/REV. Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage, 2015, p. 4, <[unesdoc.unesco.org/ark:/48223/pf0000234177](https://unesdoc.unesco.org/ark:/48223/pf0000234177)>, visited on 16 June 2020.

been referred to as an example of a shipwreck of a historic ship along with ships of the Dutch “Vereenigde Oostindische Compagnie”, British HMS Birkenhead, American CSS Alabama, British HMS Erebus and HMS Terror.<sup>111</sup> It is reasonable to expect that the wreck of the MS Estonia, which includes the remains of over 800 persons from 17 States and represents the second deadliest peacetime sinking of a European ship after the sinking of the RMS Titanic in 1912,<sup>112</sup> carries a special historical and cultural value. Thus, one may classify the wreck of the MS Estonia as falling within the ambit of “historical objects” that can be granted protection under Article 303 of the LOSC.<sup>113</sup> This would enable to effectively protect the wreck against pilferers. It constitutes an underwater monument, the integrity of which needs to be and can be effectively safeguarded under the domestic legal acts of Finland, e.g. an *ad hoc* regulation on the establishment of a buffer zone around the MS Estonia wreck, in conformity with Article 303 of the LOSC. This would enable to ensure that the interior of the wreck stays intact by the time when 100 years have passed from the sinking of the MS Estonia.

## 5 Conclusion

The high seas freedoms of navigation and overflight apply, subject to the limitations of Article 58(3) of the LOSC, in the area that has been designated by the Baltic Sea coastal States as the final place of rest for victims of the MS Estonia disaster. As a result, Finland is currently not entitled to exercise its prescriptive or enforcement jurisdiction over on-site investigations of or private diving operations to the shipwreck located in its EEZ and on its continental shelf outside the scope of the 1995 MS Estonia Treaty. The special protection regime established under the 1995 MS Estonia Treaty is binding and violations against it can be effectively sanctioned in respect of only the nationals of its few States Parties. This creates jurisdictional gaps, particularly in the context of the active personality principle, which do not allow to effectively protect the MS Estonia wreck against private persons originating from States that are not parties to the 1995 MS Estonia Treaty. Such persons have looted the wreck in the past and are also able to pilfer items from the site in the future.

However, Article 303 of the LOSC enables Finland, in the spirit of cooperation with the other States Parties to the 1995 MS Estonia Treaty, to significantly close the current loopholes in the protection regime of the MS Estonia wreck. The wreck carries a significant historical and cultural value similar to the wreck of RMS Titanic. This enables

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<sup>111</sup> J. Huang, ‘Maritime archaeology and identification of historic shipwrecks: A legal perspective’, 44 *Marine Policy* (2014) p. 258. The author, however, contends that: „Estonia is not a historic shipwreck, but it may become one in the future.”

<sup>112</sup> A. Whyte, ‘Estonia shipwreck investigator and nautical linguist Captain Uno Laur dies’, *ERR News*, 8 October 2018, <[news.err.ee/867482/estonia-shipwreck-investigator-and-nautical-linguist-captain-uno-laur-dies](https://news.err.ee/867482/estonia-shipwreck-investigator-and-nautical-linguist-captain-uno-laur-dies)>, visited on 16 June 2020.

<sup>113</sup> On the relationship of the LOSC and the UNESCO Convention, see, e.g. Scovazzi, *supra* note 29, pp. 1959–1960; Dromgoole 2003, *supra* note 46, pp. 75–76.

to classify the wreck of the MS Estonia as falling within the ambit of “historical objects” that can be granted protection under Article 303 of the LOSC in a contiguous archaeological zone. Within the up to 24 nm wide contiguous archaeological zone, Finland could prohibit the removal of objects from the wreck and its surrounding seabed without its approval and exercise its legislative and enforcement jurisdiction towards other States and private persons irrespective of whether their State of origin is a party to the 1995 MS Estonia Treaty. This would deter pilferers that have so far been able to loot the MS Estonia wreck. In general, Finland would have the right to regulate and authorize activities directed at the MS Estonia shipwreck.

This would require Finland to broaden the functional and spatial scope of its current contiguous zone. Yet instead of extending the breadth of its current 2 nm wide contiguous zone to its maximum limit in its whole maritime area, Finland could establish an approximately 1 km<sup>2</sup> wide buffer zone around the MS Estonia wreck, the limits of which would overlap with the area constituting the final place of rest as stipulated under Article 2 of the 1995 MS Estonia Treaty. In this case, Finland would follow Estonia’s practice in designating tiny buffer zones around not only ancient, but also relatively modern wrecks of considerable cultural value that lie within the 24 nm limits as measured from the straight baselines.

**Map 1.** The outer limits of Estonia's, Finland's and Sweden's maritime zones and the location of the wreck of the MS Estonia

Source: A. Lott, 'Kas Eestil on õigus Estoniale sukelduda?', *Postimees*, 12 November 2020, pp. 16–17. This is an English version of the map which originally appeared in Estonian. The location of the wreck of the MS Estonia (59°22,9' N 21°41,0' E), as depicted on this map, serves an illustrative purpose only. The distance of the wreck, as measured from the closest Finnish rock Grimsörarna south of Utö Island, is approximately 19 nm.