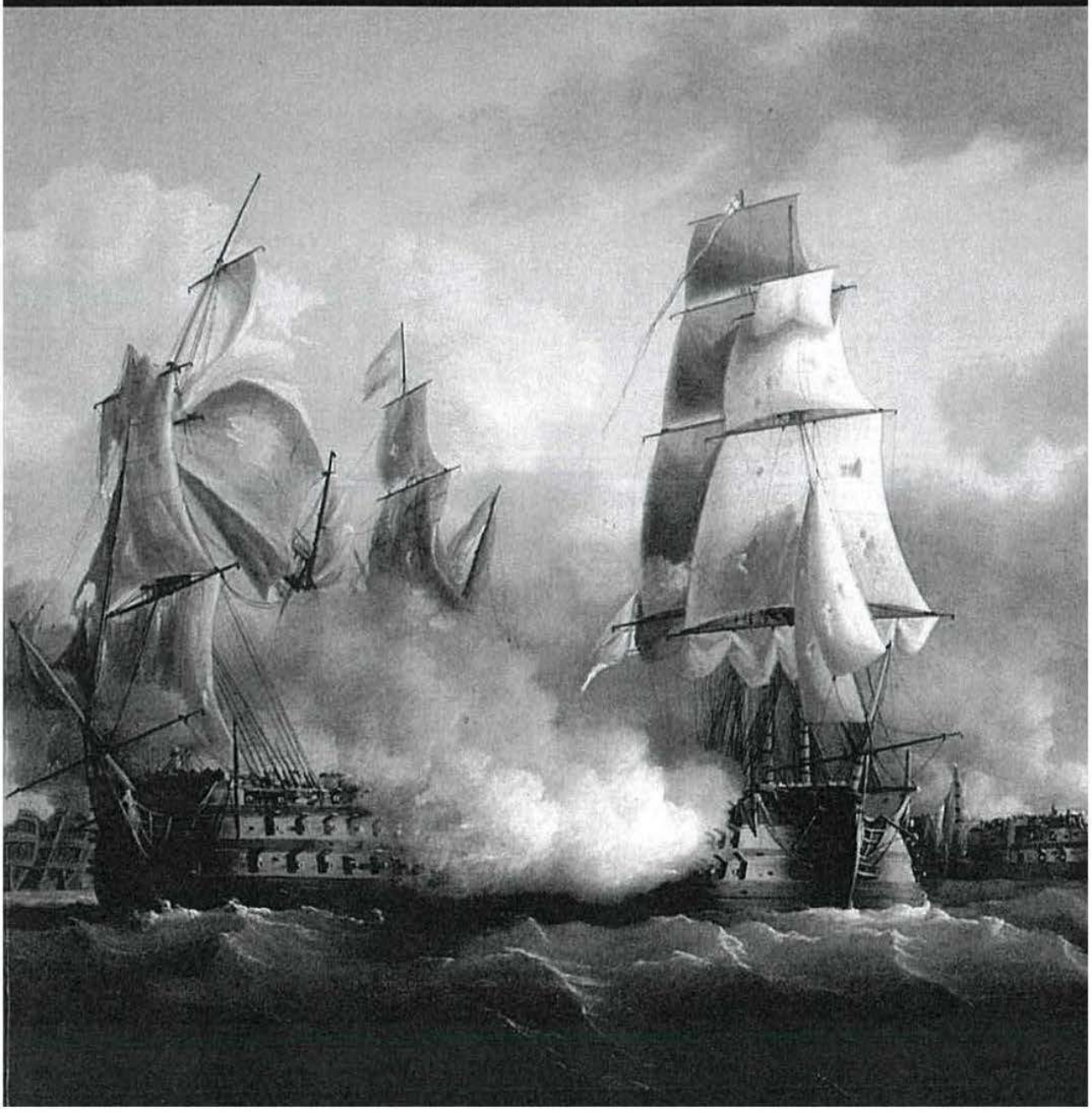
SARAH DROMGOOLE

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Underwater Cultural Heritage and International Law



Underwater Cultural Heritage and International Law

Sarah Dromgoole

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107480124

First published 2013
3rd printing 2014
First paperback edition 2014

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
Dromgoole, Sarah.
Underwater cultural heritage and international law / Sarah Dromgoole.
pages cm.
ISBN 978-0-521-84231-0 (Hardback)
1. Underwater archaeology – Law and legislation. 2. Cultural property – Protection (International law) 3. Convention on the Protection of Underwater Cultural Heritage (2001) 4. Unesco. I. Title.
K3791.D76 2013
344'.09409162–dc23 2013003684

ISBN 978-0-521-84231-0 Hardback
ISBN 978-1-107-48012-4 Paperback

Additional resources for this publication at www.cambridge.org/dromgoole

1 The evolution of international law on underwater cultural heritage

1. Introduction

Since the 1950s and the dawning of awareness of the potential cultural significance of shipwrecks and other forms of UCH, there have been a number of international initiatives designed to provide such material with legal protection. Some have been more successful than others, but they have all contributed in one way or another to the international legal position that exists today.

This chapter charts the development of international law in this field from the earliest initiatives through to the adoption of the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001.[1] It plots the development of interest in, and approaches to, the matters that became focal points of contention during the UNESCO negotiations, focusing in particular on the central questions of coastal state jurisdiction and the application of salvage law. It also traces the emergence of increasingly sophisticated approaches to UCH protection and management as appreciation of the cultural value of UCH grew and marine archaeological theory and practice developed. Changing perceptions of the threats posed to UCH over the five decades in question are also noted.

The subject matter of this chapter has already been extensively covered in academic literature and therefore the treatment here is relatively brief and intended primarily to provide a backdrop for the discussion that comes in later chapters. To give some sense of attitudes prevailing at key moments in the evolution of the subject, the language of contemporary reports and commentaries is sometimes adopted.

[1] This chapter is not concerned with international agreements made for the protection of specific wreck sites, or for the protection of UCH in specific regional seas. These are discussed in a number of later chapters.

and historical nature'; it is also unclear what the precise nature is of the preferential rights referred to in the article, as well as which states have such rights. Even more importantly, the article does not address the question: if the ISA is not responsible for implementing the objective set out in the article, then who is? The negotiating history of the article provides some indicators about these matters, but they are far from decisive.

2.1.2 Article 303

Article 303 of the LOSC originated in a proposal made by Greece in 1979, in the Second Committee, that the sovereign rights of the coastal state in respect of both the continental shelf and the EEZ be extended to include rights regarding the discovery and salvage of any 'object of purely archaeological or historical nature on the seabed and subsoil'.[14] Later the same year, Greece revised its proposal, the amended form referring only to the continental shelf.[15] This version gained support from six further states.[16] However, it soon became clear that it would not achieve consensus: in sessions in 1980 it met with opposition from three maritime states, namely the USA, the UK and the Netherlands.[17] That opposition was predicated on the following chain of argument:

> [the proposal] granted the coastal state rights over its continental shelf which were unrelated to the latter's natural resources and thus might pave the way for other exceptions, favouring creeping jurisdiction and, ultimately, lead to a regime of full coastal state sovereignty over the continental shelf.[18]

A counter-proposal made by the US for a general duty to be imposed on states to protect archaeological and historical objects found in the marine environment led to a debate over the extent of the waters to which such a duty should apply. During that debate, Greece argued for full coastal state jurisdiction over UCH to the 200-mile limit;[19] the USA

[14] Caflisch, 'Submarine Antiquities and the International Law of the Sea', p. 16.

[15] According to Caflisch, in light of the definition of the continental shelf adopted in the draft of Art. 76(1), reference to the EEZ was 'unnecessary'. Under that definition, the continental shelf was at least as broad as the EEZ and the assumption was that archaeological and historical objects will only be found on or in the seabed, not in the water column: *ibid.*, p. 17 n. 58. (For the reason why the UNESCO Convention 2001 opted to refer to both the continental shelf and the EEZ, see Chap. 8, n. 45.)

[16] Cape Verde, Italy, Malta, Portugal, Tunisia and Yugoslavia.

[17] Caflisch, 'Submarine Antiquities and the International Law of the Sea', p. 17.

[18] *Ibid.*

[19] Nordquist suggests that the notion of using a 200-mile limit probably originated in an initiative of the Council of Europe in 1978 (on which, see section 2.2.1, below): Nordquist, Rosenne and Sohn, *United Nations Convention on the Law of the Sea 1982*, Vol. V, p. 159 n. 2.

responded by proposing a text based on the combination of a general duty and some limited control in the twelve- to twenty-four-mile zone.[20] Ultimately, the US proposal was adopted, on the basis that it was 'closer to a compromise' than any of the other proposals on the table.[21]

Article 303 provides:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article [i.e. customs, fiscal, immigration or sanitary regulations].
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

Article 303 is located in Part XVI of the Convention, which is headed 'General Provisions'.[22] Its location in that part is assumed to mean that – with the exception of paragraph 2, which relates specifically to the contiguous zone – the article applies generally and is not geographically restricted. The effect of this is that the duty on states in paragraph 1

[20] According to Oxman, Vice Chairman of the US delegation, '[t]he real focus of concern [was] the area immediately adjacent to the territorial sea' and '[t]he main issue was the policing of [this] area'; 'the vast seaward reaches of the economic zone and continental shelf were really not relevant to the problem': Oxman, 'The Third United Nations Conference on the Law of the Sea', p. 240. Strati has suggested that these assertions were politically motivated and did not reflect reality: see Strati, *The Protection of the Underwater Cultural Heritage*, pp. 343–4. However, it is possible they may have been at least partly influenced by the conventional wisdom that ancient seafarers sailed close to the coast and avoided the open sea (a view challenged by recent discoveries: see, for example, N. Paphitis, 'Roman shipwrecks found nearly a mile deep', *Associated Press*, 21 June 2012).

[21] Nordquist, Rosenne and Sohn, *United Nations Convention on the Law of the Sea 1982*, Vol. V, p. 159. For further discussion of the circumstances surrounding this crucial compromise, see Caflisch, 'Submarine Antiquities and the International Law of the Sea', pp. 17–19; Strati, *The Protection of the Underwater Cultural Heritage*, pp. 162–5; Hayashi, 'Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea', pp. 294–5.

[22] After the USA made the proposal for a duty of protection to apply to the marine environment generally the issue was transferred from the Second Committee (whose business included the regimes for the continental shelf and EEZ) to the Informal Plenary of the Conference.

applies to all sea areas, as does the saving for the rights of identifiable owners, the law of salvage and other matters set out in paragraph 3. The negotiating history of the article also makes it clear that the coastal state is afforded no rights in respect of UCH on the continental shelf or in the newly created EEZ and – by virtue of paragraph 2 – only limited competence in respect of the removal of UCH in the twelve- to twenty-four-mile contiguous zone.[23]

The precise nature of the jurisdictional competence afforded to coastal states by paragraph 2 is far from clear. The lack of clarity is, in part, because of the complex wording of the provision, which includes a legal fiction[24] and a cross-reference to another article. In part, it is also because the wording was deliberately ambiguous. The USA, the UK and the Netherlands wished to avoid a formal extension of coastal state jurisdiction over UCH beyond the twelve-mile territorial limit; Greece and the co-sponsors of the Greek proposals wished to provide a means of controlling the removal of UCH in the twelve- to twenty-four-mile zone. The wording accommodates both objectives.[25]

In 1989, Nordquist suggested that the meaning of paragraphs 3 and 4 of Article 303 was 'self-explanatory'.[26] However, this is not entirely the case. Article 303(3) is clearly a saving provision in respect of 'the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges',[27] but the impact it has on the application of other provisions is uncertain. In particular, it is unclear what its relationship is with Article 303(2), and also with Article 149 (given that Article 303(3) is of general geographical application). Is the effect of Article 303(3) that the laws of salvage and other

[23] The contiguous zone is a zone contiguous to the territorial sea extending no further than twenty-four miles from baselines: LOSC, Art. 33.

[24] A good definition of a legal fiction is '[t]he assumption by the law that a particular assertion is true (even though it may not be) in order to support the functioning of a legal rule': *Webster's New World Dictionary* (2006).

[25] For discussion of Art. 303(2), see Chap. 7, section 3.3.

[26] Nordquist, Rosenne and Sohn, *United Nations Convention on the Law of the Sea 1982*, Vol. V, p. 161. This volume is one of a series, produced over a number of years, under the general editorship of Myron Nordquist. The series provides an article-by-article commentary on the LOSC. In the words of Churchill and Lowe, it 'enjoys an unusual authority on the subject': Churchill and Lowe, *The Law of the Sea*, p. 27.

[27] The reference in Art. 303(3) to laws and practices with respect to cultural exchanges reflects the fact that international cultural exchanges have long been regarded as of benefit to humanity and have been promoted by instruments in the cultural heritage field. It makes clear that protective measures should not inhibit legitimate exchanges of this kind. See, further, Strati, *The Protection of the Underwater Cultural Heritage*, pp. 174–5.

rules of admiralty override the protective objectives of those provisions? And, assuming it does apply to Article 149, how do the rights of identifiable owners interact with the preferential rights referred to in that provision? Article 303(4) is also unclear: in particular, does it mean that Article 303 is 'without prejudice' only to *pre-existing* international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature,[28] or is it also without prejudice to agreements made at a later date?

2.1.3 An 'incomplete' regime

Thanks to the efforts of a small group of states (motivated, for the most part, by a desire to find a means of regulating the recovery of UCH situated in the Mediterranean Sea), the LOSC includes some limited provision relating to UCH protection. However, even before the text of the treaty was finalised, that provision was the subject of considerable criticism.

While there are many aspects of Articles 149 and 303 that are open to criticism, the core problems are the following. As far as Article 149 is concerned, the fundamental problem is its failure to designate an agency to put into practice the protective principle it enshrines: as Caflisch pointed out in his seminal article of 1982, this failure deprives the principle of 'all real significance'.[29] As far as Article 303 is concerned, a view expressed by Caflisch that the duties set out in paragraph 1 of that article are 'far too general and vague to have any significant normative content'[30] is widely shared and the need to resort to a 'constructive ambiguity' in paragraph 2 – the only provision in the LOSC affording a concrete mechanism to control interference with UCH *beyond* territorial limits – is a self-evident flaw. On the face of it, the saving for salvage law in paragraph 3 of Article 303 is an active encouragement to the unregulated recovery of UCH: Scovazzi, a leading commentator, has characterised this provision as an 'invitation to looting'.[31] However, the most glaringly obvious problem with the two articles taken together – and one noted by virtually every commentator on the subject – is that they appear to leave a particular geographical 'gap' in the provision they afford. That gap relates to the continental shelf *beyond* the contiguous zone; in other words, to the area of the continental shelf from

[28] For example, the 1970 UNESCO Convention on Illicit Trade in Cultural Property.
[29] Caflisch, 'Submarine Antiquities and the International Law of the Sea', p. 29.
[30] *Ibid.*, p. 20.
[31] See, for example, Scovazzi, 'The Protection of Underwater Cultural Heritage', p. 125.

respect to warships.[163] The opposition of Turkey centred on the fact that it is not a state party to the LOSC and therefore had issues with respect to the technical relationship between the two treaties.[164]

3.1.3 Development and status of the Annex

A major contribution of the ILA's Committee on Cultural Heritage Law to the development of the UNESCO Convention was its recognition at an early stage in its work that there was a need for a set of archaeological standards to govern activities directed at UCH.[165] Such standards would provide guidance for the competent national authorities in making a judgement about whether or not activities were acceptable and would also ensure uniformity of practice. In 1991, the ILA Committee had called on a newly established scientific committee of the International Council on Monuments and Sites (ICOMOS)[166] to assist with the drafting of such standards.

The ICOMOS International Committee on the Underwater Cultural Heritage (ICUCH) embarked on the task of preparing a set of principles, or 'Charter', to be appended to the draft treaty[167] and the eventual outcome of the process was the International Charter on the Protection and Management of Underwater Cultural Heritage, which was adopted by the 11th General Assembly of ICOMOS in Sofia, Bulgaria, in 1996.[168] The UNESCO Convention includes an Annex which is closely based on this Charter.

An important question for the ILA Committee and, later, also for the UNESCO negotiators, was the relationship that the benchmark standards should have with the treaty itself. Such a question is not uncommon in treaty-making. Should the standards have the same status as the treaty, or a lesser legal status, in other words that of a non-binding code of practice to which the treaty simply refers? If the standards were to be

[163] *Ibid.* The Greek concern on this issue related not only to the provisions in the Convention relating to sunken warships but also to a provision (Art. 13) relating to operational warships: see, further, Chap. 8, n. 101.

[164] See Turkey's Statement on Vote, reproduced in Camarda and Scovazzi, *The Protection of the Underwater Cultural Heritage*, p. 432.

[165] O'Keefe, *Shipwrecked Heritage*, p. 21.

[166] ICOMOS is 'an international non-governmental organisation of professionals, dedicated to the conservation of the world's historic monuments and sites': see www.icomos.org.

[167] For details of the process, see Grenier, 'The Annex', pp. 111–12.

[168] The International Charter on the Protection and Management of Underwater Cultural Heritage 1996 supplements the ICOMOS Charter for the Protection and Management of Archaeological Heritage 1990.

afforded treaty status, should they be incorporated in the main text of the treaty, or in an annex? The option most generally favoured during the UNESCO negotiations was to give the standards binding force through some form of incorporation in the treaty. However, this then gave rise to the question of amendment. The process of treaty amendment is notoriously difficult and time-consuming, and the standards are intended to reflect prevailing good practice. If they were to be an integral part of the treaty, how could it be ensured that they keep pace with changing archaeological theory and practice? The 1994 ILA Draft allowed for ICOMOS to make revisions to the appended 'Charter' from time to time, permitting states parties effectively to 'opt-out' from amendments to which they did not consent.[169] However, as pointed out by O'Keefe, one difficulty with this approach is that over the course of time different states parties may end up applying different standards.[170] It became apparent too that the notion that a non-governmental organisation such as ICOMOS could make revisions binding on states parties, even with some provision for opt-out, would be unacceptable to some states.

The position taken by the Convention on this matter is as follows:

> The Rules annexed to this Convention form an integral part of it and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Rules.[171]

This means that the 'Rules' in the Annex to the UNESCO Convention are not just a code of practice or guidelines, but have the status of binding treaty provisions. No special provision is made for the revision of the Annex and, instead, it is subject to the general amendment procedures applicable to the rest of the Convention.[172]

The significance of the Annex for the Convention as a whole is difficult to overstate. The Rules in the Annex are not simply an integral part of the Convention in a technical sense; they are integral to its entire spirit and ethos.[173] This is illustrated by the fact that a number of the fundamental principles of the Convention are simply reiterations of the general principles of the annexed Rules. Given that these Rules derived from

[169] 1994 ILA Draft, Art. 15. See also 1998 UNESCO Draft, Art. 24, which followed the approach of the 1994 ILA Draft but made provision for the formal notification of states parties of revisions.

[170] O'Keefe, 'Protecting the Underwater Cultural Heritage', p. 302.

[171] UNESCO Convention, Art. 33.

[172] See UNESCO Convention, Art. 32. For a discussion of the amendment procedures, see Chap. 10, section 6.

[173] See Grenier, 'The Annex', p. 120.

the ICOMOS Charter,[174] it is clear that the work of ICOMOS – a body with professional expertise in the heritage sector – had a profound influence on the final shape of the Convention.

At the conclusion of the UNESCO negotiations, the Annex was widely praised, including by those states unable to support the Convention as a whole. At the time, a number indicated that they would adopt, or at least consider adopting, the Rules in their national law and practice.[175]

3.2 The UNESCO Convention 2001: overview

The UNESCO Convention 2001 is a substantial and technically complex treaty. The main body of the text contains thirty-five articles and the Annex includes an additional thirty-six Rules. The conventional regime is governed by a number of overarching objectives and general principles. These are enunciated in Article 2 and in Part I of the Annex, and referred to in the preamble and other parts of the text.

The treaty 'aims to ensure and strengthen the protection of underwater cultural heritage'[176] and its overall objective is the preservation of UCH 'for the benefit of humanity'.[177] The preamble recognises that cooperation between states, other organisations and interested parties 'is essential' for the protection of UCH[178] and the principle that 'states parties shall cooperate in the protection of underwater cultural heritage' – set out in Article 2(2) – is a cornerstone of the Convention.[179]

As far as its material scope of application is concerned, in general terms the Convention follows the approach of the 1994 ILA Draft. 'Underwater cultural heritage' is defined broadly to include 'all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years'.[180] Arguments made by certain states that the definition should include a criterion based on 'significance' were rejected. On two specific aspects of its material scope, the Convention does not follow the ILA approach. First, in order to avoid

[174] During the governmental expert meetings, some modifications were made to the language adopted by the Charter in order to reflect the conventional status of the Annex and a few amendments of a more substantive nature were made for political reasons. See Garabello, 'The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage', pp. 183–92; see also O'Keefe, *Shipwrecked Heritage*, p. 152.

[175] See, for example, the Statements on Vote by France and Norway reproduced in Camarda and Scovazzi, *The Protection of the Underwater Cultural Heritage*, pp. 427 and 430.

[176] Art. 2(1). [177] Art. 2(3). [178] Preambular clause 10. [179] Art. 2(2).

[180] Art. 1(1)(a).