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A Handbook on the New Law of the Sea

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11 Underwater Archaeological and Historical Objects

SECTION 1 INTRODUCTION

Maritime accidents as well as bradyseism (slow rise and fall of earth's crust) have accumulated on the sea-bed and ocean floor the evidence of remote civilizations, which may contribute to a greater understanding of mankind's history and culture. This evidence consists, *inter alia*, of remains of vessels and cargoes of the great seafaring nations [1] as well as of sites, submerged towns, harbour rocks and coastal dwellings [2].

Objects lost at sea have enjoyed, thanks to the marine environment, a better surrounding than those on land and, since most sank quickly, they have preserved, being for the most part intact, "a moment in time" [3]. Moreover, when situated at great depths, they have been protected, until recently, from the violence of men.

Today, the development of modern technology has expanded the ability of scientists to locate objects at sea, in that they may benefit not only from conventional seismic detection devices, such as side-scan sonar, sub bottom profilers and magnometers, but also from aerial and satellite photography, multi-spectral imaging and from the techniques designed to

1. In his statement to the General Assembly on 1 November 1967, Ambassador Pardo (Malta) indicated that there would appear to be more objects of archaeological interest lying on the bottom of the Mediterranean than there are in the museums of Greece, Italy, France and Spain combined (First Committee, 1515 meeting, Wednesday, 1 November 1967, at 10 a.m., point 20: UN doc. A/C.1/PV.1515, p. 3).
2. Such as Pozzuoli on the Tyrrhenian coast near Naples, the medieval city of Dunwick on the east coast of Britain, some submerged sectors of towns on the Black Sea coast and the former pirate town of Port Royal in Jamaica.
3. "A complete sunk ancient ship in good condition is a sort of undersea Pompeii, in which dark, cold water instead of hot ashes has preserved a moment in time", Boscom, *Deep-Water Archaeology in Science*, Vol. 174, 1971, p. 262.

study polymetallic nodules, *inter alia* the analysis of the acoustic shadow cast on the bottom of the sea[4].

As Professor Caflisch underlines[5], "this perspective, attractive as it may seem, has its negative sides", as underwater technology is accessible not only to public authorities, but also to individuals and the latter may be incited to underwater search for historical objects by greed for their possible monetary value, rather than by scholarly interest for their cultural importance, and may thus loot the sites and destroy the relics.

The above considerations show the need for a legal framework for the protection and removal of historical underwater objects, comprising rules on allocation of State jurisdiction, binding standards to be included in appropriate national laws, and provisions on settlement of disputes of jurisdiction between States.

The study which follows contains an appraisal of the current legal framework, taking account, in particular, of the work on the subject carried out by Professors Caflisch, Oxman, Migliorino and Roucounas (see general bibliography in Vol. 2).

SECTION 2 CURRENT LEGAL FRAMEWORK AT NATIONAL AND INTERNATIONAL LEVEL

Up to now, only a few States have enacted special domestic legislation and taken measures on protection of historical wrecks[6]; others[7] have provided that their legislation on land archaeology

4. An example of the complexity of the present engineering works for archaeological survey can be found in the means utilized by the French group IFREMER for the recovery of the *Titanic*'s remains which lie two and a half miles deep in the sea. These means include: a mother ship, the *Nadir*; a small deep-sea research vessel, the *Nautile*, which has a crew of three and mechanical arms that enable it to grab and lift objects ranging in size from a tea-cup to a safe; a special robot craft, the *Robin*, attached to the *Nautile* by a two-foot cable, whose powerful lights and television cameras scout the terrain ahead of the deep-sea vessel and transmit television pictures (*The New York Times*, 14 August 1987, p. A32.

5. L. Caflisch, "Submarine Antiquities and the International Law of the Sea", in *Netherlands Yearbook of International Law*, 1982, Vol. XIII, p. 4.

6. France (loi No. 61-1262, 24.11.1961 – *JO*, 25.11.1961; décret No. 61-1547, 26.12.1962 – *JO*, 12.1.1963; arrêté, 4.2.1965 – *JO*, 13.2.1965); United Kingdom (Protection of Wrecks Act (*Public General Acts and Measures of 1973*, Part I, pp. 545-548)); Australia (Historic Shipwrecks Act 1976 (No. 190 of 1976)); Denmark (Protection of Cultural Heritage, 1984); some federal states of the United States (Florida: Antiquities Act 1965; Archives and History Act 1967; Texas: Antiquities Code 1969).

7. Greece (Laws of 24.8.1932 on Research and Conservation of Archaeological Objects); Turkey (Law of Antiquities 1973); Italy (Protection of Items of Artistic and Historic Interest GU No. 223, 28.8.1972); Norway (Protection of Antiquities Act of 29 June 1951 and Amended Act of 1953).

is also applicable to the removal from the bottom of the sea of any object of archaeological, historical or other cultural significance. These types of legislation are mainly confined to specific issues, such as the terms and conditions for granting a licence which authorizes the removal of a relic, the rights, if any, of the finder and the ownership of the articles removed.

At present, international law does not afford a comprehensive specific legal régime on underwater archaeological and historical objects. In particular, the 1958 Geneva Conventions on the Law of the Sea contain no special provisions on the subject. Consequently, the rules applicable to such objects are general ones appearing in existing international instruments, either global[8] or regional[9], on the protection of cultural property as well as in the 1958 Geneva Conventions establishing the exclusive jurisdiction of the coastal State in its territorial sea[10] and the freedom of the high seas[11].

This general approach does not take account of the peculiarities of marine research nor of the specific features arising out of the marine environment, both of which justify the most recent regulatory efforts undertaken by the international community in this field.

The outcome of these efforts is the provisions on underwater archaeological and historical objects enacted by the Third United Nations Conference on the Law of the Sea and the Draft European Convention on the Protection of Underwater Cultural Heritage prepared by the Committee of Experts within the Council of Europe.

Neither of these sets of rules is at present in force, as the United Nations Convention on the Law of the Sea has not yet entered into force and the Draft European Convention is not even open for signature.

In spite of this, it may be of interest to analyse their scope and content because they embody or crystallize emergent rules of customary law.

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8. The Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954; the Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970; the Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972.

9. The European Cultural Convention (1954); the European Convention on the Protection of the Archaeological Heritage (1969); the Inter-American Convention on the Protection of Historic Movable Property (1935); the Inter-American Convention on the Archaeological, Historical and Artistic Heritage of the American Nations (1946).

10. Article 1 of the Convention on the Territorial Sea and the Contiguous Zone adopted at the Law of the Sea Conference at Geneva on 29 April 1958. This Convention came into force on 10 September 1964.

11. Article 2 of the Convention on the High Seas adopted at the Law of the Sea Conference at Geneva on 29 April 1958. This Convention came into force on 30 September 1962.

SECTION 3 THE 1982 CONVENTION ON THE LAW OF THE SEA

The 1982 Convention on the Law of the Sea (hereinafter referred to as "the Convention") includes two specific rules (Arts. 149 and 303) regarding archaeological and historical objects, which appear respectively in Parts XI (The Area) and XVI (General Provisions). Article 149 concerns the preservation and disposal of such objects found in the Area, that is on the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. Article 303 concerns, on the one hand, the protection of such objects regardless of their location in the maritime environment and, on the other, their removal from the contiguous zone.

These rules are complemented by other provisions of the Convention dealing with the general issue of the attribution of rights and jurisdiction in the different maritime areas. This is the case, *inter alia*, of Articles 56-60 (rights and duties of the coastal States and of other States in the exclusive economic zone), 77 and 80 (rights of the coastal State over the continental shelf), as well as of Articles 87 (freedom of high seas), 89 (invalidity of claims of sovereignty over the high seas) and 111 (right of hot pursuit).

We will undertake an examination of these provisions, in particular their scope and content, which will cover the use of terms, the general rules concerning archaeological and historical objects and the régime for the removal of such objects in the different maritime areas.

Paragraph 1 Use of Terms

The draftsmen of the Convention used in the heading of Article 149 the term "archaeological and historical objects" and in Article 303 the term "objects of an archaeological and historical nature". The difference between these terms would appear to be the result of a lack of co-ordination within the Drafting Committee.

The Convention fails to define the term "objects" and the adjectives "archaeological" and "historical". Consequently those interpreting it should rely on the ordinary meaning of the words, taking account of the terminology appearing in other international instruments and of historical investigation[12].

This approach yields the following result: the term "objects" should be taken to mean isolated items (mainly wrecked ships, cargoes or parts thereof), and the adjective "archaeological" should be interpreted as "relating to traces of human existence, which bear witness to epochs and

12. See the rules on interpretation of treaties set forth in Section 3 (Arts. 31 and 32) of the Vienna Convention on the Law of Treaties of 23 May 1969.

civilizations for which excavations or discoveries are the main source or one of the main sources of scientific information" [13].

Unfortunately, differing interpretations may be given to the adjective "historical" which, unless further qualified, may concern objects dating from yesterday.

The trend of the negotiations on Article 303 may supply some guidance towards understanding the grounds for the inclusion of the term objects of an "historical nature" beside the term objects of an "archaeological" nature.

As Professor Oxman [14] recalls, the reference to the former was added in the text at the insistence of the Tunisian delegation, which feared that the expression "objects of an archaeological nature" might be interpreted in a restrictive sense and thus exclude the Byzantine relics.

Consequently, the qualification "archaeological and historical" may be attached either to objects dating back to periods before main historical events (such as the collapse of the Byzantine Empire, 1453; the discovery of America, 1492; the destruction of Tenochtitlán, 1521, or of Cüzco, 1533) or to objects of a more recent age (such as 100 or 50 years ago). It follows, as the time limit for these objects is not set in a precise form, that their description as archaeological or historical will depend on the attitude of the international community and of a given society towards the values to be protected and consequently on the assessment of the international and national authorities concerned.

Paragraph 2 **General Rules**

Article 303 (1) of the Convention provides that "States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose". This provision implies that any operation aimed at damaging such objects wherever they lie is illegal and that States Parties have a duty to notify the proposed removal operations and the intended subsequent acts of preservation and disposal [15], as well as to embark in good faith upon negotiations on relevant projects.

Moreover, Article 303 (3) and (4) lays down the necessity of safeguarding the rights of identifiable owners [16], the law of salvage, the rules of

13. See the definition of the term "archaeological" in Article 1 of the European Convention on the Protection of the Archaeological Heritage (1969).

14. B. H. Oxman, "The Third United Nations Conference on the Law of the Sea: the Ninth Session (1980)", 75 *AJIL* (1981), pp. 211-256.

15. This notification system may differ, depending on the location of the object (within 24 miles or beyond 24 miles).

16. Owners of the ship, owners of the objects and perhaps owners of subrogated rights (such as insurers).

admiralty (of both the coastal and flag States)[17], other laws and practices with respect to cultural exchanges, as well as the rules of international law and the international agreements which will be enacted by the competent international organizations (these agreements include the agreement, if any, which will be adopted by the Council of Europe on the protection of objects of an archaeological and historical nature).

Paragraph 3 **Régime**

A. Internal waters, territorial sea and archipelagic waters

States have sovereign rights over their land territory, internal waters – in the case of archipelagic States, archipelagic waters – and territorial sea. Their sovereignty extends in particular to their maritime ports and to the bed and subsoil of their territorial sea.

The Convention imposes some limits on these rights in order to take account of the right of third States to innocent passage through newly constituted internal waters (Art. 8 (2)), through territorial sea (Art. 17) and through archipelagic waters (Art. 52) and to archipelagic sea lanes passage (Art. 53), and of the criminal jurisdiction of the flag States on board their ships (Art. 27 (1)).

The sovereignty of coastal States over the said maritime areas implies that items which lie on, in or under their sea-bed or subsoil are exclusively governed by the legislation and administrative instruments of the coastal States.

Consequently, the latter may, as regards items found on the sea-bed or in the subsoil of such maritime areas, authorize or refuse to authorize other States to engage in the removal operations. Furthermore, they are entitled to undertake themselves the same operations.

Nevertheless, the removal cannot justify the temporary suspension of the innocent passage of foreign ships, as set forth in Article 25 (3), since the coastal State may apply this provision only if such suspension is essential for the protection of its security and, in principle, one can hardly see how the removal of a wreck could prove essential for such protection.

B. Maritime areas beyond national jurisdiction

The Convention, on the one hand, confirms the customary rule of the freedom of the high seas (Art. 87) and, on the other, establishes a new régime governing the Area, namely the sea-bed, ocean

17. "Rules of admiralty" is a concept peculiar to Anglo-Saxon law. It means commercial maritime law. This interpretation was given in the report of President Amerasinghe on the work of the Informal Plenary Meeting of the Conference on general provisions (doc. A/CONF.62/L.58 of 22 August 1980, point 14).

floor and subsoil thereof beyond the limits of national jurisdiction. According to this régime, the Area and its resources, as defined in Article 133 *(a)* [18], are the common heritage of mankind (Art. 136) and the activities conducted in relation to such resources are managed by a new international body (called the International Sea-Bed Authority) for the benefit of mankind as a whole (Art. 140).

It follows, *a contrario*, that the archaeological and historical objects which lie in the Area, as they are not comprised in the definition of "resources", do not form part of the common heritage of mankind, and, consequently, the exploration aiming at their removal from the Area is beyond the managerial power of the International Sea-Bed Authority, is not subject to any form of international regulation or authorization and is governed by the general principle of the freedom of the high seas [19].

This freedom, however, is restricted, as regards search for and removal of archaeological and historical objects in the high seas, by the duties imposed on States Parties under Articles 87 (2), 149 and 303 (1).

Article 87 (2) prescribes that States Parties must exercise the freedoms of the high seas without interfering with the interests of other States in the exercise of the same freedoms.

Article 149 obliges States Parties to take all appropriate administrative and legislative measures in order to ensure that persons under their jurisdiction preserve, or dispose of, the archaeological and historical objects for the benefit of mankind as a whole, with particular regard being paid to the preferential rights of certain entities, namely the State or country of origin, the State of cultural origin or the State of archaeological and historical origin.

Article 149 raises many problems of interpretation as it does not entrust any international body with the power to control compliance of national instruments with the common heritage principle. Consequently it is not clear whether this power pertains to the International Sea-Bed Authority, on the basis of Article 140, or to another international agency (such as UNESCO), due to its special qualifications and expertise, or to individual States.

Moreover, Article 149 fails to define those entitled to preferential rights and the order of priority among them [20] and does not provide for an *ad hoc* procedure for the settlement of disputes between several claimants in addition to the general procedure laid down in Article 187 (Sea-Bed Chamber). Finally, Article 149 does not determine the scope and content of preferential rights.

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18. "Resources" means all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules.
19. Article 87 (1) contains an illustrative list of these freedoms.
20. It is left to those who interpret the Convention to consider whether they are hierarchically ranked.

It follows that this provision is deprived of any real significance and is far from the one envisaged in the Greek[21] and Turkish[22] proposals submitted to the United Nation Sea-Bed Committee in 1972 and 1973, which represented the starting point for the negotiations, within the Conference, on the régime of archaeological and historical objects on the sea-bed and ocean floor beyond national jurisdiction. The proposals of these two States aimed in particular at establishing three rules, namely that (1) the archaeological and historical objects in the Area form part of the common heritage of mankind, (2) the State of their cultural origin has preferential rights to undertake their removal and to acquire them, and (3) the International Sea-Bed Authority has powers in respect of their identification, protection and conservation.

These proposals were objected to mainly on the grounds that the scope of common heritage of mankind is limited to mineral resources *in situ* in the sea-bed, ocean floor and subsoil of the Area beyond the limits of national jurisdiction and that the International Sea-Bed Authority lacks special qualifications on archaeological and historical objects.

Finally, Article 303 (1) obliges States Parties to protect archaeological and historical objects and to co-operate for this purpose.

This duty may imply that the operations relating to such objects have priority over other activities in the Area, and may justify in particular their temporary suspension, except as far as innocent passage is concerned in the territorial sea.

C. Contiguous zone

According to the Convention, States Parties are entitled to proclaim that a zone contiguous to their territorial sea is subject to their control for the purpose of preventing and punishing infringements of their customs, fiscal, immigration or sanitary laws and regulations within their territory or territorial sea (Art. 33) and that they may presume that the removal, which they have not approved of, of objects of an archaeological and historical nature from the sea-bed and subsoil of such zone constitutes[23] an infringement within their territory or territorial sea of the said laws and regulations (Art. 303 (2)). Thus, through a *fictio juris*, the Convention establishes a new zone of jurisdiction of the

21. UN doc. A/AC.138/SCI/L.16; see Shigeru Oda, *The International Law of the Ocean Development*, Sijthoff, Leiden, 1975, p. 328; UN doc. A/AC.138/SCI/L.25, see S. Oda, *op. cit.*, p. 330.

22. UN doc. A/AC.138/SCI/L.21, see S. Oda, *op. cit.*, p. 330.

23. The Conference agreed that the phrase appearing in Article 303, paragraph 2, "result in an infringement", was understood to mean that it "would constitute or constitutes an infringement within its territory or territorial sea" (see doc. A/CONF.62/L.58 of 22 August 1980, point 14).

coastal State for the special purpose of protecting the underwater cultural property.

This zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured (Art. 33 (2)).

The scope of this new coastal States' jurisdiction includes the right of the coastal State to undertake the hot pursuit of a foreign ship which has removed, without its approval, archaeological and historical objects from the sea-bed or subsoil of the contiguous zone that it has proclaimed for the protection of such objects (Art. 111 (1)).

The genesis of Article 303 (2) is to be found in the negotiations held during the eighth and ninth sessions of the Conference on the suggestion presented to the Second Committee by the Greek delegation [24] and on the proposal revising this suggestion sponsored by seven States (Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia) [25].

The suggestion was aimed at granting coastal States sovereign rights as regards the discovery and removal of objects of a purely archaeological and historical nature *both* on the sea-bed and subsoil of their exclusive economic zone *and* on or under their continental shelf, and at recognizing preferential rights for the disposal of such objects to the States or countries of their cultural origin, other than the coastal State.

The proposal by the seven States, three times revised by its co-sponsors [26] limited the content and scope of the rights conferred in the original suggestion by Greece on coastal States by replacing the term "sovereign rights" by "jurisdiction for the purpose of research, recovery and protection", by reducing the scope of such jurisdiction first to the continental shelf and then to the continental shelf situated within the 200-nautical-miles limit, and by restricting its content through imposing a duty on coastal States to respect the rights of identifiable owners.

Nevertheless, in spite of these limitations of the coastal States' jurisdiction over archaeological and historical objects in their continental shelf, some maritime States [27] objected to the proposal by the seven States, on the grounds that it gave to coastal States rights which were not connected with the resources of the continental shelf and thus amounted to reopening the negotiations on the régime of such maritime area which had already been concluded.

In this context, in March 1980 the American delegation introduced

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24. Informal suggestion submitted to the Second Committee of the Conference during the first part of the eighth session (Geneva, spring 1979).

25. UN doc. A/CONF.62/C.2, Informal Meeting/43 of 16 August 1979.

26. UN doc. A/CONF.62/C.2, Informal Meeting/43, Rev. 1, of 21 August 1979; UN doc. A/CONF.62/C.2, Informal Meeting/43, Rev. 2, of 19 March 1980; UN doc. A/CONF.62/C.2, Informal Meeting/43, Rev. 3, of 27 March 1980.

27. In particular the Netherlands, the United Kingdom and the United States.

within the Plenary of the Conference an informal proposal to be inserted in the general rules of the Convention [28]. The American draft rejected the idea of the coastal State's jurisdiction over archaeological and historical objects in the continental shelf and obliged all States to protect such objects wherever they are found in the maritime environment. The only point of convergence with the proposal by the seven States was the recognition of the need to protect the rights of identifiable owners and the interests of the State or country of cultural origin.

Since the positions on the matter of jurisdiction were so clearly divergent (continental shelf jurisdiction – no jurisdiction beyond the territorial sea sovereign rights), the parties concerned embarked upon negotiations on this issue and finally agreed in a spirit of compromise on the solution of the contiguous zone jurisdiction. Thus, by referring in Article 303 (2) to Article 33, the draftsmen of the Convention established the coastal State's "archaeological jurisdiction" over the contiguous zone.

D. Exclusive economic zone

The Convention establishes that States Parties may proclaim an exclusive economic zone beyond and adjacent to their territorial sea, which shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The régime of the archaeological and historical objects in such area is laid down indirectly in Articles 56, 59 and 60.

According to Article 56, coastal States have: (1) sovereign rights, in particular for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil of their exclusive economic zone and the superjacent water column, and (2) jurisdiction in particular with regard to marine scientific research and the protection and preservation of the marine environment.

It follows that this Article grants no power to the coastal State to make laws and regulations on the removal of archaeological and historical objects which lie on, in or under the sea-bed or subsoil of their exclusive economic zone, provided, of course, that there is no overlapping between such zone and any contiguous zone which they may have proclaimed. This is so because the coastal State's sovereign rights over natural resources of this area relate to living and non-living resources and thus do not concern archaeological and historical objects.

Likewise, the coastal State's jurisdiction to regulate, authorize and conduct marine scientific research does not include any right as regards

28. UN doc. A/CONF.62/GP.4 of 27 March 1980.

the search for archaeological and historical objects, since the latter does not constitute a distinct section of marine scientific research. Indeed, it would be difficult to assert that the "studies and related experimental works designed to increase man's knowledge of the marine environment" include exploration aimed at locating and recovering sunken artefacts[29].

The absence of a coastal State's jurisdiction with regard to archaeological and historical objects in the exclusive economic zone does not however result in awarding all States the freedom of search for and removal of such objects. This assertion is based on the wording of Article 58 (1). Indeed this provision establishes a comprehensive list of the freedoms which all States enjoy in the exclusive economic zone[30] and such a list does not include the freedom of search for and removal of archaeological and historical objects.

As a result, the Convention attributes no jurisdiction to coastal States nor rights to other States as concerns archaeological and historical objects in the exclusive economic zone.

This fact implies that any State may search for and remove archaeological and historical objects in an exclusive economic zone if no other State intends to undertake the same operations. In cases where the interests of two or more States would conflict, the basis for the resolution of any ensuing dispute is to be found in the optional criteria set out in Article 59[31].

Finally, let us turn to Article 60, which may be relevant to our study only in very few cases, i.e., in cases where the removal operations are conducted from an installation or structure instead of a ship. In the context of archaeological and historical research, this provision lays down that coastal States have in their exclusive economic zone the exclusive right to undertake, authorize and regulate the construction, operation and use of installations and structures which either are intended for economic purposes or interfere with the exercise of the coastal State's rights in the said area.

Accordingly, coastal States may claim jurisdiction with regard to any installation and structure planned by other States in the exclusive

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29. This undisputed definition of marine scientific research appears in Part II, Article 1, of the Informal Single Negotiating Text (A/CONF.62/WP.8, Part III, of 7 May 1975) and in Part III, Article 48, of the Revised Single Negotiating Text (A/CONF.62/WP.9 of 23 November 1976) as well as in the suggestions tabled by several delegations, contained respectively in documents A/CONF.62/C.3/L.9 (Trinidad and Tobago), L.19 (Austria and 16 other States), L.26 (Socialist States) and L.29 (Colombia and three other States).

30. These three freedoms are: the freedom of navigation, the freedom of overflight and the freedom of the laying of submarine cables and pipelines.

31. "The conflict should be resolved on the basis of equity and in the light of all relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

economic zone of the coastal State for the purpose of searching for underwater archaeological and historical objects, when the removal of such objects may be construed as an economic purpose or when the location of the installation and structure concerned interfere with the exercise of their own rights.

E. Continental shelf

The Convention grants coastal States which are Parties to it sovereign rights over the natural resources of their continental shelf (Art. 77) and jurisdiction to regulate marine scientific research thereupon (Art. 246).

Since the meaning of the terms "natural resources" and "marine scientific research" in these Articles is the same as that indicated in the provisions relating to the exclusive economic zone, it follows that the Convention grants no power to coastal States in respect of archaeological and historical objects which lie in, on or under the sea-bed and subsoil of their continental shelf, provided that such zone does not overlap with any contiguous zone.

Consequently, the régime appearing in the Convention as regards archaeological and historical objects on the continental shelf differs from the present domestic legal framework and practice of a number of States which have either enacted regulations on the protection of such objects within their continental shelf[32] or which, when concluding contracts for prospecting or drilling hydrocarbons within their continental shelf, impose on the permit holder a duty to comply with the domestic legislation of the coastal State in the event of accidental discovery of archaeological property[33].

Furthermore, it must be stressed that, in the very few cases where the removal operations on the continental shelf are conducted from an installation or structure, the construction, operation and use of such devices are governed by Article 60, which we have examined above, since Article 80 establishes for the continental shelf an application by analogy of such provision.

Paragraph 4 **Conclusions**

The above study shows that the United Nations Convention on the Law of the Sea lays down a broad framework for the protection of archaeological and historical objects.

32. Australia (Historic Shipwrecks Act of 1976 (No. 190 of 1976)).
33. This practice is followed, *inter alia*, by Norway and Thailand.

In particular, it establishes two general duties and three rules on the allocation of State jurisdiction. Accordingly, all States have a duty: (1) to protect underwater cultural property, regardless of its location in the maritime environment, and (2) to preserve (and dispose of), for the benefit of mankind as a whole, the objects located on the international sea-bed Area which are of value to the world community[34].

Similarly, jurisdiction is allocated as follows: (1) coastal States have exclusive rights over archaeological and historical objects in their internal waters, territorial sea and archipelagic waters; (2) coastal States have jurisdiction with regard to the removal of such objects in any contiguous zone which they have proclaimed for this purpose; and (3) all States enjoy general freedom in that part of the exclusive economic zone and of the continental shelf situated outside the limit of the contiguous zone, if any.

Moreover, while the Convention does not call explicitly for global or regional co-operation, it establishes in one of its general provisions that the régime laid down therein on the general duty of protection for archaeological and historical objects shall not prejudice international agreements on such items which are at present in force or which may be adopted within global or regional bodies.

In this context it may be of interest to look at the Draft Convention prepared within the Council of Europe on underwater cultural heritage.

SECTION 4 THE DRAFT EUROPEAN CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

The Council of Europe has set up an *Ad Hoc* Committee comprising archaeologists and lawyers and has instructed it to draft a convention on the protection to be afforded to underwater cultural heritage.

The *Ad Hoc* Committee met between 1980 and 1985 and prepared a Draft Convention[35] aimed in particular at protecting underwater traces of human existence both *in situ* and after recovery and at establishing a number of binding standards to be complied with by the relevant national rules.

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34. This second duty may be interpreted so as to coincide with a moratorium on the exercise of unilateral control custody and recovery and with a prohibition of any action in respect of underwater cultural property in the international sea-bed Area, in the absence of a convention setting out guidelines for the disposal of such property (accordingly, Leigh Ratiner in *Los Lieder* published by the Law of the Sea Institute, University of Hawaii, Honolulu, No. 1, p. 1).

35. Council of Europe, doc. CAHAQ 1985.

Paragraph 1 **Application**

The draft applies to "underwater cultural property". This term is more comprehensive than the term "objects of an archaeological and historical nature" appearing in Article 303 of the United Nations Convention on the Law of the Sea. In fact, the term "cultural property", according to Article 1, does not only refer to movable objects, but also to immovable property (such as sites and installations) and to geographical features of historical significance, whenever these three relate to traces of human existence and are at least 100 years old (nevertheless, States Parties may protect even more recent property).

Paragraph 2 **Territorial Scope**

Article 2 establishes that the draft is applicable in internal waters, the territorial sea and the contiguous zone (limited to States Parties which have proclaimed such a zone). The scope of the contiguous zone in Article 2 is substantially the same as in Article 303 (2) of the United Nations Convention on the Law of the Sea, since in both Articles the zone referred to has an autonomous scope and serves to regulate the movement of archaeological objects as well as to prevent and punish infringements. The only difference between the two provisions is that the former describes in detail what the latter covers by a general rule. Consequently, the régime laid down in the draft may, in substance, be invoked not only against States which are Parties to the draft but also against States which are Parties to the United Nations Convention on the Law of the Sea.

Paragraph 3 **Standards**

The standards to be met by States Parties under the draft are the following: (1) to protect and register sites and objects; (2) to ensure that excavation is carried out only where it is necessary to protect the objects, for the maritime environment guarantees their preservation whereas there is a danger of their being destroyed if exposed to the atmosphere; (3) properly to treat and conserve objects which are recorded; (4) to see that objects from the same site are kept together; (5) to record all the data on the discoveries; (6) to publish information on the objects and related scientific work (this standard being subject to a certain degree of discretion on the part of the State); and (7) to preserve objects under conditions allowing for their study and exhibition.

Paragraph 4 **Conclusions**

The foregoing demonstrates that the draft contains fairly complete legislation and not mere rights of control (as is the case for the United Nations Convention on the Law of the Sea) and affords to coastal States (which will become Parties to it when it will be open to signature and subsequent ratification) a jurisdiction with the same territorial scope as the United Nations Convention on the Law of the Sea (contiguous zone) and a wider application than in the latter instrument (as the draft applies not only to archaeological and historical objects, but also to sites, installations and geographical features).

SECTION 5 **CONCLUSIONS**

The set of rules which we have just examined shows that there is a customary law, created by the mere process of negotiation and virtual adoption of it by consensus, on the régime of underwater archaeological and historical objects. The customary law indicates that coastal States have jurisdiction on archaeological and historical objects found beyond the limits of their territorial sea. Nevertheless, the field of application of this new jurisdiction covers a very limited area (namely the contiguous zone), subject to its proclamation by the coastal States concerned.

Moreover, customary law includes a general duty to dispose, for the benefit of mankind as a whole, of the underwater archaeological and historical objects which are found in the maritime areas beyond the limits of the exclusive economic zone and of the continental shelf, but fails to determine the legal content of that duty. Thus, it is left to future treaty provisions to determine the rules for the disposal of archaeological and historical objects for the benefit of the world community.

PART III

The International Sea-Bed Area