Underwater Cultural Heritage and International Law

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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.

2. Initiatives preceding the UNESCO Convention 2001

In its early phases, the development of international law in this field took place through two separate processes: one at a global, and the other at a regional, level. The processes overlapped in their timing by six years and therefore each was in some measure influenced by the other. As will be seen, both had a profound influence on the shape and content of the UNESCO Convention 2001.

2.1 UN Convention on the Law of the Sea 1982 (LOSC)

The first notable reference to UCH in an international forum was in 1956. It was made in the preparatory report for UNCLOS I produced by the UN's International Law Commission (ILC).[2] This report included seventy-three draft articles, along with a commentary on each. The articles formed the basis for the text of the Geneva Conventions of 1958 and the commentary provided a basis for the interpretation of those treaties.[3]

In its report, the ILC accepted the notion already emerging in customary international law that a coastal state could exercise control and jurisdiction over the continental shelf for the purpose of exploring and exploiting its natural resources. However, its acceptance of the notion came with the explicit proviso that the rights should be exercised for that sole purpose and should not affect the freedom of the high seas any more than is 'absolutely unavoidable'.[4] It enshrined the notion in draft Article 68 and used the formulation 'sovereign rights' to refer to the rights concerned. In its commentary on draft Article 68, the ILC declared:

> It is clearly understood that the rights in question do *not* cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.[5]

[2] The ILC was established by the UN General Assembly in 1948 for the purpose of promoting the codification and progressive development of international law. It comprises a permanent body of thirty-four independent experts on international law: see, further, Boyle and Chinkin, *The Making of International Law*, pp. 171 *et seq.*

[3] The ILC report is accorded considerable weight in light of its carefully considered nature and the fact that it was the product of professional independent expertise 'illuminated by the observations of governments': Churchill and Lowe, *The Law of the Sea*, p. 15.

[4] Report of the International Law Commission to the General Assembly, 11 UN GAOR Supp. (No. 9), UN Doc A/3159 (1956), reprinted in (1956) *Yearbook of the International Law Commission*, Vol. II, pp. 295–6.

[5] *Ibid.*, Vol. II, p. 298. Emphasis added.

This statement made it clear that the ILC was firmly of the view that shipwrecks were not encompassed within the sovereign rights of the coastal state on the continental shelf and therefore should not be regarded as natural resources in this context.

Draft Article 68 became Article 2(1) of the Geneva Convention on the Continental Shelf. In light of the ILC's pronouncement, it became generally accepted that the sovereign rights of coastal states over natural resources referred to in that article could not be interpreted as extending to shipwrecks. This conclusion was to have a profound impact on the development of international law with respect to UCH.

The issue of UCH next came to international attention in 1968. In that year the UN General Assembly established the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (known as the Sea-Bed Committee) to undertake the preparatory work for a new treaty which would establish a legal regime for the deep seabed. The Sea-Bed Committee was charged with drawing up a list of subjects that should be included within that regime. Thanks to Greece, a state deeply concerned about the plight of UCH in the Mediterranean Sea,[6] the topic of 'Archaeological and Historical Treasures' was on the final list approved by the Sea-Bed Committee in 1972.[7]

UNCLOS III began in 1973 and its business was divided between three main committees. Given its starting point, UCH initially fell within the remit of the First Committee, which was concerned with the deep seabed regime. However, towards the end of the negotiations, it was recognised that efforts also needed to be made to address UCH in more general terms and to deal with the more pressing issue of finding a means of controlling activities arising closer to shore. The matter was therefore raised in the Second Committee, which was concerned with the regimes for zones other than the deep seabed, including the continental shelf and the EEZ.

The outcome of the deliberations was the inclusion in the LOSC of two, separately negotiated, provisions relating to UCH.

2.1.1 Article 149

The text of Article 149 originated in proposals made by Greece and Turkey in 1972 and 1973, and developed through several stages. A draft article modifying the proposals appeared in a negotiating text prepared by the Chairmen of all three Committees and the Conference

[6] See General introduction, section 1.1, above.

[7] See, further, Strati, *The Protection of the Underwater Cultural Heritage*, p. 297.

President in 1975.[8] Further substantial modifications were then undertaken in the First Committee and a revised article appeared in a subsequent negotiating text of 1976.[9] The form of that article remained virtually unchanged in all subsequent texts. By the end of this gestation period, the substance of the original proposals had been considerably emasculated.

Article 149 provides:

> All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

Article 149 is located in Part XI of the LOSC, which establishes the regime for the Area, in other words the deep seabed and subsoil thereof beyond the limits of national jurisdiction.[10] Part XI sets out a highly technical framework for the management of the Area and its resources. It declares both to be the 'common heritage of mankind'[11] and provides that activities relating to the resources of the Area must be carried out for the benefit of mankind as a whole.[12] It establishes an institution called the International Seabed Authority (ISA), to undertake the management process.

At least two points about Article 149 are clear from the text of the Convention read alongside the negotiating history. First, objects of an archaeological and historical nature found in the Area are *not* part of the resources of the Area. These are defined restrictively to include mineral resources only.[13] Therefore, despite the fact that such objects are to be preserved or disposed of 'for the benefit of mankind as a whole', they are not encompassed within the common heritage of mankind (CHM) principle enshrined in Part XI. Secondly, it is clear that the functions of the ISA, the body set up by Part XI, are limited to matters related to the exploration and exploitation of the mineral resources of the Area. The body is accorded no direct role in respect of objects of an archaeological and historical nature.

On other matters relating to Article 149, there is far less clarity. It is unclear how old an object must be to qualify as being of 'an archaeological

[8] The Informal Single Negotiating Text. See UN Doc A/CONF.62/WP.8, UNCLOS III Off. Rec. Vol. IV, p. 137.
[9] The Revised Single Negotiating Text. See UN Doc A/CONF.62/WP.8/Rev.1/Part I, UNCLOS III Off. Rec. Vol. V, p. 125.
[10] LOSC, Art. 1(1)(1). [11] LOSC, Art. 136. [12] LOSC, Art. 140(1).
[13] LOSC, Art. 133(a).

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.

twenty-four miles to the outer limit of the juridical continental shelf (which forms the boundary with the Area). This geographical area – which is at least 176 miles in breadth and, in the case of broad-margin states, potentially much more extensive[32] – falls outside the scope of application of the zonal-specific provisions in Article 303(2) and Article 149. Instead, it is subject only to the general provisions set out in Article 303, paragraphs 1 and 3. As a result, deliberate interference with UCH in the gap for the most part is governed by the general rules of the LOSC. In essence, this means that the principle of freedom of the high seas applies to the search for and recovery of UCH and the only state with competence to control such activity (at least, to do so effectively) is the flag state of the ship engaged in the activity.[33]

Without doubt the regime for UCH established by the LOSC is 'complicated and not complete'.[34] Despite there being a question-mark over whether Article 303(4) was in fact intended to refer only to agreements antecedent to the LOSC, it has been widely interpreted as extending an invitation to a competent international organisation to elaborate upon, and complete, 'this incipient new branch of law'[35] in a subject-specific instrument.

2.2 *Developments within the Council of Europe*

In January 1977, during a debate on progress at UNCLOS III (which was mid-way through its term at that point), the matter of UCH and, more especially, the problem of 'illicit exploration' of shipwrecks by 'skin divers', was raised in the Parliamentary Assembly of the Council of Europe.[36] Wrecks around the shores of Europe, it was pointed out, represented 'unique historical records' of the European cultural heritage.[37] Recognising that it was unlikely that the treaty under

[32] See Chap. 7, n. 92.

[33] The states of nationality of individuals on board the ship also have jurisdiction to take action to control the activities of their own nationals. However, in practice, the exercise of such jurisdiction will not be as effective as the exercise of jurisdiction by the flag state of the vessel involved.

[34] Nordquist *et al.*, *United Nations Convention on the Law of the Sea 1982*, Vol. VI, p. 230.

[35] *Ibid.*, Vol. V, p. 162.

[36] See the speech of John Roper, for the UK, in Council of Europe, Parliamentary Assembly debate on the UN Conference on the Law of the Sea, 28th Ordinary Session, Official Report, 24 January 1977 (AS (28) CR 20, 20th Sitting).

[37] *Ibid.* 'Like tombs, they are closed deposits frozen at a moment of time when the ship goes down. But what is not generally realised is that objects under water very often are preserved in a way in which objects in earth are not preserved. They are maintained at

negotiation at UNCLOS III would be in place quickly, the Assembly instructed its Committee on Culture and Education to embark on a study of the subject.[38]

2.2.1 The Roper Report and Recommendation 848 (1978)

In 1978, the Committee published its findings in a report.[39] The report included an explanatory memorandum by the rapporteur, John Roper, the then Vice Chairman of the Committee, and two separate reports prepared by expert consultants on archaeological and legal aspects. It also incorporated a formal Recommendation, entitled 'Recommendation 848 on the Underwater Cultural Heritage'. The report, widely referred to as the Roper Report, was one of the first detailed studies concerning UCH and its legal protection,[40] and it proved to be hugely influential.

A 'striking fact' which had apparently emerged from the study was that there was 'very considerable interest' in UCH in Europe, as well as further afield.[41] The Report commented that '[t]he fast-growing public enthusiasm for the sport of underwater diving is matched by increasing appreciation of the importance of the historical and archaeological material found underwater, as also by the increasing activity of trained archaeologists and those legislating in the field'.[42]

The Report identified as the 'main danger' to UCH intentional human interference by both professional and amateur treasure hunters, an activity which it referred to as 'modern piracy'.[43] In its view, the lack of recognition of underwater archaeology as a valid scientific discipline and the fact that there were few specialist marine archaeologists had left the material remains of the past located in the marine environment exposed. This meant that '[c]ommercial interests, a refinement of salvage operators, [had] intervened and sub-aqua enthusiasm for sunken treasures [had] been awakened'.[44] The Report went on to note that proper

constant humidity. Perhaps it is not generally realised that leather and timber are better preserved under water, in a wreck, than in any other way.'

[38] See Order No. 361 (1977) and Council of Europe, Parliamentary Assembly, 28th Ordinary Session, Official Report, 24 January 1977 (AS (28) CR 20, 20th and 21st Sittings).

[39] Parliamentary Assembly of the Council of Europe, 'The Underwater Cultural Heritage: Report of the Committee on Culture and Education (Rapporteur: Mr. John Roper)', Doc. 4200-E, Strasbourg, 1978.

[40] To the author's knowledge the only earlier study relating to law and UCH was published by Crane Miller in 1973: Crane Miller, *International Law and Marine Archaeology*. A more general study of UCH had been published by UNESCO in 1972: *Underwater Archaeology: A Nascent Discipline*.

[41] Doc. 4200-E, 1978, p. 3. [42] *Ibid.*, p. 4. [43] *Ibid.*, p. 6. [44] *Ibid.*, p. 7.

archaeology in the marine environment was hugely expensive and emphasised that interference should not take place until the technical expertise and facilities were in place to ensure that the work was undertaken appropriately.[45] In his report, the expert archaeological consultant, David Blackman, pointed out that, once a site had been located and a pre-disturbance survey conducted,

> [t]he next stage *may* be *excavation*, but I should stress that it is too often assumed that excavation must automatically follow. The best means of preserving an underwater site is to leave it where it is.[46]

An analysis of the legislation of European states undertaken by the legal consultants Lyndel Prott and Patrick O'Keefe made it clear that domestic legislation relating to UCH was varied and inadequate and, more importantly, generally did not apply *beyond* the territorial sea.[47] The Roper Report concluded that progress on the matter could be made at a European level and that such progress might eventually form the basis of wider international agreement.[48] Although the focus of attention at the time was on the Mediterranean Sea, it concluded that the experiences and interests of most European states were sufficiently similar 'to suggest that recommendations for action in the member states of the Council of Europe may meet with some success'.[49] Recommendation 848 on the Underwater Cultural Heritage urged member states of the Council of Europe to review their domestic legislation and, where necessary, revise it in order to comply with a number of minimum requirements.

These minimum requirements for national legislation, laid out in an annex to the Recommendation, were based on recommendations made by Prott and O'Keefe. Three of the requirements proved to be of particular significance with respect to the future direction of international legal protection for UCH. They were:

> ii Protection should cover all objects that have been beneath the water for more than 100 years ...
>
> ...
>
> iv National jurisdiction should be extended up to the full 200 mile limit ...
>
> v. Existing salvage and wreck law should not apply to any items protected under ii and iv above.

[45] *Ibid.*, p. 6. [46] *Ibid.*, p. 36. (Emphasis in original.)

[47] *Ibid.*, p. 49. This conclusion was based on an analysis of the legislation of European states undertaken by Lyndel Prott and Patrick O'Keefe (Doc. 4200-E, 1978, Appendix III).

[48] *Ibid.*, p. 3. [49] *Ibid.*

In their report, Prott and O'Keefe had concluded that the application of traditional salvage and wreck laws to UCH was inappropriate because these laws encouraged the unregulated recovery of material.[50] They had also recommended the adoption of the age criterion of 100 years to identify the objects subject to the scheme of protection (an approach, they pointed out, was taken by some Scandinavian legislation). In their view, such a criterion should have the effect of reducing the impact of the salvage law exclusion and thereby avoiding 'severe hardship' for salvors.[51]

The Roper Report recognised that the proposal for an extension of national jurisdiction was the most controversial of the recommendations.[52] According to the Report:

> [t]he reasoning behind the proposal [was] the need to allocate responsibility for cultural remains that are ... accessible in waters outside existing territorial limits
>
> and
>
> to plan ... for protecting what is apparently out of reach but may soon be in danger as a result of technological developments.[53]

The reference to 'the full 200-mile limit' was a reference to the new concept of an exclusive economic zone, then under development at UNCLOS III.[54] Prott and O'Keefe used the term 'cultural protection zone' to refer to the proposed zone, a term devised to emphasise that the purpose of the zone was *cultural protection*, not economic exploitation; therefore, while the zone could be regarded as 'analogous' to the EEZ, it was clearly distinguishable from both the EEZ and the continental

[50] At the time Recommendation 848 was drawn up, Art. 303 of the LOSC had not yet been conceived. Therefore, there was nothing to indicate that this proposal might be out of step with subsequent developments at UNCLOS III.

[51] Doc. 4200-E, 1978, p. 70. [52] *Ibid.*, p. 17. [53] *Ibid.*

[54] *Ibid.* The selection of a zone coterminous with the 200-mile EEZ, rather than the continental shelf, was determined at least in part because of the circumstances in the Mediterranean Sea, where the physical continental shelves are narrow in breadth and therefore use of the continental shelf would not have covered the whole of the sea. Prott and O'Keefe pointed out that if the continental shelf was chosen as the limit, at least half of the Mediterranean Sea would be excluded from the protective framework: *ibid.*, p. 66. (Presumably this calculation was made on the basis of the definition of the continental shelf under the 1958 Geneva Convention on the Continental Shelf, which was 'the seabed and subsoil ... adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas': Art. 1.)

shelf.[55] What was being proposed was that coastal states should have full jurisdictional competence (both legislative and enforcement jurisdiction) over UCH out to 200 miles.

Acknowledging that there might be difficulty implementing the proposed zone simply through a process of unilateral extensions of coastal state jurisdiction,[56] the Roper Report suggested that the proposed cultural protection zone could be adopted through a European treaty.[57] In their report, Prott and O'Keefe suggested that if such a zone was widely adopted by European states, it could become the basis for the formation of a rule of customary international law.[58]

Recommendation 848, which was adopted by the Parliamentary Assembly of the Council of Europe in October 1978, included a recommendation to the Committee of Ministers that it draw up a European convention on the protection of UCH, open to all of the Council of Europe's member states and also to other states bordering on seas in the European area.[59]

2.2.2 Draft European Convention 1985

In 1979 the Council of Europe's Committee of Ministers decided to accept the recommendation of the Parliamentary Assembly that it draw up a European treaty on UCH and set up an Ad Hoc Committee of Experts (CAHAQ) to undertake the task. CAHAQ held six plenary meetings between 1980 and 1985.

A draft European Convention on the Protection of the Underwater Cultural Heritage was finalised in March 1985 and submitted to the Committee of Ministers for approval. However, in light of objections by Turkey to the provisions relating to the territorial scope of the Convention, the draft was never adopted.[60] The final text and all related documents remain confidential and publicly unavailable. Nevertheless, an earlier version of the draft was declassified to allow for consultation by

[55] Prott and O'Keefe, *Law and the Cultural Heritage*, Vol. I, pp. 100–1.

[56] Note was taken of the fact that, in 1976, Australia had exerted legislative jurisdiction over UCH on its continental shelf and that Norway also exercised some relevant controls in this area: Doc. 4200-E, 1978, p. 56. These, and other, unilateral extensions of jurisdiction with respect to UCH are discussed further in Chap. 7, section 4.1.

[57] Doc. 4200-E, 1978, p. 17. [58] *Ibid.*, p. 57. [59] Recommendation 848, 1(a).

[60] At the time, the Council of Europe operated a treaty adoption system under which it was possible for one state to block the signature-opening process: see Polakiewicz, *Treaty Making in the Council of Europe*, p. 25.

interested parties.[61] The following comments are based on the declassified version, but draw on further insights from other official documents on file with the author.

In its preamble, the draft Convention acknowledged 'the importance of the underwater cultural heritage as an integral part of the cultural heritage of mankind'; the need for 'more stringent supervision to prevent ... clandestine excavation'; and the fact that such excavation would cause 'irremediable loss of [the] historical significance' of the heritage 'by destroying [its] environment'. It also recognised that the treatment of UCH required the application of scientific methods, appropriate techniques and equipment, and highly qualified professional expertise.[62] The material scope of application of the draft Convention was broadly defined to include 'all remains and objects and any other traces of human existence located entirely or in part in the sea', which were to be considered as being part of UCH and to constitute 'underwater cultural property' for the purposes of the Convention.[63] In line with Recommendation 848, underwater cultural property 'being at least 100 years old' would qualify for protection.[64]

The draft Convention provided that 'Contracting States shall ensure as far as possible that all appropriate measures are taken to protect underwater cultural property *in situ*'[65] and 'shall require that discoverers of underwater cultural property leave this property, as a principle, where it is situated'.[66] It therefore adopted the principle of protection *in situ* which was becoming increasingly established in

[61] DIR/JUR (84) 1, Strasbourg, 22 June 1984. The Draft Convention, as released, constitutes the version adopted by the Ad Hoc Committee of Experts on the Underwater Cultural Heritage (CAHAQ) on the occasion of its fifth meeting, held in Strasbourg, 19–23 March 1984. The confidential character of the text was waived by decision of the Committee of Ministers taken by their 374th meeting at Deputies level (14–22 June 1984). As is the general practice with Council of Europe treaties, the draft Convention was accompanied by an Explanatory Report (also declassified). These explanatory reports are not intended to provide an authoritative interpretation of the treaty, but rather to facilitate the application of its provisions: Polakiewicz, *Treaty Making in the Council of Europe*, pp. 26–7. They can be treated as part of the context of the treaty for the purposes of treaty interpretation: see General introduction, section 3.2.1, above.

[62] Draft Convention, declassified version. The preamble of the final text had fewer and less-detailed clauses than those of the declassified version.

[63] Art. 1(1).

[64] Art. 1(2). Although the draft Convention adopted a 100-year threshold for its application, the provision was formulated somewhat differently from that in Recommendation 848 because it referred to the age of the material rather than the length of time it had been underwater. For further discussion, see Chap. 2, section 3.2.2.

[65] Art. 3(1). [66] Art. 6(2).

land archaeology.[67] Authorisations to carry out survey, excavation or recovery operations could be granted, but only on the basis of 'scientific considerations'.[68] As far as recovered artefacts were concerned, the draft Convention acknowledged the archaeological principle of 'association of finds' and the need to ensure that, as far as possible, material is conserved in a manner facilitating its study and public display.[69] Contracting states were required to ensure that 'all discoveries of underwater cultural property be reported without delay to their competent authorities, whether the property has been removed from its place of discovery or not'[70] and also to provide for 'official registration' of known underwater cultural property and new discoveries.[71] There were further provisions designed to promote training in underwater archaeological investigation and excavation methods, and in techniques for conservation,[72] as well as appreciation of UCH and awareness of the need to protect it.[73] Other significant features of the draft Convention included a duty on contracting states to co-operate in the protection of UCH,[74] including with respect to illegally recovered or illegally exported UCH,[75] and provision for the establishment of a permanent body – a 'Standing Committee' – to keep the implementation of the Convention under review.[76]

Despite the fact that the draft Convention had its origins in Recommendation 848, it did not adopt that instrument's approach to national jurisdiction and the application of salvage and wreck laws. Instead, it followed the approach of the LOSC. The influence of UNCLOS III is hardly surprising given that the final versions of Articles 149 and 303 had been more or less settled by the time CAHAQ started its work.

Rather than providing for the exclusion of the application of salvage and wreck laws, the draft Convention echoed Article 303(3) of the LOSC:

> Nothing in this Convention affects the rights of identifiable owners, the law of salvage or other rules of maritime law, or laws and practices with respect to cultural exchanges.[77]

[67] The precise origins of the principle are hard to trace and the extent to which it was an established tenet of archaeology in the early 1980s is unclear. However, at an international level, reference was made to the principle in the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations (which applies in principle to marine archaeology as well as terrestrial archaeology). See para. 8 of that instrument. For further discussion of the principle, see Chap. 9, section 3.2.

[68] Art. 5(2). [69] Art. 10(1). [70] Art. 6(1). [71] Art. 7(1). [72] Art. 4.

[73] Art. 10(2). [74] Art. 9. [75] Art. 12. [76] Art. 16. [77] Art. 2(7).

The only difference of note between this provision and Article 303(3) is its replacement of the reference to 'rules of admiralty' with 'rules of maritime law', presumably to make it explicit that the saving applied to *any* relevant rules of private maritime law, not simply those administered by the admiralty courts of the common law world.[78]

On the question of the extent of national jurisdiction over UCH, it seems that three options were considered: to limit the territorial scope of application of the Convention to the twelve-mile territorial sea; to adopt an approach based on the continental shelf or on the 200-mile EEZ; or to adopt an approach based on the contiguous zone.[79] It appears that the second of these options was rejected by several states on the basis that it had been superseded by the developments at UNCLOS III (and indeed had been rejected in that forum). The third option – which could be regarded as the compromise option – garnered the broadest support. The draft Convention therefore adopted a reformulated version of the legal fiction device in Article 303(2).[80]

Despite the decision to use the contiguous zone as the basis for the territorial scope of application of the Convention, the continental shelf beyond that limit was not entirely ignored. A further provision relating to coastal state jurisdiction was set out in Article 2(5).[81] This stated:

> Each Contracting State, in the exercise of its jurisdiction over the exploration for and exploitation of the natural resources of its continental shelf, shall take appropriate measures for the protection of underwater cultural property in accordance with the objectives of this Convention.

This provision was prompted by the practice of certain states (notably Greece and Norway) to make it a requirement that oil and gas contractors working on the continental shelf report archaeological discoveries

[78] In light of the lack of consensus over the provisions in respect of jurisdiction (which also appear in Art. 2 of the declassified version of the draft Convention), the draft Explanatory Report makes no comment on Art. 2 and therefore provides no insight into this provision.

[79] Leanza, 'The Territorial Scope of the Draft European Convention on the Protection of the Underwater Cultural Heritage', p. 127.

[80] According to Leanza, CAHAQ considered at least five different wording formulations for this provision: *ibid.* The formulation adopted in the relevant provisions of the declassified version of the draft Convention (Art. 2(2)–(3)) attempted to avoid at least some of the fiction of Art. 303(2) by referring to the infringement of the *cultural property laws* of the state, rather than its customs, fiscal, immigration and sanitary laws and regulations. A different formulation was adopted in the final text: for details, see Strati, *The Protection of the Underwater Cultural Heritage*, pp. 170–1.

[81] In the final draft, this provision became Art. 17, but the text remained the same.

made in the course of their work.[82] In linking the taking of measures to protect UCH with a coastal state's jurisdiction over the natural resources of the continental shelf, Article 2(5) managed to avoid raising concerns about creeping jurisdiction.

Turkey's dissatisfaction with the provisions on jurisdiction related to the potential difficulties of their application in the eastern Aegean Sea, given its dispute with Greece over maritime boundaries in that area. It objected to the use of the contiguous zone as the basis for the territorial scope of application of the Convention and maintained the view that the continental shelf was the 'only logical and viable' approach because it would plug the gap in the provision made by Articles 149 and 303 of the LOSC.[83] Out of the sixteen member states represented at the final meeting of CAHAQ,[84] it seems that only Turkey objected to the final text of the Convention and to its adoption and opening for signature.

It has to be said that there is some irony in the fact that a technical issue regarding delimitation between the two states that had first brought the question of UCH to international attention caused the derailment of the first attempt to produce a specific international treaty in the field. Nevertheless, despite its failure, the Council of Europe's initiative made a vital contribution to the evolution of international law in the area. It demonstrated that there was recognition at a political level, certainly within Europe, of the need for a treaty framework to afford protection to UCH in extra-territorial waters; it laid extremely valuable groundwork for such a framework, especially with respect to aspects unrelated to jurisdiction; and it demonstrated that acceptable compromises could be reached on areas of contention such as salvage law. It also provided a stark forewarning that the jurisdictional question could prove to be a major obstacle to achieving a comprehensive protective regime in the post-UNCLOS III era.

2.2.3 Valletta Convention 1992

The abandonment of the draft European Convention in the mid-1980s marked the end of the Council of Europe's attempts to create a treaty dedicated to UCH. However, it did not mark the end of that

[82] The practice of Norway in this respect had been noted by Prott and O'Keefe in their survey of national practice for the Council of Europe in 1978: see Doc. 4200-E, 1978, pp. 56 and 120. For further discussion of the practice and its legitimacy in international law, see Chap. 7, section 4.1.

[83] Minority statement made by the Turkish expert, on file with the author.

[84] Austria, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the UK and Turkey.

organisation's interest in furthering the protection of UCH. In the late 1980s, it began work on revising a relatively old treaty, the European Convention on the Protection of the Archaeological Heritage 1969. The original 1969 Convention applied only implicitly to UCH. Among the motivations for revising the text was the recognition that – given the apparently irresolvable deadlock on the 1985 draft treaty – the matter of UCH was one that still needed to be addressed. The revised text therefore explicitly included UCH within its scope.

The European Convention on the Protection of the Archaeological Heritage (Revised) 1992 was opened for signature in Valletta, Malta, in 1992; thereafter it became known as the Valletta Convention. Its core aim is 'to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study'.[85]

According to its Explanatory Report, the revised treaty 'stands as testimony to the evolution of archaeological practice throughout Europe'.[86] Certainly during the two decades following the adoption of its predecessor, there had been a number of significant changes. First of all, as the Explanatory Report acknowledges, there had been a 'major switch' from investigating the archaeological heritage through excavation and recovery to the use of more sophisticated and less intrusive techniques. Excavation was now regarded as a final, and by no means inevitable, stage in the process of archaeological investigation. The Convention recognises that excavation is essentially a destructive activity[87] and enshrines a preference for the protection of the archaeological heritage *in situ*.[88] Secondly, perceptions of the archaeological heritage had become much more sophisticated and had moved away from an object-centred approach to one that recognised that the *context* in which an object was found was equally important in terms of the information about the past it could elicit.[89] Thirdly, a wider range of threats to the archaeological heritage were perceived. While the original 1969 treaty had been addressed purely at dealing with illicit and clandestine excavations, those responsible for drafting the Valletta Convention had in mind a broad range of threats: 'major planning schemes, natural risks, clandestine or unscientific excavations and insufficient public awareness'.[90] The focus had shifted from the question of how to treat

[85] Art. 1(1).
[86] Explanatory Report, p. 1. For the status of the Explanatory Report, see n. 61, above.
[87] See wording of Art. 3(ii). [88] See Arts. 4(ii) and 5(iv).
[89] See, further, Chap. 2, section 3.2.3. [90] Preamble.

objects and sites *after* their chance discovery, to the question of how to manage the archaeological heritage in its entirety.

The Valletta Convention requires that each state party has in place procedures for the authorisation of excavation and other archaeological activities that ensure that such activities are conducted scientifically and that non-destructive methods of investigation are applied wherever possible.[91] In one of the first indications of how the question of commercial exploitation of UCH was likely to be treated in the context of international protective regimes, the Explanatory Report makes clear that excavations 'made solely for the purpose of finding precious metals or objects with a market value should never be allowed'.[92] Among other things, the Convention also makes provision for the maintenance of an inventory of the archaeological heritage;[93] mandatory reporting of chance discoveries;[94] the integrated conservation of the archaeological heritage within the planning process;[95] public financial support for archaeological research and conservation;[96] facilitation of the collection and dissemination of scientific knowledge;[97] promotion of public awareness and access;[98] prevention of the illicit circulation of archaeological material;[99] and monitoring of the application of the Convention.[100]

The Convention defines the 'archaeological heritage' broadly to include 'all remains and objects and other traces of mankind',[101] 'whether situated on land or underwater',[102] so long as those elements meet three criteria.[103] One of those criteria is that the elements 'must be located *in any area within the jurisdiction of the parties*'.[104] Clearly this includes the territorial sea. However, it also provides leeway for individual states parties to interpret the scope of their jurisdiction more widely. On this point, the Explanatory Report provides:

> the actual area of State jurisdiction depends on the individual States and in respect of this there are many possibilities. Territorially, the area can be

[91] Art. 3. [92] Explanatory Report, p. 8. [93] Art. 2(i). [94] Art. 2(iii).
[95] Art. 5. [96] Art. 6. [97] Art. 7. [98] Art. 9. [99] Art. 10. [100] Art. 13.
[101] Art. 1(2). [102] Art. 1(3).
[103] For details of all three criteria, see Chap. 2, section 3.2.3.
[104] Valletta Convention, Art. 1(2)(iii). Emphasis added. The 1969 Convention did not refer to its territorial scope of application. However, as Strati points out: 'in light of the nature of the measures adopted, which assume the undiscretionary authority and the exclusive competence of contracting States, it would be reasonable to conclude that it applies only to archaeological objects found within national territories' (Strati, *The Protection of the Underwater Cultural Heritage*, p. 78); in other words, it would include archaeological remains in the territorial sea, but not those beyond that limit.

coextensive with the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone or a cultural protection zone.

Noting that some member states of the Council of Europe restrict their jurisdiction over UCH to the territorial sea, while others extend it to the continental shelf,[105] the Explanatory Report makes clear that the Convention recognises and reflects these differences of state practice, without 'indicating a preference' for one or the other.[106] Under the terms of the Convention, states parties are therefore free to determine the extent of the maritime areas under national jurisdiction to which they will apply the Convention.

By not making the choice for states parties, those drafting the treaty neatly side-stepped the issue which had derailed the 1985 draft European Convention. Their tactic ensured that their initiative could achieve broad support from the member states of the Council of Europe, including those that took a 'coastal state' or 'flag state' perspective. Significantly, Turkey and Greece were among its original signatory states, as were France, Germany, the Netherlands and the UK.

The Valletta Convention has proved to be a remarkably successful treaty. It came into force in 1995 and has been widely ratified and implemented by states across the continent of Europe.[107] It is regarded by European archaeologists and heritage managers as an important and effective standard-setting instrument.[108] From a UCH perspective, the specific inclusion of sites, objects and other remains situated underwater within its scope of application afforded valuable formal recognition of the fact that UCH is of no less importance than its terrestrial counterpart and should be treated on a par. However, the 'seamless' approach taken to remains situated on land and underwater means that the provisions of the Convention do not address the unique circumstances of heritage

[105] Apart from the practice of Norway and Greece, already noted, within the European context, Spanish cultural heritage legislation enacted in 1985 applied to material on the continental shelf, and the remit of Irish national monuments legislation was extended to the furthest extent of the continental shelf in 1987: see, further, Chap. 7, section 4.1.

[106] Explanatory Report, p. 6.

[107] At the time of writing, the Valletta Convention has been ratified by forty-two of the forty-seven member states of the Council of Europe, including the UK, the Netherlands, France, Germany, Greece, Ireland, Italy, Portugal and Spain.

[108] Having said that, its approach is becoming dated and it is gradually being superseded by a new generation of standard-setting instruments sponsored by the Council of Europe. These include the European Landscape Convention 2000 and the Framework Convention on the Value of Cultural Heritage for Society 2005, both of which apply in general terms to UCH.

situated in the marine environment. In particular, implementation of many of the treaty's provisions relies upon the traditional 'town and country' planning system, but in the marine zone equivalent planning systems are still a rarity.[109] The Convention also does little to address the core area of difficulty with respect to the protection of UCH: the need for regulatory mechanisms to control activities targeting UCH in extra-territorial waters. Given that its provisions are framed from the perspective of the needs of the terrestrial heritage, its focus is on a broad range of threats, rather than on the specific problem of activities targeting the heritage and it gives states parties merely the *option* of applying its provisions extra-territorially. As a result, state practice in this regard is variable depending on national attitudes to the jurisdictional question.[110] Furthermore, the Valletta Convention is in nature only a regional instrument and therefore does nothing to directly assist the protection of UCH more globally.[111]

3. The UNESCO initiative

By the mid-1980s it was becoming clear that major strides were being made in the field of marine technology, particularly with respect to the development of submersibles capable of reaching great depth. The discovery of the *Titanic* in 1985 – and the subsequent recovery of a large number of artefacts from the site[112] – provided powerful evidence of the potential for the application of this technology for shipwreck search and recovery operations. If there had been doubt about the threat to UCH lying in the open oceans a decade or so previously,[113] there was no room for doubt now: it was manifestly evident that UCH located anywhere on the continental shelf, or indeed on the deep seabed, was vulnerable to deliberate human interference.

[109] On this, see, further, Chap. 10, section 3.

[110] This statement is based on anecdotal evidence of state practice. To the author's knowledge, no comprehensive survey has been undertaken of the practice of the states parties to the Valletta Convention with respect to extra-territorial application.

[111] Before leaving consideration of relevant Council of Europe initiatives, note should be made of Council of Europe Recommendation 1486 on Maritime and Fluvial Cultural Heritage (2000) (Doc. 8867), which was adopted by the Committee of Ministers on 18 July 2001. This Recommendation, incorporated in a report produced by Edward O'Hara, the rapporteur for the Parliamentary Assembly's Committee on Culture and Education, contained several recommendations relating to UCH. These were informed by the initiative then taking place within the UNESCO forum (see below) and were broadly aligned with its fundamental principles.

[112] See General introduction, section 1.2, above.

[113] See n. 20, above.

In 1985, the prevailing international law on the subject was somewhat uncertain. Although it seemed likely that the LOSC would gain sufficient ratifications to enter into force, it had yet to do so.[114] While many of its provisions may have been representative of customary international law,[115] this certainly could not be said of either Articles 149 or 303. Nonetheless, it was recognised that these articles had a 'symbolic importance' and could not be ignored.[116] In particular, Article 303(1) placed a duty on states to protect UCH and to cooperate for that purpose, and Article 303(4) appeared to anticipate that such cooperation could manifest itself in the form of a global treaty to plug gaps in the LOSC regime. UNESCO was the obvious international organisation with competence to take up this task. However, the initiative that eventually led to the UNESCO Convention 2001 had its origins in another quarter.

3.1 Background and process

3.1.1 Groundwork by the International Law Association

In 1988, the International Law Association[117] took up interest in the subject of UCH protection. Aware that the Council of Europe's recent attempt to produce a treaty in this field had reached an impasse, and recognising a growing sense within the international community generally that something needed to be done to provide satisfactory protection for UCH, the ILA's newly established Committee on Cultural Heritage Law decided to take on as its first task the preparation of a new draft convention on UCH.[118]

The ILA produced a skeleton draft in 1990,[119] and then two further drafts, one in 1992[120] and one in 1994.[121] The 1994 draft was adopted at

[114] At the end of 1987, the LOSC had thirty-four states parties, almost all of which were G-77 members. Sixty ratifications were required for it to enter into force (LOSC, Art. 308). It did so on 16 November 1994. See, further, General introduction, section 2.2.1, above.

[115] See General introduction, section 3.2.3, above.

[116] ILA, Queensland Conference (1990), International Committee on Cultural Heritage Law, First Report, p. 10.

[117] The ILA is a private body comprising individuals with an interest in international law. The Association's main objectives are the study, clarification and development of international law. These objectives are pursued through the work of specialised international committees overseen and endorsed by general biennial conferences.

[118] During its work, the ILA Committee consulted with a broad range of experts: see O'Keefe and Nafziger, 'Report', p. 417 n. 2.

[119] See ILA, Queensland Conference (1990), International Committee on Cultural Heritage Law, First Report, Appendix I.

[120] See ILA, Cairo Conference (1992), International Committee on Cultural Heritage Law, Report and Draft Convention for Consideration at the 1992 Conference.

[121] For the 1994 ILA Draft Convention with article-by-article commentaries, see O'Keefe and Nafziger, 'Report', pp. 404–17.

the ILA's 66th Conference in Buenos Aires that year. This draft (hereafter 1994 ILA Draft) was then forwarded to UNESCO for consideration and became the 'blueprint for the development of' the UNESCO Convention 2001.[122]

The ILA Committee drew on, and was influenced by, the experience of the Council of Europe: the Chairman of the ILA's Cultural Heritage Law Committee, Patrick O'Keefe, has referred – in particular – to the debt that the 1994 ILA Draft owed to the 1985 draft Convention.[123] Like that instrument, the ILA text adopted a broad definition of UCH and a 100-year threshold for material to qualify for protection under its regime.[124] However, on the two other core issues – salvage law and coastal state jurisdiction – the 1994 ILA Draft departed from the approach of the earlier treaty initiative and instead adopted an approach more reflective of its forebear, Recommendation 848. On salvage law, the ILA text provided for its non-applicability to material falling within the scope of application of the Convention.[125] On coastal state jurisdiction, it made provision which would have allowed a state party to opt to establish a 'cultural heritage zone' in an area beyond its territorial sea up to the outer limit of its continental shelf.[126] Where a state party did establish such a zone, it would be required to take measures to ensure that activities within the zone affecting UCH complied with certain minimum standards to be set down in a Charter annexed to the Convention.[127]

Given that the approach of the 1985 draft Convention on salvage law and jurisdiction had been influenced by the LOSC, how did the ILA Committee regard the relationship between that treaty and its own proposals? Its decision to exclude the application of salvage law appears to have been made on the basis that the saving provision for the law of salvage in Article 303(3) of the LOSC did not preclude later instruments

[122] O'Keefe, *Shipwrecked Heritage*, p. 23. [123] *Ibid.*, p. 22. [124] 1994 ILA Draft, Art. 2(1).
[125] *Ibid.*, Art. 4.
[126] *Ibid.*, Arts. 1(3) and 5. It may be recalled (see n. 54, above) that the 200-mile limit was selected by Recommendation 848 because the continental shelf as defined by the 1958 Geneva Convention on the Continental Shelf would have been inadequate to cover the whole of the Mediterranean Sea. However, this problem did not arise with the definition of the continental shelf under the LOSC.
[127] A suggestion that consideration should be given to the development of guidelines for the conduct of archaeological activities in the form of a 'code of practice', which might be attached to a treaty instrument, was made by Prott and O'Keefe in the Roper Report: see Council of Europe Doc. 4200-E, 1978, p. 48. On the subsequent development of the 'Charter', see, further, section 3.1.3, below.

from modifying or excluding salvage law.[128] On the jurisdiction question, it seems that giving states the option to establish a cultural heritage zone over the continental shelf was regarded as justifiable on the following premise:

> There is no rule of international law that prohibits a matter discussed during the negotiations for one convention and rejected being raised in negotiations for a later convention, particularly where the latter is more specific.[129]

The *optional* approach to extended jurisdiction was clearly influenced by the approach of the Valletta Convention. The success of that initiative suggested that such an approach was a way of reconciling two diametrically opposing viewpoints: the view that '[i]t would be meaningless to simply repeat the provisions of the [LOSC] ... without bringing any improvements'[130] and the view that there should be no extension of coastal state jurisdiction beyond the position enshrined in the LOSC.[131]

O'Keefe has pointed out that there was a 'fundamental difference in purpose' between the Council of Europe's draft Convention and the ILA draft.[132] The territorial scope of application of the Council of Europe's instrument was never intended to extend further than the limits of national jurisdiction. The ILA draft, on the other hand, was designed to deal with international waters generally, including the area beyond national jurisdiction. In doing this, it addressed the fact that because Article 149 of the LOSC provides no means of fulfilling the objective it sets out, the 'gap' in jurisdictional provision created by the LOSC in practice extends to *include* the Area, as well as the continental shelf beyond twenty-four miles. The ILA draft therefore made use of general principles of international jurisdiction, specifically the nationality and territorial principles,[133] in order to provide some means of deterring activities in this area that were

[128] See O'Keefe, 'The Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage Prepared by the International Law Association', p. 101.

[129] *Ibid.*, p. 99.

[130] A view expressed by Italy during the ILA meetings: *ibid.* Italy's position is interesting because it had taken a similar position to the maritime powers with respect to coastal state jurisdiction until the late 1990s. However, its position on the matter changed as a result of activities by a US team of archaeologists (with US naval assistance in the form of a nuclear-powered submarine), at Skerki Bank, a deepwater feature located on important trading routes off the coast of Scilly and rich in shipwrecks. For a note of this policy change, see O'Keefe, *Shipwrecked Heritage*, p. 27.

[131] O'Keefe, 'The Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage Prepared by the International Law Association', p. 99.

[132] *Ibid.*, p. 95. [133] On these principles, see, further, Chap. 7, section 2.

inconsistent with the Charter. A state party was required to prohibit its nationals and vessels under its flag from engaging in such activities in respect of any area not within a cultural heritage zone or territorial sea of another state party;[134] it was also required to prohibit the use of its territory in support of such activities.[135] Where material brought into the territory of a state party had been retrieved in a manner contrary to the Charter, provision was made for its seizure.[136]

3.1.2 The UNESCO process

Cognisant of the ILA's work, in 1993, UNESCO took up the matter and began to consider the possibility of developing a new international instrument for the protection of UCH. At its 141st Session in 1993, the UNESCO Executive Board called on the Director-General of UNESCO to undertake a study into the feasibility of drafting such an instrument.[137] The study was prepared by the UNESCO Secretariat and presented to the 146th Session of the Executive Board in 1995.[138]

The feasibility study concluded that the situation beyond the territorial sea was, in its word, 'critical':[139]

> At the present time there is literally no object which cannot be located and explored on the sea-bed. Sophisticated equipment can pinpoint any anomaly on the sea-bed, and advanced technology enables the lifting of objects. This technology, pioneered for the exploration of natural resources, is now in use by salvors. The cost of this technology is dropping rapidly and can be used by 'treasure hunters' whose interest is solely in the recovery of commercially valuable material, without regard to the proper methodology of archaeological excavation.[140]

Noting that shipwrecks in coastal waters had already been the subject of 'severe looting', it made the point that much of the UCH that remained unexplored was on the outer continental shelf or on the deep seabed; it also noted that deep-water shipwrecks are of 'particular importance' since for 'various chemical and biological reasons' they are likely to be exceptionally well preserved. In its view, the application of salvage law encouraged removal of material for commercial purposes and therefore promoted damage to, and destruction of, UCH.[141]

[134] 1994 ILA Draft, Art. 8. [135] *Ibid.*, Art. 7. [136] *Ibid.*, Art. 10.
[137] Resolution 5.5.1, para. 15.
[138] UNESCO Secretariat, 'Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage', presented to the 146th Session of the UNESCO Executive Board, Paris, 23 March 1995, Doc. 146 EX/27.
[139] *Ibid.*, para. 29. [140] *Ibid.*, para. 11. [141] *Ibid.*, para. 32.

Noting the LOSC's provisions for UCH, the study concluded that these were 'not adequate'.[142] Moreover, since the 'general thrust' of the LOSC was not related to UCH protection, it also concluded that it would not be appropriate to deal with the inadequacy 'by way of amendment or Protocol to' the LOSC.[143] It pointed out that, when consulted by the ILA about a possible treaty on UCH, the response of other international organisations had been one of disinterest: the UN Division for Ocean Affairs and the Law of the Sea (DOALOS) did not reply;[144] the IMO indicated that it was interested only in wrecks that posed a hazard to navigation; and the CMI indicated that it was not directly interested in the topic.[145]

The feasibility study identified three 'major issues' that would need to be resolved: first, issues relating to jurisdiction, not simply the extent of coastal state jurisdiction in respect of UCH, but also the question of how to control activities on the deep seabed beyond the limits of national jurisdiction; secondly, the place of salvage law; and thirdly, the adoption of archaeological standards by which to judge the appropriateness of activities.[146]

The overall conclusion of the study was that it would be feasible to elaborate an instrument for the protection of UCH. However, at its meeting in May 1995, the UNESCO Executive Board decided that more time was required for examination of the issues, particularly those relating to jurisdiction.[147] At the 28th Session of the UNESCO General Conference which took place in October/November 1995, it was evident that all member states (to whom both the 1994 ILA Draft and the feasibility study had been circulated) regarded the matter as one of major concern.[148] The Director-General was therefore invited to organise, in consultation with the UN and the IMO, a meeting of experts in archaeology, salvage and jurisdictional regimes to consider the matter further. At this meeting, in May 1996, it was unanimously

[142] *Ibid.*, para. 42. [143] *Ibid.*

[144] DOALOS, the Secretariat for the LOSC, did cooperate with UNESCO at a later stage. However, its position was awkward because of questions regarding the relationship between the two treaties. For contrasting perspectives on this matter, see Blumberg, 'International Protection of Underwater Cultural Heritage', pp. 502–3 and O'Keefe, *Shipwrecked Heritage*, p. 29.

[145] UNESCO, Feasibility Study, para. 18. See also O'Keefe, 'International Waters', p. 231.

[146] UNESCO, Feasibility Study, para. 21.

[147] See Clement, 'Current Developments at UNESCO Concerning the Protection of the Underwater Cultural Heritage', p. 311.

[148] *Ibid.*, p. 312.

accepted that there was a need for a convention and this was reported back to the 29th Session of the UNESCO General Conference in October 1997. The Conference invited the Director-General to prepare a first draft.

A preliminary draft text based on the 1994 ILA Draft, but amended in light of comments by states and by the meeting of experts, was published in 1998.[149] This draft (hereafter 1998 UNESCO Draft) was then discussed at two meetings of government-nominated experts. The first took place in June/July 1998 and the second in April 1999. A revised draft, adopted by the participants at the second meeting, formed the basis for work at a third meeting held in July 2000, but was not formally amended at that meeting.[150] The Director-General of UNESCO made it clear that a fourth meeting, scheduled for March/April 2001, was to be the last meeting before a text was finalised.[151] At that meeting, attention focused on a Single Negotiating Text produced by the Chairman.[152] At this stage, there were three particular issues on which agreement still needed to be reached: the core questions of coastal state jurisdiction and salvage law, and a further issue: sunken warships.

The potential for the issue of sunken warships to cause difficulties in the creation of an international legal regime for UCH was a matter that had come to light when the ILA was laying its groundwork for the treaty. A number of the major maritime states maintain that the sovereign immunity of warships and other state vessels and aircraft continues after they have been wrecked at sea and that, consequently, no one may interfere with such wrecks without the express consent of the flag state. This claim is disputed by other states. Given the political sensitivity of the issue, and the desire to avoid becoming mired down in it, the 1994 ILA Draft had simply excluded sunken warships and other state vessels and aircraft from its scope of application. This approach was also followed by the 1998 UNESCO Draft. However, commentators pointed out that such exclusion would seriously undermine the entire purpose of the new treaty because sunken warships form an important component of UCH. Efforts were therefore made to

[149] Doc. CLT-96/Conf.202/5, April 1998. For a discussion of this draft, see Dromgoole and Gaskell, 'Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998'. The text of the 1998 draft, along with explanatory comments, can be found appended to that article.

[150] Doc. CLT-96/CONF.205/5 Rev. 2, July 1999. This draft was a working text and will not be considered further here.

[151] See O'Keefe, *Shipwrecked Heritage*, p. 30. [152] *Ibid.*

include state vessels and aircraft within the scope of the Convention, but to make special provision which would take account of the status claimed for them by some flag states.

By the end of the scheduled period for the fourth meeting, an acceptable compromise had been found on the salvage law question. However, no agreement had been reached on the other two outstanding issues. The meeting was therefore extended by a further six days in July 2001.[153] Despite this extension and efforts to accommodate the concerns of flag states, compromise formulas with respect to the wording of the provisions relating to coastal state jurisdiction on the continental shelf and in the EEZ, and sunken warships, could not be found. As a result, the Chairman's Single Negotiating Text, with amendments, was put to a vote and adopted by forty-nine votes in favour, four against and eight abstentions. On 29 October 2001, at the 31st Session of the UNESCO General Conference, a recommendation that the Text be adopted was debated by Programme Commission IV. Amendments were proposed by several of the maritime states and rejected. The Text was then approved by ninety-four votes in favour to five against, with nineteen abstentions.[154] On 2 November 2001, the Text was formally adopted in plenary session by eighty-seven votes in favour,[155] four against[156] and fifteen abstentions.[157] On 6 November 2001, it was signed by the Director-General of UNESCO and the President of the General Conference and opened for accession.[158]

First-hand commentaries on the negotiations make it clear that they were characterised by tensions with respect to both substantive and

[153] The time constraints imposed by UNESCO and its handling of other procedural matters at the end of the negotiations upset a number of the participating states, especially those who were unsatisfied with the text. See the Statements on Vote of the Netherlands, Turkey and the UK, reproduced in Camarda and Scovazzi, *The Protection of the Underwater Cultural Heritage*, pp. 424–5, 432 and 432–3. See also the Statement on Vote by Greece set out in Strati, 'Greece' (2nd edn), pp. 118–20. On the US viewpoint, see Blumberg, 'International Protection of Underwater Cultural Heritage', p. 503 n. 17.

[154] The extra vote against was accounted for by the USA, whose contra-vote was recorded.

[155] No formal record was kept of those states voting in favour. The varying numbers of votes in favour, and abstentions, on the different voting occasions were accounted for partly by the fact that not all states were present on each occasion and partly by some states shifting their positions.

[156] Russian Federation, Norway, Turkey and Venezuela.

[157] Brazil, the Czech Republic, Colombia, France, Germany, Greece, Iceland, Israel, Guinea-Bissau, the Netherlands, Paraguay, Sweden, Switzerland, Uruguay and the UK.

[158] UNESCO's treaty-making procedures do not include a process whereby states can indicate by signature their consent to be bound prior to (but also subject to) the deposit of their instrument of adherence: see, further, O'Keefe, *Shipwrecked Heritage*, p. 141.

procedural matters.[159] Inevitably, the most fundamental area of dispute was the question of coastal state jurisdiction, with the majority of participants supporting an extension of coastal state jurisdiction on the continental shelf in the interests of UCH protection and a vocal minority opposing such an extension. Arguments about the question of compatibility with the LOSC (whether the proposals were compatible or not, and also whether they *needed* to be compatible, or not) were used by both sides to support their positions.

Among those states that failed to vote in favour of the Convention were a number of maritime states. Russia and Norway voted against the Convention; France, Germany, the Netherlands and the UK abstained. The USA did not have a vote because it was not a member of UNESCO at the time. However, it too expressed serious reservations about the final Text. All of these states were dissatisfied with the provisions relating to coastal state jurisdiction on the continental shelf and in the EEZ, and several were also dissatisfied with the provisions with respect to sunken warships.[160] Nonetheless, in statements made at the end of the negotiations, they also made it clear that they strongly supported the Convention's general principles and objectives and were disappointed that their concerns had not been overcome.[161]

Notably, two other states that abstained, or voted against the Convention, were Greece and Turkey. The fact that the Convention did not provide full and direct coastal state jurisdiction over UCH on the continental shelf (in other words, turn the continental shelf into a 'cultural protection zone') was a bitter disappointment for Greece after its long campaign on this issue. Having accepted compromises on salvage law and commercial exploitation, it clearly considered it a step too far to accept the concessions that had been made with respect to coastal state jurisdiction.[162] It was also dissatisfied with the concessions made with

[159] See, for example, O'Keefe, who provides a fascinating account of the intense efforts made by participants at the fourth meeting to reach consensus, as well as of the politics of the negotiations: *Shipwrecked Heritage*, pp. 25–32. See also Garabello, 'The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage'; Espósito and Fraile, 'The UNESCO Convention on Underwater Cultural Heritage', pp. 204–9.

[160] France, Germany, Russia, the UK and the USA.

[161] See Statements on Vote for all the relevant maritime states with the exception of Germany, reproduced in Garabello and Scovazzi, *The Protection of the Underwater Cultural Heritage*, pp. 239–53.

[162] Not without reason, Greece regarded the provisions with respect to the continental shelf and EEZ as over-complicated and difficult to enforce: see the Statement on Vote by Greece set out in Strati, 'Greece' (2nd edn), pp. 118–20.

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).

potentially difficult questions relating to the rights of identifiable owners, the 1994 ILA Draft applied only to UCH 'which has been lost or abandoned'.[181] The difficulty of defining the notion of abandonment led to this approach being dropped and the final text of the Convention says nothing about ownership rights, private or public. However, it does recognise that some states may have a special interest in certain UCH and caters for this interest by introducing a novel concept: the notion that states may have a 'verifiable link' to UCH. Secondly, unlike the 1994 ILA Draft, the Convention applies to sunken warships and other state vessels and aircraft, but makes specific provision for them which varies according to the maritime zone in which they are located.

An important distinction drawn by the Convention is between two forms of activities affecting UCH: those that are 'directed at' UCH and those 'incidentally affecting' UCH. Activities 'directed at' UCH are defined to mean 'activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage'.[182] Activities 'incidentally affecting' UCH, on the other hand, are defined to mean 'activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage'.[183] The Convention focuses on controlling the former, although it also includes some significant provision with respect to the latter. The bulk of the conventional framework is designed to ensure that activities 'directed at' UCH are undertaken in accordance with the archaeological benchmark standards enshrined in the Annex.

Parts II–XIV of the Annex include detailed rules covering all aspects of archaeological project management, including: project design, funding and timetable; the competence and qualifications of the project team; conservation and site management; reporting and dissemination of results; and curation of project archives. The Convention adopts the fundamental archaeological principle that remains should be protected *in situ* wherever possible and provides that preservation *in situ* must be considered as the 'first option' before activities directed at UCH are allowed or engaged in.[184] Activities directed at UCH may be authorised only in a manner consistent with the protection of that heritage[185] and shall not adversely affect that heritage more than is necessary to achieve

[181] 1994 ILA Draft, Art. 2(1). [182] Art. 1(6). [183] Art. 1(7). [184] Art. 2.
[185] Rule 1.

the objectives of the project.[186] Non-destructive techniques and survey methods must be used in preference to recovery of objects.[187] If excavation or recovery is deemed necessary 'for the purpose of scientific studies or for the ultimate protection' of the UCH, the methods used must be as non-destructive as possible.[188] Where UCH is recovered, it must be deposited, conserved and managed in a manner that ensures its long-term preservation.[189] States parties must ensure that proper respect is given to all human remains located in maritime waters[190] and activities directed at UCH must therefore avoid the unnecessary disturbance of human remains or venerated sites.[191] In line with the overall objective that humanity should reap the benefit of the protective regime, non-intrusive access to observe or document *in situ* UCH is encouraged.[192] Furthermore, the project archives – including any recovered UCH – as far as possible must be kept together and intact in a manner that is available for both professional and public access.[193]

As the experience of the Council of Europe demonstrated, attempts to exclude the application of salvage law to UCH in the text of a binding international instrument will meet with political resistance from some common law states. The final text of the UNESCO Convention replaced the clear-cut exclusion of salvage law in the 1994 ILA Draft with a compromise provision. This severely curtails – but does not totally exclude – the application of salvage law and the related law of finds.

A central tenet of the Convention is its commitment to the principle that there should be no commercial exploitation of the archaeological heritage. The centrality of this principle to the initiative arose in part from the deep international concern about increasing levels of commercial exploitation and, in part, from the input of ICOMOS. The view that commercial exploitation is fundamentally incompatible with the protection and management of archaeological heritage is one that is deeply held by much of the international heritage community. However, the question of whether or not the treaty scheme should allow some room for the involvement of commercially motivated organisations was a contentious one. The US delegation, in particular, was of the view that it should. Ultimately, a compromise was struck. The principle that there should be no commercial exploitation is set down in a simple and unqualified form in Article 2(7). However, it is

[186] Rule 3. [187] Rule 4. [188] Rule 4. [189] Art. 2(6).
[190] Art. 2(9). (Human remains are encompassed within the definition of UCH in Art. 1(1)(a).)
[191] Rule 5. [192] Art. 2(10). [193] Rule 33.

elaborated upon in Rule 2 of the Annex and this incorporates two carefully delimited provisos to the general principle.

In the interests of ensuring the uniform application of the annexed Rules to all areas of the sea, provision is made for each of the recognised maritime zones, *including* the territorial sea and other areas under coastal state sovereignty.[194] However, at the heart of the treaty are the provisions with respect to the continental shelf and EEZ, and the Area. Articles 9 and 10 create a complex regulatory framework for the continental shelf and EEZ, which involves a reporting and notification procedure, and the taking of various forms of protective action by states parties, acting alone and in concert. In attempting to create a formula acceptable to flag states, Articles 9 and 10 incorporate a number of constructive ambiguities[195] and accord a special role to a 'Coordinating State', which may or may not be the coastal state. The provisions in Articles 11 and 12, which relate to the Area, reflect the form – if not the entire substance – of Articles 9 and 10.

As a supplement to the provisions relating to each of the maritime zones, Articles 14, 15 and 16 oblige states parties to make use of the territorial and nationality principles of jurisdiction to counter activities that are contrary to the Convention. This reflects a view expressed by the ILA Committee that a 'responsible regime of control must, *at a minimum*, apply accepted general principles of international jurisdiction'.[196] Evidence of the ILA's influence is also found in Articles 17 and 18, which require states parties to impose sanctions for the violation of measures taken to implement the Convention, including the seizure of UCH where it has been recovered contrary to the terms of the Convention.

Underpinning the entire treaty framework is the principle that states parties must cooperate in the protection of UCH. The all-important regulatory regimes it creates for the continental shelf and EEZ, and the Area are dependent upon states parties sharing information and taking collaborative and coordinated action. The Convention also establishes a more general framework for cooperation, information-sharing and

[194] Art. 7. Art. 8 makes provision for the contiguous zone. When ratifying the Convention, or at any time thereafter, states may choose to declare that the Rules shall apply to inland waters too: see Art. 28.

[195] Ambiguity is also used as a device in Art. 3, which sets out the relationship between the Convention and the LOSC.

[196] ILA, Cairo Conference (1992), International Committee on Cultural Heritage Law, Report and Draft Convention for Consideration at the 1992 Conference, p. 13. Emphasis added.

mutual assistance by states parties for the purposes of UCH protection, and envisages that – over time – participating states will develop broad-ranging collaborative efforts on a whole host of matters, including investigation, excavation, documentation, conservation, study and presentation of UCH,[197] and training.[198] Furthermore, states parties are encouraged to enter into formal bilateral, regional or other multilateral agreements, or to develop existing agreements, for the preservation of UCH, provided such agreements are 'in full conformity' with the Convention and do not 'dilute its universal character'.[199]

The treaty does not create a permanent body, such as the ISA, to implement the Convention on behalf of states parties, nor one that might review its implementation, such as the Standing Committee proposed in the 1985 draft European Convention. Instead, implementation is left to the states parties themselves,[200] with the assistance of a Secretariat within UNESCO.[201] Provision is made for a Meeting of States Parties to be convened on a regular basis and for that Meeting to decide on its own functions and responsibilities.[202] The influence of the LOSC is clear in some of the procedural aspects of the Convention. As with the LOSC, reservations to the Convention are prohibited (unless expressly provided for)[203] and the provision made for the settlement of disputes incorporates the complex compulsory dispute settlement machinery in the LOSC.[204] Also, the process of amending the treaty is onerous and reflects, to some extent, the amendment procedures enshrined in the LOSC.

4. Concluding remarks

Of the three 'major issues' identified by the 1995 UNESCO feasibility study as needing to be satisfactorily addressed by a new international instrument on UCH, two were dealt with successfully. The compromise the UNESCO Convention 2001 enshrines on the question of salvage law is politically acceptable and the standards set out in its Annex by which the appropriateness of activities must be judged appear to be universally supported by states. Indeed, the Annex is undoubtedly the Convention's greatest achievement to date. However, there remain two stumbling blocks in the way of the Convention becoming a fully effective global

[197] Art. 19. [198] Art. 21. [199] Art. 6.
[200] Each State Party must establish competent authorities, or reinforce existing ones, to ensure the proper implementation of the Convention: Art. 22.
[201] Art. 24 makes provision for the Secretariat for the Convention. [202] Art. 23.
[203] Art. 30. [204] Art. 25.

regime: the old chestnut of coastal state jurisdiction and the relatively new concern relating to the treatment of sunken warships. Although the device of constructive ambiguity has been deployed successfully in the field of UCH protection on a number of occasions to accommodate differing viewpoints, with respect to these issues the tactic appears to have failed (at least so far) to achieve its objective.

7 Rights, jurisdiction and duties under general international law

1. Introduction

To exercise control over activities that might adversely impact upon UCH located in the marine environment, a state must have the requisite authority under international law. There are some general principles of international law that may be helpful in this respect and there is also a specific international legal framework for the seas set out in the LOSC. This framework establishes the rights and jurisdiction of states in respect of marine spaces and the activities that take place within them. As will be clear from earlier chapters, the LOSC includes only limited provision relating specifically to UCH.

The fact that a state may have the legal authority, or competence, to take action in respect of treasure hunting and other activities that interfere with UCH does not mean that it will necessarily *use* that competence. In practice, states may make use of the authority available to them where their own national interests are clearly at stake, but may need encouragement to use it to protect the interests of the international community more generally. This encouragement may come in the form of duties imposed by international law.

This chapter examines the authority available to states to take action to protect UCH, as well as the duties imposed upon them, under general international law.[1] The primary focus is on the mechanisms that are available to regulate the activities of commercial salvors and others who have the intention of interfering with shipwrecks and other UCH and who have the capacity to undertake activities on deepwater sites beyond

[1] The expression 'general international law' as used here means the international legal framework outside the UNESCO conventional regime. The jurisdictional framework established by the UNESCO Convention 2001 is considered in Chap. 8.

coastal areas. However, brief consideration is also given to the question of regulation of commercial activities that may *inadvertently* interfere with UCH, such as trawling, dredging and the construction of renewal energy installations. The chapter is split into three sections. The first identifies two general principles of international jurisdiction which afford states some means whereby they can control, or at least have some indirect influence upon, activities beyond their territorial limits. The second discusses the rights, jurisdiction and duties of states with respect to each of the internationally recognised maritime zones under the regime set out in the LOSC. The final section explores how the jurisdictional mechanisms identified and discussed in the first two sections could be utilised to their full potential in order to afford protection to UCH located in extra-territorial waters.

Some readers, especially non-lawyers, may find it helpful to review parts of the General introduction before reading this chapter. In particular, Section 2.2 provides an introduction to the law of the sea and outlines the recognised maritime zones and their interrelationship with one another. Section 3.1 may also be useful: it provides a brief introduction to the concepts of sovereignty and jurisdiction.

2. Use of general principles of international jurisdiction in the context of underwater cultural heritage

A number of general principles of international jurisdiction are recognised whereby a state can exercise control over individuals and legal entities in respect of both civil and criminal matters.[2] While some of these principles are controversial, the two that are relevant in the present context are well-established rules of customary international law. These principles will simply be noted at this stage, before attention is turned to the principles relating specifically to maritime jurisdiction. However, they will be returned to later in the chapter.

2.1 Territorial principle

Under the territorial principle of jurisdiction, as a matter of general principle a state has legislative and enforcement jurisdiction over all matters arising in its territory. Generally speaking, it can therefore prohibit or restrict activities in its territory and can do so whether those

[2] For a general outline of all the principles, see Brownlie, *Principles of Public International Law*, chap. 15.

activities are undertaken by its own nationals, or the nationals of other states. The territory of the state includes its ports, internal waters and territorial sea. As will be discussed further in section 3.2 below, subject to certain exceptions the state can regulate the activities not only of the nationals of other states that come within its territory, but also of their flag vessels.

By making judicious use of the territorial principle, it is possible for a state to counter interference with wreck sites lying *beyond* its territorial limits. For example, by restricting or prohibiting use of its ports, or by making their use dependent on prior consent, it could use the principle to hamper the activities of foreign vessels operating in international waters by restricting their lines of supply.[3] It could also require that material found outside territorial limits, but then brought within those limits, be reported, as well as restrict or ban the importation of material raised from particular sites.

UK legislation provides some relevant examples. One is the well-known provision in the Merchant Shipping Act 1995 requiring that any person finding or taking possession of any wreck outside UK territorial waters, and bringing it within those waters, must report it to the Receiver of Wreck.[4] Another UK statute that is less well known in the UCH context but which illustrates the potential of the territorial principle to assist in deterring inappropriate activities on extra-territorial wreck sites is the Dealing in Cultural Objects (Offences) Act 2003.[5] This Act creates an offence of 'dealing with tainted cultural objects'.[6] While the 'dealing' must take place in the UK (for example, the acquisition of an object, or its disposal), the 'tainting' of an object can take place anywhere. Among other things, an object will be 'tainted' if it is removed from a wreck site of historical or archaeological interest, wherever that wreck site may be, provided that the removal constitutes an offence under UK law, or the law of any other country.[7] The constituent elements of the offence are complex, but its scope is remarkably broad. To take just one example, it could encompass the situation where

[3] Any restrictions of this sort would need to comply with international law rules on access to ports, including those relating to ships in distress: see, further, Churchill and Lowe, *The Law of the Sea*, pp. 61–5.

[4] Merchant Shipping Act 1995, s. 236(1).

[5] This statute was enacted to reinforce the UK's implementation of the 1970 UNESCO Convention on Illicit Trade in Cultural Property. (The UK acceded to the 1970 Convention, somewhat belatedly, in 2002.)

[6] Dealing in Cultural Objects (Offences) Act 2003, s. 1.

[7] Dealing in Cultural Objects (Offences) Act 2003, s. 2.

either a British or foreign national, without authorisation, acquires, disposes of, imports or exports an item removed from the wrecks of HMS *Prince of Wales* or HMS *Repulse*, situated off Malaysia, since access to these wreck sites is restricted under the UK Protection of Military Remains Act 1986.[8]

Carefully crafted domestic legislation utilising the territorial principle of jurisdiction can provide a means whereby a state can indirectly – but potentially quite effectively – influence activities undertaken at UCH sites in international waters.

2.2 *Nationality principle*

The utilisation of another established basis for jurisdiction – the nationality principle – can also be helpful in protecting extra-territorial sites. Under this principle, a state has the power to exercise legislative and, in some cases, enforcement jurisdiction over the activities of its own nationals when they are outside its territory.[9] The nationality principle extends not only to the nationals of the state, but also to vessels registered with the state, since the authorisation to fly the flag of the state effectively confers the nationality of the state on the vessel. A state can therefore legislate to regulate the activities of its flag vessels and of anyone on board those vessels, including non-nationals.

Although, generally speaking, the nationality principle is reserved for dealing with serious criminal offences committed abroad, such as treason and murder, it can also be used to control other activities which the state would like to see regulated and clearly it has some potential for providing states with control over extra-territorial activities affecting UCH. Again, it is possible to find examples of legislation that does this. Two statutes previously discussed,[10] the UK Protection of Military Remains Act 1986 and the US Sunken Military Craft Act of 2004, make use of the nationality principle in order to afford protection to sunken military vessels and aircraft lying beyond the territorial sea. The UK statute creates offences applicable to certain military wrecks in international waters, making it clear that those offences can be committed only by someone on board a British-controlled ship, or by a British

[8] On this statute, see, further, Chap. 4, section 2.2. Whether the offence *would* encompass such a situation depends on whether the removal did in fact constitute an offence under the 1986 Act (see the terms of ss. 2 and 3).

[9] Generally speaking, the legislation of one state cannot be *enforced* in another state: see Aust, *Handbook of International Law*, p. 44.

[10] See Chap. 4, section 2.2.

national.[11] The US statute enacts various prohibitions that are not subject to any geographical limit, but again makes it clear that the application of those prohibitions to non-nationals is limited.[12]

'Long-arm' provisions of this kind are undoubtedly useful, although they have the obvious limitation that they cannot be used to regulate the activities of *foreign* flagged vessels and nationals.[13]

3. Rights, jurisdiction and duties under the Law of the Sea Convention

Aside from general principles of international jurisdiction, there are also specialist rules set out in the LOSC relating to the rights and jurisdiction of states over maritime areas.

As discussed in Chapter 1, in light of concerns about the lack of legal protection for UCH in the Mediterranean Sea, proposals were put forward at UNCLOS III that would have given coastal states direct jurisdiction over UCH located on the continental shelf. This would have meant that the coastal state would have been able to regulate activities related to UCH conducted in this area not just by its own nationals and flag vessels, but by those of other states as well. However, these proposals were rejected by some maritime states (most notably, the USA, the UK and the Netherlands). These states were of the view that a departure from the pre-existing position – that coastal state rights and jurisdiction on the continental shelf should be tied to natural resources – would lead to creeping jurisdiction and, ultimately, to claims of full coastal state sovereignty over these areas.[14] As a result, the LOSC contains only limited provision with respect to UCH, making available to coastal states a special jurisdictional tool in respect of the maritime zone immediately contiguous to the territorial sea and making some provision for UCH located on the deep seabed beyond areas of national jurisdiction.

It is usually the case that rights are accompanied by responsibilities and the LOSC makes provision for both. The following discussion starts by looking at the duties the Convention imposes upon states with respect to UCH. It then goes on to consider the rights and jurisdiction afforded to

[11] Protection of Military Remains Act 1986, s. 3(1).
[12] Sunken Military Craft Act of 2004, sec. 1402.
[13] Aside from limitations with regard to enforceability *in law* against foreign vessels and nationals, there may also be difficulties in enforcing the provisions *in practice* where activities take place in waters far from the state's territorial boundaries.
[14] See Chap. 1, section 2.1.2.

states in each of the maritime zones and the implications these have for UCH protection.

3.1 *Duties under Article 303(1)*

Article 303(1) of the LOSC provides:

> States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.[15]

There are several points to note about this provision. First, the duty is twofold, comprising two related duties: (i) a duty to protect *and* (ii) a duty to cooperate. Secondly, the provision refers to UCH (or, more specifically, 'objects of an archaeological and historical nature')[16] found *at sea*. In light of the fact that Article 303 is located in Part XVI of the Convention, which is headed 'General Provisions', it is generally accepted that the duties set out in paragraph 1 apply to *all* sea areas. Thirdly, and importantly, the provision is 'internationalist' in nature, in other words it requires states to act to protect UCH no matter what its origins may be: the fact that a state has no direct *national* interest in the UCH concerned is irrelevant. Finally, the second limb of the duty, which requires that states *cooperate* for the purpose of protecting UCH, represents – in the specific context of UCH – a more general duty that exists under international law requiring states to cooperate with one another for the good of all.[17] In the marine zone, the necessity for cooperation to ensure the effective regulation of activities is self-evident. Furthermore, given the international nature of shipping and trade, and the resultant international significance of much UCH, cooperative action is clearly appropriate in determining how such UCH should be protected.

When the LOSC was still in draft form, Caflisch argued that the duties under Article 303(1) 'appear far too general and vague to have any significant normative content'.[18] More recently, Blumberg argued that Article 303(1) is hortatory only, on the basis that it '[could not] be construed to provide specific regulatory competence over UCH located

[15] For the historical development of this provision, see Chap. 1, section 2.1.2.

[16] The meaning of the phrase 'objects of an archaeological and historical nature' is discussed in Chap. 2, section 3.1. As that discussion shows, modern state practice generally treats the expression expansively so as to include even relatively recent material. In light of this, and for the sake of simplicity, this chapter for the most part employs the term UCH and treats it as synonymous with the phrase used by the LOSC.

[17] See, further, Lowe, *International Law*, pp. 110–13.

[18] Caflisch, 'Submarine Antiquities and the International Law of the Sea', p. 20. See, further, Chap. 1, section 2.1.3.

in any geographic zone of a coastal state's jurisdiction'.[19] It is certainly true that the provision is general and vague, providing no guidance as to what the duties comprise, or how they should be fulfilled.[20] It is also true, as Blumberg pointed out, that Article 303(1) does not in itself create specific regulatory competence. Nonetheless, as the discussion below will show, there are ways that states can use competences otherwise available to them in order to protect UCH in all sea areas. Arguably, what Article 303(1) does do is to oblige states to be *active* in seeking ways to use the methods open to them under international law to protect UCH, wherever it might be located, both on an individual basis and collaboratively.[21]

Article 303(1) refers to states, rather than states parties. The extent to which this provision can be said to be representative of customary international law and, as such, binding on non-states parties to the LOSC is impossible to answer given that its normative content is uncertain. It is clear that many states do now take action of one form or another to

[19] Blumberg, 'International Protection of Underwater Cultural Heritage', p. 493.

[20] A comparison can be drawn between the general obligation to protect UCH in Art. 303(1) and a similar general obligation to protect and preserve the marine environment set out in Art. 192. Art. 192 is accompanied by a substantial number of detailed provisions (together with Art. 192, making up Part XII of the Convention) that provide flesh to the duty and clarification as to how it should be fulfilled. The Convention provides no such guidance with respect to Art. 303(1).

[21] The precise content and extent of the duty, and the degree to which it is enforceable in international law, are highly debatable. Scovazzi has suggested that '[a] State which knowingly destroyed or allowed the destruction of elements of the underwater cultural heritage would be responsible for a breach of the obligation to protect it': Scovazzi, 'The Protection of Underwater Cultural Heritage', p. 121. However, even the imputation of a duty as basic as this would require some qualification to take account of circumstances where other interests may take precedence. For example, it may be necessary for a state to take action to deal with a serious hazard posed by a historic shipwreck and, in the course of doing so, to damage or possibly even destroy the wreck. Implementation of the duty in these circumstances might entail ensuring that any damage to the wreck is minimised, or undertaking rescue archaeology in advance of destruction. Interestingly, the question of breach of the duty in Art. 303(1) has recently arisen before an international tribunal. In the *M/V Louisa* case, before the International Tribunal for the Law of the Sea (ITLOS), Saint Vincent and the Grenadines intitially claimed that the Kingdom of Spain had been excessive in its actions to protect UCH when it detained a vessel flying the flag of Saint Vincent and the Grenadines, operating in Spanish inshore waters under a permit to undertake marine scientific research, on the basis that the recovery of 'several cannon balls, some pieces of pottery, and a stone with a hole in it' (in the words of the applicant) was a violation of Spanish heritage legislation: see *M/V Louisa*, ITLOS Case No. 18 (quotations from the Request for the Prescription of Provisional Measures of 23 November 2010, pp. 20–1). Later, the applicant asserted that it was not in fact 'claiming a substantive right under Art. 303' and that the previous reference to Art. 303 had been a 'typographical error'. See, further, Chap. 10, section 4.

protect UCH, including that located extra-territorially, but the extent to which they do so because they believe they are under a *legal obligation* to do so is debatable.[22] Having said that, there is little doubt that one of the major non-parties to the LOSC – the USA – regards Article 303(1) as a significant obligation.[23]

3.2 *Maritime spaces subject to coastal state sovereignty*

According to Article 2(1) of the LOSC:

> The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

Sovereignty over the territorial sea is exercised subject to the provisions of the LOSC and to other rules of international law.[24] In particular, it is subject to the right of innocent passage that the ships of all states enjoy through the territorial sea.[25] The LOSC establishes the maximum breadth of the territorial sea as twelve miles from baselines.[26]

Landward of its territorial sea limits the coastal state enjoys exclusive jurisdiction over all matters, subject to the restrictions on sovereignty referred to above. This means that, subject to those restrictions, it is free to legislate in any way it sees fit to protect UCH.[27] Inshore areas are likely

[22] In other words, one of the two requisite elements for the creation of customary international law, *opinio juris*, may not be present: see General introduction, section 3.2.2, above. The participation of as many as ninety states at the UNESCO negotiations is perhaps the best evidence of widespread recognition that protection of UCH is a matter of both individual and collective state responsibility and it is possible that the very existence of the UNESCO Convention 2001, and the enhanced profile it gives to the question of UCH protection, will foster in all states an increasing sense of legal obligation with respect to UCH protection.

[23] The USA was in fact responsible for the proposal for a general duty to protect UCH to be included in the LOSC: see Chap. 1, section 2.1.2. As will be seen below, the USA has made considerable efforts to protect UCH, including that lying beyond its territorial limits, and has sought to act cooperatively with other states in this regard. When it intervened on behalf of Spain in the *Mercedes* case (see Chap. 4, section 2.3.2), it referred to its 'duty [under international law] to protect cultural resources found at sea and to cooperate with other nations in safeguarding them': 'Statement of Interest and Brief of the United States as *Amicus Curiae* in Support of the Kingdom of Spain', 27 August 2009.

[24] LOSC, Art. 2(3).

[25] LOSC, Art. 17. For the rules on innocent passage, see LOSC, Part II, section 3.

[26] LOSC, Art. 3.

[27] Caflisch has pointed out that the right of innocent passage has 'no direct bearing' on the matter of UCH: Caflisch, 'Submarine Antiquities and the International Law of the Sea', pp. 10–11. However, another restriction that has more bearing is that relating to sovereign immunity: see Chap. 4, sections 2.1 and 2.2.

to be particularly rich in UCH of all types and therefore it is clearly important that this material is afforded appropriate protection. As previously discussed,[28] many states have exercised jurisdiction in this regard and it can be argued that – by virtue of Article 303(1) – they are under a duty to do so.

States that are entitled to draw up 'archipelagic baselines' under Part IV of the LOSC,[29] such as Indonesia and the Philippines, have sovereignty over their archipelagic waters, as well as the territorial sea and internal waters.[30] In the context of UCH protection, the legal status of archipelagic waters is significant because they can be very extensive areas, criss-crossed by important historical trading routes.

3.3 *The contiguous zone*

The contiguous zone is a twelve-mile strip of water lying immediately adjacent to the territorial sea. In the general scheme of ocean space, it represents a relatively small geographical area, but in the context of UCH it is important because the *only* UCH-specific jurisdictional tool afforded to coastal states by the LOSC applies to this zone.

Article 303(2) of the LOSC provides:

> In order to control traffic [in objects of an archaeological and historical nature], the coastal State may, in applying article 33, presume that their removal from the seabed 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.[31]

To understand the meaning of this provision, one needs to consider it alongside the provision to which it refers, Article 33. This provides:

> 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>   (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
>   (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

[28] See, in particular, General introduction, section 1.3 and Chap. 2, section 2.

[29] See General introduction, section 2.2.2, above.

[30] See LOSC, Art. 49. The sovereignty of an archipelagic state over its archipelagic waters is exercised subject to Part IV of the treaty, which accords foreign vessels the right of innocent passage and a right of archipelagic sea lanes passage. Caflisch has pointed out that neither of these rights has a 'direct bearing' on the matter of UCH: Caflisch, 'Submarine Antiquities and the International Law of the Sea', pp. 10–11.

[31] For the historical development of this provision, see Chap. 1, section 2.1.2.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.[32]

So, what does Article 303(2) permit the coastal state to do? This is a question that has been the subject of much academic reflection. Uncertainty about the matter arises not simply from the fact that the wording of the provision itself, and of the provision to which it refers, is somewhat tortuous. It also arises because the question is politically controversial. It is clear that the jurisdiction afforded to coastal states over the contiguous zone by virtue of Article 33 was intended to be tightly limited. It covers only the four functions specifically referred to in the article: matters relating to customs, taxation, immigration and sanitation. It also provides *enforcement* jurisdiction only. On the other hand, the provision in Article 303(2) represented a concession to states which had called for full coastal state jurisdiction over UCH on the continental shelf and therefore it was clearly intended to provide at least some degree of coastal state control over activities taking place in the more limited area of the contiguous zone.

Under Article 33, a state may, within its contiguous zone, enforce the customs, fiscal, immigration and sanitary laws that are applicable to its territory and territorial sea. In other words, the state is given the power to take action in the contiguous zone which will prevent the infringement *within its territory or territorial sea* of the laws referred to; it may also take action in the contiguous zone to punish those that commit such infringements. What the coastal state cannot do under Article 33 is to create laws and regulations applicable to the contiguous zone itself. In other words, Article 33 accords it no *legislative* jurisdiction within the zone. This means that it cannot legislate to regulate or prohibit activities (relating to the four matters referred to in the article) taking place in the zone itself.

While Article 303(2) is tied in with Article 33, it is a rather different creature. At least in part, this is because it is based on a 'legal fiction'.[33] Under the provision, the coastal state is allowed to presume that the removal of UCH from the seabed in the contiguous zone without its approval *would* amount to a breach of the laws and regulations applicable in its territory and territorial sea relating to customs, fiscal, immigration

[32] Art. 33 of the LOSC is based on Art. 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, although under the 1958 Convention the maximum extent of the contiguous zone was twelve miles from baselines.

[33] For the meaning of a legal fiction, see Chap. 1, section 2.1.2.

and sanitary matters. The fiction itself is actually twofold: first of all, an offence that is committed in the contiguous zone may be treated *as if* it took place in the territorial sea; secondly, although there is little likelihood that removal of UCH from the seabed (even if took place *within* the territorial sea) would amount to a breach of the laws referred to, nonetheless it can be treated *as though* it was such a breach.[34] It was for the sake of political expediency that Article 303(2) was annexed to the provision in Article 33.[35] However, an unfortunate consequence of this annexation is that it has created uncertainty about exactly what Article 303(2) permits a state to do. The core uncertainty is whether Article 303(2) – like Article 33 – affords only enforcement jurisdiction, or whether it goes further and affords legislative jurisdiction.

One view, which will be referred to here as the restrictive view, is that Article 303(2) allows a state to treat removal of UCH from the seabed in the contiguous zone as though it was an infringement of its customs, fiscal, immigration and sanitary laws applicable to its territory, including its territorial sea. Article 303(2) refers specifically to the 'removal' of objects from the seabed 'in the zone referred to' and there seems little doubt that it provides a mechanism for the coastal state to control such removal (with the object of controlling 'traffic' in such objects).[36] However, under the restrictive viewpoint, such control should be treated as the *enforcement* of laws applicable to its territory and should not be exercised by means of legislation in respect of the contiguous zone itself.[37] Even under this restrictive view, a subtle but crucial distinction between Article 303(2) and Article 33 needs to be noted: while Article 33 only permits the coastal state to prevent or punish infringements taking place within the twelve-mile territorial sea, Article 303(2) permits a

[34] The protection of heritage *in situ* is a matter very largely unrelated to customs, fiscal, immigration and sanitary laws. Once heritage items are *removed* from their location and attempts are made to import them into, or export them from, a state, customs or fiscal regulations may become relevant.

[35] See Oxman, 'Marine Archaeology and the International Law of the Sea', p. 363.

[36] Aust, for example, states: 'a wreck in the contiguous zone is assimilated to one found in the territorial sea, and the coastal state can require its approval to remove the wreck': Aust, *Handbook of International Law*, p. 300.

[37] According to Oxman, the whole aim of the fiction in Art. 303(2) was to avoid 'converting the contiguous zone from an area where the coastal State has limited enforcement competence to one where it has legislative competence': Oxman, 'The Third United Nations Conference on the Law of the Sea', p. 240. The view that Art. 303(2) provides only enforcement jurisdiction is supported by some academic commentators: see, for example, Brown, 'Protection of the Underwater Cultural Heritage', pp. 329–30 and Long, *Marine Resources Law*, p. 533.

coastal state to take action to regulate certain activities taking place in the contiguous zone itself.[38]

Where some commentators take a more liberal view is on the question of whether or not Article 303(2) affords states *legislative* competence in respect of UCH in the contiguous zone – in other words, whether they can apply their heritage laws directly to this area. Strati, for example, has suggested that it is the combination of the jurisdictional mechanism in Article 303(2) *and* the duty to protect in Article 303(1) that together 'in substance' provide the authorisation for a state to extend its heritage laws to the contiguous zone.[39] She argues that this enables them to establish a twenty-four-mile 'archaeological zone' distinct from the general contiguous zone.[40]

In fact the two viewpoints are merely a reflection of a constructive ambiguity in the provision, designed to accommodate different viewpoints.[41] Nonetheless, if one accepts that Article 303(2) permits a coastal state to control activities taking place in the contiguous zone itself – which the wording of the provision surely obliges one to do – it is difficult to see how this can be implemented in practice without reference to an appropriate legislative framework. Legislation relating to customs, fiscal, immigration and sanitary matters is self-evidently inappropriate. Reference to heritage laws applicable in the territorial sea would be more appropriate, but it must be borne in mind that the jurisdiction afforded by Article 303(2) is limited: the state is permitted to take action only in so far as it relates to controlling *removal* of objects from the seabed and the *trafficking* of objects. Institution of a permit system in respect of archaeological excavation or other recovery activities would appear to be permissible, but other measures found in heritage legislation designed to protect UCH in the territorial sea may be more questionable.[42]

[38] For the nature of measures that could be taken, see Brown, *The International Law of the Sea*, Vol. I, p. 135.

[39] Strati, *The Protection of the Underwater Cultural Heritage*, p. 168.

[40] *Ibid.* Strati also argues that there is no need for the declaration of a general contiguous zone before the application of Art. 303(2), arguing that Art. 303(2) has 'an independent character that enables its autonomous declaration': *ibid.*, pp. 168–9.

[41] See Chap. 1, section 2.1.2.

[42] For example, Le Gurun has pointed out that the French provision for the contiguous zone refrains from providing for state ownership of maritime cultural assets (something provided for in the French territorial sea) because this would be 'viewed as exceeding the opportunity offered by article 303(2)': Le Gurun, 'France' (2nd edn), pp. 75–7. This view is probably correct because provision for state ownership is not a measure directly connected to the *removal* of UCH (although it seems that some states, for example

To what degree is the more liberal viewpoint supported by state practice? Contiguous zones do not exist automatically but need to be claimed by the coastal state.[43] The latest table of claims to maritime jurisdiction published by the UN suggests that more than eighty states have exercised this right,[44] but there is no official collation of details of the usage to which the zone is put. However, it seems that in recent years a growing number of states are establishing a contiguous zone with UCH specifically in mind.[45]

Within Europe, Denmark may have been the first state to make use of Article 303(2) when it introduced legislative provision in 1984 to the effect that underwater monuments, including shipwrecks over 100 years old, located within twenty-four miles, could not be damaged or removed without authority.[46] France also implemented Article 303(2) at a relatively early stage, in its Law of 1989.[47] In 1992, Spain proclaimed a

Denmark and South Africa, do claim ownership of UCH in the contiguous zone: see, further, below). Many other typical heritage protection measures can be justified on the basis that they relate in one way or another to preventing unauthorised removal of, or trafficking in, objects. For instance, Le Gurun has pointed out that a reporting duty can be justified on the basis that it is easier to control traffic in UCH if its existence is known: *ibid.*, p. 76. (It has sometimes been argued that provisions that are designed merely to protect UCH from inadvertent damage or interference would be inappropriate. However, bearing in mind that the contiguous zone will fall under the continental shelf and EEZ regimes, such provisions may be justifiable under those regimes, rather than under Art. 303(2). See, further, section 4, below.)

[43] See General introduction, section 2.2.2, above. Various commentators, including Strati, argue that a state does not need to declare a contiguous zone for the purposes of Art. 33 prior to exercising jurisdiction over UCH under Art. 303(2). See Strati, *The Protection of the Underwater Cultural Heritage*, pp. 168–9. However, as far as it is possible to tell, it seems that the majority of states do declare a contiguous zone before exercising jurisdiction under Art. 303(2).

[44] DOALOS, Table of Claims to Maritime Jurisdiction as at 15 July 2011 (available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/claims.htm).

[45] At the time of writing, the UK has not declared a contiguous zone. However, there appears to be an intention to do so when a suitable legislative opportunity arises. (It is interesting to note that a draft Heritage Protection Bill of 2008 (yet to be enacted) made provision enabling the future amendment of the definition of UK waters in the Act to include the contiguous zone. See s. 226(4) of the draft Bill.)

[46] The Danish Museum Act of 2001 (as amended) goes further and makes provision for reporting of finds and state ownership of everything reported. Denmark did not formally declare a contiguous zone until 2005. Despite some question regarding the impact of the 2005 Law on the Contiguous Zone on the formerly established 'heritage protection zone' (see Strati, 'Protection of the Underwater Cultural Heritage', p. 30, including nn. 24 and 25), it seems that the official Danish text of the Law makes it 'crystal clear' that the Law simply formalises the 'heritage protection zone' and does not alter or abolish it: personal communication with Thijs Maarleveld, 17 March 2010.

[47] Law No. 89-874, now consolidated in the 2004 Code for Heritage. As Le Gurun points out, France implemented Art. 303(2) prior to its ratification of the LOSC in 1996: Le Gurun, 'France' (2nd edn), p. 77.

contiguous zone and its heritage laws apply by implication to the twelve- to twenty-four-mile area.[48] In 2004, Norway made a similar proclamation and announced a prohibition on the destruction or removal of material in the contiguous zone that would be subject to protection by the heritage legislation applicable to its territorial sea.[49] In the same year, without formally declaring a contiguous zone, Italy introduced a legislative measure providing that archaeological objects in the twelve- to twenty-four-mile zone are to be treated in accordance with internationally accepted archaeological standards.[50] In 2005, the Netherlands established a contiguous zone and, in 2007, extended its monuments legislation to apply – at least in part – to the zone.[51]

With the exception of Norway, the states referred to above assert legislative competence of one sort or another over UCH in the contiguous zone. Outside of Europe, there are also examples of states that have taken action in fairly recent years and again these show that a legislative approach is favoured. For example, since 1994, South Africa has exercised legislative competence over a 'maritime cultural zone' co-extensive with its contiguous zone and expressly exerts 'the same rights and powers' in this zone as it does in respect of UCH in its territorial sea.[52] Most interesting of all is the position of the USA. In 1999, President Clinton proclaimed a contiguous zone, stating that the extension was 'an important step in preventing the removal of cultural heritage found

[48] See Aznar-Gómez, 'Spain', pp. 277 and 284. As we will see below (section 4.1), Spanish heritage legislation expressly applies to the continental shelf and, therefore, by implication to the contiguous zone. Legislation making specific provision for the recovery of archaeological objects in the contiguous zone has been under consideration in the Spanish Parliament: personal communication with Mariano Aznar-Gómez, 23 March 2010.

[49] See Kvalø and Marstrander, 'Norway', pp. 221, 223 and 225.

[50] The legislation refers specifically to the Rules in the Annex to the UNESCO Convention 2001: Article 94 of the Italian Cultural Code (Legislative Decree 42/2004). Personal communication with Nicola Ferri, 10 March 2010.

[51] The Act on Archaeological Heritage Management, published on 6 February 2007, amends the Dutch Monuments Act 1988. The amendments require reporting and permits for archaeological excavation in the twelve- to twenty-four-mile zone. Personal communication with Thijs Maarleveld, 17 March 2010. See also Maarleveld, 'The Netherlands', p. 172.

[52] Maritime Zones Act No. 15 of 1994, s. 6. See Forrest, 'South Africa', p. 256. This includes blanket protection for all wrecks over sixty years of age, the assertion of state ownership of all such material, and the institution of a permit system for all activities that might disturb, damage or destroy such material. For details, see *ibid.*, pp. 267 *et seq.*

within 24 nautical miles of the baseline'.[53] In light of the fact that the USA already had legislation in place affording protection to cultural resources out to 200 miles, which provides for a permit system in respect of the removal of, or injury to, such resources,[54] it regarded the proclamation as an aid to enforcement of that pre-existing legislation against foreign flag vessels and nationals in the twelve- to twenty-four-mile zone.[55] It therefore also exercises *legislative* jurisdiction in this zone under the authority of Article 303(2).

From the limited information available, it seems that an increasing number of states are turning to the Article 303(2) mechanism to afford some level of protection to UCH in their coastal waters and also it seems that, generally speaking, they are asserting both legislative and enforcement competence. It is interesting to note that their actions do not appear to have given rise to protest. Furthermore, among the states concerned are France, the Netherlands and the USA, all of which are vocal opponents of creeping jurisdiction. Certainly there appears to be no evidence that the usage is leading to the legislative approach being extended to the matters referred to in Article 33 and, for those concerned about jurisdictional 'creep', that should be reassuring.[56] However, it seems that Caflisch may have been prescient when, in 1982, he commented that the 'practical effect' of Article 303(2) 'will be to extend coastal state legislative competence to the 24-mile limit as far as submarine antiquities are concerned'.[57]

Given the permissive nature of Article 303(2), it is difficult to argue that states are under a *duty* to utilise the jurisdiction it affords them in light of their general duty under Article 303(1). Nevertheless, states

[53] Presidential Proclamation 7219 of August 2, 1999: The Contiguous Zone of the United States, 64 Fed. Reg. 48,701 (September 9, 1999).

[54] Title III of the Marine, Protection, Research and Sanctuaries Act of 1972, 16 USC s. 1431 *et seq.* See, further, sections 4.2.1 and 4.2.2, below.

[55] Personal communication with Ole Varmer, US National Oceanic and Atmospheric Administration, 9 March 2010. For further details, see Varmer, 'United States', pp. 363 and 382–3. As Varmer points out, the USS *Monitor* is located approximately seventeen miles offshore and is therefore a direct beneficiary of the contiguous zone proclamation.

[56] In fact, in relation to the contiguous zone the main concern is any sign of functional creep to the matter of security, rather than usage of the zone under Art. 303(2): see Roach, *United States Responses to Excessive Maritime Claims*, p. 166.

[57] Caflisch, 'Submarine Antiquities and the International Law of the Sea', p. 24. Churchill and Lowe also make the point that, under the LOSC, the contiguous zone is part of the EEZ (assuming the coastal state claims an EEZ) and therefore no longer part of the high seas. Therefore the former presumption against coastal state jurisdiction in the zone is removed, making it easier to defend claims to both enforcement and legislative jurisdiction. Churchill and Lowe, *The Law of the Sea*, p. 139.

should consider the benefits of using this jurisdictional tool: even taking the simple step of making a statement such as that by President Clinton in 1999 sends a clear signal that the state is committed to protecting UCH and will make full use of the authority available to it under international law to do so.

3.4 *The continental shelf and the exclusive economic zone*

One of the fundamental elements of the overall package deal established in the LOSC was that coastal states were afforded the right to claim an exclusive economic zone (EEZ) of 200 miles, to complement already firmly established rights in respect of the continental shelf. In both these maritime zones the coastal state is afforded sovereign rights[58] and jurisdiction relating to natural resources. The two zones taken together represent a significant ocean space, a proportion approaching 50 per cent of the entire oceans.[59]

Part V of the LOSC sets out the regime for the EEZ and Part VI that for the continental shelf. As discussed earlier,[60] the continental shelf and EEZ regimes are closely intertwined, as are Parts V and VI. However, where states claim an EEZ, the two regimes will apply in tandem to the area out to 200 miles from baselines.[61] In the case of broad-margin states, Part VI makes provision for the outer continental shelf (OCS) – in other words, the physical continental margin beyond 200 miles.[62] (As many states do claim an EEZ,[63] unless otherwise indicated the following discussion assumes that the two regimes apply in tandem.)

[58] It is important to distinguish the 'sovereign rights' attributed to the coastal state in respect of its continental shelf and EEZ from the full sovereignty that a coastal state has over its internal waters, territorial sea and archipelagic waters. In contrast with the full or 'plenary' jurisdiction which comes with sovereignty, the sovereign rights of a coastal state in the EEZ and on the continental shelf are limited *functionally*, to the specific purposes provided for in the relevant parts of the LOSC (Parts V and VI).

[59] This very rough estimate is based on figures cited by Prescott and Schofield that suggest that the Area (in other words the seabed and its subsoil beyond national jurisdiction) accounts for approximately 50.5 per cent of the oceans and that the total ocean surface covered by territorial sea (which is not part of the EEZ or continental shelf) is perhaps less than 1 per cent: see Prescott and Schofield, *Maritime Political Boundaries of the World*, pp. 30 and 33.

[60] See General introduction, section 2.2.2, above.

[61] See LOSC, Art. 56(3).

[62] For the definition of the juridical continental shelf and an explanation of the term 'broad-margin States', see General introduction, section 2.2.2, above.

[63] See DOALOS, Table of Claims to Maritime Jurisdiction as at 15 July 2011 (available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/claims.htm). The table illustrates that it is not just states parties to the LOSC that claim an EEZ. Both the USA and Turkey, for example, do so.

Article 56 of Part V sets out the rights, jurisdiction and duties of the coastal state in its EEZ. The key paragraph of Article 56 is paragraph 1, which provides:

In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
  (i) the establishment and use of artificial islands, installations and structures;
  (ii) marine scientific research;
  (iii) the protection and preservation of the marine environment;
(c) other rights and duties provided for in this Convention.

As far as the OCS is concerned, the rights of the coastal state are set out in Article 77 of Part VI, which makes provision in respect of the continental shelf simpliciter (in other words, where it does not coexist with an EEZ).[64] Article 77(1) provides:

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

The natural resources referred to in Article 77 are natural resources relating to the seabed and its subsoil, namely mineral and other non-living resources, together with sedentary species, such as corals, sponges, oysters and clams.[65]

The rights and jurisdiction of the coastal state under Articles 56 and 77 will be considered in more detail below.[66] For the moment, it is suffice to note that – within 200 miles – a coastal state that has declared an EEZ is afforded rights and jurisdiction in respect of natural resources, specifically rights in relation to the exploration, exploitation, conservation and

[64] Art. 77 therefore applies within 200 miles in cases where the coastal state does not claim an EEZ.

[65] See LOSC, Art. 77(4). Exactly what counts as a sedentary species, in other words, 'organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil' is a matter of some debate: see, for example, Churchill and Lowe, *The Law of the Sea*, pp. 151–2 and 156, including n. 36.

[66] See section 4.2.

management of such resources and with regard to other activities for the economic exploitation and exploration of such resources,[67] as well as jurisdiction over several matters relating thereto, namely the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.[68] In 1956, the International Law Commission (ILC) made clear its view that shipwrecks were not natural resources and that view has been generally accepted ever since.[69]

The LOSC makes no specific provision for UCH located on the continental shelf or in the EEZ beyond twenty-four miles. As noted above, proposals to give coastal states such rights were explicitly rejected. The basic international legal regime governing the search for, and recovery of, shipwrecks and other UCH beyond twenty-four miles is therefore dependent on the fundamental juridical (in other words, legal) nature of these zones. As far as the continental shelf simpliciter is concerned, the juridical status of the zone is high seas.[70] As a result, there is a presumption in favour of the exercise of high seas freedoms and the search for, and recovery of, UCH are regarded as within these freedoms.[71] There is, however, a significant difference with respect to the situation in the EEZ. Here the juridical status of the zone is *sui generis*: it is neither high seas nor is it an area over which the coastal state has

[67] While Art. 56(1) does not explicitly state that the rights 'with regard to other activities for the economic exploitation and exploration of the zone' are limited to natural resources and other natural features of the zone, this is widely accepted to be the case in light of the negotiating history of the Convention. In the words of Oxman, '[the phrase] is qualified by the words "such as", which introduce the reference to the production of energy from the water, currents and winds. ... It would not be reasonable to construe these words as embracing wrecked ships or marine archaeology': Oxman, 'Marine Archaeology and the International Law of the Sea', p. 366. See also Strati, *The Protection of the Underwater Cultural Heritage*, p. 264.

[68] It should be noted that the reference in Art. 56(1)(c) to 'other rights and duties provided for in this Convention' appears to be a reference mainly to the provisions in the LOSC relating to the contiguous zone and to the right of hot pursuit: see Churchill and Lowe, *The Law of the Sea*, p. 169.

[69] See Chap. 1, section 2.1. The ILC's pronouncement on this matter will be returned to again at the end of this book: see Final reflections.

[70] The continental shelf comprises the seabed and subsoil, not the water column above, which constitutes high seas and, as such, is governed by the high seas regime set out in Part VII: see Art. 86.

[71] Part VII of the LOSC sets out the regime for the high seas. Art. 87 of that Part provides that '[t]he high seas are open to all States' and then goes on to set out a list of freedoms which do not relate to the search for, and recovery of, UCH. However, the list is non-exhaustive and the freedoms cover any legitimate uses of the seas not otherwise provided for. See, further, Churchill and Lowe, *The Law of the Sea*, pp. 205–6. The freedoms must be exercised with 'due regard' for the interests of other states: Art. 87(2).

sovereignty (which would give rise to a presumption in favour of coastal state jurisdiction). Instead, the relative rights of the coastal state and the international community as a whole are governed by the specific provisions of Part V of the treaty, which sets out the regime for the EEZ. Since Part V does not attribute the right to search for and recover UCH to either the coastal state or to other states, it is regarded as an 'unattributed' right.[72] As such, any dispute relating to these activities must be resolved under an 'elusive' formula set out in Article 59 of Part V.[73]

Under the Article 59 formula:

> [conflicts] should be resolved on the basis of equity and in the light of all the 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.[74]

This means that when a conflict arises between two states with respect to activities in the EEZ, all the relevant factors need to be weighed up on a case-by-case basis. On matters relating to access to UCH sites, Strati has suggested that the following factors are relevant:

> (a) the existence of a cultural link between the cultural property in question and one of the parties of the dispute; (b) in case of relatively recent wrecks, the qualification of one of the parties as the flag State of the sunken vessel; (c) the accommodation of the interests of the international community in the protection and preservation of the underwater cultural property; (d) interference with the exercise of the rights of the coastal or flag States.[75]

Another commentator has suggested that where a dispute relates to the exploration and exploitation of natural resources, it should probably be resolved in favour of the coastal state; where, on the other hand, it relates to other matters, then the interests of other states – or of the international community as a whole – would be favoured.[76] If this is the case, in circumstances where activities targeting UCH are the cause of concern to the coastal state, if it can be shown that they represent a potential threat to its legitimate economic interests in the zone, for example if the party undertaking the activities is engaged in gathering significant quantities of survey data about the seabed and subsoil of the

[72] Churchill and Lowe, *The Law of the Sea*, p. 175. [73] *Ibid.*, p. 461.

[74] LOSC, Art. 59. Arguably, in areas of the EEZ within the twenty-four-mile limit, Art. 59 would not apply with respect to disputes involving activities targeting UCH because – by virtue of Art. 303(2) – the coastal state is attributed the right to control recovery activity: see section 3.3, above.

[75] Strati, *The Protection of the Underwater Cultural Heritage*, p. 266. For an interesting and detailed discussion of Art. 59 in the context of UCH, see *ibid.*, pp. 265–6 and 268–9.

[76] Nordquist *et al.*, *United Nations Convention on the Law of the Sea 1982*, Vol. II, p. 569.

EEZ,[77] this would seem to be a strong factor weighing in favour of the coastal state's interests taking priority. Even if the activities pose no such threat, in light of the duty in Article 303(1) on states to protect UCH in all sea areas, the interests of the coastal state and those of the international community as a whole may well be seen to coincide. Again this would suggest a resolution of the dispute in favour of the coastal state.

It is clear that the LOSC makes no direct provision for coastal state jurisdiction over UCH in the EEZ and on the continental shelf beyond twenty-four miles. However, the extent to which states have unilaterally exercised such jurisdiction is a matter that will be considered later in this chapter.[78]

3.5 *Beyond the limits of national jurisdiction*

As previously noted,[79] one of the primary purposes of the LOSC was to establish an international regime for the mineral resources of the deep seabed in order to ensure that they were exploited equitably and in the interests of all mankind. The Convention therefore established an entirely new maritime zone, the 'Area', which it defines as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.[80] It also established an international authority, the International Seabed Authority (ISA), to administer the Area and its resources on behalf of states parties.

Detailed provision for the Area is made in Part XI of the LOSC.[81] As with the continental shelf simpliciter, it needs to be borne in mind that the Area is the seabed itself and its subsoil, and the concept does not apply to the water column above. The superjacent waters retain their status as high seas and fall under the high seas regime set out in Part VII of the Convention.[82] This regime is therefore operative subject to the specific regime in Part XI governing the exploration and exploitation of the mineral resources of the zone.

Article 149 of Part XI makes specific provision for UCH in the Area:

> All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard

[77] On this matter, see, further, section 4.2.2, below.
[78] See section 4.2, below. [79] See General introduction, section 2.2.1, above.
[80] LOSC, Art. 1(1)(1). '[B]eyond the limits of national jurisdiction' means beyond the limits of the juridical continental shelf as defined by Art. 76(1) of the LOSC.
[81] It should be noted that Part XI is implemented as modified by the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.
[82] See LOSC, Arts. 86 and 135.

being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

Several aspects of this article have been discussed in previous chapters.[83] Here the concern is with the question of the rights, jurisdiction and duties of states, as well as the ISA, in respect of UCH located beyond the limits of national jurisdiction. Again, the proportion of ocean space under discussion is substantial: roughly 50.5 per cent.[84]

Article 149 has been much criticised over the years and deservedly so. The most significant criticism is that it provides that things must be done without providing for *who* should do them, or *how* they should be done. By definition, the Area is 'beyond the limits of national jurisdiction'. There is nothing in Article 149 that accords any form of jurisdiction to individual states, or to states acting in concert, or that requires them to make use of general principles of international jurisdiction, in order to further the objectives of the article. The obvious candidate to be charged with responsibility for ensuring that Article 149 is implemented – the ISA – is not referred to by Article 149 and it is clear from the provisions of Part XI that its role is limited to controlling activities related to the exploration and exploitation of the mineral resources of the zone.[85] Proposals to extend its role to UCH were not taken up.[86] In consequence, Article 149 is essentially an empty shell.

[83] For discussion of the meaning of 'objects of an archaeological and historical nature', see Chap. 2, section 3.1; for discussion of the nature of the interests of 'mankind as a whole' and the 'preferential rights' referred to in Art. 149, see Chap. 3, section 4.1; for an outline of the historical development of the article, see Chap. 1, section 2.1.1.

[84] See Prescott and Schofield, *Maritime Political Boundaries of the World*, p. 30. Oxman suggested that at the time of UNCLOS III there was 'relatively slight concern' that much UCH would be found in this area: Oxman, 'The Third United Nations Conference on the Law of the Sea', p. 240. However, while the density of shipwrecks on the deep seabed might be less than in other maritime areas, it has been argued that those that do exist 'may be in an excellent state of preservation': O'Keefe, *Shipwrecked Heritage*, p. 95. Other forms of UCH that are likely to be found in the Area are aircraft wrecks and space debris.

[85] The ISA's functions are limited to controlling and organising 'activities' in the Area (Art. 157(1)), which are defined as 'activities of exploration for, and exploitation of, the resources of the Area' (Art. 1(1)(3)). The resources of the Area are defined to include only mineral resources (Art. 133(a)). It should be noted that as well as having the powers and functions expressly conferred upon it by the LOSC the ISA also has 'such incidental powers, consistent with [the LOSC], as are implicit in and necessary for the exercise of those powers and functions': Art. 157(2). Among other things, it has responsibilities with respect to the protection of the marine environment: see Art. 145.

[86] For details, see Hayashi, 'Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea', pp. 292–3.

What, then, is the position as far as shipwrecks and other UCH located in the Area are concerned? As with the continental shelf simpliciter, there is a presumption in favour of the exercise of high seas freedoms, including the freedom to search for, and recover, UCH. However, it should be borne in mind that the general duty imposed on states by Article 303(1) to protect UCH and to cooperate for this purpose applies to the area beyond national jurisdiction, as it does to all other sea areas, and Article 149 provides a degree of flesh to this duty by providing that UCH found in the Area must be preserved or disposed of for the benefit of mankind and with regard to the preferential rights of states of origin. Therefore, in so far as states may have legitimate jurisdictional or other mechanisms available to them to take action in respect of UCH found in this zone, they must take cognisance of Article 149.[87] To date, circumstances do not appear to have arisen in which a shipwreck located in the Area has given rise to questions concerning the practical application of this provision.[88]

An activity in the Area that is potentially as significant – if not more significant – than unregulated activities targeting UCH, in terms of the likely damage or destruction to UCH that may arise, is deep seabed

[87] Mechanisms they may consider using are the nationality and territorial principles of jurisdiction and also, where applicable, the assertion of sovereign immunity and ownership rights. Indeed, the potential application of these measures to afford protection to UCH located in the Area gives rise to some interesting scenarios. For example, take the discovery of a shipwreck lying in the Area in which a state has ownership rights. One might argue that, by virtue of Art. 303(1), the state would have a duty to assert its rights before, say, a US federal admiralty court in the event of the initiation of an *in rem* salvage action with respect to the wreck. Assuming that the state was awarded the recovered material (a reasonable assumption given the landmark judgment in the *Juno* and *La Galga*, discussed in Chap. 4, section 2.3.1), the provisions of Art. 149 indicate that it must then ensure that the material is 'preserved or disposed of' for the benefit of mankind as a whole. In so far as one or more other states might come forward to claim some form of preferential rights, particular regard would need to be paid to these rights.

[88] It was by an accident of fate that the *Titanic* came to rest on the outer continental shelf of Canada, rather than the deep seabed. If it was located in the Area, the implications of Art. 149 may well have been explored more thoroughly by now. (Interestingly, the provisions of Art. 149 have been called in aid of a shipwreck that was *not* located in the Area: the *Mercedes* (see Chap. 4, section 2.3.2).) Given that the Area is, by definition, beyond the jurisdiction of any state, domestic heritage legislation generally does not refer to this zone. However, Chinese legislation is a notable exception. China claims to have an exclusive right to regulate UCH in the Area that originated from China. In commenting on this legislation, Fu concludes that China's position in this respect is justifiable under Art. 149, given that particular regard must be given to the preferential rights of states of origin: Fu, 'China (including Taiwan)', p. 35.

mining, along with operations associated with such mining. It is here that, in practice, the ISA is in a position to play a useful role. In implementing the regulatory framework for mineral exploration and exploitation set out in Part XI, the ISA can ensure that contractors take appropriate account of UCH in the course of their work. While commercial exploitation of the mineral resources of the Area probably remains unlikely for some time to come, a number of exploration licences have been issued and the ISA is developing a Mining Code to govern activities in respect of the mineral resources of the zone. In 2000, it adopted Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, which require that contractors notify the ISA of archaeological finds and take all reasonable measures to avoid disturbing such objects.[89] More recently it has developed sets of regulations relating to two other mineral resources, polymetallic sulphides and cobalt-rich crusts, and these include enhanced provisions in respect of UCH finds.[90]

4. Plugging the gap(s)

As pointed out in Chapter 1,[91] a geographical 'gap' in the specific provision the LOSC affords to UCH is frequently noted and that gap relates to the area between twenty-four miles and the outer extent of the juridical continental shelf (which forms the boundary with the Area). In this marine area (which, at a minimum, will be 176 miles in breadth and may be much more extensive)[92] deliberate interference with UCH is

[89] See Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, Reg. 34 (available at www.isa.org.jm). See also Reg. 8, which provides that those merely prospecting for nodules in the Area must also notify the ISA of archaeological finds.

[90] See Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, adopted in 2010, and Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area, adopted in 2012, Regs. 8 and 37 in both (available at www.isa.org.jm). It is significant that in all three sets of Regulations, the second of the two provisions relating to archaeological objects is located in Part V headed 'Protection and Preservation of the Marine Environment'. This suggests that the ISA may regard UCH as so intimately associated with the natural marine environment that it falls under its mandate to protect the marine environment under Art. 145. (As the ISA acts on behalf of states parties to the LOSC, one could also argue that this is an example of the implementation of Art. 303(1).) On the close physical link between the cultural and natural environment, see, further, section 4.2.1, below. On the relationship between the Mining Code and the UNESCO Convention 2001, see Chap. 10, section 3.2.

[91] See Chap. 1, section 2.1.3.

[92] By virtue of the definition of the juridical continental shelf set out in Art. 76 (see General introduction, section 2.2.2, above), the 'gap' will be at least 176 miles in breadth. In the case of broad margin states, it may be up to (and even beyond) 326 miles. (The rules for

subject to the general rules of the LOSC outlined above and neither Article 303(2) nor Article 149 will apply. Furthermore, given the absence of any means within the Convention for implementing the protective objectives set out in Article 149, in practice the actual jurisdictional gap can be regarded as *all* waters beyond twenty-four miles.

The question that arises is: how can states implement their duty under Article 303(1) to protect UCH and to cooperate for this purpose in the substantial proportion of the oceans that falls into the gap? This question is becoming of critical significance. Not only is the technology now available to search for, and locate, shipwrecks in deep waters, but in various parts of the world systematic search operations are already taking place over extensive areas of the continental shelf and there seems little doubt that these will extend to the deep seabed in the foreseeable future.[93]

4.1 *Unilateral extensions*

In a detailed survey of creeping jurisdiction published in 1991, Kwiatkowska reported that a number of states – among them, Australia, Cape Verde, Cyprus, Ireland, Morocco, Spain and the Seychelles – required prior consent for the removal of UCH on the continental shelf beyond twenty-four miles.[94] Generally, these unilateral extensions of jurisdiction preceded the adoption of the LOSC.[95] In noting the extensions, Kwiatkowska commented:

the delimitation of the outer limit of the continental shelf in cases where the outer edge of the continental margin extends beyond 200 miles from baselines are complex: see Art. 76(3)–(7).)

[93] The activities of OME illustrate current capabilities. In recent years, the company has conducted systematic search operations over thousands of square miles of seabed around the coasts of Europe. Apparently targeted discoveries include the eighteenth-century British warship HMS *Victory* (depth: 80 metres), the seventeenth-century British warship HMS *Sussex* (depth: 1,000 metres) and the Spanish colonial-era warship the *Mercedes* (depth: 1,100 metres). In 2010, the company announced that it had technology 'on the drawing board' that would extend its capabilities to 6,000 metres' depth: 'Odyssey Marine Exploration Announces 2009 Financial Results', OME press release, 10 March 2010 (available at www.shipwreck.net). It should be noted, too, that a wreck such as HMS *Victory* is well within the range of divers using specialised equipment (see General introduction, section 1.3, above).

[94] Kwiatkowska, 'Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice', p. 163; see also Churchill and Lowe, *The Law of the Sea*, p. 175 n. 52.

[95] For details of some of the legislation, see Prott and O'Keefe, *Law and the Cultural Heritage*, Vol. I, pp. 95–7, 99, 107.

It thus cannot be excluded that the concept of an 'offshore cultural protection zone', coextensive even with the continental shelf or a 200-mile zone or both, will gain further support in the future.[96]

In fact, there have been few further extensions of this kind in recent years[97] and therefore the prospect that they would lead to the emergence in customary international law of a 'cultural protection zone' coextensive with the EEZ or continental shelf has not materialised. Nonetheless, most if not all of these states continue to have legislation on the statute book asserting control of UCH beyond twenty-four miles. For example, the Australian Historic Shipwrecks Act 1976 applies to 'waters adjacent to the coast of a state', which are defined by the Petroleum (Submerged Lands) Act 1967 to include waters out to a set of co-ordinates corresponding to the outer edge of the continental shelf.[98] In Ireland, Section 3 of the National Monuments (Amendment) Act 1987, which makes provision for the protection of wrecks and archaeological objects, applies to areas 'on, in or under the seabed to which section 2(1) of the Continental Shelf Act 1968 applies'.[99] The Spanish Law 16/1985 of 25 June 1985 requires authorisation for any activity directed at UCH on the continental shelf.[100] However, interestingly, there appear to be no examples of attempts by these states to

[96] Kwiatkowska, 'Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice', p. 164.

[97] One exception is the Dominican Republic. It introduced legislation in 2007 which provides, among other things, that 'salvage operations with respect to treasures from ancient sunken vessels within the exclusive economic zone which constitute part of the National Cultural Heritage' ... 'shall be a national priority': for an interesting discussion of this provision, see Kopela, '2007 Archipelagic Legislation of the Dominican Republic', pp. 524–32. While it seems that earlier extensions were not subject to protest, Kopela notes that the provision in the Dominican Republic's 2007 Act was protested by the USA and the UK: *ibid.*, p. 524.

[98] Jeffery, 'Australia' (2nd edn), p. 3. Section 28 of the 1976 Act provides: 'Subject to the obligations of Australia under international law ... this Act extends according to its tenor to foreigners and to foreign ships'. It might therefore be argued that the Act only purports to apply to foreign flag vessels and nationals to the extent permitted by international law.

[99] See, further, O'Connor, 'Ireland' (2nd edn), p. 131; Long, *Marine Resources Law*, p. 547; Symmons, *Ireland and the Law of the Sea* (2nd edn), pp. 128–35. For an interesting discussion of the Irish government's decision not to make use of its legislation to place an underwater heritage order on the *Carpathia*, which is located on the Irish continental shelf beyond twenty-four miles, see O'Connor, 'Ireland' (2nd edn), pp. 142–3.

[100] See Espósito and Fraile, 'The UNESCO Convention on Underwater Cultural Heritage', p. 206 n. 22. See also Aznar-Gómez, 'Spain', pp. 277 *et seq.*

enforce this legislation against foreign flag vessels and nationals operating beyond twenty-four miles.[101]

These unilateral extensions of jurisdiction are distinguishable from the more limited controls exercised by some states in the course of licensing natural resource exploration and exploitation activities in the EEZ and on the continental shelf. These controls are in fact more analogous to those exercised by the ISA in respect of mineral operations on the deep seabed. Greece and Norway were among the first states to include provision for the reporting, and subsequent treatment, of UCH discovered incidentally during offshore operations, and other states have followed.[102] Imposition of such permit conditions, together with preconsent processes that take account of archaeological considerations, provide states with effective means to prevent or mitigate inadvertent damage and destruction by development activities in their offshore waters.[103] However, the question arises as to the lawfulness of these controls in so far as a state might seek to enforce them against foreign

[101] It is possible that the attempt of the Spanish authorities to apply Spain's heritage legislation to the proposed activities with respect to HMS *Sussex* (see Chap. 4, section 2.2) may be a case in point, although the precise location of the site has not been disclosed and it may be located within twenty-four miles of baselines.

[102] The Greek and Norwegian provision, dating back to the 1970s, relates to hydrocarbon exploration and exploitation: see Strati, *The Protection of the Underwater Cultural Heritage*, p. 261; see also Strati, 'Greece' (1st edn), p. 74; and Kvalø and Marstrander, 'Norway', pp. 223–4. It is interesting to note that the European Communities Hydrocarbon Licensing Directive 94/22 ([1994] OJ L164/3) provides that 'Member States may, to the extent justified by national security, public safety, public health, security of transport, protection of the environment, protection of biological resources and of *national treasures possessing artistic, historic or archaeological value* ... impose conditions and requirements on the exercise of' activities of prospecting, exploration and exploitation of hydrocarbons (Art. 6(2), emphasis added). (On this Directive, see, further, Long, *Marine Resources Law*, pp. 350 *et seq.*) In light of this, archaeological conditions on hydrocarbon licences – at least within Europe – may be more common than is generally supposed. It is certainly the case that Ireland and the Netherlands impose such conditions. Indeed, the reporting requirements in the Netherlands extend quite broadly across marine sectors, for example to include general geophysical survey and dredging: personal communication with Thijs Maarleveld, 26 April 2010. This type of provision should be distinguished from the voluntary reporting schemes adopted in some other states, for example the Joint Nautical Archaeology Policy Committee (JNAPC) Code of Practice for Seabed Development in the UK (available at www.jnapc.org.uk).

[103] The ratification and implementation by many European States of the Valletta Convention 1992, along with several European Union Directives relating to environmental impact assessment and strategic environmental assessment, has been instrumental in triggering government reviews of the relationship between archaeology and the development control process, including in respect of marine areas 'within the jurisdiction' of the state concerned (Valletta Convention, Art. 1(2)(iii)). On the Valletta Convention more generally, see Chap. 1, section 2.2.3.

operators. It might be argued that if the coastal state has the right to explore and exploit the natural resources of these zones, it can determine how these activities are carried out. However, the matter may not be quite as straightforward as this because, in both zones, due regard must be paid to the interests of other states.[104] Nonetheless, justification for the imposition of reasonable conditions designed to protect UCH may come in the form of the duty on states under Article 303(1) to afford protection to UCH: given the rate of commercial development of the offshore marine environment, it is vital that states are able to offer UCH protection of this nature.

4.2 Making full use of the Law of the Sea Convention provisions

In light of advances in technology over recent decades, the maritime area that is at most immediate risk of unregulated UCH recovery is the geological continental shelf.[105] Graduating to a depth of approximately 140 metres, this area is well within the reach of divers utilising sophisticated diving equipment, as well as commercial salvors utilising submersibles. For this reason, attention has been turning increasingly to the question of whether the rights and jurisdiction afforded to states with respect to the natural resources of their offshore areas could be utilised to better effect in the interests of UCH protection.

4.2.1 Protection of sovereign rights

As noted above, by virtue of Articles 56 and 77 respectively, a state has sovereign rights over the natural resources of its EEZ and continental shelf and is entitled to act, where necessary, to protect those rights (provided it does so with due regard to the interests of other states). In the course of so acting, it may also be able to afford some level of protection to UCH. Although wreck sites are not a natural resource in themselves, they are very often inextricably connected with such resources, especially with the passage of time. In some cases they may be partially or totally embedded in seabed deposits, such as sand and gravel. In many cases they act as magnets for living natural resources: fish congregate in and around wreck sites and various species of animals and plants attach themselves to wreck surfaces. Wrecks may therefore form artificial reefs, providing an attractive habitat for both fauna and

[104] See Arts. 56(2), 78(2) and 87(2).

[105] For the relationship between the geological continental shelf and the juridical continental shelf, see General introduction, section 2.2.2, above, including n. 41.

flora. In recent years research has shown that there is a strong relationship between wreck sites and marine life, and that such sites can be of considerable ecological value.[106] Interference with, or recovery of material from, a wreck will almost inevitably disturb or damage the living resources of both the water column and the seabed to some degree.[107] Certain shipwreck recovery methods also have the potential to damage mineral resources, for example the use of prop-wash deflectors[108] or explosives. Physical intervention on wreck sites may therefore interfere with the sovereign rights of the coastal state.[109]

Utilising the close relationship between wrecks and living resources to afford indirect protection to UCH beyond twenty-four miles is not a new idea. In 1984, O'Connell stated:

> Legislators have ... a simple weapon to control the activities of marine archaeologists on the continental shelf, and that is to regulate the disturbance of the seabed. So a wreck site embedded in coral could be immunized by the expedient of forbidding interference with the coral, which is a 'natural resource' of the continental shelf.[110]

Interestingly, this idea is supported by one of the firmest adherents to the LOSC regime: the fact that it is a control mechanism tied firmly to the natural resources of the EEZ and continental shelf means that it has been positively promoted by the US State Department.[111] Probably the best example of state practice in this regard is the US National Marine Sanctuaries Act of 1972 (NMSA).[112] This statute provides for the

[106] See the reports on wrecks and ecology produced by Wessex Archaeology (available at www.wessexarch.co.uk/tags/coastal-and-marine).

[107] Within the EEZ, a coastal state has sovereign rights over all living resources. On the continental shelf simpliciter, interference would need to take place with sedentary species. For the meaning of sedentary species, see n. 65 above.

[108] According to Varmer, '[p]rop-wash deflectors (or 'mailboxes') can punch a hole in the seabed 30 feet across and several feet deep in hard packed sediment in fifteen seconds': Varmer, 'United States', p. 361.

[109] Questions arise, of course, regarding the degree of interference with living resources required. In some cases there may be a demonstrable adverse impact (see Blumberg, 'International Protection of Underwater Cultural Heritage', p. 495); in others the impact may be notional. However, as O'Keefe has argued, it is unlikely that any state would challenge action taken by another state to protect its sovereign rights: O'Keefe, *Shipwrecked Heritage*, p. 90.

[110] O'Connell, *The International Law of the Sea*, Vol. II, p. 918.

[111] See, for example, Blumberg, 'International Protection of Underwater Cultural Heritage', p. 495. Blumberg led the US delegation to the UNESCO negotiations.

[112] Title III of the Marine, Protection, Research and Sanctuaries Act of 1972, 16 USC sec. 1431 *et seq.* (as amended by Public Law 106-513, November 2000).

designation of areas of the marine environment as 'national marine sanctuaries' to 200 miles offshore.[113] Activities in each sanctuary are governed by a tailor-made set of regulations which are designed to protect the sanctuary's particular 'resources', among which may be 'historical', 'cultural' and 'archeological' resources.[114] According to Varmer,[115] the two activities prohibited by all the sanctuary regulations that assist particularly in the protection of UCH are the removal of, or injury to, sanctuary resources and any alteration of the seabed.[116]

4.2.2 Utilisation of jurisdictional rights

As well as providing the coastal state with sovereign rights over natural resources on the continental shelf and in the EEZ, the LOSC also provides it with jurisdiction for specific purposes related to these resources. To what extent can these jurisdictional rights be called in aid of UCH?

Two particular potential mechanisms for controlling activities directed at UCH have been identified.[117] First of all, Article 81 provides:

> The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for *all purposes*.[118]

The term 'drilling' is not defined by the Convention and the extent to which it might cover excavation and other activities directed at UCH is unclear.[119] However, broadly interpreted, it could encompass any activities that probe or otherwise disturb the seabed, including digging or blowing, use of prop-wash deflectors and other similar devices, and perhaps even the use of explosives.

[113] Areas of the marine environment 'possess[ing] conservation, recreational, ecological, *historical*, scientific, educational, *cultural*, *archeological*, or esthetic qualities which give them special national, and in some cases international, significance' may be designated: 16 USC sec. 1431(a)(2), emphasis added. There are currently thirteen designated sanctuaries, the largest of which is almost 138,000 square miles. For details, see www.sanctuaries.noaa.gov.

[114] 16 USC sec. 1432(8). The extent to which shipwrecks and other UCH are regarded as integral and important sanctuary resources is apparent upon visiting the official sanctuaries website: www.sanctuaries.noaa.gov.

[115] See Varmer, 'United States', p. 363.

[116] For a detailed discussion of the operation of the NMSA in the context of UCH, including the question of enforcement of regulations against foreign flag vessels and nationals, see Varmer, 'United States', pp. 359–66.

[117] See, for example, Oxman, 'Marine Archaeology and the International Law of the Sea', pp. 369–70; Blumberg, 'International Protection of Underwater Cultural Heritage', pp. 495–6; Varmer, 'A Perspective from Across the Atlantic', p. 25.

[118] Emphasis added.

[119] Blumberg, 'International Protection of Underwater Cultural Heritage', p. 496.

Secondly, by virtue of Article 60(1):

> In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
>
> (a) artificial islands;
> (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
> (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

By virtue of Article 80, this provision also applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf. Where those targeting UCH make use of equipment constituting an 'installation' or 'structure',[120] either for economic purposes or in such a way as interferes with the exercise by the coastal state of its rights in the EEZ or on the continental shelf, again it would seem to fall within the coastal state's regulatory competence.[121]

Oxman has suggested that, at least in some cases, the impact of these mechanisms, taken together, 'may be so substantial that the coastal state will be in an effective position to determine whether, and if so under what conditions, marine archaeology may occur'.[122] In fact, to date it seems that the USA may be the state that has taken fullest advantage of these options by employing them to afford protection to historical, cultural and archaeological resources under its National Marine Sanctuaries programme. According to Varmer, any activities involving altering the seabed, the placing of structures on the seabed, drilling or digging, would be regarded as a breach of NMSA regulations enforceable against foreign salvors.[123]

[120] Again, these terms are undefined by the Convention. However, it has been argued that they include both mobile and fixed equipment, which may be manned or unmanned: Wegelein, *Marine Scientific Research*, pp. 135 *et seq.* The main distinction to draw is with ships, which are capable of navigation. 'The question may arise whether a permanently moored ship ceases to be a ship and becomes an installation. The answer would depend on the ship's capacity to navigate despite the mooring, i.e., if the mooring can be removed without imminent loss of the vessel, the ship will remain a ship even without actually navigating': *ibid.*, p. 140.

[121] It is doubtful that the reference to 'other economic purposes' in Art. 60(1)(b) includes the recovery of UCH for commercial gain: see Strati, *The Protection of the Underwater Cultural Heritage*, p. 267.

[122] 'Marine Archaeology and the International Law of the Sea', p. 369.

[123] Varmer, 'United States', p. 363. In Varmer's view, *any* salvage activity is likely to involve one of these offences: *ibid.* In the UK, activities of a similar nature on the continental shelf may require a licence under the Marine and Coastal Access Act 2009. The degree to which activities commonly undertaken by archaeologists and others involved in the

As the US experience has shown, utilisation of Articles 60, 80 and 81 of the LOSC undoubtedly can be helpful to afford protection to UCH, but these mechanisms do have drawbacks. For example, they can be used only in specific circumstances, require close investigation of the nature of ongoing activities, and can be utilised only after a salvage operator has started to make an expensive investment in respect of a particular site.

Another potential – but rather more controversial – control mechanism which would avoid these drawbacks is to treat at least certain activities undertaken by such operators and others targeting UCH as *marine scientific research*. This activity is subject to direct coastal state control in the EEZ and on the continental shelf.[124] As is the case with the terms 'drilling', 'installation' and 'structure', 'marine scientific research' is a term left undefined by the LOSC. However, what is clear is that it encompasses scientific research directed *at* the natural marine environment, rather than merely undertaken *in* the marine environment.[125] The generally accepted position is that archaeological excavation or other types of direct and deliberate intervention on UCH sites do *not* qualify as marine scientific research on the basis that such work – while in many instances making use of scientific methodology – is directed at the human, rather than the natural, environment.[126] However, it is arguable that an increasingly common precursor to direct intervention – remote-surveying of the seabed and subsoil using side-scan sonar, bathymetric and related technologies – may, at least in certain circumstances, qualify as marine scientific research. Such survey operations are directed at the seabed and subsoil, components of the natural marine environment. Importantly, in circumstances where they are undertaken systematically and over wide areas, the data gathered could be of direct significance for the exploration and exploitation of natural resources. As such, the sovereign rights and jurisdiction of the

investigation or excavation of UCH sites may be licensable under this relatively new statute – and the extent to which offences may be enforceable against foreign flag vessels and nationals – is a matter still under consideration by the Marine Management Organisation, the public body set up to administer the licensing regime.

[124] See LOSC, Art. 56(1)(b)(ii) and, more particularly, Art. 246.

[125] See Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage', p. 43. Relevant activities would include physical and chemical oceanography, marine biology, and marine geology and geophysics: Soons, *Marine Scientific Research and the Law of the Sea*, pp. 6, 124.

[126] While this may have been true in the past, increasingly archaeological research is directed to an understanding of the environment in which material remains of the human past may be found. It is therefore becoming difficult to draw tenable distinctions between the disciplines of archaeology and those of the physical sciences

coastal state over such resources could be prejudiced unless it has a right to control the activity.[127]

The question of whether or not survey operations of *any* kind constitute marine scientific research is itself controversial and this may be the biggest barrier to broad acceptance of the argument set out.[128] However, the considerable advantage it has over the other options outlined is that it would enable the coastal state to take regulatory measures *prior* to any intervention taking place, thereby avoiding potential destabilisation of sites, the evidentiary problems of other regulatory methods and the possible vigorous defence of its legal position by any salvor that has expended considerable time and resources on a particular operation.

A final question that is occasionally asked is: could the jurisdiction provided to coastal states in respect of the protection and preservation of the marine environment of the EEZ be of indirect benefit to UCH? Although the Convention does not define 'marine environment', again there seems little doubt that it means the *natural* marine environment.[129] Nonetheless, as discussed above, in practice there is a close relationship between the natural and human (or 'historic') environments and protective measures aimed at one are likely to benefit the other. Having said that, it needs to be borne in mind that the jurisdiction provided to coastal states by Article 56(1) in respect of the protection and preservation of the marine environment is not general in nature, but is that 'provided for in the relevant provisions of [the] Convention', namely those in Part XII.[130] These provisions are designed to address the very specific threat of *pollution*. Nonetheless, UCH may derive some indirect benefit from action taken under these provisions.[131]

[127] For a detailed analysis of this argument, see, generally, Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage'. Some of the more sophisticated ocean exploration companies involved in shipwreck recovery may have a direct interest in natural resource exploration. Even where this is not the case, survey information is a marketable commodity.

[128] Having said that, according to Long: 'State practice ... appears to support the view that hydrographic surveying within the EEZ is within the jurisdiction of the coastal State and that the consent of the coastal State must be obtained prior to the commencement of survey activities': Long, *Marine Resources Law*, pp. 695–6. The strongest opposition to the notion that survey operations constitute MSR comes from the USA: see, for example, Roach and Smith, *United States Responses to Excessive Maritime Claims*, pp. 446–9.

[129] See, for example, Nordquist *et al.*, *United Nations Convention on the Law of the Sea 1982*, Vol. IV, pp. 42–3.

[130] Churchill and Lowe, *The Law of the Sea*, p. 169.

[131] Interestingly, the impact on UCH of action taken under these provisions may be wider than the potential benefits of being protected indirectly from damage from polluting substances. The activities of archaeologists and others involved in physical intervention

4.3 *Making full use of the territorial and nationality principles of international jurisdiction*

The discussion set out above relates to the jurisdiction afforded to coastal states with respect to their offshore waters. Therefore, the potential means of providing benefits to UCH identified above can apply no further seaward than the outer limit of the juridical continental shelf, which marks the limit of their national jurisdiction. However, it will be recalled that there are some general principles of international jurisdiction which can be useful in the context of UCH protection. As pointed out in section 2, above, these principles can be used by states acting individually to impact upon activities in international waters generally, *including* the Area. In practice, however, the most effective way of utilising these principles is if two or more states *coordinate* their use of them.

A good example of the coordinated application of these principles is the international agreement concluded in 2000 for the protection of RMS *Titanic*.[132] The discovery of the *Titanic* in 1985 lying on the outer edge of Canada's continental shelf posed a challenge to the international community: how could legal protection be afforded to the world's most famous shipwreck? After considerable efforts on the part of the US government,[133] in 1997, formal negotiations commenced between a number of states closely connected (historically or geographically) to the wreck: the USA, the UK, France and Canada. The outcome of these negotiations was a text for an agreement, finalised in 2000.[134] The

at UCH sites may pollute the marine environment and therefore be subject to regulation. For example, if a large amount of sediment is removed from a site and deposited elsewhere on the seabed, it may constitute dumping. According to Art. 210 of the LOSC, '[dumping] within the territorial sea and the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State'. Parties contemplating activities that will deposit material on the seabed may require a licence under domestic legislation such as the UK Marine and Coastal Access Act 2009.

[132] For a detailed discussion of the agreement, see Dromgoole, 'The International Agreement for the Protection of the *Titanic*: Problems and Prospects'.

[133] In the wake of the discovery of the *Titanic* in 1985, the US Congress passed the RMS Titanic Maritime Memorial Act of 1986 (Pub. L. No. 99-513, 100 Stat. 2048 (1986)). This Act included direction to US authorities to enter into negotiations with other interested nations to establish an international agreement providing for the designation of the wreck as an international maritime memorial. Initial attempts by the US State Department to follow this direction by engaging the UK, France and Canada in discussions met with little interest: see, further, Dromgoole, 'The International Agreement for the Protection of the *Titanic*: Problems and Prospects', pp. 3–5.

[134] The Agreement was signed by the UK in 2003 and the USA in 2004, but has yet to be signed by Canada or France. It will come into force after implementing legislation has

regulatory framework which the Agreement sets out (which, it may just be noted here, adopts standards closely based on the Annex to the UNESCO Convention 2001)[135] relies upon the full and effective exercise of the nationality and territorial principles by the states parties to the Agreement. It provides that each party 'shall take the necessary measures, in respect of its nationals and vessels flying its flag' to regulate their activities at the site through a system of project authorisations[136] and each party 'shall [also] take appropriate actions to prohibit activities in its territory including its maritime ports, territorial sea, and offshore terminals, that are inconsistent with [the] Agreement'.[137] If (as appears to be the eventual intention) all those states in the general geographical vicinity of the wreck, together with all those states with the technology to access the wreck, become parties to the Agreement, the jurisdictional mechanisms it employs could be very effective in regulating future activities at the site.[138]

It is noteworthy that the preamble to the Titanic Agreement refers specifically to the relevance of Article 303 of the LOSC. Inter-state agreements of this kind, utilising the nationality and territorial principles of jurisdiction to afford protection to UCH, provide a potentially helpful means whereby states can act in accordance with their twofold duty under Article 303(1). They have the potential to be used not just to protect one particular site, such as the *Titanic*, but to protect a number of related sites (for example, a battlefield such as Jutland or Trafalgar), or to afford protection to UCH generally within an enclosed or semi-enclosed sea.[139] However, 'mini-treaties' are only ever likely to be used in exceptional circumstances to protect sites in the open oceans.[140] This is because – to be effective in respect of such sites – they require multiple parties. As the Titanic Agreement has demonstrated, it can be difficult to engage sufficient political interest and will to bring them to fruition. It is striking that, to date, there appears to be only one such agreement in

been enacted by the US Congress. Such legislation has been drawn up and is currently under consideration: see RMS Titanic Maritime Memorial Preservation Act of 2012 (available at www.gc.noaa/gov/gcil_titanic-legislation.html).

[135] On this aspect of the Titanic Agreement, see, further, Chap. 10, section 2.

[136] Art. 4(1). [137] Art. 4(5).

[138] Some might argue that the horse has already bolted in light of the extensive salvage activities that have taken place at the site in the years since its discovery: see, further, Chap. 5, section 3.4.3.

[139] For further discussion of inter-state agreements, see Chap. 10, section 2.

[140] Cf. bilateral treaties to protect sites in the territorial sea, which are relatively common: see Chap. 4, section 2.2.

force protecting a wreck site in international waters: that relating to the passenger ferry M/S *Estonia*, which sank on the Finnish continental shelf in 1994.[141]

5. Concluding remarks

It is clear that the state that has been most active in exploring and utilising the authority available to it under general international law in order to protect UCH located in extra-territorial waters is the USA. This may strike some as ironic in light of the fact that the USA was one of the states that blocked attempts at UNCLOS III to provide coastal states with direct jurisdiction over UCH on the continental shelf. However, the USA has taken the duty under Article 303(1) seriously and utilised the authority available to it under general international law to the fullest extent possible in order to implement the duty. It seems likely that other states that remain non-parties to the UNESCO Convention 2001 will increasingly follow its lead.[142] However, the jurisdictional mechanisms available to them are makeshift and, in some cases, controversial. Given their piecemeal nature, they rely on considerable political will to be employed effectively. What is really required to deal with the step-change in marine technology that took place in the period immediately following the adoption of the LOSC is a clear and comprehensive treaty framework that builds on what is already in place in order to plug the obvious gaps. The purpose of the UNESCO Convention 2001 is, of course, to provide that framework.

[141] This Agreement, which seeks to criminalise activities disturbing the peace of the resting place of more than 800 victims of the disaster, was originally made in 1995 between Estonia, Finland and Sweden, but was later amended to allow for accession by other states. Denmark, Latvia and the UK became parties in 1999, Poland and Russia in 2000 and Lithuania in 2002: for the Agreement and accession details, see (1995) *Finnish Treaty Series* 49. (The Agreement is reprinted in (1996) 31 *UN Law of the Sea Bulletin* 62.) For further discussion of this agreement, see Chap. 9, section 4.4.

[142] The Statements on Vote by the major maritime powers made in 2001 at the end of the UNESCO negotiations indicated a general commitment to the strengthening of efforts to protect UCH, individually and collaboratively, based on action taken in conformity with the LOSC but with reference to the UNESCO Annex as the relevant standard for the conduct of activities. For the Statements, see Garabello and Scovazzi, *The Protection of the Underwater Cultural Heritage*, pp. 243 *et seq.*