Ocean Law and Policy

20 Years under UNCLOS

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CHAPTER 4

The Legal Protection of Underwater Cultural Heritage: Concerns and Proposals

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Introduction

On 1 November 2001, the UNESCO Convention for the Protection of Underwater Cultural Heritage (UNESCO Convention) was adopted.[1] As its preamble states, one of its aims is "to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice," including particularly the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS).[2] During the negotiating process and when voting its adoption, however, several States voiced some concerns,[3] particularly some maritime powers.[4]

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1 2562 UNTS 1, entered into force 2 January 2009 ("UNESCO Convention" or "the Convention" hereinafter). As for July 2016, the UNESCO Convention has 55 States parties (see the list *infra* n. 31). For the more recent analysis of the Convention and its legal implications see S. Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge: Cambridge University Press, 2013). For an analysis of the drafting of the Convention see R. Garabello, *La Convenzione UNESCO sulla protezione del patrimonio culturale subacqueo* (Milan: Giuffrè Editore, 2004).

2 Only two UNCLOS articles—149 and 303—deal with the "archaeological and historical objects" found at sea. For the text of both articles, see *infra* nn. 28 and 29.

3 See the position of most of these States as expressed in the final voting of the Convention in UNESCO, *Records of the General Conference, Proceedings of the 31st Session*, 2 November 2001, vol. 2, at 561–570 (available electronically at <http://unesdoc.unesco.org/images/0012/001289/128966m.pdf>, accessed 21 October 2014). Some abstaining States changed their initial position and decided to become a party (Paraguay and France) or have initiated the domestic process to become a party (the Netherlands and Germany).

4 See S. Dromgoole, "Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001," *Marine Policy* 38 (2013): 116–123; and O. Varmer, J. Gray and D. Alberg, "United States: Responses

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These concerns—which impeded (and still impede) the ratification of the Convention by some of these States—mostly relate two issues:[5] (1) how the UNESCO Convention affects the legal status of sunken State vessels (particularly warships); and (2) the impact that this Convention may have upon the jurisdictional equilibrium created by UNCLOS.

The concerns imply an assessment of the relationship between two successive treaties relating to a similar subject matter: the protection of underwater cultural heritage. Whereas article 303(4) of UNCLOS establishes that "[t]his 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 3 of the UNESCO Convention states that:

> Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.

Given that this last article seems to specify that the UNESCO Convention be subject to (or that it is not to be applied in a manner incompatible with) international law and UNCLOS, the provisions of the latter instrument prevail.[6] The problem is that customary law of the sea as codified by UNCLOS does not completely answer—at least explicitly—the two concerns posed by those reluctant States.

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to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage," *Journal of Maritime Archaeology* 5 (2010): 129–141. See also the complete appraisal of the US laws and policies, a gap analysis in the context of the Convention and recommendations on how to fill those gaps in O. Varmer, "Closing the Gaps in Protection of Underwater Cultural Heritage on the Outer Continental Shelf," *Stanford Environmental Law Journal* 33 (2014): 251–286.

5 The UK remained also concerned about the Convention applying to all underwater traces of human existence—the so-called 'blanket protection' concern—which will not be however addressed in this paper. On this concern, see Dromgoole, *Underwater . . ., supra* n. 1, 93–94 and P.J. O'Keefe, *Shipwrecked Heritage. A Commentary on the UNESCO Convention on underwater cultural heritage* (London: Institute of Art and Law, 2002) at 27.

6 Art. 30(2), 1969 Vienna Convention on the Law of Treaties (1155 UNTS 331). Being "preserved" by Art. 303(4) UNCLOS, the "hierarchy" between the UNESCO Convention and UNCLOS is not affected by Art. 311 of the later.

This chapter revisits these two concerns, and elucidates the issues raised by those States, and addresses them in order to clarify the legal impact of the Convention and its consistency with international law including UNCLOS. This may, consequently, help to facilitate or ease the future ratification or acceptance of those reluctant States. The chapter also addresses possible implied solutions given by UNCLOS to those States neither able nor willing to become parties to the UNESCO Convention but desiring to adequately protect the underwater cultural heritage located in the maritime zones under their sovereignty or jurisdiction.[7]

The Main Concerns about the UNESCO Convention

The two main legal concerns about the UNESCO Convention were advanced during the negotiation process. Some States still persist and avoid accession to the Convention, although others have accepted its main principles and the rules of its Annex as best archaeological practice.[8]

The Treatment of Sunken State Vessels

The concern around the treatment of sunken State vessels arises from article 7(3) of the UNESCO Convention. This proviso reads as follows:

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7 This paper will not, therefore, deal with the underwater cultural heritage located beyond the limits of national jurisdiction.

8 The majority of States have accepted the main principles of the Convention including consideration of *in situ* preservation as an initial policy preference and the rules of its Annex as an international standard or best practice for when it is determined that intrusive research and recovery is necessary or appropriate. Among the "reluctant" States, the UK has applauded the general principles of the text and, particularly, subscribed to the Norms annexed to the Convention. Actually, the British Government "has adopted the annex of the Convention as best practice for archaeology" (*Hansard Written Answers*, 24 January 2005, Col. 46W). See the last application of this policy in the Guidance "Protection and Management of Historic Military Wrecks outside UK Territorial Waters," April 2014, of the UK Department for Culture, Media & Sport and the UK Ministry of Defence (available electronically at <https://www.gov.uk/government/publications/protection-and-management-of-historic-military-wrecks-outside-uk-territorial-waters>, accessed 25 October 2014).

The United States, for its part, during the Second Meeting of the States Parties to the Convention, had the occasion to "re-affirm its support of the overall goal of this UNESCO Convention to protect underwater cultural heritage. The United States fully supports the Annex of Rules concerning activities directed at underwater cultural heritage." UNESCO Doc. UCH/09/2.MSP/220/4 REV., Annex, at 12.

> Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, *should* inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and Aircraft. [emphasis added]

The conditional tense finally included—"should" instead of "shall"—was the result of two opposing views during the negotiating process. The latter term was defended by historical and current maritime powers, which understood that a coastal State *must* respect the ownership and sovereign immunity of a foreign sunken State craft and communicate the discovery in its territorial sea (or archipelagic waters) of a sunken State vessel to its flag State.[9] Against this position, a significant number of coastal States maintained that nothing in international law obliges a State to inform another State of any circumstance that occurs within its territory unless otherwise agreed to or imposed by an international law rule.

To some extent, the conflicting relationship between sovereignty and property was behind the disagreement. To some States—most particularly the Latin American States—the location of the wreck was tantamount to inuring title to the coastal State. For example, Latin American and Caribbean countries asserted that underwater cultural heritage "is the property of the State in which it is found and through this it is the heritage of the Humanity."[10] This position was firmly opposed by those States defending the principle under which, according to international law, sunken State vessels—such as

9 Unless the name of vessel or flag State is readily apparent, this process would not appear to be trigged until evidence of the flag State is identified after what may be a lengthy and possibly complicated archaeological research process.

10 Santo Domingo Declaration, 16 June 1998, which resulted from the First Meeting of the Technical Commission on Underwater Cultural Heritage of the Forum of Ministers of Culture and Officials Responsible for Cultural Policy of Latin America and the Caribbean, reprinted in UNESCO, *Background Materials on the Protection of the Underwater Cultural Heritage* (vol. II, Paris, 2000), at 341–2.

However, a line of change could be identified from 2008 onwards, when the Meeting of Ministries of Culture of the *Conferencia Iberoamericana* adopted the Declaration of San Salvador (22–23 May 2008), in which it was decided to adopt a common position regarding the protection and conservation of underwater cultural heritage in the region and to call for a commission of experts to follow up on the question (para. 12). See the Declaration (in Spanish) at <http://www.oei.es/xicic.htm>, accessed 2 October 2014.

warships and vessels on government service—regardless of location or of the time elapsed, remain the property of the State owning them at the time of their sinking unless it explicitly and formally relinquishes ownership.[11]

The concern of some States, particularly the United States, is that the UNESCO Convention does not explicitly address or recognize "the regime under which the flag State must consent before its vessels can be the subject of recovery."[12] This issue includes concerns about respect of ownership and the sovereign immunity of sunken State vessels located in the internal waters and territorial waters of a coastal State.[13] Article 7(3) of the UNESCO Convention, however, does not automatically mean that the Convention does not respect the flag State consent regime or that ownership or title lies with the coastal State. On the contrary: the flag State consent regime and sovereign immunity are recognized throughout the Convention and the continuing title of the flag State is expressly provided for in article 2(8), under which the Convention does not modify "the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft."

11 See this position as defended by the US, the UK, Spain, Japan, Germany, France or Russia at *Federal Register*, Vol. 69, No. 24, Thursday, February 5, 2004, Notices, at 5647–8. During the negotiation of the UNESCO Convention, a proposal submitted by the UK and Russia (and endorsed by the United States) tried to substitute "should inform" to "shall consult" and to add the following sentence: "such State vessels and aircraft shall not be recovered without the collaboration of the flag State, unless the vessel and aircraft have been expressly abandoned in accordance with the laws of that State." The proposal was rejected (see the proposal in UNESCO Doc. 31 C/COM.IV/DR.5, of 26 October 2001).

12 Statement of Robert C. Blumberg, Chair of U.S. Observer Delegation to the 31st UNESCO General Conference, to Commission IV of the General Conference, Regarding the U.S. Views on the UNESCO Convention on the Protection of Underwater Cultural Heritage, October 29, 2001, Paris, France (available electronically at <http://www.gc.noaa.gov/documents/gcil_heritage2_blumberg.pdf>, accessed 8 November 2014). It is worth noting that, on one hand, the US raises concerns about a requirement for reporting underwater cultural heritage discovered in the exclusive economic zone or on the continental shelf as possibly upsetting balance under UNCLOS and, on the other hand, it also raises concerns that if sunken State vessels are discovered within the territorial sea there is no requirement that it be reported to the flag State.

13 Actually, the UNESCO Convention's negotiators early accepted that the text would not address the question of title or property. See Report of the Meeting of Governmental Experts on the Draft Convention for the protection of the Underwater Cultural Heritage, UNESCO Doc. CLT-98/CONF.202/7, para. 13.

Consistent with UNCLOS, article 7(1) of the UNESCO Convention states that "States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea." But this provision relates only to the regulation and authorization of activities directed at the wrecks *within its territory* and does not automatically convey title to them to the coastal State,[14] nor does it change the interests of the flag State in its underwater cultural heritage under UNCLOS or otherwise.

An exception to the logical rule stated in article 7(1) of UNESCO Convention—the coastal State's exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea[15]—is the immunity of sunken warships, an exception allowed by articles 2(8) and 3 of the same Convention and confirmed by State practice and *opinio juris*.[16]

The logic of this approach could be further confirmed when dealing in particular with wrecks located in the exclusive economic zone (EEZ), the continental shelf or the Area. In the case of the EEZ and the continental shelf, article 10(7) simply states that "no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State." Without

14 For example, under the agreement regarding CSS *Alabama*, France recognized and respected the continued ownership, sovereign immunity and interest of the United States in its Civil War wreck while the US recognized the jurisdiction of France to regulate all activities directed at this wreck in the territorial sea of France (the text of the 1989 Agreement is available electronically at <http://www.history.navy.mil/branches/org12-9c.htm>, accessed 4 October 2014). This was also the position sustained, for example, by Spain around the legal title of the HMS *Sussex*, a British warship sunk in Spanish waters in 1694: when some problems arose with its recovery in 2007 by a private US company acting under the authorisation of the British Ministry of Defence, Spain did not asserted title over the wreck but it simply required to apply Spanish archaeological legislation to operations directed at an archaeological site located in Spanish waters. On these and other cases it may be seen M.J. Aznar, "Treasure hunters, sunken State vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage," *The International Journal of Marine and Coastal Law* 25 (2010): 209–236.

15 States have "exclusive competence" in regard to their own territory (*Isla de Palmas* [1928] 2 UNRIAA 829, at 838), including the maritime spaces within those territories (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits) [1986] ICJ Rep 14, at 111 (para. 212)).

16 See further the Resolution on "The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law," adopted by the Institut de droit international on 29 August 2015, Tallinn Session (available at <http://www.justitiaetpace.org/idiE/resolutionsE/2015_Tallinn_09_en.pdf>).

flag State consent, it is admitted, however, that coastal States might otherwise adopt: (i) urgent measures to protect the wreck (including measures against the unauthorized salvage of the wreck)[17] and (ii) sovereign measures relating to the safety of navigation, which could damage the wreck. With regard to the Area, under article 12(7), "[n]o State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State." The recognition of the flag State's interest is therefore not affected, but reinforced. Furthermore, nothing in the Convention—which must be interpreted contextually—implies that the legal status of sunken State vessels changes by the mere fact that they are located in the internal waters, archipelagic waters or territorial seas of a coastal State instead of on the continental shelf or in the Area.[18]

The principles of sovereignty and immunity thus contextually irradiate throughout the Convention; these tenets of international law are (and must be) well balanced with the protection of sunken State vessels when considered

17 Art. 10(4) of the Convention states that "[w]ithout prejudice to the duty of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage, including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties." During the drafting of the Operational Guidelines of the UNESCO Convention, immediate danger was defined as the existence of conditions which can reasonably be expected to cause damage, destruction or looting, to a specific underwater cultural heritage within a short delay of time and which can be eliminated by taking safeguarding measures. This definition was not finally included in the Guidelines (archive on file with the author, who acted as member of the Spanish Delegation in the Working Group which drafted these Guidelines, adopted by Resolution 6/MSP 4 of the Conference of States Parties to the Convention, UNESCO doc. CLT /CEH/CHP/2013/OG/H/1, August 2013, and available electronically at <http://unesdoc.unesco.org/images/0022/002226/222670E.pdf>, accessed 22 October 2014).

18 As said by Craig Forrest, "[t]he actual regime for State owned vessels in the Convention reflects the resulting compromise between flag States and coastal States. Rather than focusing on the rights of the flag State, it was agreed that a balance would be drawn between the right of the flag State and the Coastal State." C. Forrest, "A New International Regime for the Protection of Underwater Cultural Heritage," *International and Comparative Law Quarterly* 51 (2002): 511–554, at 528–29.

as underwater cultural heritage under the definition provided for in article 1 of the Convention.

The Jurisdictional Equilibrium under the Law of the Sea Convention

When Article 303 UNCLOS was under negotiation during the Third UN Conference on the Law of the Sea (UNCLOS III), a proposal to extend coastal sovereign rights over archaeological objects upon the continental shelf and the EEZ attracted firm opposition from three maritime powers—the United States, the United Kingdom and The Netherlands. Their opposition is founded in concern over creeping jurisdiction:

> [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, favoring creeping jurisdiction and, ultimately, lead to a regime of full coastal state sovereignty over the continental shelf.[19]

Since the adoption of UNCLOS, an increasing number of coastal States have declared domestically their jurisdiction to regulate the protection of the underwater cultural heritage in their EEZ and/or on their continental shelf.[20] This exercise of authority, however, is not necessarily inconsistent with UNCLOS.[21] To some extent, this consideration influenced the drafting of articles 9 and 10 of the UNESCO Convention.

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19 Quoted in L. Caflisch, "Submarine Antiquities and the International Law of the Sea," *Netherlands Yearbook of International Law* 13 (1982): 3–32, at 17.

20 See, for example, the legislations of Argentina, Australia, Bangladesh, Barbados, Bermuda, Brazil, Canada, Cape Verde, China, Colombia, Cuba, Dominican Republic, DPR Korea, Greece, Guyana, Iceland, Indonesia, Iran, Ireland, Jamaica, Madagascar, Malaysia, Morocco, the Netherland, Pakistan, Philippines, Portugal, SFR Yugoslavia, Spain, Tanzania, United States, Vanuatu or Vietnam. See the practice cited in M.J. Aznar, "The Contiguous Zone as an Archaeological Maritime Zone," *The International Journal of Marine and Coastal Law* 29 (2014): 1–51.

21 For example, while the US *National Marine Sanctuary Act* (2000) asserts authority to protect certain natural and cultural heritage resources in special areas within the US exclusive economic zone, it expressly provides that any enforcement against a foreign flagged vessel or national must be consistent with international law, including consent of flag State (16 U.S.C. § 1435(a)). See Varmer, Gray and Alberg, *United States . . ., supra* n. 3, at 137–140.

The reluctance of most maritime powers arose when these articles raised concerns as to whether they would result in an enlargement of coastal State rights over activities in their EEZ and continental shelf.[22] The structure of the arguments is set forth as follows:

> (a) Under paragraph 1(b) of article 9, in the case of discovery or activity directed at underwater cultural heritage in these zones, States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to the coastal State or, alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties. For some States, this proviso would grant the coastal State the right to impose a reporting obligation on non-nationals and on masters of vessels flying a foreign flag to report such activities and discoveries. This outcome, however, could simply be seen as mere application of the principle upon which a State is recognized by international law to impose reporting obligations on its nationals and on vessels flying its flag wherever they may. There is nothing in the provision indicating that this is some extension of coastal State jurisdiction over underwater cultural heritage. Even if a coastal State did implement laws under this Convention to require foreign vessels and nationals to report finds of underwater cultural heritage within its EEZ and on its continental shelf, the enforcement could only be against foreign flagged vessels and nationals of states that have consented to requirement under the Convention or other international law. Such law of a coastal State would not apply to foreign flagged vessels and nationals of a State that are not parties to the Convention or consented to the requirement under some other law.
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> (b) A second set of jurisdictional concerns arises also from the role of the "coordinating State". Under the UNESCO Convention, the coordinating State—normally the coastal State unless decided otherwise[23]—will

22 For some States, this alleged enlargement was not solved with the "constructive ambiguities" deliberately included in some articles of the Convention. For Russia, for example, "[t]he ambiguity and vagueness of some articles of the Convention are, in our view, bound to give rise to conflict situations." UNESCO, *Records of the General Conference . . ., supra* n. 3, at 562.

23 Art. 10(3)(b) establishes that "[w]here there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in a State Party's exclusive economic zone or on its continental shelf, that State Party shall [. . .]

be the focal point in consultations with "all other States Parties which have declared an interest under Article 9, paragraph 5, on how best to protect the underwater cultural heritage."[24] The coordinating State—and this is the most controversial point—may further "take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting."[25] It also shall implement measures of protection which have been agreed by the consulting States, shall issue all necessary authorizations for such agreed measures and may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary

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coordinate such consultations as 'Coordinating State,' unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared an interest under Article 9, paragraph 5, shall appoint a Coordinating State." However, if the coastal State does not want to take the lead in coordinating the various parties interests, perhaps because of the discovery of the flag State of underwater cultural heritage, there is a process for agreeing upon another State to be a coordinating State. So while the coastal State's right to regulate activities directed at underwater cultural heritage in its exclusive economic zone or on its continental shelf is firmly grounded on rights under UNCLOS, the respect of flag State jurisdiction, for example, and the possibility that such flag State may end up being coordinating State under certain circumstances further supports the view that the provisions in Article 10 does not upset the balance of flag State jurisdiction and coastal State jurisdiction under UNCLOS.

24 See Article 10(3)(a). Under Art. 9(5), "[a]ny State Party may declare to the State Party in whose exclusive economic zone or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned." The UNESCO Convention Operational Guidelines (see *supra* n. 17) includes a Form (Form 3) available for States parties to communicate their interest under Art. 9(5). In that Form, in order to demonstrate its condition of being an "interested States", a State must have to accompanying its declaration by (a) the results of scientific expertise, (b) historic documentation or (c) any other adequate documentation.

25 See article 10(4). Russia, for example, considered that this proviso may "be interpreted as broadening, beyond the limits laid down by the 1982 United Nations Convention on the Law of the Sea, the rights and jurisdiction of a coastal State over adjacent maritime areas. It can be regarded as offering a coastal State the right, unilaterally and at its own discretion, to take any measures, not excluding the use of force, on the pretext of protecting the underwater cultural heritage." UNESCO, *Records of the General Conference . . ., supra* n. 3, at 562.

> authorizations.[26] Again, these provisions are consistent with UNCLOS duties to protect underwater cultural heritage and cooperate for that purpose, and do not upset the delicate jurisdictional balance between flag State jurisdiction and coastal State jurisdiction under UNCLOS.
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> Moreover, as it is expressly said in paragraph 6 of said Article 10, when adopting all these decisions, the coordinating State "shall act on behalf of the States Parties as a whole and not in its own interest" and "[a]ny such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea."

In summary, for the particular purpose of the protection of underwater cultural heritage in the exclusive economic zone or on the continental shelf, the UNESCO Convention is consistent with provisions in UNCLOS and seems to elaborate—perhaps using some "constructive ambiguities"—a regime for these marine zones that tries to translate the general principle of protection embodied in Article 303(1) UNCLOS and Article 2(3) of the UNESCO Convention, a protection that *shall* be performed either individually (paragraph 4) and through cooperation with other States (paragraph 2). If this obligation must be interpreted and applied in full conformity with UNCLOS (Article 3 of the UNESCO Convention) and no act or activity undertaken on the basis of this Convention may constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction[27], then the UNESCO Convention may be consistent with the balance of jurisdiction under UNCLOS or be labelled as a "neutral" agreement with regard jurisdictional matters.

UNCLOS Explicit and Implied Alternatives

Only two UNCLOS Articles—149 and 303—address archaeological and historical objects found at sea. While Article 149 addresses these objects when found in the Area,[28] Article 303—located in the 'General provisions' part of

26 See article 10(5).

27 Article 2(11), UNESCO Convention.

28 Art. 149 says: '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.'

UNCLOS—applies to all maritime zones.[29] The legal regime thus established has been characterized, however, as "contradictory and counterproductive."[30]

The vague responsibilities to protect cultural objects in the Area, the identification and extent of the so-called preferential rights and rights of identifiable owners, the legal fiction and the presumption governing the regime of those objects in the contiguous zone or the application of the law of salvage and other rules of admiralty law to the underwater cultural heritage are among the conceivable critiques to the regime. The UNESCO Convention seems to be a plausible solution for a growing number of States that already adhere to its text.[31] Some States, however, still believe the UNESCO Convention does not adequately address these issues and other gaps present in the protection of underwater cultural heritage. Among the most important issues are how

29 Art. 303 wording is as follows: "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 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. 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."

30 T. Scovazzi, "A Contradictory and Counterproductive Regime," in *The Protection of the Underwater Cultural Heritage, Before and After the 2001 UNESCO Convention*, R. Garabello and T. Scovazzi, eds. (Leiden: Martinus Nijhoff, 2003): 3–18. See further B.H. Oxman, "Marine Archaeology and the International Law of the Sea," *Columbia Journal of Law and the Arts* 12 (1987–1988): 353–372; C. Lund, "Protection of the Under-Water Cultural Heritage," in *Il regime giuridico internazionale del Mare Mediterraneo*, U. Leanza, ed. (Milan: Giuffrè Editore, 1987): 351–354; or A. Strati, "Protection of the Underwater Cultural Heritage," in *Unresolved Issues and the New Challenges to the Law of the Sea*, Anastasia Strati *et al.*, eds. (The Hague: Martinus Nijhoff, 2006): 21–62.

31 As of July 2016, the Convention has 55 States parties: Albania, Algeria, Antigua and Barbuda, Argentina, Bahrain, Barbados, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Cambodia, Croatia, Cuba, Democratic Republic of the Congo, Ecuador, France, Gabon, Ghana, Grenada, Guatemala, Guinea Bissau, Guyana, Haiti, Honduras, Hungary, Iran (Islamic Republic of), Italy, Jamaica, Jordan, Lebanon, Libya, Lithuania, Madagascar, Mexico, Montenegro, Morocco, Namibia, Nigeria, Palestine, Panama, Paraguay, Portugal, Romania, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Togo, Trinidad and Tobago, Tunisia and Ukraine. As far as this author knows, further ratifications are probably in the pipeline in Australia, Germany, the Netherlands, some countries in the Arab Gulf and Uruguay.

the legal regime applies beyond the outer limit of the territorial sea, and particularly in the EEZ and the continental shelf.

The Explicit and Evolving Solutions

Within its internal waters, archipelagic waters and territorial sea, the coastal State exercises full and complete sovereignty subject to UNCLOS and other rules of international law.[32] This rule means that the regulation of underwater cultural heritage in these maritime zones is governed by the coastal State's national regulation. The application of national laws to foreign flagged vessels and nationals must be consistent with international law—including UNCLOS. The Law of the Sea Convention includes a general duty on the part of coastal States to protect (and to cooperate in the protection of) underwater cultural heritage.[33] States thus apply their domestic cultural and heritage legislations and foreign States vessels, and nationals conducting activities in these zones are obliged to respect and comply with them.[34]

Some problems arise when dealing with the regime to be applied in the contiguous zone. Article 303(2) UNCLOS, referring to Article 33 of that instrument, establishes a complex regime based on a presumption and a legal fiction upon which the removal of underwater cultural heritage from the seabed of the contiguous zone without the approval of the coastal State would result in an infringement within its territory or territorial sea of its customs, fiscal, immigration or sanitary laws and regulations. This provision

32 See *supra* n. 15. Under Art. 7(1) of the UNESCO Convention "States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea."

33 Art. 303(1) UNCLOS, but also those obligation derived from other cultural agreements—like the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (1037 UNTS 151) or the 1992 European Convention on the Protection of the Archaeological Heritage (revised) (*European Treaty Series* No. 143)—which obliged State parties to protect the cultural heritage located within their territories, including those maritime zones. See Michail Risvas, "The Duty to Cooperate and the Protection of Underwater Cultural Heritage," *Cambridge Journal of International and Comparative Law* 2 (2013): 562–590.

34 In a recent case before the International Tribunal for the Law of the Sea (ITLOS), the rights of the coastal State to enforce its domestic legislation in its internal waters and territorial sea, including that protecting the underwater cultural heritage, have been recognized and reinforced. See *The M/V "Louisa" Case* (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Judgement of 28 May 2013, ITLOS Reports [2013], available electronically at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_merits/judgment/C18_Judgment_28_05_13-orig.pdf>, accessed 23 October 2014.

has been viewed as somewhat of a stretch in that it creates grey legal zones and does not clarify the rights and duties of both coastal and other States in their activities directed at underwater cultural heritage in the adjacent contiguous zone.

State practice—both multilateral and unilateral—offers a general, quite uniform and constant evidence of the acceptance of a coastal State's right to legislate on and to enforce the protection of underwater cultural heritage located in its contiguous zone.[35] Consequently, it could be argued that current international law includes an archaeological maritime zone that extends to the outer limit of the State's declared contiguous zone. Article 8 of the UNESCO Convention seems to confirm this rule, as it states:

> Without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied.

The UNESCO provision may be evidence of the general acceptance of the UNCLOS regime for protecting underwater cultural heritage in the contiguous zone to include the authority of the coastal State to regulate and authorize activities directed at that heritage.

Some Implied Solutions

There is still the challenge to adequately protect underwater cultural heritage beyond the outer limit of the contiguous zone. Given the limited (and vague) regime established by UNCLOS in articles 149 and 303, however, some of the complaints about the vagueness and limited guidance of Article 303 ignore how the treaty is a framework convention and that detail about rights and responsibilities in article 303 may be found in other provisions of the Convention. The Convention therefore may be helpful for coastal States desiring to protect the underwater cultural heritage located in their EEZ and on their continental shelf. Amid other possibilities, these solutions might be (1) to use the right of the coastal State to protect the marine environment in these two zones, (2) to explore the possibilities offered by the regime of marine scientific research to protect underwater cultural heritage and (3) to refer protection to article 59 UNCLOS as a case of non-attribution of rights and jurisdiction in the EEZ.

35 Aznar, *The Contiguous Zone, supra* n. 20.

1. Underwater Cultural Heritage and the Protection of Marine Environment

UNCLOS recognizes coastal States sovereign rights and jurisdiction over activities such as the exploration and exploitation of the natural resources of their EEZ and continental shelf.[36] In the case of the EEZ, article 56(1)(a) establishes that the coastal State has not only "sovereign rights for the purpose of exploring and exploiting" the natural resources (whether living or non-living) but the sovereign rights for the purpose of "conserving and managing" these natural resources. Although this last proviso has been labelled "to be a question of drafting rather than of substance,"[37] it seems to recognize broad coastal States' rights not only to the exploration and exploitation of the living resources, but also to conserve and manage these resources.

In the case of the continental shelf, the rights of the coastal State are recognized to be over activities directed at "the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, 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."[38]

Underwater cultural heritage has not been included among "natural resources." As the International Law Commission (ILC) affirmed, "[i]t is clearly understood that the rights of the coastal State do not cover objects such as wrecked ships and their cargoes (including bullion) lying in the seabed or covered by sand in the subsoil."[39] In most cases, however, the seabed, its subsoil and the sand embedding or covering archaeological objects are actually natural resources. Leaving aside sedentary species such as oysters, clams or abalones—protected by the continental shelf regime—the vast majority of non-sedentary fishing species live around reefs and submerged protrusions, and in or near man-made submerged structures. Some of them, using the words of a U.S. admiralty court, are "the remains of abandoned, two hundred year old shipwrecks, which have lain undisturbed for centuries under an undetermined amount of sand, [and that] reasonably can be characterized as natural resources for the purposes of the Federal Act."[40] Thus, activities directed

36 Arts. 56 and 77, UNCLOS, respectively.

37 R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd ed., Manchester University Press: Manchester, 1999) at 166.

38 Article 77(4), UNCLOS.

39 *Yearbook of the International Law Commission*, vol. II, 1956, at 289.

40 *Subaqueous Exploration and Archaeology, Ltd. And Atlantic Ship Historical Society, Inc., v. The Unidentified, Wrecked and Abandoned Vessel et al.*, 577 F.Sup. 597, 613 (D. Md. 1983), aff'd, 765 F.2d 139 (4th Cir. 1985). The Federal Court refers to the 1953 Submerged Lands Act (67 Stat. 29, 43 U.S.C. Sec. 1301–1315).

at underwater cultural heritage may affect natural resources and, *vice versa*, exploitation of natural resources may affect underwater cultural heritage.

Under the UNESCO Convention, the definition and scope of underwater cultural heritage includes not only the archaeological objects (human remains, sites, structures, buildings, wrecks and their cargo, artifacts, etc.), but also their "archaeological and *natural* context" as well.[41] [emphasis added] Exactly as it occurs in land archaeology, where the removal of soil is necessary, underwater archaeological activities habitually produce an impact on the fragile marine environment that should be minimized.[42] Despite these efforts, activities directed to the underwater cultural heritage normally imply some destruction of the marine environment.

Faced with adverse activities directed to the underwater cultural heritage located in the EEZ or on their continental shelf, coastal States may set forth environmental standards, both international and domestic, applicable to their EEZ zone and continental shelf.[43] Complementing UNCLOS, some international rules have been adopted in a regional scale (the Mediterranean Sea[44] or the Caribbean Sea,[45] for example) using "special protected area"

41 Art. 1(1)(a) on the definition of underwater cultural heritage (emphasis added).

42 Hence, the annexed Rules to the UNESCO Convention also includes environmental protocols when dealing with an archaeological project: any project shall include and environmental policy (Rule 10(l)) to ensure that the seabed and marine life are not unduly disturbed (Rule 29); and any work shall include an assessment that evaluates the significance and vulnerability of the underwater cultural heritage and the surrounding natural environment (Rule 14), which shall include a background study of the environmental characteristics of the site (Rule 15). Between States parties to this Convention, hence, environmental standards may be used to reject any activity directed to the underwater cultural heritage located in the exclusive economic zone or on their continental shelf.

43 UNCLOS remains silent as to the measures a coastal State is entitled to take in case its sovereign rights in the exclusive economic zone and the continental are violated. Nonetheless, the ILC also considered the exercise of enforcement measures by the coastal State with a view to protecting its natural resources to fall within the scope of the "sovereign rights" notion (*Yearbook of the International Law Commission*, vol. II, 1956, at 297).

44 See, for example, the 1995 Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (2102 UNTS 203) or the 2008 Protocol on Integrated Coastal Marine Zone Management in the Mediterranean (text available at <http://195.97.36.231/dbases/webdocs/BCP/ProtocolICZM08_eng.pdf>, accessed 20 October 2014). These protocols were adopted in the general framework of the Barcelona Convention 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (the "Barcelona Convention," text available at <http://195.97.36.231/dbases/webdocs/BCP/bc95_Eng_p.pdf>, accessed 20 October 2014).

45 See, for example, the 1990 Protocol Concerning Specially Protected Areas and Wildlife (text available at http://www.cep.unep.org/ accessed 20 October 2014), adopted within

approach that, under agreement, may be established beyond 24 nm. In some other cases, it is the domestic legislation that goes beyond that limit and may be applied up to 200 nm.[46]

2. Underwater Cultural Heritage and Marine Scientific Research

UNCLOS contains no definition of marine scientific research. There is, however, general agreement that marine archaeology was not considered as marine scientific research during the negotiations for the treaty.[47] This decision was mainly due to a twofold argument: the limited recognition of marine archaeology as an independent scientific discipline in the 1980s, and the fact that marine scientific research was mainly confined to the natural environment and resources. It has been plausibly argued, however, that contemporary marine archaeology is a full scientific discipline and, that marine scientific research actually implies an indiscriminate collecting of data that may be used either for environmental or archaeological purposes.[48] Modern underwater technology—particularly the use of remote sensing equipment and different unmanned submersible vehicles—permits the gathering of massive information for the bottom of the seas which maybe directly transformed in a tradeable commodity.

As a matter of distinction, commentators generally agree to distinguish between pure or 'fundamental' research, which is conducted exclusively for peaceful purposes and in order to increase scientific knowledge for the benefit of all mankind, and 'applied' research, which is of direct significance for the exploration and exploitation of natural resources. Therefore, while pure research does not imply direct economic revenue, applied research is primarily focused on future and foreseeable commercial activities. The information gathered by modern underwater technology, when directed at an archaeological target (for example, a shipwreck), is likely not characterized as pure marine scientific research.

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the general framework of the 1983 Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (the "Cartagena Convention," text available at <htts://www.cep.unep.org>, accessed 20 October 2014).

46 This is done, as we have seen, in the US *National Marine Sanctuaries Act* (2000), under which an area of "marine environment" may be designed and regulated that includes "the exclusive economic zone, consistent with international law" (16 U.S.C. 1431, 1432, para. 3).

47 See, among others, Alfred Soons, *Marine Scientific Research and the Law of the Sea* (The Hague: TMC Asser Instituut, 1982): 275.

48 See S. Dromgoole, "Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage," *The International Journal of Marine and Coastal Law* 25 (2010): 33–61.

Article 246 UNCLOS recognizes coastal State discretion to regulate both types of research in its EEZ and on its continental shelf. In both cases, coastal States, "in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their [EEZ] and on their continental shelf in accordance with the relevant provisions of [UNCLOS]"; [49] and that research "shall be conducted with the consent of the coastal State." Whereas coastal States "shall, in normal circumstance, grant their consent" for pure research,[50] in cases of applied research, coastal States "may . . . in their discretion withhold their consent."[51]

Activities directed at underwater cultural heritage in the EEZ or on the continental shelf may then be subject to the coastal State's discretion, depending on the nature and purpose of that activity. If, for example, the latter is a research project supervised by a scientific institution, in cooperation with States and following archaeological protocols internationally recognized by the scientific community,[52] the coastal State should grant its consent in normal circumstances. This type of project is carried out exclusively for peaceful purposes, and in order to increase scientific knowledge for the benefit of all mankind.

Commercial activities, however, directed at underwater cultural heritage, such as work performed by treasure hunters, is not pure research notwithstanding the recent efforts of some companies to introduce themselves as archaeological endeavours. Recent cases in Spain and the United Kingdom, as well as other well known cases on the west coast of Africa, the Indian Ocean and in the Caribbean, show how these treasure hunters do not respect archaeological protocols.[53] The purpose of these individuals and companies is not to increase scientific knowledge for the benefit of all mankind, but to

49 Paragraph 1.

50 Paragraph 3.

51 Paragraph 5.

52 For example those listed in the Charter on the Protection and Management of Underwater Cultural Heritage ("Charter of Sofia") adopted by the International Council on Monuments and Sites (ICOMOS) in its 11th General Assembly in Sofia, October 1996 and exported *mutatis mutandi* to the Annex of the 2001 UNESCO Convention. See the Charter at <http://www.international.icomos.org/charters/underwater_e.pdf>, accessed 13 October 2014.

53 A good example could be the attitude of one of these treasure hunter companies (Odyssey Marine Exploration, Inc.) when excavating in 2007 the wreck of the Spanish Royal Navy frigate Nuestra Señora de las Mercedes about 1,000 meters deep on the current Portuguese continental shelf, without the sovereign owner's permission and without any archaeological care. As a US District Judge acknowledged, that action "irreparably"

increase their economic benefits. Therefore, coastal States, in order to protect underwater cultural heritage located in their EEZ or on their continental shelf, have the discretion to grant or withhold any permit to those actors. Furthermore, the regime of marine scientific research grants research rights only to States, not private actors. Private companies such as treasure hunters are not inherently entitled to be granted such permits.

3. Protection of the Underwater Cultural Heritage as a Non-Attributed Regime

A final question to be addressed is the consequence derived from the definition of the protection of the underwater cultural heritage as a non-attributed regime under UNCLOS.[54] Article 59 regulates the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the EEZ in cases where the Convention does not attribute these rights or jurisdiction to the coastal State or to other States within the zone. When a conflict arises between the interests of the coastal State and any other State(s), "the conflict 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."[55]

Three variables apply to resolve these possible conflicts: (a) equity and relevant circumstances,[56] (b) interests of the parties involved, and (c) interest of the international community as a whole.

(a) In order to find an equitable solution to the possible conflict, some relevant circumstances may be taken into account: the purpose (commercial or scientific) of the activity directed to the underwater cultural heritage, the flag State, in case of an activity directed to a shipwreck or aircraft and its possible consideration as public property thus subject to the immunity principle,[57] the cultural and historic link of different States to the archaeological site, or the exact location of the site and its possible inter-

disturbed the site. See *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2379 (2012).

54 See Churchill and Lowe, *supra* n. 37, at 152, note 22.

55 Art. 59, UNCLOS.

56 "Equity" and "relevant circumstances" may be perfectly melted in a single variable since equitable principles are generally applied in the law of the sea taking into account all the relevant circumstance. See as a jurisprudential point of departure in the *North Sea Continental Shelf* cases (ICJ Reports [1969], at 53, para. 101).

57 The 2001 UNESCO Convention establishes that "no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State." (Art. 10(7)).

ference with other legitimate interests (international navigation, security, protection of marine environment, other uses of the EEZ or the continental shelf, etc.)[58] Whether some of these variables may solve the conflict, the solution must be generally found through cooperation. This is the UNESCO Convention's option proposed in its Articles 9 and 10 under a basic scheme of identification of interest, combined with information sharing, consultations, cooperative protection, and management of sites.

(b) With regard the interests of the parties involved, it has been suggested that "[g]iven the functional nature of the exclusive economic zone, where economic interests are the principal concern, this formula would normally favour the coastal State. Where conflicts arise on issues not involving the exploration for and exploitation of resources, the formula would tend to favour the interests of other States or of the international community as a whole."[59] Some types of activities directed to underwater cultural heritage may be characterized as commercial activities and therefore subject to the jurisdiction of the coastal State. Furthermore, these activities are normally characterized by the use of artificial installations and structures, the operation of drilling (or similar purpose) artifacts, etc. In these cases, UNCLOS attributes the exclusive rights to regulate these activities exclusively to the coastal State.[60]

Even when these activities have a scientific, non-economic motive, however, they may be qualified as marine scientific research and, as such, fall also under the coastal State's jurisdiction in its exclusive economic zone or on its continental shelf.

(c) Perhaps the basic criteria to be used when protecting underwater cultural heritage in the EEZ is the interest of the international community as a whole. Underwater cultural heritage, as any cultural heritage, must be generally protected. States generally "have the duty to protect objects of an archaeological and historical nature found at sea and shall

58 For the later circumstance, the UNESCO Convention provides that "[a] State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea." (Art. 10(4)).

59 Myron Nordquist, ed., *United Nations Convention on the Law of the Sea: A Commentary* (Vol. 2, Dordrecht/Boston/London: Martinus Nijhoff, 1993): 569.

60 Arts. 60, 80 and 81 UNCLOS.

cooperate for this purpose,"[61] and particularly, "shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities."[62] If coastal States have a protective and a proactive domestic legislation on cultural heritage (an increasing trend otherwise), nothing impedes a fair application of its rules to the underwater cultural heritage located in its EEZ or on its continental shelf, without impairing legitimate rights of third States under current law of the sea, including UNCLOS.[63] If coastal States are parties to the UNESCO Convention, they have a particularly enhanced regime that governs activities directed to underwater cultural heritage located in the waters under their jurisdiction beyond 24 nm.

Some Tentative Conclusions

The 2001 UNESCO Convention is an international agreement that is consistent with UNCLOS, which the negotiating parties used as their framework to build upon some of the more vague provisions regarding underwater cultural heritage. Both treaties, however, are by-products of their respective epochs. UNCLOS was drafted and adopted when maritime powers were concerned about free navigation, and coastal States were concerned about control of exploitation of natural resources off their coast. The treaty was negotiated when underwater technology was not as advanced or relatively available for deep water exploitation, and underwater cultural heritage was an exotic subject of interest. The UNESCO Convention, on the other hand, arrived when seas and oceans already were spaces where integral policies are to be developed, when technology is unveiling information unimaginable a few decades ago, and where, thanks to evolving scientific methods, underwater remains are indispensable to understanding our common history. For example, the

61 Art. 303(1), UNCLOS.

62 Art. 2(4), UNESCO Convention.

63 And third States, "[i]n exercising their rights and performing their duties under [UNCLOS] in the exclusive economic zone [of another State,] shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with [Part V UNCLOS]." (Art. 58(3), UNCLOS).

discovery and scientific management of the *Titanic*'s remains and recognition that deep water technology had developed to exploit underwater cultural heritage set the stage for development of the UNESCO Convention and its protection of that heritage.

The Convention has attracted some criticism and created certain legal concerns from different angles. Criticism comes from private actors, such as treasure hunters and commercial individuals, that believe the Convention edges out their commercial activities.[64] Even longstanding salvage disputes about well-known wrecks are beginning to be resolved under archaeological and public law criteria, rather than by strictly private commercial interests.[65]

Notwithstanding the relevance of these criticisms, sunken State vessels and the jurisdictional concerns are indeed more important. This chapter suggests that these concerns may be dispelled with an evolving and contextual interpretation of the UNESCO Convention as its "constructive ambiguities" are being implemented consistent with international law including UNCLOS. This interpretation must include the overarching principle: the duty of all States to protect underwater cultural heritage, enshrined in Article 303(1) UNCLOS.

Several other principles and rules would act as building blocks of the protective regime proposed by the UNESCO Convention, interpreted and applied in the context of and in a manner consistent with international law, particularly UNCLOS: territorial sovereignty, immunity, scientific precaution, and cooperation. Whether States are convinced that the fine jurisdictional balance

64 For a recent opposing view, see among others J.B. Segarra, "Above Us the Waves: Defending the Expansive Jurisdictional Reach of American Admiralty Courts in Determining the Recovery Rights to Ancient or Historic Wrecks," *Journal of Maritime Law and Commerce* 43 (2012): 349–391. See, previously, D.J. Bederman, "Rethinking the Legal Status of Sunken Warships," *Ocean Development and International Law* 31 (2000): 97–125.

It must be reminded that under Art. 4 of the Convention, "[a]ny activity relating to underwater cultural heritage to which this Convention applies *shall not be subject* to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, *and* (b) is in full conformity with this Convention, *and* (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection" (emphasis added, calling attention to the negative tense of this article's drafting and the cumulative criteria adopted by the Convention trying to exclude, almost completely, the application of salvage law to underwater cultural heritage).

65 The case of the RMS *Titanic* is paramount. See the US NOAA, Guidelines for Research, Exploration, and Salvage of R.M.S. Titanic (NOAA Guidelines), 66 *Fed. Reg*. 18906 (12 April 2001); and the recent interim decision of the salvage award at *RMS Titanic, Inc. v. The Wrecked and Abandoned Vessel*, F. Supp. 2d, 2010 WL3239112 (E.D.Va., 2010). See M.J. Aznar and O. Varmer. "The *Titanic* as Underwater Cultural Heritage: Challenges to Its Legal International Protection," *Ocean Development and International Law* 44 (2013): 96–112.

achieved by UNCLOS is not compromised by the new regime created by the UNESCO Convention, especially for the EEZ and the continental shelf, then coastal States may protect in close cooperation with other interested States the underwater cultural heritage located in these marine zones. A particular role must be recognized for flag States over their sunken State vessels, irrespective of the location of their wreckage.[66] For these cases, collaboration among States is the best solution, as evidenced by several bilateral agreements already concluded.[67] As the UNESCO Convention is nested in UNCLOS, future underwater cultural heritage agreements (regional or bilateral) may be rooted in the 2001 Convention. Article 6(1) encourages States parties "to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage." These new agreements shall be in full conformity with the Convention, and may not dilute its universal character. Furthermore, they should ensure better protection of underwater cultural heritage than that adopted in the Convention.

Cooperation within the legal framework created by UNCLOS and the UNESCO Convention, or framing new, more adequate agreements is thus the cornerstone for the protection of underwater cultural heritage.[68] UNCLOS, as the codified expression of the international law of the sea, may accom-

66 This has been accepted by US courts sitting in admiralty in two cases involving Royal Spanish Navy frigates: the *Juno* and *La Galga*, wrecked in 1750 and 1802 in the US contiguous zone (*Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), *cert. denied*, 148 L. Ed. 2d 956, 121 S.Ct. 1079 (2001)) and the *Nuestra Señora de las Mercedes*, wrecked in 1804 in the Portuguese continental shelf (see *supra* n. 53).

67 For example the Exchange of Notes constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Italy regarding the Salvage of HMS *Spartan* (1952), the Agreement between the Netherlands and Australia concerning old Dutch shipwrecks (1972), the Exchange of Notes between South Africa and the United Kingdom Concerning the Regulation of the Terms of Settlement of the Salvaging Wreck of the HMS *Birkenhead* (1989), the Agreement between the Government of the United States of America and the Government of the French Republic Concerning the Wreck of the CSS *Alabama* (1989), the Memorandum of Understanding Between the Government of Great Britain and Canada Pertaining to the Shipwrecks HMS *Erebus* and HMS *Terror* (1997), or the Agreement between the French Republic and the Government of the United States of America concerning the Wreck of *La Belle* (2003).

68 These agreements may be either of a soft law nature: for example, Spain has recently signed two Memorandums of Understanding with the US (2013) and with Mexico (2014) for the cooperation in the protection of the underwater cultural heritage located in their respective waters (archives on file with the author).

modate—explicitly and implicitly—the general interest of States protecting underwater cultural heritage. Some of its clauses—particularly those referring to the protection of marine environment and those regulating marine scientific research—may be constructively interpreted in order to protect underwater cultural heritage in the exclusive economic zone or on the continental shelf. Additionally, Article 59 may help to resolve conflicts of interest when protecting that heritage.

A more evolved regime may be found in the UNESCO Convention—which, as any other treaty, is to be applied only among States parties—or may be created when drafting new agreements protecting particular archaeological sites or regulating that protection for a more ample marine area (including a regional sea).[69] As a by-product of these international agreements, States have the duty to implement domestically their international obligations so created, thus establishing a multi-layered array of rules protecting underwater cultural heritage.

69 For example, all riparians States to the Adriatic Sea are States parties to the UNESCO Convention. A particular regime for that Sea could be envisaged among these States, establishing a rather more tailored regime if so decided.