Underwater Cultural Heritage Protection

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The soul of the past is in deep water.

Phillipe Diole

The protection of underwater cultural heritage has been described as ‘the last major issue of a global nature that needs to be resolved in the Law of the Sea’.2 ‘Underwater cultural heritage’ includes shipwrecks and other sites and objects of historical and archaeological interest such as towns and harbour works, which have been submerged, usually for at least a century or more.3

Treasure-hunting is a staple of adventure stories, but the trade in valuable objects raised from the sea floor is also big business. For example in 1986, Christie’s auction house raised US$16 million from the sale of Chinese porcelain and gold ingots recovered from the Dutch East India Company ship the Geldermalsen, which sank in the South China Sea in 1752.4 In such cases, the recovered objects end up in the hands of private collectors and are not available to scholars for the purposes of research and study, nor are they displayed to the public at large. Tales abound of treasure-hunters stripping a wreck of valuable objects and destroying irreplaceable historical and archaeological information in the process, or worse, dynamiting wreck sites so that no one else can access them.5

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4 S Williams, ‘Underwater Heritage: a Treasure Trove to Protect’ (February 1997) 87 UNESCO Sources 8.
5 This was the fate of the Geldermalsen which was reported to have been dynamited after only half of its estimated 320,000 articles of chinaware were salvaged. P Hoagland, ‘China’ in Dromgoole, above n 3, 23.
Like archaeological and historical sites on land, underwater cultural heritage provides insights into the past. However, historic shipwrecks in particular have unique value in that they are ‘time-capsules’. Archaeologists are usually less interested in the spectacular or precious objects recovered from a wreck or other underwater site than in the context in which they appear. While wrecks and other objects often decay or become assimilated into the marine environment through accretion, layers of silt and sediment can also preserve a wreck and its cargo. Because of the chemistry and biology of deeper waters, wrecks located on the deep seabed tend to be exceptionally well preserved. In other cases, the immediate environment around a wreck may not support marine creatures, which would otherwise consume it. For example, the seventeenth-century wooden Swedish warship, the Wasa, was found incredibly well preserved because it sank in cold brackish water that saved it from shipworms. As a result, the Wasa provided a window into the life and times of seventeenth-century sailors. Other wrecks may contain unanticipated finds, such as the collection of eighteenth-century Tahitian artefacts discovered when HMS Pandora was excavated. Consequently, HMS Pandora sheds light not only on the history of the Bounty mutiny and eighteenth-century British naval life, but on Polynesian history as well.

Underwater archaeology is a relatively recent discipline that was pioneered in the 1950s and 1960s. The development of scuba-diving equipment allowed archaeologists unprecedented opportunities to discover, survey and excavate underwater sites. Nevertheless, technological developments such as scuba also posed a considerable threat to the preservation of underwater cultural heritage. Peter Throckmorton, one of the pioneers of underwater archaeology, commented that ‘in twenty years sport divers have done more harm to archaeological sites in the sea than all the forces of nature in three millennia’. More recent technological developments also mean that wrecks located on the deep seabed are now accessible, as the discovery of the Titanic and the recovery of objects from the wreck site demonstrates.

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7 Hutchison, ibid.
8 E D Brown, 'Legal Loopholes' (February 1997) 87 UNESCO Sources 10.
9 Norton, above n 1, 236.
11 HMS Pandora was a British naval frigate, despatched in 1790 to recapture HMS Bounty and return the mutineers to England to stand trial, which sank on the Great Barrier Reef. HMS Pandora had called at Tahiti where some of the mutineers, who had asked Fletcher Christian to set them down there, surrendered. The Queensland Museum has excavated HMS Pandora. The Museum of Tropical North Queensland in Townsville has an excellent and extensive gallery devoted to the wreck.
12 Dromgoole, 'Editor's Introduction', above n 3, xvii-sviii.
13 Norton, above n 1, 260.
14 The Titanic lies in over 4000 metres of water, 325 nautical miles from the
that 98 per cent of the ocean bottom can be directly searched and reached by submersible and remotely operated vehicle (ROV) systems.\textsuperscript{15}

Additional threats are posed by other uses of coastal areas and the sea including land reclamation, dredging, dumping, the construction of harbour works, drilling for natural gas and oil, mineral exploration and the laying of cables and pipelines. Land-based marine pollution also affects underwater cultural heritage.\textsuperscript{16}

Until the adoption of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection of the Underwater Cultural Heritage in 2001 (the UNESCO Convention), the international legal regime governing underwater cultural heritage had been fragmentary. While some pre-existing cultural heritage conventions are applicable to underwater cultural heritage, those conventions are mostly directed to the protection of historical or cultural objects found within the land territory of a state, or are directed to particular activities that may affect cultural property, such as trade in artefacts. Consequently, they provided little scope for \textit{in situ} protection, preservation and management of underwater cultural heritage.\textsuperscript{17} Of most relevance for determining jurisdiction over underwater cultural heritage is the international law of the sea. However, the 1958 Geneva Conventions on the Law of the Sea\textsuperscript{18} do not contain any provisions expressly dealing with underwater cultural heritage. The 1982 Convention on the Law of the Sea (UNCLOS)\textsuperscript{19} contains two provisions that explicitly concern objects of historical or archaeological importance, but the coverage of the Convention in respect of underwater cultural heritage is incomplete.

A number of states have enacted legislation that specifically applies to underwater cultural heritage. However, most municipal heritage protection legislation does not apply beyond territorial waters. As yet, there appear to be

\textsuperscript{15} Verlaan, above n 14, 243.

\textsuperscript{16} Dromgoole, above n 3.


\textsuperscript{19} Convention on the Law of the Sea (10 December 1982), 1833 UNTS 397.
no clearly settled customary international norms that apply in other maritime zones.

This unsatisfactory situation prompted the International Law Association’s (ILA) Committee on Cultural Heritage Law to draft a convention to protect underwater cultural heritage. That draft formed the basis of the negotiating text for the UNESCO Convention.

This paper analyses the international legal regime applicable to underwater cultural heritage prior to adoption of the UNESCO Convention, including whether there is emerging customary international law in this area. It does not consider regional instruments nor does it consider in any detail the provisions of admiralty law, such as the law of salvage, finds or abandonment. It then examines what sort of regime would be best suited to the protection and preservation of underwater cultural heritage, including the provisions of the UNESCO Convention.

I. Conventional Law of the Sea

Different rules apply to underwater cultural heritage depending on the different maritime zones in which it is located. Those rules are outlined below by reference to each maritime zone.

Internal waters, territorial waters and archipelagic waters

Activities relating to relics located on the seabed or subsoil of internal waters, territorial waters, or archipelagic waters, are subject to the jurisdiction of the coastal state. That is, the coastal state is able to exercise jurisdiction over underwater cultural heritage located in these waters in much the same way as it exercises jurisdiction over objects located in its land territory. The various passage regimes applying in territorial or archipelagic waters, such as rights of innocent passage, or passage through international straits, have little direct bearing on activities relating to underwater cultural heritage.

Contiguous zone

Activities relating to underwater cultural heritage, prima facie, do not come within those subject areas, namely, customs, fiscal, immigration or sanitary laws, in which a coastal state may take preventative or punitive action in the

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22 Hayashi, above n 21; Caflisch, above n 3, 10-11.
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contiguous zone. However, article 303(2) of UNCLOS provides that, in order to control traffic in archaeological and historical objects, the coastal state may presume that their removal from the seabed in the contiguous zone without its approval amounts to an infringement of the laws listed in article 33. This provision has a number of curious features. First, by a legal fiction, the removal of underwater cultural heritage is presumed to be an infringement of the coastal state's fiscal or customs laws, as neither immigration nor sanitary laws would apply to such activities. Second, it differs from the usual contiguous zone jurisdiction in that the coastal state may prevent, or take punitive action in respect of, the removal of objects located within 24 nautical miles of its baselines, rather than the coastal state's enforcement jurisdiction being limited to activities occurring within the territorial sea.

These features have led Strati to argue that this provision effectively creates a sui generis 'archaeological zone'. However, article 303(2) is limited to the coastal state exercising jurisdiction in relation to the removal of objects. It says nothing about the search for such objects, or the carrying out of archaeological or other activities impacting on underwater cultural heritage by nationals or vessels of other states. In order to overcome these limitations, Strati argues that article 303(2) should be interpreted teleologically and in concert with article 303(1), which provides a general duty on all states 'to protect objects of an archaeological and historical nature found at sea' and to cooperate to this end. If such an interpretation were accepted, then the coastal state's powers would not be limited to preventing the removal of relics, but would include limited control over archaeological exploration. The difficulty with Strati's argument is that it is unclear what the duty of protection in article 303(1) entails. Giorgi argues that article 303(1) 'implies that any operation aimed at damaging such objects wherever they lie is illegal and that states parties have a duty to notify the proposed removal operations and the intended subsequent acts of preservation and disposal, as well as to embark in good faith upon negotiations on relevant projects'. However, article 303(1) is silent as to who is to be notified: the coastal state, the flag state, the state of 'historical or cultural origin', an international organisation, or relevant private interests? What if no state has an interest in, for example, an historic shipwreck because it is located on the seabed of the high seas and no one claims ownership of the vessel? Given the vague language of article 303(1), the better conclusion is that

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23 Art 24 Convention on the Territorial Sea and the Contiguous Zone 1958, above n 18; art 33 UNCLOS, above n 19; Caflisch, above n 3, 13.
25 Strati, above n 17, 167-70; see also Caflisch, above n 3, 20.
26 Eg trawling or dredging or the laying of submarine cables or pipelines may disturb or damage objects on the seafloor, without entailing their removal.
27 Strati, above n 17, 167-70.
29 See art 149 UNCLOS, above n 19.
reached by Caflisch who comments that the duties of protection and cooperation in article 303(1) 'appear far too vague and general to have any significant normative content'.

A further difficulty with Strati's argument for an 'archaeological zone' is that examination of the history of the negotiations concerning article 303 can lead to the opposite conclusion. Article 303 stems from a Greek proposal submitted to the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1979, that is, at a relatively late stage of the negotiations. The Greek proposal would have given the coastal state sovereign rights over relics found on the seabed or subsoil of the continental shelf and the exclusive economic zone (EEZ), with preferential rights given to the states or countries of the relics’ cultural origin in the event of their disposal. However, some of the major maritime powers, notably the United States of America, the United Kingdom and the Netherlands, objected to this 'creeping jurisdiction' whereby coastal states were given rights not connected with the natural resources of the continental shelf, the extent of coastal states' rights regarding the continental shelf having already been settled in the negotiations. Agreement was not reached until the diplomatic conference when the interested delegations were given 48 hours to reach a compromise. The United States offered the 'solution', which became article 303. It does not appear to have been in the minds of the negotiators to create a new type of maritime zone; indeed, the maritime powers were against extending coastal state jurisdiction. The unfortunate result is that article 303 smacks of the worst aspects of a hastily agreed compromise, as it is vague, ambiguous and ill-conceived.

Further complexities arise when article 303(3) and 303(4) of UNCLOS are considered. Article 303(3) provides:

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.

Brief mention must be made of some pertinent aspects of the law of salvage and other rules of admiralty, which have a particular bearing on underwater cultural heritage. A vessel's owner does not relinquish rights in the vessel when it sinks, irrespective of what maritime zone it sinks in. These rights are only relinquished when the vessel has been abandoned, either expressly or impliedly. Determining issues of ownership and 'abandonment' can be complicated, and the applicable rules vary between national jurisdictions.

The law of salvage provides for compensation to be paid by the ship's owner to a salver who provides assistance to a vessel 'in peril', usually to the

30 Caflisch, above n 3, 20.
31 The Greek proposal was subsequently revised and became known as the seven-power proposal, referring to Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia. See Strati, above n 17, 162-65.
32 Giorgi, above n 28, 569-70; Caflisch, above n 3, 16-19; Strati, above n 17, 162-65.
33 P O'Keefe, 'International Waters' in Dromgoole, above n 3, 226.
34 Ibid 227. See also O Varmer and C M Blanco, 'United States of America' in Dromgoole, above n 3, esp 207-10.
value of what has been recovered. Consequently, salvage operates on commercial principles. Even a sunken vessel is deemed to be 'emperilled' thereby giving the salvor rights in relation to that vessel. If its owner has abandoned the vessel, then the salvor effectively becomes the owner, that is, 'finders keepers'.

Most of those who are interested in preserving and protecting underwater cultural heritage regard the economic incentives of salvage as antithetical to these goals. As O'Keefe notes, the commercial nature of salvage means that there is a temptation to extract commercially valuable material as quickly as possible, with little incentive to excavate to archaeological standards. In particular, much material that is of enormous interest to an archaeologist is often of little commercial value. Moreover, it is usual for a salvor, once awarded any material raised, to then sell it. Consequently, artefacts recovered from a wreck are dispersed, with little opportunity for others to study a collection of objects from the one site. However, Brice contests this view, arguing that salvors include highly trained professionals who can and do work with archaeologists to excavate underwater cultural heritage sites responsibly. Given the enormous expense of locating and recovering submerged objects, he argues that without salvors being prepared to engage in such speculative work, many underwater sites may go undetected and their artefacts unrecovered. The arguments based on experience seem to be stronger on the preservationists' side, than on those of the salvors. Another flaw with Brice's argument is that, given that the excavation of a wreck or other underwater site, whether it be by a salvor or an archaeologist, is an inherently destructive act, he gives little credence to the notion of underwater cultural heritage as an 'exhaustible resource' that should be preserved, conserved or managed so as to also allow future generations access to it.

There are further unresolved questions regarding whether this reservation in article 303(3) extends to the domestic legislation of the coastal state, whether the admiralty laws of the coastal state are to take priority over those of flag states in areas beyond the territorial sea, and whether article 303(3) takes precedence over article 303(1) and 303(2). Caflisch and Strati argue for a restrictive interpretation of article 303(3) so as to give meaning to the object

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35 O'Keefe in Dromgoole, above n 3, 227-30.
36 See eg Prott and O'Keefe, above n 6, 123; Hutchison, above n 6, 288-89.
37 O'Keefe in Dromgoole, above n 3, 229.
38 Bob Marx, one of the most notorious and successful 'treasure hunters', estimates the cost of 'working a wreck' to be between US$30,000 and US$40,000 per day. See S Williams, 'Marx is the Name, Treasure's the Game' (February 1997) 87 UNESCO Sources 9.
40 In other words, to apply international environmental law principles such as sustainable development and intergenerational equity to the protection and preservation of underwater cultural heritage. In this regard, see the discussion of the UNESCO Convention, below.
and purpose of article 303(1). Nevertheless, these ambiguities further weaken the effect of the general duty of states to protect the underwater cultural heritage set out in article 303(1).

Article 303(4) of UNCLOS provides:

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.

While it clearly preserves the operation of existing and future international conventions, it is unclear whether article 303(4) preserves existing rules of customary international law. Caflisch argues that article 303 was designed to modify the customary rule that underwater cultural heritage beyond the territorial sea was governed by the principle of freedom of the high seas, so that to preserve such a rule would be 'absurd'. Accordingly, he argues that article 303(4) should only preserve future rules of customary international law.

Exclusive economic zone

The orthodox view is that protection of underwater cultural heritage is not an activity coming within the jurisdiction of the coastal state under article 56 of UNCLOS because relics are not part of the living or mineral resources of the seabed; archaeology is not a relevant branch of marine scientific research; and the conservation of underwater cultural heritage does not involve protection of the marine environment. Consequently, it is generally assumed that high seas freedoms apply to activities relating to underwater cultural heritage in the EEZ.

Continental shelf

Under the 1958 Geneva Convention on the Continental Shelf (CSC) and UNCLOS, the coastal state has sovereign rights to explore and exploit the natural resources located on the continental shelf. Natural resources are defined as the mineral and other non-living resources of the seabed and living organisms belonging to sedentary species. In 1956, the International Law Commission in its commentary on the draft Convention on the Continental Shelf clarified that 'natural resources' did not include 'objects such as wrecked ships and their cargoes ... lying on the seabed or covered by the sand of the subsoil.' As the definition of 'natural resources' in UNCLOS is the same as

41 Caflisch, above n 3, 20-22; Strati, n 17, 171-74.
42 Caflisch, above n 3, 20-22. See also Strati, above n 17, 175-76.
43 On this point, see the discussion below concerning the continental shelf.
44 Giorgi, above n 28, 570; Strati, above n 17, ch 7. However, for the opposing view, see the section on continental shelf jurisdiction and the discussion of marine scientific research in the Area, below.
45 Hayashi, above n 21, 295.
46 Art 2 CSC; art 77 UNCLOS, above n 19.
47 Art 2(4) CSC; art 77(4) UNCLOS, above n 19.
48 As quoted in Hayashi, above n 21, 294. However, if a wreck was encrusted with sedentary organisms such as shellfish or coral, it could arguably be part of the natural resources of the continental shelf and thereby provide an incidental basis
in the CSC, it thus appears that the coastal state does not have exclusive jurisdiction with respect to underwater cultural heritage situated on its continental shelf.49

Some commentators have argued that underwater archaeology as an academic discipline comes within the purview of 'scientific research' relating to the natural resources of the continental shelf, or the marine environment generally.50 If this view is correct, then pursuant to articles 5(8) of the CSC and 246(2) of UNCLOS, the consent of the coastal state would be required before any such activity could be undertaken on its continental shelf, thereby giving the coastal state a degree of control over activities of third states, their nationals and vessels. Unfortunately, the better view is that underwater archaeology is excluded from the ambit of 'scientific research' for the purposes of the CSC and UNCLOS. This view is supported by the fact that underwater cultural heritage does not form part of the natural resources of the continental shelf, the text of the relevant provisions and their drafting history, and the fact that underwater archaeology is not directed at scientific inquiry regarding the marine environment.51

High seas and the 'Area'52
The list of 'high seas freedoms' in article 2 of the 1958 Geneva Convention on the High Seas is not exhaustive, so that the search for and recovery of underwater cultural heritage would be governed by the principle of the freedom of the high seas.53 Under UNCLOS the situation is similar, except in regard to relics located within the 'Area'.54 Consequently, in the high seas, the only constraint on states is not to interfere with the exercise by other states of the same freedoms of the high seas, and the vague duty in article 303(1).55

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49 Caflisch, above n 3, 14-15.
50 Verlaan argues that underwater archaeology is 'scientific research', above n 14, 243 as does H Zhao, 'Recent Developments in the Legal Protection of Historic Shipwrecks in China' (1992) 23 Ocean Development and International Law 316. This issue is discussed further in the section on the Area, below.
51 Caflisch, above n 3, 15, Strati, above n 17, 249-57 and 262, and O'Keefe and Nafziger, ILA Proceedings, above n 20, 11-12.
52 The 'Area' is defined in art 1 of the UNCLOS Convention as meaning 'the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction'. The landward boundaries of the 'Area' and the high seas need not coincide. To illustrate, if a coastal state's EEZ and continental shelf boundaries coincide, then the boundaries of the Area and the high seas will coincide. If, however, a coastal state has not claimed an EEZ, or the boundaries of the continental shelf extend beyond the EEZ, then the boundaries of the high seas and the Area will be different. See Brown, above n 24, 18-20 and 218.
53 Hayashi, above n 21, 293-94; Strati, above n 17, ch 6.
54 Hayashi, above n 21, 294.
55 Art 87 UNCLOS, above n 19.
Otherwise, admiralty law will govern underwater cultural heritage located in the high seas.56

In regard to underwater cultural heritage located on the deep sea bed beyond the continental shelf, that is, the ‘Area’, article 149 of UNCLOS provides:

All objects of an archaeological or 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.

This article stems from proposals submitted to the Seabed Committee of UNCLOS III by Greece in 1972 and by Turkey in 1973. Under these proposals historical and archaeological objects located in the Area were to be part of the common heritage of mankind, to be protected, or disposed of, by the International Seabed Authority with preferential rights given to certain states to acquire such objects in the event of their disposal.57 However, the text finally adopted as article 149 does not give the International Seabed Authority jurisdiction over such objects, nor does it specify how such objects are to be preserved or disposed of ‘for the benefit of mankind as a whole’,58 appearing to leave the matter to the discretion of individual states.59 Further, it does not provide a mechanism by which to determine, in the event of a conflict, which states are to take preference, or what these preferential rights entail.60 In this regard, the phrases ‘state or country of origin’, ‘state of cultural origin’ or ‘state of historical or archaeological origin’ are particularly unhelpful, as the following example illustrates.

Suggestions that antiquities found in international waters should belong to the country of historical or cultural origin are meaningless. ... [I]t is known that classical Greek statues were cast not only in what is modern Greece, but also in Italy, Asia Minor, and elsewhere. Would a unique bronze from far at sea belong to Greece, Italy, or Turkey today?61

It is also unclear whether, in the event of a dispute, such matters would be covered by the dispute settlement procedures in Part XI of UNCLOS.62 The better view is that the dispute settlement procedures in Part XI only apply to activities regarding the natural resources in the Area, so any disputes arising under article 149 will be covered by the general procedures in Part XV.63 There is no ad hoc procedure for the settlement of disputes.64

56 Strati, above n 17, 227.
57 Hayashi, above n 21, 292-93; Caflisch, above n 3, 26-28; Strati, above n 17, 296-300.
58 Interestingly, under art 149 underwater cultural heritage is not part of the ‘common heritage of mankind’ cf arts 133 and 136. See Strati, above n 17, 302-4.
59 Caflisch, above n 3, 29; Strati, above n 17, 300-1.
60 Ibid 29-30; Strati, above n 17, 301-2.
62 Giorgi, above n 28, 567.
63 Strati, above n 17, 306-7.
64 Giorgi, above n 28, 567.
Moreover, there is some uncertainty as to the interpretation to be given to 'objects of an archaeological and historical nature' which is common to articles 149 and 303(1). These terms are not defined in UNCLOS. It appears that the word 'historical' was included in the draft provision because the Tunisian delegation feared that the term 'archaeological' may not have been broad enough to cover Byzantine relics. Consequently, one of the United States' negotiators at UNCLOS III suggested that article 303 (and by implication article 149) was only meant to apply to objects that were many hundreds of years old and suggested a cut-off date of 1453, the year of the fall of Byzantium! However, the general rules of treaty interpretation would not support such a restrictive interpretation, with the result that the provisions would apply to objects of much more recent origin. Such a view is also supported by state practice, in that much national heritage protection legislation applies to objects of far more recent origin.

Just as there is debate over whether the continental shelf provisions concerning scientific research cover underwater archaeology, the inclusion of article 149 in Part XI has given rise to a similar debate as to whether underwater archaeology is a branch of 'marine scientific research'. Verlaan has suggested it is, so that article 143 and Part XIII of UNCLOS govern underwater archaeology. Accordingly, he argues that article 149 is intended to exclude salvage operations in the Area, and underwater archaeology in the Area is to be conducted only by states parties and the International Seabed Authority for the benefit of mankind as a whole. However, neither the drafting history of article 149, nor the text of Part XI supports this conclusion. For the reasons outlined above regarding scientific research conducted on the continental shelf, underwater archaeology does not appear to be a relevant branch of marine scientific research. Moreover, archaeological and historical objects are not included in the definition of 'resources' in article 133 and so do not fall within the mandate of the International Seabed Authority. Nor do archaeological and historical objects form part of the 'common heritage of mankind' in UNCLOS.

The exclusion of archaeological and historical objects from the 'common heritage of mankind' in UNCLOS seems surprising. As noted above, this concept was a feature of both the Greek and Turkish proposals that provided the foundations for article 149. Moreover, explicit or implicit in the advocacy for an improved international regime for the protection of underwater cultural heritage is the concept that these artefacts are a part of the shared or common heritage of humanity. However, at least in the context of UNCLOS, it is

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65 Caflisch, above n 3, 8-10.
66 Ibid 9; Prot and O'Keefe, above n 6, 104; Strati, above n 17, 179-80.
67 Verlaan, above n 14, 235-37.
68 Caflisch, above n 3, 15 and 23.
perhaps fortunate that the underwater cultural heritage was not deemed to be part of the ‘common heritage of mankind’. This is because the principle applies in respect of the exploration and exploitation of the mineral resources of the deep seabed.\textsuperscript{70} By contrast, the content of the common heritage of mankind principle in cultural heritage law is concerned with non-appropriation, preservation, protection and education.\textsuperscript{71}

Consequently, subject only to the vague principles stated in article 149 and the general duty articulated in article 303(1), activities relating to underwater cultural heritage located in the Area are governed by the principle of freedom of the high seas.\textsuperscript{72}

Strati has neatly summed up the position under UNCLOS and, by implication, the 1958 Geneva Conventions:

The 1982 scheme is, no doubt, incoherent and incomplete. Archaeological and historical objects found on the continental shelf, beyond the 24-mile limit, are “free for all”, while those found on the deep seabed are to be preserved for the benefit of mankind as a whole. ... The inability of the 1982 Convention to provide an efficient scheme of protection is the result both of the manner in which the archaeological issue was dealt with during the negotiations of UNCLOS III and of the determination of the maritime powers to prevent the expansion of coastal competence over archaeological objects on the continental shelf.\textsuperscript{73}

\section*{II. Unilateral Measures: Emerging Customary International Law?}

The history of the law of the sea is littered with examples of unilateral action by one state being copied by other states, leading to the rapid development of customary international law and, ultimately, treaty law.\textsuperscript{74} In other situations, unilateral action such as Canada’s Arctic Waters Pollution Prevention Act of

\begin{itemize}
  \item \textsuperscript{70} Strati, above n 17, 303. Note however that following the adoption in 1994 of the Agreement relating to the Implementation of Part XI UNCLOS, above n 19, the common heritage of mankind principle has been dropped from Part XI UNCLOS: Hunter, Salzman and Zaelke, above n 69, 338 and 795-97.
  \item \textsuperscript{71} Strati, above n 17, 8-10 and 302-4. Hunter, Salzman and Zaelke also point out that the common heritage of mankind principle currently has limited application although it generally has the following four features: non-appropriation, international management, shared benefits and reservation for peaceful purposes: see above n 69, 338-39. However, the application of the common heritage of mankind principle in cultural heritage law lacks at least one of these features; international management. This is due to the focus of much cultural heritage law being on land-based artefacts that come within national jurisdiction. In relation to the underwater cultural heritage, much of which may be located in international waters, Strati argues for some form of international trust to be managed by an international authority: see Strati, above n 17, 8-9 and 304-5.
  \item \textsuperscript{72} Giorgi, above n 28, 567.
  \item \textsuperscript{73} Strati, above n 17, 311.
  \item \textsuperscript{74} The Truman Proclamation extending the United States’ jurisdiction over the continental shelf, the extension of an exclusive fishing zone to 12 nautical miles by Iceland and the claim by some Latin American states to the precursor of a 200 nautical mile EEZ, are prime examples.
\end{itemize}
1970 – no matter how worthy its aims, how ineffective the current state of international law to achieve those aims, or even the claimed international legal bases for the measure – has attracted immediate protest by other states alleging violations of international law.\footnote{J A Beesley, ‘The Canadian Approach to International Environmental Law’ (1973) 11 \textit{Canadian Yearbook of International Law} 3; Louis Henkin, ‘Arctic Anti-Pollution: Does Canada Make – or Break – International Law?’ (1971) 65 \textit{American Journal of International Law} 131.}

The success or otherwise of unilateral action in blazing a trail for the formation of new international law depends on a number of factors. Some of those identified by Henkin include: the geopolitical issues affected; the framing of the measure, especially whether it is tailored to particular situations rather than applying generally; the process undertaken in formulating the measure; and whether it departs from recently agreed international law, particularly multilateral treaty law.\footnote{Henkin, ibid 135-36.} Consequently, while national legislation will meet domestic legal and political requirements, it can never be safely predicted in advance whether unilateral action which may stretch the boundaries of settled international law will be either effective or accepted on the international plane.

Moreover, to develop into customary international law, two requirements must be met: there must be relatively uniform, consistent and general state practice; and that practice must arise from states acting under a sense of legal obligation \textit{(opus juris sive necessitatis)}.\footnote{I Brownlie, \textit{Principles of Public International Law} (4th ed, 1990) 5; Hunter, Salzman and Zaelke, above n 69, 223-25.} In respect of the protection of the underwater cultural heritage, while a number of states have enacted relevant domestic legislation, does this indicate the emergence of a norm of customary international law which may remedy the shortcomings of the law of the sea conventions?

Most municipal legislation relevant to the protection of underwater cultural heritage extends only to the limits of the territorial sea or contiguous zone. However, notwithstanding the views outlined above that continental shelf jurisdiction does not apply to underwater cultural heritage, some states have enacted heritage protection legislation that extends to their continental shelf. One oft-cited and early example is Australia’s Historic Shipwrecks Act 1976 (Cth). While the 1972 Netherlands-Australia Agreement Concerning Old Dutch Shipwrecks\footnote{The text of the Agreement can be found at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/treaties/1972/18.html?query=historic+shipwreck>.} partially provides the constitutional underpinning of the legislation, the Commonwealth also relies on its obligations under the CSC.\footnote{The definition of continental shelf in s 3(1) of the Act is the same as that in the Seas and Submerged Lands Act 1973 (Cth) which in turn refers to the definition in the CSC. Schedule 2 of the Petroleum (Submerged Lands) Act 1967 (CSC) defines those waters in which the Historic Shipwrecks Act applies, namely, from the low-water mark out to certain geographical coordinates that approximate to the edge of the Australian continental shelf. See B Jeffrey, ‘Australia’ in Dromgoole, above n 3, 6-7; and P O’Keefe and L Prott, ‘Australian Protection of Historic Shipwrecks’ (1978) 6 \textit{Aust YBIL} 133.}
Although no state has protested this extension of jurisdiction, some commentators have expressed doubt over the legislation's validity in international law. Similar doubts have been expressed about Ireland's National Monuments (Amendment) Act 1987 which protects wrecks or other objects of historical, archaeological or artistic importance on the continental shelf. Portugal, Spain, the Seychelles and Cyprus also exercise jurisdiction over underwater cultural heritage on the continental shelf.

Other states, such as Norway and Thailand, require persons holding permits for prospecting or drilling for hydrocarbons on the continental shelf to comply with domestic legislation of the coastal state 'in the event of accidental discovery of archaeological property.' This approach is more consistent with the provisions concerning the exploration or exploitation of the natural resources of the continental shelf in UNCLOS and the CSC.

Morocco and Jamaica claim jurisdiction over archaeological research conducted in the EEZ, while Denmark exercises jurisdiction over relics found within its 200 nautical mile fishing zone. In addition, the legislation of some 13 other states extends jurisdiction over the conduct of research, or sovereign rights over all resources, structures or other devices within the EEZ, which may extend, depending on the construction of the particular legislation, to archaeological research. Another 11 states claim a 200-nautical-mile territorial sea and cultural property found within these waters comes under the jurisdiction of these coastal states.

Interestingly, the United States, one of the maritime powers that objected to the 'creeping jurisdiction' of the Greek proposal that laid the basis for article 303 of UNCLOS, has legislation that allows for the creation of marine parks or sanctuaries up to 200 nautical miles offshore, that is, within its EEZ. The National Marine Sanctuaries Act 1972 allows the designation of particular areas of the marine environment possessing, inter alia, 'historical, research, education, or aesthetic qualities which give them special national significance'. One national marine sanctuary has been created solely to protect an historic shipwreck, the *USS Monitor*, an ironclad Civil War vessel, which lies some 16 miles off the coast of North Carolina. The United States also initiated an

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80 O'Keefe and Prott, ibid 133.
81 N O'Connor, 'Ireland' in Dromgoole, above n 3, 89-90.
82 Zhao, above n 50, 318; Strati, above n 17, 269; E Z Alvarez, 'Spain' in Dromgoole, above n 3, 144.
83 Giorgi, above n 28, 572; Prott and O'Keefe, *Law and the Cultural Heritage*, above n 6, 96; O'Keefe in Dromgoole, above n 3, 223.
84 Strati, above n 17, 270.
85 Democratic People’s Republic of Korea, Iceland, Mauritius, Pakistan, Vanuatu, Barbados, Grenada, Guyana, Philippines, Tanzania, Iran, Malaysia, and Trinidad and Tobago: see Strati, above n 17, 270 and 292-93.
86 Benin, Congo, Ecuador, El Salvador, Liberia, Nicaragua, Panama, Peru, Sierra Leone, Somalia and Uruguay: see Strati, above n 17, 270 and 293.
87 Varmer and Blanco, above n 34, 213.
agreement with the United Kingdom, Canada and France to protect the *Titanic*, which lies in international waters.\(^8\)

The United Kingdom, which also objected to ‘creeping jurisdiction’ in relation to article 303 of UNCLOS, has adopted legislation extending protection to certain military wreck sites containing human remains in international waters.\(^8\)

Although its territorial basis is limited to the territorial sea, a unique feature of the Swedish cultural heritage legislation is that archaeological finds and wrecks at least 100 years old discovered in the Area and salvaged by Swedish vessels, or taken into Swedish territory, accrue to the state. The relevant legislative provisions implement article 149 of the UNCLOS.\(^9\)

China’s claim to jurisdiction is the most extensive. The 1989 Regulation on Protection and Administration of Underwater Cultural Relics applies to all sea areas under Chinese jurisdiction and to ‘cultural relics originating from China which remain beyond the territorial sea of a foreign country but within the sea areas under foreign jurisdictions or within an area of the high seas’.\(^9\) Although this legislation in part relied on China’s anticipated obligations under UNCLOS (China being a signatory only to UNCLOS at the time the regulation was made), the compatibility of this legislation – particularly the assertion of jurisdiction over cultural relics originating from China but beyond the territorial sea of another state – with international law is questionable.\(^9\)

While there is some state practice indicating that a coastal state may exercise jurisdiction over underwater cultural heritage located beyond its territorial sea or contiguous zone, that practice is neither sufficiently extensive nor sufficiently uniform to indicate the emergence of a new rule of customary international law. This conclusion is reinforced by the lack of uniformity in national legislation concerning the threshold age at which wrecks and other objects are protected, whether finds of underwater cultural heritage accrue to the state or private interests, the application of salvage law and provisions for the enforcement of national legislation.\(^9\)

From the point of view of those interested in preserving underwater cultural heritage, national legislation that provides the greatest possible jurisdictional coverage – especially where it is backed up by an effective enforcement regime – is to be preferred. Unilateral action can thus overcome some of the defects in

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\(^9\) T Adlercreutz, ‘Sweden’ in Dromgoole (ed), above n 3, 162.

\(^9\) Zhao, above n 50, 310; P Hoagland, ‘China’ in Dromgoole (ed), above n 3, 28.

\(^9\) Zhao, ibid 316-23; Hoagland, ibid 28.

These issues are not canvassed here. However, a useful survey of some of the differences in national approaches on these issues is contained in Dromgoole, ‘Editor’s Introduction’, above n 3, xviii-xix, and the collection of essays on selected national schemes in *Legal Protection of the Cultural Heritage*. 
the conventional law of the sea and customary international law. However, doubts have been expressed about the international legal validity of some national legislation which extends jurisdiction over underwater cultural heritage located beyond the coastal state's contiguous zone, although these doubts have been expressed by commentators, and not by other states:

One drawback of unilateral measures is that a lack of uniformity can create uncertainty and conflicting claims from those whose rights and interests may be affected, for example, underwater archaeologists, salvors, oil companies, and submarine pipeline and cable layers. The lack of uniformity and international consensus may also provide opportunities for less than scrupulous operators to attempt to influence national legislators to pass laws that best suit their interests. One notorious example of this occurred in Portugal, where a number of international treasure-hunting companies interested in salvaging some of the Spanish galleons and Portuguese Indiamen wrecked around the Azores, succeeded in persuading the Portuguese government to pass laws that would have allowed them to do so. Expressions of international concern, including by UNESCO, and a concerted campaign by the local archaeological community, eventually persuaded the Portuguese government to change its mind. While international law may not necessarily have prevented this from happening, a more certain international legal regime would have bolstered the arguments of those interested in protecting and preserving the Azores wrecks for archaeological and public benefit.

A further disadvantage of unilateral action is that national governments can effectively do little to protect underwater cultural heritage located in international waters. For example, agreements such as that concerning the Titanic only apply to the states party to such agreements. Consequently, multilateral agreement is likely to be a more effective strategy to protect underwater cultural heritage.

### III. The Way Forward? The UNESCO Convention on the Protection of the Underwater Cultural Heritage

The lack of a comprehensive international regime for the protection of underwater cultural heritage led the ILA to adopt a draft convention on the subject at its 1994 conference. Annexed to the ILA draft was a Charter prepared by the International Council on Monuments and Sites (ICOMOS) containing guidelines for the study, excavation and preservation of underwater cultural heritage. That draft, with modifications, was taken up by UNESCO in

94 Williams, above n 5, 7.

It is interesting to trace the evolution of the text by comparing the text of the Convention as adopted with the ILA draft. While the Convention is a major improvement on the UNCLOS regime, it is obvious from the course of the negotiations in UNESCO that the ILA’s uncompromisingly preservationist stance has been watered down.\(^9\) Obviously, for the Convention to be effective and to attract wide support by states, it needs to balance appropriately the interests of a diverse range of groups, including states themselves, shipowners, salvors, divers, art collectors, and those concerned to preserve the underwater cultural heritage as a public resource for this and future generations, such as archaeologists.\(^7\) While still in draft form, the Convention attracted alarmist comment and active opposition from sport divers’ associations in the United States, and this opposition has continued.\(^8\) Nevertheless, there was consensus among states represented at the UNESCO Experts’ Meetings that a multilateral regime for the better protection of underwater cultural heritage is desirable and

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\(^7\) Strati, above n 17, 18-20; Prott and O’Keefe, above n 6, 15-27.

some agreement that clarification or expansion of the rights and duties of the coastal state over relics located on the continental shelf is appropriate.\textsuperscript{99} It is clear, however, that the text of the Convention as adopted does not represent a satisfactory compromise on all issues for the states taking part, as four states voted against the Convention and 15 abstained.\textsuperscript{100}

The preamble to the Convention opens by '[a]cknowledging the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage'.\textsuperscript{101} This represents a departure from the ILA draft that stated that underwater cultural heritage 'belongs to the common heritage of humanity'.\textsuperscript{102} The reports of the meetings convened by UNESCO to consider the draft Convention give no indication as to what prompted the change in wording. It may reflect the fact that the principle of 'common heritage of humanity' or 'common heritage of mankind' has fallen from disfavour so that it now has only limited application,\textsuperscript{103} or it may also be a recognition of the fact that the 'common heritage of mankind' usually refers to the resources of the global commons, not to things located within states' jurisdiction.\textsuperscript{104} Another explanation may be that there was a desire to place greater emphasis on the preservation of underwater cultural heritage for this and future generations, rather than treating it as an exploitable resource. The preamble goes on to recognise the importance of protecting and preserving the underwater cultural heritage and to state that the responsibility for protecting and preserving the underwater cultural heritage rests with all states.\textsuperscript{105}

A theme running through the preamble and the Convention is the need for education about the significance of the underwater cultural heritage and public access to it. The preamble does this by noting the growing public interest in underwater cultural heritage, the need for education and dissemination of information about the significance of underwater cultural heritage and the growing threats to it, as well as 'the public's right to enjoy the education and recreational benefits of responsible, non-intrusive access to in situ underwater cultural heritage'.\textsuperscript{106}

\textsuperscript{99} See the paper on the draft Convention prepared for the UNESCO General Conference, 31st Session, above n 96.

\textsuperscript{100} Eighty-seven states voted in favour of the Convention. The four votes against were from Norway, Russian Federation, Turkey and Venezuela and the following 15 states abstained from voting: Brazil, Colombia, Czech Republic, France, Germany, Greece, Guinea-Bissau, Iceland, Israel, Netherlands, Paraguay, Sweden, Switzerland, United Kingdom, Uruguay. See 'Activities – Underwater Cultural Heritage', <http://www.unesco.org/culture/legalprotection/water/html_eng/convention.shtml>.

\textsuperscript{101} Preambular [1].

\textsuperscript{102} ILA draft, preambular [6].

\textsuperscript{103} Hunter, Salzman and Zaelke, above n 69, 334.

\textsuperscript{104} Ibid 343.

\textsuperscript{105} Preambular [2].

\textsuperscript{106} Preambular [3], [4] and [5].
Another theme in the preamble is the need for cooperation ‘among States, international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties and the public at large’ as ‘essential for the protection of underwater cultural heritage’. Cooperation is also inherent in the idea that responsibility for protecting and preserving the underwater cultural heritage rests with all states. Although the international environmental law principle of ‘common concern’ is not referred to, it is arguably implicit in this emphasis on cooperation and shared responsibility.

A third theme is the need for the development of the law and rules applicable to underwater cultural heritage. This is expressed through the emphasis on the specialised techniques necessary for the exploration, excavation and protection of underwater cultural heritage indicating a ‘need for uniform governing criteria’ and the need to ‘codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice’. However, the ‘progressive development’ aspect proved to be one of the major hurdles in the negotiations.

The ILA’s draft sought to bridge the gaps in the UNCLOS regime by allowing states parties to establish a ‘cultural heritage zone’ extending to the outer limits of the continental shelf. Within this zone, the coastal state would control all activities relating to underwater cultural heritage, subject to rights of innocent passage, transit passage and freedom of navigation. However, as would be expected from the above discussion of the UNCLOS provisions and state practice, the issue of coastal state jurisdiction over underwater cultural heritage, especially on the continental shelf or in the EEZ is contentious. Understandably, given the protracted nature of the negotiations and the comprehensiveness of UNCLOS, there was reluctance on the part of some states to risk re-opening or amending the UNCLOS rules, despite there being general agreement on the need to improve the international legal regime applicable to underwater cultural heritage. There was tension between those who felt that the coastal state’s jurisdiction should not extend beyond that established by UNCLOS, while others felt the need to remedy the deficiencies of the UNCLOS provisions through the negotiation of a new, more far-reaching, instrument.

Reflecting these tensions, the notion of a cultural heritage zone was dropped and in its place the Experts’ Meetings developed three sets of options concerning the possible extent of coastal state jurisdiction. The first of these

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107 Preambular [10].
108 Preambular [2].
109 Hunter, Salzman and Zaelke, above n 69, 343-45.
111 Preambular [12].
112 ILA draft, arts 1.3 and 5.
113 First Experts meeting, p 2; Second Experts meeting, p 3.
114 First Experts meeting, p 3; Second Experts meeting, pp 3-4.
allowed a coastal state to exercise jurisdiction over underwater cultural heritage in their exclusive economic zone or on their continental shelf. Any discoveries would have to be reported to the coastal state's competent authorities, and the coastal state may regulate activities directed at or affecting underwater cultural heritage within these maritime zones.\textsuperscript{115} The second option, with a nod to article 303 of UNCLOS, provided that in exercising their sovereign rights in the EEZ and on the continental shelf, a coastal state shall take account of the need to protect underwater cultural heritage. However, the coastal state's jurisdiction is limited to territorial waters, or it may extend to the outer limits of the contiguous zone for those states that have declared such a zone.\textsuperscript{116} The third option sought a middle path. It provided that nothing in the draft Convention 'shall prejudice the rights, jurisdiction and duties of states' under UNCLOS, or, in an alternative formulation, the draft Convention 'shall be interpreted and applied in the context of and in a manner consistent with' UNCLOS.\textsuperscript{117} It then went on to provide that the coastal state shall be notified of any activity or discovery relating to underwater cultural heritage in its EEZ or on the continental shelf. The coastal state may 'authorize protective interventions and scientific research' on the underwater cultural heritage, in consultation with the competent national authorities of the state whose nationals or vessels intend to engage in such activities, so as to ensure, at a minimum, compliance with the Rules Concerning Activities Directed at Underwater Cultural Heritage (the Rules).\textsuperscript{118}

The final text of the Convention has further elaborated upon option three. In order to seek to resolve the tension between those who wanted to preserve the existing jurisdictional regime in UNCLOS, article 3 of the Convention states:

> 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.

While it should be possible to read the Convention together with UNCLOS, this provision arguably perpetuates the ambiguities regarding the scope and application of the relevant UNCLOS provisions which have been discussed above.

Moreover, article 6 provides that the Convention does not alter the rights or obligations of states parties under bilateral, regional or multilateral agreements for the protection of sunken vessels concluded before its adoption. Article 6 also encourages states parties to enter into bilateral, regional or multilateral agreements for the preservation of underwater cultural heritage, provided such agreements are in conformity with the Convention. While the intention behind

\textsuperscript{116} Ibid art 5, opt 2.
\textsuperscript{117} Ibid art 2 bis, opt 3.
\textsuperscript{118} Ibid art 5, opt 3.
articles 3 and 6 is perfectly understandable, determining and reconciling the international law applicable to a particular underwater cultural heritage site could be a very complicated exercise.\footnote{119}

The final text of the Convention provides that in its internal waters, archipelagic waters or territorial sea, states parties have the exclusive right to regulate and authorise activities directed at underwater cultural heritage in these waters. However, the Convention also provides that states parties shall apply the Rules which are annexed to the Convention. In addition, where identifiable state vessels and aircraft are located in these waters, states parties should inform the flag state, if a party to the Convention, and other states with a verifiable link, especially a cultural, historical or archaeological link, of such discoveries. Such information should be transmitted with 'a view to cooperating on the best methods' of protecting such vessels or aircraft.\footnote{120}

Article 8 provides that states parties may regulate and authorise activities directed at underwater cultural heritage within the contiguous zone, provided that the Rules are applied. Article 8 states that this is in accordance with article 303 of UNCLOS. Article 8 is also stated to be 'without prejudice to and in addition to Articles 9 and 10' of the Convention, which concern underwater cultural heritage located in the EEZ and on the continental shelf. As was to be expected, the extent of coastal states' jurisdiction over underwater cultural heritage located in its EEZ or on its continental shelf was among the most controversial issues to be dealt with in the course of negotiations.\footnote{121}

Article 9 relies on nationality and flag state jurisdiction to establish a reporting and notification regime.\footnote{122} Although such a regime would appear to be fairly innocuous, article 9 was one of the most controversial provisions to be negotiated.\footnote{123} If a national or a vessel flying its flag discovers or intends to engage in activities directed at underwater cultural heritage located in the state party's EEZ or on its continental shelf, the national or the master of the vessel is required to report such discovery or activity to the state party. A similar report shall be provided to the state party where its nationals or flagged vessels discover or intend to undertake activities directed at underwater cultural heritage located in the EEZ or on the continental shelf of another state party.\footnote{124}

\footnote{119} Art 25 provides that if states parties cannot settle a dispute between themselves, then it may be referred to UNESCO for mediation. If mediation is unsuccessful, then the provisions relating to the settlement of disputes in Part XV of UNCLOS apply.
\footnote{120} Art 7.
\footnote{121} O'Keefe, above n 48, 81-83, 88.
\footnote{122} Art 16 provides '[s]tate parties shall take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with this Convention'.
\footnote{123} O'Keefe, above n 48, 81.
\footnote{124} Art 9 [1(a)]. However, warships and other government ships and aircraft with sovereign immunity undertaking their normal mode of operations are not obliged to report discoveries of underwater cultural heritage – see art 13. This exclusion also applies to arts 10, 11 and 12 of the Convention.
However, the discovery or activity shall also be reported to the coastal state either directly by the national or the vessel’s master, or by the national’s or flag state. In the latter case, the transmission is indirect as the state which has received the report is required to transmit it to all other states parties.

There is a ‘constructive ambiguity’ in article 9, paragraph 1(b) that represents a compromise between the interests of those maritime states that were concerned to prevent the extension of coastal states’ jurisdiction over the continental shelf and the EEZ and those states that sought to extend the protection of underwater cultural heritage.

On one interpretation, article 9, paragraph 1(b) would give the coastal state power to take action with regard to underwater cultural heritage located on its continental shelf or in its EEZ, even when the discovery has been made by non-nationals or vessels flagged in another state.

Alternatively, article 9, paragraph 1(b) can be read as giving the coastal state a right to receive only a report. Although this ambiguity may have allowed for a compromise to be reached in negotiations, it will be interesting to see whether it prevents a number of the maritime states from becoming parties to the Convention, or gives rise to disputes on the Convention’s interpretation and application.

Reports made under article 9 are also to be transmitted to the Director-General of UNESCO, who will then make the information available to all states parties to the Convention. Any state party that has a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned may declare its interest in being consulted in the effective protection of that heritage to the state party in whose EEZ or continental shelf the underwater cultural heritage is located.

Article 10 establishes a cooperative regime for the protection of underwater cultural heritage located in a state party’s EEZ or continental shelf. The purpose of article 10 is to establish, in consultation with all states parties that have declared an interest under article 9, measures for the protection of the underwater cultural heritage. In most cases, the coastal state will play the role of coordinating state, unless it expressly declares that it does not wish to do so, in which case the states parties with a declared interest shall appoint a coordinating state. Article 10 expressly provides that the coordinating state ‘shall act on behalf of the States Parties as a whole and not in its own interest’. In respect of state vessels and aircraft, any activities must be conducted with the agreement of the flag state and in collaboration with the coordinating state. As it could take some time for all interested states to reach an agreement, paragraph 4 allows the ‘Coordinating State’ (in most cases, likely to be the coastal state) to take ‘all practicable measures’ to prevent any immediate danger to the underwater cultural heritage.

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125 Art 9 [1(b)(i)].
126 Art 9 [1(b)(ii)].
127 O’Keefe, above n 48, 82-83.
A potential limitation on the scope of any protective regime is contained in article 10, paragraph 2 which provides that the state party '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'. One of the rights of a coastal state is the exploitation of the natural resources of its continental shelf. Accordingly, if an historic wreck is located on the continental shelf of a state party near where drilling for oil or natural gas is to take place, it is entirely within the state party's rights to prohibit any study or preservation of the wreck if that were to interfere with the exploitation of these natural resources. However, the operation of the UNCLOS provisions on continental shelf jurisdiction can also operate to offer protection of underwater cultural heritage in some circumstances. For example, wrecks frequently provide habitats for fish, or are so encrusted with sedentary organisms as to be embedded in a reef. In such circumstances, the wreck may form part of the natural resources of the continental shelf and the state party is exclusively entitled to regulate activity with regard to these resources, thereby incidentally protecting the wreck.

In relation to underwater cultural heritage in the Area, a similar notification and protection regime to that applying to the EEZ and continental shelf is established. However, in addition to notifying the Director-General of UNESCO of any discoveries or activities, the state party whose national or flagged vessel has located the underwater cultural heritage shall also notify the Secretary-General of the International Seabed Authority.

One issue the Convention does not explicitly address is who is to bear the costs of protecting underwater cultural heritage located in the Area. As noted above, underwater archaeology is very expensive, even more so in the very deep waters beyond the continental shelf. Similarly, monitoring activities undertaken so far from land can be very expensive and there is little scope for taking any enforcement action due to the 'freedoms' of the high seas. The issue of costs would presumably be addressed in any agreement between the interested state parties. However, the potential costs involved could limit the extent or effectiveness of any measures, or the willingness of some states to become involved in the protection and management of underwater cultural heritage located in the Area.

In addition to nationality and ‘flag’ jurisdiction, an important, protective aspect of the Convention involves the use of territorial and ‘port state’ jurisdiction. Article 14 provides that ‘[s]tates parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention’. Article 15 provides that states parties are to

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128 UNCLOS, above n 19, art 77.
129 O'Keefe, above n 48, 90.
130 See art 11: Reporting and notification in the Area, and art 12: Protection of underwater cultural heritage in the Area.
131 Including freedom of navigation, see UNCLOS, above n 19, art 87.
take measures ‘to prohibit the use of their territory, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of any activity directed at underwater cultural heritage which is not in conformity with this Convention’.

Article 17 provides for the imposition of sanctions for violations of measures taken in implementation of the Convention. Article 18 allows a state party to seize underwater cultural heritage in its territory which has been recovered in a manner not in conformity with the Convention. The Director-General of UNESCO is to be notified of any such seizures, as are any states, with a ‘verifiable link’ to the items seized. The state party is to ensure that the disposition of any seized underwater cultural heritage is for the public benefit.

A significant point of departure between the ILA draft and the Convention concerns salvage law. The ILA draft had a specific provision excluding the application of salvage law to underwater cultural heritage,132 it being argued that the economic imperatives of salvage are irreconcilable with archaeological excavation. Article 2, paragraph 7 of the Convention states that underwater cultural heritage shall not be commercially exploited. This is reinforced by Rule 2 in the Annex to the Convention, which states that the commercial exploitation of underwater cultural heritage ‘for trade or speculation’ is ‘fundamentally incompatible’ with its preservation and proper management. The Rule goes on to state that underwater cultural heritage ‘shall not be traded, sold, bought or bartered as commercial goods’. However, ‘commercial exploitation’ is not defined in the Convention. As O'Keefe notes, determining what is ‘commercial exploitation’ within the meaning of article 2 and rule 2 may itself be problematic. For example, is it ‘commercial exploitation’ to exhibit artefacts from a wreck and charge entry fees to the exhibition, such as was done by the venture company formed to raise artefacts from the Titanic? Similarly, is it ‘commercial exploitation’ to charge for guided tours of a wreck, or to make films of such sites?133 Accordingly, it seems that it will be up to individual states to determine what constitutes prohibited commercial exploitation within the meaning of the Convention, having regard to its principles and objectives.

Article 4 which, subject to certain conditions, preserves the operation of salvage law, appears to sit oddly with these provisions. Article 4 provides that underwater cultural heritage shall not be subject to the law of salvage or the law of finds134 unless it is authorised by the competent authorities, is in full conformity with the Convention and ensures that any recovery of the underwater cultural heritage achieves its maximum protection.135 This appears to be a sensible compromise in several respects. First, in many jurisdictions

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132 ILA draft, art 4.
133 O'Keefe, above n 48, 51-52, 158. O'Keefe concludes that such activities would not infringe Rule 2, although they could arguably infringe art 2 [7].
134 Salvage law provides for the compensation of the effort undertaken by the salvor who saves ship from loss or danger at sea. The law of finds confers ownership on the person who finds and reduces to possession an abandoned vessel. See O'Keefe, above n 48, 61.
135 Art 4.
salvage law does not apply to sunken vessels and, after a period of time, such vessels become state property so that the law of finds, which applies to abandoned vessels, is not applicable. Accordingly, it seems sensible to allow those states in which salvage law or the law of finds are applicable the scope to regulate salvage activities in a way that is compatible with the Convention. Second, while the commercial imperatives of salvage, whereby the amount awarded is based on a percentage of the value of what is saved and the work undertaken, can be incompatible with studying and preserving a wreck according to archaeological standards and practice, this does not always have to be the case. As O'Keefe notes, United States courts have sought to apply such standards and practices to salvors working on historic wrecks, although this may not always have been done to the satisfaction of professional archaeologists and problems may arise in applying and enforcing such standards where the work is undertaken within the sea areas of another state.

Moreover, the difficulties and expense involved in underwater archaeology may mean that 'commercial', profit-seeking ventures, including salvage operators, will be the only ones ever likely to access significant historic wrecks in very deep water. For example, while many in the cultural heritage community are deeply sceptical of the operations of the company formed to raise artefacts from the wreck of the Titanic, the simple fact is that it is highly unlikely that a public, not for profit institution would have the funds available to undertake such work. Accordingly, it makes more sense to educate and as far as possible regulate the activities of those undertaking such ventures so as to preserve the heritage and archaeological values of a site. Finally, despite the imperative language of article 2, paragraph 7, it seems that commercial salvage activities directed at underwater cultural heritage will not infringe the prohibition on commercial exploitation, provided the conditions in article 4 are fulfilled.

Sunken warships and military aircraft were excluded from the coverage of both the ILA draft and earlier drafts of the Convention. Nevertheless, the records of the Experts' Meetings indicate that this issue was not uncontentious, particularly what constitutes a warship or military aircraft. Article 2, paragraph 8 provides that nothing in the Convention 'shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any States' rights with respect to its State vessels and aircraft.'

Finally, mention must be made of other provisions of the Convention that provide for information sharing and assistance between states parties, the

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136 O'Keefe, above n 48, 62.
137 Ibid 61.
138 Ibid 62.
141 First Experts meeting, pp 5-6; Second Experts meeting, pp 4-5.
142 Art 19.
obligation of states parties to raise public awareness of the 'value and significance of underwater cultural heritage' and the importance of protecting it,\textsuperscript{143} and the provision of training in underwater archaeology.\textsuperscript{144}

IV. Conclusion

Despite the many threats to the underwater cultural heritage, the major hope for its conservation lies in the growing public awareness of and interest in it. Although underwater archaeological excavation is very expensive and most cultural institutions are chronically under-resourced, there are several examples that demonstrate that underwater archaeology can be undertaken without a major drain on public resources, as well as provide new sources of revenue, principally through tourism. For example, the excavation and salvage of the Tudor warship the \textit{Mary Rose} was funded from private donations;\textsuperscript{145} the \textit{Wasa} museum in Stockholm is Sweden's only self-sustaining museum;\textsuperscript{146} a quarter of a million tourists visit the Western Australian Maritime Museum per year; and, due to the pioneering work of archaeologists such as George Bass and Peter Throckmorton, Bodrum in Turkey has now been transformed from a small town whose principal industries were fishing and sponge-diving, to one of the main centres for the study and practice of underwater archaeology in the Mediterranean, with attendant increases in population and tourism.\textsuperscript{147}

'Stakeholders', such as recreational divers, cable-layers, prospectors and salvors, should also be encouraged to preserve and protect underwater cultural heritage.

Nevertheless, education and awareness alone are not enough and need to be supported by an adequate international legal framework. In this respect, the conventional law of the sea is deficient. Unilateral action by some states has overcome some of these deficiencies by extending jurisdiction over underwater cultural heritage beyond the territorial sea. However, such unilateral action has many disadvantages. Despite the compromises evident in its text, the Convention for the Protection of Underwater Cultural Heritage offers good prospects for remedying many of the deficiencies of the conventional law of the sea. It is to be hoped that the emphasis on cooperation in the Convention will be placed above the interests of individuals and states in order to protect this important aspect of our shared heritage.

\textsuperscript{143} Art 20.
\textsuperscript{144} Art 21.
\textsuperscript{145} Williams, above n 5, 12-13.
\textsuperscript{146} Karlsson, above n 10, 15.
\textsuperscript{147} Williams, above n 5, 8.