

The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea

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I. Introduction

For more than two decades, the international community has been struggling for a comprehensive legal instrument governing the protection of the underwater cultural heritage. In view of the growing sense of frustration with the slow progress at the Third United Nations Conference on the Law of the Sea (UNCLOS III) and the relatively low status of marine archaeology in the context of the negotiations for an international treaty on the law of the sea,¹ the idea of a specific agreement on maritime cultural property emerged in January 1977, when states, in the course of the debates at UNCLOS III, called for a report of the Council of Europe’s Parliamentary Assembly on the protection of the underwater cultural heritage at the European level. Following this report — the so-called Roper-Report² —, the Parliamentary Assembly adopted, in 1978, Recommendation 848 suggesting, *inter alia*, the drawing up of a European Convention on the Protection of the Underwater Cultural Heritage, which was supposed to form the basis of a wider international agreement.³

¹ See A.C. Arend, “Archaeological and Historical Objects: The International Legal Implications of UNCLOS III”, *Va. J. Int’l L.* 22 (1982), 777 et seq.

² Report of the Committee on Culture and Education of the Parliamentary Assembly of the Council of Europe on the Underwater Cultural Heritage (Rapporteur: Mr. Roper), published in: Council of Europe, *Documents of the Parliamentary Assembly, Thirtieth Ordinary Session (Second Part)*, 27 September - 4 October 1978, Vol. IV, 1978, Doc. 4200.

³ Recommendation 848 of the Parliamentary Assembly of the Council of Europe on the Underwater Cultural Heritage, published in: Report of the Committee on Culture and Education of the Parliamentary Assembly of

In spite of the fact that the Draft European Convention had been finalised by an *ad hoc* committee of experts and transmitted to the European Council's Committee of Ministers in March 1985, no decision was taken due to objections, on the part of the Government of Turkey, to the territorial scope of the Draft.⁴ For the time being, the attempt to provide for a comprehensive international scheme for the protection of maritime cultural property, at least at the European level, thus had failed.⁵ This was particularly awkward since in the meantime, the 1982 United Nations Convention on the Law of the Sea,⁶ which would eventually become the "constitution of the oceans", had been opened for signature without addressing issues related to the protection of the underwater cultural heritage in a satisfactory manner.⁷

In 1988, the newly created Committee on Cultural Heritage Law of the International Law Association (ILA) then took as its first task the

the Council of Europe on the Underwater Cultural Heritage, see note 2, 1 et seq.

- 4 For the discussions on the territorial scope of application of the Draft European Convention on the Protection of the Underwater Cultural Heritage see U. Leanza, "The Territorial Scope of the Draft European Convention on the Protection of the Underwater Cultural Heritage", in: Council of Europe, *International Legal Protection of Cultural Property. Proceedings of the Thirteenth Colloquy on European Law, Delphi, 20 - 22 September 1983*, 1984, 127 et seq.; U. Leanza, "La sfera di applicazione spaziale della Convenzione europea sulla protezione del patrimonio culturale subacqueo e zona contigua e zona archeologica nell'ordinamento internazionale e nell'ordinamento interno", in: U. Leanza (ed.), *Nuovi saggi di diritto del mare*, 1988, 35 et seq.
- 5 The Council of Europe reconsidered the subject during the negotiations for the revision of the 1969 European Convention for the Protection of the Archaeological Heritage (ETS No. 66). While article 1 para. 3 of the revised European Convention of 1992 (ETS No. 143) now explicitly mentions archaeological heritage situated under water, article 1 para. 2 (iii) extends the scope of application of the agreement to "any area within the jurisdiction of the Parties." Contrary to what has sometimes been contended in legal literature (see, e.g., J. Blake, "The Protection of the Underwater Cultural Heritage", *ICLQ* 45 (1996), 819 et seq., (828)), this does not mean, however, that the revised European Convention allows the exercise of coastal state jurisdiction over maritime cultural property found in the EEZ and on the continental shelf; see W. Graf Vitzthum/ S. Talmon, *Alles fließt. Kulturgüterschutz und innere Gewässer im Neuen Seerecht*, 1998, 46 et seq.
- 6 *ILM* 21 (1982), 1261 et seq.
- 7 See below at II. 2.

preparation of a Draft Convention on the Protection of the Underwater Cultural Heritage. The final version of the text, the so-called Buenos Aires Draft, was adopted by ILA at its 66th conference held at Buenos Aires in 1994.⁸ Although the Draft, which was annexed by the Charter for the Protection and Management of the Underwater Cultural Heritage prepared by the International Council on Monuments and Sites (ICOMOS),⁹ met with mixed reception,¹⁰ it was submitted to UNESCO for consideration.

In 1995, UNESCO undertook and presented a feasibility study, concluding that the Buenos Aires Draft was a useful basis for the creation of a new instrument for the protection of maritime cultural property.¹¹ The 28th General Conference of UNESCO invited the Director-General to organise, in consultation with the United Nations and the International Maritime Organisation (IMO), a meeting of experts representing expertise in archaeology, salvage and jurisdictional regimes.¹² The experts, who came together in Paris in May 1995, requested the Secretariat of UNESCO to use the Buenos Aires Draft, the Draft European Convention, and the discussions from their meeting as the basis of an annotated reference document.¹³ In November 1997, the

⁸ ILA, *Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage*, published in: ILA, *Report of the Sixty-Sixth Conference Held at Buenos Aires, Argentina, 14 to 20 August 1994*, 1994, 15 et seq.

⁹ ICOMOS, *International Charter on the Protection and Management of Underwater Cultural Heritage*, reprinted in: *International Journal of Cultural Property* 6 (1997), 128 et seq.

¹⁰ P.J. O'Keefe, "Protecting the Underwater Cultural Heritage. The International Law Association Draft Convention", *Marine Policy* 20 (1996), 297 et seq., (304).

¹¹ Executive Board of UNESCO, *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, UNESCO Doc. 146 EX/27 of 23 March 1995.

¹² General Conference of UNESCO, *Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage*, UNESCO Doc. 28 C/Res. 3.13, published in: UNESCO, *Records of the General Conference, Twenty-Eighth Session, Paris, 25 October to 16 November 1995*, Vol. 1: Resolutions, 1996, 48.

¹³ UNESCO, *Summary Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage*, UNESCO Headquarters, 22 - 24 May 1996, published in: Executive Board of UNESCO, *Report by the Director-General on the Findings of the Meeting of Experts Concerning the Preparation of an International Instrument for the Protection of the Underwater Cultural Heritage*, UNESCO Doc. 151 EX/10 of 12 March 1997, Annex I.

29th General Conference of UNESCO then decided that the protection of the underwater cultural heritage should be regulated at the international level and that the method adopted should be an international convention.¹⁴

A first meeting of governmental experts on the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage was held 29 June - 2 July 1998 at the Headquarters of UNESCO in Paris.¹⁵ The participants — 122 experts from 58 states representing different regions of the world, as well as from the United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS), IMO, and observers from a non-member state as well as from non-governmental organisations, such as ILA and ICOMOS — were invited to present their observations on a draft jointly prepared by UNESCO and DOALOS, in consultation with IMO. Three further meetings¹⁶ followed until the text was approved, on 7 July 2001, by a vote of 49 in favour, four against, and eight abstentions.¹⁷ On 2 November 2001, the 31st General Conference of UNESCO finally adopted the UNESCO Convention on the Protection of the Underwater Cultural Heritage,¹⁸ thus putting

¹⁴ General Conference of UNESCO, *Preparation of an International Instrument for the Protection of the Underwater Cultural Heritage*, UNESCO Doc. 29 C/Res. 21 of 12 November 1997, published in: UNESCO, *Records of the General Conference, Twenty-Ninth Session, Paris, 21 October to 12 November 1997*, Vol. 1: Resolutions, 1998, 52.

¹⁵ See UNESCO, *Report of the Meeting of Governmental Experts on the Draft Convention for the Protection of the Underwater Cultural Heritage, UNESCO Headquarters, Paris, France (29 June – 2 July 1998)*, UNESCO Doc. CLT-98/CONF.202/7.

¹⁶ For the results of the second and the third meeting of governmental experts see UNESCO, *Final Report of the Second Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage, UNESCO Headquarters, Paris, France (19 – 24 April 1999)*, UNESCO Doc. CLT-99/CONF.204, August 1999; UNESCO, *Final Report of the Third Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage, UNESCO Headquarters, Paris, France (3 – 7 July 2000)*, UNESCO Doc. CLT-2000/CONF.201/7 of 21 August 2000.

¹⁷ General Conference of UNESCO, *Draft Convention on the Protection of the Underwater Cultural Heritage*, UNESCO Doc. 31 C/24 of 3 August 2001, para. 10.

¹⁸ *ILM* 41 (2002), 40 et seq., available at: http://www.unesco.org/culture/legalprotection/water/html_eng/convention.shtml. The text was adopted by a vote of 87 in favour, four against, and 15 abstentions. In the following,

an end to the decades-long undertaking to elaborate a comprehensive legal regime for the protection of submarine antiquities.

According to its article 27, the UNESCO Convention will come into force three months after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession. Given the strong support for the agreement within the international community, especially on the part of states like Australia, Canada, Denmark, Italy, Portugal and Spain as well as the majority of the G-77, it is not unlikely that this will soon happen.

Yet, serious doubts have been raised by a number of states, such as France, the United Kingdom, the Netherlands, Norway, the Russian Federation and the United States of America, as to the compatibility of the Convention with the international law of the sea.¹⁹ During the general debate in Commission IV of the 31st General Conference of UNESCO, a number of amendments were proposed — without success — by the Russian Federation and the United Kingdom with the endorsement of the United States of America.²⁰ Norway expressly reserved its position under article 311 para. 3 of the UN Convention on the Law of the Sea, which relates to international agreements modifying or suspending the operation of provisions of the Law of the Sea Convention.²¹ During the 56th session of the UN General Assembly, the UNESCO Convention created an unusual debate, in the course of which the aforementioned states reaffirmed their concerns.²² These states, therefore, do not seem to be prepared to become a party to the UNESCO Convention, the universality and effectiveness of which could thus be seriously undermined.

the agreement is referred to as “UNESCO Convention on Underwater Cultural Heritage,” “UNESCO Convention”, or the “Convention.” For the text of the Convention, see Annex.

¹⁹ For the concerns of the United States of America see S.D. Murphy, “Contemporary Practice of the United States of America Relating to International Law”, *AJIL* 96 (2002), 461 et seq., (468 et seq.).

²⁰ General Conference of UNESCO, *Draft Resolution Submitted by the Russian Federation and the United Kingdom*, UNESCO Doc. 31 C/COM.IV/DR.5 (COM.IV) of 26 October 2001.

²¹ See below at IV. 1.

²² See the excerpts from the Proceedings of the 65th and 66th Plen. Mtg. of the General Assembly reprinted in: *Environmental Policy and Law* 32 (2002), 184 et seq.

Against this background, this article will examine the question of whether the UNESCO Convention on Underwater Cultural Heritage is in line with the existing international law of the sea. The focus will be on the issue of jurisdiction,²³ which was the most controversial topic during the negotiations of the Convention and is the primary reason for the rejection of the agreement by states like Norway, Russia and the United States of America.²⁴ After a brief review of the relevant rules of the international law of the sea pertaining to the protection of maritime cultural property (II.), the article will first present an overview of the UNESCO Convention itself, in particular the provisions on the jurisdiction *ratione loci* (III.). It will then address the issue of the compatibility of the jurisdictional regime embodied in the agreement with the international law of the sea, as laid down primarily in the 1982 UN Convention on the Law of the Sea (IV.). The article concludes that the various provisions of the UNESCO Convention on the jurisdiction *ratione loci* — with the exception of article 8, which deals with the protection of cultural relics found in the contiguous zone —, when interpreted restrictively, can in fact be regarded as being in conformity with the Convention on the Law of the Sea.

²³ For a comprehensive overview of the Convention see G. Carducci, "New Developments in the Law of the Sea: the UNESCO Convention on the Protection of the Underwater Cultural Heritage", *AJIL* 96 (2002), 419 et seq.; C. Forrest, "A New International Regime for the Protection of Underwater Cultural Heritage", *ICLQ* 51 (2002), 511 et seq.; M. Rau, "Kulturgüterschutz im Meer: eine erste Analyse der neuen UNESCO-Konvention", *ZaöRV* 61 (2001), 833 et seq.; T. Scovazzi, "Convention on the Protection of Underwater Cultural Heritage", *Environmental Policy and Law* 32 (2002), 152 et seq. An article-by-article analysis has recently been published by P.J. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, 2002.

²⁴ Another highly controversial issue during the drafting of the Convention was the status of sunken warships and state vessels. The subject cannot be comprehensively dealt with here. For a first analysis of the pertinent provisions of the UNESCO Convention see Rau, see note 23, 867 et seq.

II. The Current Situation of Maritime Cultural Property Under the International Law of the Sea

The contemporary international law of the sea is primarily governed by the 1982 UN Convention on the Law of the Sea,²⁵ which came into force on 16 November 1994. The agreement deals with all matters relating to the law of the sea, including marine archaeology. Yet, its provisions on the protection of cultural relics found at sea, which were drafted late in the negotiations at UNCLOS III, are fragmentary and unsatisfactory (see at II. 2.). Furthermore, quite a significant group of states for whom the underwater cultural heritage is of particular importance — such as Canada, Colombia, Peru, Turkey and the United States of America — are not yet a party to the Law of the Sea Convention.²⁶

While it is true that some of these states remain bound by the 1958 Geneva Conventions,²⁷ which are still in force,²⁸ none of the four agreements produced by the First United Nations Conference on the Law of the Sea (UNCLOS I) makes specific reference to the underwater cultural heritage (see at II. 1.). Finally, customary international law, as it stands today, does not provide for a satisfactory legal framework for the protection of cultural relics found at sea either, although it is sometimes argued that there is not only a tendency to expand coastal state jurisdiction over maritime shipwrecks and submerged sites beyond the territorial sea, but also growing acceptance of the proposition that the deep seabed cultural property forms part of the common heritage of mankind (see at II. 3.).

²⁵ See note 6.

²⁶ As of 30 May 2002, there were 138 states parties to the UN Convention on the Law of the Sea, see http://www.un.org/Depts/los/reference_files/status2002.pdf.

²⁷ Convention on the Territorial Sea and the Contiguous Zone, UNTS Vol. 516 No. 7477; Convention on the Continental Shelf, UNTS Vol. 499 No. 7302; Convention on the High Seas, UNTS Vol. 450 No. 6465; Convention on Fishing and Conservation of the Living Resources of the High Seas, UNTS Vol. 559 No. 8164.

²⁸ For the relationship between the Law of the Sea Convention and the four Geneva Conventions see article 311 para. 1 of the Convention on the Law of the Sea, which states that: "This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958."

1. The 1958 Geneva Conventions

Since the invention of the aqualung in the 1940s, which has made it possible to undertake extensive underwater exploration and excavation operations,²⁹ the legal protection of maritime cultural property has been an emerging area of the international law of the sea.³⁰ At the time of the

²⁹ For an overview of the techniques and technology used in the search for shipwrecks lying on the seabed see R. Mather, "Technology and the Search for Shipwrecks", *Journal of Maritime Law and Commerce* 30 (1999), 175 et seq.

³⁰ The leading monograph on the subject has been presented by A. Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, 1995. See further, e.g., J. Allain, "Maritime Wrecks: Where the *Lex Ferenda* of Underwater Cultural Heritage Collides with the *Lex Lata* of the Law of the Sea", *Va. J. Int'l L.* 38 (1998), 747 et seq.; A.K. Altes, "Submarine Antiquities: a Legal Labyrinth", *Syracuse Journal of International Law and Commerce* 4 (1976), 77 et seq.; K. Bangert, "A new area of international law: the protection of maritime cultural property", in: S. Yee/ W. Tieya (eds), *International Law in the Post-Cold War World. Essays in memory of Li Haopei*, 2001, 119 et seq.; J.-P. Beurier, "Pour un droit international de l'archéologie sous-marine", *RGDIP* 93 (1989), 45 et seq.; J. Blake, "The Protection of the Underwater Cultural Heritage", *ICLQ* 45 (1996), 819 et seq.; E.D. Brown, "Protection of the underwater cultural heritage. Draft principles and guidelines for implementation of article 303 of the United Nations Convention on the Law of the Sea, 1982", *Marine Policy* 20 (1996), 325 et seq.; L. Caflish, "Submarine Antiquities and the International Law of the Sea", *NYIL* 13 (1982), 3 et seq.; S. Dromgoole, "A Protective Legal Regime for the Underwater Cultural Heritage: The Problem of International Waters", *Annuaire de droit maritime et océanique* 15 (1997), 119 et seq.; S. Dromgoole (ed.), *Legal Protection of the Underwater Cultural Heritage. National and International Perspectives*, 1999; M. Hayashi, "Archaeological and historical objects under the United Nations Convention on the Law of the Sea", *Marine Policy* 20 (1996), 291 et seq.; R. Herzog, *Kulturgut unter Wasser. Schatztaucher, das Seevölkerrecht und der Schutz des kulturellen Erbes*, 2001; G. Hutchinson, "Threats to underwater cultural heritage. The problems of unprotected archaeological and historic sites, wrecks and objects found at sea", *Marine Policy* 20 (1996), 287 et seq.; U. Leanza, "La zona archeologica marina e la protezione dei beni culturali subacquei", in: P. Paone (ed.), *La protezione internazionale e la circolazione comunitaria dei beni culturali mobili*, 1998, 91 et seq.; M.L. Pecoraro, "Nota sulla protezione del patrimonio culturale subacqueo", in: U. Leanza (ed.), *Il regime giuridico internazionale del mare mediterraneo*, 1987, 367 et seq.; R.T. Robol, "Legal protection for Underwater Cultural Resources: Can We Do Better?", *Jour-*

negotiations of the Geneva Conventions, however, the issue was not yet considered a particularly important one. As a consequence, the four agreements do not explicitly deal with marine archaeology.

While the subject of the status of historical shipwrecks was raised during the drafting of the 1958 Convention on the Continental Shelf,³¹ no specific rule was included in the final text. It has sometimes been contended though that cultural relics lying on the seabed could be qualified as a “natural resource” within the meaning of article 2 para. 1 of the Convention on the Continental Shelf, thus falling within the ambit of the coastal state’s sovereign rights over the continental shelf.³² Yet, under a literal interpretation of the term “natural resources”, which is defined in article 2 para. 4 of the Convention on the Continental Shelf as “mineral and other non-living resources of the seabed and sub-soil together with living organisms belonging to sedentary species”, this view can hardly be maintained.³³ Moreover, a wider reading of the notion so as to include maritime cultural property must also be rejected in the light of the *travaux préparatoires* of the Convention on the Continental Shelf, recourse to which may be taken, pursuant to article 32 of the 1969 Vienna Convention on the Law of Treaties,³⁴ when the interpretation in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the treaty leaves the meaning of a provision ambiguous or obscure: the question of whether mineral and other non-living resources encompassed shipwrecks and their cargo was expressly answered in the negative, not only in the course of the preparatory

nal of Maritime Law and Commerce 30 (1999), 303 et seq.; L. Prott/ P.J. O’Keefe, “International Legal Protection of the Underwater Cultural Heritage”, *RBDI* 14 (1978/79), 89 et seq.; D. Shelton, “Recent Developments in International Law Relating to Marine Archaeology”, *Hague Yearbook of International Law* 10 (1997), 59 et seq.; Vitzthum/ Talmon, see note 5, 23 et seq.

³¹ Bangert, see note 30, 122; Strati, see note 30, 249.

³² See, e.g., E.M. Fry, “Recent Developments in the Law of the Sea 1984-1984”, *San Diego L. R.* 23 (1986), 701 et seq., (721). This interpretation of the term “natural resources” in the 1958 Geneva Convention on the Continental Shelf is followed by Cyprus and the Seychelles, see L.V. Prott/ P.J. O’Keefe, “Maritime Archaeology”, in: R. Bernhardt (ed.), *EPIL* III (1997), 298 et seq., (299).

³³ Caffish, see note 30, 13 et seq.; Strati, see note 30, 249 et seq.

³⁴ UNTS Vol. 1155 No. 18232.

work of the Fourth Committee of UNCLOS I,³⁵ but also by the International Law Commission (ILC) in its comment on the then draft article 68 of the Convention on the Continental Shelf.³⁶ Likewise, archaeological research does neither fall under the sovereign right of the coastal state to explore the continental shelf, as guaranteed in article 2 para. 1 of the Convention on the Continental Shelf, nor is it covered by the consent-regime for marine scientific research set out in article 5 of the Convention.³⁷

Under the four 1958 Geneva Conventions, the decisive boundary between the area within which maritime cultural heritage is, or at least, may be protected and the area where there is practically no protection for cultural relics, therefore, is the outer limit of the territorial sea:³⁸ while in the latter, the coastal state, by virtue of its sovereignty,³⁹ has exclusive jurisdiction over shipwrecks and submerged sites, the exploitation of underwater cultural heritage beyond the territorial sea boundary is part of the freedom of the high seas.

2. The 1982 UN Convention on the Law of the Sea

With the entry into force of the 1982 UN Convention on the Law of the Sea, the situation has not significantly improved. While the agreement, in its arts 149 and 303, contains two provisions that explicitly deal with the protection of “objects of an archaeological and historical nature found at sea”, these provisions “are ambiguous at best”.⁴⁰

³⁵ See the statement made on 26 March 1958 by Mr. Jhirad (India), reprinted in: United Nations Conference on the Law of the Sea, *Official Records*, Vol. VI: Forth Committee: Continental Shelf, 1958, 51.

³⁶ *ILCYB* (1956-II), 298.

³⁷ Strati, see note 30, 252 et seq.

³⁸ A. Strati, “The Protection of the Underwater Cultural Heritage in International Legal Perspective”, in: *Archaeological Heritage: Current Trends in its Legal Protection (International Conference Athens, 26 - 27 November 1992)*, 1995, 143 et seq., (150 et seq.). As rightly noted by Altes, see note 30, 81, the coastal state’s authorities under article 24 of the Convention on the Territorial Sea and the Contiguous Zone can only be “of some incidental importance with regard to illicit traffic in protected antiquities.”

³⁹ See article 1 of the Convention on the Continental Shelf.

⁴⁰ Shelton, see note 30, 61.

Article 149 of the Convention on the Law of the Sea concerns the protection of maritime cultural property found in “the Area”, i.e. “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”⁴¹ The provision reads:

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.

In the course of the preparatory work of the Seabed Committee of UNCLOS III, Greece and Turkey had submitted various proposals providing for the protection of cultural relics found on the deep seabed as part of the common heritage of mankind within the meaning of the now article 136 of the Convention on the Law of the Sea, for the protection of which the International Seabed Authority should be the competent organ.⁴² The subsequent drafts, however, abandoned the express recognition of archaeological objects in the Area as part of the common heritage of mankind and failed to designate an international body as the regulating organ. The final text of article 149 of the Convention on the Law of the Sea is not only primarily programmatic in character, but also suffers from various flaws.⁴³ As a consequence, the provision is generally deemed of little practical importance.

The question of the protection of maritime cultural property outside the special zone of the Area is dealt with in article 303 of the Convention on the Law of the Sea, which states:

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.

⁴¹ Article 1 para. 1 (1) of the Convention on the Law of the Sea.

⁴² B. Genius-Devime, *Bedeutung und Grenzen des Erbes der Menschheit im völkerrechtlichen Kulturgüterschutz*, 1996, 324 et seq.; A. Strati, “Deep Seabed Cultural Property and the Common Heritage of Mankind,” *ICLQ* 40 (1991), 859 et seq., (874 et seq.).

⁴³ For a detailed analysis of article 149 of the Convention on the Law of the Sea see Strati, see note 30, 300 et seq.; Vitzthum/ Talmon, see note 5, 48 et seq.

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.

The norm is not less problematic than article 149. While it is clear that its second paragraph, which has been rightly identified in legal literature as “[t]he main innovation of the 1982 Convention with respect to underwater cultural property”,⁴⁴ grants the coastal states some rights for the purposes of protecting the underwater cultural heritage within their contiguous zone, there has been considerable debate over the question of the scope of the coastal states’ authority with regard to archaeological objects under article 303 para. 2. Some scholars have argued that the provision, read in conjunction with article 33 of the Convention on the Law of the Sea, creates a fully-fledged 24-mile archaeological zone, within which the coastal states exercise legislative as well as enforcement jurisdiction with regard to cultural relics found on the seabed.⁴⁵

Yet, article 303 para. 2 of the Convention on the Law of the Sea establishes a mere *fictio juris*, whereby it is assumed that the removal of archaeological and historical objects from the seabed of the contiguous zone constitutes an infringement of the customs and fiscal regulations of the coastal state, the latter thus having the right to exercise the powers of control set out in article 33. The effect of the provision, therefore, is only a limited one: it extends the scope of application of article 33 to the removal of cultural relics from the contiguous zone, without, however, attributing to the coastal state legislative jurisdiction over archaeological objects found in the 24-mile zone.⁴⁶

⁴⁴ Strati, see note 38, 159.

⁴⁵ See, e.g., Caflish, see note 30, 20; S. von Schorlemmer, *Internationaler Kulturgüterschutz. Ansätze zur Prävention im Frieden sowie im bewaffneten Konflikt*, 1992, 217.

⁴⁶ Herzog, see note 30, 160 et seq.; Vitzthum/ Talmon, see note 5, 33 et seq. Strati, see note 30, 168, argues that although article 303 para. 2 of the Convention on the Law of the Sea does not create a full jurisdictional zone, it attributes to the coastal states the exclusive right to regulate the removal of archaeological objects from their contiguous zone and, in doing so, to impose the conditions they consider to be necessary for the protection of the objects recovered. Yet, as correctly noted by Vitzthum/ Talmon, *ibid.*, 38 et seq., under article 303 para. 2 of the Convention on the Law of the Sea,

The general duty to protect maritime cultural property found at sea and to cooperate for that purpose, enshrined in the first paragraph of article 303 of the Convention on the Law of the Sea, goes back to a proposal made by the United States of America during the negotiations at UNCLOS III, which was meant as a compromise solution with regard to the issue of jurisdiction over maritime cultural property lying on the continental shelf:⁴⁷ while some delegations wanted the continental shelf regime to include underwater cultural heritage,⁴⁸ others opposed any extension of coastal states' competences on the continental shelf to archaeological and historical objects. The final outcome suffers from vagueness and ambiguity. First, the precise area of application of article 303 para. 1 is not clear. Two interpretations are possible:⁴⁹ either the provision is linked to the contiguous zone regime, referred to in article 303 para. 2, or it contains a general principle regarding the protection of cultural relics found at sea.⁵⁰ Second, by failing to specify the measures to be taken for its implementation, the norm has hardly any practical effect, but is — just like article 149 of the Convention on the Law of the Sea — primarily programmatic in nature.

In any event, article 303 para. 1 of the Convention on the Law of the Sea, though recognising a general interest in the protection of the underwater cultural heritage, cannot serve as a justification for the adoption of unilateral measures regarding the protection of maritime cultural property that are not in line with the general jurisdictional framework embodied in the Law of the Sea Convention. Thus, the provision does not alter the legal regimes governing the continental shelf, the exclusive economic zone (EEZ) and the high seas, as set out in Parts V-VII of the

coastal states are only granted the right to define the conditions under which they may consent to such removals, the difference between the two positions being the following: while under the former approach, the removal of archaeological objects from the seabed of the 24-mile zone constitutes a violation of the laws of the respective coastal state and, therefore, is illegal, the latter interpretation comes to the conclusion that short of a consent of the coastal state, the removal of cultural relics from the contiguous zone just triggers the control powers mentioned in article 33.

⁴⁷ See informal proposal by the United States of America of 27 March 1980, reprinted in: R. Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents*, Vol. XII, 1987, 299.

⁴⁸ See, e.g., the proposal by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia of, reprinted in: Platzöder, see note 47, Vol. V, 1980, 50.

⁴⁹ Bangert, see note 30, 125.

⁵⁰ See below at IV. 1.

Convention on the Law of the Sea. At best, it can be interpreted as putting the states parties under a general obligation to protect archaeological and historical objects and to cooperate for that purpose when exercising the rights guaranteed by the Law of the Sea Convention.⁵¹

In sum, when it comes to the protection of maritime cultural property beyond 24 nautical miles, the 1982 UN Convention on the Law of the Sea is not very helpful. Just like under the 1958 Geneva Conventions, a large part of the underwater cultural heritage, therefore, is governed by the freedom of the high seas,⁵² which applies — short of any specific provision on the protection of cultural relics seaward of the contiguous zone boundary — also to the EEZ.⁵³ The situation is further aggravated by the fact that according to article 303 para. 3 of the Convention on the Law of the Sea, certain areas of law, the law of salvage in particular, remain unaffected by the marine archaeology provisions of the Law of the Sea Convention. Given that the salvor works for profit, the danger of uncontrolled activities regarding the underwater cultural heritage is thus again increased.⁵⁴ As will be seen, however, article 303 para. 4 of the Convention on the Law of the Sea allows for the elaboration of future agreements that ensure a better protection of the underwater cultural heritage.⁵⁵ Thus, even though the UN Convention on the Law of the Sea was conceived as a “package deal”, it does not stand in the way of filling the gaps it has left open with regard to the protection of archaeological and historical objects found at sea.

⁵¹ Vitzthum/ Talmon, see note 5, 29.

⁵² It might be conceivable, however, to interpret article 303 para. 1, read together with article 87 para. 1 of the Convention on the Law of the Sea, as obliging the states parties, in accordance with the flag state and the active personality principles of international jurisdiction, to impose on the ships flying their flags as well as on their nationals the duty to abstain from activities causing harm to cultural relics found on the seabed of the high seas; for an elaboration of this argument see Strati, see note 30, 224 et seq.

⁵³ See article 58 para. 1 of the Convention on the Law of the Sea.

⁵⁴ For a discussion of the application of salvage law to the underwater cultural heritage see G. Brice, “Salvage and the underwater cultural heritage”, *Marine Policy* 20 (1996), 337 et seq.; Herzog, see note 30, 127 et seq.; Strati, see note 30, 43 et seq.; P. Fletcher-Tomenius/ P.J. O’Keefe/ M. Williams, “Salvor in Possession: Friend or Foe to Marine Archaeology?”, *International Journal of Cultural Property* 9 (2000), 263 et seq.; O. Varmer, “The Case Against the ‘Salvage’ of the Cultural Heritage”, *Journal of Maritime Law and Commerce* 30 (1999), 279 et seq.

⁵⁵ See below at IV. 1.

3. Customary International Law

Some commentators finally contend that under customary international law, coastal states may exercise control over maritime cultural property found in the EEZ or on the continental shelf.⁵⁶ Yet, while it is true that a growing number of states, such as Australia, Denmark, Ireland, Jamaica, Morocco, Portugal and Spain, have extended their jurisdiction over archaeological objects beyond the 24-mile limit,⁵⁷ it can hardly be argued that this trend already satisfies the prerequisites of customary international law, as set out in article 38 para. 1 (b) of the Statute of the ICJ.⁵⁸ The same holds true for the assertion that state practice provides for sufficient evidence for the recognition of a fully-fledged 24-mile archaeological zone, contrary to article 303 para. 2 of the Convention on the Law of the Sea: only a handful of states, including Denmark and France, have expanded their competence over cultural relics found in the contiguous zone.⁵⁹ As a consequence, under customary international law, maritime cultural property lying on the seabed seaward of the territorial sea boundary is, at present, governed by the freedom of the high seas.⁶⁰ That also applies to deep seabed cultural property, which has not yet been recognised as the common heritage of mankind.⁶¹ The only instrument to date, other than the 1982 UN Convention on the Law of the Sea, to deal with the cultural resources of the deep seabed being a U.S. law that provides for the designation of the remains of the *R.M.S. Titanic* as an international maritime memorial.⁶²

⁵⁶ Along these lines, e.g., O'Keefe, see note 23, 58 et seq.

⁵⁷ See Strati, see note 30, 269.

⁵⁸ Herzog, see note 30, 170 et seq.; Vitzthum/ Talmon, see note 5, 43 et seq., 45 et seq.; Strati, see note 30, 269 et seq.

⁵⁹ Strati, see note 30, 185; Vitzthum/ Talmon, see note 5, 40.

⁶⁰ Whether at least the limited rights of the coastal states under article 303 para. 2, read together with article 33 of the Convention on the Law of the Sea, can already be considered to be part of customary international law, is doubtful.

⁶¹ Strati, see note 42, 892 et seq.

⁶² R.M.S. Titanic Memorial Act of 1986, 16 U.S.C. §§ 450rr - 450rr-6. For an overview of the national and international rules and principles governing the protection of the *Titanic* see, e.g., J.A.R. Nafziger, "The Titanic Revisited", *Journal of Maritime Law and Commerce* 30 (1999), 311 et seq.

III. A Comprehensive Legal Instrument for the Protection of Maritime Cultural Property: the UNESCO Convention on Underwater Cultural Heritage

The UNESCO Convention on Underwater Cultural Heritage, adopted in November 2001,⁶³ is the first comprehensive international instrument on the protection of maritime cultural property. The agreement seeks to fill the gaps the UN Convention on the Law of the Sea has left open, in particular as regards the protection of cultural relics lying on the continental shelf and on the deep seabed. It deals with all relevant aspects of the protection of underwater cultural heritage, including the manner in which authorised activities directed at such heritage have to be carried out in order to meet objective archaeological standards.⁶⁴

The following sections will give a short overview of the UNESCO Convention (III. 1.), before considering the jurisdictional regime (jurisdiction *ratione loci*) set out by the instrument (III. 2.). In a final section, some specific provisions relating to the compliance with and the enforcement of the agreement, which are closely related to the issue of jurisdiction *ratione loci*, shall be briefly examined (III. 3.).

1. Overview

Article 1 para. 1 (a) of the UNESCO Convention defines the notion of “underwater cultural heritage”, for the purposes of the Convention, as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years”. By using the words “traces of human existence”,⁶⁵ the provision makes clear that the Convention does not only protect isolated objects, but also entire sites, including the context in which they are found.⁶⁶ In fact, as stated by the

⁶³ See above at I.

⁶⁴ See the Rules Concerning Activities Directed at Underwater Cultural Heritage annexed to the Convention.

⁶⁵ See already Article 1 of the 1969 European Convention on the Protection of the Underwater Cultural Heritage and article 1 para. 1 of the 1994 Buenos Aires Draft of the ILA.

⁶⁶ The inclusion of the context in the notion of the underwater cultural heritage is explicitly confirmed in article 1 para. 1 (a) (i) and (ii) of the UNESCO Convention.

Cultural Heritage Law Committee of ILA in its commentary on article 1 of the Buenos Aires Draft, “context is one of the most essential aspects of the archaeological heritage in providing knowledge of life during a particular era.”⁶⁷ The connection to humanity, which is required, it excludes, *inter alia*, palaeontological material from the definition of underwater cultural heritage. As regards the time-limit, the figure of 100 years, which already appeared in article 1 of the Draft European Convention on the Protection of the Underwater Cultural Heritage as well as in article 2 of the ILA Draft, is in line with a couple of national heritage laws dealing with underwater remains, the latter sometimes establishing, however, the age of the cultural relic as the qualifying factor of protection.⁶⁸

Whether the phrase “having a cultural, historical or archaeological character”, which takes up the language of arts 149 and 303 of the UN Convention on the Law of the Sea, was needed as a further qualifying factor, apart from the 100-year time-limit, was the object of some controversy during the negotiations of the Convention. The majority of the delegations thought that this was the case, although it can be doubted that the phrase adds anything to the definition of the notion of underwater cultural heritage.⁶⁹ In any event, it would have been preferable to speak of “value”, “significance” or “importance” instead of “character”, as, for example, article 1 of the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property⁷⁰ does.⁷¹

Article 2 of the Convention sets out the objectives and general principles on which the protection of maritime cultural property under the agreement is based. These include, *inter alia*, the duty to cooperate in

⁶⁷ Cultural Heritage Law Committee of ILA, *Final Report on the Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage*, published in: ILA, see note 8, 432 et seq., (435).

⁶⁸ See the overview of time limits provided by national heritage laws given by Strati, see note 30, 180.

⁶⁹ O’Keefe, see note 23, 43.

⁷⁰ *ILM* 10 (1971), 271 et seq.

⁷¹ Rau, see note 23, 843 et seq. According to Carducci, see note 23, 423, “the quality of a cultural, historical, or archaeological ‘character’ does allow for some flexibility of interpretation, which, once kept within the due limits of bona fide interpretation of the Convention and the general duty to cooperate for the protection of UCH [i.e. underwater cultural heritage], should prevent [...] extreme readings, though the definition of UCH remains broad.”

the protection of the underwater cultural heritage,⁷² the obligation to preserve underwater cultural heritage for the benefit of humanity,⁷³ the principle of *in situ* preservation as the first option before allowing or engaging in activities directed at underwater cultural heritage,⁷⁴ the prohibition of commercial exploitation of the underwater cultural heritage,⁷⁵ and the duty to give proper respect to all human remains located in maritime waters.⁷⁶ Some of these objectives and principles, which may serve as guidelines for the interpretation of the remaining articles of the instrument, are further specified by the Rules Concerning Activities Directed at Underwater Cultural Heritage annexed to the Convention, which are based on the ICOMOS Charter for the Protection and Management of the Underwater Cultural Heritage.⁷⁷ Thus, Rule 2, for example, proceeding from the general prohibition of commercial exploitation of underwater cultural heritage, as laid down in article 2 para. 7 of the Convention, states that:

The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

It is worth noting that according to article 33 of the Convention, the Rules of the Annex form an integral part of the agreement. As a consequence, just like the other provisions of the Convention, they create legally binding obligations for the contracting states.

A major breakthrough in the protection of maritime cultural property is the rejection of the law of salvage,⁷⁸ which is stipulated, subject to specified conditions, in article 4 of the UNESCO Convention. As was seen, article 303 para. 3 of the UN Convention on the Law of the Sea disclaims any effect of the marine archaeology provisions of the Law of the Sea Convention on certain areas of law, including the law of

⁷² Article 2 para. 2.

⁷³ Article 2 para. 3.

⁷⁴ Article 2 para. 5.

⁷⁵ Article 2 para. 7.

⁷⁶ Article 2 para. 9.

⁷⁷ See note 9.

⁷⁸ Similarly Carducci, see note 23, 425 et seq.; Forrest, see note 23, 524 et seq.; O'Keefe, see note 23, 61 et seq.; Rau, see note 23, 866 et seq.; Scovazzi, see note 23, 154.

salvage.⁷⁹ While it is true that from a theoretical point of view, one may doubt whether salvage law is applicable at all to the recovery of cultural relics found at sea, since one of the requirements for salvage operations is a situation of imminent danger,⁸⁰ in practice, a number of national courts have relied on the concept of salvage in cases involving ancient shipwrecks.⁸¹ In view of the inappropriateness of salvage law as a means of protecting underwater cultural heritage, its general rejection, as stipulated in article 4 of the UNESCO Convention, therefore, is certainly to be applauded.

While article 6 of the Convention deals with — existing as well as future — bilateral, regional or other multilateral agreements for the preservation of underwater cultural heritage, arts 7 - 12 concern the jurisdictional regime governing the protection of the underwater cultural heritage in the different areas of the sea. The provisions, which constitute the core of the agreement, will be discussed in detail below.⁸² Suffice it here to mention that as regards maritime cultural relics lying on the continental shelf and on the deep seabed, the central idea of the relevant norms of the Convention is that all states parties have a responsibility to protect underwater cultural heritage found beyond the 12-mile limit or the 24-mile limit respectively.⁸³ Consequently, arts 9 -

⁷⁹ See above at II. 2.

⁸⁰ See, e.g., article 1 (a) of the International Convention on Salvage of 28 April 1989, IMO Doc. LEG/CONF.7/27. It is true, however, that article 30 para. 1 (d) of the International Convention on Salvage, which provides for the possibility of making reservations to the application of the Convention “when the property involved is maritime cultural property of prehistoric, archaeological or historical interest and is situated on the seabed,” seems to proceed from the assumption that as a general rule, the Salvage Convention is applicable to underwater cultural heritage. For an analysis of the Salvage Convention see, e.g., K.U. Bahnsen, *Internationales Übereinkommen von 1989 über Bergung*, 1997; G. Darling/ C. Smith, *LOF 90 and the New Salvage Convention*, 1991; M. Kerr, “The International Convention on Salvage 1989 - How it Came to Be”, *ICLQ* 39 (1990), 530 et seq.

⁸¹ See, e.g., *Plataro Ltd. v. Unidentified Remains of a Vessel*, 518 F.Supp. 816 (W.D.Tex. 1981). For further court cases see Strati, see note 30, 48 et seq. In the United States of America, Section 7 (a) of the Abandoned Shipwreck Act of 1987 (reprinted in: L.V. Prott/ I. Srong (eds), *Background Materials on the Protection of the Underwater Cultural Heritage*, Vol. 1, 1999, 31 et seq.) now explicitly excludes the application of salvage law to abandoned shipwrecks.

⁸² See below at III. 2.

⁸³ See arts 9 para. 1 and 11 para. 1 of the UNESCO Convention.

12 of the Convention, which apply to underwater cultural heritage in the EEZ, on the continental shelf and on the deep seabed, designate a system of consultations between the states parties on how to ensure the effective protection of cultural relics found in the areas concerned. During the drafting of the agreement, this scheme was regarded as giving flesh to the bones of the clumsy wording of article 303 para. 1 of UNCLOS, in particular as concerns the protection of maritime cultural property in the EEZ and on the continental shelf.⁸⁴

Arts 14 - 18 of the UNESCO Convention concern the issue of compliance with and enforcement of the agreement. The provisions relate, *inter alia*, to the dealing in and possession of underwater cultural heritage illicitly exported or recovered,⁸⁵ port state jurisdiction,⁸⁶ measures of the states parties relating to their nationals and vessels flying their flag,⁸⁷ sanctions for violations of measures the contracting states have taken to implement the Convention,⁸⁸ and the seizure and disposition of underwater cultural heritage that has been recovered in a manner not in conformity with the agreement.⁸⁹ As already stated, some of the norms, being closely interrelated to the issue of jurisdiction *ratione loci*, will be dealt with in greater detail after having analysed the jurisdictional regime set out by the Convention.⁹⁰

Of particular interest is, finally, article 25 of the Convention. The provision sets out the mechanism for the peaceful settlement of disputes between the states parties concerning the interpretation or application of the agreement. During the negotiations of the Convention, a couple of delegations pleaded for the ICJ in The Hague to become the final arbitrator between the contracting states; the ICJ was said to have the higher expertise in the field of cultural heritage law than, for example, the International Tribunal for the Law of the Sea (ITLOS) in Hamburg.⁹¹ Yet, given the law of the sea implications of the UNESCO

⁸⁴ See also O'Keefe, see note 23, 81: "Although it is not expressly stated, article 9 can be seen as fleshing out the requirement in article 303(1) of UNCLOS that: "States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose."

⁸⁵ Article 14.

⁸⁶ Article 15.

⁸⁷ Article 16.

⁸⁸ Article 17.

⁸⁹ Article 18.

⁹⁰ See below at III. 3.

⁹¹ Similarly O'Keefe, see note 23, 139.

Convention, which have become more than obvious during the drafting of the instrument, the majority of the delegations wisely opted for a reference to the dispute settlement procedure laid down in Part XV of the UN Convention on the Law of the Sea. Thus, the states parties to the UNESCO Convention now have the choice between the four dispute settlement procedures listed in article 287 para. 1 of the Convention on the Law of the Sea, one of which being proceedings before ITLOS.

It is worth noting that according to article 25 para. 3 of the UNESCO Convention, the provisions relating to the peaceful settlement of disputes set out in Part XV of the Convention on the Law of the Sea apply, *mutatis mutandis*, to disputes between the states parties to the UNESCO Convention “*whether or not they are also Parties to the United Nations Convention on the Law of the Sea.*”⁹² Contrary to what is claimed by Patrick O’Keefe,⁹³ this is in full conformity with the Law of the Sea Convention, which states in its article 288 para. 2 that:

A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

It is generally agreed that the norm also covers disputes between states that are not parties to the Convention on the Law of the Sea.⁹⁴ This is illustrated, *inter alia*, by article 30 para. 2 of the 1995 Straddling Fish Stocks Agreement,⁹⁵ which served as a model for article 25 para. 3 of

⁹² Emphasis added.

⁹³ O’Keefe, see note 23, 137 et seq.

⁹⁴ See, e.g., T.A. Mensah, “The Jurisdiction of the International Tribunal for the Law of the Sea”, *Zeitschrift für ausländisches und internationales Privatrecht* 63 (1999), 330 et seq., (335 et seq.). For the implications of the dispute settlement mechanism of the Law of the Sea Convention for non-parties see generally J.E. Noyes, “The Third-Party Dispute Settlement Provisions of the 1982 United Nations Convention on the Law of the Sea: Implications for States Parties and for Nonparties”, in: M.H. Nordquist/J.N. Moore (eds), *Entry into Force of the Law of the Sea Convention*, 1995, 213 et seq., (227 et seq.).

⁹⁵ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Doc. A/CONF.164/37 of 8 September 1995.

the UNESCO Convention.⁹⁶ Furthermore, under general international law, states are not prevented from making use of existing institutions, created within the framework of an agreement to which they are not a party, provided that this is allowed under the agreement within the framework of which the institution concerned has been established.

2. Jurisdictional Regime (Jurisdiction *Ratione Loci*)

As noted previously, the various provisions of the UNESCO Convention concerning the rights and obligations of the contracting states *vis-à-vis* underwater cultural heritage in the different areas of the sea, i.e. the jurisdiction *ratione loci* (arts 7 - 12), on which the present article focuses, constitute the core of the UNESCO Convention. During the negotiations of the agreement, the provisions were hotly debated. This holds particularly true for arts 9 and 10, which govern maritime cultural property found in the EEZ and on the continental shelf. As a consequence, these two provisions can hardly deny their character as a compromise between divergent positions on the role of the coastal states in the protection of cultural relics beyond the 12-mile limit or the 24-mile limit respectively (see at III. 2. c.). By contrast, the provisions of the UNESCO Convention dealing with the protection of maritime cultural property found in the internal waters, archipelagic waters and territorial sea of the states parties were far less disputed during the drafting of the instrument (see at III. 2. a.). The same holds true for article 8 of the Convention, which relates to underwater cultural heritage found in the contiguous zone (see at III. 2. b.). Finally, cultural relics lying on the deep seabed are addressed in arts 11 and 12, which follow to a great extent the lines of the protection scheme governing maritime cultural property in the EEZ and on the continental shelf (see at III. 2. d.).

⁹⁶ For further examples see article 31 of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of 5 September 2000 and article 24 para. 4 of the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean of 20 April 2001.

a. Internal Waters, Archipelagic Waters and Territorial Sea

The protection of the underwater cultural heritage in the internal waters, archipelagic waters and territorial sea of the states parties is dealt with in article 7 of the Convention, the first paragraph of which reads:

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.

The provision explicitly confirms the sovereignty of the states parties in the areas concerned. As a consequence, in its internal waters, archipelagic waters and territorial sea, each contracting state remains the sole guardian of the underwater cultural heritage.⁹⁷ In other words: unlike in the case of cultural relics found in its EEZ and on its continental shelf,⁹⁸ a coastal state being a party to the UNESCO Convention is, as a general rule, not obliged to consult any other state on how to ensure effective protection of maritime cultural heritage in the parts of the sea dealt with in article 7.⁹⁹

⁹⁷ Rau, see note 23, 853 et seq.

⁹⁸ See below at III. 2. c.

⁹⁹ As regards sunken war ships and state vessels, article 7 para. 3 of the Convention states, however, that: "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." Without making the requirement to inform the flag state and the other states referred to in the provision obligatory, article 7 para. 3 of the Convention thus emphasizes the basic need for cooperation among the states concerned when the remains of a warship or state vessel are found within the archipelagic waters or territorial sea of a contracting state; see O'Keefe, see note 23, 76. During the debate in Commission IV of the 31st General Conference of UNESCO, an amendment proposed by the Russian Federation and the United Kingdom with the endorsement of the United States aimed at changing the wording of article 7 para. 3 of the Convention so as to make the requirement to inform the flag states and the other states concerned an imperative; see General Conference of UNESCO, see note 20. The amendment was rejected. For a discussion of article 7 para. 3 of the UNESCO Convention see Carducci, see note 23, 428; Forrest, see

It is important to note, however, that while article 7 para. 1 of the UNESCO Convention speaks of a “right” of the contracting states to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea, this does not mean that under the agreement, the protection of maritime cultural property in these areas is discretionary. On the contrary: pursuant to article 2 para. 4 of the Convention, “States Parties *shall* [...] 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.”¹⁰⁰ In the light of this provision, it would seem that the contracting states are under an obligation to protect cultural relics found in their internal waters, archipelagic waters and territorial sea.¹⁰¹ Hence, the sovereignty of the contracting states, as referred to in article 7 para. 1 of the UNESCO Convention, does not cover the decision on the “if” of the protection.

Furthermore, according to article 7 para. 2 of the Convention, the states parties shall require that the Rules of the Annex be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea. The sovereignty of the contracting states in these areas thus is further restricted, the “how” of the protection being no longer at their discretion either. From the point of view of marine archaeology, this commitment to objective standards even in areas under the sovereignty of the states parties is a major step, the importance of which should not be underestimated.¹⁰²

b. Contiguous Zone

As regards the protection of the underwater cultural heritage in the contiguous zone, article 8 of the Convention seems to proceed from a similar approach as article 7: just like in their internal waters, archipelagic waters and territorial sea, the states parties may regulate and authorize activities directed at underwater cultural heritage within their 24-mile zones; in doing so, they shall require that the Rules of the Annex be applied. Thus, article 8 of the Convention appears to attribute to

note 23, 529; O’Keefe, see note 23, 76 et seq.; Rau, see note 23, 869; Scovazzi, see note 23, 156.

¹⁰⁰ Emphasis added.

¹⁰¹ Rau, see note 23, 854.

¹⁰² Ibid.

the coastal states a comprehensive legislative competence over cultural relics found in their contiguous zone.¹⁰³

Yet, according to the opening words of article 8, the powers granted to the coastal states shall be exercised “in accordance with” article 303 para. 2 of the UN Convention on the Law of the Sea. One may read this reference to the Law of the Sea Convention as significantly limiting the coastal states’ competence in the 24-mile zone.¹⁰⁴ This depends, however, on how article 303 para. 2 of the Convention on the Law of the Sea is interpreted: as was seen, some commentators argue that the norm creates a fully-fledged archaeological zone, in which the coastal states exercise comprehensive legislative and enforcement jurisdiction over cultural property.¹⁰⁵ During the negotiations of the UNESCO Convention, this view was shared by quite a significant number of delegations. Consequently, these delegations did not regard the scope of the coastal states’ legislative competence under article 8 of the UNESCO Convention as limited.¹⁰⁶

By contrast, if one follows a more restrictive interpretation of article 303 para. 2 of the Convention on the Law of the Sea, the powers attributed to the coastal states under article 8 of the UNESCO Convention are far less extended. This latter approach seems to be confirmed by the fact that the opening words of article 8 further state that the right of the coastal states to regulate and authorize activities directed at underwater cultural heritage in their contiguous zone is “[w]ithout prejudice to” arts 9 and 10 of the Convention, i.e. the provisions dealing with maritime cultural property found in the EEZ and on the continental shelf: the application of these provisions to cultural relics found in the 24-mile zone would hardly make any sense if the coastal states were

¹⁰³ Ibid., 855 et seq.

¹⁰⁴ Along these lines, O’Keefe, see note 23, 79, who argues that against the background of the limited scope of the coastal states’ powers granted by article 303 para. 2 of the Convention on the Law of the Sea, under article 8 of the UNESCO Convention, “the regulation and authorization of activities directed at underwater cultural heritage in the contiguous zone must be directed at activities resulting or likely to result in removal of the heritage concerned.”

¹⁰⁵ See above at II. 2.

¹⁰⁶ Similarly Carducci, see note 23, 428 et seq.

granted comprehensive legislative and enforcement jurisdiction in their contiguous zone.¹⁰⁷

Be that as it may, by explicitly allowing the states parties to the Convention to “regulate and authorize” activities directed at underwater cultural heritage within their contiguous zone, article 8 of the UNESCO Convention attributes to the coastal states at least a certain degree of legislative competence over cultural relics found in their 24-mile zone. As will be discussed below, this finding is of some importance for the question of the conformity of the Convention with the existing international law of the sea.¹⁰⁸

It should finally be noted that, just like in the internal waters, archipelagic waters and territorial sea of the contracting states, the protection of maritime cultural property in the contiguous zone is, pursuant to article 2 para. 4 of the Convention, mandatory. In a case where a state party does not claim a contiguous zone,¹⁰⁹ the regime governing the protection of the underwater cultural heritage in the EEZ and on the continental shelf, which will be addressed in the following, applies.¹¹⁰

c. EEZ and Continental Shelf

The issue of the protection of maritime cultural property in the EEZ and on the continental shelf was the most difficult and controversial one during the drafting of the UNESCO Convention. The underlying dispute concerned the role that the coastal states should play in the

¹⁰⁷ One might argue though that the reference to arts 9 and 10 of the Convention is only to clarify that the latter remain applicable in the 24-mile zone when the respective coastal state is unwilling or unable to exercise its powers under article 8 or does not claim a contiguous zone. In this case, it would not be *a priori* impossible to interpret article 8 of the Convention as attributing to the coastal states a comprehensive legislative competence over cultural relics found in their 24-mile zone; see Rau, see note 23, 856 et seq.

¹⁰⁸ See below at IV. 3.

¹⁰⁹ Maintaining a contiguous zone is not mandatory; see R.R. Churchill/ A.V. Lowe, *The Law of the Sea*, 3rd edition, 2001, 135.

¹¹⁰ This is due to the spatial overlap between the EEZ and the 24-mile zone; see article 55 of the UN Convention on the Law of the Sea, which defines the EEZ as “an area *beyond and adjacent to the territorial sea*” [emphasis added]. As to the legal status of the contiguous zone as part of the EEZ see Churchill/ Lowe, see above, 139; R.-J. Dupuy/ D. Vignes (eds), *A Handbook on the New Law of the Sea*, Vol. 1, 1991, 269.

protection of cultural relics found seaward of the 24-mile limit: while a significant number of delegations considered that the extension of coastal state jurisdiction would be the best way to ensure the effective protection of the underwater cultural heritage in the EEZ and on the continental shelf,¹¹¹ others, arguing that such an extension of coastal state jurisdiction would not be in line with the UN Convention on the Law of the Sea, pleaded for a mechanism of consultations and cooperation between the states parties. The solution adopted is the result of a compromise: on the one hand, arts 9 para. 5 and 10 paras 3 and 5 of the UNESCO Convention designate a cooperative system, which is based on the idea that all states parties have a responsibility to protect underwater cultural heritage in the EEZ and on the continental shelf.¹¹² This mechanism can be regarded as fleshing out the general duty to cooperate in the protection of underwater cultural heritage, as laid down in article 2 para. 2 of the UNESCO Convention.¹¹³ On the other hand, article 10 paras 2 and 4 grant the coastal states some limited powers for the purposes of protecting maritime cultural property found in their EEZ and on their continental shelf. The attribution of these rights to the coastal states was as a concession to those delegations which favoured a general extension of coastal state jurisdiction over maritime cultural property found in the EEZ and on the continental shelf.

Article 9 para. 1 of the UNESCO Convention sets up a rather complex scheme regarding the question of to whom reports of discoveries of maritime cultural property in the EEZ and on the continental shelf and reports of activities directed at such cultural property shall be made. The relevant part of the norm provides:

- (a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activity directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;

¹¹¹ This approach was followed by the 1994 Buenos Aires Draft of the ILA, which provided for the possibility of establishing so-called “cultural heritage zones” (article 5 para. 1). These were defined as “all the area beyond the territorial sea of the State up to the outer limit of its continental shelf as defined in accordance with relevant rules and principles of international law” (article 1 para. 1). Within the cultural heritage zones, the coastal states should have jurisdiction over activities affecting the underwater cultural heritage. Maintaining such a zone was, however, not mandatory.

¹¹² See article 9 para. 1 of the Convention.

¹¹³ See Rau, see note 23, 847.

- (b) in the exclusive economic zone or on the continental shelf of another State Party:
 - (i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;
 - (ii) 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.

While article 9 para. 1 (a) of the Convention deals with the competence of the coastal states *vis-à-vis* its national or the master of a vessel flying its flag and thus is clearly based on the active personality and the flag state principles of international jurisdiction, article 9 para. 1 (b) of the Convention is more complicated: under the provision's first alternative, discoveries of maritime cultural property in the EEZ and on the continental shelf of another state party and activities directed at such cultural property shall be reported to the state of the national, the flag state and the coastal state. The decisive question is, however, *who* is to impose the reporting obligation on the persons concerned. During the negotiations of the Convention, some delegations contended that article 9 para. 1 (b) (i) was capable of two interpretations:¹¹⁴ first, it was said that the notion "States Parties" could be read as encompassing only the state of the national and the flag state. Second, it was argued that the term could be interpreted as addressing also the coastal state. Under the first interpretation, article 9 para. 1 (b) (i) of the Convention, just like article 9 para. 1 (a), would be based solely on the active personality principle and the flag state principle. Under the second approach, the provision would attribute to the coastal states some limited legislative competence with regard to maritime cultural heritage found in their EEZ and on their continental shelf. This so-called "constructive ambiguity" was regarded as making the provision acceptable to more states.

However, article 9 para. 1 (b) (i) of the Convention is far from ambiguous.¹¹⁵ On the contrary: given that the norm clearly distinguishes between "States Parties" and "that other State Party", the latter being the coastal state, the term "States Parties" can hardly be interpreted as including the coastal state. Rather, it is obvious that the notion only re-

¹¹⁴ Similarly O'Keefe, see note 23, 82 et seq.

¹¹⁵ During the drafting of the UNESCO Convention this view was also expressed by, *inter alia*, the Italian delegation.

fers to the state of the national and the flag state.¹¹⁶ The wording of article 9 para. 1 (b) (i) of the Convention thus being perfectly clear, it is of little importance that during the negotiations for the UNESCO Convention on Underwater Cultural Heritage, a Norwegian amendment of the provision, which would have changed “States Parties” to “a State Party”, qualified “national” by “its” and added after “vessel” the words “flying its flag”, was rejected.¹¹⁷ as was already noted, pursuant to article 32 of the 1969 Vienna Convention on the Law of Treaties, recourse to the *travaux préparatoires* may only be had when a literal and teleological interpretation leaves the meaning of a provision ambiguous or obscure.¹¹⁸

The second alternative of article 9 para. 1 (b) goes back to a proposal of the delegation of the United States of America. Under this alternative, the reporting obligation exists exclusively *vis-à-vis* the state of the national and the flag state, which shall rapidly and effectively transmit the information received to all other states parties, including the coastal state.¹¹⁹ The provision aims at negating any *special* interest of the coastal states with regard to maritime cultural property found in their EEZ and on their continental shelf. Yet, given that activities directed at underwater cultural heritage found in the EEZ and on the continental shelf may interfere with the coastal states’ sovereign rights or jurisdiction, as set out in particular in arts 56 and 77 of the UN Convention on the Law of the Sea,¹²⁰ it can hardly be denied that the coastal states will be more directly concerned by a discovery than other states.¹²¹ It is, therefore, highly questionable whether article 9 para. 1 (b) was really needed.¹²² Be that as it may, according to article 9 para. 2 of the UNESCO Convention, each state party shall declare, on depositing its

¹¹⁶ See also Scovazzi, see note 23, 154, according to whom this interpretation conforms more with the preparatory works of the UNESCO Convention.

¹¹⁷ But see O’Keefe, see note 23, 83, who argues that the rejection of the Norwegian proposal is “a clear indication” that the majority of the delegations wished to retain both interpretations of article 9 para. 1 (a) (i) of the Convention.

¹¹⁸ See above at II. 1.

¹¹⁹ Provided that state is a party to the Convention; see O’Keefe, see note 23, 83.

¹²⁰ This is the approach taken by article 10 para. 2 of the UNESCO Convention, which is also based on a proposal made by the United States of America.

¹²¹ Similarly O’Keefe, see note 23, 81.

¹²² Rau, see note 23, 859 et seq.

instrument of ratification, acceptance, approval or accession,¹²³ the manner in which reports will be transmitted under article 9 para. 1 (b) of the Convention.

While article 9 paras 3 and 4 of the UNESCO Convention concern the distribution of information about a discovery or intent to engage in activities directed at such heritage, article 9 para. 5 marks the first step in the cooperative procedure laid down in article 10 paras 3 and 5 of the Convention.¹²⁴ The norm provides that any state party may declare to the coastal state its interest in being consulted on how to ensure the effective protection of the underwater cultural heritage concerned. Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the heritage in question.¹²⁵ This requirement takes up the language of article 149 of the UN Convention on the Law of the Sea. Unlike the latter, article 9 para. 5 of the UNESCO Convention leaves room, however, for other connecting factors.

According to article 10 para. 3 of the Convention, the coastal state shall then consult all states parties which have declared an interest under article 9 para. 5 on how best to protect the underwater cultural heritage concerned and coordinate such consultations as the so-called “coordinating state”. In a case where the coastal state expressly declares that it does not wish to act as coordinator, the consulting states shall appoint a coordinating state. Measures of protection agreed upon by the consulting states shall finally be implemented by the coordinating state, unless all the states involved agree that another state party is to do so.¹²⁶ Likewise, the coordinating state or that other state party shall issue all necessary authorisations for such agreed measures.¹²⁷

For the purposes of the present paper, it is of particular importance that pursuant to article 10 para. 6 of the Convention, the coordinating state, in coordinating consultations, taking measures and issuing authorisations, shall act “on behalf of the States Parties as a whole and

¹²³ See article 26 of the UNESCO Convention.

¹²⁴ As rightly pointed out by O’Keefe, see note 23, 86, article 9 para. 5, therefore, is strangely placed.

¹²⁵ See also arts 6 para. 2, 7 para. 3, 11 para. 4 and 18 paras 3 and 4 of the Convention. For a critique of the qualification of the verifiable link by addition of the words “especially a cultural, historical or archaeological link”, see O’Keefe, see note 23, 70.

¹²⁶ Article 10 para. 5 (a).

¹²⁷ Article 10 para. 5 (b).

not in its own interest.” Furthermore, according to the second sentence of article 10 para. 6, “any 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.” Thus, it seems that the powers granted to the states parties under article 10 paras 3 and 5 of the UNESCO Convention are not meant as an extension of coastal state jurisdiction. Rather, the coastal states, acting as the coordinating states, are addressed as “guardians” of the community interest in the protection of maritime cultural property found in the EEZ or on the continental shelf or “agents” for the enforcement of the collective will of the contracting states.¹²⁸

Article 10 paras 2 and 4 of the Convention, finally, address situations in which the coastal state may act without consulting the other states parties. As already stated, the provisions were meant as a concession to those who pleaded for a general extension of coastal state jurisdiction over maritime cultural property found in the EEZ and on the continental shelf.

Article 10 para. 2 concerns the right of the coastal states to prohibit or authorise any activity directed at underwater cultural heritage located in their EEZ or on their continental shelf in order to prevent interference with their sovereign rights or jurisdiction, as provided for by international law, including the UN Convention on the Law of the Sea.¹²⁹ The underlying rationale of the provision is that by exercising their existing powers in their EEZ and on their continental shelf, the coastal states may incidentally protect maritime cultural property.¹³⁰ Thus, the provision obviously proceeds from the assumption that it does not grant the coastal states any *new* rights but is only of a declaratory nature.¹³¹ The decisive question is, however, how likely an interference with the coastal state’s sovereign rights or jurisdiction has to be in order to trigger the coastal states’ authorities under article 10 para. 2. During the negotiations of the UNESCO Convention, the Netherlands wanted the provision to refer to activities directed at underwater cultural heritage that *will* interfere with the coastal state’s sovereign rights or jurisdiction. This would have been a rather strict test. Other delegations proposed to replace the phrase “to prevent interfer-

¹²⁸ See below at IV. 3. d.

¹²⁹ See in particular Parts V and VI of the Convention on the Law of the Sea.

¹³⁰ For a critique of this approach see Scovazzi, see note 23, 155.

¹³¹ For an evaluation of this argument see below at IV. 3. d.

ence with” by the words “which may interfere with”. This would have given the coastal states quite a broad margin of appreciation. It would seem that the final text of article 10 para. 2 of the UNESCO Convention is somewhere in the middle. In any case, the norm cannot be used to provide *extensive* protection to maritime cultural property.¹³² Furthermore, it is possible for another state to challenge an exercise of the coastal states’ authority under article 10 para. 2 of the Convention on the grounds that the sovereign rights or jurisdiction are not likely to suffer interference by the activity in question.¹³³

Unlike article 10 para. 2, article 10 para. 4 of the UNESCO Convention, which deals with situations of emergency, again refers to the coastal state acting in its role as the “coordinating state” within the meaning of article 10 para. 3 (b) of the Convention. As a consequence, article 10 para. 6 applies. Thus, just like under article 10 paras 3 and 5, the coastal states, when taking action to prevent immediate danger to underwater cultural heritage in their EEZ or on their continental shelf, have to act on behalf of the states parties as a whole and not in their own interest. From a pragmatic point of view, article 10 para. 4 makes perfect sense: in times of immediate danger to underwater cultural heritage, a cooperative system would certainly not be very effective;¹³⁴ under these circumstances, the idea of using the coastal state, being normally the nearest state, suggests itself.¹³⁵

It should finally be noted that the wording of article 10 para. 4 seems to indicate that coastal states are not obliged to adopt provisional measures.¹³⁶ One might argue though that in the light of the general duty to take all appropriate measures in conformity with the Conven-

¹³² But see O’Keefe, see note 23, 90.

¹³³ O’Keefe, *ibid.*, who claims, however, that: “[a] determination by a State that its sovereign rights are suffering interference is not lightly to be put aside. It would be necessary for the other State to prove its allegations – not only the practical aspects but also something approaching misconduct on the part of the coastal State.”

¹³⁴ See also Scovazzi, see note 23, 155: “It would have been illusory to subordinate this right to the conclusion of consultations that are inevitably expected to last for some time. [...]. By definition, in a case of urgency a determined State must be entitled to take immediate measures without losing time in any procedural requirements.”

¹³⁵ From the point of view of the existing international law of the sea, however, article 10 para. 4 of the UNESCO Convention might, of course, be problematic; see below at IV. 3. d.

¹³⁶ O’Keefe, see note 23, 92.

tion that are necessary to protect underwater cultural heritage, as laid down in article 2 para. 4 of the Convention, the coastal states cannot arbitrarily abstain from taking action under article 10 para. 4 to prevent immediate danger to underwater cultural heritage. Moreover, pursuant to the opening words of article 10 para. 4, the coastal state's authority to adopt urgent measures is without prejudice to the general duty of all states parties to protect the underwater cultural heritage by way of all practicable measures in accordance with international law. Thus, in particular, the flag state and the state of the nationality of the master of the vessel are not precluded from taking action to prevent any immediate danger to maritime cultural property found in the EEZ or on the continental shelf of another state party.

d. Deep Seabed

The mechanism governing the protection of the underwater cultural heritage in the Area, as set out in arts 11 and 12 of the UNESCO Convention, largely parallels the protection scheme provided for in arts 9 and 10 of the Convention. The remaining differences between the two systems are primarily due to the fact that as regards maritime cultural property found on the deep seabed, there is obviously no room for a special role of the coastal states. As a consequence, the reporting obligation, which is addressed in article 11 para. 1, is clearly based on the active personality and the flag state principles of international jurisdiction and exists exclusively *vis-à-vis* the state of the nationality of the master of the vessel¹³⁷ and the flag state. Furthermore, as there is no "natural" coordinator, the states parties who have declared an interest, under article 11 para. 4 of the Convention, in being consulted on how to ensure the effective protection of the underwater cultural heritage in question,¹³⁸ have to appoint a coordinating state.¹³⁹ Finally, the right to

¹³⁷ Under article 11 para. 2 of the Convention, the states parties are obliged to notify the Director-General of UNESCO and the Secretary General of the International Seabed Authority (ISBA) of discoveries and activities reported to them. According to article 11 para. 3, the Director-General of UNESCO then shall promptly make available to all states parties any such information supplied by states parties.

¹³⁸ Pursuant to article 11 para. 4 of the Convention, such declaration again shall be based on a verifiable link to the underwater cultural heritage concerned. Unlike in article 9 para. 5, the link is not qualified, however, by addition of the words "especially a cultural, historical or archaeological link". Instead, article 11 para. 4 refers to the preferential rights of the states men-

adopt urgent measures is explicitly granted to *all* states parties.¹⁴⁰ However, given that such measures must be in conformity with the Convention, which includes conformity with the relevant rules of the existing international law of the sea,¹⁴¹ it would seem that they can only be directed at nationals or vessels flying the flag of the state party concerned.¹⁴²

According to article 12 para. 6 of the Convention, the coordinating state shall, when coordinating consultations, taking measures and issuing authorisations, not only act on behalf of all states parties, but also “for the benefit of humanity as a whole”. This requirement takes up the reference to “the benefit of mankind as a whole” in article 149 of the UN Convention on the Law of the Sea. As a general principle, the phrase can also be found in article 2 para. 3 of the UNESCO Convention. One may ask whether the concept has any normative force.¹⁴³ In any case, it can hardly be said to imply that the underwater cultural heritage in the Area is now recognized as part of the common heritage of mankind.¹⁴⁴

tioned in article 149 of the Convention on the Law of the Sea, the wording of which has been slightly changed though. As correctly stated by O’Keefe, see note 23, 96, it would seem that “[i]n practical terms, the additional words add nothing to the concept of a verifiable link.”

¹³⁹ Article 12 para. 2. It is worth noting that apart from the states parties who have declared an interest in being consulted on how to ensure the effective protection of the underwater cultural heritage in question, the ISBA is to be invited to participate in the consultations.

¹⁴⁰ Article 12 para. 3. Here again, one might argue that in the light of the general duty of the states parties to take all appropriate measures to protect underwater cultural heritage, as set out in article 2 para. 4 of the Convention, a contracting state that is capable of preventing immediate danger to underwater cultural heritage in the Area, cannot arbitrarily abstain from taking action. But see O’Keefe, see note 23, 98, according to whom such measures are “entirely optional”.

¹⁴¹ See article 3 of the Convention. For a discussion of this provision see below at IV. 2.

¹⁴² O’Keefe, see note 23, 98 et seq.

¹⁴³ O’Keefe, *ibid.*, 99, speaks of “a very vague concept”.

¹⁴⁴ The same holds true for the underwater cultural heritage in general, although it is addressed in the Preamble to the UNESCO Convention 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*” [emphasis added]; see Rau, see note 23, 850 et seq.

3. Miscellaneous

As already noted, the jurisdictional regime set out by the UNESCO Convention is supplemented with the various provisions of the agreement that deal with the compliance with and the enforcement of the Convention (arts 14 - 18). For the purposes of the present paper, two norms are of special interest: article 15, referring to, *inter alia*, the issue of port state jurisdiction, and article 16, concerning measures relating to nationals and vessels.

a. Port State Jurisdiction

Article 15 of the UNESCO Convention obliges the states parties to take measures to prohibit the use of their territories, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of activities directed at underwater cultural heritage which are not in conformity with the Convention. The norm primarily aims at denying port state support to activities adversely affecting the underwater cultural heritage.

The idea of making use of port state powers in order to protect archaeological objects found at sea was already expressed during the negotiations at UNCLOS III.¹⁴⁵ Yet, it did not find its way into the 1982 UN Convention on the Law of the Sea. Nevertheless, as will be shown below, the concept of port state jurisdiction with regard to activities adversely affecting maritime cultural property, as it is now laid down in article 15 of the UNESCO Convention, is in full conformity with the existing international law of the sea.¹⁴⁶

It should be noted that as the successful completion of a project depends to a great extent on the possibility of calling local ports,¹⁴⁷ article 15 is of particular importance.¹⁴⁸ However, as rightly pointed out by Patrick O'Keefe, "[t]he full impact of Article 15 will only become apparent when most of the States of a particular geographic region become party to the Underwater Convention and implement the obliga-

¹⁴⁵ T. Treves, "La nona sessione della Conferenza sul diritto del mare", *Riv. Dir. Int.* 63 (1980), 432 et seq., (441).

¹⁴⁶ See below at IV. 3. c.

¹⁴⁷ A. Strati, *Draft Convention on the Protection of Underwater Cultural Heritage. A Commentary prepared for UNESCO*, UNESCO Doc. CLT-99/WS/8, April 1999, 39.

¹⁴⁸ Similarly O'Keefe, see note 23, 107.

tion.”¹⁴⁹ Until then, foreign ships searching for or recovering maritime cultural property may use the facilities of a state that is not yet a party to the UNESCO Convention.

b. Measures Relating to Nationals and Vessels

As was already seen, arts 9 para. 1 and 11 para. 1 of the Convention establish a range of obligations of the states parties in respect of their nationals and vessels flying their flag.¹⁵⁰ These obligations, which relate to the reporting of any discovery of underwater cultural heritage and any intention to engage in activities directed at such heritage in the EEZ, on the continental shelf and in the Area, are complemented by the duties laid down in article 16 of the Convention. The provision reads as follows:

States 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.

The norm primarily aims at obliging the states parties to *prohibit* its nationals and ships of its flags from engaging in activities adversely affecting underwater cultural heritage. This finding is confirmed by the fact that earlier drafts of article 16 contained provisions expressly stating that measures to be taken by a state party in respect of its nationals and vessels flying its flag should include prohibition of activities directed at underwater cultural heritage otherwise than in accordance with the Convention or the Rules of the Annex respectively.¹⁵¹ Likewise, article 8 of the Buenos Aires Draft of the ILA, which served as a model for article 16 of the UNESCO Convention, dealt with the prohibition of certain activities by nationals and ships.

¹⁴⁹ *Ibid.*, 108.

¹⁵⁰ See above at III. 2. c. and d.

¹⁵¹ See article 7 para. 2 (a) of the Draft from July 1999 and article 15 para. 2 (a) of the Informal Draft Negotiating Text prepared by the Chairman of the Third Meeting of Governmental Experts on the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage. For the text of the Draft from July 1999 and the Informal Draft Negotiating Text see UNESCO, *Fourth Meeting of Governmental Experts on the Draft Convention on the Protection of the Underwater Cultural Heritage, Paris, UNESCO Headquarters, 26 March - 6 April 2001. Consolidated Working Paper*, UNESCO Doc. CLT-2001/CONF.203/INF.3, Paris, March 2001.

It is important to see, however, that unlike article 8 of the Buenos Aires Draft, article 16 of the UNESCO Convention does not restrict the measures to be taken to the prohibition of activities adversely affecting maritime cultural property. Rather, the norm obliges the states parties to take *all* practicable measures to ensure that their nationals and vessels flying their flags do not engage in such activities. It would seem that this not only includes further *legislative* action, but also the *enforcement* of the prohibition to engage in activities directed at underwater cultural heritage in a manner not in conformity with the Convention in situations where such activities are actually occurring.¹⁵² It is worth noting that in this regard, there is a certain link between article 16 and arts 10 para. 4 and 12 para. 3 of the Convention, which concern the rights and duties of the contracting states to prevent any immediate danger to underwater cultural heritage in the EEZ, on the continental shelf and in the Area.¹⁵³

It should finally be noted that the territorial scope of application of article 16 of the UNESCO Convention is not explicitly limited.¹⁵⁴ Yet, given that according to general international law, a state may not exercise its power in the territory of another state,¹⁵⁵ the norm was certainly not intended as allowing enforcement measures in the territorial sea of another state party. By contrast, short of a reference in article 16 to a specific maritime zone, national legislation imposing on the national and the master of the vessel the duty to refrain from engaging in activities adversely affecting underwater cultural heritage is to apply to *all* areas of the sea.¹⁵⁶

¹⁵² Similarly O'Keefe, see note 23, 109.

¹⁵³ See above at III. 2. c. and d.

¹⁵⁴ In this regard, article 16 of the UNESCO Convention differs from article 8 of the Buenos Aires Draft, article 7 para. 2 of the UNESCO Draft from July 1999, and article 15 para. 2 of the Informal Draft Negotiating Text.

¹⁵⁵ PCIJ, *Affaire du "Lotus"*, Série A No. 10, 4 et seq., (18 et seq.). See generally F.A. Mann, "The Doctrine of Jurisdiction in International Law", *RdC* 111 (1964), 1 et seq., (127 et seq.); F.A. Mann, "The Doctrine of International Jurisdiction Revisited After Twenty Years", *RdC* 186 (1984), 9 et seq., (34 et seq.).

¹⁵⁶ The right to *authorize* activities directed at underwater cultural heritage in the different maritime zones is exclusively laid down, however, in arts 7 para. 1, 8, 10 paras 1, 2, 4 and 5 (b) and (c), and 12 paras 1, 4 and 5 of the Convention; see above at III. 2.

IV. The Compatibility of the UNESCO Convention on Underwater Cultural Heritage with the International Law of the Sea

It is now time to address the issue of the compatibility of the protection scheme set out by the UNESCO Convention with the existing international law of the sea, as primarily laid down in the 1982 UN Convention on the Law of the Sea. Interestingly, the Law of the Sea Convention contains a provision that can be interpreted as expressly allowing for the elaboration of more comprehensive schemes of protection of underwater cultural heritage which may substantially depart from the basic principles and objectives of the Convention on Law of the Sea (see at IV. 1.). Yet, given that the latter was conceived as a package deal, it is widely agreed that its jurisdictional regime, which is often said to represent a delicate balance, should not be lightly disturbed. Furthermore, the fear, which was already expressed at UNCLOS III,¹⁵⁷ that in particular the extension over the continental shelf of a set of coastal states' rights which bear no relation to natural resources might favour creeping jurisdiction, i.e. the claim of more and more control over the continental shelf, and alter overtime the conceptual character of the regime applicable to this area, must be taken seriously. The UNESCO Convention appears to be well aware of this: in its article 3, the agreement explicitly states that it is not to prejudice the rights, jurisdictions and duties of states under international law, including the UN Convention on the Law of the Sea (see at IV. 2.). However, given that this might be only lip service, it will have to be discussed at the end of this section as to whether the protection scheme provided for in the UNESCO Convention departs from the regime embodied in the Law of the Sea Convention (see at IV. 3.).

1. Starting Point: Article 303 para. 4 of the UN Convention on the Law of the Sea

Being the primary codification of the contemporary international law of the sea and the "constitution of the oceans", the UN Convention on the Law of the Sea not only deals with all subject matters concerning the international law of the sea, but also contains provisions on its rela-

¹⁵⁷ Strati, see note 30, 164.

tion to other treaties addressing law of the sea issues. Most importantly, article 311 of the Convention on the Law of the Sea deals with the actual or potential existence of international agreements impinging upon matters for which the Law of the Sea Convention also provides. Of particular interest is the third paragraph of article 311, which states that:

Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

It has already been mentioned that during the general debate in Commission IV of the 31st General Conference of UNESCO, article 311 para. 3 of the UN Convention on the Law of the Sea was invoked by Norway.¹⁵⁸ Similar references to the provision had been made by a couple of delegations in the course of the negotiations of the UNESCO Convention. The central argument for those who support recourse to article 311 para. 3 of the Convention on the Law of the Sea is that in their view, the jurisdictional regime set out by the UNESCO Convention affects the application of the “basic principles” of the Law of the Sea Convention, in particular the distribution of competences in the EEZ and on the continental shelf as provided for in Parts V and VI of the instrument. Yet, as regards the elaboration of international agreements on the protection of maritime cultural property, article 311 para. 3 of the Convention on the Law of the Sea is not pertinent.

According to article 311 para. 5 of the Convention on the Law of the Sea, article 311 “does not affect international agreements expressly permitted or preserved by other articles of this Convention.” The provision has the effect of precluding any argument of possible inconsistency between the *lex generalis* of article 311 para. 3 and the *lex specialis* of other relevant articles of the Convention on the Law of the Sea.¹⁵⁹ Such other articles include, for example, article 211 para. 1, which concerns the establishment of international rules and standards to prevent,

¹⁵⁸ See above at I.

¹⁵⁹ M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Vol. V, 1989, 243.

reduce and control pollution of the marine environment from vessels.¹⁶⁰ It is important to understand that while some of these norms require, just like article 311 para. 3, the compatibility of the international agreement in question with the general principles and objectives of the Law of the Sea Convention,¹⁶¹ others, like article 211 para. 1, abstain from making similar requirements. Given their *lex specialis* character, these latter articles, therefore, allow for the adoption of international agreements that do not meet the criteria set out in article 311 para. 3 of the Convention on the Law of the Sea.

Now, as regards the protection of cultural relics found at sea, article 303 para. 4 of the Convention on the Law of the Sea 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 is clear that short of a reference to the basic principles and objectives of the Law of the Sea Convention, article 303 para. 4 allows for the international agreements mentioned to substantially depart from the Convention on the Law of the Sea, one may ask whether the provision relates exclusively to *existing* international agreements in the sphere of cultural heritage protection, such as the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property.¹⁶² Yet, under a literal interpretation of the term “other international agreements”, the norm appears to encompass both existing as well as future agreements. This is confirmed by the fact that the title of article 237 of the Convention on the Law of the Sea refers to “other conventions” which are then divided, in the first paragraph of article 237, in “conventions and agreements concluded previously” and “agreements which may be concluded in furtherance of the general principles set fourth in this Convention”.¹⁶³ Furthermore, the object and purpose of article 303 para. 4, which was added late in the negotiations at UNCLOS III,¹⁶⁴ also lend some support to the view that the provision leaves the door open to future agreements that may

¹⁶⁰ For a comprehensive list of articles of the UN Convention on the Law of the Sea that specifically refer to the possibility that the subject matter of a given provision may be governed by some other existing or future international agreement, see Nordquist, *ibid.*, 240.

¹⁶¹ See, e.g., article 237 of the Convention on the Law of the Sea.

¹⁶² See note 70.

¹⁶³ Herzog, see note 30, 227.

¹⁶⁴ Strati, see note 30, 162 et seq.

fill in the gaps the Convention on the Law of the Sea has left open regarding the protection of the underwater cultural heritage. This view is not only shared by the overwhelming majority of legal commentators,¹⁶⁵ but was also expressed by a couple of delegations during the drafting of the UNESCO Convention.¹⁶⁶

It is sometimes contended though that article 303 para. 4 of the Convention on the Law of the Sea does not allow for the creation of new rights of the states parties beyond the 24-mile limit.¹⁶⁷ To come to this conclusion, it is argued that article 303 does not deal with the issue of jurisdiction seaward of the contiguous zone boundary and that according to article 303 para. 4, only “this article” is without prejudice to other international agreements in the field of cultural heritage protection.¹⁶⁸ Consequently, when it comes to the creation of new rights in respect of cultural relics found in the EEZ, on the continental shelf and in the Area,¹⁶⁹ article 311 para. 3 of the Convention on the Law of the Sea is said to be the relevant norm.¹⁷⁰

Yet, this line of reasoning does not appear to be cogent. Article 303 para. 1 speaks of archaeological and historical objects “found at sea”,

¹⁶⁵ See, e.g., Arend, see note 1, 803; Hayashi, see note 30, 292; Herzog, see note 30, 227; O’Keefe, see note 23, 19; Rau, see note 23, 865; Scovazzi, see note 23, 154; Shelton, see note 30, 63; Strati, see note 30, 175 et seq.; Vitzthum/ Talmon, see note 5, 25.

¹⁶⁶ See, e.g., UNESCO, *Draft Convention for the Protection of the Underwater Cultural Heritage, Third Meeting of Governmental Experts, UNESCO Headquarters, Paris 3 - 7 July 2000, Document Presented by the Government of Italy*, para. 4: “Very important for the present negotiation is para. 4 of [...] Art. 303 [...]. This is an interesting point: the UNCLOS allows for the drafting of more specific treaty regimes which can ensure a better protection of the underwater cultural heritage. In other words, the UNCLOS itself fully encourages the future filling of the gaps it has left open [...].”

¹⁶⁷ Herzog, see note 30, 229 et seq.; similarly Allain, see note 30, 767 et seq.

¹⁶⁸ As stated by Allain, see note 30, 768: “While article 303 may be supplanted by other international agreements, other provisions of the LOS Convention may not.”

¹⁶⁹ Concerning the protection of the underwater cultural heritage in the Area, article 149 of the Convention on the Law of the Sea is considered *lex specialis*. However, given that the norm does not contain a provision comparable to article 303 para. 4, article 311 para. 3 is said to apply to the elaboration in the future of schemes of protection of underwater cultural heritage located on the deep seabed; see Herzog, see note 30, 228.

¹⁷⁰ Herzog, *ibid.*, 230.

without referring to a special maritime area. The provision may therefore be understood as containing a *general* principle regarding the protection of underwater cultural heritage, which is not just to be applied in the contiguous zone, as addressed in article 303 para. 2, but also — and particularly — seaward of the 24-mile limit.¹⁷¹ This is confirmed by the genesis of article 303 para. 1¹⁷² as well as by the fact that article 303 is included as one of the “General Provisions” of the Convention on the Law of the Sea. As noted by Kaare Bangert:

The area of application is not stated in Article 303 as it follows from its position in Part XVI that it has general application *mutatis mutandis*. Precisely due to its position in this Part it is superfluous to further specify the area of application, as this is presumed by its very position. No other rule in Part XVI has special rules on its area of application. [...]. So paragraph 1 is a self-contained unit consisting of a substantive rule, the duty to protect, and the procedure for the enforcement of this principle by co-operation. [...]. How this principle is to be implemented will depend on the individual circumstances and must be decided by mutual co-operation.¹⁷³

Hence, while it is true that article 303 para. 1 is, from the point of view of cultural heritage protection, rather vague and unsatisfactory,¹⁷⁴ the norm clearly establishes a minimum of a legal regime governing the protection of maritime cultural property seaward of the contiguous zone boundary, which also concerns, by implication, the issue of jurisdiction: by opting for mutual cooperation, article 303 para. 1 implicitly excludes coastal state jurisdiction. Against this background, it is hard to see, however, why article 303 para. 4 of the Convention on the Law of the Sea should be interpreted as not applying to the creation of new rights of the states parties in respect of cultural relics found in the EEZ and on the continental shelf by way of an international agreement that alters the regime provided for in article 303 para. 1.

In sum, the 1982 UN Convention on the Law of the Sea, therefore, does not stand in the way of an elaboration of more comprehensive schemes of protection of the underwater cultural heritage, be it on a

¹⁷¹ Carducci, see note 23, 420; Shelton, see note 30, 62. This is also admitted by Herzog, see note 30, 182 et seq.

¹⁷² As was seen, article 303 para. 1 is the result of a compromise on the issue of jurisdiction over maritime cultural property lying on the continental shelf; see above at II. 3.

¹⁷³ Bangert, see note 30, 125.

¹⁷⁴ See above at II. 3.

universal or a regional level. In view of the *lex specialis* character of article 303 para. 4, any such protection scheme does not necessarily have to meet the criteria set out in article 311 para. 3, but may substantially depart from the basic principles and objectives embodied in the Law of the Sea Convention.

2. The Saving Clause of Article 3 of the UNESCO Convention on Underwater Cultural Heritage

For the question of the conformity of the UNESCO Convention with the UN Convention on the Law of the Sea as the “constitution of the oceans”, the conclusion just reached is of fundamental importance: given that article 303 para. 4 of the Convention on the Law of the Sea explicitly enables states to stipulate derogatory provisions in the field of marine archaeology, there can be — from a purely formal perspective — *a priori* no incompatibility between the UNESCO Convention and the Law of the Sea Convention. In other words: independent of the question of the consistency of the UNESCO Convention with the *substantive* provisions of the Convention on the Law of the Sea, any court or tribunal being appealed to in accordance with the relevant provisions of Part XV of the Convention on the Law of the Sea will be prevented from holding that the states parties to the UNESCO Convention are in breach of their obligations under the Law of the Sea Convention.

Another question is, of course, whether a departure from the basic principles and objectives of the Convention on the Law of the Sea would be a *politically* wise means of ensuring a better protection of the underwater cultural heritage. As already noted at the beginning of this section, the jurisdictional regime set out by the Law of the Sea Convention is often regarded as representing a delicate balance which should not be lightly disturbed. Moreover, quite a significant number of states fear that any move towards more coastal state control, in particular in the EEZ and on the continental shelf, might lead to wider claims and thus overtime alter the conceptual character of the regimes applicable to these areas. One may take the view that this is “no more than a supposition and is not borne out in reality.”¹⁷⁵ Yet, as a matter of fact, states fearing such creeping jurisdiction will always feel prevented from becoming a party to an international agreement that creates new coastal states’ rights seaward of the territorial sea boundary or the 24-

¹⁷⁵ O’Keefe, see note 23, 26.

mile limit respectively. As a consequence, the agreement in question will lack the support necessary for the achievements of its goals.

For all these reasons, the UN General Assembly, during the drafting of the UNESCO Convention, passed a number of resolutions that stressed “the importance of ensuring that the instrument to be elaborated is in full conformity with the relevant provisions of the Convention [on the Law of the Sea].”¹⁷⁶ A large part of the work of the four meetings of governmental experts was devoted to the question of how to handle this, even though the majority of the delegations participating would have been ready to go beyond the Law of the Sea Convention, in particular by extending the jurisdiction of the coastal states to cultural relics found in the EEZ and on the continental shelf. Different views on the interpretation of the Convention on the Law of the Sea further complicated the negotiations.

Be it as it may, article 3 of the UNESCO Convention now explicitly 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.

As rightly noted by Patrick O’Keefe, the provision indicates that the supporters of the UNESCO Convention regard the instrument as being compatible with the Convention on the Law of the Sea.¹⁷⁷ Nevertheless, in case that there is a conflict between the two agreements, the latter shall prevail. Moreover, according to the second sentence of article 3, the UNESCO Convention is to be interpreted and applied in a manner consistent with the Law of the Sea Convention. This is of particular importance for the peaceful settlement of disputes concerning the interpretation or application of the UNESCO Convention: if, for example, a coastal state makes excessive use of its rights under article 10 paras 2 and 4 of the Convention in order to provide extensive protection to underwater cultural heritage outside of its territorial sea,¹⁷⁸ its actions can be challenged before a court or tribunal being competent under ar-

¹⁷⁶ A/RES/53/32 of 24 November 1998, para. 20; A/RES/54/31 of 24 November 1999, para. 30; A/RES/55/7 of 30 October 2000, para. 36.

¹⁷⁷ O’Keefe, see note 23, 57.

¹⁷⁸ For the rights of the coastal states under article 10 paras 2 and 4 of the Convention see above at III. 3. c.

title 25 of the Convention on the ground that the Law of the Sea Convention does not grant the coastal states comprehensive jurisdiction with regard to cultural relics found in the EEZ and on the continental shelf.

It is worth noting that article 3 of the UNESCO Convention largely parallels article 4 of the 1995 Straddling Fish Stocks Agreement.¹⁷⁹ There is, however, one basic difference between the two provisions: while the latter exclusively relates to the Law of the Sea Convention, the former adds the words “international law, including”. This formulation, which goes back to a proposal made by the Argentine delegation, has raised the concern of a couple of states.¹⁸⁰ During the debate in Commission IV of the 31st General Conference of UNESCO, an amendment proposed by Russia and the United Kingdom with the endorsement of the United States of America was to delete the words “international law, including”.¹⁸¹ The proposal was rejected without debate.

The problem with the final version of article 3 of the UNESCO Convention is that the reference to international law in general might be seen as indicating that states like Australia, Denmark, Ireland, Portugal or Spain, which already exercise control over underwater cultural heritage in the EEZ or on the continental shelf,¹⁸² may continue to do so, even though the Law of the Sea Convention does not provide for coastal state jurisdiction with regard to cultural relics found beyond the territorial sea boundary or the 24-mile limit respectively.¹⁸³ However, given that the trend to make claims over the EEZ and the continental

¹⁷⁹ See note 95.

¹⁸⁰ See, e.g., Statement of R.C. Blumberg, U.S. Observer Delegate to the 31st UNESCO General Conference, Before Commission IV of the General Conference, Regarding the U.S. Views on the UNESCO Convention on the Protection of the Underwater Cultural Heritage, Paris, France (Oct. 29, 2001), reprinted in: Murphy, see note 19, 470 et seq.: “Article 3 is inadequate to resolve the concerns over jurisdiction and ambiguities in the text, because it includes a vague reference to international law in addition to (the LOS Convention).”

¹⁸¹ See note 20.

¹⁸² See above at II. 3.

¹⁸³ Along these lines O’Keefe, see note 23, 59, who argues that the UNESCO Convention establishes only a “minimum international standard” from which states may depart by continuing to exercise control over the continental shelf, for example, or by claiming such control when the need is present.

shelf does not yet satisfy the prerequisites of customary international law,¹⁸⁴ it is clear that at present, article 3 cannot be used as a justification for the exercise of powers not provided for in the UNESCO Convention or the Convention on the Law of the Sea. While it is true that the norm may, in principle, apply to *future* developments through custom,¹⁸⁵ it is not very likely that such international custom will soon be established. As regards future developments made by *international agreements*, article 6 para. 1 of the UNESCO Convention, which explicitly encourages the states parties to enter into bilateral, regional or other multilateral agreements ensuring a better protection of the underwater cultural heritage, stipulates that all such agreements shall be in full conformity with the provisions of the UNESCO Convention.¹⁸⁶ In sum, the reference in article 3 to international law in general might, therefore, be less problematic than it is feared by those who wanted the words “international law, including” to be deleted.

It should finally be noted though, that from a dogmatic point of view, a saving clause that relates to international law in general does not make much sense: an international agreement that is not to alter the existing law is simply superfluous. It would be absurd to argue that the UNESCO Convention is not intended to create new rights and obligations. The duty to impose reporting obligations, for example, as set out in arts 9 para. 1 and 11 para. 1 of the Convention,¹⁸⁷ does not yet exist in international law. The decisive point is that the instrument seeks to establish new rules regarding the protection of maritime cultural property *without infringing upon the basic principles governing the existing international law of the sea*. The saving clause of article 3 of the Convention should, therefore, be read as relating primarily to the UN Convention on the Law of the Sea, in particular the delicate balance of rights and interests set out by it. This interpretation is confirmed not only by the preparatory work of article 3,¹⁸⁸ but also by the

¹⁸⁴ See above at II. 3.

¹⁸⁵ O’Keefe, see note 23, 58.

¹⁸⁶ This is overlooked by O’Keefe, see note 23, 58 et seq., who contends that article 3 allows for further developments made by other international agreements among states which depart from the “minimum international standard” provided for in the UNESCO Convention, i.e. by extending coastal state jurisdiction over the continental shelf.

¹⁸⁷ See above at III. 2. c. and d.

¹⁸⁸ The words “international law, including” were added late during the negotiations of the UNESCO Convention. The saving provision in the UNESCO Draft of July 1999 (article 2 *bis*), for example, took up the lan-

fact that the provision is headed “Relationship between this Convention and the United Nations Convention on the Law of the Sea.”¹⁸⁹

3. The Conformity of the Jurisdictional Regime of the UNESCO Convention on Underwater Cultural Heritage with the Substantive Provisions of the UN Convention on the Law of the Sea

Against this background, it remains to be discussed whether the jurisdictional regime embodied in the UNESCO Convention can be regarded as being in line with the *substantive* provisions of the UN Convention on the Law of the Sea, in particular the norms on the delimitation of the rights and duties of the coastal states and the other states beyond the territorial sea limit. As was seen, the protection scheme embodied in the UNESCO Convention rests on various pillars:¹⁹⁰

- cooperation and collaboration (“coordinated jurisdiction”);
- flag state and nationality jurisdiction;
- port state jurisdiction; and
- coastal state jurisdiction.

From the point of view of the existing international law of the sea, it is primarily the forth pillar which might give rise to concern: given that the Law of the Sea Convention does not provide for comprehensive coastal state jurisdiction with regard to underwater cultural heritage seaward of the 12-mile limit but grants the coastal states only a limited set of rights concerning cultural relics found in the contiguous zone,¹⁹¹ it will have to be examined whether the jurisdictional regime set up by the UNESCO Convention relies on any *extension* of the rights of the coastal states (see at IV. 3 d.). By contrast, measures based on cooperation and collaboration as well as flag state, nationality and port state ju-

guage of article 4 of the Straddling Fish Stocks Agreement, thus referring exclusively to the UN Convention on the Law of the Sea.

¹⁸⁹ Rau, see note 23, 865 et seq.

¹⁹⁰ See above at III. 2. and 3.

¹⁹¹ See above at II. 2.

jurisdiction are, from a law of the sea perspective, *a priori* unproblematic (see at IV. 3. a., b. and c.).

a. Cooperation and Collaboration (“Coordinated Jurisdiction”)

The duty to cooperate, enshrined in article 2 para. 2 of the UNESCO Convention,¹⁹² is one of the major objectives of the new agreement.¹⁹³ As rightly noted by Craig Forrest, from this principle emerged a large part of the jurisdictional regime embodied in the Convention.¹⁹⁴ It has already been mentioned that in particular the cooperative mechanism for the protection of maritime cultural property in the EEZ and on the continental shelf, as provided for in arts 9 para. 5 and 10 paras 3 and 5 of the Convention, can be regarded as fleshing out the general duty to cooperate in the protection of underwater cultural heritage.¹⁹⁵ The same holds true for the regime governing cultural relics found in the Area, which largely parallels the cooperative system for the EEZ and the continental shelf.¹⁹⁶ In view of this, it is not an exaggeration to say that the principle of state cooperation is the primary foundation upon which the jurisdictional regime set out by the UNESCO Convention is based.¹⁹⁷

As it is the very idea of this “system of coordinated jurisdiction”¹⁹⁸ to avoid any creation of new jurisdictional zones or extension of coastal state jurisdiction, there is, in principle, no conflict with the existing international law of the sea, as primarily laid down in the UN Convention on the Law of the Sea.¹⁹⁹ On the contrary: the procedural mechanisms set up by arts 9 para. 5, 10 paras 3 and 5, 11 para. 4

¹⁹² See above at III. 1.

¹⁹³ Similarly O’Keefe, see note 23, 50.

¹⁹⁴ Forrest, see note 23, 543.

¹⁹⁵ See above at III. 2. c.

¹⁹⁶ See above at III. 2. d.

¹⁹⁷ As a general objective, the principle of state cooperation is also expressed in para. 10 of the Preamble to the UNESCO Convention, which declares that: “[C]ooperation among States [...] is essential for the protection of underwater cultural heritage.”

¹⁹⁸ Forrest, see note 23, 544.

¹⁹⁹ As to the powers of the coastal state to coordinate the consultations and to implement the agreed upon measures of protection in respect of underwater cultural heritage in the EEZ and on the continental shelf, see below at IV. 3. c.

and 12 paras 2 and 4 of the UNESCO Convention can be considered as merely putting article 303 para. 1 of the Convention on the Law of the Sea, i.e. the general duty to cooperate in the protection of archaeological and historical objects found at sea, in concrete terms. Thus, this latter provision may be said to form the legal basis of the shared jurisdictional structure established by arts 9 para. 5, 10 paras 3 and 5, 11 para. 4 and 12 paras 2 and 4 of the UNESCO Convention.

During the negotiations of the UNESCO Convention, it was argued by the Russian delegation, however, that the cooperative mechanism for the protection of underwater cultural heritage in the EEZ and on the continental shelf was not in *full* conformity with article 303 para. 1 of the Convention on the Law of the Sea for the reason that article 9 para. 5 of the UNESCO Convention required that there had to be a verifiable link between the underwater cultural heritage concerned and the states declaring an interest in being consulted on how to ensure the protection of that heritage: as was also articulated in article 9 para. 1 of the UNESCO Convention, *all* states parties had a responsibility to protect underwater cultural heritage in the EEZ and on the continental shelf; the concept of a verifiable link, established by article 9 para. 5 of the Convention, infringed upon this overriding requirement.²⁰⁰ Yet, in view of the vagueness of article 303 para. 1 of the Convention on the Law of the Sea, this position can hardly be maintained. The primary aim of article 303 para. 1 is to exclude unilateral action. The cooperative system created by arts 9 para. 5 and 10 paras 3 and 5 of the UNESCO Convention perfectly conforms to this. Besides, it appears to be only reasonable to restrict the right to take part in the consultations of states which dispose of a connecting factor to the underwater cultural heritage in question: the cooperative mechanism laid down in arts 9 para. 5 and 10 paras 3 and 5 has already been characterised as being “unfortunate in that it is overly bureaucratic and potentially time consuming.”²⁰¹ It

²⁰⁰ As regards the verifiable link-requirement enshrined in article 11 para. 4 of the Convention, the situation was different: in view of the fact that article 149 of the Convention on the Law of the Sea – as *lex specialis* – explicitly mentions the “preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin”, article 11 para. 4 of the UNESCO Convention was regarded also by Russia as being in line with the Law of the Sea Convention.

²⁰¹ Forrest, see note 23, 544; similarly O’Keefe, see note 23, 88: “The solution adopted is complex and will require goodwill on the part of all states parties to make it work. The danger is that the underwater cultural heritage may be damaged or destroyed while the various processes are being im-

would have been even more so if all states parties had been granted the right to declare an interest in being consulted on how to ensure the effective protection of underwater cultural heritage found in the EEZ and on the continental shelf.

b. Flag State and Nationality Jurisdiction

The second foundation upon which the jurisdictional regime embodied in the UNESCO Convention is based is flag state and nationality jurisdiction. As was seen, the reporting system applicable to the EEZ and the continental shelf, as set up by article 9 para. 1 of the Convention, relies exclusively on the flag state and the active personality principles of international jurisdiction rather than on any extension of the — legislative — competence of the coastal states.²⁰² The same applies to the system for reporting in the Area, which is substantially similar to that provided for in article 9 para. 1 of the Convention.²⁰³ Likewise, flag state and nationality jurisdiction form the basis of article 16 of the Convention, which requires measures to be taken in order to ensure that vessels and nationals do not engage in activity directed at underwater cultural heritage in a manner not in conformity with the Convention.²⁰⁴ Finally, the flag state and the active personality principles may also be said to be inherent in arts 10 para. 4 and 12 para. 3 in so far as these provisions address the rights and duties of *all* states parties in situations of imminent danger to underwater cultural heritage located in the EEZ, on the continental shelf and in the Area.²⁰⁵

There can be no doubt that under the existing international law of the sea, both flag and nationality are valid bases of jurisdiction. As regards the principle of flag state jurisdiction, it is not only articulated, *inter alia*, in arts 92 and 94 of the UN Convention on the Law of the

plemented.” See also Scovazzi, see note 23, 154, according to whom arts 9 and 10 of the UNESCO Convention result from “a stratification of proposals, counter-proposals, last-minute changes and ‘constructive ambiguities’ which do not lead to an easily readable text.”

²⁰² Contrary to what was contended by a couple of delegations during the negotiations of the UNESCO Convention, this holds true also for the reporting obligations under article 9 para. 1 (b) (ii) of the Convention; see above at III. 2. c.

²⁰³ See above at III. 2. d.

²⁰⁴ See above at III. 3. b.

²⁰⁵ See above at III. 3. c. and d.

Sea, but also forms the primary basis of the compliance and enforcement mechanisms set up by a number of specialised international instruments in the sphere of the international law of the sea, such as the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas²⁰⁶ or the 1995 Straddling Fish Stocks Agreement.²⁰⁷ Considering the dangers posed by vessels flying the flag of non-parties or a flag of convenience, the drafters of the UNESCO Convention decided, however, not to *exclusively* rely on the flag state principle but to supplement it with the jurisdiction of states in respect of their nationals,²⁰⁸ which is – just like flag state jurisdiction – also undisputed: as rightly noted by Patrick O’Keefe, “[a]part from possible considerations of human rights, States are quite free under international law to impose duties on their nationals [...] even though they are outside the territorial jurisdiction of the State.”²⁰⁹ In particular in the field of international criminal law, the principle of nationality is “[t]he most important of the alternative approaches to the problem of jurisdiction.”²¹⁰

Thus, while one may doubt whether flag state and nationality jurisdiction, if used alone, would prevent the looting of underwater cultural heritage,²¹¹ the various provisions of the UNESCO Convention re-

²⁰⁶ *ILM* 33 (1994), 968 et seq.

²⁰⁷ See, e.g., P.G.G. Davies/ C. Redgwell, “The International Legal Regulation of Straddling Fish Stocks”, *BYIL* 57 (1996), 199 et seq., (265 et seq.); G. Moore, “The FAO Compliance Agreement”, in: M.H. Nordquist/ J.N. Moore (eds), *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations*, 2000, 77 et seq., (79 et seq.).

²⁰⁸ In relying on the flag state principle *and* the nationality principle, the relevant provisions of the UNESCO Convention follow the track of article 8 of the 1994 Buenos Aires Draft of ILA.

²⁰⁹ O’Keefe, see note 23, 82, who correctly adds that: “There may be problems of enforcement but that is another issue.”

²¹⁰ Mann, “The Doctrine of Jurisdiction in International Law”, see note 155, 88. See generally I. Bantekas/ S. Nash/ M. Mackarel, *International Criminal Law*, 2002, 22 et seq.

²¹¹ See Strati, see note 147, 43. This is exactly the reason why article 10 para. 4 of the UNESCO Convention does not grant the right to adopt *urgent* measures in respect of maritime cultural property found in the EEZ or on the continental shelf primarily to the flag state or the state of the nationality of the master of the vessel – although these are not precluded from taking action –, but attributes it to the coastal state; see Scovazzi, see note 23, 155: “It would [...] have been illusory to grant this right to the flag State [...]” For a discussion of the conformity of article 10 para. 4 of the Con-

quiring the states parties to take action in respect of their nationals and vessels flying their flag are, from the point of view of the existing international law of the sea, unproblematic.

c. Port State Jurisdiction

The same applies to port state jurisdiction, which is addressed in article 15 of the UNESCO Convention.²¹² It is generally agreed that under international law, coastal states have the sovereign right to deny access to their ports to any foreign vessel; *a majore ad minus*, they may place certain conditions upon entry.²¹³ In its judgement in the *Nicaragua* case, the ICJ explicitly stated that:

The basic legal concept of state sovereignty in customary international law [...] extends to territorial waters and territorial sea of every state [...]. It is [...] by virtue of its sovereignty that the coastal state may regulate access to its ports.²¹⁴

Arts 25 para. 2 and 211 para. 3 of the Convention on the Law of the Sea confirm this right of the coastal states to regulate and even deny access to their maritime ports. Likewise, article 23 para. 4 of the 1995 Straddling Fish Stocks Agreement also gives strong confirmation of the *opino juris* of states that under the existing international law of the sea, there is no general right of entry into ports. The provision reads:

Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

As noted previously, the idea of making use of the port states' powers in order to protect cultural relics found at sea was already articulated during the negotiations at UNCLOS III.²¹⁵ However, the proposal did

vention with the delimitation of rights and duties under the Convention on the Law of the Sea, see below at IV. 3.

²¹² See above at III. 3. a.

²¹³ L. de La Fayette, "Access to Ports in International Law", *International Journal of Marine and Coastal Law* 11 (1999), 1 et seq.; G.C. Kasoulides, *Port State Control and Jurisdiction. Evolution of the Port State Regime*, 1993; V. Lowe, "The Right of Entry into Maritime Ports in International Law", *San Diego L. Rev.* 14 (1977), 597 et seq.

²¹⁴ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgement of 27 June 1986, ICJ Reports 1986, 14 et seq., paras 212 et seq.

²¹⁵ See above at III. 3. a.

not find its way into the final text of the Convention on the Law of the Sea. Under article 15 of the UNESCO Convention, the states parties to the agreement now have the duty to prohibit the use of their ports in support of activities directed at underwater cultural heritage which are not in conformity with the Convention. In a way, the provision resembles article 23 para. 3 of the Straddling Fish Stocks Agreement, according to which “[s]tates may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of sub-regional, regional or global conservation and management measures on the high seas.” In sum, it perfectly conforms to the existing international law of the sea.

d. Coastal State Jurisdiction

Given the conformity of the aforementioned bases of jurisdiction with the existing international law of the sea, as primarily governed by the 1982 Convention on the Law of the Sea, the decisive question is whether the UNESCO Convention relies on any extension of coastal state jurisdiction. As was seen, apart from a limited set of powers with respect to maritime cultural property found within the contiguous zone, coastal states do not dispose of any rights regarding the protection of the underwater cultural heritage beyond the territorial sea boundary.²¹⁶ The UNESCO Convention has been repeatedly criticised for the reason that it departs from this by creating new powers for the coastal states in a manner that alters the delicate balance of rights and interests set up by the Law of the Sea Convention. According to the United States of America, for example, this is the case:

with Article 9 (1) (b) (i), which requires a flag State to give direct prior notification to a coastal State of any activity to be directed at [underwater cultural heritage] in its exclusive economic zone or on its continental shelf. It is also the case with the protection scheme set out in Article 10, which creates a right of the coastal State, acting as the “coordinating State”, to take unspecified and apparently unlimited protection measures to prevent immediate danger to [underwater cultural heritage] located in its [exclusive economic zone] or on its continental shelf. Of particular concern is the fact that the coastal

²¹⁶ See above at II.

State may take such protection prior to consultations with the other States on whose behalf it is intended to be coordinating.²¹⁷

As concerns the reporting procedure laid down in article 9 para. 1 (b) (i) of the Convention, the argument is clearly misleading. While it is true that the provision recognises a certain interest of the coastal states in being informed of discoveries of underwater cultural heritage in their EEZ and on their continental shelf as well as of activities directed at such heritage, this does not mean that it departs from the balance of rights and interests provided for by the Convention on the Law of the Sea. For one, as discussed earlier, article 9 para. 1 (b) (i) operates exclusively with the flag state and the nationality principles of international jurisdiction.²¹⁸ Second, the interest of the coastal states in being informed of discoveries and activities in their EEZ and on their continental shelf can easily be justified by the fact that under article 10 para. 2 of the UNESCO Convention, the coastal states have the right to prohibit or authorise activities directed at cultural relics found in their EEZ and on their continental shelf in order to prevent interference with their sovereign rights or jurisdiction as provided for by international law, including the UN Convention on the Law of the Sea.

As was seen, article 10 para. 2 proceeds from the assumption that it does not confer any new powers but is only declaratory in character.²¹⁹ And in fact, it may be argued that the sovereign rights and jurisdiction of the coastal states, as set out in particular in Parts V and VI of the Convention on the Law of the Sea, also encompass — as a sort of “annex authority” — the right to take action in order to prevent interference with the exercise of the existing powers.²²⁰ It should be noted that this view is also shared by the United States of America, which even formulated an early draft of article 10 para. 2 of the UNESCO Convention. Thus, while one may doubt whether the norm provides for an *appropriate* mechanism for the protection of maritime cultural property,²²¹ it is, from the point of view of the existing international law of the sea, rather unproblematic.²²² Against this background, it is obvious,

²¹⁷ Statement of R.C. Blumberg, see note 180, 470.

²¹⁸ See above at III. 2. c. and IV. 3. b.

²¹⁹ See above at III. 2. c.

²²⁰ But see Carducci, see note 23, 430.

²²¹ See the critique presented by Scovazzi, see note 23, 155.

²²² For the problem of how likely an interference with the coastal states' sovereign rights or jurisdiction has to be in order to trigger the powers under article 10 para. 2 of the UNESCO Convention, see above at III. 2. c.

however, that article 9 para. 1 (b) (i) of the Convention must also be considered as being in full conformity with the balance of rights and interests set up by the Law of the Sea Convention.

Regarding the role of the coastal states in the cooperative mechanism provided for in arts 9 para. 5, 10 paras 3 and 5 of the UNESCO Convention,²²³ it is important that pursuant to article 10 para. 6 of the Convention, the coastal state, in coordinating consultations, taking measures and issuing authorisations, shall “act on behalf of the States Parties as a whole and not in its own interest.” Moreover, as stipulated in the second sentence of article 10 para. 6, “[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.” The provision makes perfectly clear that article 10 paras 3 and 5 do not aim at attributing any new rights to the coastal state. Rather, the latter is addressed as a sort of “guardian” of the community interest in the protection of maritime cultural property found in the EEZ or on the continental shelf or “agent” for the enforcement of the collective will of the contracting states by which it is bound.²²⁴

In any event, under article 10 para. 5 of the Convention, any *unilateral* action of the coastal state is excluded by the fact that it is up to the states consulting to decide on the measures to be taken. Accordingly, when the coastal state, in implementing the agreed upon measures, departs from the collective will of the states parties, as identified according to the procedure laid down in article 10 para. 3, resort may be made to the dispute settlement mechanism set out in article 25 of the Convention. Besides, article 10 para. 5 addresses the coastal state merely in its capacity as the “coordinating state” within the meaning of article 10 para. 3 (b) of the Convention.²²⁵ Given that the state parties involved may agree that the procedures to be followed after the consultations

²²³ See above at III. 2. c.

²²⁴ Rau, see note 23, 861.

²²⁵ The designation of the coastal state as the “coordinator of first resort” can be justified by the fact that the coastal state usually is the nearest. Thus, article 10 para. 3 (b) of the UNESCO Convention is not necessarily to be read as a recognition of any preferential rights or special role of the coastal states with regard to underwater cultural heritage in their EEZ and on their continental shelf; see Rau, see note 23.

have taken place are to be implemented by another state party,²²⁶ it thus once again becomes very clear that the authority to implement the agreed upon measures of protection and to issue all necessary authorisations therefore cannot be meant as a new coastal state right *stricto sensu*.

Concerning the authority of the coastal state to adopt urgent measures, as set out in article 10 para. 4 of the Convention,²²⁷ the situation is more complex. The basic difference between the coastal state's powers under article 10 para. 5 and those under article 10 para. 4 is that according to the latter provision, the coastal state may also take action *prior to consultations* if necessary. Hence, in adopting measures to prevent immediate danger to underwater cultural heritage, including looting, the coastal state is — unlike in the case of article 10 para. 5 — not bound by any decision of the interested states parties but may act unilaterally. This might in fact be regarded as amounting to a new right of the coastal state.

For this reason, it has been argued by Craig Forrest that the measures that may be taken by the coastal states under article 10 para. 4 of the UNESCO Convention were limited to the extent that they had to be in conformity with existing powers of coastal states in international law.²²⁸ As a consequence, article 10 para. 4 was only applicable to measures *vis-à-vis* the coastal state's nationals and vessels flying its flag. While this approach certainly avoids any conflict with the existing international law of the sea and thus would perfectly conform to article 3 of the UNESCO Convention,²²⁹ it significantly limits the scope of article 10 para. 4, which has been identified by Professor Scovazzi as the "cornerstone" of the new Convention.²³⁰

It remains doubtful, however, whether such a narrow reading of article 10 para. 4 is needed: just like article 10 para. 5 of the Convention, the norm addresses the coastal state merely in its capacity as the coordinating state. Moreover, in taking measures to prevent immediate danger to underwater cultural heritage located in its EEZ or on its continental

²²⁶ Article 10 para. 5 (a) and (b). As rightly noted by O'Keefe, see note 23, 91, "[t]here is no requirement that the State chosen should be one of those consulting. There may be factors such as access to technology that make the choice of a State outside the group logical."

²²⁷ See above at III. 2. c.

²²⁸ Forrest, see note 23, 544.

²²⁹ See above at IV. 1.

²³⁰ Scovazzi, see note 23, 155.

shelf, the coastal state again has to act on behalf of the states parties as a whole and not in its own interest, and any 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 Convention on the Law of the Sea.²³¹ Finally, the coastal state may exclusively act when there is any “immediate danger” to the underwater cultural heritage concerned and only as long as the interested states parties have not yet agreed on measures of protection.²³² While it is true that the protection measures in article 10 para. 4 are expressly not limited to dangers caused by activities directed at underwater cultural heritage but rather are extended to any danger “whether arising from human activities or any other cause”,²³³ the phrase “any other cause”, which was inserted to cover situations which could not be envisaged by the drafters but may arise in practice,²³⁴ can be interpreted restrictively so as to avoid an excessive use of article 10 para. 4.

Thus, article 10 para. 4 of the UNESCO Convention may also be read as a narrowly construed exception to the general rule that measures of protection regarding underwater cultural heritage located in the EEZ or on the continental shelf have to be agreed upon by the interested states parties, which finds its justification in the fact that “in a case of urgency, a determined state must be entitled to take immediate measures without losing time in any procedural requirements.”²³⁵ Understood in this way, the provision, just like article 10 paras 3 and 5, does not grant the coastal state any new right *stricto sensu*, but makes use of the coastal state as an “organ” of the community of the states parties for the purpose of effectively coping with emergency situations.²³⁶

While the regime governing the protection of cultural relics found in the EEZ or on the continental shelf, as embodied in arts 9 and 10 of the UNESCO Convention, may therefore be considered as not relying on any extension of coastal state jurisdiction, a few remarks should finally

²³¹ Article 10 para. 6 of the Convention.

²³² The coastal state’s powers under article 10 para. 4 may thus be said to be subordinated to the cooperative procedure laid down in article 10 paras 3 and 5 of the Convention, which is the priority mechanism for the protection of maritime cultural property located in the EEZ and on the continental shelf.

²³³ Emphasis added.

²³⁴ O’Keefe, see note 23, 93.

²³⁵ Scovazzi, see note 23, 155.

²³⁶ Rau, see note 23, 862.

be made concerning article 8 of the Convention. As was seen, the provision explicitly empowers the states parties to “regulate and authorize” activities directed at underwater cultural heritage within their contiguous zone.²³⁷ Independent of the exact scope of article 8, the norm thus grants the coastal states at least a limited set of legislative powers. Even though it adds the phrase “in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea”, article 8 of the UNESCO Convention therefore clearly goes beyond article 303 para. 2 of the Convention on the Law of the Sea, which only extends the scope of application of article 33 of the Convention on the Law of the Sea to the removal of cultural relics from the contiguous zone without attributing to the coastal states any legislative competence with regard to cultural relics found in the 24-mile zone.²³⁸ Given that during the negotiations of the UNESCO Convention, article 8 was rather undisputed, one might argue, however, that the provision constitutes a “subsequent practice” in the application of the Law of the Sea Convention within the meaning of article 31 para. 3 (b) of the Vienna Convention on the Law of Treaties.²³⁹

V. Concluding Remarks

Being the first international agreement that comprehensively deals with the protection of maritime cultural property in all areas of the sea, the UNESCO Convention on Underwater Cultural Heritage — even though certainly not without its shortcomings²⁴⁰ — represents a major contribution to the strengthening of the protection of the underwater

²³⁷ See above at III. 2. b.

²³⁸ See above at II. 2.

²³⁹ Rau, see note 23, 856.

²⁴⁰ This holds particularly true for the various provisions on the status of sunken warships and state vessels (arts 2 para. 8, 7 para. 3, 10 para. 7 and 12 para. 7), which clearly reflect their character as a compromise solution between divergent positions on the issues of sovereign immunity and title to sunken state craft; see Rau, see note 23, 867 et seq. Nevertheless, as noted by Carducci, see note 23, 434: “[I]ssues like state vessels and warships are simply incidental and accessory to the Convention and should not deter the international community from reacting positively to it and the high standards it embodies, which are consistent with the 1982 Convention, and from joining it quickly to prevent the further damaging and looting of underwater cultural heritage.”

cultural heritage, which is currently threatened by looters and treasure divers. As was seen, from the point of view of the existing international law of the sea, as primarily governed by the 1982 UN Convention on the Law of the Sea, the UNESCO Convention does not raise any major concerns: firstly, the Law of the Sea Convention, in its article 303 para. 4, explicitly enables states to elaborate more comprehensive schemes of protection of the underwater cultural heritage, which may substantially depart from the basic principles and objectives of the Law of the Sea Convention, so that from a purely formal perspective, there can be *a priori* no incompatibility between the UNESCO Convention on Underwater Cultural Heritage and the UN Convention on the Law of the Sea. Second, the fear that the UNESCO Convention on Underwater Cultural Heritage might alter the delicate balance of rights and interests set out in the Law of the Sea Convention is, to a large extent, unfounded: the UNESCO Convention relies on cooperation between the states parties as well as on flag state, nationality and port state jurisdiction rather than on any extension of coastal state jurisdiction.²⁴¹ Thus, its jurisdictional provisions — with the exception of article 8, which concerns the protection of cultural relics found in the contiguous zone²⁴² —, when interpreted narrowly, can be considered as being in full conformity with the delimitation of the rights and duties of the coastal states and the other states under the Convention on the Law of the Sea.

From a technical point of view, the UNESCO Convention on Underwater Cultural Heritage may, therefore, be regarded as an agreement for the implementation of the marine archaeology provisions of the UN Convention on the Law of the Sea.²⁴³ This idea of “implementation” of the provisions of the Law of the Sea Convention relating to the protection of the underwater cultural heritage was repeatedly articulated during the negotiations of the UNESCO Convention, not only by a couple of delegations,²⁴⁴ but also by the UN General Assembly.²⁴⁵ However, it did not find its way into the official title of the new instrument, which is partly due to the fact that the idea was opposed by

²⁴¹ Similarly Forrest, see note 23, 543.

²⁴² See above at III. 2. b. and IV. 3. d.

²⁴³ Carducci, see note 23, 420 et seq.

²⁴⁴ See also the statement made by Mr. Kolby (Norway) during the 56th session of the UN General Assembly, reprinted in: *Environmental Policy and Law* 32 (2002), 185.

²⁴⁵ See note 176.

those member states of UNESCO that are not a party to the Convention on the Law of the Sea.²⁴⁶ Moreover, as the examples of the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea²⁴⁷ and the 1995 Straddling Fish Stocks Agreement show, the label of an “implementing agreement” should not be given too much significance.²⁴⁸ Finally, while the notion of “implementing agreement” is sometimes linked to the idea of a modification of the *pacta tertiis*-rule, as expressed in article 34 of the 1969 Vienna Convention on the Law of Treaties,²⁴⁹ it is quite obvious that the provisions of the UNESCO Convention on Underwater Cultural Heritage can only apply among parties to the agreement.²⁵⁰

It should finally be noted though that in spite of the general consistency of the jurisdictional regime embodied in the UNESCO Convention with the balance of rights and interests set out in the UN Convention on the Law of the Sea, the application of the provisions of the agreement will require some goodwill on the part of the contracting states. This holds particularly true for the norms on the powers of the coastal states to take unilateral action in the EEZ and on the continental shelf,²⁵¹ which can be easily misused by the coastal states in order to provide *extensive* protection to maritime cultural property seaward of the 12 mile-limit or the 24-mile limit respectively. Against this background, it must be stressed once more that the powers granted to the coastal states under article 10 paras 2 and 4 of the UNESCO Convention constitute narrowly construed exceptions to the general rule that measures of protection in regard to cultural relics found in the EEZ and on the continental shelf have to be agreed upon by the interested states parties pursuant to the procedural mechanism set up by arts 9 para. 5 and 10 paras 3 and 5 of the Convention. In practice, it might well be that arts 3 and 25 of the Convention, which deal with the rela-

²⁴⁶ Besides, UNESCO might be considered as the wrong forum for the elaboration of an “implementing agreement” in the full sense of the term.

²⁴⁷ *ILM* 33 (1994), 1309 et seq.

²⁴⁸ Scovazzi, see note 23, 156.

²⁴⁹ See, e.g., E. Franckx, “*Pacta Tertiis* and the Agreement for the Implementation of the Straddling Fish Stocks Provisions of the United Nations Convention on the Law of the Sea”, *Tul. J. Int'l & Comp. L.* 8 (2000), 49 et seq.

²⁵⁰ See also Statement of R.C. Blumberg, see note 180, 470.

²⁵¹ Article 10 paras 2 and 4 of the UNESCO Convention; see above at III. 2. d.

tionship between the UNESCO Convention and the UN Convention on the Law of the Sea as well as with the peaceful settlement of disputes between the states parties to the UNESCO Convention,²⁵² will turn out to be of particular importance in this context. Nonetheless, this should not prevent states from joining the new agreement.

²⁵² See above at III. 1. and IV. 1.

Annex

Convention on the Protection of the Underwater Cultural Heritage

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 15 October to 3 November 2001, at its 31st session,

Acknowledging 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,

Realizing the importance of protecting and preserving the underwater cultural heritage and that responsibility therefor rests with all States,

Noting growing public interest in and public appreciation of underwater cultural heritage,

Convinced of the importance of research, information and education to the protection and preservation of underwater cultural heritage,

Convinced of the public's right to enjoy the educational and recreational benefits of responsible non-intrusive access to *in situ* underwater cultural heritage, and of the value of public education to contribute to awareness, appreciation and protection of that heritage,

Aware of the fact that underwater cultural heritage is threatened by unauthorized activities directed at it, and of the need for stronger measures to prevent such activities,

Conscious of the need to respond appropriately to the possible negative impact on underwater cultural heritage of legitimate activities that may incidentally affect it,

Deeply concerned by the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage,

Aware of the availability of advanced technology that enhances discovery of and access to underwater cultural heritage,

Believing that cooperation among States, international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties and the public at large is essential for the protection of underwater cultural heritage,

Considering that survey, excavation and protection of underwater cultural heritage necessitate the availability and application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialization, all of which indicate a need for uniform governing criteria,

Realizing 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, including the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970, the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972 and the United Nations Convention on the Law of the Sea of 10 December 1982,

Committed to improving the effectiveness of measures at international, regional and national levels for the preservation *in situ* or, if necessary for scientific or protective purposes, the careful recovery of underwater cultural heritage,

Having decided at its twenty-ninth session that this question should be made the subject of an international convention,

Adopts this second day of November 2001 this Convention.

Article 1 – Definitions

For the purposes of this Convention:

1. (a) “Underwater cultural heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:
 - (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
 - (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
 - (iii) objects of prehistoric character.
- (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.

- (c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.
- 2. (a) “States Parties” means States which have consented to be bound by this Convention and for which this Convention is in force.
- (b) This Convention applies *mutatis mutandis* to those territories referred to in Article 26, paragraph 2(b), which become Parties to this Convention in accordance with the conditions set out in that paragraph, and to that extent “States Parties” refers to those territories.
- 3. “UNESCO” means the United Nations Educational, Scientific and Cultural Organization.
- 4. “Director-General” means the Director-General of UNESCO.
- 5. “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.
- 6. “Activities directed at underwater cultural heritage” means activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage.
- 7. “Activities incidentally affecting underwater cultural heritage” means activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage.
- 8. “State vessels and aircraft” means warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.
- 9. “Rules” means the Rules concerning activities directed at underwater cultural heritage, as referred to in Article 33 of this Convention.

Article 2 – Objectives and general principles

- 1. This Convention aims to ensure and strengthen the protection of underwater cultural heritage.
- 2. States Parties shall cooperate in the protection of underwater cultural heritage.

3. States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.
4. States Parties 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.
5. The preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.
6. Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation.
7. Underwater cultural heritage shall not be commercially exploited.
8. Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying 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.
9. States Parties shall ensure that proper respect is given to all human remains located in maritime waters.
10. Responsible non-intrusive access to observe or document *in situ* underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management.
11. No act or activity undertaken on the basis of this Convention shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction.

Article 3 – Relationship between this Convention and the United Nations Convention on the Law of the Sea

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.

Article 4 – Relationship to law of salvage and law of finds

Any 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.

Article 5 – Activities incidentally affecting underwater cultural heritage

Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.

Article 6 – Bilateral, regional or other multilateral agreements

1. States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention.
2. The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements.
3. This Convention shall not alter the rights and obligations of States Parties regarding the protection of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adoption, and, in particular, those that are in conformity with the purposes of this Convention.

**Article 7 – Underwater cultural heritage
in internal waters, archipelagic waters and territorial sea**

1. 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.
2. Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, States Parties shall require that the Rules be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.
3. 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.

Article 8 – Underwater cultural heritage in the contiguous zone

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.

**Article 9 – Reporting and notification
in the exclusive economic zone and on the continental shelf**

1. All States Parties have a responsibility to protect underwater cultural heritage in the exclusive economic zone and on the continental shelf in conformity with this Convention.

Accordingly:

- (a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;

- (b) in the exclusive economic zone or on the continental shelf of another State Party:
 - (i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;
 - (ii) 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.
- 2. On depositing its instrument of ratification, acceptance, approval or accession, a State Party shall declare the manner in which reports will be transmitted under paragraph 1(b) of this Article.
- 3. A State Party shall notify the Director-General of discoveries or activities reported to it under paragraph 1 of this Article.
- 4. The Director-General shall promptly make available to all States Parties any information notified to him under paragraph 3 of this Article.
- 5. Any 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.

**Article 10 – Protection of underwater cultural heritage
in the exclusive economic zone and on the continental shelf**

- 1. No authorization shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf except in conformity with the provisions of this Article.
- 2. 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.
- 3. Where 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:

- (a) consult all other States Parties which have declared an interest under Article 9, paragraph 5, on how best to protect the underwater cultural heritage;
- (b) 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.

4. Without 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.

5. The Coordinating State:

- (a) shall implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures;
- (b) shall issue all necessary authorizations for such agreed measures in conformity with the Rules, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations;
- (c) may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefor, and shall promptly inform the Director-General of the results, who in turn will make such information promptly available to other States Parties.

6. In coordinating consultations, taking measures, conducting preliminary research and/or issuing authorizations pursuant to this Article, the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest. Any 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.

7. Subject to the provisions of paragraphs 2 and 4 of this Article, 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.

Article 11 – Reporting and notification in the Area

1. States Parties have a responsibility to protect underwater cultural heritage in the Area in conformity with this Convention and Article 149 of the United Nations Convention on the Law of the Sea. Accordingly when a national, or a vessel flying the flag of a State Party, discovers or intends to engage in activities directed at underwater cultural heritage located in the Area, that State Party shall require its national, or the master of the vessel, to report such discovery or activity to it.

2. States Parties shall notify the Director-General and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to them.

3. The Director-General shall promptly make available to all States Parties any such information supplied by States Parties.

4. Any State Party may declare to the Director-General 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 to the underwater cultural heritage concerned, particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin.

Article 12 – Protection of underwater cultural heritage in the Area

1. No authorization shall be granted for any activity directed at underwater cultural heritage located in the Area except in conformity with the provisions of this Article.

2. The Director-General shall invite all States Parties which have declared an interest under Article 11, paragraph 4, to consult on how best to protect the underwater cultural heritage, and to appoint a State Party to coordinate such consultations as the “Coordinating State”. The Director-General shall also invite the International Seabed Authority to participate in such consultations.

3. All States Parties may take all practicable measures in conformity with this Convention, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause including looting.
4. The Coordinating State shall:
 - (a) implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures; and
 - (b) issue all necessary authorizations for such agreed measures, in conformity with this Convention, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations.
5. The Coordinating State may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefor, and shall promptly inform the Director-General of the results, who in turn shall make such information available to other States Parties.
6. In coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations pursuant to this Article, the Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties. Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.
7. No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.

Article 13 – Sovereign immunity

Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes,

that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.

Article 14 – Control of entry into the territory, dealing and possession

States 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 – Non-use of areas under the jurisdiction of States Parties

States Parties shall 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 16 – Measures relating to nationals and vessels

States 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.

Article 17 – Sanctions

1. Each State Party shall impose sanctions for violations of measures it has taken to implement this Convention.
2. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activities.
3. States Parties shall cooperate to ensure enforcement of sanctions imposed under this Article.

Article 18 – Seizure and disposition of underwater cultural heritage

1. Each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention.
2. Each State Party shall record, protect and take all reasonable measures to stabilize underwater cultural heritage seized under this Convention.
3. Each State Party shall notify the Director-General and any other State with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure of underwater cultural heritage that it has made under this Convention.
4. A State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit, taking into account the need for conservation and research; the need for reassembly of a dispersed collection; the need for public access, exhibition and education; and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the underwater cultural heritage concerned.

Article 19 – Cooperation and information-sharing

1. States Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage under this Convention, including, where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage.
2. To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage, heritage excavated or recovered contrary to this Convention or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage.
3. Information shared between States Parties, or between UNESCO and States Parties, regarding the discovery or location of underwater cultural heritage shall, to the extent compatible with their national legislation, be kept confidential and reserved to competent authorities of States Parties as long as the disclosure of such information might en-

danger or otherwise put at risk the preservation of such underwater cultural heritage.

4. Each State Party shall take all practicable measures to disseminate information, including where feasible through appropriate international databases, about underwater cultural heritage excavated or recovered contrary to this Convention or otherwise in violation of international law.

Article 20 – Public awareness

Each State Party shall take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Convention.

Article 21 – Training in underwater archaeology

States Parties shall cooperate in the provision of training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to underwater cultural heritage.

Article 22 – Competent authorities

1. In order to ensure the proper implementation of this Convention, States Parties shall establish competent authorities or reinforce the existing ones where appropriate, with the aim of providing for the establishment, maintenance and updating of an inventory of underwater cultural heritage, the effective protection, conservation, presentation and management of underwater cultural heritage, as well as research and education.

2. States Parties shall communicate to the Director-General the names and addresses of their competent authorities relating to underwater cultural heritage.

Article 23 – Meetings of States Parties

1. The Director-General shall convene a Meeting of States Parties within one year of the entry into force of this Convention and thereafter at least once every two years. At the request of a majority of States

Parties, the Director-General shall convene an Extraordinary Meeting of States Parties.

2. The Meeting of States Parties shall decide on its functions and responsibilities.
3. The Meeting of States Parties shall adopt its own Rules of Procedure.
4. The Meeting of States Parties may establish a Scientific and Technical Advisory Body composed of experts nominated by the States Parties with due regard to the principle of equitable geographical distribution and the desirability of a gender balance.
5. The Scientific and Technical Advisory Body shall appropriately assist the Meeting of States Parties in questions of a scientific or technical nature regarding the implementation of the Rules.

Article 24 – Secretariat for this Convention

1. The Director-General shall be responsible for the functions of the Secretariat for this Convention.
2. The duties of the Secretariat shall include:
 - (a) organizing Meetings of States Parties as provided for in Article 23, paragraph 1; and
 - (b) assisting States Parties in implementing the decisions of the Meetings of States Parties.

Article 25 – Peaceful settlement of disputes

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention shall be subject to negotiations in good faith or other peaceful means of settlement of their own choice.
2. If those negotiations do not settle the dispute within a reasonable period of time, it may be submitted to UNESCO for mediation, by agreement between the States Parties concerned.
3. If mediation is not undertaken or if there is no settlement by mediation, the provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea apply *mutatis mutandis* to any dispute between States Parties to this Convention concerning the interpretation or application of this Conven-

tion, whether or not they are also Parties to the United Nations Convention on the Law of the Sea.

4. Any procedure chosen by a State Party to this Convention and to the United Nations Convention on the Law of the Sea pursuant to Article 287 of the latter shall apply to the settlement of disputes under this Article, unless that State Party, when ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, chooses another procedure pursuant to Article 287 for the purpose of the settlement of disputes arising out of this Convention.

5. A State Party to this Convention which is not a Party to the United Nations Convention on the Law of the Sea, when ratifying, accepting, approving or acceding to this Convention or at any time thereafter shall be free to choose, by means of a written declaration, one or more of the means set out in Article 287, paragraph 1, of the United Nations Convention on the Law of the Sea for the purpose of settlement of disputes under this Article. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is party, which is not covered by a declaration in force. For the purpose of conciliation and arbitration, in accordance with Annexes V and VII of the United Nations Convention on the Law of the Sea, such State shall be entitled to nominate conciliators and arbitrators to be included in the lists referred to in Annex V, Article 2, and Annex VII, Article 2, for the settlement of disputes arising out of this Convention.

Article 26 – Ratification, acceptance, approval or accession

1. This Convention shall be subject to ratification, acceptance or approval by Member States of UNESCO.
2. This Convention shall be subject to accession:
 - (a) by States that are not members of UNESCO but are members of the United Nations or of a specialized agency within the United Nations system or of the International Atomic Energy Agency, as well as by States Parties to the Statute of the International Court of Justice and any other State invited to accede to this Convention by the General Conference of UNESCO;
 - (b) by territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters gov-

erned by this Convention, including the competence to enter into treaties in respect of those matters.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Director-General.

Article 27 – Entry into force

This Convention shall enter into force three months after the date of the deposit of the twentieth instrument referred to in Article 26, but solely with respect to the twenty States or territories that have so deposited their instruments. It shall enter into force for each other State or territory three months after the date on which that State or territory has deposited its instrument.

Article 28 – Declaration as to inland waters

When ratifying, accepting, approving or acceding to this Convention or at any time thereafter, any State or territory may declare that the Rules shall apply to inland waters not of a maritime character.

Article 29 – Limitations to geographical scope

At the time of ratifying, accepting, approving or acceding to this Convention, a State or territory may make a declaration to the depositary that this Convention shall not be applicable to specific parts of its territory, internal waters, archipelagic waters or territorial sea, and shall identify therein the reasons for such declaration. Such State shall, to the extent practicable and as quickly as possible, promote conditions under which this Convention will apply to the areas specified in its declaration, and to that end shall also withdraw its declaration in whole or in part as soon as that has been achieved.

Article 30 – Reservations

With the exception of Article 29, no reservations may be made to this Convention.

Article 31 – Amendments

1. A State Party may, by written communication addressed to the Director-General, propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the next Meeting of States Parties for discussion and possible adoption.
2. Amendments shall be adopted by a two-thirds majority of States Parties present and voting.
3. Once adopted, amendments to this Convention shall be subject to ratification, acceptance, approval or accession by the States Parties.
4. Amendments shall enter into force, but solely with respect to the States Parties that have ratified, accepted, approved or acceded to them, three months after the deposit of the instruments referred to in paragraph 3 of this Article by two thirds of the States Parties. Thereafter, for each State or territory that ratifies, accepts, approves or accedes to it, the amendment shall enter into force three months after the date of deposit by that Party of its instrument of ratification, acceptance, approval or accession.
5. A State or territory which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention by that State or territory, be considered:
 - (a) as a Party to this Convention as so amended; and
 - (b) as a Party to the unamended Convention in relation to any State Party not bound by the amendment.

Article 32 – Denunciation

1. A State Party may, by written notification addressed to the Director-General, denounce this Convention.
2. The denunciation shall take effect twelve months after the date of receipt of the notification, unless the notification specifies a later date.
3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Convention to which it would be subject under international law independently of this Convention.

Article 33 – The Rules

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

Article 34 – Registration with the United Nations

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General.

Article 35 – Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

Annex

Rules concerning activities directed at underwater cultural heritage

I. General principles

Rule 1. The protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.

Rule 2. The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

This Rule cannot be interpreted as preventing:

- (a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities;

- (b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34; and is subject to the authorization of the competent authorities.

Rule 3. Activities directed at underwater cultural heritage shall not adversely affect the underwater cultural heritage more than is necessary for the objectives of the project.

Rule 4. Activities directed at underwater cultural heritage must use non-destructive techniques and survey methods in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.

Rule 5. Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.

Rule 6. Activities directed at underwater cultural heritage shall be strictly regulated to ensure proper recording of cultural, historical and archaeological information.

Rule 7. Public access to *in situ* underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management.

Rule 8. International cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.

II. Project design

Rule 9. Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authorities for authorization and appropriate peer review.

Rule 10. The project design shall include:

- (a) an evaluation of previous or preliminary studies;
- (b) the project statement and objectives;

- (c) the methodology to be used and the techniques to be employed;
- (d) the anticipated funding;
- (e) an expected timetable for completion of the project;
- (f) the composition of the team and the qualifications, responsibilities and experience of each team member;
- (g) plans for post-fieldwork analysis and other activities;
- (h) a conservation programme for artefacts and the site in close cooperation with the competent authorities;
- (i) a site management and maintenance policy for the whole duration of the project;
- (j) a documentation programme;
- (k) a safety policy;
- (l) an environmental policy;
- (m) arrangements for collaboration with museums and other institutions, in particular scientific institutions;
- (n) report preparation;
- (o) deposition of archives, including underwater cultural heritage removed; and
- (p) a programme for publication.

Rule 11. Activities directed at underwater cultural heritage shall be carried out in accordance with the project design approved by the competent authorities.

Rule 12. Where unexpected discoveries are made or circumstances change, the project design shall be reviewed and amended with the approval of the competent authorities.

Rule 13. In cases of urgency or chance discoveries, activities directed at the underwater cultural heritage, including conservation measures or activities for a period of short duration, in particular site stabilization, may be authorized in the absence of a project design in order to protect the underwater cultural heritage.

III. Preliminary work

Rule 14. The preliminary work referred to in Rule 10 (a) shall include an assessment that evaluates the significance and vulnerability of the underwater cultural heritage and the surrounding natural environment

to damage by the proposed project, and the potential to obtain data that would meet the project objectives.

Rule 15. The assessment shall also include background studies of available historical and archaeological evidence, the archaeological and environmental characteristics of the site, and the consequences of any potential intrusion for the long-term stability of the underwater cultural heritage affected by the activities.

IV. Project objective, methodology and techniques

Rule 16. The methodology shall comply with the project objectives, and the techniques employed shall be as non-intrusive as possible.

V. Funding

Rule 17. Except in cases of emergency to protect underwater cultural heritage, an adequate funding base shall be assured in advance of any activity, sufficient to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination.

Rule 18. The project design shall demonstrate an ability, such as by securing a bond, to fund the project through to completion.

Rule 19. The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption of anticipated funding.

VI. Project duration – timetable

Rule 20. An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the completion of all stages of the project design, including conservation, documentation and curation of recovered underwater cultural heritage, as well as report preparation and dissemination.

Rule 21. The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption or termination of the project.

VII. Competence and qualifications

Rule 22. Activities directed at underwater cultural heritage shall only be undertaken under the direction and control of, and in the regular presence of, a qualified underwater archaeologist with scientific competence appropriate to the project.

Rule 23. All persons on the project team shall be qualified and have demonstrated competence appropriate to their roles in the project.

VIII. Conservation and site management

Rule 24. The conservation programme shall provide for the treatment of the archaeological remains during the activities directed at underwater cultural heritage, during transit and in the long term. Conservation shall be carried out in accordance with current professional standards.

Rule 25. The site management programme shall provide for the protection and management *in situ* of underwater cultural heritage, in the course of and upon termination of fieldwork. The programme shall include public information, reasonable provision for site stabilization, monitoring, and protection against interference.

IX. Documentation

Rule 26. The documentation programme shall set out thorough documentation including a progress report of activities directed at underwater cultural heritage, in accordance with current professional standards of archaeological documentation.

Rule 27. Documentation shall include, at a minimum, a comprehensive record of the site, including the provenance of underwater cultural heritage moved or removed in the course of the activities directed at underwater cultural heritage, field notes, plans, drawings, sections, and photographs or recording in other media.

X. Safety

Rule 28. A safety policy shall be prepared that is adequate to ensure the safety and health of the project team and third parties and that is in conformity with any applicable statutory and professional requirements.

XI. Environment

Rule 29. An environmental policy shall be prepared that is adequate to ensure that the seabed and marine life are not unduly disturbed.

XII. Reporting

Rule 30. Interim and final reports shall be made available according to the timetable set out in the project design, and deposited in relevant public records.

Rule 31. Reports shall include:

- (a) an account of the objectives;
- (b) an account of the methods and techniques employed;
- (c) an account of the results achieved;
- (d) basic graphic and photographic documentation on all phases of the activity;
- (e) recommendations concerning conservation and curation of the site and of any underwater cultural heritage removed; and
- (f) recommendations for future activities.

XIII. Curation of project archives

Rule 32. Arrangements for curation of the project archives shall be agreed to before any activity commences, and shall be set out in the project design.

Rule 33. The project archives, including any underwater cultural heritage removed and a copy of all supporting documentation shall, as far as possible, be kept together and intact as a collection in a manner that is available for professional and public access as well as for the curation of the archives. This should be done as rapidly as possible and in any case not later than ten years from the completion of the project, in so far as may be compatible with conservation of the underwater cultural heritage.

Rule 34. The project archives shall be managed according to international professional standards, and subject to the authorization of the competent authorities.

XIV. Dissemination

Rule 35. Projects shall provide for public education and popular presentation of the project results where appropriate.

Rule 36. A final synthesis of a project shall be:

- (a) made public as soon as possible, having regard to the complexity of the project and the confidential or sensitive nature of the information; and
- (b) deposited in relevant public records.