The Duty to Cooperate and the Protection of Underwater Cultural Heritage

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Abstract

The aim of this article is twofold. First, it will seek to clarify the law in relation to the duty to co-operate for the protection of underwater cultural heritage under the 1982 United Nations Convention on the Law of the Sea, the 2001 United Nations Educational, Scientific and Cultural Organisation Convention on the Protection of the Underwater Cultural Heritage and the ad hoc agreements for the protection of underwater cultural heritage. Second, it will embark on an assessment of the main shortcomings of the current legal framework, namely the general and vague formulation of the duty to co-operate under the United Nations Convention on the Law of the Sea, the controversial character of the United Nations Convention on the Law of the Sea, and the scarcity of ad hoc underwater cultural heritage agreements. It will then suggest possible ways of improving the legal framework by concluding regional conventions and more ad hoc agreements, and negotiating a new universal convention employing other jurisdictional bases, such as nationality, port-state and territoriality.

Keywords

Law of the sea, underwater cultural heritage, cooperation in international law

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1 Introduction

On 2 January 2009 the United Nations Educational, Scientific and Cultural Organisation Convention on the Protection of the Underwater Cultural Heritage (*UNESCO Convention*) entered into force, eight years after its adoption.¹ It is the first international convention dealing specifically with Underwater Cultural Heritage (*UCH*), since the 1985 Draft European Convention failed to be adopted.² The new UNESCO Convention puts great emphasis on international cooperation, to a much greater extent than the 1982 United Nations Convention on the Law of the Sea (*UNCLOS*).³ It tries to create a framework for cooperation as envisaged by UNCLOS Article 303(1).⁴ Article 303 of UNCLOS reads as follows:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

¹ UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, 41 ILM 40.

² The Greek–Turkish dispute over the Aegean Sea and disagreement over the jurisdictional scope of the convention prevented its adoption by the Council of Ministers of the Council of Europe. See J Blake, ‘The protection of the Underwater Cultural Heritage’ (1996) 45 *ICLQ* 819, 824–5.

³ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3. See also UNESCO Convention Preamble and Art 2(2); M Rau, ‘The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea’ (2002) 6 *Max Planck UNYB Law* 387, 435; S Dromgoole, ‘2001 UNESCO Convention on the protection of Underwater Cultural Heritage’ (2003) 18 *IJMCL* 59, 68.

⁴ C Lund, ‘The Making of the 2001 UNESCO Convention’, in L Prott (ed), *Finishing the Interrupted Voyage* (2006) 14, 18.

Furthermore, existing bilateral agreements dealing with UCH are based on and exemplify cooperation, provided for both under the UNCLOS and the UNESCO Convention.⁵

The aim of this article is twofold. First, it will seek to clarify what the law in relation to the duty to cooperate for the protection of UCH actually is. Second, it will embark on an assessment of the main shortcomings of the current legal framework, namely the general and vague formulation of the duty to cooperate under the UNCLOS; the controversial character of the UNESCO Convention; and the scarcity of *ad hoc* UCH Agreements. The article will conclude by suggesting possible ways of improving the legal framework, namely developing regional conventions; concluding more *ad hoc* agreements; and negotiating a new universal convention employing a range of jurisdictional bases, such as nationality, port-state and territoriality.

2 The duty to cooperate for the preservation of UCH: the current legal framework

2.1 The UNCLOS

2.1.1 The UNCLOS and UCH

The question of UCH was first raised at the international level during the long negotiations that resulted in the adoption of the UNCLOS.⁶ However, UCH issues were not high on the agenda and did not receive much attention.⁷ Commenta-

⁵ For an analysis of the different law making approaches in the protection of UCH compared with other fields of public international law, such as international economic law, see M Risvas, 'Multilateral and Bilateral Approaches in the protection of Underwater Cultural Heritage' (2013) *TDM* (forthcoming). On the interplay between international investment law and UCH protection, see V Vadi, 'Investing In Culture: Underwater Cultural Heritage and International Investment Law' (2009) 42 *Vanderbilt J of Transnational L* 854, 878ff; cf. *Malaysian Historical Salvors SDN, BHD v Malaysia*, ICSID Case No ARB/05/10 (Award on Jurisdiction, 17 May 2007).

⁶ Before the UNCLOS, the silence of public international law on the matter of UCH was part of what Altes called a 'legal labyrinth'; see A Altes, 'Submarine Antiquities: a legal labyrinth' (1976) 4 *Syracuse J of Int L & Commerce* 77, 94.

⁷ D Watters, 'The Law of the Sea Treaty and Underwater Cultural' (1983) 48 *American Antiquity* 808, 809. This can be partly explained by the fact that underwater archaeology as a distinct discipline emerged in the 1970s; see L H van Meurs, *Legal Aspects of Marine Archaeological Research* (1985) 3–5. Technological progress and particularly the invention of aqualung in 1943 made underwater archaeological activities feasible; see A Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (1995) 1. Muckelroy described

tors observed 'a lack of interest by many States, passionate commitment by some and outright antipathy by others.'⁸ Consequently, it comes as no surprise that the UNCLOS contains only two provisions concerning the protection of the UCH: Articles 149 and 303. UNCLOS Article 149 specifically deals with UCH found in the Area:⁹

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 contrast, the scope of UNCLOS Article 303 is much broader. It is precisely in Article 303(1) where an *expressis verbis* recognition of an obligation of cooperation can be found. Looking at the *travaux préparatoires* of Article 303, the thorny questions were those about jurisdiction and the application of the law of salvage; cooperation issues were marginalised and received little or no attention.¹⁰ Generally speaking, two main opposing approaches can be identified in relation to UCH. During the last sessions of negotiations of the UNCLOS in 1979 and in 1980, a group of states proposed to recognise sovereign rights of coastal states over archaeological objects situated on their continental shelf.¹¹ The US, UK and the Netherlands strongly opposed this, as they considered (and still consider) it as 'creeping jurisdiction'.¹² The origins of the present formulation of Article 303(1) and the explicit recognition of the duty to cooperate to protect UCH can be traced

underwater archaeology in 1978 as a 'relatively new field of research'; see K Muckelroy, *Maritime Archaeology* (1978) 23.

⁸ P O'Keefe, quoted in Watters, above n 7, 809.

⁹ '[T]he seabed, ocean floor and subsoil thereof beyond the limits of national jurisdiction' (UNCLOS Art 1). See also A Strati, 'Deep Seabed Cultural Property and the Common Heritage of Mankind' (1991) 40 *ICLQ* 859.

¹⁰ L Caflisch, 'Submarine Antiquities and the International Law of the Sea' (1982) 13 *Netherlands YIL* 3, 16–20; M Hayashi, 'Archaeological and historical objects under the United Nations Convention on the Law of the Sea' (1996) 20 *Marine Policy* 291; M Nordquist, *The United Nations Convention on the Law of the Sea 1982: A Commentary*, vol 5 (1985) 159.

¹¹ The group of states were Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia; UN Doc. A/CONF.62/C.2/Informal Meeting/43/Rev.1 (16 August 1979); UN Doc. A/CONF.62/C.2/Informal Meeting/43/Rev.1 (27 March 1980); Caflisch, above n 10, 16; A Arend, 'Archaeological and Historical Objects: the international legal implications of UNCLOS III' (1982) 22 *Va JIL* 777, 793–5.

¹² E Roucouas, 'Greece' in T Treves (ed), *The Law of the Sea, the European Union and its Member States* (1997), 225, 251.

to a Greek proposal in 1980. This informal proposal, which represented a decisive compromise regarding jurisdiction, provided *inter alia* that 'all states have the duty to protect in a spirit of cooperation, objects of archaeological or historical value, found in the marine environment.'¹³ Later on, the rather metaphysical 'spirit of cooperation' was replaced by the more positivistic 'duty to cooperate' in a 'perfectly neutral' US sponsored draft article, which finally became Article 303(1) in its present wording.¹⁴

2.1.2 The scope of the duty to cooperate under the UNCLOS

Article 303(1) refers to objects of archaeological and historical nature found at sea without any further qualification. It is unclear, however, whether objects of archaeological and historical nature are to be read conjunctively, as in the Chinese, English and French texts, or disjunctively, as in the Arabic, Russian and Spanish texts, all being equally authentic.¹⁵ Given the lack of consensus on what belongs to or constitutes UCH, public international offers no general definition.¹⁶ Over time, however, the term *heritage* has prevailed over *property* because it connotes the duty to preserve and protect.¹⁷

Any definition of UCH must address three main elements: time, archaeological and/or historical nature, and form of protection. First, in relation to time two main approaches have been identified.¹⁸ One focusses on the age of archaeological or historical objects, only including artifacts that are more than one hun-

¹³ UN Doc A/CONF.62/GP/10 (18 August 1980); Strati, above n 7, 164.

¹⁴ Cf. *Lac Lanoux Arbitration (Spain v France)* (1957) 12 RIAA 281, 307; Roucounas, above n 12, 252; UN Doc A/CONF.62/GP/11 (19 August 1980); Arend, above n 11, 796–8.

¹⁵ UNCLOS Art 320; Nordquist, above n 10, 160.

¹⁶ C Forrest, 'Defining "Underwater Cultural Heritage"' (2002) 31 *Int J of Nautical Archaeology* 1; J M Panayotopoulos, 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: Main Controversies' in A F Vrdoljak & F Francioni (eds), *The Illicit Traffic of Cultural Objects in the Mediterranean* (Working Paper, 2009), 40, available at <<http://cadmus.eui.eu/handle/1814/12053>> [accessed 10 September 2013]; B Oxman, 'Marine Archaeology and the International Law of the Sea' (1988) 12 *Columbia-VLA J of Law & the Arts* 352, 364–5. For the uncertainty over the definition of the subject-matter of international cultural law, see generally J Blake, 'On Defining the Cultural Heritage' (2000) 49 *ICLQ* 61, 85.

¹⁷ L Prott & P O'Keefe, 'Cultural Heritage or Cultural Property?' (1992) 1 *Int J of Cultural Property* 307; T Scovazzi, 'La notion de patrimoine culturel de l'humanité dans les instruments internationaux' in J Nafziger & T Scovazzi (eds), *The Cultural Heritage of Mankind* (2008) 3, 14; cf. Convention for the Protection of Cultural Property in the Event of Armed Conflicts, 14 May 1954, 249 UNTS 240; Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

¹⁸ Strati, above n 7, 181.

dred years old.¹⁹ The other lays emphasis on cultural value regardless of age.²⁰ The value-based approach is mainly predicated on the *travaux préparatoires* of the UNCLOS;²¹ the age-based approach is supported by state practice in the form of treaties and domestic legislation.²² The latter approach seems to be more consistent with the purpose of Article 303, which is the protection of UCH. Second, regarding the archaeological and/or historical nature of the object, some states advocate blanket protection, while others want to grant protection only to UCH of some significance.²³ Blanket protection, despite being financially burdensome, ensures better protection of UCH as quite often the determination of an objects' archaeological value is not apparent until its recovery and study.²⁴ Finally, regarding form, the wording of both Articles 303 and 149 of the UNCLOS seems to indicate that specific objects rather than sites are covered. Preparatory work of the UNCLOS indicates that UCH covers 'all kinds of wrecks and related objects of archaeological and/or historical importance found at sea'.²⁵

Article 303(1)'s scope of application *ratione loci* is not limited to any particular maritime zone.²⁶ The Article falls into Part XVI of the UNCLOS under the

¹⁹ Oxman, above n 16, 241; Arend, above n 11, 779–80.

²⁰ Strati, above n 7, 183.

²¹ For e.g., the term 'historical' was introduced to appease the Tunisian delegation's fears that the term 'archaeological' would not cover Byzantine relics; see B Oxman, 'The Third United Nations Conference on the Law of the Sea: The Ninth Session' (1981) 75 *AJIL* 211, 240.

²² For treaties, see Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231, Art 1; Forrest, above n 16, 7. For domestic legislation, see, for example, Historic Shipwrecks Act 1976 (Cth) (*HSA*); Law No. 117 1983 as amended by Law No. 3 2010 (Egypt); Law No. 86-35 1986 (Tunisia). For an extensive table of time limits under domestic legislation, see Strati, above n 7, 179; Council Directive (EC) 93/7 on the return of cultural objects unlawfully removed from the territory of a Member State [1993] OJ L 74 and Annex I, Council Regulation No. 116/2009 of 18 December 2008 on the export of cultural goods [2009] L 39/1.

²³ Dromgoole, 'Protection of Historic Wreck: the UK approach Part II: towards reform' (1989) 4 *Int J of Estuarine & Coastal L* 95, 103; Council of Europe, Parliamentary Assembly, Recommendation 848 of 4 October 1978 on the underwater cultural heritage <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta78/EREC848.htm#1>> [accessed 27 July 2013]; European Draft Convention on the protection of UCH Art I; European Convention on the Protection of the Archaeological Heritage (Revised), 16 January 1992, 143 ETS; UNESCO Convention. Cf. Forrest, above n 16, 8–9.

²⁴ H P Del Bianco, 'Underwater Recovery Operations in Offshore Waters: Vying for Rights to Treasure' (1987) 5 *Boston Univ ILJ* 153, 171; G Henderson, 'Significance Assessment or Blanket Protection?' (2001) 30 *Int J of Nautical Archaeology* 3, 3; Forrest, above n 16, 9.

²⁵ Hayashi, above n 10, 291.

²⁶ E Roucounas, 'Sub-marine Archaeological Research: some legal aspects' in U Leanza (ed), *Il regime giuridico internazionale del Mare Mediterraneo: The international legal regime of the*

title 'General Provisions' and constraints to its application are nowhere to be found in the convention.²⁷ Still, the duty to protect UCH in all maritime zones does not mean that the coastal state can regulate objects of archaeological and historical nature found in the Exclusive Economic Zone (EEZ)/continental shelf.²⁸ On the contrary, it was fierce opposition to 'creeping jurisdiction' (or '*horror jurisdictionis*') and the will to disassociate UCH protection from EEZ/continental shelf provisions that led to the inclusions of Article 303 under the 'General Provisions' part.²⁹

2.1.3 The content of the duty to cooperate under the UNCLOS

States have a positive legal obligation to cooperate over the protection of UCH under UNCLOS Article 303(1). According to the Vienna Convention on the Law of Treaties (*VCLT*), 'a treaty shall be interpreted 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 its object and purpose'.³⁰ The ordinary meaning of the language used in Article 303(1) ('*shall co-operate*') denotes that states have a legal obligation to cooperate for the protection of UCH. Consequently, given that the duty to cooperate under UNCLOS has some normative content:

a State which persistently disregards any request by other States to negotiate on forms or ways of co-operation aiming at the protection of underwater cultural heritage could also be held responsible for an internationally wrongful act.³¹

While it is established that states have a duty to cooperate, the extent that they require to do so is not clear. cooperation can mean different things in different contexts. In the context of maritime delimitation, for example in the *North Sea Continental Shelf* and *Fisheries Jurisdiction* cases, the duty to cooperate is

Mediterranean Sea (1987) 309, 315.

²⁷ 'Ubi lex non distinguit nec nos distinguere debemus. Such is the wisdom of centuries', *Flegenheimer Case (USA v Italy)* (1958) 14 RIAA 327, 366.

²⁸ E Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters: Public International Law and What It Offers* (2002) 58.

²⁹ T Scovazzi, 'The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention' in D Freestone, R Barnes & D Ong (eds), *The Law of the Sea, Progress and Prospects* (2006) 120, 123; Boesten, above n 28, 58.

³⁰ 23 May 1969, 1155 UNTS 331, Art 31(1).

³¹ T Scovazzi, 'Underwater Cultural Heritage' in R Wolfrum (gen ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2011).

understood as a duty to negotiate in good faith.³² Thus the threshold in order to fulfil the obligation of cooperation is lower than in the context of living resources conservation, as in *Bluefin Tuna*, and protection of the marine environment, as in the *MOX Plant* and the *Land Reclamation*.³³ In these cases the duty to cooperate entails consultation and imposes stricter obligations to states.³⁴ Moreover, the duty to cooperate lacks the same normative meaning in all maritime zones, but is intrinsically linked with the jurisdictional rights of the states therein.

Coastal states can exercise both prescriptive and enforcement jurisdiction over their internal waters and their territorial sea.³⁵ The same is true for the archipelagic waters in the case of archipelagic states.³⁶ The seabed areas below territorial and internal waters also fall under coastal state's sovereignty and are not legally included in the continental shelf.³⁷ It follows that coastal states have jurisdiction to regulate UCH matters, yet at the same time states are obliged to cooperate under Article 303(1) with other states for the protection of UCH found in these zones.³⁸ While this obligation is vague and a rather limited one, given coastal states' sovereignty, there are cases where such cooperation is required. In other words, sovereignty and obligations of cooperation are not mutually exclusive. In the *Lac Lanoux* case, while France enjoyed full sovereignty over its land, it had also an obligation under customary law to take into account Spanish views; this obligation of cooperation, however, did not extend to co-decision.³⁹ In the WTO context, the Panel and the Appellate Body criticised unilaterally adopted measures without demonstrating an effort to cooperate with affected states.⁴⁰ Although this was done on the basis of the WTO agreements and not

³² *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, ICJ Reports 1969 p 3, 46–8; *Fisheries Jurisdiction (UK v Iceland)*, Merits, ICJ Reports 1974, p 3, 30–3.

³³ See C Hutchison, 'The Duty to Negotiate International Environmental Disputes in Good Faith' (2006) 2 *McGill Journal of Sustainable Development Law and Policy* 117, 120; *Southern Bluefin Tuna (New Zealand v Japan, Australia v Japan)* (1999) 117 ILR 148, 164; *MOX Plant (Ireland v UK)* (2001) 126 ILR 257, 277; *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (2003) 126 ILR 487, 504.

³⁴ Hutchison, above n 34.

³⁵ Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 UNTS 205, Arts 1, 5(1); UNCLOS Art 2; R Churchill & V Lowe, *The Law of the Sea* (3rd edn, 1999) 95.

³⁶ UNCLOS, Arts 45–54.

³⁷ *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, ICJ Reports 1982 p 18, 76.

³⁸ R Frost, 'Underwater Cultural Heritage Protection' (2004) 23 *Australian YIL* 25, 28; Nordquist, above n 10, 161.

³⁹ *Lac Lanoux*, above n 14, 307–8; V Lowe, *International Law* (2007) 112.

⁴⁰ *US—Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Appellate Body Report, 12 October 1998) para 168; *US—Standards for Reformulated and Conventional*

under customary law, it reinforces the argument that the sovereign right to adopt regulations could be limited by the duty to cooperate.

Sunken state vessels could serve as an illustration to UCH cooperation within areas under coastal state's sovereignty. The legal status of sunken state vessels is one of the most controversial UCH issues.⁴¹ Nevertheless, it seems safe to assume that in extreme cases of coastal state's unilateralism, i.e. when the coastal state destroys, by act or omission, a foreign state vessel, without consultation with the flag state or the state of cultural or historical origin, it will arguably violate not only the duty to protect UCH, but also the duty to cooperate.⁴² Through bilateral agreements, state practice seems to support that argument, as obligations of cooperation under treaties dealing with cultural heritage protection exist and bind coastal states.

The nature of duty to cooperate in the contiguous zone is labyrinthine, as the status of UCH therein is highly controversial and extensively debated. Two main interpretations of Article 303(2), in conjunction with UNCLOS Article 33, have been proposed: either they create a full-fledged 24 miles, archaeological zone within which the coastal state can regulate UCH;⁴³ or the *fictio juris* established covers only coastal state's enforcement jurisdiction to prohibit the removal of

Gasoline, WT/DS2/AB/R (Appellate Body Report, 29 April 1996) 28; *US—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/R (Panel Report, 10 November 2004) paras 6.523–6.531.

⁴¹ For the dispute over *Juno* and *La Galga* wrecks situated in US contiguous zone, see *Sea Hunt, Inc. v Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir, 2000). For the German submarine *U-859* case, see *Simon v Taylor* [1975] 2 Lloyd's Rep 338 (Singapore High Court) and *Nordsjø Dykker Co v Hovding Skipsopphugging*, 135 *Norsk Retstidende* 346 (Norway Supreme Court). For the dispute over Admiral Nakhimov, see 'USSR note of 3 October 1980 to Japan' (1986) 29 *JAIL* 185. See also V Vadi, 'War, Memory and Culture: the Uncertain Legal Status of Historic Sunken Warships under International Law' (2013) 37 *Tul Mar LJ* 333; M Aznar-Gómez, 'Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage' (2010) 25 *Int J of Maritime & Coastal L* 209, 223; D Bederman, 'Rethinking the Legal Status of Sunken Warships' (2000) 31 *Ocean Development & Int L* 97; T Scovazzi, 'Les épaves de navires d'état' (2006) 52 *AFDI* 400; A Roach, 'Sunken warships and military aircraft' (1996) 20 *Marine Policy* 351. See also the *Institut de Droit International's* work in progress: 'The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law', *IDI* <http://www.idi-iil.org/idiE/navig_commissions.html> [accessed 28 July 2012].

⁴² Both an action and an omission could constitute an international wrongful act; see ILC Articles on the Responsibility of States of Internationally Wrongful Acts, ILC *Ybk* 2001/II(2), Art 2.

⁴³ A Strati, 'Protection of the underwater cultural heritage: from the shortcomings of the UN Convention of the Law of the Sea to the compromises of the UNESCO Convention' in A Strati, M Gavouneli & N Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea* (2006) 21, 44–6; T Scovazzi, above n 29, 121–2; Caflisch, above n 10, 20; P Sioussouras, 'The contiguous zone as a mechanism for protecting underwater cultural heritage' in A Strati, M Gavouneli &

UCH objects, provided that the coastal state has enacted appropriate legislation.⁴⁴ According to the former interpretation, the analysis regarding the territorial sea applies *mutatis mutandis* to the contiguous zone.⁴⁵ However, according to the latter interpretation, obligations of cooperation between the coastal states and other states can only extend to the removal of the object(s). Again, given the stipulation in Article 303(1), cooperation does not equal to co-decision, and the coastal state is the ultimate judge of whether the object can be removed or not.

Under the UNCLOS, the recovery of historic wrecks in the EEZ does not fall within the rights of either the coastal state or other states.⁴⁶ This triggers UNCLOS Article 59, which determines that conflicts must be resolved on the basis of *equity*. However, equity is a nebulous concept that displays 'a considerable and confusing degree of variety'.⁴⁷ Similarly, the coastal state enjoys certain rights over the continental shelf in relation to the exploration and exploitation of its natural mineral resources, but the preparatory work to the UNCLOS demonstrates that this does not include the protection of UCH.⁴⁸

In turn, as Article 303(1) is too general and too unclear, it is difficult to identify any concrete obligations of cooperation for the protection of UCH in the high

N Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea* (2006) 63–70; S Karagiannis, 'Une nouvelle zone de juridiction: la zone archéologique maritime' (1990) 4 *Espaces et ressources maritimes* 1.

⁴⁴ Churchill & Lowe, above n 35, 137; W Vitzthum & S Talmon, *Alles fließt: Kulturgüterschutz und innere Gewässer im Neuen Seerecht* (1998) 33–41; Oxman, above n 16, 364; E 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' (1996) 20 *Marine Policy* 325, 329–30.

⁴⁵ Following Tunisia (Law No 86-35 1986), other states, such as France (Law No 98-874 1989), Algeria (Presidential Decree No. 04-344 2004), Cyprus (Law to provide for the Proclamation of the Contiguous Zone by the Republic of Cyprus 2004), and Italy (Law No 42 2004) extended their jurisdiction by creating archaeological zones; see I Papanicolopulu, 'A Note on Maritime Delimitation in a Multizonal Context: the Case of the Mediterranean' (2007) 38 *Ocean Development & Int L* 381, 382. However, 'instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule'; see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, ICJ Reports 1986 p 14, 98. Nevertheless, a generalised state practice may lead to a creation of a new rule; see *Fisheries Jurisdiction*, above n 32, 131; *North Sea Continental Shelf*, above n 32, 41, or the re-interpretation of an existing one, VCLT Art 31(3)(b).

⁴⁶ Churchill & Lowe, above n 35, 175.

⁴⁷ See generally, V Lowe, 'The Role of Equity in International Law' (1992) 12 *Australian YIL* 54; M Janis, 'The Ambiguity of Equity in International Law' (1983) 9 *Brooklyn JIL* 7, 28.

⁴⁸ UNCLOS Art 77 and above n 13-21.

seas.⁴⁹ The freedom of the high seas covers archaeological research either as marine scientific research or in its own right, and UNCLOS Article 303(1) cannot limit this.⁵⁰

While Article 303(1) also applies to the Area, Article 149 provides *lex specialis* in this regard.⁵¹ Reading Article 149 in the light of Article 303(1), it could be deduced that all states—and particularly the states of origin, either cultural origin or historical and archaeological origin—shall cooperate for the protection and preservation of UCH. Preferential rights (*in casu* those established in Article 149) do not imply the ‘extinction of concurrent rights of other states’, which have to be determined through negotiations, and thus reinforce cooperation.⁵² UNGA Resolutions also invite

Member States engaged in seeking the recovery of cultural and artistic treasures from the seabed, in accordance with international law, to facilitate by mutually acceptable conditions the participation of States having a historical and cultural link with those treasures⁵³

while Boesten suggests that ‘it may be assumed that a claim from another State should be taken into account when deciding on preservation or disposal.’⁵⁴

In light of the above, it is fair to say that, although the UNCLOS didactically provides for a general duty to cooperate for the UCH protection, it is difficult to instantiate it, i.e. to translate it into more specific obligations and standards of state conduct.

2.2 The UNESCO Convention

2.2.1 The UNESCO Convention and UCH

Given the shortcomings of the UNCLOS, UCH was aptly described in 1996 as ‘the last major issue of a global nature that needs to be resolved in the LOS [law of the

⁴⁹ Boesten, above n 28, 59.

⁵⁰ S Dromgoole, ‘Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage’ (2010) 25 *Int J of Maritime & Coastal L* 33; Arend, above n 11, 786; Strati, above n 7, 224; H C Miller, *International Law and Marine Archaeology* (1973) 27.

⁵¹ Rau, above n 3, 428; J Allain, ‘Maritime Wrecks: Where the Lex Ferenda of Underwater Cultural Heritage Collides with *Lex Lata* of the Law of the Sea Convention’ (1998) 38 *Va JIL* 747, 762.

⁵² *Fisheries Jurisdiction*, above n 32, 27–8, 32.

⁵³ GA Res 46/10 (1991) para 7; GA Res 48/49 (1993) para 7.

⁵⁴ Boesten, above n 28, 53.

sea’;⁵⁵ hence, the need to flesh out the laconic duty to cooperate under UNCLOS Article 303(1) was apparent. This was one of the primary objectives of the new UNESCO convention, as affirmed by Carsten Lund, President of the UNESCO Convention Conference.⁵⁶ However, the UNESCO Convention has been ratified by only 45 states.⁵⁷ In line with the *pacta tertiis* rules, it is not opposable to third states.⁵⁸

UNESCO Convention Article 2(2) stipulates that ‘States Parties shall cooperate in the protection of underwater cultural heritage.’⁵⁹ Cooperation is symbolically emphasised in the Preamble and occupies the second paragraph—among eleven other in Article 2—due to French insistence.⁶⁰ Unlike the UNCLOS, it elaborates more and provides for detailed obligations of cooperation.

2.2.2 The scope of the duty to cooperate under the UNESCO Convention

The UNESCO Convention applies to all maritime zones, including internal waters.⁶¹ Contrary to the UNCLOS, it contains an expansive definition of UCH:

(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;

⁵⁵ A Couper, ‘The Principal Issues in Underwater Cultural Heritage’ (1996) 20 *Marine Policy* 283, 285.

⁵⁶ Lund, above n 4, 18; P O’Keefe, *Shipwrecked Heritage – A commentary on the UNESCO Convention on Underwater Cultural Heritage* (2002) 50.

⁵⁷ ‘Convention on the Protection of the Underwater Cultural Heritage. Paris, 2 November 2001’, *UN Educational, Scientific and Cultural Organization* <<http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha>> [accessed 27 July 2013].

⁵⁸ *Pacta tertiis nec nocent nec prosunt*; VCLT Art 34.

⁵⁹ UNESCO Convention Art 2(2).

⁶⁰ The Preamble to the UNESCO Convention provides 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.’ See also R Garaballo, ‘The negotiating history of the Convention on the protection of the Underwater Cultural Heritage’ in R Garaballo & T Scovazzi (eds), *The Protection of the Underwater Cultural Heritage—Before and After the 2001 UNESCO Convention* (2001) 89, 114.

⁶¹ UNESCO Convention Art 28 contains an opt-in clause in, allowing its application to inland waters.

- (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.⁶²

By setting the time limit to 100 years and adopting a blanket protection approach rejecting any criterion of significance, Article 1 of the UNESCO Convention is considered to reflect state practice and promote the protection of UCH.⁶³ Its scope of application includes not only objects, but also sites together with their archaeological and natural context and emphasis is laid on preservation *in situ*.⁶⁴

2.2.3 The content of the duty to cooperate under the UNESCO Convention

The UNESCO Convention affirms in Article 7(1) a coastal state's sovereign and exclusive right to regulate UCH within their territorial sea, archipelagic and internal waters.⁶⁵ At the same time, according to Article 7(3), 'in recognition of general practice among states', coastal states should inform the flag state or other states with a verifiable link, especially a cultural, historical or archaeological link, of the discovery of identifiable *state* vessels and aircrafts.⁶⁶ However, the

⁶² UNESCO Convention Art 1(1).

⁶³ O'Keefe, above n 56, 42; Dromgoole, above n 3, 63–4; Forrest, above n 16, 10; see also above at n 24.

⁶⁴ UNESCO Convention Art 1(a)(ii) and 2(5), Annex Rules 1 & 25, based on the ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage 1996. The Annex Rules of the UNESCO Convention enjoy general acceptance; see Panayotopoulos, above n 16, 55–6.

⁶⁵ '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': UNESCO Convention Art 7(1).

⁶⁶ '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': UNESCO Convention Art 7(3).

Convention, despite noticing the existence of considerable state practice, does not create a positive obligation to inform either the flag state or a state with a verifiable link,⁶⁷ as it was impossible to reach consensus on the matter during the negotiations.⁶⁸ Article 7 does not even contain an explicit reference to a duty to cooperate, but rather employs the phrase ‘with a view to co-operating on the best methods of protecting State vessels and aircrafts.’⁶⁹ Nonetheless, this reflects the duty to cooperate.⁷⁰

The UNESCO Convention, contrary to the UNCLOS, grants comprehensive legislative and enforcement jurisdiction to the coastal state in the contiguous zone, but it does not contain any obligation of cooperation.⁷¹ Where no contiguous zone is proclaimed, Articles 9 and 10 of the UNESCO Convention dealing with the EEZ and the continental shelf apply.⁷²

The preceding 1994 International Law Association (ILA) Draft Convention provided for the extension of coastal states’ jurisdiction over UCH in the EEZ/continental shelf. According to Article 5(1):

A State Party to this Convention may establish a cultural heritage zone and notify other States Parties of its action. Within this zone, the State Party shall have jurisdiction over activities affecting the underwater cultural heritage

while Article 1(3) defined ‘cultural heritage zone’ 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’.⁷³

⁶⁷ Cf. Rau, above n 3, 410; C Forrest, ‘A New International Regime for the Protection of Underwater Cultural Heritage’ (2002) 51 *ICLQ* 511, 529. Carducci occupies the middle ground, recognising the limits of the adopted wording and the drafting history, but also emphasises teleological interpretation; see G Carducci, ‘New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage’ (2002) 96 *AJIL* 419, 428.

⁶⁸ USA, UK, Spain and other delegations supported cooperation, information and consultation, while the Group of 77 emphasised coastal state’s sovereignty and rejected any additional burden of cooperation with regard to state vessels. See Garabello, above n 60, 134–5.

⁶⁹ UNESCO Convention Art 7(3).

⁷⁰ L Bautista, ‘Gaps, Issues and Prospects: International Law and the Protection of Underwater Cultural Heritage’ (2005) 14 *Dalhousie J of Legal Studies* 66, 76.

⁷¹ UNESCO Convention Art 8; Rau, above n 3, 413.

⁷² Proclamation of a contiguous zone is optional; see Churchill & Lowe, above n 35, 135; Rau, above n 3, 413.

⁷³ P O’Keefe, ‘Protecting the Underwater Cultural Heritage The International Law Association Draft Convention’ (1996) 20 *Marine Policy* 297, 301, 306; J Nafziger, ‘The Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage’ (1997) 6 *IJCP* 119..

Similarly, according to 1998 Draft UNESCO Convention Article 5(1), state parties shall require the notification of any UCH discovery in their EEZ/continental shelf.⁷⁴ Since such an extension of jurisdiction proved impossible, due to strong reactions by some states, a complex system of cooperation was instead created.⁷⁵ Cooperation is based on notification, consultation and provisional measures; however, in all cases it is unclear who is to cooperate with whom.⁷⁶ Any state 'with a verifiable link, especially a cultural, historical or archaeological link' to the UCH can declare an interest and participate in the cooperative process.⁷⁷

Article 9(1), which deals with reporting and notification and is based on the nationality and flag state jurisdiction, does not pose any particular problems:⁷⁸

(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.

This is not the case with Article 9(1)(b):

(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.

⁷⁴ UNESCO Doc CLT-96/CONF.202/5 (April 1998); S Dromgoole & N Gaskell, 'Draft UNESCO Convention on the protection of Underwater Cultural Heritage 1998' (1999) 14 *Int J of Maritime & Coastal L* 171, 198–200.

⁷⁵ T Scovazzi, 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2001) 11 *Italian YIL* 9, 16–17; O'Keefe, above n 56, 88; Dromgoole, above n 3, 76; Rau, above n 3, 414.

⁷⁶ Scovazzi, above n 75, 17.

⁷⁷ UNESCO Convention Art 9(5).

⁷⁸ Rau, above n 3, 415; O'Keefe, above n 56, 82.

While Article 9(1)(b)(i) utilises the nationality and flag state jurisdiction, Article 9(1)(b)(ii) is delphic. It is unclear whether the obligation is imposed pursuant to the personality and flag state jurisdiction principles *or* by the coastal state to foreign vessels, effectively constituting an expansion of the coastal state's jurisdiction over the EEZ/continental shelf.⁷⁹ Although last minute proposals by France, Russia, the UK and the USA explicitly excluding the latter interpretation were unsuccessful, the *travaux préparatoires* and the intention of the drafters support the former interpretation.⁸⁰ However, such interpretation seems to run contrary to the plain wording of the chapeau of Article 9(1)(b), given that a coastal state cannot operate in another state's EEZ or continental shelf; only a flag state can in these maritime zones.

UNESCO Convention Article 10 establishes a system of consultations. According to Article 10(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.

Thus, coastal states are effectively upgraded to 'coordinating states' regarding UCH found in their EEZ or on their continental shelf. Article 10(5) further specifies the 'Coordinating State' concept. Its main role, acting 'on behalf of the States Parties as a whole', is to implement measures adopted by the consulting states; to issue the relevant authorisations and conduct preliminary research; and to issue the relevant preliminary research authorisations, while informing

⁷⁹ O'Keefe, above n 56, 83.

⁸⁰ Garabello, above n 60, 144–5; G Carducci, 'The Expanding Protection of Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' in G Camarda & T Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Legal Aspects* (2002) 135, 198; Scovazzi, above n 75, 18.

other state parties via the UNESCO Director-General.⁸¹ Finally, Article 10(4), which Scovazzi characterises as the ‘cornerstone’ of the UNESCO Convention, provides that the ‘Coordinating State’ can adopt provisional measures for the protection of UCH found in the EEZ/continental shelf and may request other states’ assistance for doing so.⁸² However, the coordinating state could impose provisional measures without cooperation through consultation, if necessary for the prevention of immediate danger and the protection of UCH.⁸³

Regarding UCH found in the Area, the UNESCO Convention contains similar provisions, for notification, consultation and adoption of provisional measures, which are found in Articles 11 and 12. Again, states with a ‘verifiable link’ and a declared interest under Article 11(4) participate in the cooperation process. The main two differences are that the ‘co-ordinating state’ is not the coastal state but rather one appointed after consultations by states having declared an interest under Article 11(4), while the International Seabed Authority (ISBA) is notified and participates in the consultations.⁸⁴

The UNESCO Convention also contains more general and technical obligations that are not *directly* related to the LOS. Article 19 contains two main obligations: cooperation in the management of UCH and information sharing.⁸⁵ Article 21 also contains an obligation of cooperation in training in underwater archaeology and technology transfer, which was absent in the ILA Draft, while Rule 8 of the Annex to the UNESCO Convention provides for international cooperation in the exchange of the archaeologists and other relevant professionals.⁸⁶ However, without further guidance it is difficult to identify the normative implications of the duty to cooperate and more specifically how a state can be in breach thereof.

2.3 *Ad hoc* agreements

Apart from the UNESCO Convention, which sought to holistically address the issue of UCH protection, states have also concluded *ad hoc* agreements. *Ad hoc* agreements deal with specific UCH sites or objects. They can be classified in two categories: agreements that they cover UCH situated in the territorial sea of a state party, and agreements that deal with UCH found in areas where state

⁸¹ UNESCO Convention Art 10(5) and 10(6).

⁸² Scovazzi, above n 29, 132.

⁸³ UNESCO Convention Art 10(4).

⁸⁴ Ibid, Art 12(2).

⁸⁵ Ibid, Art 19(1) and 19(2).

⁸⁶ Garabello, above n 60, 167.

parties do not enjoy sovereignty. The latter poses greater problems and raises more questions relating to the LOS framework.

2.3.1 Agreements covering UCH under sovereignty of state parties

A prominent example of *ad hoc* cooperation is the Agreement between Australia and the Netherlands concerning UCH remains of ships belonging to the Dutch East India Company, which was incorporated into Australian legislation.⁸⁷ However, it is unclear whether it applies only to the territorial sea in conformity with the UNCLOS, or to the EEZ/continental shelf as well, like relevant domestic legislation.⁸⁸ The treaty provides for the recognition of mutual interest and the creation of a joint committee trusted with the protection and management of the shipwrecks.⁸⁹ The wreck of *HMS Birkenhead* off the coast of Cape Town, is covered by an agreement between South Africa and the UK providing for a cooperative framework for salvage operations and distribution of finds, based on equality, cooperation and consultations.⁹⁰ The wreck of the Confederate CSS *Alabama* sunk in the English Channel was also subject to an agreement between France and the USA.⁹¹ Cooperation was materialised by the establishment of a joint scientific committee responsible for the wreck.⁹² A system of prior notification and consultation is created *in lieu* of unilateral actions.⁹³

Another example of bilateral cooperation is the treaty between France and the USA concerning the wreck of *La belle*, a French ship of Louis XIV sunk off the coast of Texas.⁹⁴ Galenskaya also mentions an agreement between the UK, France

⁸⁷ Agreement between Australia and the Netherlands concerning Old Dutch Shipwrecks, and Arrangement, 6 November 1972, [1972] ATS 18; HSA Schedule 1; B. Jeffrey, 'Australia' in S Dromgoole (ed), *The Protection of the Underwater Cultural Heritage: National Perspectives in light of the UNESCO Convention 2001* (2006) 1, 3.

⁸⁸ C Johnson, 'The Agreement between Australia and the Netherlands concerning Old Dutch Shipwrecks' in Camarda & Scovazzi (eds), above n 116, 22; Dromgoole, above n 3, 82; HSA Part II; Jeffrey, above n 87, 12.

⁸⁹ Old Dutch Shipwrecks Agreement Art 4; Johnston, above n 88, 23–5.

⁹⁰ Exchange of Notes Constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa regarding the salvage of *HMS Birkenhead*, 27 September 1989, [1990] UKTS 3.

⁹¹ Agreement between the Government of the French Republic and the Government of the United States of America concerning the wreck of the CSS *Alabama*, 3 October 1989, TIAS 11687.

⁹² Ibid, Arts 1, 2, 4, 5.

⁹³ Ibid, Arts 2, 3; G. Acquaviva, 'The case of the *Alabama*. Some remarks on the Policy of the United States towards Underwater Cultural Heritage' in Camarda & Scovazzi (eds), above n 80, 31, 46–7.

⁹⁴ Agreement regarding the wreck of *La Belle* (France-USA), 1 April 2003, *Journal officiel de la République française* no 144, 24 June 2003, 10560.

and Egypt over Napoleonic Wars shipwrecks in Aboukir Bay, according to which all the treasures lifted from the seabed would be transferred to the ownership of Egypt, but other finds would be divided between the two states.⁹⁵ Agreements can also cover historic wrecks not yet discovered, such as the Canada-UK agreement on *HMS Erebus* and *HMS Terror*.⁹⁶

Finally, two more agreements must be mentioned: the *HMS Spartan* Agreement relating to a WW2 cruiser, and the *MS Estonia* agreement, dealing with the liners' wreck.⁹⁷ Although both were concluded shortly after the ships were sunk and they were considered maritime graves rather than UCH sites, they reinforce an international trend for cooperation in shipwrecks' protection.

2.3.2 Agreements covering UCH beyond state-parties' sovereignty

The most famous example of *ad hoc* cooperation is the *Titanic* Agreement, which exemplifies cooperation envisaged in UNCLOS Article 303(1) and the UNESCO Convention.⁹⁸ The treaty was negotiated between Canada, France, the UK and the USA, but signed and ratified so far only by the UK and the USA. Emerging partly as a response to private salvage operations, which generated a rich litigation history before US courts, the agreement specifically addresses the *RMS Titanic wreck*.⁹⁹ Under Article 5 of the Agreement, state parties are obliged to exchange information, cooperate and consult each other before adopting any measure for the protection of the wreck based on the nationality, territoriality and flag state jurisdiction.¹⁰⁰

⁹⁵ L Galenskaya, 'International co-operation in cultural affairs' (1986) 198 *Hague Recueil* 265, 300–2.

⁹⁶ Memorandum of Understanding Between the Government of Great Britain and Canada Pertaining to the Shipwrecks HMS Erebus and HMS Terror, 5, 8 August 1997, in Camarda & Scovazzi (eds), above n 80, 442.

⁹⁷ Exchange of notes constituting an agreement regarding the salvage of HMS Spartan, 6 November 1952, 158 UNTS 432; 1995 Agreement regarding the MS Estonia (Estonia-Finland-Sweden), SÖ-1995:36; 1996 Additional Protocol (Denmark-Latvia-Poland-Russia-UK) SÖ-1997:52.

⁹⁸ 2003 Agreement Concerning the Shipwrecked Vessel RMS *Titanic* (US–UK), 6 November 2003, [2003] UKTS 4; S Dromgoole, 'The International Agreement for the Protection of the *Titanic*: Problems and Prospects' (2006) 37 *Ocean Development & Int L* 1, 17, 19.

⁹⁹ M Leigh Miller, 'Underwater Cultural Heritage: Is the *Titanic* Still In Peril As Courts Battle Over The Future of the Historic Vessel?' (2006) 20 *Emory ILR* 345, 369; see also *RMS Titanic, Inc v Haver*, 171 F.3d 943 (4th Cir, 1999); *RMS Titanic, Inc v Wrecked & Abandoned Vessel believed to be the RMS Titanic*, 286 F.3d 194 (4th Cir, 2002); *RMS Titanic, Inc v Wrecked & Abandoned Vessel believed to be the RMS Titanic*, 435 F.3d 521 (4th Cir, 2006); J Nafziger, 'The Evolving Role of Admiralty Courts in Litigation Related to Historic Wrecks' (2003) *Harv ILJ* 251.

¹⁰⁰ *Titanic* Agreement Arts 4(4), 5(4), 5(5); Dromgoole, above n 98, 7.

It should be also noted that UCH provisions can be included in bilateral agreements that do not deal exclusively with UCH. The Torres Strait Treaty stipulates in Article 9(2) that:

if a wreck of historical or special significance to a Party is located or found in an area between the two countries under the jurisdiction of the other Party, the Parties shall consult with a view to reaching agreement on the action, if any, to be taken with respect to that wreck.¹⁰¹

The duty to cooperate, as defined in the Torres Strait Treaty is not limited to the territorial sea but rather covers the continental shelf as Australia asserts jurisdiction over UCH in the continental shelf.¹⁰²

Finally, the relatively limited state practice, especially beyond the territorial sea, renders any discussion about formation of customary law rather premature.¹⁰³

3 The duty to cooperate for the protection of UCH: problems and prospects

3.1 Current problems

Three major problems in relation to the duty to cooperate for the protection of UCH *de lege lata* will be identified: the inconclusive formulation of the duty to cooperate under the UNCLOS; the controversial character of the UNESCO Convention, which hinders its wide acceptance/ratification; and the scarcity of existing *ad hoc* agreements.

3.1.1 The UNCLOS: a general and inconclusive framework

The explicit recognition of a legal duty to cooperate for the protection of the UCH in the ‘constitution of the oceans’, ratified by 164 States and the EU,

¹⁰¹Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters, 18 December 1978, 18 ILM 291, Art 9(2).

¹⁰²HSA ss 4A, 5, 6, 7, 17.

¹⁰³Boesten, above n 28, 59–60.

carries significant symbolic value.¹⁰⁴ However, in practical terms, although the protection of UCH is arguably one of the objectives of the LOS, UNCLOS Article 303 seems to undermine this objective.¹⁰⁵ Laconically put, the provision ‘does not say very much’.¹⁰⁶ It is not clear at all what this duty to cooperate means and what obligations, if any, it entails for states.¹⁰⁷ Due to its very vague wording, it has been suggested that it lacks ‘any significant normative content’.¹⁰⁸ It is indicative of the incompleteness of the UNCLOS provisions that, upon ratification of the UNCLOS, the Netherlands declared that ‘there may be a need to further develop, in international cooperation, the international law on the protection of the underwater cultural heritage’.¹⁰⁹ Things are even more complicated, as states with a link to particular UCH are not easily identifiable. Therefore, it is not even clear *which* states are going to cooperate.

In particular, there is a widespread consensus that there is a legal vacuum concerning UCH situated in the EEZ/continental shelf under the UNCLOS.¹¹⁰ This legal vacuum is further exacerbated by the fact that analogies from other cooperative regimes and mechanisms within the EEZ cannot be drawn, in contrast with the territorial sea.¹¹¹ The *differentia specifica* is that in other fields,

¹⁰⁴Statement by Tommy T B Koh, President of the Third United Nations Conference on the Law of the Sea (6, 11 December 1982), *UNOLOS Division for Ocean Affairs and the Law of the Sea* <www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf> [accessed 27 July 2013]; ‘Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 09 August 2013’, *UNOLOS Division for Ocean Affairs and the Law of the Sea* <www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm> [accessed 27 July 2013].

¹⁰⁵GA Res 60/30(2005) para 7; GA Res 64/71(2009) para 7; GA Res 65/37(2010) para 78; Strati, above n 7, 224; but cf. T Scovazzi, ‘A Contradictory and Counterproductive Regime’ in Garaballo & Scovazzi (eds), above n 60, 3, 4.

¹⁰⁶*Ibid.*

¹⁰⁷UNCLOS Art 303(1) ‘seems more like a political declaration that imposes no specific duties on States Parties’; see YJ Zhao, ‘The relationships between three multilateral regimes concerning the Underwater Cultural Heritage’ in J Nafziger & T Scovazzi (eds), *The Cultural Heritage of Mankind* (2008) 601, 606.

¹⁰⁸Caflisch, above n 10, 20; however, according to Oxman, Art 303(1) is ‘fairly specific’ unlike the ‘sweeping conceptual generalities of article 149’; see Oxman, above n 16, 362. Arend also finds UNCLOS Art 303 clearer than Art 149: above n 11, 801.

¹⁰⁹‘Declaration by the Netherlands upon ratification of the UNCLOS’ (*UNOLOS Division for Ocean Affairs and the Law of the Sea*, 28 June 1996) <www.un.org/Depts/los/convention_agreements/convention_declarations.htm> [accessed 27 July 2013].

¹¹⁰While it seems unlikely that UCH objects could be found in the EEZ and not on the seabed, Scovazzi’s example is interesting: a bottle containing a message by Giuseppe Garibaldi, floating in the EEZ of a third country; see Scovazzi, above n 29, 124, 126–127.

¹¹¹Examples include the conservation of marine living resources. See Y Tanaka, ‘Obligation to Co-

such as environmental protection or conservation of living resources, coastal states' jurisdiction exists in the first place within the EEZ, which is not the case with UCH.¹¹² The same applies in relation to the continental shelf.

Likewise, the ambiguity of Article 149, the failure to designate a specific regulatory authority, the absence of state practice and the fact that most archaeological and historical objects are not found in the Area but in other maritime zones, render the duty to cooperate in the Area rather impractical.¹¹³

3.1.2 The UNESCO Convention: a controversial regime

Turning to the UNESCO Convention, the major issue is the controversy over its compatibility with the UNCLOS. UNCLOS Article 303(4) allows for the conclusion of specialised treaties.¹¹⁴ However, UNCLOS Article 311 which governs the latter's relation to other international agreements, limits states parties' capacity to conclude agreements modifying or suspending the operation of the UNCLOS by laying down strict conditions. The most important requirements are that the new agreement must not be incompatible with the effective execution of the object and purpose of UNCLOS and it must not affect the enjoyment by other state parties of their rights or the performance of their obligations under the UNCLOS.¹¹⁵ These limitations do not apply to the UNESCO Convention by virtue of UNCLOS Article 311(5) which 'does not affect international agreements expressly permitted or preserved by other Articles of this Convention'.

Nevertheless, questions about the compatibility of the UNESCO Convention with the UNCLOS are pivotal for two reasons. First, the UNESCO Convention twice 'declares its loyalty' to the UNCLOS:¹¹⁶

operate in Marine Scientific Research and the Conservation of Marine Living Resources'(2005) 65 *ZaōRV* 937.

¹¹² See UNCLOS Art 56.

¹¹³ Arend, above n 11, 791–3; Strati, above n 9, 877–9; Oxman, above n 21, 240; Nevertheless, due to technological progress shipwrecks are becoming more and more accessible; see Roderick Mather, 'Technology and the Search of Shipwrecks' (1999) 30 *J of Maritime Law & Commerce* 176, 184. It is estimated that 98% of the sea bed is accessible; see E O'Hara, 'Maritime and Fluvial Cultural Heritage' in Report of Committee on Culture and Education, *Parliamentary Assembly of the Council of Europe*, Doc 8867, 12 October 2000, para 3.4.3.

¹¹⁴ M Giorgi, 'Underwater Archaeological and Historical Objects' in R J Dupuy & D Vignes (eds), *A Handbook on the New Law of the Sea*, vol 1 (1991) 561, 573.

¹¹⁵ UNCLOS Art 311(3).

¹¹⁶ Y Dinstein, 'The Interaction between Customary International Law and Treaties' (2006) 322 *Hague Recueil* 243, 391.

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.¹¹⁷

Second, despite the lip service paid to the UNCLOS, the controversy created undermines the UNESCO Convention's *raison d'être*. Although one of the primary objectives of the UNESCO Convention was to create a legal framework of cooperation by fleshing out UNCLOS Article 303(1), this effort has not been crowned with success. The international community has not wholeheartedly endorsed the new convention. It is highly indicative of its tepidness that the convention was adopted by vote (87 in favour, 4 against, and 15 abstentions)¹¹⁸ and not by consensus, by now the standard way of adopting treaties.¹¹⁹ Furthermore, the UNESCO Convention has been ratified by only 42 states, including two land-locked states.¹²⁰ Likewise, the UN General Assembly in its annual resolution concerning Oceans and the LOS simply refers to the UNESCO Convention, while in some resolutions it is not even mentioned.¹²¹

What lies at the heart of the controversy is the way that the duty to cooperate is fleshed out by the UNESCO Convention in Articles 9 and 10 regarding the EEZ and the continental shelf.¹²² This was the most controversial issue during the negotiations of the UNESCO Convention and Articles 9 and 10 have been

¹¹⁷ UNESCO Convention Art 3.

¹¹⁸ Norway, Russia, Turkey, Venezuela voted against; Brazil, Czech Republic, Colombia, France, Germany, Greece, Iceland, Israel, Guinea-Bissau, the Netherlands, Paraguay, Sweden, Switzerland, UK and Uruguay abstained from voting.

¹¹⁹ Carducci, above n 67, 420; A Aust, *Modern Treaty Law and Practice* (2000) 107.

¹²⁰ Paraguay and Slovakia. This can be contrasted with the number of ratifications of the other conventions concluded under the auspices of UNESCO regarding cultural heritage and its protection; see Risvas, above n 5, 7.

¹²¹ When the Convention is referred to, the General Assembly either 'takes note of' or 'notes' it; see GA Res 56/12 (2001) para 43; GA Res 60/30 (2005) para 8; GA Res 61/222 (2006) para 8; GA Res 62/21 (2007) para 8; GA Res 63/21 (2008) para 8; GA Res 64/71 (2009) para 8; GA Res 65/37A (2010) para 8. Cf. GA Res 61/52 (2006), which 'recognises the importance of the Convention on the Protection of the Underwater Cultural Heritage'. The Convention was not mentioned in GA Res 57/141 (2002); GA Res 58/240 (2003); GA Res 59/24 (2004).

¹²² Other UNESCO provisions containing obligations of cooperation also raise questions concerning its compatibility with UNCLOS, such as Art 12 concerning the Area.

subjected to severe criticism.¹²³ The 'constructive ambiguity' of Article 9, albeit a necessary compromise, seems to depart from the UNCLOS.¹²⁴ This could prevent states from ratifying the Convention and undermines its effectiveness.¹²⁵ For some states, like Norway and Russia, the coordination regime was *excessive*, jeopardising the freedom of the high seas, while for others, like Greece, it was *inadequate*, falling short of the desired expansion of coastal state jurisdiction.¹²⁶ The UNESCO attempt at finding a middle ground failed to satisfy either group of states. Russia also maintained during the negotiations that cooperation in EEZ/continental shelf was not fully compatible with UNCLOS Article 303(1). Moreover, UCH found in the Area are to be reported to the ISBA although the latter lacks the competence to regulate or even to supervise UCH found in the Area.¹²⁷

As a result, obligations of cooperation contained in the UNESCO Convention which lie arguably outside the jurisdictional framework of the UNCLOS are opposable only *vis-à-vis* the 45 states parties to the UNESCO Convention. Thus, not only is the UNESCO Convention binding upon relatively few states, but it also seems unlikely that its provisions concerning cooperation could acquire *customary* status in the near future, bearing in mind states' views.

Beyond the controversy and its normative implications, there are other practical drawbacks of the UNESCO Convention. The consultation mechanism based on cooperation is accused of being not only 'bureaucratic and potentially time consuming' but also ineffective, as states often have conflicting views.¹²⁸ Requiring *all* states with a verifiable link to cooperate in *all* UCH cases could be arduous. If all states had the opportunity to participate, the cooperative mechanism would become even more cumbersome.¹²⁹

¹²³ See above at n 79; S Murphy, 'Contemporary Practice of the United States Relating to International Law: Law of the Sea: US Concerns Regarding UNESCO Convention on Underwater Heritage' (2002) 96 *AJIL* 468, 469.

¹²⁴ O'Keefe, above n 56, 83; Carducci, above n 67, 198; Scovazzi, above n 75, 23; K Gwan-Lee, 'An inquiry into the compatibility of the UNESCO Convention 2001 with UNCLOS 1982' in L Prott (ed), *Finishing the Interrupted* (2006) 20, 25.

¹²⁵ Frost, above n 38, 46.

¹²⁶ Strati, above n 43, 46.

¹²⁷ UNCLOS Art 149; see also D Rothwell & T Stephens, *The International Law of the Sea* (2010) 136.

¹²⁸ Zhao, above n 107, 619; Forrest, above n 67, 544; Boesten, above n 28, 167.

¹²⁹ Rau, above n 3, 436-437.

3.1.3 The *ad hoc* agreements: a shattered web

Both the UNCLOS and the UNESCO Convention encourage the conclusion of *ad hoc* agreements.¹³⁰ The latter requires these agreements to be in full conformity with its provisions, but agreements concluded before the adoption of the UNESCO Convention are unaffected.¹³¹ As far as their relationship to the former is concerned, *ad hoc* agreements can be also considered as agreements expressly permitted UNCLOS Article 303(4) and therefore exempted from the strict requirements of compatibility with the UNCLOS imposed by UNCLOS Article 311.

The *ad hoc* agreements are important, but they concentrate on specific sites, such as the *Titanic* Agreement, or groups of sites, such as the Old Dutch Shipwrecks Agreement. Since they are scarce, they cannot provide a comprehensive solution to the problem of UCH protection. What is more, as they are not opposable to third parties, they can be useful for shipwrecks situated in the territorial sea, internal or archipelagic waters of a coastal state, but they are not relevant for wrecks situated in the contiguous zone, the EEZ and the continental shelf, as coastal states' rights over UCH in these maritime zones are contested. For these reasons they constitute a shattered web of obligations of cooperation.

To sum up, the key problems of the current legal framework of the duty to cooperate are: (a) the UNCLOS provisions are general, programmatic and do not impose concrete obligations of cooperation; (b) the UNESCO Convention is only ratified by 41 states and it is not opposable to third states, while very important states for UCH are not parties; and (c) *ad hoc* agreements, while useful, are scarce and do not regulate UCH holistically.

3.2 Possible solutions

While there is no easy solution to complicated and endemic problems, I would like to suggest three possible initiatives that could flesh out of the duty to cooperate more effectively and thus contribute to the UCH protection. The first is the creation of regional agreements; the second is a new convention; and the third is the proliferation of *ad hoc* agreements. These agreements would be based on port states jurisdiction, nationality and flag state jurisdiction and territoriality jurisdiction respectively.

¹³⁰ UNCLOS Art 303(4); UNESCO Convention Art 6(1).

¹³¹ UNESCO Convention Art 6(3).

3.2.1 A regional approach

Although an attempt to develop a European convention on UCH failed during the 1980s, it seems that regionalism is regaining its momentum. Particularly in the Mediterranean, a regional agreement dealing with UCH has long been on the drawing board. The 2001 Syracuse Declaration 2001 emphasised cooperation through a regional convention, the promotion of bilateral and multilateral *ad hoc* agreements and the creation of a Mediterranean museums' network.¹³² Based on the 2001 Declaration, Italy informally proposed a draft regional convention for the protection of UCH in 2003, in an attempt 'to overcome the concerns felt by some Mediterranean States with respect to the universal convention'.¹³³ Outside the Mediterranean region, Forrest advocates a regional agreement in Southern Africa for cooperation towards UCH protection.¹³⁴

Regional cooperation could also avoid the dangers of a universal approach. States that share similar conditions and interests, particularly those adjacent to a closed or semi-closed sea, are in a better position to cooperate.¹³⁵ Moreover, a regional agreement providing for information sharing and based on port jurisdiction could create a protective web.¹³⁶ States could impose conditions or close their ports to ships allegedly engaged in activities detrimental to the protection of UCH. If all or nearly all Mediterranean states were parties to such a convention, incidents like Robert Ballard's expeditions in 1997–1998 off the coast of Sicily could be easily prevented, while also avoiding the threat of 'creeping jurisdiction'.¹³⁷

It is true that the UNESCO Convention also makes use of port state

¹³² Siracusa Declaration on the Submarine Cultural Heritage of the Mediterranean Sea, 10 March 2001, in Camarda & Scovazzi (eds), above n 80, 448–9.

¹³³ R Garabello, 'Sunken warships in the Mediterranean. Reflections on some relevant examples in state practice relating to the Mediterranean Sea' in T Scovazzi (ed), *La protezione del patrimonio culturale sottomarino nel mare Mediterraneo* (2004) 171, 197; see also T Scovazzi, 'Un Futuro Accordo sulla protezione del Patrimonio Culturale Sottomarino del Mediterraneo' in T Scovazzi (ed), *La protezione del patrimonio culturale sottomarino nel mare Mediterraneo* (2004) 157, 162–3.

¹³⁴ C Forrest, 'South Africa' in Dromgoole (ed), above n 87, 247, 269.

¹³⁵ A Gonzáles, 'The Shades of Harmony: Some Thoughts on the Different Contexts that Coastal State face as regards the 2001 Underwater Cultural Heritage Convention' in B Hoffman (ed), *Art and Cultural Heritage, Law, Policy and Practice* (2006) 308, 310.

¹³⁶ *Nicaragua*, above n 45, 111–12; Churchill & Lowe, above n 35, 61–4. Cf. *Saudi Arabia v Arabian American Oil Co* (1963) 27 ILR 117, 212; Convention and Statute on the International Regime of Maritime Ports, 9 December 1923, 58 LNTS 285; V Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 *San Diego LR* 597.

¹³⁷ Scovazzi, above n 17, 83.

jurisdiction, nationality and flag state jurisdiction.¹³⁸ However, other more controversial provisions of the UNESCO Convention prevent ratification and render ineffective the uncontroversial provisions. If a regional agreement focused on port state jurisdiction, it would more easily be accepted. In other words, a different way of cooperation, moving beyond the ‘creeping jurisdiction’ controversy (i.e. whether or not the coastal state should play a role in UCH protection in the EEZ and the continental shelf) could be more effective.

3.2.2 A new convention

A new agreement could provide for inspection for illicit trafficking in underwater antiquities in zones beyond coastal states jurisdiction based on the flag state jurisdiction. Fleshing out the duty to cooperate in such a way would be clearly *infra legem* and thus more easily and widely accepted by states, as it would appease fears of creeping jurisdiction. This approach is not unprecedented in the LOS context; it already happens with regard to drug trafficking. Similar to matters relating to UCH, the UNCLOS only provides an obligation of cooperation to tackle drug trafficking.¹³⁹ However, as the consent of the flag state is necessary, states have concluded multilateral, regional and bilateral (often called ‘ship-rider’) agreements, which make provision for the boarding of ships suspected to be involved in drug trafficking, in order not to be obliged to seek *ad hoc* expression of consent on behalf of the flag state.¹⁴⁰ The same rationale lies behind bilateral

¹³⁸ UNESCO Convention Art s15 and 16.

¹³⁹ UNCLOS Art 108; M Gavouneli, *Functional Jurisdiction in the Law of the Sea* (2007) 29; GA Res 64/71 (2009) para 90. On the PSI, see generally N Klein, *Maritime Security and the Law of the Sea* (2011) 193ff; D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2012) 232ff; F Spadi, ‘Bolstering the Proliferation Security Initiative at Sea: A Comparative Analysis of Ship-boarding as a Bilateral and Multilateral Implementing Mechanism’ (2007) 75 *Nordic JIL* 249.

¹⁴⁰ An example of a multilateral agreement is the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, 1582 UNTS 165, Art 17, which establishes obligations of cooperation in Art 17, but does not provide general *ex ante* authorization for boarding; regional examples include the Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, in V Lowe & S Talmon, *The Legal Order of the Oceans: Basic Documents on the Law of the Sea* (2009) 789; an example of a bilateral treaty is the Agreement between the Government of the United States of America and the Government of Antigua and Barbuda concerning maritime counter-drug operations, 19 April 1995, amended by exchange of notes in 1996, further amended by the 2003 Protocol. For all maritime drug trafficking agreements and Memoranda of Understanding signed by the USA, see ‘List of maritime counter narcotics law enforcement agreements signed by the United States as of August 2005’, *US Department of State* <<http://www.state.gov/s/l/2005/87199.htm>> [accessed 27 July 2013]. See also

agreements concluded pursuant to the Proliferation Security Initiative (PSI) and Article 8bis of the 2005 Protocol to the Convention for the Suppression of 1988 Unlawful Acts of Violence Against the Safety of Maritime Navigation.¹⁴¹

However, it should be emphasised that negotiation of and reaching agreement on a new convention could prove particularly difficult. While a new specialised convention could address some of the problematic and thorny questions concerning UCH, it is debatable whether this would constitute a realistic option.

3.2.3 More *ad hoc* agreements

The proliferation of *ad hoc* agreements is another way of strengthening cooperation for the UCH protection, with the caveat that they should not move outside the established legal framework and should not advance claims that could be regarded as ‘creeping jurisdiction’. Thus, they could contribute more broadly to the protection of the most significant sites and, if generalised, could possibly lead to the creation of customary rules in the long run.

The Old Dutch Shipwrecks Agreement was mentioned during the UNESCO negotiations and was recommended as a basis for other agreements.¹⁴² Finally, negotiations for the conclusion of new agreements are ongoing, like those between Australia and Turkey concerning the wreck of the WW1 Australian submarine AE2 in Gallipoli or between Australia and the UK concerning old British shipwrecks.¹⁴³

It should be noted that neither regional nor bilateral agreements are a panacea. They will not lead overnight to the creation of comprehensive and generally accepted legal framework, since cooperation obligations contained therein will bind only state parties. Furthermore, their application could be done under different standards, as there are no generally accepted international standards, apart from those contained in the Annex of the UNESCO Convention which bind only state parties.

Medvedyev et al v France [2008] 3394/03, para 59; *Medvedyev et al v France* [2010] 3394/03, para 97 (GC).

¹⁴¹ See, respectively, Interdiction Principles for the Proliferation Security Initiative 2003, in Lowe & Talmon, above n 140, 803; 10 March 1988, 1678 UNTS 222; 10 March 1988, 1678 UNTS 221.

¹⁴² Johnston, above n 88, 22–3.

¹⁴³ Garabello, above n 133, 178; M Staniforth, ‘Australian approaches to shared heritage: Royal Navy vessels in Australian waters’, *English Heritage*, <<http://www.english-heritage.org.uk/publications>> [accessed 27 July 2013].

4 Conclusions

The above analysis has showed that the legal framework of cooperation in UCH matters is incomplete, mainly because (1) the relevant UNCLOS provisions are highly abstract; (2) the substantially more specific provisions of the UNESCO Convention are controversial and do not bind but a few states; and (3) *ad hoc* agreements are relatively few. Since a global, wholehearted endorsement of the UNESCO Convention remains merely a remote possibility—the reasons that originally prevented it are still present—this article made other proposals to flesh out the duty to cooperate imposed by the UNCLOS. Those include but are not limited to regional conventions and possibly a new convention avoiding controversies *à la* UNESCO Convention, making use of flag and port state jurisdiction as well as the proliferation of bilateral agreements.

A final point must be emphasised. The above suggestions try to move beyond some controversies that have plagued UCH discourse for a long time. However, these proposals are not necessarily antithetical and *ipso facto* antagonistic to the UNESCO Convention. At the end of the day, states are the ultimate rule-makers in public international law and history shows that what is currently controversial can be acceptable after some time. As the ancient Greek dramatist Menander eloquently put it ‘time grows a scrupulous judge.’¹⁴⁴

¹⁴⁴J M Edmond (tr), *The Fragments of Attic Comedy*, vol 3b (1961) 953.