8

Underwater Archaeological and Historical Objects

8.1 Introduction

Underwater archaeological and historical objects refer to materials and remains lying on or in the seabed that have the potential to yield information and knowledge about natural and historical existence of human civilisation.[1] These include submerged sites and structures of remains of a prehistoric settlement, wreck sites and wreckage of ships, aircraft and spacecraft along with the items contained therein, and their archaeological and natural context.[2] In particular of shipwrecks, the estimation is that until the nineteenth century, almost 5 per cent of all seagoing ships were lost every year because of bad weather, incidents of navigation, maritime crimes, naval battles or other events.[3] These shipwrecks and sites are known as a 'time capsule', meaning that everything may well be as it was when it disappeared beneath the water's surface, loaded with irreplaceable information about the history of humankind.[4]

Land-based archaeology is a vintage academic science, but maritime or underwater archaeology only became an 'independent' or 'specialised'

[1] Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press 2013) 1.

[2] International Council of Museums and Sites (ICOMOS), Charter on the Protection and Management of Underwater Cultural Heritage (Sofia Charter), ratified by the 11th ICOMOS General Assembly in Sofia, Bulgaria, October 1996 www.icomos.org/en/faq-doccen/179-articles-en-francais/ressources/charters-and-standards/161-charter-on-the-protection-and-management-of-underwater-cultural-heritage; Convention on the Protection of the Underwater Cultural Heritage (2 November 2001, in force 2 January 2009) 2562 UNTS 3, Article 1(1)(a) (CPUCH); Dromgoole (2013) 66.

[3] Tullio Scovazzi, 'The Relationship between Two Conventions Applicable to Underwater Cultural Heritage', in James Crawford et al. (eds.), *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (Brill 2017) 504.

[4] David Nutley, 'Submerged Cultural Sites: Opening a Time Capsule' (2008) 60(4) Museum International – Underwater Cultural Heritage 7, 7–9; Patrick J. O'Keefe, 'Underwater Cultural Heritage', in Francesco Francioni and Ana Filipa Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 295.

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subject by the end of the 1960s due to the growing awareness of the significance of shipwrecks and other forms of underwater cultural heritage (UCH).[5] This was made possible through innovations in marine technology, in particular the aqualung, which permitted and generalised scuba diving, and the application of remote sensing and underwater robotics.[6] Access to underwater archaeological and historical objects had a twofold impact: scientific discovery of historical vestiges and, at the same time, information that could be used for purposes such as commercial exploitation. In addition, the growing human utilisation of the ocean and its resources increasingly threatens the existence of these objects, deliberately or otherwise.[7] Moreover, these objects are vulnerable to changes of the marine environment, such as natural disasters, global warming, acidification and water pollution.

The international law to protect underwater archaeological and historical objects, however, has remained underdeveloped to adequately regulate human activities in the interests of their preservation. The 1982 United Nations Convention on the Law of the Sea (UNLCOS) refers to these objects twice.[8] While Article 149 relates only to those archaeological and historical objects located in the Area, Article 303 lays down a general obligation for all States to protect such objects found at sea with a particular focus on the contiguous zone. However, UNCLOS does not define any specific rules relating to such objects found on the continental shelf or in the exclusive economic zone (EEZ), that is, the space located between the external limit of the contiguous zone and the limit of the Area.[9] In this regard, UNCLOS left a legal vacuum that would threaten the protection of these objects, as it emphasises the principle of flag State jurisdiction and the freedom of the high seas, which could easily lead to a first-come-first-served approach.[10]

[5] Dromgoole (2013) 28.
[6] Howard H. Shore, 'Marine Archaeology and International Law: Background and Some Suggestions' (1972) 9(3) San Diego L Rev 668, 668.
[7] Dromgoole (2013) 3–4.
[8] United Nations Convention on the Law of the Sea (10 December 1982, in force 16 November 1994) 1833 UNTS 3, Articles 149, 303 (UNCLOS).
[9] Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Martinus Nijhoff 1989) 161–162.
[10] Dromgoole (2013) 35–36; Tullio Scovazzi, 'Article 303', in Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (Hart 2017) 1955.

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On a positive note, the international law of the sea, including the implementation of UNCLOS, is not static, but evolves through State practice and subsequent agreements. Certain threats to the majority of underwater archaeological and historical objects have been addressed by the United Nations Organization for Education, Science and Culture (UNESCO), particularly through the 2001 Convention on the Protection of Underwater Cultural Heritage (CPUCH).[11] The CPUCH, without altering the jurisdictional framework of maritime zones established by UNCLOS, institutes an international State cooperation scheme based on information sharing and cooperative protection.[12] Of particular interest to the EEZ, the coastal State has been granted a special role as a Coordinating State for the protection of UCH found in the EEZ and on the continental shelf on behalf of State parties as a whole.[13]

This chapter analyses and discusses the jurisdiction over activities that are pertinent to the archaeological and historical objects found in the EEZ. In Section 8.2, the development of the legal framework to protect these objects under UNCLOS and the CPUCH is reviewed, together with an interpretation of how these objects are defined under each treaty. The jurisdictional arrangements over activities that may affect the protection of these objects found in the EEZ is then analysed in Section 8.3. Special attention is given to the relevant provisions of the CPUCH, which somewhat clarifies the role of the coastal State in protecting UCH in the EEZ. This is followed by a discussion in Section 8.4 of the legal procedures that could be invoked to settle disputes relating to these objects.

A central strand of the discussion in this chapter is premised on the argument that the subject of underwater archaeological and historical objects falls under the unattributed rights and jurisdiction in the EEZ.[14] With this understanding, all States have the right to undertake activities

[11] United Nations Organization for Education, Science and Culture (UNESCO), 'Underwater Heritage (Convention 2001)' www.unesco.org/en/underwater-heritage?hub=412.

[12] Sarah Dromgoole, '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2003) 18(1) Int'l J Marine & Coastal L 59, 68–69.

[13] CPUCH Articles 9–10.

[14] Anastasia Strati, 'Protection of the Underwater Cultural Heritage: from Shortcomings of the UN Convention on the Law of the Sea to the Compromises of the UNESCO Convention', in Anastasia Strati, Maria Gavouneli and Nikolaos Skourtos (eds.), *Unresolved Issues and the New Challenges to the Law of the Sea: Time Before and Time After* (Brill 2006) 32; Dromgoole (2013) 259.

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relating to the archaeological and historical objects found in the EEZ. In addition to the due regard obligation, the exercise of such a right must not breach the acting State's obligation to protect such objects and those obligations it undertook as a State party to the CPUCH. Given the lack of specific provisions in UNCLOS addressing the issues relating to these objects found in the EEZ, the provisions of CPUCH on the protection of UCH in the EEZ can be considered an agreement substantiating the rules codified in UNCLOS Article 59.[15]

8.2 Overview of the Legal Framework

8.2.1 Historical Development

Beginning in the 1950s, modern technological advances allowed the discovery and recovery of archaeological and historical objects from the marine environment. At the time, international law was not clear on who had the right to explore these objects or allocate their property rights.[16] States had adopted national legislation to regulate certain activities of their nationals to provide protection of these objects from intentional human interference.[17] The issue of these objects did not receive any special attention during the First and Second United Nations Conference on the Law of the Sea and was only discussed at the Third Conference towards the end of the negotiation process.[18] This resulted in only one provision, Article 303, which was incorporated in the Part XVI 'General Provisions' that applies to all maritime zones, with the intention to avoid upsetting the specific jurisdictional balance adopted in various maritime zones.[19]

[15] Alexander Proelss, 'Article 59', in Proelss (2017) 462; Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th ed., Manchester University Press 2022) 293.

[16] Shore (1972) 669; Bernard H. Oxman, 'Marine Archaeology and the International Law of the Sea' (1987–1988) 12(3) Colum-VLA JL & Arts 353, 353–355.

[17] Dromgoole (2013) 68–70; Patrick J. O'Keefe and James A. R. Nafziger, 'The Draft Convention on Underwater Cultural Heritage' (1994) 25(4) Ocean Dev & Int'l L 391, 394–396; Geoffrey N. Bailey, Jan Harff and Dimitris Sakellariou, 'Archaeology and Palaeolandscapes of the Continental Shelf: An Introduction', in Geoffrey N. Bailey, Jan Harff and Dimitris Sakellariou (eds.), *Under the Sea: Archaeology and Palaeolandscapes of the Continental Shelf* (Springer 2017) 1; Craig Forrest, *Maritime Legacies and the Law: Effective Legal Governance of WWI Wrecks* (Edward Elgar 2019) 193–197.

[18] Nordquist, Rosenne and Sohn (1989) 159.

[19] Ibid 160; Scovazzi 'Article 303' (2017) 1952.

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The negotiation history of Article 303 of UNCLOS has been well described in the literature and can be summarised as follows.[20] The provision originated in a proposal submitted by Greece, with revisions and support by other States, that the sovereign rights of the coastal State in respect of both the continental shelf and the EEZ be extended to include rights regarding the discovery and salvage of any 'object of purely archaeological or historical nature on the seabed and subsoil'.[21] This proposal met with strong opposition from other maritime States, namely, the United States, the United Kingdom and the Netherlands, which feared the creeping jurisdiction of the coastal State in the EEZ and on the continental shelf. Instead, the United States proposed to include a general duty of all States to protect archaeological and historical objects found in the marine environment. Ultimately, the US proposal was adopted after much debate on the basis that it was 'closer to a compromise than any of the others' presented.[22]

Article 303 has four paragraphs, with one declaring the general duties to protect and cooperate to protect objects of an archaeological and historical nature found at sea, one giving coastal States a limited jurisdictional right to control traffic in such objects up to the outer limit of their contiguous zone when declared, and two disclaimer provisions of relevant rights holder and other international agreements. Activities directed at these objects, or activities that might incidentally affect them, between the outer limit of the contiguous zone and the Area were not regulated but rather subordinated to the rights and duties related to the exploration and exploitation of the EEZ and the continental shelf.

The legal framework for protecting underwater archaeological and historical objects created under UNCLOS has been harshly criticised as

[20] Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)' (1980) 74 Am J Int'l L 1, 23–24; L. Van Meurs, 'Legal Aspects of Marine Archaeological Research' (1986) Acta Juridica 83, 90–100; Nordquist, Rosenne and Sohn (1989) 159–161; Tullio Scovazzi, 'Article 149', in Proelss (2017) 1053–1054; Scovazzi 'Article 303' (2017) 1951–1952; Mariano J. Aznar, *Maritime Claims and Underwater Archaeology: When History Meets Politics* (Brill 2020) 8.

[21] United Nations Conference on the Law of the Sea (Third Conference), Official Records, Vol. XIII: Ninth Session, A/CONF.62/L.51, 29 March 1980, Report of the Chairman of the Second Committee, paras 12, 16, informal proposal presented by Cabo Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia (C.2/Informal Meeting/43/Rev.2); Myron H. Nordquist, Satya N. Nandan, Michael W. Logde and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. VI (Martinus Nijhoff 2002) 230.

[22] Third Conference, Official Records, Vol. XIV: Resumed Ninth Session, A/CONF.62/L.58, 22 August 1980, Report of the President on the Work of the Informal Plenary Meeting of the Conference on General Provisions, paras 13–15.

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complicated and incomplete.[23] Several historical conditions contributed to this legal gap. During the 1970s, recognition of marine archaeology as an independent scientific discipline was still limited, and it was not considered marine scientific research during the Third Conference, as it does not involve the study of the natural marine environment.[24] These objects were seen by some lead negotiating States as commodities and were thus subject to appropriation, the law of finds and/or salvage, and trade with commercial values. Additionally, the risks and threats to these objects were not perceived the same in the 1970s as they are today.

Subsequent development on using legal tools to protect underwater archaeological and historical objects was mainly driven by concerned States of the Mediterranean Sea through proceedings at the European level. Notable instruments adopted by the Council of Europe include the Roper Report and Recommendation 848, a 1985 draft European Convention on the Protection of the Underwater Cultural Heritage and the 1992 revised European Convention on the Protection of the Archaeological Heritage.[25] These initiatives made vital contributions to the evolution of international law in the field. They demonstrated that there were political recognition and commitment, certainly within Europe, to develop a treaty framework to afford protection to UCH. Additionally, the debates and draft provisions showed that acceptable compromises could be reached on areas of contention such as the definition and criteria of UCH, jurisdictional attribution over certain

[23] O'Keefe and Nafziger (1994) 397–399; Tullio Scovazzi, 'A Contradictory and Counterproductive Regime', in Roberta Garabello and Tullio Scovazzi (eds.), *The Protection of the Underwater Cultural Heritage, Before and After the 2001 UNESCO Convention* (Brill 2003) 3–17; Strati (2006) 28–34; Mariano J. Aznar, 'The Legal Protection of Underwater Cultural Heritage: Concerns and Proposals,' in Carlos Espósito et al. (eds.), *Ocean Law and Policy: Twenty Years of Development under the UNCLOS Regime* (Brill 2017) 124–147.

[24] Alfred H. A. Soons, *Marine Scientific Research and the Law of the Sea* (Kluwer 1982) 275; Sarah Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage' (2010) 25 Int'l J Marine & Coastal L 33, 44–46.

[25] Parliamentary Assembly of the Council of Europe, The Underwater Cultural Heritage: Report of the Committee on Culture and Education (Rapporteur: Mr. John Roper) (Doc 4200-E, Strasbourg, 1978) https://pace.coe.int/en/files/4425; Parliamentary Assembly of the Council of Europe, Recommendation 848 (1978), Underwater Cultural Heritage, https://pace.coe.int/en/files/14882; European Convention on the Protection of the Archaeological Heritage (Revised) (16 January 1992, in force 25 May 1995) ETS No. 143 www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=143; Janet Blake, 'The Protection of the Underwater Cultural Heritage' (1996) 45(4) Int'l & Compar LQ 819, 820–831; Dromgoole (2013) 45–46.

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activities targeted at these objects beyond the outer limit of the contiguous zone, and the scientific standards of archaeology and conservation.[26]

The protection of UCH has also been the subject of discussion and initiatives in other forums. A notable example of the legal instruments is the 1993 Draft Convention on the Protection of the Underwater Cultural Heritage produced by the International Law Association (ILA).[27] The ILA Draft Convention had been taken up by UNESCO, along with other instruments and conventions, as a basis to develop an international agreement on this subject.[28] There was considerable political commitment during the negotiation process of the CPUCH to find acceptable compromises on the core areas of contention. Mirroring the process at the Third Conference, the main tension remained between the coastal States arguing for broader jurisdiction within certain maritime zones to adequately protect the UCH and the maritime powers resisting the pressure for coastal States to be given such direct jurisdiction.[29] A consensus could not be reached on a number of key provisions, and the negotiations concluded with a majority vote to adopt the CPUCH in 2001. Several maritime powers rejected the draft convention over concerns about two particular issues. First, they regarded the regulatory framework established for the continental shelf and EEZ as prejudicial, or at least potentially, to the 'package deal' and jurisdictional balance enshrined in UNCLOS; second, they were dissatisfied with the treatment of sunken State vessels including warships.[30]

[26] Dromgoole (2013) 37–44.

[27] O'Keefe and Nafziger (1994) 404–417.

[28] UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, 5 December 1956, reprinted in Convention and Recommendations of UNESCO Concerning the Protection of the Cultural Heritage (UNESCO 1985) 101–114; Convention for the Protection of the World Cultural and Natural Heritage (16 November 1972, in force 17 December 1975) 1037 UNTS 151; Ricardo J. Elia, 'ICOMOS Adopts Archaeological Heritage Charter: Text and Commentary' (1993) 20(1) J Field Archaeology 97, 97–98; United Nations General Assembly (UNGA) A/51/645, 1 November 1996, Law of the Sea Report of the Secretary-General, paras 142–144; Draft Convention on the Protection of Underwater Cultural Heritage: A Commentary, prepared for UNESCO by Anastasia Strati, 1999 https://unesdoc.unesco.org/ark:/48223/pf0000115994.

[29] UNGA A/54/429, 30 September 1999, Oceans and the Law of the Sea Report of the Secretary-General, paras 522–526; Roberta Garabello, 'The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage', in Garabello and Scovazzi (2003) 138–151.

[30] 'Statements on Vote for All the Relevant Maritime States With the Exception of Germany', reproduced in Garabello and Scovazzi (2003) 239–253; Robert C. Blumberg,

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The CPUCH was negotiated for the main purpose of solving the caveats left unresolved by UNCLOS and creating a new international legal regime for the protection of UCH according to generally accepted scientific standards.[31] It focuses on how State parties can regulate human activities that could affect UCH in different maritime zones rather than on the objects themselves. Therefore, the regulatory regime established by CPUCH is heavily reliant on flag State jurisdiction and cooperation. The wide participation of and implementation by State parties are crucial for the regime to be fully functional and effective. Major historical maritime powers such as Spain, Portugal, Italy and Tunisia are parties and there are an increasing number of Latin American States (where a lot of UCH lies) have also ratified. Non-State parties including Australia, Canada, China, Germany, Greece, Russia, the Netherlands, the United Kingdom, the United States and Türkiye generally support the principles and standards of the CPUCH.[32] It is, nevertheless, the most complete and up-to-date regulation of activities directed at or incidentally affecting UCH in continental and marine waters and has seventy-seven State parties worldwide as of July 2024.[33]

The CPUCH was the culmination of an evolutionary process in the development of international law in the field of UCH protection taking place over more than four decades.[34] From the perspective of the scope of application, the CPUCH only covers certain archaeological and historical objects – the broader term used by UNCLOS – that meet its criteria and have been under water for at least 100 years.[35] From the perspective of

'International Protection of Underwater Cultural Heritage', in Myron Nordquist, John Norton Moore and Kuen-Chen Fu (eds.), *Recent Developments in the Law of the Sea and China* (Brill 2006) 493–497; J. Ashley Roach, *Excessive Maritime Claims* (4th ed., Brill 2021) 665–668.

[31] CPUCH Preamble; Dromgoole (2013) 24, 281.

[32] 黄伟和南雁冰,'中国加入《保护水下文化遗产公约》的方案探究——以《〈条例〉修订草案》和《公约》的比较与结合为视角',2019年3月,第4卷第2期,边界与海洋研究,56–73页,第57–59页 (HUANG Wei and NAN Yanbing, 'Research on Measures of China's Accession to the Convention on the Protection of the Underwater Cultural Heritage: From the Perspective of Comparison and Combination between the Draft Revision to Regulation and the Convention' (2019) 4(2) Journal of Boundary and Ocean Studies 56, 57–59.); Aznar (2020) 11–12.

[33] Guido Carducci, 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage' (2002) 96 Am J Int'l L 419, 433; UNESCO, 'Convention on the Protection of the Underwater Cultural Heritage, States Parties' www.unesco.org/en/legal-affairs/convention-protection-underwater-cultural-heritage.

[34] Dromgoole (2013) 71.

[35] CPUCH Article 1(1).

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the hierarchy relationship between these two instruments, both UNCLOS and CPUCH provide that it is subject to the other, which is a rather paradoxical situation.[36] An attempt to resolve this deadlock could be to apply the general principles of law according to which the special rules prevail over the general rules (*lex specialis* derogates from *legi generali*), and the later treaty relating to the same subject matter suspends the earlier treaty among the same State parties.[37] In this regard, among State parties to both treaties, the interpretation and implementation of Articles 149 and 303 of UNCLOS should follow, insofar as they are compatible with the basic principles of UNCLOS, the more specific and later CPUCH regime. Article 3 of CPUCH guarantees that all the UNCLOS provisions other than those two specifically related to the UCH are unaffected.

8.2.2 *Objects of Archaeological and Historical Nature*

In the practice of heritage law, the definitions of subject matter often include two types of criteria. One is the 'definitional criteria' that sets out the type of subject matter capable of being afforded protection by the legislation, and the other is the 'selection criteria' that limits the scope of the definition by reference to some value, or is indicative of value, which determines what is to be protected in fact.[38] This approach to defining the subject matter has been employed by both UNCLOS and CPCUH.

Both Articles 149 and 303 of UNCLOS used the same phrase, 'objects of an archaeological and historical nature', to define their subject matter. The word 'objects' describes the subject matter that is capable of being covered, and the phrase 'of an archaeological and historical nature' describe the value that these objects must possess in order to be covered in fact. However, UNCLOS did not define any of the terms used. Under the general rules of treaty interpretation, each term must be interpreted in good faith in accordance with its ordinary meaning in the context in which it is found and in light of the treaty's object and purpose, taking

[36] CPUCH Article 3; UNCLOS Article 303(4).

[37] Vienna Convention on the Law of Treaties (23 May 1969, in force 27 January 1980) 1155 UNTS 331, Article 30(3); UNCLOS Article 311(3); Dromgoole (2013) 277–281; Scovazzi (2017) 517–518; Malcolm N. Shaw, *International Law* (8th ed., Cambridge University Press 2017) 48.

[38] Roger M. Thomas, 'Heritage Protection Criteria: An Analysis' (2006) J Plan & Env't L 956, 960–962.

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into account any subsequent agreements, practice and other relevant rules of international law.[39]

It should be noted that the 'objects of an archaeological and historical nature' were clearly excluded from the notion of 'resources' as used in UNCLOS.[40] In its commentary on a draft article describing the coastal State's sovereign right over the continental shelf, the International Law Commission (ILC) declared that '[i]t is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil'.[41] This firm statement made it clear that the ILC was of the view that shipwrecks were not included within the sovereign rights of the coastal State on the continental shelf, which was 'for the purpose of exploring and exploiting its natural resources'.[42] In light of the ILC's early pronouncement, it became generally accepted that the sovereign rights of coastal States over natural resources on the continental shelf and in the EEZ, as codified in UNCLOS, could not be interpreted as extending to shipwrecks.[43]

As to the 'definitional criteria', the ordinary meaning of the term 'object' is a material thing that can been seen and touched, and is generally associated with a thing that is movable. It may at first appear questionable whether something that was originally a fixed, immovable site or structure can qualify as an object. In light of the object and purpose of Articles 149 and 303, the context of the term as found therein, and taking into account the *travaux préparatoires*, there is no doubt that a broad interpretation was intended that would encompass sites, fixed structures and shipwrecks.[44] A distinction between the subject matter of

[39] Vienna Convention on the Law of Treaties Article 31; Request for An Advisory Opinion submitted by the Commission of Small Island States on Climate Change and Internaitonal Law, Advisory Opinion of 21 May 2024, ITLOS List of cases: No. 31, para 135 (Climate Change Advisory Opinion).

[40] Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment of 21 April 2022, ICJ Reports 2022, p. 266, para 184.

[41] 'Report of the International Law Commission (ILC) to the United Nations General Assembly (UNGA), A/3159, Articles Concerning the Law of the Sea with Commentaries' (1956) 2 YB ILC 298, Article 68, Commentary 5 (ILC Draft Articles).

[42] Ibid Article 68.

[43] UNCLOS Articles 56(1)(a), 77(1); Nordquist, Rosenne and Sohn (1989) 162; Dromgoole (2013) 29–30.

[44] Moritaka Hayashi, 'Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea' (1996) 20(4) Marine Policy 291, 291; 赵亚娟,'国际法视角下"水下文化遗产"的界定',2008年1月,第26卷第1期,河北法学,143–147页,第144页 (ZHAO Ya-juan, 'Evolution of the Meaning of the "Underwater Cultural

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the two provisions can be observed in that Article 149 explicitly applies to 'all objects of an archaeological and historical nature', whereas Article 303 applies to such objects generally and does not refer to 'all'.

In order to fall within the scope of Articles 149 and 303, objects must be 'of an archaeological and historical nature'. This phrase represents the 'selection criteria'. Although the words 'archaeological and historical' are frequently used to describe the subject matter of protective legislation, it seems that no consideration was given to definitions at the Third Conference.[45] The adjectives 'archaeological and historical' imply objects of antiquity rather than those of more recent origin, and the value of these objects is evident by their association to humankind.[46] The key challenge and difficulty to applying the selection criterion used in Articles 149 and 303 is the question of time, that is, how to define the age of the object or a date prior to which such object be considered 'archaeological and historical'. Commentators and national legislation have adopted different thresholds for protection of these objects. It has been argued that, given the negotiation history was heavily influenced by the practice and approaches of the Mediterranean States, this phrase should be interpreted as covering only things that are 'many hundreds of years old' and was not intended to apply to 'modern objects whatever their historical interest'.[47] However, State practice and scholarly opinions have evolved to interpret 'archaeological and historical' to include objects of more recent origin, and there is no evidence that objects are limited to things that are centuries old.[48]

The CPUCH adopted the term 'UCH' to define the subject matter. It refers to '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'.[49] This is followed by a list of examples and two specific exclusions from the scope of application of the CPUCH, namely pipelines and cables and other operational installations.[50] The 'definitional criteria' require that the subject matter

Heritage" in the Context of International Law' (2008) Hebei Law Science 143, 144); Dromgoole (2013) 72.

45 Oxman (1987–1988) 364; Nordquist, Rosenne and Sohn (1989) 160.

46 Dromgoole (2013) 73.

47 Oxman (1987–1988) 364; Dromgoole (2013) 74.

48 Nordquist, Nandan, Logde and Rosenne (2002) 231; Strati (2006) 32; Dromgoole (2013) 74–75.

49 CPUCH Article 1(1)(a).

50 CPUCH Article 1(1)(b)–(c).

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be 'all traces of human existence', whereas the 'selection criteria' is limited to those 'having a cultural, historical or archaeological character' and having been under water for more than 100 years.[51] The fact that the subject matter must represent a trace of human existence, or form part of the context for such traces, excludes natural materials such as sediments, peat and fossilised fauna and flora dating from prehistoric times that are not directly associated with evidence of human existence.[52] Moreover, this definition gives no further indication of how significant the subject matter should be or how to assess its value. The threshold of having been under water for more than 100 years defines its value on the one hand and excludes the remains of cultural, historical and archaeological significance that fall outside its protective regime on the other hand.[53]

It is clear that UNCLOS covers a much broader scope of subject matter than the CPUCH, as the more precise definition of UCH only forms part of the archaeological and historical objects found at sea. Thus, despite the fact that the term itself is commonly used in practice, the definition of UCH under the CPUCH cannot be used to interpret the term used in Articles 149 and 303 of UNCLOS.[54] Subsequent analyses and discussions will follow the general interpretation and scope of objects of an archaeological and historical nature as defined under UNCLOS, and will highlight the additional rights attributed to State parties over UCH under the CPUCH.

8.2.3 *The Duties to Protect Archaeological and Historical Objects Found at Sea*

Article 303 is located in Part XVI 'General Provisions' of UNCLOS. With the exception of paragraph 2, which relates specifically to the contiguous zone, it applies generally and is not geographically restricted. The effect of this is that the duties on States in paragraph 1 apply to all maritime areas, including the EEZ, as do the provisions for the rights of identifiable

[51] Garabello (2003) 105; Yin-Cheng Hsu, 'Developments in International Cultural Heritage Law: What Hampers the Convention on the Protection of the Underwater Cultural Heritage' (2016) 3(1) Edinburgh Student L Rev 116, 117.

[52] Dromgoole (2013) 88–89. See the explanatory comments on Article 1 of the 1998 UNESCO Draft which form part of UNESCO Doc. CLT-96/Conf.202/2, April 1998 (reproduced in the appendix to Sarah Dromgoole and Nicholas Gaskell, 'Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998' (1999) 14(2) Int'l J Marine & Coastal L 171, 195–196).

[53] Dromgoole (2003) 63–64.

[54] Scovazzi 'Article 149' (2017) 1054–1055; Scovazzi 'Article 303' (2017) 1950–1951.

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owners, the law of salvage, other international agreements and additional matters set out in paragraphs 3 and 4.

Under Article 303(1), States have two very general duties to protect and cooperate to protect all archaeological and historical objects found at sea. It does not require that the State should have an interest in or be in any way relevant to the objects of concern; the duties apply generally irrespective of the origins of the objects.[55] These duties are not without vagueness due to the lack of precision in their content.[56] States have broad discretion to decide on the means to protect these subjects, albeit such protection cannot be considered a basis for any State to claim jurisdiction over the area where these objects are found. This limitation was clear from the negotiation history such that Article 303 is a compromise resulting from major maritime powers' concern for avoiding any further erosion of the high seas freedoms.[57] Nevertheless, the duty to protect has some legal consequences. For example, States should take all necessary measures, including legislative, administrative and enforcement measures, necessary to protect these objects. More importantly, a State that knowingly allows its nationals or ships flying its flag to damage or destroy objects of archaeological and historical nature could be held responsible for an internationally wrongful act.[58]

While it is established that States have a duty to cooperate for the protection of underwater archaeological and historical objects, the extent that they are required to do so is not clear, as cooperation can mean different things in different contexts.[59] The duty to cooperate is a duty of concuct and can be seen as implying a duty to act in good faith in pursuing the protection of these objects, and in taking into account the positions of the other relevant States.[60] States are expected to implement this duty to cooperate through subsequent regional and international initiatives to effectively protect these objects.

[55] Dromgoole (2013) 246.

[56] Lucius Caflisch, 'Submarine Antiquities and the International Law of the Sea' (1982) 13 (3) Netherlands YBIL 3, 20; Blumberg (2006) 493.

[57] Scovazzi 'Article 303' (2017) 1955.

[58] Ibid 1953; International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) 2(2) YB ILC 31, Articles 1–2.

[59] Michail Risvas, 'The Duty to Cooperate and the Protection of Underwater Cultural Heritage' (2013) 2(3) Cambridge J Int'l & Comp L 562, 568–569.

[60] UNCLOS Article 300; North Sea Continental Shelf Cases (Federal Republic of Germany v. Netherlands/; Federal Republic of Germany v. Denmark), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, para 85; Scovazzi 'Article 303' (2017) 1953; Climate Change Advisory Opinion para 306.

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As the name indicates, the objectives of the CPUCH are to 'ensure and strengthen the protection of [UCH]', and State parties assume the duty to cooperate to this end.[61] State parties are obligated, individually or jointly, to take all appropriate measures using 'the best practice means at their disposal and in accordance with their capabilities' in conformity with the CPUCH and international law to protect UCH.[62] State parties are further encouraged to develop bilateral, regional or other multilateral agreements to protect UCH.[63] The CPUCH also explicitly states that '[a]ll States Parties have a responsibility to protect [UCH]' in the EEZ and on the continental shelf.[64] The CPUCH could be considered a subsequent agreement that clarifies the general duties to protect UCH, particularly through the establishment of a cooperation mechanism among relevant States that will be discussed below.

Paragraph 2 of UNCLOS Article 303 gives the coastal State limited competence in respect of the removal of underwater archaeological and historical objects found in the contiguous zone. With respect to the rest of the EEZ, the coastal State is afforded no rights in respect of these objects, and its rights and duties over activities that might affect these objects will be governed by relevant provisions of UNCLOS and general international law. However, the precise nature of the jurisdictional competence afforded to coastal States by paragraph 2 is far from clear.[65] The exercise of this right is conditioned on the coastal State proclaiming a contiguous zone up to 24 nautical miles (NM) from the baselines.[66] The coastal State's right is based on a presumption and a legal fiction, which assumes that its customs, fiscal, immigration or sanitary laws and regulations would be infringed with the unauthorised removal of archaeological and historical objects from such zone.[67] If understood literally, the legal basis for the coastal State to take action is not the domestic legislation on the protection of these objects. Moreover, the coastal State's right is only triggered with the actual and detected removal of such objects from the contiguous zone. It is not clear whether such a

[61] CPUCH Article 2(1)–(2).
[62] CPUCH Article 2(4).
[63] CPUCH Article 6.
[64] CPUCH Article 9(1).
[65] Mariano J Aznar, 'The Contiguous Zone as an Archaeological Maritime Zone' (2014) 29 Int'l J Marine & Coastal L 1, 6; Scovazzi (2017) 508–509; Scovazzi 'Article 303' (2017) 1954–1955.
[66] UNCLOS Article 33.
[67] UNCLOS Articles 33(1), 303(2); Dromgoole (2013) 250–252; Aznar (2014) 7, 10.

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right would extend to take actions against activities that cause other damage to these objects *in situ*. The lack of clarity of this coastal State right is, in part, because of the negotiation history where some maritime powers, notably the United States, the United Kingdom and the Netherlands, wished to avoid a formal extension of coastal State jurisdiction over these objects beyond the limit of the territorial sea.[68]

In the 2022 *Nicaragua v Colombia* case, the International Court of Justice (ICJ) had the opportunity to examine the legal status and scope of Article 303(2). Colombia is not a party to UNCLOS but adopted national legislation to protect cultural heritage in the declared 24 NM 'integral contiguous zone' based on the claim that both Articles 33(1) and 303(2) reflect customary international law.[69] The ICJ, after considering State practice and other legal developments in this field, accepted Colombia's argument and declared that under customary law, Colombia is 'entitled to a contiguous zone', and 'it includes the power of control with respect to archaeological and historical objects' found therein.[70] Although provided with no further content, the statement of 'power of control' is broader than merely 'control traffic in such objects' in case of a 'removal from the seabed' from the contiguous zone. The ICJ's declaration of the customary law status of Article 303(2) and the expanded interpretation of the coastal State's right could serve as a legal basis for coastal States to control activities affecting these objects in the contiguous zone. The ICJ's interpretation reflects the development of the law by the CPUCH and State practice.

The coastal State's right relating to the UCH in the contiguous zone has been, to some extent, clarified and expanded by the CPUCH.[71] Rather than referring to the 'removal' of these objects from the seabed, State parties have been granted the right to regulate and authorise activities directed at UCH within their contiguous zones.[72] Although the wording goes quite far from Article 303(2) of UNCLOS, CPUCH

[68] Oxman (1987–1988) 363; Nordquist, Rosenne and Sohn (1989) 161; Robert C. Blumberg, 'International Protection of Underwater Cultural Heritage', paper presented at University of Virginia Center for Oceans Law and Policy Annual Conference on the Law of the Sea Issues in the East and South China Sea, Xiamen, China, 12 March 2005 https://2001-2009.state.gov/g/oes/rls/rm/51256.htm (archived content).

[69] Nicaragua v. Colombia (2022), paras 148, 157 and 169. Certain geographical extent of the 'integral contiguous zone' went beyond 24 NM that had been declared by the ICJ as not in conformity with customary international law, as reflected in Article 33, paragraph 2, of UNCLOS (para 175).

[70] Nicaragua v. Colombia (2022), paras 155, 163–164, 186.

[71] Aznar (2014) 11–12.

[72] CPUCH Article 8.

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has acknowledged that this provision is 'without prejudice to' and 'in accordance' with UNCLOS.[73] This article could be understood from two perspectives. CPUCH has a relatively narrow focus on UCH, which is only part of the archaeological and historical objects covered by UNCLOS. In addition, CPUCH is a later developed and more specialised law. Therefore, it would modify the rights and obligations between States that are parties to both treaties, whereas legal matters that fall outside of these two perspectives will continue to be governed by UNCLOS.[74] It is worth noting that there is a strong trend of State practice to adopt an expanded interpretation of the coastal State right in relation to archaeological and historical objects found in the contiguous zone as recognised by the ICJ in the *Nicaragua v Colombia* case.[75] Several States – Mauritius, South Africa, and some from the Mediterranean Sea region – have established a 24 NM 'archaeological zone' or 'cultural heritage/protection zone' with the aim to protect UCH.[76]

Paragraph 3 of Article 303 protects 'the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges'. As a non-prejudice clause, it allows the application of private law and admiralty law, including salvage law, to underwater archaeological and historical objects found at sea. This paragraph also fails to provide precise definitions of the terminology used and has the potential to further weaken the general duties to protect these objects.

The tension between ownership rights and the protection of these objects has been a constant challenge in the field of cultural heritage law.[77] Likewise for Article 303(3), neither the negotiation history nor the paragraph explains who are the 'identifiable owners', how ownership established and whether ownership could be transferred through salvage

[73] Ibid.
[74] Vienna Convention on the Law of Treaties Article 30(3)–(4).
[75] Aznar (2014) 13-30; Nicaragua v. Colombia (2022), para 185.
[76] Luigi Migliorino, 'In Situ Protection of the Underwater Cultural Heritage under International Treaties and National Legislation' (1995)10(4) Int'l J Marine & Coastal L 483, 488–493; Robyn Frost, 'Underwater Cultural Heritage Protection' (2004) 23 Aust YBIL 25, 37–39; Dromgoole (2013) 253–255; Scovazzi 'Article 303' (2017) 1955; Churchill, Lowe and Sander (2022) 297.
[77] 马明飞和任鹏举,'南海海域水下文化遗产的所有权归属：冲突与协调',2021年3月,第39卷第2期,海南大学学报人文社会科学版,27–37页,第27–32页 (MA Ming-fei and REN Peng-ju, 'On the Ownership of Underwater Cultural Heritage in the South China Sea: Conflict and Coordination' (2021) 39(2) Humanities & Social Sciences Journal of Hainan University 27, 27–32.); Dromgoole (2013) 96–97.

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or through abandonment after being submerged.[78] It would be clear that the ownership referred to here is in a private law context compared with the terms of 'the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin' as used in Article 149 of UNCLOS. Article 303(3) does not address the relationship between the rights of the identifiable owner and the rights that could be recognised by salvors, if any, and the preferential rights of other States.

The implications of the phrase 'the law of salvage and other rules of admiralty' differ between countries. The law of salvage is essentially a matter of private law that governs relationships between private parties. In many national laws, the law of salvage is related to the service to recover property lost at sea that has a value to be salvaged.[79] But some common law jurisdictions, such as the United States, have interpreted salvage law to cover treasure salvage, and applied admiralty law in an extra-territorial manner to grant salvors and finders rights over wrecks and properties found at sea, wherever they are located.[80] Should this approach be commonly adopted, the protection phrase in Article 303(3) could function as an active encouragement to the unregulated recovery of underwater archaeological and historical objects.[81] The International Convention on Salvage, in contrast, allows its State parties to make reservations to exclude its application 'when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed'.[82]

It has been argued that the duty to protect underwater archaeological and historical objects could be carried out using the law of salvage,

[78] Dromgoole (2013) 114–115; Nordquist, Rosenne and Sohn (1989) 160.

[79] Dromgoole (2013) 169–171.

[80] James A. R. Nafziger, 'The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck' (2003) 44(1) Harv Int'l LJ 251, 253–256 Craig Forrest, 'Historic Wreck Salvage: An International Perspective' (2008–2009) 33(2) Tul Mar LJ 347, 359–364; Scovazzi (2017) 510–511.

[81] Scovazzi 'Article 303' (2017) 1956–1957; Garabello (2003) 125.

[82] International Convention on Salvage (28 April 1989, in force, 14 July 1996) 1954 UNTS 165, Article 30(1)(d); International Maritime Organization (IMO), 'Status of IMO Treaties: Comprehensive information on the status of multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions, 24 July 2024' www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx. As of 2024, this reservation has been made by twenty-five of the seventy-eight States Parties including Australia, Bulgaria, Canada, China, Croatia, Ecuador, Estonia, Finland, France, Germany, Iran, Jamaica, Mexico, the Netherlands, New Zealand, Norway, Poland, the Russian Federation, Saudi Arabia, Spain, Sweden, Tunisia, Türkiye, Ukraine and the United Kingdom.

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provided that the operation is consistent with the public interest as reflected in the scientific rules of recovery and the international standards of conservation and curation.[83] As a negotiated compromise, the CPUCH did not ban the application of the law of salvage or law of finds to UCH but eliminated its undesirable effects. In addition to declaring that UCH should not be commercially exploited, the CPUCH provides that activities relating to UCH may only be subject to the law of salvage or law of finds if it is authorised by the competent authorities, in full conformity with the CPUCH, and ensures that any recovery of UCH receives maximum protection.[84]

Finally, Article 303(4) protects in another non-prejudice clause 'other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature'. The intention of this clause is not to affect, for example, existing agreements such as the 1972 Agreement between Australia and the Netherlands on Old Dutch Shipwrecks located in Australian waters, or other similar agreements to be concluded.[85] Among possible subsequent agreements, the CPUCH, which began to be negotiated at UNESCO when UNCLOS entered into force, has become the most influential multilateral agreement for the protection of UCH.

The most glaring problem with the application of the general duties to protect underwater archaeological and historic objects under UNCLOS is the geographical 'gap' in the provisions they afford. This gap relates to the EEZ and continental shelf beyond the contiguous zone to the outer limit of the juridical continental shelf that forms the boundary with the Area. As a result, activities affecting these objects, deliberately or incidentally, are governed by the general rules of UNCLOS. But archaeological research and protection do not fall directly within the purposes

[83] Ben Juvelier, '"Salvaging" History: Underwater Cultural Heritage and Commercial Salvage' (2017) 32(5) Am U Int'l L Rev 1023, 1037–1045; Ole Varmer and Caroline M. Blanco, 'The Case for Using the Law of Salvage to Preserve Underwater Cultural Heritage: The Integrated Marriage of the Law of Salvage and Historic Preservation' (2018) 49(3) J Mar L & Comm 401, 413.

[84] CPUCH Articles 2(7), 4; Scovazzi 'Article 303' (2017) 1957–1958.

[85] Agreement between Australia and the Netherlands concerning Old Dutch Shipwrecks and Arrangement (6 November 1972, in force 6 November 1972) ATS No. 18; Australia Government, 'Underwater Cultural Heritage: International Agreements' www.dcceew.gov.au/parks-heritage/heritage/underwater-heritage/international-agreements; Antony Firth, 'UK Safeguarding of Underwater Cultural Heritage: Factual Background', unpublished briefing paper for BA/HFF Steering Committee on Underwater Cultural Heritage. Fjordr Ref: 16200 (Fjordr Ltd 2014); Scovazzi 'Article 303' (2017) 1960.

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for which 'sovereign rights' are granted to the coastal State as set forth in UNCLOS. In essence, subject to the undefined general duties to protect these objects, the obligations of due regard and non-abuse of rights, it is the flag State that has the competence to control these activities.[86] Presumably, in the course of time, this gap in law will be dealt with by the competent international organisation, in particular UNESCO, and by State practice.[87]

8.2.4 *State Cooperation Mechanism under the Convention on the Protection of Underwater Cultural Heritage*

Developed by UNESCO, the CPUCH is the international community's response to the inadequacy of the international legal protections and to concerns about the increasing incidence of commercial exploitation of shipwrecks and other UCH. It is the product of thirteen years of preparatory work at different levels at UNESCO, including four years of formal negotiations.[88] Its purpose is to afford a comprehensive legal regime for protecting UCH in all maritime zones for the benefit of the whole of humanity.[89] The CPUCH embodies a form of scientific cooperation built around three main ideas. First, the performance of any activity directed at the UCH must follow widely recognised scientific standards; second, any commercial approach to UCH must be avoided; and third, it creates a cooperation mechanism among the State parties to protect the UCH.[90] At the core of the CPUCH is a complex regime that enables State parties, individually and collectively as appropriate, to regulate activities in international waters. It develops the twofold duties to protect and to cooperate to protect underwater archaeological and historical objects mandated in Article 303(1) UNCLOS. For the purpose of this chapter, the discussion will focus on the State cooperation mechanism applicable in the EEZ, including the contiguous zone.

As discussed earlier, the CPUCH has clarified and expanded the right and jurisdiction given to coastal States with respect to the protection of UCH found in the contiguous zone. In the contiguous zone, where

[86] Dromgoole (2013) 35–36.
[87] Nordquist, Rosenne and Sohn (1989) 161–162; Scovazzi 'Article 303' (2017) 1951.
[88] Dromgoole (2013) 24.
[89] CPUCH Preamble.
[90] CPUCH Articles 2, 9–12, 19, 23–24, 33, Annex Rules Concerning Activities Directed at Underwater Cultural Heritage; Dromgoole (2013) 61; Aznar (2020) 16.

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declared, State parties may 'regulate and authorize' activities directed at UCH, and in so doing require these activities to be taken in accordance with internationally accepted archaeological principles and standards of behaviour.[91] State parties also assume the obligation to implement other relevant provisions of the CPUCH. For example, when authorising and regulating such activities, there should be a presumption in favour of preservation *in situ* until such time as intervention is justified for scientific or protective purposes.[92]

At the heart of the CPUCH are the provisions with respect to the protection of UCH in the EEZ and on the continental shelf, which to some extent fills the legal gap left by UNCLOS.[93] Articles 9 and 10 of the CPUCH establish a complex cooperation mechanism that involves a reporting and notification procedure, as well as the taking of various forms of protective actions by relevant States parties, acting alone and in concert. In attempting to create a formula to accommodate the competing interests of different States, Articles 9 and 10 incorporate a number of constructive ambiguities and accord a special role to a 'Coordinating State', which may or may not be the coastal State.[94]

The State cooperation mechanism, as a compromise achieved in the CPUCH, involves the participation of all the States linked to the heritage. The mechanism is achieved through the coordination by the 'Coordinating State', normally the coastal State in whose EEZ or on whose continental shelf the UCH is located unless otherwise decided.[95] Any State party may declare, through diplomatic channels, to the State party in whose EEZ or on whose continental shelf the UCH is located 'its interest in being consulted on how to ensure the effective protection of that [UCH]' and assume the role as one of the 'interested State Parties'.[96] However, the interest must be based on 'a verifiable link, especially a cultural, historical, or archaeological link, to the [UCH] concerned' and

[91] CPUCH Articles 8, 33, Annex.
[92] CPUCH Article 2(5); Dromgoole (2013) 24.
[93] It should be acknowledged that the CPUCH also adopted rules and obligations for State parties to protect UCH in the Area that clarified the rules stated in Article 149 of UNCLOS.
[94] UNESCO, Underwater Cultural Heritage 2001 Convention, 'State Protection Mechanism: State Cooperation Mechanism' www.unesco.org/en/underwater-heritage/state-protection-mechanism?hub=412.
[95] CPUCH Article 10(3).
[96] CPUCH Article 9(5).

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supported by relevant evidence and documentation.[97] This cooperation mechanism may entail the performance of preliminary research, the authorisation of archaeological activities to prevent undesirable activities and regulate desirable ones, and/or the adoption of urgent and preventive measures.[98] The three-step procedure – reporting, consultations and urgent measures – can be summarised as follows.

State parties to the CPUCH have the obligation to follow the reporting and notification requirements laid out in Article 9. Primarily, State parties are required to ensure their nationals or vessels flying their flags report any discoveries or intentions to engage in activities directed at UCH in their EEZs or on their continental shelves. They are further required to ensure that their nationals or vessels flying their flags report such discoveries or activities in the EEZ or on the continental shelf of another State party to them or to that State party. The relevant State party is then requested to notify the Director-General of UNESCO of such reported discoveries or activities, who then will promptly make such information available to all State parties. Upon receiving such information, any State party may declare to the State party in whose EEZ or on whose continental shelf the UCH is located its interest to be consulted.

Under Article 10 of the CPUCH, the State party in whose EEZ or on whose continental shelf the UCH is located will assume the role as 'Coordinating State' to coordinate the consultation process with all other interested State parties on how best to protect the UCH. If the coastal State does not wish to assume the role as Coordinating State, the role will be jointly appointed by other interested State parties. The Coordinating State shall implement the protective measures that have been agreed to by the consulting States, and shall issue all necessary authorisations for these measures in conformity with the rules concerning activities directed at the UCH.[99] These provisions are consistent with the general duties under UNCLOS to protect UCH and cooperate for that purpose and do not upset the delicate jurisdictional balance between different States in the EEZ.

[97] Ibid; UNESCO, Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage, CLT/HER/CHP/OG 1/REV, August 2015, Chapter II, B Declarations of Interest; Thijs J. Maarleveld, 'The Notion of "Verifiable Links" in the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2014) 19(2) Art Antiquity and Law 101, 103–112.

[98] Aznar (2020) 18–19.

[99] CPUCH Annex.

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Article 10(4) further authorises the Coordinating State to take all practical measures and/or issue any necessary authorisation to prevent any immediate danger to UCH arising from human activities or any other cause, including looting. Such urgent measures could be taken prior to the consultation process with all other interested State parties. Moreover, the Coordinating State may request assistance from other State parties in taking the urgent measures to protect the UCH. This authorisation, however, has generated debates on whether it gives the Coordinating State unchecked power to take any measures, not excluding the use of force, on the pretext of protecting the UCH in the EEZ.[100] As such, the immediate paragraph states that the Coordinating State shall act 'on behalf of the States parties as a whole and not in its own interest', and any coordinating 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 [UNCLOS]'.[101] This statement should constitute a bar to any creeping jurisdiction temptation.

In addition to this three-step procedure to facilitate cooperation, State parties have a general duty to cooperate to protect the UCH under the CPUCH. State parties are required to cooperate and assist each other in the protection and management of UCH, including, 'where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage'.[102] In order to prevent secrecy and unregulated activities directed at UCH, each State party undertakes to share information with other State parties about the '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'.[103]

In 2021–2022, the State cooperation mechanism under the CPUCH was activated for the first time with respect to an archaeological site on the Skerki Bank, a geological featured between Sicily and Tunisia hosting numerous wrecks from Phoenician times to the Second World War, with Tunisia acting as the Coordinating State and the participation of seven

[100] UNESCO, Records of the General Conference, Proceedings of the 31st session, 2 November 2001, Vol. 2, Statement by Mr Sidorov (Russian Federation), 562 https://unesdoc.unesco.org/ark:/48223/pf0000128966.
[101] CPUCH Article 10(6).
[102] CPUCH Article 19(1).
[103] CPUCH Article 19(1)–(2).

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interested State parties.[104] A Coordinating Committee, composed of the eight State parties, has been established to support the initiative with each State represented by a designated focal point. The Coordination Committee is responsible for developing strategies and action plans to achieve the objectives of the initiative. Researchers from the eight States collaborated to carry out an international underwater archaeological mission on the Skerki Bank in 2022 that led to the discovery of three new shipwrecks and the retrieval of relevant archaeological information.[105] The establishment of this cooperation mechanism represents a real opportunity for the Mediterranean States to protect an archaeological site beyond the limit of their territorial waters.

Underpinning the entire treaty framework is the principle that State parties must cooperate in the protection of UCH. The all-important cooperation mechanism the CPUCH creates for the EEZ and the continental shelf is dependent upon State parties sharing information and taking collaborative and coordinated actions. In accordance with international law and UNCLOS, regulation by maritime zone allows the CPUCH to facilitate and improve cooperation between State parties. The CPUCH establishes sufficient firewalls against any kind of creeping jurisdiction that deviates from the jurisdictional framework set up by UNCLOS. The only provision that goes beyond what was explicitly declared by UNCLOS is with respect to the contiguous zone in which State parties may regulate and authorise activities directed at UCH.[106] This provision is still in line with the objective of Article 303(2) of UNCLOS as acknowledged by the ICJ in the *Nicaragua v Colombia* case, which gives the coastal State 'the power of control with respect to archaeological and historical objects', and it was unchallenged and generally accepted by States that negotiated the CPUCH.[107] Any of the acts or activities undertaken on the basis of the CPUCH cannot be used as a

[104] UNESCO, 'Underwater Archaeological Mission for UNESCO and 8 Member States in the Mediterranean: A Multilateral Underwater Archaeological Mission under the Framework of UNESCO' www.unesco.org/en/skerki-bank-mission. International scientists from Algeria, Croatia, Egypt, France, Italy, Morocco, Spain and Tunisia participated in the mission.

[105] UNESCO, 'Fact Sheet: Multilateral underwater archaeological mission under the auspices of UNESCO on the Skerki Bank and in the Sicilian Channel' https://unesdoc.unesco.org/ark:/48223/pf0000388533.

[106] CPUCH Article 8.

[107] Aznar (2020) 22; Nicaragua v. Colombia (2022), para 186.

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legal argument to expand, reinforce or dispute current jurisdictional or sovereign rights as recognised by UNCLOS.[108]

8.3 Rights and Jurisdiction over Activities Affecting Archaeological and Historical Objects

The key objective of the legal framework relating to underwater archaeological and historical objects is to provide adequate protection. Central to this framework is for States to regulate activities that affect these objects to ensure that they are not unduly interfered with or damaged. As acknowledged in the earlier discussion, such objects found in the EEZ or on the continental shelf are not natural resources but are human-made resources. Considering the sovereign rights and jurisdiction attributed to the coastal State under UNCLOS, jurisdiction relating to these objects is not automatically attributed to the coastal State. Likewise, they do not fall under the high seas freedoms that have been explicitly preserved for all States in the EEZ. Thus, when a conflict on the attribution and exercise of rights and jurisdiction over these objects arises, it must be resolved based on the principles of Article 59 of UNCLOS and other rules of international law.

The nationality principle is a well-established principle of jurisdiction under international law, and as such, its utilisation by any flag State over its own nationals and ships flying its flag to protect underwater archaeological and historical objects is not a matter of controversy.[109] When a conflict arises between a coastal State and another State with respect to activities affecting these objects in the EEZ, all the relevant factors need to be weighed on a case-by-case basis. The relevant factors would include whether these activities interfere with the exercise of the rights and fulfilment of duties of the relevant States, the duties of all States – the international community – to protect these objects, any subsequent agreement that is applicable to both States, and whether there is a verifiable link between the objects and any State.[110] The two legal doctrines that guide the attribution and exercise of rights and freedoms in the EEZ could provide some guidance.[111] Where the dispute relates to

[108] CPUCH Articles 2(11), 10(6).
[109] Shaw (2017) 455–457, 493–494; James Crawford, *Brownline's Principles of Public International Law* (9th ed., Oxford University Press 2019) 443–444.
[110] Dromgoole (2013) 259–260.
[111] See Chapter 3 in this volume.

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the exploration and exploitation of natural resources, it should probably be resolved in favour of the coastal State; where it relates to the communication freedoms, then the interests of other States – or the international community as a whole – would be favoured. The exercise of such rights and jurisdiction must also follow the due regard obligation and not constitute an abuse of rights.

In order to discuss jurisdictional issues over the activities carried out by a non-national, an important distinction should be made between two forms of activities affecting these objects: those that are 'directed at' them and those 'incidentally affecting' them. This distinction is only explicitly recognised and defined by the CPUCH for the benefit of UCH.[112] UNCLOS only refers to 'traffic in such objects' once in Article 303(2), which is an activity directed at these objects. Jurisdiction over other activities that may affect these objects can only be discussed in the general jurisdictional framework under the international law and UNCLOS. The CPUCH limits both activities to those that may 'physically disturb or otherwise damage' UCH.[113] It primarily focuses on controlling activities directed at UCH to ensure that they are undertaken in accordance with the archaeological benchmark standards.

8.3.1 Activities Directed at Underwater Archaeological and Historical Objects

Broadly speaking, activities directed at underwater archaeological and historical objects can be defined to mean human activities having these objects as their primary target. It would also be reasonable to add the requirement that these activities should have the potential to, directly or incidentally, physically disturb or otherwise damage these objects. If the activities have no impact on these objects, it would not be justifiable to put a restriction on the conduct of these human activities.[114] Activities that have those objects as the main target commonly involve the search for, exploration of, recording of and extraction and removal of items of the object, such as artefacts from shipwrecks.

The coastal State, through its role as the flag State, has the right to regulate and authorise activities directed at the archaeological and historical objects found in its EEZ or on its continental shelf by its nationals

[112] Dromgoole (2013) 345.
[113] CPUCH Article 1(6)–(7).
[114] Dromgoole (2013) 65.

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and vessels flying its flag. While this right is not explicitly stated in UNCLOS, it could be assumed through the nationality principle, the exclusive flag State jurisdiction over ships and the general duty to protect these objects.[115] The CPUCH also requires that State parties to 'take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at [UCH] in a manner not in conformity with this Convention'.[116] This flag State right, in principle, will apply to activities conducted by its nationals in the EEZ of another State and other maritime zones. Therefore, it is primarily the flag State jurisdiction that is applicable to these activities conducted in the EEZ and on the continental shelf provided that the exercise of such right has due regard to the rights and duties of the coastal State and complies with the applicable laws and regulations adopted by the coastal State.[117]

States have been using the nationality principle to collectively protect archaeological and historical sites found outside of the limits of national jurisdiction. Since its discovery in 1985, the wreck of the *Titanic*, lying more than 300 miles off the coast of Newfoundland, has been the subject of numerous expeditions that have led to the recovery of thousands of artefacts.[118] Puzzled by the lack of clear international regulations and protection, and concerned about the ongoing activities at the site and its deteriorating condition, the United Kingdom and the United States, together with France and Canada, negotiated the Agreement concerning the Shipwrecked Vessel RMS *Titanic* (Titanic Agreement) in 2003 that will afford the wreck some specific legal protection.[119] The Titanic Agreement refers specifically to the relevance of Article 303 of UNCLOS and establishes a protective scheme based on the exercise by State parties of the nationality and territorial principles of jurisdiction.[120] Another example is the multilateral agreement between Finland, Estonia and Sweden regarding the protection of the passenger ferry M/S *Estonia*,

[115] UNCLOS Articles 94, 303(1).
[116] CPUCH Article 16.
[117] UNCLOS Article 58(3).
[118] Marian Leigh Miller, 'Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle over the Future of the Historical Vessel' (2006) 20 Emory Int'l L Rev 345, 345–346.
[119] Agreement Concerning the Shipwrecked Vessel RMS Titanic (6 November 2003, in force 18 November 2019) UKTS No 8 (2019) www.state.gov/multilateral-19-1118.
[120] Ibid Preamble, Articles 3–5; Sarah Dromgoole, 'The International Agreement for the Protection of the Titanic: Problems and Prospects' (2006) 37(1) Ocean Dev & Int'l L 1, 7.

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which sank on the Finnish continental shelf in 1994.[121] State parties to this agreement assume the right to criminalise activities by their nationals that disturb the peace of the resting place of more than 800 victims of the disaster.[122]

In addition to flag State jurisdiction over activities directed at the archaeological and historical objects, the coastal State has the right to regulate the 'removal' of these objects from the contiguous zone.[123] This right has been expanded by the CPUCH to the right to regulate and authorise activities directed at UCH by State parties, and by the ICJ to include the power of control with respect to archaeological and historical objects.[124] Moreover, a number of factors could warrant concurrent jurisdiction of non-flag States in the EEZ or on the continental shelf. The first category of factors includes some of these activities, which, although directed at the underwater archaeological and historical objects, may actually affect the exercise of other rights and jurisdiction by different States. The second category comprises the rights and jurisdiction provided by subsequent agreements, primarily the CPUCH.

The discovery and exploration activities directed at archaeological and historical objects involve the use of acoustic and magnetic remote sensing devices to explore the ocean floor that are often referred to as survey operations.[125] These devices include side-scan and bathymetric sonar systems to identify seabed protrusions and indentations, sub-bottom profilers to provide cross-sectional analyses of the sub-sea strata to enable identification of material buried in sediment, and magnetometers to locate ferrous material.[126] Technology development has revolutionised the field of shipwreck search and recovery, and the mapping of the seafloor. For example, marine archaeologists have discovered thousands of wrecks, ranging from Roman and Phoenician vessels to German U-boats and modern fishing vessels, and identified and mapped the layout

[121] Agreement between the Republic of Finland, the Republic of Estonia and the Kingdom of Sweden Regarding the M/S Estonia (23 February 1995, in force 26 August 1995) 1890 UNTS 176 (M/S Estonia Agreement). The Agreement was opened for accession by other States through a Protocol adopted on 23 April 1996.

[122] M/S Estonia Agreement Article 4.

[123] UNCLOS Article 303(2).

[124] CPUCH Article 8; Nicaragua v. Colombia (2022), para 186.

[125] Tine Missiaen, Dimitris Sakellariou and Nicholas C Flemming, 'Survey Strategies and Techniques in Underwater Geoarchaeological Research: An Overview with Emphasis on Prehistoric Sites', in Bailey, Harff and Sakellariou (2017) 21.

[126] Roderick Mather, 'Technology and the Search for Shipwrecks', (1999) 30(2) J Mar L & Com 175, 177–180.

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of the submerged Bronze Age city of Pavlopetri and the Ice Age Scandinavian Mesolithic dwelling remains, graves and fishing structures.[127] The devices and technology employed for surveying these objects are almost identical to those used in hydrographic survey that deals with the measurement and description of the physical features of the ocean.[128] The data collected through these operations, depending on the objectives and devices employed, could reveal important information to be used for navigation, exploration and exploitation of the seabed and its natural resources, environmental protection and management, marine science and maritime boundary delimitation.[129] The survey operations could potentially affect the sovereign rights and jurisdiction attributed to the coastal State in the EEZ and on the continental shelf. However, the question of whether or not survey operations of any kind, including those targeted at underwater archaeological and historical objects, constitute marine scientific research is itself controversial and has been subject to much debate.[130]

Activities directed at archaeological and historical objects could also involve the use of equipment constituting an 'installation' or 'structure'. Under UNCLOS, the coastal State has exclusive right to construct and to authorise and regulate the construction, operation and use of installations and structures either for economic purposes or if such structures interfere with the exercise of its rights in the EEZ or on the continental shelf.[131] Although national and international laws have repeatedly called

[127] Mather (1999) 182–183; Helena Smith, 'Lost Greek City That May Have Inspired Atlantis Myth Gives Up Secrets', The Guardian, 16 October 2009 (online); Ole Grøn and Lars Froberg Mortensen, 'Stone Age in the Danish North Sea Sector' (2011) 26 Maritime Archaeology Newsletter from Denmark 3; Jon Henderson, Chrysanthi Gallou, Nicholas Flemming and Elias Spondylis, 'The Pavlopetri Underwater Archaeology Project: Investigating an Ancient Submerged Town', in Jonathan Benjamin et al., *Submerged Prehistory* (Oxbow Books 2011) 207.

[128] Roach (2021) 490; International Hydrographic Organization (IHO), S-32 IHO – Hydrographic Dictionary, (Hydrographic Dictionary Working Group (HDWG) 2019), Eng ID 5244, https://iho.int/en/standards-and-specifications.

[129] IHO, Manual on Hydrograph, Publication C-13 (1st ed, May 2005 (corrections to February 2011)), 2–6 https://iho.int/uploads/user/pubs/cb/c-13/english/C-13_Chapter_1_and_contents.pdf.

[130] Dromgoole (2010) 49–53; Ronán Long, *Marine Resources Law* (Thomson Round Hall 2007) 695–696; Guifang (Julia) Xue, 'Marine Scientific Research and Hydrographic Survey in the EEZs: Closing up the Legal Loopholes?', in Myron H. Nordquist, Tommy T. B. Koh and John Norton Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff 2009) 209–232; Roach (2021) 491–493. For discussion on survey for submarine cables and pipelines, see Chapter 5 in this volume; for discussion on military survey, see Chapter 6 in this volume.

[131] UNCLOS Articles 60, 80. See Chapter 4 in this volume.

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for protection of these objects and tried to prevent the commercialisation of them, it is unavoidable that some of these activities would be commercially driven, such as treasure hunting and looting. It is unclear whether this type of commercial exploitation would constitute the 'economic purposes' as used in UNCLOS, particularly given that these objects are not considered natural resources. However, it would be less controversial for the coastal State to claim jurisdiction if the installation or structure is located in a fishing ground or near an offshore oil platform. In addition, if the installation or structure is located in a busy shipping lane or in other ways interferes with navigation, it may potentially affect the freedom of navigation enjoyed by all States.

Exploration and excavation activities may also involve 'drilling' on the continental shelf. UNCLOS has granted the coastal State the exclusive right to authorise and regulate drilling on the continental shelf for all purposes.[132] Although the term 'drilling' is not defined by UNCLOS, the ordinary meaning could encompass digging or blowing, the use of propwash deflectors and other similar devices, and perhaps even the use of explosives.[133] It would be plausible that the excavation and other activities directed at underwater archaeological and historical objects be subject to the coastal State's jurisdiction if they probe or otherwise disturb the seabed of the continental shelf.[134] The use of drilling is further subject to the duty of having due regard to the sovereign rights and jurisdiction of the coastal State. Moreover, the use of drilling should also have due regard to other uses of the seabed, such as the laying of submarine cables and pipelines by all States.[135]

Another potential interference of other rights by the activities directed at underwater archaeological and historical objects relates to the natural marine environment. This close relationship has been acknowledged by the CPUCH when defining UCH and referring to environmental precaution and mitigation considerations.[136] Underwater archaeology and the natural marine environment, particularly marine life, are closely related, and such objects can be of considerable ecological value.[137] For example,

[132] UNCLOS Article 81.
[133] Dromgoole (2013) 269.
[134] Blumberg (2006) 496.
[135] See Chapter 5 in this volume.
[136] CPUCH Article 1(1)(a), Annex Rules 10(l), 14, 29.
[137] Dromgoole (2013) 16; James Delgado and Ole Varmer, 'The Public Importance of World War I Shipwrecks: Why a State Should Care and the Challenges of Protection', in UNESCO, Underwater Cultural Heritage from World War I: Proceedings of the

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some objects may have become an artificial reef or be embedded in a fragile marine environment. In some cases, though, the object may be a potential or actual hazard for the marine environment. For example, a large number of sunken warships during the two world wars carried bunker or cargo oils, mercury, munitions, or other poisonous or noxious cargos.[138] Therefore, any interference with or recovery of such materials from an object will almost inevitably disturb or damage the environment of both the water column and the seabed to varying degrees.[139] Even though the coastal State's jurisdiction to protect and preserve the marine environment is limited and may not directly include those activities, it could make a strong claim for their potential interference with the exercise of its sovereign rights over natural resources.[140]

It is apparent from the preceding discussion that the coastal State may find legal basis, albeit slim and indirect, to claim concurrent jurisdiction over certain activities directed at archaeological and historical objects found in its EEZ or on the continental shelf if they interfere with its sovereign rights and jurisdiction. A potential, and rather controversial, remedy to this situation would be treating certain activities as marine scientific research that is subject to coastal State jurisdiction in the EEZ and on the continental shelf. The generally accepted position is that marine archaeological activities do not qualify as marine scientific research on the basis that they are directed at the human-made objects rather than the natural environment.[141] However, it is arguable that an increasingly common precursor to direct intervention – the use of scientific methodologies – is directed at the seabed and subsoil that are components of the natural marine environment. Importantly, in some cases the data gathered could be of direct significance for the exploration and exploitation of natural resources. As such, these activities may have a significant influence on the sovereign rights and jurisdiction of the coastal State in the EEZ and on the continental shelf. Giving the coastal

Scientific Conference on the Occasion of the Centenary of World War I, Bruges, Belgium, 26 & 27 June 2014 (UNESCO 2015) 112 https://unesdoc.unesco.org/ark:/48223/pf0000233355; Wessex Archaeology, 'Wrecks on the Seabed: Ecology' www.wessexarch.co.uk/our-work/wrecks-seabed-ecology.

[138] Craig Forrest, 'Culturally and Environmentally Sensitive Sunken Warships' (2012) 26(1) Austl & NZ Mar LJ 80, 80–81.

[139] Dromgoole (2013) 267–268.

[140] Daniel P. O'Connell, *The International Law of the Sea*, Vol. II (Oxford University Press 1988) 918.

[141] Soons (1982) 6, 124; Dromgoole (2010) 43; Roach (2021) 500.

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State rights over certain activities has the advantage of avoiding potential destabilisation of these objects and their natural context, and possible interference in its sovereign rights and jurisdiction.[142]

A second category of concurrent rights and jurisdiction provided by the CPUCH to its State parties is applicable to the UCH. The CPUCH focuses on addressing undesirable threats, such as treasure hunting and other unregulated activities, and regulating the authorised activities targeted at the UCH. State parties are obligated to ensure that any activity directed at UCH is undertaken in accordance with internationally accepted archaeological principles and standards of behaviour.[143] The fundamental archaeological principle requires that preservation *in situ* should be the first management option for any UCH, and that activities should be authorised only when justified for scientific or protective purposes.[144]

Under the CPUCH, the coastal State in whose EEZ or on whose continental shelf the UCH is located has been given '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 [UNCLOS]'.[145] In addition, the coastal State is required to take measures to prohibit the use of artificial islands, installations and structures under its jurisdiction in the EEZ or on the continental shelf in support of any activity directed at UCH that is not in conformity with the CPUCH.[146] These authorisations echo those under UNCLOS whereby the coastal State may establish jurisdiction over activities directed at UCH that have the potential to affect its sovereign rights and jurisdiction. The CPUCH provides State parties with a concrete basis for taking actions to prevent activities directed at UCH from damaging natural resources that is unlikely to be challenged by any another State.[147]

As discussed earlier, under the State cooperation mechanism, the CPUCH creates the roles of Coordinating State, generally the coastal

[142] Dromgoole (2013) 271–272.
[143] CPUCH Articles 7(2), 8, 10(5), Annex.
[144] Ibid Article 2(5); Dromgoole (2013) 24; Mariano J. Aznar, 'In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle' (2018) 13 J Mari Arch 67, 68–72; UNESCO, UCH/23/9.MSP/7.INF, 9 June 2023, Convention on the Protection of the Underwater Cultural Heritage, Meeting of States Parties, Ninth Session, 13–14 June 2023, Evaluation of Examples of Best Practices, p. 33–34.
[145] CPUCH Article 10(2).
[146] Ibid Article 15.
[147] Dromgoole (2013) 290–291.

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State in whose EEZ or on whose continental shelf the UCH is located, and interested State parties that collectively regulate activities directed at UCH. As such, the coastal State could assume, against another State party, the right to require a non-national or master of a foreign flagged vessel to report to it the discovery or activity directed at UCH in its EEZ or on its continental shelf.[148] Moreover, the coastal State, acting as the Coordinating State, may 'take all practicable measures' to prevent any immediate danger to UCH arising from human activities, including those undertaken by a foreign national or vessel.[149]

It should be noted that some States assert unilateral jurisdiction over certain archaeological and historical objects found in their EEZs or on their continental shelves, particularly with respect to the contiguous zone.[150] The United States has a well-established national system to afford legal protection to historical, cultural and archaeological resources at sea. The United States adopted the National Marine Sanctuaries Act in 1972, supported by other laws and regulations, that provides for the designation of areas of the marine environment as 'national marine sanctuaries' to 200 NM offshore, including heritage sites.[151] Activities in each sanctuary are governed by a tailor-made set of regulations that are designed to protect the sanctuary's particular 'historical', 'cultural' and 'archaeological' resources, and activities that involve the removal of or injury to such resources and any alteration of the seabed are prohibited.[152] As of 2024, the network includes a system of sixteen national marine sanctuaries and the Papahānaumokuākea and Rose Atoll marine national monuments.[153]

[148] CPUCH Article 9(1)(b)(ii).
[149] Ibid Article 10(4).
[150] Barbara Kwiatkowska, 'Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice' (1991) 22(2) Ocean Dev & Int'l L 153, 163–164; Dromgoole (2013) 264–266.
[151] National Marine Sanctuaries Act, Title 16, Chapter 32, Sections 1431 et seq. United States Code, as amended by Public Law 106-513, November 2000, https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/archive/library/national/nmsa.pdf; United States National Oceanic and Atmospheric Administration (NOAA), 'National Marine Sanctuaries: Maritime Heritage' https://sanctuaries.noaa.gov/maritime/.
[152] Ole Varmer, 'United States of America', in Sarah Dromgoole (ed.), *The Protection of the Underwater Cultural Heritage National Perspectives in Light of the UNESCO Convention 2001* (2nd ed., Martinus Nijhoff 2006) 359–366.
[153] NOAA, 'National Marine Sanctuary System' www.sanctuaries.noaa.gov.

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8.3.2 *Activities Incidentally Affecting Underwater Archaeological and Historical Objects*

There is no doubt that human activities may inadvertently cause serious damage and destruction to archaeological and historical objects, even when not directed at them. In particular, activities that have physical contact with the seabed, such as bottom trawling, dredging, dumping, seabed mining, the laying of submarine cables and pipelines, and the construction of wind farms, fixed offshore platforms and other installations, can all have a negative impact on these objects.

The duties to protect and cooperate to protect underwater archaeological and historical objects under UNCLOS have legal implications for all States. As such, all States, including the coastal State, are obligated to take the necessary measures to protect these objects from risks caused by activities undertaken by their own nationals and vessels. However, it is unclear whether the duties to protect these objects would automatically trump the right of other uses of the ocean in circumstances where the existing objects come into conflict with these activities. The CPUCH further strengthened this obligation by requiring all State parties to '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 [UCH]'.[154] However, it did not define what constitute 'best practicable means at its disposal' and left it to each individual State party to decide.[155] Among State parties to the CPUCH, it would be plausible to argue that the State of concern should consult the Coordinating State before conducting any activities that might incidentally affect UCH in the EEZ or on the continental shelf.[156]

Shipwrecks, by virtue of their number and physical mass, are the main constituent of underwater archaeological and historical objects, and some have the potential to pose a hazard to navigation in the EEZ.[157] The legal framework that facilitates State intervention is not straightforward when the shipwreck lays in the EEZ. UNCLOS made no reference to the safety of navigation and shipwrecks in general. The flag State, whose vessel could be affected, may not have the immediate right to remove the wreck,

[154] CPUCH Article 5.
[155] Forrest (2019) 219.
[156] CPUCH Article 7(4)–(5).
[157] Forrest (2019) 177–179; IMO, 'Nairobi International Convention on the Removal of Wrecks' www.imo.org/en/About/Conventions/Pages/Nairobi-International-Convention-on-the-Removal-of-Wrecks.aspx.

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since such operations might affect the seabed. The coastal State, even if it has the knowledge of such a hazard to navigation in its EEZ, is not obligated to give appropriate publicity to such dangers, as is required in its territorial sea, let alone a duty to remove the hazard.[158] Moreover, unless the shipwreck poses a threat to cause marine pollution, the coastal State does not have a strong legal basis to take action either. Nevertheless, the coastal State may inform other mariners of such navigational hazards based on good intentions and its due regard obligation to the freedom of navigation. It is worth noting that the coastal State has been given the right to remove or have removed, at the shipowner's expense, a wreck that poses a hazard to navigation under the 2007 Wreck Removal Convention.[159] The Wreck Removal Convention imposes the primary responsibility for the removal of a hazardous wreck on the shipowner and is created to address more contemporary wrecks.[160] It makes no reference to wrecks that predate the entry into force of the Convention, and it is not entirely clear whether it applies to wrecks of archaeological and historical nature.[161]

The existence of certain archaeological and historical objects may also pose an obstacle to the development of the seabed in the EEZ. The State that undertakes such development, mainly the coastal State, would have the discretion to find a balance between its duties to protect these objects and its right to explore and exploit the natural resources, to use artificial islands, installations and structures, or to lay submarine cables and pipelines. This balance could only be assessed on a case-by-case basis. Given its sovereign rights over the exploration and exploitation of natural resources, the coastal State would be in a position to decide how these activities should be carried out.[162] Imposing any conditions deriving from the intention to protect these objects, nevertheless, must be balanced with its due regard obligation to the rights of other States. For example, the *Danton*, a battleship dating from the First World War, was discovered in 2008 by the Fugro geosciences company during a survey for the Galsi gas pipeline project between Algeria and Italy.[163] Upon confirming its identity, the flag State, France, asked for the site to be

[158] UNCLOS Article 24(2).
[159] Nairobi International Convention on the Removal of Wrecks (18 May 2007, in force 14 April 2015) 3283 UNTS I-55565 (RWC). See Chapter 4 in this volume.
[160] RWC Article 10.
[161] Forrest (2019) 191–192.
[162] Dromgoole (2013) 266–267.
[163] Franca Cibecchini and Olivia Hulot, 'The Danton and U-95: Two Symbolic Wrecks to Illustrate and Promote the Heritage of the First World War', in UNESCO (2014) 192.

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protected and requested that the pipeline be redirected 100 yards.[164] A Swedish wooden warship wreck, scuttled in 1715 in the Bay of Greifswald in Germany, was excavated in 2009 to make way for the Nord Stream gas pipeline constructed between Russia and Germany.[165]

State parties to the CPUCH are obligated to report discoveries by any national or vessel undertaking activities in the EEZ and on the continental shelf, not just by those who intend to engage in activities directed at UCH.[166] Such report of a discovery will trigger the procedures set out in Articles 9 and 10 relating to notification, consultation and protection, as well as the procedures for relevant States to assume the role as Coordinating State and interested State parties.[167] There are now a number of States, including Australia, China, Greece and Norway, that require their nationals to report, and to provide subsequent treatment, of UCH discovered incidentally during any offshore operation.[168] The imposition of this reporting obligation could bring these UCH to the relevant States' attention and offer them the opportunity to provide effective means to prevent or mitigate inadvertent damage during these development activities.

The coastal State may also designate, through the International Maritime Organization (IMO), a Particular Sensitive Sea Area (PSSA) to protect the archaeological and historical objects found in its EEZ or on its continental shelf.[169] A PSSA is 'an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities'.[170] The

[164] Cibecchini and Hulot (2014) 193.

[165] Nord Stream, 'Underwater Investigation of Shipwreck Parts in the Bay of Greifswald Enters Second Phase', 31 August 2008 www.nord-stream.com/press-info/press-releases/underwater-investigation-of-shipwreck-parts-in-the-bay-of-greifswald-enters-second-phase-198/; Nord Stream, 'First Shipwreck Parts Salvaged from Bay of Greifswald', 15 July 2009 www.nord-stream.com/media/news/press_releases/en/2009/07/first-shipwreck-parts-salvaged-from-bay-of-greifswald_20090715.pdf.

[166] CPUCH Article 9(1).

[167] Dromgoole (2013) 348–349.

[168] On national implementation of the CPUCH, see Sarah Dromgoole (ed.), *The Protection of the Underwater Cultural Heritage National Perspectives in Light of the UNESCO Convention 2001* (2nd ed., Martinus Nijhoff 2006).

[169] IMO, 'Particularly Sensitive Sea Areas (PSSA)' www.imo.org/en/OurWork/Environment/Pages/PSSAs.aspx. For the designation of a PSSA in the EEZ, see Chapter 4 in this volume.

[170] IMO Res A 24/Res.982, 6 February 2006, Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, para 1.2.

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presence of 'significant historical and archaeological sites' would qualify the social, cultural and economic criteria that is required for such designation and justify appropriate associated protective measures for the area.[171] The United States, for example, has designated the cultural heritage Papahānaumokuākea Marine National Monument (Northwestern Hawaiian Islands or NWHI) as a PSSA through IMO.[172] On justifying the social, cultural and economic criteria, it was highlighted that the NWHI is rich in historical and archaeological heritage resources that are rare, representative of broad themes of maritime history, and a testimony to the uniqueness of Pacific seafaring history.[173] It should be noted that the establishment of PSSAs for their historical and/or archaeological significance would need to be examined within the context of the general duties to protect these objects under Article 303 of UNCLOS, and the regulations under the CPUCH. And the associated protective measures are designed to prevent damage to these objects by international shipping activities.

These potentially negative impacts on the archaeological and historical objects are expected to grow with the intensive use of the EEZ and the continental shelf for human activities. The central role in avoiding and minimising these impacts rests with the relevant national and flag States. In most situations, it is the coastal State that shares such a role. Should the coastal State have relevant information and knowledge of the presence of these objects in its EEZ or on its continental shelf, it could employ holistic marine control procedures, including marine spatial planning and environmental impact assessment, to manage other potential competing activities.[174]

8.4 Settlement of Disputes

It is apparent from the preceding discussion that there are plenty of opportunities for disputes to arise between States relating to the underwater archaeological and historical objects found in the EEZ or on the continental shelf. For example, disputes could arise concerning the

[171] Ibid paras 4.4.14, 6.1–6.2.
[172] IMO MEPC 56/23, 30 July 2007, Report of the Marine Environment Protection Committee on Its Fifty-Sixth Session, paras 8.1–8.9.
[173] IMO MEPC 56/8, 5 April 2007, Designation of the Papahānaumokuākea Marine National Monument as a Particularly Sensitive Sea Area, Submitted by the United States, paras 3.13.1, 21.
[174] Dromgoole (2013) 348.

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interpretation and application of whether a certain State has breached the general duties to protect and cooperate to protect these objects, whether the coastal State may exercise enforcement jurisdiction over a foreign vessel that caused pollution due to treasure salvage activities, or whether the coastal State could deny consent to the delineation of a foreign pipeline to avoid damaging a heritage shipwreck. Given the differences between UNCLOS and the CPUCH on coastal State rights in the contiguous zone, and more generally the inconsistent State practices and interpretations, there could be disputes concerning the relationship between these two treaties and whether any of their provisions are considered customary law.

As a matter of general international law, and the provisions of UNCLOS, States are obligated to settle disputes between them by peaceful means.[175] For disputes concerning the interpretation or application of UNCLOS, State parties may choose to accept the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice, an Annex VII arbitral tribunal or a special Annex VIII arbitral tribunal.[176] If a State does not make a choice of procedures, it is deemed to have accepted the Annex VII arbitration.[177] The dispute settlement system is fundamentally consensual in the sense that State parties to the dispute could choose the means and procedures by agreements.[178] Under UNCLOS, this system is reinforced by a compulsory dispute settlement procedure when the State parties to the dispute cannot reach settlement by recourse to the means of their choice.[179] In this case, any party to the dispute may submit their dispute to the same procedure as accepted by both parties, or to Annex VII arbitration.[180]

To date, there are two international cases included claims relating to underwater archaeological and historical objects. ITLOS recognised, indirectly through accepting the Respondent's action to invoke domestic law, the exclusive right of the coastal State over the UCH located in its internal waters and the territorial sea in the M/V *Louisa* case.[181] ICJ

[175] Charter of the United Nations (26 June 1945, in force 24 October 1945) 1 UNTS XVI, Article 2(3); UNCLOS Article 279.
[176] UNCLOS Article 287(1), Annex VII Arbitration, Annex VIII Sepcial Aritration.
[177] UNCLOS Article 287(3).
[178] UNCLOS Article 280.
[179] UNCLOS Articles 281, 286.
[180] UNCLOS Articles 286, 287(4)–(5).
[181] The M/V 'Louisa' Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, ITLOS Reports 2013, p. 4, paras 104, 113.

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declared the customary law status of Article 303(2) and expended its interpretation of coastal States' right over these objects to reflect the development by the CPUCH and State practice.[182]

CPUCH also requires State parties to settle their disputes concerning its interpretation or application through peaceful means of their own choice.[183] When a dispute arises, State parties to the dispute shall negotiate in good faith before submitting it to mediation by UNESCO by agreement, or, if it cannot be thus settled, to the provisions set out in Part XV of UNCLOS, to be applied *mutatis mutandis*, whether or not the parties to the dispute are also a party to UNCLOS.[184] A State party to CPUCH, even if it is not a party to UNCLOS, may use the same procedure established by UNCLOS to declare which court or tribunal jurisdiction it accepts.[185]

Part XV clearly stated that the UNCLOS court or tribunal shall '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'.[186] The incorporation of the dispute settlement procedures under UNCLOS into the provision made by CPUCH for dispute settlement could be controversial. It effectively obliges States that are not party to UNCLOS to be subject to its dispute settlement mechanism. States are often reluctant to accept compulsory dispute settlement mechanisms before the dispute arises. This potential implication for States that are not party to UNCLOS may affect their consideration to ratify the CPUCH. Indeed, both Türkiye and Venezuela voted against the CPUCH citing this concern.[187]

8.5 Conclusion

Underwater archaeological and historical objects were not genuinely considered when the law of the sea was negotiated and codified at the Third Conference. This was largely due to the lack of understanding of

[182] Nicaragua v. Colombia (2022), paras 185–186.
[183] CPUCH Article 25(1).
[184] Ibid Article 25(2)–(3).
[185] UNCLOS Article 287; CPUCH Article 25(4)–(5).
[186] UNCLOS Artile 288(2), Annex VI Statute of the International Tribunal for the Law of the Sea, Article 21; Internatioanl Tribunal for the Law of the Sea, International Agreements Conferring Jurisdiction on the Tribunal, www.itlos.org/en/main/jurisdiction/international-agreements-conferring-jurisdiction-on-the-tribunal/.
[187] Statements on Vote by Türkiye and Venezuela reproduced in Garabello and Scovazzi (2003) 432, 434.

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underwater archaeology as a scientific discipline, as well as the underestimated value of and threats to these objects. The drafting history and final wording of Article 303 bears witness to the limited scope ultimately accepted. During the past few decades, the international scientific community, with the support of a number of interested States, insisted on the need to delineate a new legal canvas to adequately protect underwater cultural heritage for the benefit of all humankind. In 2001, a new legal regime was established by CPUCH, completing and resolving some of the legal gaps left by UNCLOS.

UNCLOS set out the general duties of all States to protect and cooperate to protect archaeological and historical objects found at sea, but provided no details on how States should fulfil such duties. The CPUCH provides some clarifications with respect to the rights and jurisdiction over UCH found in the EEZ or on the continental shelf. First, it explicitly stated that the coastal State may regulate and authorise activities directed at UCH in the contiguous zone, going beyond the scope recognised by UNCLOS.[188] Second, it clearly recognised that the activities directed at UCH found in the EEZ or on the continental shelf could have the potential to affect the sovereign rights and jurisdiction of the coastal State, and gave the coastal State the right to prohibit or authorise such activities.[189] Third, it created the role of the Coordinating State that gives the coastal State a potentially prominent role in respect of UCH in the EEZ or on the continental shelf, such as taking all practical measures to prevent immediate threats to UCH.[190] Nevertheless, both legal frameworks place their reliance on the nationality principle of jurisdiction, which means the support of flag States, particularly the handful that have deepwater technological capability, is absolutely crucial if the framework is to succeed in fulfilling its primary objective to protect these objects.

CPUCH shows neutrality regarding any 'creeping jurisdiction' temptation that may arise when interpreting, evoking or applying its provisions.[191] Except in regards to the contiguous zone, it is hard to argue that any provisions of the CPUCH could be used to support any excessive claim. Moreover, Article 59 of UNCLOS may help to bolster the legitimacy of the role afforded by the CPUCH to the coastal State as the Coordinating State for CUH found in the EEZ or on the continental

[188] UNCLOS Articles 33, 303(2); CPUCH Article 8.
[189] CPUCH Article 10(2).
[190] Ibid Article 10(3)–(5).
[191] Ibid Articles 2(11), 10(6).

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shelf. The goal of the CPUCH is to protect underwater heritage by ensuring that all activities directed at UCH are undertaken in accordance with benchmark archaeological standards. The coastal State, when fulfilling the role of a Coordinating State, acts on behalf of the State parties as a whole and represents the collective interests of the international community.[192]

State practice during the past four decades shows that many coastal States have been expanding their rights over the contiguous zone by adding legislative powers to protect underwater heritage, a practice that generally has been accepted.[193] Nonetheless, extending this jurisdiction beyond the outer limit of the contiguous zone, as several States have done, is not yet supported by general State practice.[194] However, the coastal State, based on the connection and potential impacts on is sovereign rights and jurisdiction, as well as fulfilling its general duties to protect, may find legal basis to claim concurrent jurisdiction over certain activities that affect the archaeological and historical objects found in its EEZ or on the continental shelf.

[192] UNCLOS Article 59; Dormgoole (2013) 302–303.
[193] Aznar (2014) 38; Nicaragua v. Colombia (2022), paras 185–186.
[194] Aznar (2020) 93–95.

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