Chapter 4

The Legal Protection of Underwater Cultural Heritage: Concerns and Proposals

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Introduction

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

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

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

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

The concerns imply an assessment of the relationship between two successive treaties relating to a similar subject matter: the protection of underwater cultural heritage. Whereas article 303(4) of UNCLOS establishes that “[t]his article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature,” article 3 of the UNESCO Convention states that:

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

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

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

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