Historic shipwrecks – contemporary challenges:

Protection of the underwater cultural heritage

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Content

Significance of UCH and the need for international protection

This paper discusses legal issues pertaining to the international protection of the underwater cultural heritage ("UCH") against activities directed at the exploration and recovery of such heritage from the seabed, especially historic shipwrecks and artefacts on board such shipwrecks. This so-called treasure hunting or other, not mercantile but nonetheless harmful activities aimed at recovery of historic objects from the seabed, are not necessarily unauthorized or illegal. As we shall see, in many cases such activities can, at most, be defined as undesirable from the perspective of the need to preserve UCH for the mankind, but they remain legal from both a national and international law perspective.

The pace of law-making and enforcement in the field of UCH has not kept up with the development of technology facilitating recovery of UCH from the seabed, starting with the invention of the aqualung in the 1940s. As a result, an unknown number of historic shipwrecks, lying in waters accessible for divers, have become subject to unregulated recovery by private individuals or organisations. Unfortunately, the Baltic Sea has not been an exception in this regard.

This paper gives special attention to protection of UCH in the Baltic and Scandinavian region[1]. Baltic and Scandinavian States have a rich maritime history, both as maritime nations and also as coastal States in whose waters active commercial and naval navigation has been taking place for a long time. This history is evidenced by numerous finds of shipwrecks and related artefacts, dating back to the Vikings. These objects need to be appropriately protected, due to their historical, cultural and, as the case may be, material value.

It should be mentioned that UCH can be located, not only on the seabed, but also in inland waters. Lakes, rivers and coastal waters of the

[1] The paper is based on my presentation at the Summer School in Riga, 2016, organized by the Riga Graduate School of Law (the host), in cooperation with universities in the Baltic and Scandinavian States, including Norway (University of Oslo).

Baltic and Scandinavian States hide not only shipwrecks but also other types of archaeological heritage in their depths, such as lake dwellings and remains of now submerged coastal sites dating back to the Stone Age. For example, in Lithuania and Latvia some of such pre-historic sites have been discovered and restored.[2] An unknown number of submerged historic objects lie as yet undiscovered under the sea and risk being collaterally destroyed by human activities if no adequate research is conducted before launching any major works on the seabed.

Since the underwater cultural heritage faces many of the same threats as its counterparts located on land, general UNESCO instruments may provide in part for a protection mechanism. Thus, the "*UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*" (1970), the "*UNESCO Convention for the Protection of the World Cultural and Natural Heritage*" (1972) and the "*European Convention on the Protection of Archaeological Heritage*", 1992 (Valletta Convention) by the European Council may also be deemed to apply to underwater objects. However, they do not set up a comprehensive regulatory framework for UCH, which would address specific challenges pertaining to the protection of UCH.

Different States have very different approaches to the protection of UCH from such activities as treasure hunting. International law does not, in principle, lay down an absolute prohibition on exploring the seabed in search of historic objects, and does not totally outlaw recovering and taking possession of such objects. As examined in this paper, the existing international restrictions on such activities mainly arise from the exercise of sovereign rights by States: thus, coastal States exercise such rights in their maritime zones (as a rule within the limits of territorial waters) and flag States with respect to shipwrecks which flew their flag, especially

[2] See, e.g.,F. Menotti, Z. Baubonis, D. Brazaitis, T. Higham, M. Kvedaravicius, H. Lewis, G. Motuzaite Ande Pranckenaite, "The first lake –dwellers of Lithuania: late bronze age pile settlements on lake Luokesas". Oxford Journal of Archaeology 24(4) 381–403 2005(available at academia.eu). Araishu lake in Latvia is yet another example. See also Ø.Hammer, S.Planke, A.Hafeez, B.O. Hjelstuen, J.I. Faleide & F.Kvalø, Agderia – a postglacial lost land in the southern Norwegian North Sea, Norwegian Journal of Geology, Vol 96 Nr. 1 (2016).

sunken naval and governmental vessels. However, international law is not fully codified on this matter, and States do not always share the same view on the customary international law in the field of UCH.

In the absence of a comprehensive international mechanism, national laws are, in practice, very important. States' approaches to historic shipwrecks are not uniform. At the domestic level, some States prohibit or limit the recovery (finding, salvage) of historic shipwrecks by private persons, and commercial exploitation of the UCH, whereas other States allow private persons to 'salvage' historic shipwrecks, or at least do not provide for an outright prohibition of such activities.

Such diversity of national approaches may be explained by several factors, including different national interests in the field of UCH. Thus, dominant maritime States may claim title to many shipwrecks around the world and would object to coastal States claiming sovereign rights to all wrecks which sank near their coasts. Coastal States, including former colonies, may have other, or even directly opposite, interests from those of the flag States of the sunken vessels. A good example of the variety of interests in a historic shipwreck and its cargo is the case involving a Spanish frigate *Nuestra Senora de las Mercedes*. In this case, the historic flag State of this ship (Spain) and the State of origin of treasures on board (Peru) had quite different perspectives on the rights to these objects.[3]

General distinctions between legal systems may also influence the way that different States treat the protection of UCH in their domestic maritime and private law systems. Thus, common law countries have traditionally strong admiralty laws and are generally more sympathetic towards the application of salvage rules to UCH than continental legal systems. It may be possible for a private enterprise to claim a salvor's reward for a find and recovery of a historic shipwrecks and artefacts from the seabed. However, several cases in the US courts, such as those related to the find of RMS *Titanic,* illustrate that the traditional maritime law approach does not take sufficient account of the need for special regulation of the historic shipwrecks. The inappropriate legal framework has caused many problems in relation to the preservation of important

[3] See footnote 14.

historic objects, especially those located in international waters open to free navigation.

The dissimilarities between national approaches may also be explained by varying degrees of awareness, experience and financial resources in the field of protection of UCH, which accordingly influences national legislative initiative and enforcement in this field.

In any case, a purely domestic approach to the protection of the historic shipwrecks is not sufficient. The international character of the problem requires a correspondingly international and even global approach to its regulation. The insufficiency of a domestic approach can be illustrated by the following example: a company based in a State with strong maritime salvage traditions may search for historic objects on the seabed of the high seas and place a claim for reward in that State, irrespective of the fact that rights to the shipwreck may be asserted by a (third) flag State which did not authorise recovery of the shipwreck. The rights to treasures on board may be claimed by yet another State – the State of origin of these treasures. In such cases, it would make sense to have an international framework in place, instead of leaving it to national law to determine the rights of the parties involved.

Furthermore, it would also be beneficial to adopt a uniform view on what kind of protection should be applied to UCH and to harmonise the concept of UCH by agreeing on the principal rules as to which objects are of sufficient value to be preserved as cultural heritage.

It has taken several decades of internationally unregulated recovery of UCH for international multilateral regulation to be adopted.

The *"UN Convention on the Law of the Sea"* adopted in 1982 (UNCLOS) lays down only two provisions addressing the duty to protect UCH, but it remains the most important international instrument for the protection of the UCH, due to its wide acceptance by the States. Still, UNCLOS has not been ratified by some of the countries which play a significant role in the field. These are: the USA, which is a forum for salvage claims, as well as Colombia and Peru, i.e. coastal States in whose waters there may be historic shipwrecks and artefacts originated in those States.

As discussed in more detail below, the general character of obligations laid down in UNCLOS leaves too great a margin of flexibility to the State Parties and does not resolve issues surrounding the uncontrolled recovery of UCH from the seabed.

The "Convention on the Protection of the Underwater Cultural Heritage" adopted by UNESCO in 2001 (hereinafter the 2001 UNESCO Convention) entered into force in 2009, but to date has not gained broad acceptance in the Baltic and Scandinavian region. At the time of writing, only Lithuania has ratified this convention.[4] In addition, other States around the world have not ratified the 2001 UNESCO Convention, including, remarkably, such States as the USA, Australia, Colombia as well as the UK and the Netherlands (the latter are important "market" States for UCH). By comparison, UNCLOS has been ratified by all Baltic and Nordic States and by many States around the world, so that in practice UNCLOS remains more important for the regulation of UCH than the 2001 UNESCO convention.

It should be pointed out that the 2001 UNESCO Convention is more important for regulating activities relating to UCH than may appear from its ratification status. For example, some non-party States such as Norway have unilaterally applied UNESCO's "*Rules on the Activities Directed at the Underwater Cultural Heritage*" laid down in the Annex of the 2001 Convention.

The 2001 UNESCO Convention goes much further than UNCLOS in the development of the protection framework, and pays particular attention to the protection of UCH located in seas and oceans, where specific issues arise of an international character. This convention targets activities directed at the UCH, including recovery and preservation of such objects[5].

Although some "general" cultural heritage instrument conventions explicitly refer to the "underwater cultural heritage", they do not define

[4] i.e. in the Baltic and Scandinavian region. For ratification status, see UNESCO website: http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha

[5] Some of the principles laid down in the 2001 UNESCO Convention were developed by the International Council of Monuments and Sites in its Charter on the Protection and Management of Underwater Cultural Heritage (1996).

UCH. UNCLOS also only refers to "archaeologic, historic and cultural objects at sea". The 2001 UNESCO Convention lays down a definition of UCH. Article 1(1)(a) thereof defines UCH as follows:

> "1. (a) "Underwater cultural heritage" means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:
>
> (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
>
> (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
>
> (iii) objects of prehistoric character."
>
> Article 1(1)(b) and (c) excludes pipelines and cables placed on the seabed, as well as installations other than pipelines and cables, where placed on the seabed and still in use, from the definition of UCH.

The UNESCO definition has been criticised for being too broad and unclear, in particular because it does not differentiate sufficiently between objects older than 100 years which are worthy of special protection and those which are not (which could be done by introducing additional criteria, for example, "significance"). Such criticism is, in my view, not entirely justified. The UCH is actually defined relatively precisely, while leaving considerable discretion for individual States Parties. These States are also free to extend their protection to the objects not meeting the criteria in Article 1, which is designed as a minimum provision. States are thus free to introduce stricter requirements, provided these are compatible with the UNESCO Convention and other obligations of international law[6].

[6] Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage.

Several important implications for State Parties follow from the fact that a shipwreck or another submerged object falls within the UNESCO definition. As a general note, State Parties must ensure that any such object comes under the protection of the 2001 UNESCO Convention regime, which is set out in both the further provisions of the 2001 Convention and in its Annex (Rules Concerning Activities Directed at Underwater Cultural Heritage).

Importantly, the Convention aims at preserving the UCH for the benefit of the mankind. It follows from this that States Parties have a duty to cooperate to protect UCH, to take all necessary measures in compliance with the Convention and international law to protect UCH by the best practicable means, and a duty to protect against activities directed against UCH, as well as from collaterally damaging activities.

Although this may sound like a noble objective to pursue, not all States share the same views on the common heritage of mankind, since in practice implementing this objective means that States undertake to restrict their own national interests in several significant ways.

The 2001 UNESCO Convention requires that *in situ* preservation is to be applied as the first (albeit not exclusive) option. Imposing such an option may lead to objections being raised for a number of reasons, including financial ones, as well as causing problems due to lack of adequate knowledge and experience, and limitations on the commercial use of the UCH implied by such approach. For example, Colombia does not agree with the approach of the UNESCO Convention, arguing that the Convention "*makes the recovery of artifacts from historic wrecks virtually impossible for developing nations*" because it does away with traditional maritime law concepts of finds and salvage.[7] In the Baltic Sea, the Swedish battleship *Wasa* is one of few examples of lifted shipwrecks. Many others are preserved *in situ*.

[7] Daniel De Narvaez, "The UNESCO Convention for Protecting Underwater Cultural Heritage: a Colombian Perspective" in Stemm, Greg and Kingsley, Sean (eds), *Oceans Odyssey 2. Underwater Heritage Management&Deep-Sea Shipwrecks in the English Channel&Atlantic Ocean*, at p.24.

Importantly, the UNESCO Convention imposes a prohibition on the commercial exploitation of UCH, which includes sales and purchase, barter of UCH. Another very significant limitation introduced by the Convention applies to salvage and finds of UCH. As explained further in this article, application of salvage and finds law to UCH is precluded unless undertaken in accordance with certain conditions specified in the Convention. Thus, the litigations in *Mercedes (Odyssey Marine Exploration)* and the *Titanic* cases (see next section) would not be possible for a State party to the 2001 UNESCO Convention.

In addition, the 2001 Convention also imposes a duty on States Parties to take measures to prevent entry, dealing, possession of illicitly exported UCH and UCH recovered in a way contrary to the Convention. The latter requirement also has major practical implications for States which are not Parties to this Convention, because it apparently includes also those objects defined as UCH, which are found or salvaged under 'traditional' find and salvage rules in non-Party States.

States Parties must also prohibit using their territories for unlawful activities directed at UCH. As discussed further, a range of obligations are imposed on nationals and vessels flagged in a State Party, and breach of such obligations will result in the imposition of proportionate sanctions.

Last but not the least, the 2001 UNESCO Convention establishes a dispute settlement mechanism for cases involving the UCH which complements the comprehensive dispute settlement mechanism set up in UNCLOS (the latter not addressing UCH).

The above discussion gives a general idea of why many States have chosen not to become parties to the 2001 UNESCO Convention. In the next sections I will take a closer look at the issues raised by the 2001 UNESCO Convention, in light of the international and the Baltic-Nordic perspective on the protection of UCH.

Historic shipwrecks – implications of law of salvage and finds

It is easy to imagine the excitement of finding an ancient shipwreck full of gold or other precious artefacts, but are private persons permitted to search for historic objects on the seabed and take possession of them? Can one claim finder's reward or assert property rights to historic objects, as could generally be the case with lost or abandoned property? Is it generally appropriate to apply private law concepts such as possession and ownership to the case of UCH? Furthermore, should marine salvage law apply to the recovery of historic shipwrecks and artefacts?

There is no common position among States on these questions and, as yet, no uniform international regulation of these aspects of the legal status of UCH.

The application of marine salvage law to UCH raises a number of complicated issues. On the one hand, marine salvage is a recognised business and this may encourage companies to invest into expensive and technologically advanced equipment necessary to explore and recover UCH from the seabed. The costs pertaining to underwater activities are high and not all States (or private owners, as the case may be) are willing or able to cover them.

On the other hand, it is highly questionable whether salvage law should apply to historic shipwrecks and UCH generally, as it may motivate "treasure-hunters", encourage the unnecessary or dangerous recovery of historic objects from the seabed (instead of preserving *in situ*) and disregard the special importance of the UCH as a heritage of the mankind. An understanding that traditional maritime law concepts may not take sufficient account of the special situation of UCH has arisen from several litigations, illustrating the tension existing between private interests of finders such as financial reward and the need to protect UCH for the common interest.

The 1989 International Convention on Salvage allows States to exclude application of this Convention to property which is "*maritime cultural*

property of prehistoric, archaeological or historic interest and is situated on the sea-bed"[8]. Some States have made use of this option to ensure that UCH is not subject to general marine salvage rules[9].

UNCLOS addresses the protection of cultural heritage at sea, but emphasises that it does not interfere with the rights of identifiable owners as well, or with the rights of salvors of such heritage: "*Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges*" (Article 303(3)).

Article 303(3) of UNCLOS can only be understood as leaving it to the domestic law to resolve the question of property rights and, as the case may be, the claim of reward by the finder of UCH.

The 2001 UNESCO Convention introduces provisions limiting the application of the law on salvage and finds to UCH (i.e. it imposes a positive obligation on States Parties to enact corresponding provisions in their national laws)[10]. This Convention in practice precludes application of finder's rights and traditional marine salvage of UCH, by imposing very stringent requirements on such activities. Thus, Article 4 requires that any salvage or find of UCH must be authorised by competent (national) authorities, performed in full conformity with the UNESCO Convention requirements and maximum protection must be ensured for the recovery of UCH.

Even if the State authorises such activities as the 2001 Convention requires, it may not be economically feasible for private persons or commercial salvors to comply at least with the second requirement of Article 4, since the Convention and the Annex containing Rules set the standards very high. Among others, the Rules require the development

8 Article 30(1)(d).

9 For example, Latvia has done so: Maritime Code Article 254(4) excludes application of salvage law to "ships and objects which have cultural historic value".

10 The law of marine salvage regulates the rescue of property in danger at sea. The law of finds regulates rights to lost or abandoned property (i.e. shipwreck and objects on board) which has been found. For a more detailed discussion on the law of salvage and finds in the context of UCH (in the common law countries) see Sarah Droomgole, Underwater Cultural Heritage and International Law, Cambridge University Press (2013), p.167 et seq.

of a project design for the activity which is to be authorised and for it to receive appropriate peer review. Furthermore, an appropriate funding base must be secured in advance of the activity, sufficient to complete all stages of project design. In this way, the UNESCO Convention in fact precludes private salvage activities, by requiring States to enact legislation that would arguably make it unfeasible for salvors to engage into the exploration and recovery activities.

As pointed out earlier, the 2001 UNESCO Convention has not so far gained wide acceptance. Some States, including common law systems with a strong marine tradition, have a more supportive approach towards salvors' and finders' rights to salvage than the Convention allows. Several litigations in the common law jurisdictions illustrate that private companies may rely on the law of marine salvage in order to claim the salvor's award and, as the case may be, assert the finder's rights to the shipwreck and to artefacts on board which they have succeeded in locating and recovering.

Other States which also did not ratify the Convention, including Baltic and Scandinavian States, restrict the application of salvage and finds law to the UCH in their maritime zones, by prohibiting unauthorised activities directed at historic shipwrecks and artefacts on board, under a national law of cultural heritage or other *lex specialis*.[11]

A case in point from the Baltic Sea region is the *Vrouw Maria* case in Finland, in which private individuals claimed the salvor's reward as well as ownership by possession, to the shipwreck of *Vrouw Maria* and the objects which they recovered from the wreck. Their claim was dismissed, in particular because the ship, now wrecked, was in no further danger of sinking and did not need to be salvaged. The Court of Appeal in Turku concluded that both the Maritime Act and Antiquities Act applied but that the latter prevented the finders from having control and accordingly possession of the wreck.[12]

[11] E.g., Section 19(2)(1) of the Latvian Marine Environment Protection and Management Law requires that a licence or permit to be acquired before exploration of underwater cultural and historical heritage, shipwrecks and other sunken property.

[12] See Nordiske Domme (2005) p. 67 and Maija Mattika in S.Droomgole (ed.), The Protection of the Underwater Cultural Heritage. National Perspectives in Light of

In any case, such national restrictions, even if enacted, may only apply in the waters subject to the jurisdiction of the State, i.e. within the contiguous zone of maximum 24 nautical miles. Since a considerable proportion of UCH lies in the waters beyond coastal States' jurisdiction, it would also be necessary for flag States to adopt corresponding provisions regulating the conduct of their ships on the high seas. The jurisdiction of States under international law to regulate UCH is discussed in more detail further on in this paper.

In principle, the owner of the historic shipwreck or objects on board may restrict the salvage of objects for which the owner did not give consent or authorisation. The owners, or rather the successors of the original owners, may in some cases be known, but often this is no longer possible to trace. In practice, UCH has often been treated as *res nullius*, which could be freely taken into possession by its finder, without necessarily having consulted any authorities. The legal vacuum, poor enforcement or, as the case may be, little awareness, resulted in many UCH objects disappearing from their location and from the source State. The example of the Dodington coins illustrates how difficult, or even impossible, it can be to return these objects to the source State.[13]

However, it is possible in some cases to identify the owner, or at least a State which may hold a title to the shipwreck, notably a flag State. It is not certain that the objections of such an owner will trump the salvor's and finder's right to reward, even if a prior authorisation to recover the wreck was not granted to the salvor. The case of the Spanish frigate *Nuestra Senora de las Mercedes* in the US court illustrates the fact that the sovereign immunity enjoyed by naval ships precludes US courts from asserting jurisdiction over cases involving the wrecks of such ships, including salvage reward claims to objects recovered from these wrecks.[14] This case involved a shipwreck outside US waters (on the

UNESCO Convention 2001, 2nd ed. (2006), p.52, for a description of this case.

13 Craig J. Forrest, John Gribble, "The Illicit Movement of Underwater Cultural Heritage: The Case of the Dodington Coins", International Journal of Cultural Property, Vol. 11, No. 2, 2002, pp. 267–293.

14 Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel, 657 F.3d 1159 (11th Cir. 2011) [2011 BL 240845].

Spanish continental shelf); nevertheless, the location of the shipwreck did not change the US court's position on the applicability of sovereign immunity to naval and other State shipwrecks[15].

It appears that States have a duty to protect UCH, irrespective of whether the owners are identifiable. This duty of protection held by the State does not mean that owners will be deprived of their title to UCH. In cases where there are no longer known owners, a *res nullius* situation will require a legislative solution to avoid the UCH falling into the possession of a random finder. One possible solution is for the State itself (i.e. the coastal State) both to assert ownership rights and prescribe that authorisation is necessary for any activities involving UCH. For example, Norwegian law provides for the State to acquire ownership of shipwrecks and objects on board over 100 years old, where there is no longer a reasonable possibility of finding the owner. The cargo on board historic shipwrecks was not included in the Law of Cultural Heritage (kulturminneloven) at the time of the find of the shipwreck *Ankerendam*, so the law was subsequently amended to preclude finders' claims[16].

The *Vrouw Maria* case mentioned earlier also illustrates the fact that State ownership can preclude claims arising from unauthorised recovery of the historic shipwrecks, since the State as owner can prohibit anybody from starting salvage operations.

State Jurisdiction over shipwrecks in territorial sea and beyond

The rights arising from a private law title to the UCH, such as the right of ownership or possession, should not be confused with the concept of jurisdiction over UCH, which can be asserted by a State under interna-

[15] Earlier cases involved Spanish battleships sunk in the US waters: see the Juno and La Galga cases discussed in Mariano J. Aznar-Gómez, The International Journal of Marine and Coastal Law 25 (2010) 209–236.

[16] In Latvia, the State also claims ownership to cultural heritage which is over three hundred years old, without singling out underwater objects.

tional law. The jurisdiction over UCH is basically the State's power to control the UCH located within its territory (maritime zones), including the power to regulate activities directed at UCH. Such jurisdiction may be exercised by the State through legislative, executive and judicial actions.

There is an important interplay between jurisdiction and ownership, which should be kept in mind. A State may decide to exercise jurisdiction over UCH in different ways, including regulating the issues pertaining to property rights to UCH. However, this does not mean that the State having such jurisdiction over UCH will automatically assert ownership rights over it, although examples mentioned earlier show that this is possible.

Another related issue is the duty to protect UCH located at sea. In international law, jurisdiction is generally a privilege, not an obligation, and States are not required to exercise their jurisdiction. However, UNCLOS contains Article 303: "*Archaeological and historical objects found at sea*", which provides for a general duty on States to protect historical and archaeological objects at sea and to cooperate for this purpose. In order to be able to perform this duty, States must have appropriate jurisdiction over UCH. This generally formulated obligation laid down in UNCLOS is spelled out in more detail in the 2001 UNESCO Convention.

This section examines UNCLOS provisions which shed some light on the question of State jurisdiction over historic shipwrecks and compares these provisions with the 2001 UNESCO Convention. Is it the coastal State which has jurisdiction, i.e. the State in whose maritime zones the objects are located? Or is it the State where the ship was flagged? What about States with other types of connection to the shipwreck or artefacts, such as the successor State of the historic shipowner (Dutch East India company (VOC) or the State from which the treasures on board originated (e.g. former colonies such as Peru or Columbia)?

In practice, coastal States usually assert jurisdiction over shipwrecks lying in their territorial waters. It is in any case far from certain that the flag State of a historic shipwreck could trump the coastal State's jurisdiction, in whose waters the wreck lies. A special case is sunken naval and other State ships: flag States are unwilling to yield any rights to

coastal or third States and consistently claim full title to such shipwrecks, irrespective of their location or how old they may be.

UNCLOS is a central, but not exhaustive, source of international rules of jurisdiction in the law of the sea. Importantly, UNCLOS lays down the rules on the breadth of territorial sea, exclusive economic zone and continental shelf, and regulates jurisdiction and sovereign rights of coastal States in these zones, as well as laying down rules applying to the high seas, freedoms of the high seas, international seabed, and dispute settlement mechanisms.

UNCLOS envisages the following maritime zones:

- territorial sea (up to 12 nautical miles from the baselines),
- contiguous zone (24 nm from the baselines),
- Exclusive Economic Zone (up to 200 nm from the baselines),
- Continental shelf (200 nm from the baselines, as a general rule).

In the territorial sea, foreign vessels enjoy the right of innocent passage. In the Exclusive Economic Zone (EEZ) the freedom of navigation applies, subject to the condition that the coastal State's interests must be duly respected. (As to internal waters, i.e. waters on the landward side of the baselines, States generally retain full territorial sovereignty, such that the exercise of jurisdiction is not limited by the general international law or UNCLOS.)

The Continental Shelf stretches 200 nm from the baselines.[17] Some States have claimed rights to an extended Continental Shelf beyond 200 nm in accordance with Article 76 UNCLOS. Ships enjoy freedom of the high seas on the continental shelf, limited by the relevant coastal State's rights to the natural resources of the shelf.

The seabed beyond the Continental Shelf (or the extended continental shelf) is the international seabed over which no State has jurisdiction. The international seabed (the "Area") is a common heritage of mankind and is supervised by the International Seabed Authority (ISA), established

[17] In practice, the outer limits of the EEZ and continental shelf often coincide. An important nuance must be kept in mind: not all coastal States have claimed (established) EEZ but all coastal States have continental shelf ab initio.

according to UNCLOS Part XI.[18] In the Baltic Sea, there is no international seabed at all and most coastal States have established a 12nm territorial sea and corresponding contiguous zones as well as an (200-nm) EEZ and Continental Shelf.

UNCLOS does not establish any particular jurisdictional regime for UCH in the territorial sea, EEZ and continental shelf, as UCH is not a "natural" resource. However in Article 303, UNCLOS provides for the coastal State's rights to regulate UCH in the contiguous zone, which stretches 24 nautical miles from the baselines and provides coastal States with certain jurisdiction (Article 33)[19]:

"In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article."

The wording of Article 303(2) is quite confusing. In general, it does not appear to give coastal States unlimited jurisdiction over UCH located in their territorial seas and contiguous zones. It only authorises coastal States to regulate (approve) removal of UCH from the seabed in the contiguous zone and to apply enforcement powers laid down in Article 33 (Contiguous zone). Such enforcement may be undertaken to the extent it is necessary "to control traffic" in UCH.

What about other activities, not aimed at the removal of UCH from the seabed as such, e.g. the search for UCH within the contiguous zone, or underwater study visits to UCH discovered within the contiguous zone of the coastal State? Is there a difference between coastal State jurisdiction over UCH in the territorial sea (up to 12 nm) and in the contiguous zone beyond the territorial sea limit?

If Article 303(2) is read in light of the provisions on innocent passage through territorial sea, it would be logical to understand it as precluding

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[18] However, States who are not parties to UNCLOS are not members of ISA and do not generally accept the Area provisions of UNCLOS as customary law. This is important to note because the USA (a forum for salvage claims) is one of such States.

[19] So-called as being a "24-nautical mile archaeological zone".

unauthorised search and study of shipwrecks on the seabed (not just removal from the seabed), as the passage must in any case be expeditious and uninterrupted.

At the same time, jurisdiction over UCH located beyond the limit of territorial sea up to the limit of the contiguous zone seems to be narrower, as foreign ships are not subject to the conditions of the innocent passage mentioned above and the wording of Article 303(2) refers only to the removal of historic objects and to the unlawful traffic in such objects. Article 33 regulates the jurisdiction of the coastal State within the 24 nm area and opens up the ability to take certain enforcement steps against foreign ships, among others those necessary to prevent the infringement of customs law or to punish infringements committed in the territorial sea.

By contrast to UNCLOS, the 2001 UNESCO Convention expressly clarifies that States have "*the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea*." (Article 7(1)).

Jurisdiction over sunken naval and State vessels, including submarines and aircrafts, is a complicated question which is not dealt with by UNCLOS and is also left open in the 2001 UNESCO Convention.

It can be briefly pointed out that international customary law does not contain clear cut and generally accepted rules, and that there is no full agreement between States on the allocation of jurisdiction. The 2001 UNESCO Convention takes as a starting point the sovereignty of the coastal State over territorial and archipelagic waters. Other States must only be informed by the coastal State if a find of a State or naval vessel has been made:

"*Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft*".

Such an approach was rejected by maritime powers such as the USA, Russia and Norway.

As to the contiguous zone, Article 8 of the 2001 UNESCO Convention says that:

"*Without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied.*"

According to Article 1(6) of the Convention, such activities have UCH as "*their primary object and (…) may directly or indirectly, physically disturb or otherwise damage*" UCH. Apparently, the wording of the UNESCO Convention only insignificantly changes the rule laid down in Article 303(2), if the wording of the former is understood as going beyond "control of traffic" and "removal from the seabed".

Let us now examine how UNCLOS addresses the jurisdiction over the UCH located on the seabed beyond the 24-nm limit and compare that with the corresponding provisions in the 2001 UNESCO Convention.

Beyond the 24-nautical mile limit, UNCLOS does not contain specific provisions granting coastal States jurisdiction over UCH. UNCLOS recognises freedom of navigation if exercised with due regard to coastal States' sovereign rights to natural resources, on the seabed (continental shelf) and in the superjacent water column (EEZ). Since UCH is not a natural resource, UNCLOS does not address the question of whether coastal States may preclude other States from exploring the seabed beyond the contiguous zone and recovering UCH. Several well-known litigations, including the cases of *Nuestra Senora de la Mercedes* and the *Titanic*, deal with shipwrecks found beyond this limit, i.e. on the seabed of the continental shelf, in the exercise of freedom of navigation by the exploring ships (and within the EEZ limits, if such limits are established by the coastal State; if not, the high seas regime applies).

Under UNCLOS, it is, therefore up to the flag States (of ships conducting exploration and recovery of historic shipwrecks from the seabed beyond the 24 nautical mile limit) to regulate such activities. Article 94

provides for a duty on flag States to effectively exercise jurisdiction and control over their ships, in compliance with international regulation. No specific mention is made of a flag State's duties over UCH at sea in Article 94, but such a general obligation for all States to protect UCH and cooperate for this purpose is laid down in Article 303(1) UNCLOS. In the absence of specific provisions enabling the enforcement of this duty, it is unlikely that Article 303(1) will have any noticeable impact on the actual conduct of States in this field.

All in all, under UNCLOS, historic shipwrecks located on the seabed beyond the coastal State's contiguous zone can be accessed and recovered freely by any State. Indeed, activities directed at UCH on the continental shelf beyond the 24-nautical mile limit do not usually (to this author's knowledge) result in any objections from the coastal State. Such objections may rather come from States with a historic or cultural link to the objects, such as the historic flag State, or States of origin for artefacts on board such shipwrecks[20].

The 2001 UNESCO Convention spells out the rights and obligations of coastal and flag (as well as nationality) States in a much more detailed way than UNCLOS. As a starting point, this UNESCO Convention expands the responsibility of States for protecting UCH, irrespective of where it is located. Furthermore, the Convention imposes *active* obligations and rights to regulate activities directed at UCH on the seabed beyond the 24-nautical mile limit, on both the flag and nationality, as well as the coastal States.

Firstly, both the flag State of the ship and nationality State of any person involved in activities directed at UCH must require that the discovery of UCH, or any intention to engage in the activities directed at UCH in their own maritime zones, are reported to the relevant State's authorities (Article 9(1)(a)). As for cases where activities directed at UCH take place in another State Party's EEZ and continental shelf, notification is to be sent to both the flag States and the coastal State involved. Alternatively, the national who made the discovery or the master of the vessel may be required to report such discovery or activity to the flag (or

[20] See the case of frigate *Nuestra Senora de la Mercedes* cited in footnote 14.

nationality) State, which must ensure the rapid and effective transmission of such reports to all other States Parties (Article 9(1)(b))[21].

Article 9 of the 2001 UNESCO Convention expands on the previously mentioned Article 94 UNCLOS provisions, relating to the additional duties of the flag States to include obligations with respect to UCH. Interestingly, by including nationals within its scheme, Article 9 helps to avoid situations where citizens use ships flagged in a non-Party to circumvent the requirements of the Convention. If Article 9 only covered flag States, it would be easy for citizens of State Parties to circumvent the requirements of the Convention, by deploying vessels flagged in non-Parties such as the USA.[22]

Obviously, in order to become effective, State Parties must introduce appropriate reporting and notification rules and enforcement mechanisms in their national legal systems. To this end, Article 16 requires that States Parties shall take all practicable measures to ensure that their nationals, as well as vessels flying their flag, do not engage in any activity directed at UCH in a manner not conforming with this Convention. The 2001 UNESCO Convention backs up these obligations by introducing provisions on adequately severe sanctions and duty to cooperate to ensure the enforcement of sanctions (Article 17).

Secondly, a significant change to coastal States' rights and obligations with respect to UCH located on the seabed of their EEZ and continental shelves is found in Article 10 of the 2001 UNESCO Convention.

Coastal States have a duty imposed on them to protect UCH and the right to authorise activities directed at UCH in the State's Exclusive Economic Zone and Continental Shelf. According to Article 10(2), the coastal State "has the right to prohibit or authorize any activity directed at [UCH located on its continental shelf] to prevent interference with its sovereign rights or jurisdiction as provided for by international law including [UNCLOS]".

[21] What if both the nationality State and the flag State are involved? It is not entirely clear whether Article 9 gives rise to "competition" between these States as to which one is to be reported to and report further to the coastal State.

[22] Many other States offering flags of convenience are also not Parties to the 2001 UNESCO Convention.

The question is: what does international law provide in this respect? UNCLOS is in any event silent on the coastal State's jurisdiction over UCH located beyond the 24 nautical mile limit. As to customary international law, it is far from certain as to whether coastal States can claim any sovereign rights or jurisdiction over UCH located beyond territorial waters. The more coherent interpretation of UNCLOS is that beyond the contiguous zone the coastal State may not regulate activities by foreign-flagged ships aimed at the discovery and exploitation of UCH in these maritime territories, as the freedom of the high seas will apply.

A certain restriction on such freedom under international law could generally be considered in cases where a coastal State has some particular link to the shipwreck other than simply from its location on its continental shelf. For example, this could apply if the coastal State is also a historic flag State, or a State of origin for artefacts on board. (However, UNCLOS only mentions such historic and cultural links in Article 149 which applies on the international seabed (the Area).

According to Article 10(3), the coastal State may act as a Coordinating State in cases where there is a discovery of the UCH or there is an intention to direct activities at UCH located on its seabed. In this capacity, the coastal State may *inter alia* take "all practicable measures" to prevent immediate danger to UCH arising from human activities, including looting (Article 10(4)). Apparently, such measures may include the stopping of foreign vessels, if necessary in a specific case. Such interference beyond the contiguous zone is only permitted in exceptional cases by UNCLOS, which does not include protection of UCH.

Another significant change introduced by the UNESCO Convention with respect to the protection of UCH relates to the imposition of the specific duty on the coastal State to act not in its own interests but in the general interests of States Parties. This duty is manifested in the Convention in a number of ways.

For example, Article 10(1) provides that "[*n]o authorization shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf except in conformity with the provisions of this Article*". Article 10(3) requires the coastal State

to conduct consultations with all other States parties which have a verifiable link to the UCH. In addition, the coastal State acting in the capacity of Coordinating State must "*act on behalf of the States Parties as a whole and not in its own interest*". In addition, actions by the coastal State may "*not constitute a basis for assertion of any preferential or jurisdictional rights not provided for in international law, including the UNCLOS*" (Article 10(6)). In other words, the coastal State should only exercise jurisdiction on the basis of general interests and not to protect its own interests, as is the case when the coastal State protects its sovereign rights to the natural resources of the EEZ and continental shelf.

In many ways, the UNESCO regime for EEZ and the continental shelf is the same as for the international seabed in Article 149 UNCLOS "Archaeological and historical objects on the international seabed". According to this provision, all objects of an archaeological and historical nature found in the Area (i.e. the seabed beyond any State's jurisdiction) are to be preserved or disposed of for the benefit of mankind as a whole.

Generally, UNCLOS does not lay down any duty for States to act in common interests in relation to UCH located on the seabed of the continental shelf. Provisions of the 2001 UNESCO Convention mentioned above (Article 10) can result in objections being raised both by those coastal States which assert sovereign rights to UCH located on their continental shelf and also by those States which have a historic or other link to such UCH and do not wish to share their heritage with other States or with the whole mankind.

Cases such as those involving Spanish frigate *Mercedes* illustrate the insufficient regulation in the international conventions with respect to the protection of interests of States which have some historic or cultural link to the shipwreck or artefacts, but which are not coastal States or flag States. Such States are recognized by UNCLOS as having preferential rights (subject to the common heritage of mankind) with respect to UCH in the Area, i.e. beyond the outer limits of the continental shelf. As for the 2001 UNESCO Convention, it does not do more than give a right to such States to "*declare their interest in being consulted by the coastal State (In whose EEZ/CS UCH is found) on how to ensure the effective protection*

of that underwater cultural heritage (Art 9(5)). Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned".

To sum up the above discussion, Article 10 of the 2001 UNESCO Convention changes the "rules of the game" laid down in UNCLOS quite remarkably, with respect to the freedom of navigation in the waters superjacent to the continental shelf of the coastal States. Article 10 creates a far-reaching new regulation of UCH. For example, considering Article 4 which restricts application of salvage and finds law to UCH, if the 2001 UNESCO Convention Article 10 applied to the continental shelf of Canada, the litigations involving the shipwreck of the *Titanic* would not have been possible.[23]

At the same time, the coastal States' competences in the field of UCH is one of the most controversial issues of the 2001 UNESCO Convention. The UNESCO approach was considered unacceptable by several maritime nations, including Norway, because it obviously gives coastal States more rights and competences in their maritime zones than follow from the law of the sea generally and from the UNCLOS provisions (the "creeping jurisdiction" problem). This precludes other (i.e. flag) States from exercising the freedom of navigation they generally enjoy under the law of the sea, in the case of activities directed at UCH on the seabed of the EEZ.

Baltic and Scandinavian perspective on the protection of UCH

In this section I will take a brief look at the issues pertaining to the protection of UCH from the perspective of the Baltic and Scandinavian countries.[24]

[23] On the *Titanic* in more detail, see Garabello & Scovazzi; M.J.Aznar, O.Varmer The *Titanic* as Underwater Cultural Heritage: Challenges to its Legal International Protection, *Ocean Development & International Law*, 44:96–112, 2013.

[24] The Baltic and Scandinavian dimension definitely deserves a more comprehensive examination than is undertaken in this paper. For a useful and more complete discus-

The Baltic and Scandinavian countries have a lot in common – the coastline in the Baltic Sea (except for Norway), naval and maritime history, common geopolitical concerns and common trade. Many historic shipwrecks lie on the bottom of the Baltic Sea, and several important finds of such objects have already been made. Shipwrecks discovered on the seabed such as *Wasa*, *Svardet*, and *Vrouw Maria* are well-known; some wrecks were also washed ashore (*Kolka wreck I* in Latvia) or found on land (*Salma* ships in Estonia).

The Baltic Sea is shallow (around 45 m maximum depth), has low salinity and no shipworms, which assists in better preservation of the wrecks. As a result, there will be probably more discoveries made in the future. Being a relatively shallow sea, the Baltic Sea has been compared to an "enormous underwater maritime museum in which most underwater cultural heritage sites are accessible by divers"[25].

At the same time, there is intense maritime traffic and other activities in the Baltic Sea, which may lead to conflicting uses, potentially endangering UCH and so requiring an effective mechanism for protection of historic objects on the seabed, not only against activities directed at such objects (looting and similar) but also other activities and circumstances which can cause damage (construction works, natural impact). A harmonised regulatory framework adopted in the Baltic region would be of considerable help in ensuring that the protection measures are effective.

In light of these common challenges, do States with a coastline in the Baltic Sea also have a common approach to the protection of UCH?

We have seen that at the international level, the 2001 UNESCO Convention has not so far gained acceptance in the Scandinavian and Baltic region, and has so far only been ratified by Lithuania. The international instruments which in practice regulate UCH in the Baltic Sea are UNCLOS (1982), the Valletta Convention (1992) and the International Council of Monuments and Sites in its "Charter on the Protection and

sion (published in 2006) see Varenius, Björn. 2006. Rutilus: strategies for a sustainable development of the underwater cultural heritage in the Baltic Sea Region. Report dnr 1267/03-51,2006. [København]: Nordic Coucil of Ministers.

[25] See above.

Management of Underwater Cultural Heritage" (1996). In addition, the Baltic Sea States have excluded UCH from marine salvage rules, as the 1989 International Salvage Convention opens for.[26]

As discussed earlier in this paper, UNCLOS does not explicitly regulate UCH located in the EEZ and the continental shelf, but it does allow States to take measures to protect UCH located in their contiguous zones (i.e. up to 24 nautical miles from the baselines). It has been reported that national jurisdiction is mostly exercised with respect to the territorial sea (12 nm) but not in the rest of the 24 nm "archaeological zone" provided for in Article 303 UNCLOS.[27]

There are also differences between the scope of protection of UCH under the domestic laws on cultural heritage, with respect to the age and cultural significance of the historic underwater objects. For example, in Latvia, no definition of UCH (comparable to the definition laid down in the 2001 UNESCO Convention) is laid down in the law whatsoever.

One of the reasons for rejecting the 2001 Convention could be its approach to jurisdiction of the coastal States, as well as possible implications for the status of State and naval vessels, which is unacceptable for some maritime nations.[28] Additionally, flag States have quite far-reaching obligations imposed upon them to regulate their ships, which may be viewed as too burdensome by many flag States, since it exceeds their minimum international obligations.

Furthermore, the 2001 Convention and the Annex with Rules sets a high standard for the protection of UCH, including the relatively broad definition of UCH, providing for *in situ* preservation as the primary option, and imposing very significant restrictions on the application of marine salvage and the law of finds to UCH. It also requires States Parties to enact appropriate domestic legislation on the protection of UCH and to introduce an enforcement system, including sanctions, preventing

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[26] This author does not have a complete overview over such national exceptions in this region.

[27] As reported in 2006 by Rutilus (see footnote 23 above).

[28] However, some States from other regions in Europe have ratified this Convention (Spain, Portugal and France).

the unauthorised recovery and commercial exploitation of UCH. These are far-reaching requirements imposing a significant financial burden on State Parties, which need to set up a mechanism to give effect to the Convention's requirement and to establish a system for coordination and exchange of information with other State Parties. It does appear that some of the Baltic Sea countries already perform some of the activities encouraged by the 2001 UNESCO Convention, whereas other countries, for many reasons, including financial ones, are still at an the early stage in this field.[29]

An alternative solution to the 2001 UNESCO Convention could be creating a Baltic regional instrument for the protection of the UCH, which would address the issues pertaining to UCH in such a way as to tailor for the special interests and experiences of the Baltic States. Such an idea was presented some years ago in the shape of the "*Resolution on the Maritime Cultural Heritage in Estonia, Latvia and Lithuania*" (2003), which *inter alia* encouraged adoption of the UNESCO Convention and defining the maritime cultural heritage. The Resolution was followed up on a piecemeal basis, as the Baltic States have not yet achieved all the goals declared in it.

The "*Code of Good Practice for the Management of UCH in the Baltic region*" (2008) refers, generally, to the Baltic Sea region and seeks to establish a "common ground for the protection and management of UCH in the Baltic Sea region, and among other things provides for a definition of UCH (based on the 100-year threshold or, alternatively, historic significance criteria) and *in situ* preservation as the first option. It is, however, necessary to follow this work up with by achieving a better harmonisation of the legal regulation of UCH by the Baltic and Scandinavian States.

[29] On the pro and contra arguments for joining the 2001 UNESCO Convention see the report by A. Sne, A. Vilka and E.Plankajis (Riga, 2014). Original title: UNESCO Konvencija par zemūdens kultūras mantojuma aizsardzību Latvijas kultūras mantojuma aizsardzības un pārvaldes sistēmas kontekstā. English summary.

Concluding remarks

This paper discusses the issues pertaining to the international legal framework for the protection of Underwater Cultural Heritage, especially historic shipwrecks. The main international instrument is UNCLOS, although it only contains two provisions explicitly regulating UCH. However, it is nonetheless important due to a significant number of ratifications, to which the 2001 UNESCO Convention has not come close. The Baltic and Scandinavian States have generally ratified UNCLOS but not the UNESCO Convention. As a result, the international protection regime for UCH is mainly rooted in UNCLOS, the Valletta Convention and international law in general. This article did not examine the general cultural heritage conventions which may also apply to UCH.

UNCLOS' provisions on Underwater Cultural Heritage are useful, since they require all States to protect heritage at sea (irrespective of location) while vesting the coastal States with certain jurisdiction in the territorial sea and contiguous zone. In addition, a provision addresses UCH located on the international seabed, i.e. beyond all States' jurisdiction.

As for such questions as the title to historic naval and governmental shipwrecks, jurisdiction over UCH located on the continental shelf beyond the 24-nautical mile zone and the rights of owners, salvors and finders, UNCLOS leaves these to be resolved by international law in general and national legal systems. UNCLOS also does not provide for a uniform definition of the "objects of historic and archaeological nature" found at sea.

There is no consensus between States as to how to treat UCH located on the seabed. In addition to salvage laws, States disagree as to whether the *in situ* approach as the first option is necessarily appropriate. The application of the common heritage of mankind to UCH is also a point of disagreement for some States (especially developing States), since it involves putting the national interests of the particular State controlling UCH below the interests of all States taken as a whole.

The 2001 UNESCO Convention contributes to the harmonisation of the aspects mentioned above which are essential for the effective international protection framework. It also provides for relatively specific obligations for States Parties. The benefits of the 2001 UNESCO Convention are a better legal protection of UCH in the seabed beyond the contiguous zone than those of UNCLOS.

By contrast to UNCLOS, the 2001 UNESCO Convention contains a number of explicit obligations for States with respect to UCH located on the seabed within the EEZ and Continental Shelf. As we have seen, the UNESCO regime expands coastal State's jurisdiction in comparison to UNCLOS and at the same time imposes additional obligations on other States (flag States), thereby restricting their freedoms to explore and recover UCH on the seabed beyond the 24 nm. In addition, the 2001 UNESCO Convention takes a very strict approach to the law of salvage and finds, making it in practice inapplicable to recoveries of UCH.

Comparison between the UNCLOS provisions, the UNESCO approach and the national approaches to the legal regulation of UCH illuminate the differences in the various regulatory approaches, as well as the existing gaps in the international regulation. The international regulation of UCH is still quite fragmentary. This means that many important issues pertaining to the legal status of UCH remain in the international customary law domain. Unfortunately, this opens up a lot of uncertainty for States as to what rights they hold under international law and how to protect those rights. It is possible that some of the grounds for States to refuse the 2001 UNESCO Convention are rooted in this uncertainty and their position would change if international law were clearer on the questions important to them. Since this Convention expressly confirms that States must act in accordance with UNCLOS and general international law when exercising jurisdiction over UCH, it is possible that at least some of these concerns are not well-founded.

These include such questions as sovereign rights of the historic flag States to wrecks of naval and governmental vessels, as well as rights of non-flag and non-coastal States to artefacts which have some historic and cultural connection to such States (e.g. in whose territory the values

on board originated, notably former colonies). As the above discussion shows, neither UNCLOS nor the 2001 UNESCO Convention lays down more or less specific criteria to determine what kind of link will provide States with legal title to UCH and how the disputes arising from conflict of legal titles may be resolved.

Uncontrolled and unauthorised recovery of UCH from the seabed in international waters also poses a significant threat to the interests of States holding a historic or cultural link to the shipwrecks and sunken artefacts and to the protection of such objects as the common heritage of mankind. Given the significant diversity in the national approaches to salvage of UCH, the unilateral prohibition by a State of salvage of UCH would not be effective to prevent such activities beyond the 24 nautical mile limit.

Although a multilateral, global agreement on UCH has been hard to achieve, bilateral agreements have sometimes been entered into by States to regulate the question of title and other issues in specific cases. An example of such a bilateral agreement is the Agreement between Australia and the Netherlands (1972) concerning old Dutch shipwrecks (of the Dutch East India Company). Although the Netherlands (successor of the Company) claims in principle to retain title over the Company's shipwrecks irrespective of their location, in this case the bilateral agreement was reached, transferring all titles to the four shipwrecks in Australian waters to Australia (the Netherlands preserving the "continuing interest" in the articles recovered from the wrecks). This may have been a much better option for the Netherlands than having no such agreement at all, as the case with the shipwreck *Geldermalsen* illustrates, being a wreck of the Company's ship from which artefacts were salvaged off Indonesian coast without consulting the Netherlands.

A more recent example is the arrangement between UK and Canada (1997) involving the then undiscovered wrecks of Sir John Franklin's ships *Erebus* and *Terror*, found in 2014 and 2016 in the Northwest Passage. Under the arrangement UK agreed to limit some of its rights as an owner without waiving sovereign immunity and agreed that Canada would have discretion to take appropriate actions with respect to the shipwrecks.

This arrangement appears to preclude the risk that commercial salvors may avail themselves of salvor's or finder's rights[30].

Another well-known agreement regulates the shipwreck of the *Titanic* located on the continental shelf of Canada. To this author's best knowledge, the "Agreement Concerning the Shipwrecked Vessel RMS Titanic" has not yet entered into force[31].

States with a link to a historic shipwreck located outside their jurisdiction may choose to enter into agreements with salvage companies, and in this way avoid the unpredictable impact of an unauthorised recovery on their interests, as well as ensuring that the exploration and recovery takes place in an appropriate way[32]. However, the 2001 UNESCO Convention (if applicable) may significantly limit the margin of discretion for States entering into such agreements.

30 GarabelloScovazzi (2003), p. 22.

31 On issues pertaining to the *Titanic* see Garabello & Scovazzi; M.J.Aznar, O.Varmer The *Titanic* as Underwater Cultural Heritage: Challenges to its Legal International Protection, *Ocean Development & International Law*, 44:96–112, 2013.

32 E.g., Partnering Agreement Memorandum concerning the Shipwreck of *HMS Sussex* (2002) between the UK and Odyssey Marine Exploration, Inc.