

International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges

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ABSTRACT

The international legal regime aimed at the protection and governance of underwater cultural heritage is facing substantial strife. Unauthorized salvage and looting are a continuing threat. Additional challenges include disputes between post-colonies and post-colonial powers over title to sunken vessels, lack of a global policy for the protection of underwater gravesites, and the exploitation of underwater cultural heritage as a means to claim disputed territory. Considerable time has passed since the signing (2001) and entry into force (2009) of the UNESCO Convention on the Protection of the Underwater Cultural Heritage. Notable maritime powers refused to sign the Convention because they were concerned that it would erode international law principles, particularly marine jurisdiction and state-owned vessels' immunity. The article revisits the maritime powers' reservations and maintains that in practice these concerns did not materialize. It then demonstrates that the Convention is well suited to facing the current challenges to international underwater cultural heritage governance.

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INTRODUCTION

In 2014, as tensions around maritime borders in the South China Sea were growing, China launched the *Kaogu-01*, a shiny new ship that local media described as “armed to the teeth.”¹ The *Kaogu-01* was indeed fully armed, but

1. Andrew S. Erickson & Kevin Bond, *Archaeology and the South China Sea*, DIPLOMAT (July 20, 2015), <http://thediplomat.com/2015/07/archaeology-and-the-south-china-sea/>.

with unlikely armaments—state of the art marine archaeological tools.² The *Kaogu-01*'s mission was a rather curious one: finding underwater archaeological evidence that China was the sovereign to the disputed waters of the South China Sea.³ A year later, on the other side of the globe, Spain and Colombia were engaged in a diplomatic dispute concerning “the holy grail of shipwrecks”—the *San Jose*, a Spanish galleon that sank in 1708 with eleven million gold and silver coins, and which Colombia declared it had just discovered.⁴ These two stories reflect two of the new challenges facing the global governance of underwater cultural heritage—exploitation of underwater cultural heritage as a means of claiming disputed territory and tensions between former colonies and former colonial powers over title to sunken vessels. Alongside these challenges, international underwater cultural heritage governance faces another pressing matter: devising a global policy for the protection of underwater gravesites. Meanwhile, the familiar threats of unauthorized salvage and looting continue to be a real concern.

Up until about thirty years ago, these challenges and concerns did not exist. For generations underwater cultural heritage—ships and airplanes that were lost at sea, sunken treasures and statues, and submerged cities and ports—was protected from human interference. However, the advance of marine technological capabilities in the last decade of the Twentieth Century made them accessible for the first time in history.⁵ It also put them at jeopardy, mainly due to unauthorized treasure-hunting.

The realization of the threat that unauthorized salvaging poses to underwater cultural heritage led to the establishment of an international framework aimed at its protection: The UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2001 (“the Convention”).⁶ The Convention’s main goal is to ensure that any interference with underwater cultural heritage meets internationally accepted archaeological standards.⁷ The Convention engages with

2. *Id.*

3. *Id.*; see also Jeremy Page, *Chinese Territorial Strife Hits Archaeology*, WALL ST. J. (Dec. 2, 2013), <http://www.wsj.com/articles/SB10001424052702304470504579164873258159410>.

4. Jonathan Watts & Stephen Burgen, *Holy Grail of Shipwrecks Caught in Three-Way Court Battle*, GUARDIAN (Dec. 6, 2015), <http://www.theguardian.com/world/2015/dec/06/holy-grail-of-shipwrecks-in-three-way-court-battle>; Willie Drye, *Treasure on Sunken Spanish Galleon Could Be Biggest Ever*, NAT'L GEOGRAPHIC (Dec. 9, 2015), <http://news.nationalgeographic.com/2015/12/151209-spanish-shipwreck-billion-treasure-archaeology/>; Corey Charlton, *Hands off our treasure! Spain says it holds the rights to galleon the San Jose - and its \$1bn worth of gold coins - found in Colombian waters 300 years after it sank*, DAILY MAIL (Dec. 8, 2015), <http://www.dailymail.co.uk/news/article-3351250/Hands-treasure-Spain-says-holds-rights-galleon-San-Jose-1bn-worth-gold-coins-Colombian-waters-300-years-sank.html#ixzz4Hd6PFg9h>.

5. SARAH DROMGOOLE, UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW 2–7 (2013); CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 289–92 (2010).

6. The UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 2562 U.N.T.S. 3 [hereinafter The UNESCO Convention].

7. See Sarah Dromgoole, *Reflections on the Position of the Major Maritime Powers with*

two very different legal arenas: laws regarding the protection of cultural heritage and laws regarding the governance of the seas. This means that the considerations at play extend far beyond the mere regulation of activities aimed at underwater cultural heritage. The drafting of the Convention was a long and arduous process involving a considerable degree of political compromise. Rigorous negotiations were held about its form and scope.⁸ The negotiating parties attempted to balance between the interests of coastal states, namely the states in whose waters cultural heritage was found (often former colonies belonging to the Global South), and those of flag states, namely the sovereigns under whose laws the submerged vessels were registered or licensed (often maritime powers belonging to the Global North).⁹

Despite the negotiating parties' best efforts, two notable unsolved issues remained after the final drafting of the Convention. The first is the relationship between the Convention and the United Nations Convention on the Law of the Sea, 1982 ("UNCLOS"),¹⁰ specifically, whether the Convention erodes UNCLOS's provisions by bestowing jurisdiction where UNCLOS does not. The second is the treatment of sunken state vessels under the Convention;¹¹ particularly, whether sunken state vessels enjoy full immunity from any action affecting them without the flag state's prior consent. These disagreements resulted in a substantial majority of the negotiating parties supporting the final text, but with a notable, yet politically significant, minority refusing to support it. The latter included France, Germany, the Netherlands, Norway, Russia, the U.K., and the U.S. ("the maritime powers").¹²

While unauthorized salvaging remains a continuing threat to underwater cultural heritage, the latter part of this decade has also seen the emergence of new challenges to the governance of underwater cultural heritage. These include, as mentioned above, claims of former colonies to ownership of former empires'

Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage, 38 MARINE POL'Y. 116 (2013).

8. Sarah Dromgoole, *Why the UK Should Reconsider the UNESCO Convention 2001*, in PROTECTION OF UNDERWATER CULTURAL HERITAGE IN INTERNATIONAL WATERS ADJACENT TO THE UK 23 (Robert Yorke ed., 2010).

9. See Dromgoole, *supra* note 7, at 118; FORREST, *supra* note 5, at 347. For a detailed account of the negotiations see Roberta Garabello, *The Negotiating History of the Provisions of the Convention on the Protection of Underwater Cultural Heritage*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE 89 (Roberta Garabello & Tullio Scovazzi eds., 2003).

10. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. UNCLOS is the main international law framework for ocean governance. It defines states' rights and obligations with regard to most aspects of marine governance, for example, borders, resources, and the environment.

11. Sunken state vessels are any submerged vessel (ship, aircraft, or any other vehicle) owned or operated by a state and used only on governmental non-commercial service at the time of sinking.

12. In the final vote, fifteen countries abstained, among which were France, Germany, the Netherlands, and the U.K. Russia and Norway voted against (along with Turkey and Venezuela). Eighty-seven countries voted in favor. The U.S. was not then a member of UNESCO and thus had no voting rights, though it joined the maritime powers in voicing its concerns about these issues. See Dromgoole, *supra* note 7, at 118 n. 8.

underwater cultural heritage; issues arising amid the centennial of World War I such as the handling of underwater gravesites; and the use and abuse of underwater cultural heritage as a means to claim disputed territorial waters. As a considerable amount of time has passed since the Convention's signing (2001) and its entry into force (2009), now is an opportune moment to consider the Convention's ability to face current and future challenges and to inquire whether the maritime powers' concerns, expressed over fifteen years ago, indeed materialized in practice. These are the two main issues that this article explores.

This article will show that the maritime powers' concerns were overblown. It will demonstrate that the Convention is duly equipped to confront most current challenges facing the governance of underwater cultural heritage. It will then discuss gaps in the Convention's regime that still need to be addressed and lay out possible solutions. Finally, it will suggest that a cost-benefit analysis leads to the conclusion that despite its several drawbacks, the Convention is an essential tool for the protection and preservation of underwater cultural heritage.

The article progresses as follows: Part I gives a short overview and analysis of the Convention's main features and objectives. Part II outlines the maritime powers' objections to the Convention. Part III evaluates the maritime powers' objections in light of reality on the ground, and maintains that despite the maritime powers' concerns, international law principles of marine jurisdiction and state immunity are strongly upheld in practice. Part IV discusses current challenges to international underwater cultural heritage governance and illustrates how the Convention can meet them. Part V discusses limitations and gaps in the Convention, proposes some suggestions as to how those can be overcome, and shows that despite some drawbacks, the Convention's benefits outweigh its shortcomings. This article concludes by suggesting that joining and strengthening the Convention is the way forward.

I.

THE CONVENTION'S MAIN FEATURES

Prior to the 1980's, the seas protected underwater cultural heritage from human intervention. Accessibility, or lack thereof, meant that little attention was paid to underwater cultural heritage. Hence, legislation regulating underwater cultural heritage was scarce and was almost exclusively domestic, usually as a negligible part of the laws of general (terrestrial) cultural heritage.¹³ However, by the 1980's technological developments allowed, for the first time, widespread access to deep seawaters.¹⁴ It was not very long until the wreck of RMS *Titanic*

13. David Parham & Michael Williams, *An outline of the nature of the threat to Underwater Cultural Heritage in International Waters*, in PROTECTION OF UNDERWATER CULTURAL HERITAGE IN INTERNATIONAL WATERS *supra* note 8, at 5, 9; *see also* Ole Varmer, *Closing the Gap in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf*, 33 STAN. ENV'T'L L. J. 215, 255 (2014) (contending that while several U.S. laws were primarily enacted to protect terrestrial heritage, some have been applied to marine heritage).

14. DROMGOOLE, *supra* note 5, at 2-7.

was discovered in 1985. This discovery ignited an ever-growing interest in underwater cultural heritage and highlighted its commercial potential. Widespread shipwreck “hunting” expeditions became commonplace. This new reality of easy access resulted in new threats to underwater cultural heritage. The natural, relatively negligible dangers of environmental threats such as erosion were now joined by the direct and substantial man-made threats of looting and salvage.¹⁵

UNCLOS, the main international law apparatus regarding the governance of the world’s oceans, only sporadically and somewhat incoherently addresses the management of underwater cultural heritage. This is probably because at the time UNCLOS was negotiated and drafted (between 1973 and 1982) underwater cultural heritage was mostly out of human reach.¹⁶ Notwithstanding, UNCLOS does address underwater cultural management.

A short description of maritime boundaries can be helpful before turning our attention to the relevant UNCLOS’ provisions: *Territorial Waters* are the belt of coastal waters extending (at most) twelve nautical miles from the baseline, which is generally the low-water line along the coast.¹⁷ The *Contiguous Zone* is the next twelve nautical miles after the Territorial Waters.¹⁸ The *Exclusive Economic Zone* is the waters extending two hundred nautical miles from the baseline.¹⁹ The *Continental Shelf* is, geologically, an underwater landmass that extends from the continent until the deep sea bed. Legally, it extends two hundred nautical miles from the baseline; however, where the Continental Shelf physically exceeds two hundred nautical miles it follows the geological boundary (up to a certain limit).²⁰ The *Area* is the seabed and ocean floor beyond the limits of national jurisdiction.²¹

UNCLOS handles the issue of protection of underwater cultural heritage in articles 149 and 303. Article 303(1) imposes a duty to protect “objects of an archaeological and historical nature found at sea” and states that the parties “shall” cooperate for this purpose.²² However, article 303(2) limits the parties’ jurisdiction regarding underwater cultural heritage to the relatively near-shore

15. Due to low levels of oxygen and light, ships submerged in water remain relatively unharmed. FORREST, *supra* note 5, at 301. Indeed, in almost all cases materials are better preserved underwater than on land. See UNDERWATER ARCHEOLOGY: THE NAS GUIDE TO PRINCIPLES AND PRACTICE 15–33 (Amanda Bowens ed., 2009) (specifically, see chart comparing perseverance of materials underwater and on land, at 17) [hereinafter NAS GUIDE].

16. See DROMGOOLE, *supra* note 5, at 2–7.

17. UNCLOS, *supra* note 10 art. 3.

18. *Id.* art. 33.

19. *Id.* art. 57.

20. *Id.* art. 76. Note that the legal definition of the Continental Shelf differs from the geological definition. For example, if a country’s actual Continental Shelf is only 100 nautical miles in length, it is nevertheless legally 200 nautical miles long. However if it is longer than 200 nautical miles then the legal definition follows the geological boundary (up to a certain point).

21. *Id.* art. 1(1).

22. *Id.* art. 303(1).

waters of the Contiguous Zone.²³ Article 149 deals with underwater cultural heritage found in the Area. It states that underwater cultural heritage found there “shall be preserved or disposed of for the benefit of mankind as a whole.”²⁴ This leaves two notable lacunas in UNCLOS. The first is the lack of a practical provision regarding underwater cultural heritage found in the waters between the outer-edge of the Contiguous Zone until the start of the Area, and the second is the vagueness of the definition of underwater cultural heritage.²⁵ With the advent of new technologies, it became clear that the existing framework for the protection of underwater cultural heritage was inadequate. This led the International Law Association in 1988, and following that, UNESCO in 1993, to initiate negotiations of such a framework, which resulted in the Convention’s establishment in 2001.²⁶

The breadth of the Convention is wide. It defines underwater cultural heritage and regulates activities that are not only directed at underwater cultural heritage but also those that incidentally affect it. Further, it regulates *all* maritime zones including those unaccounted for in UNCLOS. Additionally, the Convention creates a framework for international cooperation between member states regarding the protection of underwater cultural heritage.

The Convention features five fundamental principles, which are all outlined in article 2. The first is that state parties have an obligation to protect underwater cultural heritage for the benefit of humanity.²⁷ In practice this means that any activity directed at or influencing underwater cultural heritage must meet international archeological standards.²⁸ These standards are outlined in the Annex to the Convention.²⁹ Second, priority is always given to *in situ* preservation of underwater cultural heritage, namely, in its original location on the ocean floor.³⁰ This is in keeping with archaeological principles, which prescribe that excavation should occur only when the underwater cultural heritage is at risk or for research

23. *Id.* art. 303(2).

24. *Id.* art. 149.

25. The space left uncovered by UNCLOS is at least 176 nautical miles in length, and in some cases, it is even larger. Dromgoole maintains that UNCLOS does not cover the waters between the outer-edge of the Contiguous Zone until the start of the Area due to pressure from several countries that were concerned that jurisdiction over anything that is not strictly natural resources might pave the way for other exceptions, that, in turn, would ultimately lead to a regime of full coastal state sovereignty over the continental shelf. Dromgoole, *supra* note 7, at 117–18.

26. Sarah Dromgoole, *2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, 18 INT’L J. MAR. COASTALL. 58, 60 (2003) (noting, *inter alia*, that the Convention is indeed the first comprehensive international legal framework that regulates the protection of underwater cultural heritage, but that there were previous attempts to reach similar agreements at the regional level); see also FORREST, *supra* note 5, at 329–31. One of the earliest frameworks that acknowledges underwater cultural heritage (even if only somewhat casually) is the European Convention on the Protection of the Archaeological Heritage, Jan. 16, 1992, C.E.T.S. No.143.

27. The UNESCO Convention, *supra* note 6, art. 2(3).

28. Dromgoole, *supra* note 7, at 118.

29. The UNESCO Convention, *supra* note 6, Annex.

30. *Id.* art. 2(5).

purposes.³¹ Third, commercial exploitation of underwater cultural heritage is prohibited.³² Fourth, state parties are required to cooperate with each other and promote awareness of the importance of underwater cultural heritage.³³ Fifth, the principles of international law and state sovereignty are to be secured.³⁴ The premise of the Convention, it seems, is based on an assumption of wide participation and collaboration between member states. The Convention delineates different cooperation mechanisms such as sharing information and collaborating in the investigation and conservation of underwater cultural heritage sites.³⁵ It also encourages member states to enter into bilateral, regional or other multilateral agreements for the protection of underwater cultural heritage.³⁶ The Convention provides that “[n]othing 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.”³⁷ This was meant to appease the maritime powers that were concerned that the Convention might “alter the delicate balance of rights and interests set up under UNCLOS.”³⁸

The Convention also states that any activity relating to underwater cultural heritage shall not be subject to the law of salvage or law of finds, unless it is authorized, is in full conformity with the Convention, and ensures that any recovery enjoys “maximum protection.”³⁹ These requirements make the use of the laws of finds and salvage almost impossible.⁴⁰

31. See DROMGOOLE, *supra* note 5, at 167.

32. The UNESCO Convention, *supra* note 6, art. 2(7).

33. *Id.* arts. 2(1), 2(10).

34. *Id.* art. 2(8).

35. *Id.* art. 19.

36. *Id.* art. 6.

37. *Id.* art. 3.

38. STATEMENT BY ROBERT BLUMBERG, U.S. OBSERVER DELEGATE TO THE 31ST UNESCO GENERAL CONFERENCE TO COMMISSION IV OF THE GENERAL CONFERENCE, REGARDING THE U.S. VIEWS ON THE UNESCO CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE, (Oct. 29, 2001) http://www.gc.noaa.gov/documents/gcil_heritage2_blumberg.pdf [hereinafter U.S. STATEMENT].

39. The UNESCO Convention, *supra* note 6, art. 4.

40. During the negotiations, a complete ban on the application of salvage laws and law of finds was suggested. However, several countries were opposed to such a ban. This resulted in the current provision (making the application of salvage laws and laws of find extremely difficult in commercial contexts). See Tullio Scovazzi, *The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, in CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 295 (James Nafziger & Ann Nicgorski eds., 2009). See also DROMGOOLE, *supra* note 5, at 167–209 (discussing the application of salvage law and law of finds, holding that it is almost impossible to apply these in commercial contexts). There are four principal contradictions between salvage laws and underwater cultural heritage protection laws. First, salvage is inherently aimed at economic exploitation of underwater cultural heritage; second, salvage laws result in private ownership of underwater cultural heritage; third, salvagers end up selling and splitting up collections; and fourth, recovery operations carried out by commercial salvagers often cause irreparable damage to shipwrecks and their archeologically or historically valuable artifacts. FORREST, *supra* note 5, at 313–19. Indeed, salvage laws are aimed at incentivizing voluntary actions to help save vessels in peril whose cargo is at risk by rewarding those who help a sinking ship (it should be noted that preservation

Articles 9 and 10 of the Convention regulate underwater cultural heritage found in the areas not covered by UNCLOS.⁴¹ In these zones, under article 56 of UNCLOS, the coastal state enjoys sovereign rights only for the purposes of exploring and exploiting natural resources, excluding underwater cultural heritage. The Convention, on the other hand, creates a mechanism under which coastal states do practice a measure of authority. The coastal state, for example, has the right to prohibit or authorize any activity directed at underwater cultural heritage in these zones.⁴² The Convention sets a mechanism of cooperation and consultation among coastal states and interested parties.⁴³ However, in order “to prevent immediate danger” to underwater cultural heritage sites, it allows the coastal state to act “if necessary prior to consultations.”⁴⁴

Despite the wide acknowledgment of the need for an international framework that regulates activities involving underwater cultural heritage, not all the parties to the negotiations were able to support the final text. In the end, eighty-seven voted in favor of the final text, fifteen parties abstained, and four voted against it.⁴⁵ The Convention entered into force on 2 January 2009, after twenty states ratified it; as of September 2017, there are fifty-eight member states.⁴⁶

II.

THE MARITIME POWERS’ MAIN OBJECTIONS TO THE CONVENTION

Many of the parties that abstained or voted against the final text explained that while they viewed most provisions of the Convention favorably, they could not support it because it did not adequately address some of their main concerns. The U.S. observer delegate, for example, stated that: “The United States believes the draft Convention reflects substantial progress in certain important areas . . .

of the archeological value of wrecks is not a requirement of salvage laws). Cultural heritage laws have a very different goal—preservation of the submerged artifacts that are the heritage of humankind. Forrest notes that in the case of sunken vessels protected by cultural heritage laws, “peril,” a critical component in salvage law, has seemingly long passed and their cargo faces no immediate danger. *Id.* at 300, 304. On the contrary, it can be argued that the cargo typically faces more peril from salvagers than from the marine environment. U.S. courts and other national courts have not been consistent in their interpretation of “marine peril” offering at times a wide interpretation that includes “actions of the elements” after the ship has already sunk and at times a restricted approach that even acknowledges that the salvagers themselves are the source of “peril.” *Id.* at 301–02; *but cf.* Liza J. Bowman, *Oceans Apart Over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?* 42 OSGOODE HALL L. J. 1 (2004) (suggesting that, salvage companies and underwater cultural heritage protection institutions and countries should cooperate to the interest of both).

41. Namely those found between the outer-edge of the Contiguous Zone until the start of the Area (i.e. the Exclusive Economic Zone and the Continental Shelf).

42. The UNESCO Convention, *supra* note 6, art. 10(2).

43. *Id.* art. 10(3).

44. *Id.* art. 10(4). Similar mechanisms are established for the Area in article 11.

45. Dromgoole, *supra* note 7, at 188 n.8.

46. For the current status of ratifications, see *Convention on the Protection of the Underwater Cultural Heritage*. Paris, 2 November 2001, UNESCO.ORG

<http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha>.

At the same time, the United States wishes to register our serious concern that there is no consensus on other key provisions, and therefore, the convention is not ready for adoption.”⁴⁷ Delegates from other maritime powers delivered similar statements.

The maritime powers expressed three objections, two of which were more substantial. The maritime powers held that the Convention does not conform to UNCLOS, and in particular that it expands coastal states’ jurisdiction in the waters not covered by UNCLOS. They further maintained that the Convention disrupts or qualifies rules regarding the immunity of state vessels. The third (and conceivably least consequential) objection regarded the definition of underwater cultural heritage, which some viewed as too wide.

A. *The Definition of Underwater Cultural Heritage*

The Convention defines underwater cultural heritage as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years.”⁴⁸ The hundred-year criterion was established to avoid ownership-related problems and conflict with ordinary salvage law.⁴⁹ The inclusion of “cultural, historical, or archaeological character” as a qualifying criterion was an attempted compromise between states that advocated for a wide definition and those that preferred that only “significant” underwater cultural heritage would enjoy protection.⁵⁰ However, some viewed this as redundant because, after all, one could argue that almost all artifacts over a hundred years old carry a cultural, historical or archaeological character.⁵¹

The U.K. was probably the most notable objector to a wide definition of underwater cultural heritage. In its “Explanation of Vote,” the U.K. stated that protection should be based on significance rather than being “blanket,” and that “it is better to focus . . . efforts and resources on protecting the most important and unique examples of underwater cultural heritage.”⁵² It seems that the U.K.

47. U.S. STATEMENT, *supra* note 38, at 1.

48. The UNESCO Convention, *supra* note 6, art. 1(1).

49. Jeanne-Marie Panayotopoulos, *The 2001 UNESCO Convention on Underwater Cultural Heritage: Main Controversies*, in *THE ILLICIT TRAFFIC OF CULTURAL OBJECTS IN THE MEDITERRANEAN* 29, 33 (Ana Filipa Vrdoljak & Francesco Franioni eds., 2009).

50. Craig Forrest, *Defining ‘Underwater Cultural Heritage’*, 31 *INT’L. J. L. NAUTICAL ARCHEOLOGY* 3, 8–9 (2002); DROMGOOLE, *supra* note 5, at 86–95.

51. See DROMGOOLE, *supra* note 5, at 93.

52. U.K. FOREIGN AND COMMONWEALTH OFFICE, EXPLANATION OF VOTE TO UNESCO ON THE 2001 UNESCO CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE (2001) [U.K.] [hereinafter U.K. EXPLANATION]. This very much reflects the U.K.’s domestic legislation that traditionally focused on selective protection of underwater cultural heritage and extended it only to underwater cultural heritage with special significance. See, e.g., The Merchant Shipping Act 1995, c. 21 (U.K.); The Protection of Wrecks Act 1973, c. 33 (U.K.); The Ancient Monuments and Archaeological Areas Act 1979, c. 46 (U.K.); The Protection of Military Remains Act 1986, c. 35 (U.K.). The U.S. takes a similar approach. See NAS GUIDE, *supra* note 15; see also Antiquities Act, 16 U.S.C. §§ 431–33 (2012); Archaeological Resources Protection Act, 16 U.S.C. §§

was concerned that member states would be required to invest substantial resources to protect underwater cultural heritage to comply with the Convention.⁵³

*B. The Relationship with UNCLOS—Expansion of Coastal States’
Jurisdiction*

UNCLOS maintains a delicate jurisdictional balance in the Exclusive Economic Zone and Continental Shelf. It grants coastal states jurisdiction over natural resources only and does not deal with underwater cultural heritage found in those waters. The Convention, however, does.

The Convention creates a requirement that a vessel or national of another state notify the coastal state about discoveries of underwater cultural heritage in the coastal state’s Exclusive Economic Zone or Continental Shelf.⁵⁴ This may be understood as conferring on the coastal state the right to demand a report from the flag state’s vessel master.⁵⁵ Moreover, the Convention grants “Coordinating State” status to coastal states, meaning that once an underwater cultural heritage artifact is discovered in its Exclusive Economic Zone or Continental Shelf (even by another state’s national or commercial vessel), the coastal state becomes the administrator in charge of managing activities affecting the find.⁵⁶ Even though the Convention provides that “the Coordinating State shall act on behalf of the State Parties as a whole and not in its own interest,” and despite its declaration that “[a]ny such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea,” the concern was that the coastal states might practice *de facto* veto power by preventing activities carried

470aa–470mm (2012); National Marine Sanctuaries Act, 16 U.S.C. §§ 1431–445c (2012); Abandoned Shipwreck Act 43 U.S.C. §§ 2101–06 (2012); Sunken Military Craft Act, 10 U.S.C. § 113 (2004). Some of the legislation is case specific (e.g. the Abandoned Shipwreck Act applies only to abandoned ships). See Varmer, *supra* note 13, at 263–78. In several other countries, legislation applies to *all* underwater cultural heritage, including, for example, historic submerged landscapes. With regards to sunken ships, different countries have different age thresholds such as fifty years in South Africa, seventy-five years in Australia, and one hundred years in the Republic of Ireland. NAS GUIDE, *supra* note 15, at 48.

53. Some maintain that even UNCLOS itself possibly imposes some positive duties on the state. O’Keefe and Nafziger, for example, suggest the article 303(1) of UNCLOS, which provides that “[s]tates have the duty to protect objects of an archaeological and historical nature found at sea” seems to include duties such as maintenance of known sites, excavation of underwater archaeological sites, conservation and display of excavated material, and dissemination of information obtained. Patrick O’Keefe & James Nafziger, *The Draft Convention on the Protection of the Underwater Cultural Heritage*, 25 OCEAN DEV. & INT’L L. 391, 393 (1994).

54. The UNESCO Convention, *supra* note 6, art. 9.

55. The U.S. was particularly concerned that vessels conducting military surveys would be required to provide prior notifications to coastal states, thus undermining its national security interests. See Ole Varmer, Jefferson Gray, & David Alberg, *United States: Responses to the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, 5 J. MAR. ARCHEOLOGY 129, 132 (2010).

56. The UNESCO Convention, *supra* note 6, art. 10. Article 10 does state that the coordinating state must coordinate and cooperate with any other state that declared an interest in the discovery. It nevertheless confers this status on the coastal state and not on the flag state.

out by flag states.⁵⁷ Additionally, the Convention allows Coordinating States to “take all practicable measures” prior to consultations with flag states in cases of “immediate danger to the underwater cultural heritage, including looting.”⁵⁸ The nature of these practicable measures is unclear and strengthens the concern of creeping jurisdiction. Lastly, article 3, which provides that “[n]othing 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,” also caused some concern as the word “including” might imply that UNCLOS does not *necessarily* reflect international law’s legal regime.⁵⁹

Thus, the maritime powers deemed the Convention as affording creeping jurisdiction to coastal states, therefore upsetting the jurisdictional balance achieved in UNCLOS.⁶⁰

C. Treatment of Sunken State Vessels

The maritime powers’ objection regarding treatment of state vessels is similar to their objections regarding the jurisdiction of coastal states in the Exclusive Economic Zone and Continental Shelf. They were concerned that the Convention potentially qualifies international law principles. Here, the principle is that a state vessel (sunken or in use) is the exclusive preserve of the flag state, and that the coastal state does not enjoy any jurisdiction over it.⁶¹ The U.K. for example declared that it considers “that the current text *erodes the fundamental principle* of customary international law, codified in UNCLOS, of Sovereign

57. *Id.* art. 10(6).

58. *Id.* art. 10(4). Addressing the UNESCO delegations in 2000 the U.K. stated that: “The need for full conformity with UNCLOS is particularly important in respect of the [. . .] jurisdiction of the coastal State[s].” It said that introducing a new scheme of coastal state jurisdiction over underwater cultural heritage in international waters will not “be in full conformity with UNCLOS.” COMMENTS OF THE UNITED KINGDOM, FORWARDED TO UNESCO ON 28TH FEBRUARY 2000, *cited in* Michael Williams, *UNESCO Convention on the Protection of the Underwater Cultural Heritage An Analysis of the United Kingdom’s Standpoint*, in THE UNESCO CONVENTION FOR THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE PROCEEDINGS OF THE BURLINGTON HOUSE SEMINAR OCTOBER 2005, 3 (2006). The U.S. delegation voiced similar concerns. *See* Varmer et al., *supra* note 55, at 131.

59. Dromgoole, *supra* note 7, at 119.

60. *Id.*; *see also* Williams, *supra* note 58, at 3. In the context of our discussion, “creeping jurisdiction” means the subtle and gradual expansion in coastal states’ marine jurisdiction over time. Consider, for example, that prior to the 1950s coastal states practiced sovereignty over only a very narrow strip of the sea surrounding them. The 1958 Conventions (Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205; The Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311.) expanded that jurisdiction slightly (for example, article 2 of the Convention on the Continental Shelf confers jurisdiction in the Continental Shelf, yet article 1 defines it narrowly in accordance with geological conditions. *See*: The Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311). Six decades later, we have a juridical Continental Shelf that extends at least two hundred miles offshore and an Exclusive Economic Zone of 200 miles as well; namely, maritime jurisdiction that extends far from where it once was.

61. Forrest notes that a significant number, if not the majority, of ‘important shipwrecks’ are sunken state vessels, particular, warships. Craig Forrest, *Culturally and Environmentally Sensitive Sunken Warships*, 26 AUSTL. & N. Z. MAR. L. J. 80 (2012).

Immunity” and that the text “purports to alter” the fine balance achieved in UNCLOS.⁶²

UNCLOS states that on the high seas warships or ships owned or operated by a state (and that are used only for governmental non-commercial service), have complete immunity from the jurisdiction of any state other than the flag state.⁶³ The Convention, however, grants coastal states the exclusive right to regulate any activity directed at underwater cultural heritage sites found in that country’s internal and territorial waters (this includes sunken state vessels).⁶⁴ When discovering or authorizing an activity directed at an identifiable state vessel, the Convention dictates that the coastal state *should* inform the flag state of the discovery.⁶⁵ The maritime powers perceived that the term “should” rather than “shall” would undermine the absolute sovereignty of the flag state.⁶⁶ They argued for a duty of reporting, not a mere encouragement thereof. Further, they took the position that while the coastal state should control the access to the sunken state vessel, it cannot authorize any interference, removal or investigation of it without the flag state’s consent, save for specific operations permitted by international law.⁶⁷ Similarly, the maritime powers were concerned that the provisions found in article 10, which in certain cases allow coastal states to take measures without the flag state’s prior consent, could allow these measures to be carried out even on sunken state vessels.

III.

THE MARITIME POWERS’ OBJECTIONS IN LIGHT OF REALITY ON THE GROUND

As of this writing, the Convention has been in force for eight years, giving us the opportunity to assess whether the maritime powers’ concerns materialized in practice. Accordingly, we will be able to evaluate whether the maritime powers should uphold their current policy of not joining the Convention, or whether they should revisit it.

A. A Critical Analysis of the Maritime Powers’ Objections to the Convention

The maritime powers’ objections revolved around the concern that the Convention erodes or qualifies international law principles of ocean governance, as reflected in UNCLOS, specifically with regards to coastal states’ jurisdiction and the immunity of sunken state vessels. However, a close reading of the

62. U.K. EXPLANATION, *supra* note 52 (emphasis added).

63. UNCLOS, *supra* note 10, arts. 95–96.

64. The UNESCO Convention, *supra* note 6, art. 7.

65. *Id.* art. 7(3).

66. See Dromgoole, *supra* note 7, at 119; Valentina Vadi, *War, Memory, and Culture: The Uncertain Legal Status of Historic Sunken Warships Under International Law*, 37 TUL. MAR. L. J. 333, 365–66 (2013).

67. Williams, *supra* note 58, at 5.

Convention, and contextualising it within international law frameworks, suggests that there is a strong contention that the Convention actually upholds international law principles, and perhaps even reinforces them. In this regard, it is also illuminating to reflect on Spain's and Portugal's interpretation of the Convention, especially given that both are powerful maritime states that joined it.

The Convention in fact ensures the title to, and immunity of, sunken state vessels. Article 2(8) expressly states that the Convention does not modify or alter the rules and practices pertaining to sovereign immunity over state vessels.⁶⁸ Spain holds that this article—read together with the provisions requiring the flag state's consent to carrying out activities affecting its sunken state vessels in the Exclusive Economic Zone, Continental Shelf or Area—not only ensures that the Convention does not affect its legal title to its sunken vessels, but also reinforces its sovereign immunity.⁶⁹

Portugal holds that the Convention's mechanism of international cooperation actually entitles it, as a flag state, to demand coastal states to protect its sunken state vessels from any interference, including interference caused by the coastal states themselves or by third parties, thus enhancing the idea of immunity through methods of cooperation rather than possession.⁷⁰

Spain also maintains that salvagers, not states, are the main threat to sunken state vessels. The Convention, it holds, imposes a duty on the coastal state to act against salvagers, thus securing, rather than weakening, flag states' sovereignty over their sunken vessels.⁷¹

The principle of sovereign immunity is a well-established and widely recognized principle of customary international law. In article 2(8) the Convention states:

68. Moreover, the Vienna Convention on the Law of Treaties explicitly states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." It seems clear that the Convention did not mean to alter the rules and practices pertaining to sovereign immunity over state vessels. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31(a).

69. The UNESCO Convention, *supra* note 6, arts. 10(7), 12(7); *see also* Mariano Aznar-Gomez, *Spain's position having ratified the UNESCO Convention*, in PROTECTION OF UNDERWATER CULTURAL HERITAGE, *supra* note 8, at 38, 41.

70. Francisco Alves, *Portugal's position having ratified the UNESCO Convention*, in PROTECTION OF UNDERWATER CULTURAL HERITAGE, *supra* note 8, at 46, 48–49.

71. Similarly, Portugal stated that it "does not consider the compliance to [the] ethical and cultural principle [of sovereignty over sunken state vessels] fundamental for the safeguarding of its interests," but rather stated its belief that underwater cultural heritage should be "protected, researched, studied and valorized in the exclusive behalf of Science, Culture and Mankind", regardless of the sovereign. *See* Francisco Alves, *Portugal's Declaration During the Negotiation of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: International Protection and Cooperation versus Possession*, 5 J. MAR. ARCHEOLOGY, 159, 160–61 (2010).

Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.⁷²

The word “including” created a concern that the Convention suggests that UNCLOS does not necessarily reflect international law's legal regime.⁷³ However, the interpretation of article 2(8) can lead to a counter-argument that the Convention actually reinforces UNCLOS as necessarily reflecting the international law of the sea, given that it explicitly mentions UNCLOS. But even if we were to assume that other international law frameworks and state practices are to be taken into account (rather than just UNCLOS), the latter still reinforce the principle of unqualified sovereign immunity.

The principle of sovereign immunity is recognized in numerous international frameworks and conventions.⁷⁴ Specific regard to state vessels can be found *inter alia* in articles 8-9 of the Convention on the High Seas, 1958; articles 4 and 25 of the International Convention on Salvage, 1989; article 4(2) of the Nairobi International Convention on the Removal of Wrecks, 2007; and, as mentioned above, in articles 95-96 of UNCLOS.⁷⁵ This indicates that the sovereign immunity principle is strongly upheld in UNCLOS as well as in other international law frameworks.

Moreover, many countries around the globe, including many maritime powers, have signed several bilateral and multilateral agreements regarding sunken state vessels. These agreements strongly reflect international practice and customary law regarding sunken state vessels' immunity (recall that article 6 of the Convention explicitly encourages such agreements).⁷⁶ Examples of such

72. The UNESCO Convention, *supra* note 6 art. 2(8).

73. See DROMGOOLE, *supra* note 5, at 280–81; Dromgoole, *supra* note 7, at 119.

74. See, e.g., The United Nations Convention on Jurisdictional Immunities of States and Their Property Dec. 2, 2004 https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf (reaffirming that sovereign immunity is unequivocal and that immunity cannot be balanced). Though the case does not deal with cultural heritage (but rather with Italian courts ignoring Germany's immunity in cases brought by victims of the Nazi regime) the ICJ's decision regarding the absoluteness of immunity sheds important light on this discussion. International Court of Justice, Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, I.C.J. reports 2012, p. 99 (Feb. 3). For a discussion of state immunity in the cultural heritage context, see Riccardo Pavoni, Sovereign Immunity and the Enforcement of International Cultural Property Law, in *Enforcing International Cultural Heritage Law*, 79 (Francesco Francioni & James Gordley eds., 2013) (holding, *inter alia*, that there is an ambivalent relationship between the laws of state immunity and the enforcement of international cultural heritage law).

75. Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 6465; International Convention On Salvage, Apr. 28, 1989, 1953 U.N.T.S. 33479; Nairobi International Convention on the Removal of Wrecks, May 18, 2007, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228988/8243.pdf; UNCLOS, *supra* note 10.

76. John Gribble, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: An Impact Review for the United Kingdom: Project Design*, 6 J. MAR. ARCHAEOLOGY

agreements include: the British-Canadian agreement regarding HMS *Erebus* and HMS *Terror*;⁷⁷ the American-Japanese agreement regarding the *Kohyoteki* midget submarines;⁷⁸ the Dutch-Australian agreement concerning Dutch shipwrecks found off the western Australian coast;⁷⁹ and the French-American agreements regarding *CSS Alabama* and *La-belle*.⁸⁰

National legislation and state proclamations also reflect international practice and international customary law while reinforcing the principle of unqualified sovereignty in sunken state vessels.⁸¹ Legislation regarding the immunity of state vessels exists in almost all jurisdictions. Many states have also made special proclamations stating that they uphold the immunity of their sunken state vessels. Perhaps the most famous example of this is the U.S. presidential statement made in 2001, maintaining U.S. ownership of its sunken statecraft wherever located unless expressly abandoned.⁸²

The Spanish-Portuguese interpretation of the Convention as well as contextualizing the Convention within customary international law present a sound case that the immunity of sunken state vessels was not qualified in the Convention. This point is important to acknowledge, as it illuminates our discussion as to what happened in practice after the Convention's establishment and ratification, to which we now turn.

77, 83 (2011).

77. Memorandum of Understanding Pertaining to the Shipwrecks *HMS Erebus* and *HMS Terror*, U.K.-Can., Aug. 5-8, 1997, reprinted in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE *supra* note 9, at 263; see also Sarah Dromgoole, *United Kingdom*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001, 344 (Sarah Dromgoole ed., 2nd ed. 2006).

78. Varmer et. Al., *supra* note 55, at 131.

79. Agreement Concerning Old Dutch Shipwrecks, Austl.-Neth., Nov. 6, 1972, A.T.S. No. 18 (1972). The agreement was a schedule to the *Historic Shipwrecks Act 1976* (Austl.). See also Constance Johnson, *The Agreement Between Australia and the Netherlands Concerning Old Dutch shipwrecks*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE LEGAL ASPECTS 21 (Guido Camarda & Tullio Scovazzi eds., 2002).

80. Agreement Regarding the Wreck of *La Belle*, U.S.-Fr., Mar. 31, 2003 T.I.A.S. no. 03-331; Agreement Regarding the Wreck of *CSS Alabama*, U.S.-Fr., (Oct. 3, 1989) T.I.A.S. no. 11,687.

81. I do not discuss the question of whether immunity *should* exist in the case of sunken state vessels that have been submerged for over a hundred years nor whether such immunity meets the objectives thought to be at the foundation of this principle (such as preventing risk to national security). I merely reflect the legal situation as is. For a discussion of these issues see Patrizia Vigni, *The Enforcement of Underwater Cultural Heritage by Courts*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW, *supra* note 74, at 125 (holding that immunity rules might harm underwater cultural heritage in certain cases and noting that these rules do not consider the importance of underwater cultural heritage to humanity as a whole rather than just the particular flag state); see also Pavoni, *supra* note 74 at 12-13 (demonstrating that absolute immunity might, in some cases, harm preservation and protection of cultural heritage).

82. ADMINISTRATION OF WILLIAM J. CLINTON, STATEMENT ON UNITED STATES POLICY FOR THE PROTECTION OF SUNKEN WARSHIPS, Jan. 19, 2001, <http://www.gpo.gov/fdsys/pkg/WCPD-2001-01-22/pdf/WCPD-2001-01-22-Pg195.pdf>.

B. *The Reality after the Establishment of the Convention*

As a substantial amount of time has passed since the Convention was signed and entered into force, we can inquire into whether or not the maritime powers' concerns materialized in practice. U.S. court decisions, multilateral and regional initiatives, the acceding of powerful maritime states to the Convention, and consultations regarding other states' ratifications suggest the maritime powers' concerns did not materialize.

1. *United States' Courts Decisions*

On October 5, 1804, the British sunk the *Nuestra Señora de las Mercedes*, a Spanish frigate, off the south coast of Portugal. On its board was cargo of silver, gold and other artifacts that originated from the Spanish Viceroyalties in South America. In 2007 *Odyssey*, an American treasure-hunting company, discovered the wrecks of a vessel believed to be the *Mercedes* on the Portuguese Continental Shelf.⁸³ *Odyssey* recovered 594,000 coins and various other artifacts, and in April 2007 filed an *in rem* action against the vessel in the District Court for the Middle District of Florida. *Odyssey* claimed that there was insufficient evidence to determine the identity of the *res*, and demanded either possessory and ownership rights or salvage award as salvor-in-possession.⁸⁴ In response, Spain claimed that the *res* was undoubtedly the *Mercedes*, that the *Mercedes* was a Royal Spanish Navy frigate, and that it never abandoned its sovereign right over it—accordingly, the U.S. court lacked jurisdiction due to sovereign immunity.⁸⁵

In June 2009, the magistrate judge issued a “Report and Recommendations” regarding the *res*, finding it was indeed the *Mercedes*.⁸⁶ The judge concluded that the court lacked jurisdiction as the *Mercedes* was an immune sunken state vessel.⁸⁷ The report went on to say, quoting the case of *Saudi Arabia v. Nelson*,⁸⁸ that the property of a foreign state is:

83. *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126 (M.D. Fla. 2009).

84. *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel Amended Verified Compl. in Admiralty*, Aug. 6, 2007. The documents submitted by the parties as well as those delivered by the courts in the different proceedings can be found in a special online database: <http://dockets.justia.com/docket/florida/flmdce/8:2007cv00614/197978/> [hereinafter *The Mercedes Database*] (the Complaint is Document 25 in *The Mercedes Database*).

85. *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel Mot. to Dismiss Amended Compl. or for Summ. J.*, Sep. 22, 2008, (Document 131 in *The Mercedes Database*). In addition, Peru filed a claim contending it was an equal sovereign to the *Mercedes*, or at least had sovereign rights to the property aboard the *Mercedes* as it originated in its territory or its people had produced. The Peruvian claim is discussed in part IV of this paper. Additionally, twenty-five of the descendants of the *Mercedes*'s cargo owners (who were argued to be civilians that rented storage room on the ship from the Spanish government) also claimed ownership of the cargo. Their claim was rejected *inter alia* on the grounds that the cargo and wreck are linked for the sake of immunity.

86. *Mercedes District R&R*, Jun. 3, 2009; emphasis added (Document 209 in *The Mercedes Database*).

87. *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1126.

88. *Saudi Arabia v. Nelson* 507 U.S. 349 (1993).

Presumptively immune from the jurisdiction of United States courts; unless a specified [statutory] exception applies, a federal court lacks subject-matter jurisdiction over claims against it or its property.⁸⁹

The court concluded that “the comity of interests and mutual respect among nations, whether expressed as the *jus gentium* . . . or as sovereign immunity” warrants the dismissal of *Odyssey*’s claim. The District Court adopted the report in full, dismissed *Odyssey*’s claim, vacated an *in rem* arrest, and ordered *Odyssey* to surrender the *res* to Spain.

Odyssey appealed to the Eleventh Circuit, stressing that the *res* was not the *Mercedes*, that it should not enjoy immunity either as it was used for commercial functions or because immunity applies only when the sovereign property is in the sovereign’s possession, and that even if the ship was a sovereign vessel, the private cargo on its board should not enjoy immunity. In September 2011 the Court of Appeals affirmed the dismissal of *Odyssey*’s claims.⁹⁰ The court concluded that the evidence clearly demonstrate that the *res* is the *Mercedes*; and that at the time it sank, the *Mercedes* was a Spanish Navy vessel not acting under private commercial capacity, and that therefore it is immune even though it did transport private cargo, as the transport was of a sovereign nature.⁹¹ The court stated that an examination of the Foreign Sovereign Immunities Act reveals no possession requirement and that the immunity is granted to state *owned* vessels, not state *possessed* ones. Lastly, it asserted that in the context of a sunken state vessel the cargo and the shipwreck are interlinked for immunity purposes. The court emphasized that “*heightened protection*” is granted to sovereigns “when there is a potential of injury to the sovereign’s interest.”⁹² In November 2011 the court denied *Odyssey*’s motion for rehearing *en banc*. In February 2012 *Odyssey* filed a petition for writ of *certiorari* to the U.S. Supreme Court, which was denied.⁹³

89. *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1138.

90. *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011) (*Odyssey Marine Exploration II*). The U.S. filed an *amicus curiae* brief in support of many of Spain’s claims. Parenthetically, it is interesting to note that according to leaked documents that were published on WikiLeaks, the U.S. allegedly assisted Spain in return for Spain’s assistance in recovering art looted by Nazi Germany. For the *amicus curiae* see *Odyssey Marine Exploration, Inc. v. Spain*, Brief of The United States as Amicus Curiae in Partial Support of Spain, Aug., 2010, <http://www.state.gov/documents/organization/179335.pdf>; For the WikiLeaks documents see Ambassador’s Meeting with Minister of Culture, 2008 July 2, 09:21, WIKILEAKS, https://wikileaks.org/plusd/cables/08MADRID724_a.html.

91. *Odyssey Marine Exploration II*, 657 F.3d at 1159.

92. *Id.* (emphasis added).

93. *Odyssey Marine Exploration II*, *cert. denied*, 132 S. Ct. 2739 (2012). Another interesting case involves The *Lisippo Bronze* (the Victorious Youth), a statute found by an Italian fisherman in the Adriatic Sea adjacent to the Italian coast in 1964. In breach of Italian criminal law, the fisherman sold it, and the statute found its way to the collections of the Getty Museum in Malibu, California. In a series of decisions in the 2000’s-2010’s, Italian courts considered the statute to be Italian underwater cultural heritage and ordered its seizure. The curators of the Getty Museum were accused of criminal wrongdoing as Italy claimed that they have acquired the statute despite knowing it was illicitly

Prior to the *Mercedes* case, the Eastern District of Virginia heard a case involving treasure hunters and Spain. It involved two lost Spanish warships: *La-Galga* and *Juno* (both sank off the shores of Virginia, in 1750 and in 1802, respectively). *Sea Hunt*, an American salvage company that found the vessels, submitted an *in rem* claim against them with the Eastern District Court of Virginia in 1998.⁹⁴ *Sea Hunt* sought a declaratory judgment that the shipwrecks were not subject to Spain's sovereign prerogative as Spain abandoned its sovereign rights over them. Spain argued that any transfer or abandonment of sovereign vessels requires express, formal authorization by the government of Spain. It is worth noting that the U.S. submitted two statements of interest and an *amicus curiae* brief in support of the Spanish stand.⁹⁵ The District Court found that an express abandonment standard applies to the shipwrecks, but that Spain has indeed abandoned *La-Galga* under article XX of the 1763 Definitive Treaty of Peace between France, Great Britain, and Spain.

However, in 2000 the Fourth Circuit reversed this decision, fully supporting Spain's position.⁹⁶ The appeals court emphasized that the Abandoned Shipwreck Act, international agreements between the U.S. and other countries, the U.S. Executive's stand,⁹⁷ and—perhaps most importantly—customary international law all unequivocally support full immunity of sunken state vessels unless explicitly waived by the flag state. It continued that the fact that Spain stepped forward to claim *La-Galga* and *Juno* in court was in itself sufficient proof that it did not abandon its sovereignty over them. The U.S. Supreme Court denied *certiorari* in 2001.⁹⁸

The *La-Galga and Juno* case dealt with sunken state vessels in U.S. territorial waters, and the *Mercedes* dealt with international waters, thus creating a comprehensive and robust contention of complete immunity in all marine jurisdictions in U.S. case law.

At present, U.S. courts have been the only courts to directly address the issue of sovereign immunity of sunken state vessels that are underwater cultural

exported. Given the specific circumstances of the case, it does not raise the question of sovereign immunity over sunken state vessels *per se* but focuses more on the question of enforcing foreign states' court decisions regarding underwater cultural heritage in domestic courts. Parenthetically, it should be noted that the Italian courts completely disregarded the question that the Getty Museum raised, that the underwater cultural heritage artifact in question originated in Greece. For an account of the case see Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the "Getty Bronze"*, in CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY 301 (Silvia Borelli & Federico Lenzerini eds., 2012); Patrizia Vigni, *The Enforcement of Underwater Cultural Heritage by Courts*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW, *supra* note 74, at 125.

94. *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999).

95. *Id.*

96. *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000) (*Sea Hunt II*).

97. The U.K. also issued a diplomatic note in support of the Spanish stand, *Id.* at ¶ 19.

98. *Sea Hunt II, cert. denied*, 121 S.Ct. 1079 (2001).

heritage, and only in two cases. Nevertheless, the insights that the U.S. courts provide as to the legal reality on the ground is illuminating. The courts were unequivocal about the absoluteness of the immunity of the sunken state vessels, thus providing a clear account of the U.S. judiciary's approach to the interpretation of the sovereign immunity principle.⁹⁹

2. *Multi-State and Regional Initiatives and National Legislation by Member States*

International and regional cooperation regarding underwater cultural heritage, as well as national legislation, existed before the establishment of the Convention.¹⁰⁰ However the Convention's establishment and its subsequent entry into force marked a new era of increased international awareness and greater international cooperation.¹⁰¹ Moreover, it seems that the vast majority of international and regional initiatives aimed at the protection of underwater cultural heritage correspond directly with, and are inspired by, the Convention and its principles, even in cases where the parties involved are not parties to the Convention. In addition, states acceding to the Convention often created or modified national laws regarding underwater cultural heritage regulation so that they may follow the Convention's provisions. Importantly, these national laws seemingly adhere to the principles of sovereign immunity and maritime jurisdiction.¹⁰²

As part of the implementation of the Convention, UNESCO established several initiatives aimed at protecting underwater cultural heritage.¹⁰³ Representatives from the member states meet every two years to discuss state reports and coordinate new ways to cooperate.¹⁰⁴ Yet more interesting are the

99. I acknowledge that the U.S. courts' decisions have relatively little authority in international law. Notwithstanding, they still are landmark decisions. The courts set a jurisdictional standard for immunity of sunken state vessels, which will, presumably, at the very least be a reference point for future courts and litigants.

100. A notable example is the agreement for the protection of the Titanic: Agreement Concerning the Shipwrecked Vessel RMS Titanic, Can.-Fr.-U.K.-U.S., Nov. 6, 2003, <http://www.gc.noaa.gov/documents/titanic-agreement.pdf>.

101. *Cf.* ALESSANDRO CHECHI, THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES 36 (2014) (observing that with regard to the protection of cultural heritage, we are witnessing a growing global consensus).

102. *See, e.g.*, UNESCO's Database of National Heritage Laws, http://www.unesco.org/new/en/culture/themes/dynamic-content-single-view/news/unesco_database_of_national_cultural_heritage_laws_update/#.VnScUhrLIU; *see also* THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001, *supra* note 77 (listing different countries and their underwater cultural heritage laws).

103. *See, e.g.*, UNESCO's Work and Achievements in the Protection of the Underwater Cultural Heritage, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/protection/unescos-work/> (detailing UNESCO's cooperation mechanisms, scientific and technical advisory body, the support it provides to member and non-member states, its educational initiatives, capacity-building efforts, and its outreach and awareness initiatives).

104. The minutes of the bi-annual meetings can be found here: Meeting of States Parties,

initiatives that are non-UNESCO created but Convention-inspired. Take for example Spain, an influential actor in the creation of multilateral conventions aimed at protecting underwater cultural heritage. In 2009, it published a “green paper” on its national plan for the protection of underwater cultural heritage.¹⁰⁵ The green paper is a detailed document that puts Spain at the forefront of underwater cultural heritage protection. Following that, Spain initiated a cooperation scheme with Latin American and Caribbean states, and signed a first-of-its-kind Memorandum of Understanding on cooperation for the protection of underwater cultural heritage with Mexico in 2014.¹⁰⁶ The Netherlands, though not a party to the Convention, has also long been active in the protection of its sunken state vessels. The Convention has seemingly paved the way for wider cooperation between the Netherlands and Asian countries.¹⁰⁷ This cooperation focuses on shared responsibility, capacity-building, and information sharing between partners.¹⁰⁸

States have established cooperation frameworks on the regional level as well. Notable examples include the 2013 Latin American and Caribbean States’ action plan for regional cooperation, known as the Lima Declaration,¹⁰⁹ and the 2006 European Union MACHU project (Managing Cultural Heritage Underwater), which aimed to support new and better ways to effectively manage underwater cultural heritage, educate people about its importance, and make it accessible to researchers, policymakers and the general public.¹¹⁰ There is also clear evidence

<http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/meeting-of-states-parties/>. State reports can be found here: Country Reports, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/publications-resources/country-reports/>.

105. GOVERNMENT OF SPAIN, GREEN PAPER—NATIONAL PLAN FOR THE PROTECTION OF UNDERWATER CULTURAL HERITAGE (OFFICIAL ENGLISH TRANSLATION, 2009), <http://en.calameo.com/read/000075335015cc9543e0f>.

106. Elisa de Cabo de la Vega, *Cooperation between Spain and Latin America in the Caribbean*, 13 *CULTURE & DEVELOPMENT*, 26 (2015).

107. Martijn Manders, *Dutch Involvement in Asian Underwater Cultural Heritage Management: Building upon Old Connections*, 5 *J. MARITIME ARCHAEOLOGY*, 117 (2010).

108. *Id.* at 121.

109. REPUBLIC OF PERU AND UNESCO, RESULTS OF THE MINISTERIAL MEETING ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE IN LATIN-AMERICA AND THE CARIBBEAN, Oct. 16–17, 2013. This publication includes the “Latin-American Sub-Region Action Plan” and the “Caribbean Sub-Region Action Plan.”

110. While funding stopped in 2009, two of its initiatives, a web-based GIS application for management and research, and an interactive website, are still in operation. See Machu GIS, http://www.machuproject.eu/machu_gis_00.htm; Machu, <http://www.machuproject.eu/index.html>. Another E.U. project was Development of Tools and Techniques to Survey Assess Stabilise Monitor and Preserve Underwater Archaeological Sites (SASMAP). The project ran from 2012 until 2015 and was a project funded by the European Commission under the EU’s Cooperation Directive. The European Union and the Council of Europe were involved in different regional initiatives even before the Convention was established; these, however, were of limited scope. See ANASTSIA STRATI, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA 76 (1995). Other European regional initiatives include, for example, The Code of Good Practice for the Management of the Underwater Cultural Heritage in the Baltic Sea Region. BALTIC SEA STATES HERITAGE COOPERATION, THE CODE OF GOOD PRACTICE FOR

of increasing involvement of NGO's and grassroots initiatives, many of which follow the Convention's principles and guidelines.¹¹¹ Examples include the International Committee on the Underwater Cultural Heritage and the Deep Sea Conservation Coalition.¹¹² These are but a few examples of an extensive range of initiatives, cooperation schemes, and bilateral and multilateral agreements that follow the Convention's principles.¹¹³

Prior to the Convention, several countries had some domestic legislation regarding underwater cultural heritage.¹¹⁴ While domestic laws naturally exhibited certain commonalities, in general the global legal regime regarding underwater cultural heritage was heterogeneous. One of the notable outcomes of the Convention was a proliferation of national legislation on underwater cultural heritage and greater uniformity in that legislation.¹¹⁵

3. *Italy's 2010 and France's 2013 ratification of the Convention, and the Findings of the British and the Dutch Enquiry Committees*

Before the establishment of the Convention, both France and Italy had domestic legislation protecting underwater cultural heritage in their territorial waters, but limited international cooperation schemes or treaties.¹¹⁶ During negotiations on the Convention, Italy's greatest concern was ensuring the

THE MANAGEMENT OF THE UNDERWATER CULTURAL HERITAGE IN THE BALTIC SEA REGION (COPUCH), available at <http://mg.kpd.lt/LT/7/UNDERWATER-HERITAGE.htm>.

111. See, e.g., *Accredited Non-Governmental Organizations*, UNESCO, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/partners/partners-ngos/accredited-ngos/>.

112. International Committee on the Underwater Cultural Heritage, *Vision, Mission, and Strategy*, <http://icuch.icomos.org/vision-mission-and-strategy/>; The Deep Sea Conservation Coalition, <http://www.savethehighseas.org/>; see also Margaret E. Leshikar-Denton, *Cooperation is the Key: We Can Protect the Underwater Cultural Heritage*, 5 J. MAR. ARCHEOLOGY 85 (2010).

113. See, e.g., DROMGOOLE *supra* note 5, at 140–43. Many interest groups are involved in cultural heritage (underwater, terrestrial, or intangible). These include the international community, international organizations, states, non-state actors, NGO's, museums, and many different private actors. Chechi, *supra* note 101, at 36–60, provides a detailed account thereof. See also Varmer, *supra* note 13, at 257.

114. Parham & Williams, *supra* note 13, at 9.

115. UNESCO published a model law, which, it seems, inspired the domestic legislation of several state parties. UNESCO, MODEL FOR A NATIONAL ACT ON THE PROTECTION OF CULTURAL HERITAGE, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO_MODEL_UNDERWATER_ACT_2013.pdf. The homogeneity in national laws regulating underwater cultural heritage across the globe is reflected, *inter alia*, in the state parties' "state reports" to UNESCO. See UNESCO, COUNTRY REPORTS, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/publications-resources/country-reports/>.

116. Gwenaelle Le Gurun, *France*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE, *supra* note 77, at 59; Maria Clelia Ciciriello, *Italy*, in LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL AND INTERNATIONAL PERSPECTIVES 101 (Sarah Dromgoole ed., 1999); Tullio Scovazzi, *The Protection of Underwater Cultural Heritage: An Italian Perspective*, in THE ILLICIT TRAFFIC OF CULTURAL OBJECTS IN THE MEDITERRANEAN, *supra* note 49, at 75.

prohibition of unauthorized removal of artifacts from territorial waters.¹¹⁷ Italy held that the Convention adequately addressed the maritime powers' concerns. In its statement on the draft convention, distributed to all negotiating parties in 2000, Italy maintained that it was "within the spirit of UNCLOS" that a new convention for the regulation of underwater cultural heritage be established, and that the provisions in the draft did not compromise UNCLOS or state sovereignty, and that leaving things as they are would lead to the "unacceptable consequence" of leaving a great part of the underwater cultural heritage without protection.¹¹⁸ With that, Italy voted in favor.¹¹⁹ France, on the other hand, joined in the objections to the Convention. The French representative stated that "France disagrees with the project on two precise points: the status of state vessels and jurisdiction rights, which we consider are incompatible with [UNCLOS]."¹²⁰ France ultimately abstained in the final vote.

In the first years following the signing of the Convention, the only notable maritime states that ratified it were Spain and Portugal (in 2005 and 2006, respectively).¹²¹ Although other countries joined, the Convention was nevertheless viewed as an instrument with limited power and authority. This changed with Italy's and especially with France's ratification (in 2010 and in 2013, respectively).¹²² Once four notable maritime powers were parties, the power balance changed significantly. France's admission that its initial concerns never materialized challenge other countries to revisit their position towards the Convention.¹²³

The Convention's growing popularity, along with increasing international consensus around its principles, has not escaped the attention of not-party maritime powers.¹²⁴ As the United Kingdom's "UNESCO 2001 Convention Review Group" put it:

117. Scovazzi, *supra* note 116, at 82.

118. Scovazzi, *supra* note 116, at 83.

119. *Id.* at 85.

120. *Reprinted in* THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE *supra* note 9, at 246 (My translation from the original French).

121. Convention on the Protection of the Underwater Cultural Heritage, *supra* note 46.

122. See DROMGOOLE, *supra* note 5, at 366–68.

123. Indeed, several countries are currently considering ratification, such as Australia. See Craig Forrset, *Australia*, in HANDBOOK ON THE LAW OF CULTURAL HERITAGE AND INTERNATIONAL TRADE 71 (James Nafziger & Robert Kirkwood Paterson eds., 2014).

124. The Convention's growing popularity is reflected also in the UN General Assembly Resolution 66/231 on "Oceans and the Law of the Sea", which "Urges all States to cooperate, directly or through competent international bodies, in taking measures to protect and preserve objects of an archaeological and historical nature found at sea. . ." and "calls upon States that have not yet done so to consider becoming parties to" the Convention. G.A. Res. 66/231, ¶¶ 7, 8 (Dec. 24, 2011).

The Convention itself - to some surprise - has not only entered into force but has been ratified by an increasing number of states who shared concerns similar to the U.K. in 2001. [. . .] there is now a global convention on the protection of underwater cultural heritage that has widespread support and is a feature of the framework of international law with which the U.K. must deal.¹²⁵

The influence of the Convention led two influential maritime powers, the Netherlands and the U.K., to commission national committees to reassess the question of ratification in 2011 and 2014, respectively.¹²⁶ Both committees strongly and overwhelmingly concluded that their governments should join the Convention.¹²⁷

Regarding the Convention's compatibility with UNCLOS and maritime jurisdiction, the British committee maintained that there were no signs that state practice will result in creeping jurisdiction.¹²⁸ Moreover, the committee stressed that if the U.K. were to ratify the Convention, it would be able to reaffirm the primacy of UNCLOS and assert its own interpretation of specific clauses of the Convention.¹²⁹ The Dutch committee reached similar conclusions.¹³⁰

The British committee found that the Convention's cooperative framework, its affirmation of sovereign immunity, and the provision that a country with verifiable links to a wreck is to be consulted, are "likely to strengthen, rather than weaken, the position of the U.K. with respect to wrecks of British origin all over the world".¹³¹ The Dutch committee stressed that, because the Netherlands abandoned its former policy of salvaging the Dutch East India Company's

125. UK UNESCO 2001 Convention Review Group, 2014, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: An Impact Review for the United Kingdom* (Feb. 2014) [hereinafter *U.K. Report*]. Following the U.K. Report, the U.K. National Commission for UNESCO published a policy brief in which it encouraged the U.K. to reevaluate its position on the Convention: United Kingdom National Commission for UNESCO, U.K. National Commission for UNESCO, *UNESCO Convention on the Protection of Underwater Cultural Heritage: Next steps for the UK government*, at 17 (2015) [hereinafter *U.K. Policy Brief*]. See also British Academy & Honor Foundation, *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage - The Case for UK Ratification* (Mar. 2014).

126. Regarding the U.K. committee see *U.K. Report*, *supra* note 125. Regarding the Netherlands see Advisory Committee On Issues of Public International Law, *Advisory Report No. 21 On the UNESCO Convention On the Protection of the Underwater Cultural Heritage - Translation* (Dec. 2011), [http://cms.webbeat.net/ContentSuite/upload/cav/doc/Report_nr_21_-_UNESCO_Convention_on_the_Protection_of_Under_Water_Cultural_Heritage\(2\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/Report_nr_21_-_UNESCO_Convention_on_the_Protection_of_Under_Water_Cultural_Heritage(2).pdf) [hereinafter *Dutch Report*]. Apparently Germany is also considering ratification. See *UK Policy Brief*, *supra* note 125, at 11. See also Gonzalo Rodríguez Prado, *Germany Prepares for the Ratification of the UNESCO Convention on the Protection of the Underwater Cultural Heritage*, UNITED NATIONS NIPPON FOUNDATION FELLOWSHIP ALUMNI (Nov. 13, 2014), <http://www.unfalumni.org/germany-prepares-for-the-ratification-of-the-unesco-convention-on-the-protection-of-the-underwater-cultural-heritage-paris-2nd-november-2001/>.

127. *U.K. Report*, *supra* note 125; *Dutch Report*, *supra* note 126.

128. *U.K. Report*, *supra* note 125, at 8, 35.

129. *Id.* at 8.

130. *Dutch Report*, *supra* note 126, at 10.

131. *U.K. Report*, *supra* note 125, at 9.

shipwrecks, joining the Convention would essentially be a useful measure to protect Dutch sovereignty in those wrecks, and that it would actually be an “instrument for blocking unilateral claims of coastal States (possibly based on national laws).”¹³²

The British committee also maintained that concerns regarding a presumed duty to actively attend to all underwater cultural heritage were overstated.¹³³ This is because the actual numbers of sunken vessels in British waters are considerably lower than was estimated in 2001, and that “it is not the number of wrecks within a State Party’s Territorial Sea that is critical for implementing the 2001 Convention, but the number of activities directed at such sites.”¹³⁴

The discussion above suggests that, overall, concerns over creeping jurisdiction and qualifications to the immunity of sunken state vessels have not materialized. Moreover, post-Convention reality is seemingly even more favorable to the maritime powers’ approach than pre-Convention reality. This, in my view, presents a strong case for the non-ratifying maritime powers to revisit their opposition, especially given what is at stake, as the next part illustrates.

IV.

CURRENT CHALLENGES TO UNDERWATER CULTURAL HERITAGE GOVERNANCE AND HOW THE CONVENTION CAN SOLVE THEM

Recent years have brought about new challenges to the governance of underwater cultural heritage. The three most notable challenges are: (a) claims by former colonies for rights in sunken state vessels flying the colonial power’s flag, (b) a lack of global policy regarding underwater gravesites, and (c) the exploitation of underwater cultural heritage as a means to claim control in disputed waters. This part discusses these challenges and contends that the Convention is well equipped, and arguably the most fitting international law instrument, to meet them successfully.

A. *Former Colonies’ Claims to Rights in Sunken State Vessels Flying the Colonial Power’s Flag*

When it was lost at sea, the *Mercedes* was carrying a cargo of 17 tons of precious metals that originated from the Spanish Viceroyalties in South America, which included what is today Peru and Bolivia. Two hundred years later, when the *Mercedes* was recovered, Peru and Bolivia were two sovereign countries. Peru filed a claim with the District Court for the Middle District of Florida, which decided the *Mercedes* case, and subsequently with the Court of Appeals for the 11th Circuit which heard the appeal. Peru argued that it was an equal sovereign to the *Mercedes*, along with Spain. Thus, Peru claimed, it owned the ship and the

132. *Dutch Report*, *supra* note 126, at 13.

133. *U.K. Report*, *supra* note 125, at 10.

134. *Id.* at 10.

treasure onboard or, at the very least, an equitable portion of it. It further argued that Spain could not claim immunity against an equal sovereign, and that, in particular, it could not assert immunity over property claimed to be owned by another sovereign.¹³⁵ The District and subsequently the Court of Appeals, rejected Peru's claims, holding that the ship was an immune *Spanish* vessel, that the cargo and the shipwreck were interlinked for immunity purposes, and that this interlinkage precluded Peru's attempt to institute an action in U.S. courts against any part of the *Mercedes* or its cargo.¹³⁶ This applied whether or not Peru had a "patrimonial interest in the cargo."¹³⁷

Bolivia supported the Peruvian stance, though it did not join the legal proceedings. Its minister of culture explained, "[w]e have no interest in litigating with Spain, which could very well consider the discovery a shared cultural patrimony."¹³⁸ This attitude, it seems, later resulted in a Memorandum of Understanding in which the Spanish government "expresse[d] its willingness to . . . exhibit some of the goods recovered from the shipwreck *Nuestra Señora de Las Mercedes* in Bolivia, so that local citizens can appreciate [these] heritage objects."¹³⁹

The *San Jose* is another example of tensions arising between a former colony and a post-colonial power over title to a sunken state vessel.¹⁴⁰ After Colombia declared in November 2015 that it found the lost Spanish galleon, Spain was quick to ask for more information. Later, the Spanish foreign minister expressed Spain's stance that the *San Jose* was a Spanish ship, as well as an underwater gravesite for the 570 Spanish soldiers that died when it sank, and, thus, it enjoyed immunity from Colombian interference.¹⁴¹ The Spanish foreign minister noted that Spanish and Colombian domestic legislation, along with international treaties, supported the Spanish stance (even though Colombia is not a party to either UNCLOS or the

135. *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*, Claim to Contents, Artifacts and Cargo by Republic of Peru, Aug. 1, 2008, (Document 120 in *The Mercedes Database*, *supra* note 84).

136. *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1138; *Odyssey Marine Exploration II*, 657 F.3d at 1159.

137. *Odyssey Marine Exploration II*, 657 F.3d at 1182. The U.S. Supreme Court denied writ of certiorari: *Republic of Peru v. The Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011), Cert. Den., Feb. 29, 2012, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-1068.htm>.

138. *Peru and Bolivia Also Want Their Share of the Gold Found in Spanish Galleon*, MERCOPRESS (Dec. 29, 2009), <http://en.mercopress.com/2009/12/28/peru-and-bolivia-also-want-their-share-of-the-gold-found-in-spanish-galleon>.

139. De Cabo de la Vega, *supra* note 106, at 27.

140. Watts & Burgen, *supra* note 4.

141. Michael Martinez & Alba Prifti, *Colombia Says It Found Spanish Galleon; U.S. Firm Claims Half of Treasure*, CNN (Dec. 5, 2015), <http://www.cnn.com/2015/12/05/americas/colombia-spanish-galleon-san-jose-found/>; *Spain Says It Has Rights to Colombian Treasure Ship*, BBC NEWS (Dec. 8, 2015), <http://www.bbc.com/news/world-latin-america-35036121>; *Spain, Colombia Still at Odds Over Shipwreck but Agree on One Thing: To Protect It*, FOX NEWS (Dec. 14, 2015), <http://latino.foxnews.com/latino/politics/2015/12/13/spain-colombia-disagree-on-galleon-wreck-but-will-look-to-protect/> [hereinafter FOX NEWS].

Convention). It should be noted, however, that unlike the Peruvian-Spanish dispute in the *Mercedes* case, which was settled in court, both Spain and Colombia, despite their disagreement over ownership, declared that they would work together toward a diplomatic settlement.¹⁴²

The issue of former colonies' claims to rights in sunken state vessels flying the colonial power's flag was not directly addressed by the parties negotiating the Convention. Some former colonies, it seems, definitely agree to the principle of state immunity but nonetheless dispute its beneficiary. Namely, they contest the *identity* of the state that is immune.

This issue involves profound moral and political dilemmas in a post-colonial era. For example, we might ask ourselves whether Peru's patrimony as the country of origin of the goods and some of the deceased personnel bestows, or should bestow, upon it ownership or joint-ownership in the *Mercedes*.¹⁴³ If we answer this positively, it could create impossible legal complexities, such as, how to divide ownership between Peru, Spain, and Bolivia? While these questions are worthy of academic attention, they are beyond the confines of this article. With regards to our inquiry, I argue that the mechanisms within the Convention render the answers to these questions of moderate practical importance. The Convention's underlying principles emphasize cooperation and adherence to international archaeological norms, and they prohibit commercial exploitation of underwater cultural heritage.¹⁴⁴ This means that it is less important who owns the shipwreck and more important what is done with it. This point is clear when one considers the fate of a sunken state vessel under the Convention's regime.

First, the Convention urges cooperation and preservation of sunken state vessels for the benefit of humankind. This means that, regardless of the identity of the sovereign of the sunken state vessel, the sovereign is required to cooperate with all the state parties that have interests in the vessel.¹⁴⁵ Additionally, preservation for the benefit of humankind means that, in practice, the wreck should be treated in accordance with international archaeological principles. In other words, the identity of the sovereign should not affect the outcomes of the activities directed at, or affecting, the wreck. It seems that a model of this would be the Bolivian-Spanish "Memorandum of Understanding" over the *Mercedes*. Here, despite Bolivia's dissention to Spain's sovereignty, cooperation prevailed and (Spanish-owned) recovered artifacts were to be presented in heritage

142. FOX NEWS, *supra* note 141.

143. Typically, the remains of a shipwreck contain artifacts (and deceased) from many different nations. However, it can be suggested that, regardless, its heritage and cultural value is always international. See FORREST, *supra* note 5, at 288. Moreover, as Appiah notes (not necessarily in the underwater context), "a great deal of what people wish to protect as 'cultural patrimony' was made before the modern systems of nations came into being, by members of societies that no longer exist." Kawame Appiah, *Whose Culture is it Anyway?*, in CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION AND COMMERCE, 213 (James Nafziger & Ann Nicgorski eds., 2009).

144. See *supra* Part I.

145. *Id.*

institutions in Bolivia. This was a result that *in practice* would have probably occurred had Bolivia been awarded the sovereign title.

Second, according to the Convention, *in situ* preservation is always the first option.¹⁴⁶ This may not be relevant for the *Mercedes*, as *Odyssey* already salvaged the ship's cargo at the time of litigation, yet, fundamentally, this means that – in accordance with archaeological principles – excavation would not occur unless the wreck was at risk or there was a research purpose for excavating. Thus, no matter which state is sovereign, the shipwreck would ordinarily stay on the ocean floor.

Third, any commercial exploitation of a sunken state vessel is fundamentally incompatible with the Convention's principles. Title to a sunken state vessel should essentially be viewed as a means to ensure its preservation. This idea is reflected, for example, in the Dutch committee's statement that,

[e]mphasis is now on the public interest in conserving these wrecks or their contents rather than on the economic value of salvaging them. Ownership is currently therefore important not so much in order to exercise title to the [Dutch East India Company's] wrecks as to ensure their protection through international frameworks. . .¹⁴⁷

If both claimants to title are parties to the Convention (or at least agree on adherence to international archaeological standards and abstention from commercial exploitation), ownership of the vessel is indeed not so important in practice.

I do not contest that there might be some political significance to the question of ownership in a sunken state vessel. Yet, the Convention, even if unintentionally, settles many of the tensions around ownership in a post-colonial context with a win-win outcome: former colonial powers can ensure that the immunity principle holds strong, while former colonies can have their patrimony and historical and moral ties to sunken vessels respected.¹⁴⁸

146. The UNESCO Convention, *supra* note 6, art. 2(5).

147. *Dutch Report*, *supra* note 126, at 13 (emphasis added).

148. In this regard Portugal's stand is illuminating. Already at the negotiation stage it declared that it: "does not consider the compliance to [the sovereignty principle] fundamental for the safeguarding of its interests. . . Portugal considers. . . that its best contribution to the protection and valorization of its nautical heritage located in the seabed of all continents is not to claim for itself its historic and cultural heritage – that historically and culturally Portugal shares with the countries that have jurisdiction over those areas – because Portugal's basic claim and affirmation in any relationship with those countries is just based upon the principles and the ethics underlined in the project of this draft Convention. Therefore, Portugal Claims above all, that those remains must be protected, researched, studied and valorized in the exclusive behalf of Science, Culture and Mankind (which by inheritance requires the primordial respect of the interests of the site, whether flag or cultural origin countries)". Alves, *supra* note 71, at 160–61.

B. World War I Centenary and Underwater Gravesites

There are an estimated 10,000 wrecks from World War I, many of which are sunken state vessels.¹⁴⁹ These wrecks are valuable sources of historical information that cannot be found in written accounts of the war.¹⁵⁰ However, their most lasting significance is that they are the final resting place for the thousands of servicepersons who perished on board. Currently, legislation protecting these underwater gravesites is rare and inadequate, and there seems to be no specific international law apparatus that satisfactorily protects them.¹⁵¹ As we mark the centenary of their sinking, the wrecks will legally become underwater cultural heritage. This presents a unique opportunity to use the Convention to preserve these wrecks and adequately respect the last resting place of those who died on

149. Michel L'Hour, *Underwater Cultural Heritage from World War I: A Vast, Neglected and Threatened Heritage*, in *THE UNDERWATER CULTURAL HERITAGE FROM WORLD WAR I*, 97, 99 (Ulrike Guérin, Arturo Rey da Silva & Lucas Simonds eds., 2015).

150. Ulrike Guérin, *World War I Underwater Cultural Heritage and the Protection provided by the UNESCO 2001 Convention*, in *THE UNDERWATER CULTURAL HERITAGE FROM WORLD WAR I*, *supra* note 149, at 117, 120. And not only wars: A shipwreck that was recently found off the Dutch coast is said to shed light on a plot to pawn English crown jewels: Gordon Darroch, *400-Year-Old Dress Found in Shipwreck Sheds Light on Plot to Pawn Crown Jewels*, *GUARDIAN* (Apr. 21, 2016), <https://www.theguardian.com/world/2016/apr/21/400-year-old-dress-found-in-shipwreck-sheds-light-on-plot-to-pawn-crown-jewels>.

151. Craig Forrest, *Towards the Recognition of Maritime War Graves in International Law*, in *THE UNDERWATER CULTURAL HERITAGE FROM WORLD WAR I*, *supra* note 149, at 128–32 [hereinafter *Recognition of War Graves*]; Guérin, *supra* note 149, at 118. It should be noted that the Convention does state in article 2(9) that “States Parties shall ensure that proper respect is given to all human remains located in maritime waters”. The UNESCO Convention, *supra* note 6. It also goes on to mention in rule 5 of the Annex that “Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites”. *Id.* However, this did not result in the establishment of any rules regarding protection of underwater gravesites. Furthermore, while the Convention, along with the increasing attention to underwater cultural heritage, indeed yielded many different international agreements and cooperation, there seem to be no initiatives directed at the protection of underwater gravesites. Forrest mentions only three cases in which foreign wrecks are protected by national legislation: in Chuuk State (one of the four states of the Federated States of Micronesia), in Solomon Islands and in the U.K., Forrest, *supra* note 61, at 80. It should be noted, however, that underwater military graves seemingly enjoy a different status than other underwater gravesites, since they are protected by legislation pertaining military remains. See Vadi, *supra* note 66, at 367–70. See also Michael Williams, *War Graves and Salvage: Murky Waters?* 7 *J. INT'L MAR. L.* 151 (2000)). With regard to war graves on land, the situation seems to be substantially different, and there actually exists an international practice for proper treatment. Governments practice high sensitivity to both, their and the enemy's deceased soldiers' last resting place. Many countries around the world have established special commissions entrusted with the protection and proper upkeep of these gravesites and battlefields (notable examples include The Commonwealth War Graves Commission, The American Battle Monuments Commission, and The German War Graves Commission). Moreover, states seem to take considerable care to protect gravesites – military and civilian – from any unauthorized interference. It is almost unthinkable to interfere with the last resting place of people who perished and were buried on land. The issue of ethical handling of human remains in terrestrial archeological activity is often addressed in domestic law and international practice: There seems to be an international standard as to how to approach gravesites of archeological significance and how to treat the human remains found there. See *THE ROUTLEDGE HANDBOOK OF ARCHAEOLOGICAL HUMAN REMAINS AND LEGISLATION – AN INTERNATIONAL GUIDE TO LAWS AND PRACTICE IN THE EXCAVATION AND TREATMENT OF ARCHAEOLOGICAL HUMAN REMAINS* (Nicholas Marquez-Grant & Linda Fibiger eds., 2011) (detailing the practice and standards in over 60 countries).

board. Furthermore, the Convention can be used as a tool for reconciliation and peaceful cooperation between past enemies.

The lost World War I vessels that lie on the seabed face natural and manmade threats, some of which are unique to them. The first threat is the deterioration of the vessels' metal hulls through corrosion. Unlike older wrecks that were usually made of wood and thus less prone to deterioration, the vessels that sank in World War I were made of metal, which corrodes at a rapid rate.¹⁵² As time passes, these vessels become more and more vulnerable.

The second threat is commercial salvage. Although not unique to World War I wrecks, it does have a unique dimension: Specialist salvage companies specifically target World War I wrecks (for scrap) because the metal that they are made from does not contain radioactive traces that can sometimes be found in metals produced afterwards.¹⁵³ In addition, due to their historical significance, companies and individuals target the wrecks so that they can sell salvaged artifacts as memorabilia.¹⁵⁴

World War I's centenary is an opportunity to change this reality, as these sunken vessels legally become underwater cultural heritage. Member states now have a duty to protect these wrecks against any activity directed at them or indirectly affecting them. This makes current time an extraordinary opportunity to establish a clear international regime for underwater gravesites.

An additional two factors demonstrate why World War I's centenary is a rare juncture and challenge. First, in World War I a considerable number of vessels were lost within a very short period of four years. Unlike older sunken vessels whose location and identity are typically unknown, World War I losses are well documented and their exact location is usually known, as is the identity of those lost on board. We are faced with hundreds of documented underwater gravesites that cannot be dealt with *ad hoc*, but that must to be dealt with as a matter of global policy. Second, World War I is relatively recent. It could be argued that while the moral obligation to respect underwater gravesites is equal regardless of their age, the motivation to act is (presumably) stronger with regard to World War I gravesites as many of the descendants of those lost are still alive and remember their lost loved ones, and the memory of the war is still vivid.

A significant portion of World War I's (and later conflicts) lost vessels are maritime powers' state vessels. Moreover, many of the lost vessels lie in maritime powers' waters. For example, out of the estimated 7,000 ships that were sunk by submarines during World War I, almost 2,000 foundered in French waters.¹⁵⁵ This means that the maritime powers have a specific interest in shaping the global

152. FORREST, *supra* note 5, at 301. The rate of corrosion is rarely less than 0.1. mm per year, often, much faster, as noted by L'Hour. L'Hour, *supra* note 149, at 101. Changing sea temperatures and weather conditions exacerbate the pace of deterioration. FORREST, *supra* note 5, at 127. On the deterioration of wood, see NAS GUIDE, *supra* note 15, at 30–31.

153. *Recognition of War Graves*, *supra* note 151, at 127.

154. See L'Hour, *supra* note 149, at 122.

155. *Id.* at 99.

regime for the treatment of the World Wars' sunken vessels and underwater gravesites. Their participation and leadership is also important given that the management of World War I's underwater gravesites will set a clear benchmark for the treatment of other underwater gravesites. Once a clear international standard for treatment of underwater gravesites is established, it is likely to apply to *all* underwater gravesites regardless of their age. It should be kept in mind that several governments around the world license companies to salvage wrecks' metals for scrap, often without the flag state's consent.¹⁵⁶ While these states might have to stop licensing such salvaging World War I wrecks, as these legally become underwater cultural heritage, the coastal states might continue to do so with the sunken vessels from later conflicts unless an international protection regime is established. It is easier to establish such a regime with World War I wrecks as they are (or will soon become) underwater cultural heritage. Once such a regime is established, it can more readily be applied to later conflicts. Additionally, many of the maritime powers were deeply involved in the World War I and later conflicts. Collaborating in the spirit of the Convention's principle of cooperation can help heal the wounds of the past and utilize past artifacts of war as bridges for reconciliation and peace.

C. Exploitation of Underwater Cultural Heritage to Claim Disputed Territory

Control of maritime territory is important to countries for political, economic and geostrategic reasons. In addition, control of maritime territory often has an important role in the development of a nation's national identity.¹⁵⁷ It is little surprise that maritime territorial disputes often occur. Several recent disputes, however, have encompassed a disturbing development: the use, or – perhaps more fittingly – abuse, of underwater cultural heritage as a means to advance claims to sovereignty over disputed territory. The exploitation of terrestrial cultural heritage as a means of legitimising authority, as supporting evidence to claimed historical ties, or as a justification for the occupation of a certain territory, is not new.¹⁵⁸ Yet the use of underwater cultural heritage in similar ways is seemingly a relatively new phenomenon. Three examples will be discussed: (a) Canada's claims to

156. See L'Hour, *supra* note 149, at 99; *Recognition of War Graves*, *supra* note 151, at 127. A recent example involved the World War II Dutch wrecks of HNLMS De Ruyter, HNLMS Java and HNLMS Kortenaer, which were the last resting place of 2,200 people. The wrecks that were laying on the seabed off the coast of Indonesia have presumably been salvaged for metal. Oliver Holmes, *Mystery as Wrecks of Three Dutch WWII Ships Vanish from Java Seabed*, *GUARDIAN* (Nov. 16, 2016), <https://www.theguardian.com/world/2016/nov/16/three-dutch-second-world-war-shipwrecks-vanish-java-sea-indonesia>.

157. See James Manicom, *Maritime Boundary Disputes in East Asia Lessons for the Arctic*, 12 *INT'L. STUD. PERS.* 330 (2011).

158. See RANDALL H. MCGUIRE, *ARCHAEOLOGY AS POLITICAL ACTION* (2008); Don D. Fowler, *Uses of the past: Archaeology in the Service of the State*, 52 *AM. ANTIQUITY*, 229 (1987); Ian C. Glover, *National and Political Uses of Archaeology in South-East Asia*, 31:89 *INDO. MALAY WORLD* 16 (2003).

sovereignty in the Northwest Passage, (b) China's claims to sovereignty in parts of the South China Sea, and (c) Russia's annexation of Crimea.

i. Canada's Sovereignty Claims in the Northwest Passage

The Northwest passage is a sea route that connects the Atlantic and Pacific Oceans through the Canadian Arctic Archipelago. Canada maintains that the Northwest Passage forms part of its internal waters and therefore it exercises full sovereignty over it. Potential user states, such as the U.S., contend that the Northwest Passage is an international strait.¹⁵⁹ The increased interest in the Northwest Passage in recent years is seemingly a result of the impact of climate change on the Arctic: the distribution and thickness of sea ice is changing, resulting in the possibility of regular ice-free summers.¹⁶⁰ This has led to speculation that the Northwest Passage will become increasingly accessible to transit shipping and resource exploitation. Some even suggest that this is a global strategic game-changer, especially as the Northwest Passage might become an alternative to the Panama Canal.¹⁶¹

In its attempts to prove its sovereignty, Canada has strongly relied upon underwater cultural heritage finds. Ottawa has invested millions of dollars in an expedition aimed at finding the lost vessels *HMS Erebus* and *HMS Terror*, two ships that were lost in Sir John Franklin's expedition to discover the Northwest Passage.¹⁶² In 2014, the (then) Prime Minister Stephen Harper explained that the lost vessels are an important testament to Canadian Arctic sovereignty, saying that "Franklin's ships are an important part of Canadian history given that his expeditions, which took place nearly 200 years ago, *laid the foundations of Canada's Arctic sovereignty*".¹⁶³ Canada's (then) President of the Treasury

159. Gillian Macneil, *The Northwest Passage: Sovereign Seaway or International Strait? A Reassessment of The Legal Status*, 15 DALHOUSIE J. L. & SOC'Y 204, 206 (2006).

160. *Id.* at 208–09; Klaus-John Dodds & Alan Hemmings, *Polar Oceans Sovereignty and the Contestation of Territorial and Resource Rights*, in ROUTLEDGE HANDBOOK OF OCEAN RESOURCES AND MANAGEMENT 576, 578 (Hance D. Smith et al. eds., 2015).

161. Macneil, *supra* note 159, at 207; *see also* ARCTIC MARINE TRANSPORT WORKSHOP (Lawson Brigham & Ben Ellis eds., 2004); Jeff S. Birchall, *Canadian Sovereignty: Climate Change and Politics in the Arctic*, 59 ARCTIC, iii (2006) (noting that voyage from Europe to the Orient through the Passage could save up to 35% of the costs compared to voyage through the Panama Canal or Cape Horn).

162. *HMS Erbus* was found in 2014, but *HMS Terror* has not yet been found. *See* Robin McKie, *Uncovering the secrets of John Franklin's doomed voyage*, GUARDIAN (Nov. 2, 2014), <https://www.theguardian.com/science/2014/nov/02/secrets-of-john-franklins-doomed-voyage-north-west-passage>; Alex Boutilier, *Franklin Ship Found in Arctic was HMS Erebus*, TORONTO STAR (Oct. 1, 2014), https://www.thestar.com/news/canada/2014/10/01/franklin_expedition_ship_identified_as_hms_erebus.html; *The Franklin Expedition*, PARKS CANADA, <http://www.pc.gc.ca/eng/culture/franklin/index.aspx>; *Parks Canada Announces Funding for The Wrecks of HMS Erebus and HMS Terror National Historic Site*, PARKS CANADA (Mar. 17, 2016), <http://news.gc.ca/web/article-en.do?nid=1041269>.

163. *Franklin ship discovery: Stephen Harper's full statement*, CBC NEWS (Sept. 09, 2014), <http://www.cbc.ca/news/politics/franklin-ship-discovery-stephen-harper-s-full-statement-1.2760566>

Board, Tony Clement, made similar assertions, saying “This is part of our history, part of our heritage as a nation and, quite frankly, part of our Arctic sovereignty as well, I don’t think we’re going to find a Russian flag on the Erebus so I think it underscores our point [about Canadian Arctic sovereignty].”¹⁶⁴

ii. *China’s Claims to Sovereignty in Parts of the South China Sea*

On the other side of the world, in the South China Sea, increasing tensions have recently gained global attention. The South China Sea is remarkably rich in natural resources and is economically and geo-politically strategic.¹⁶⁵ China, Vietnam, Malaysia, Brunei, Taiwan, and the Philippines all claim sovereignty to the South China Sea, or parts thereof. Maritime territorial disputes are not rare in East Asia;¹⁶⁶ however, China’s actions in the South China Sea – building artificial islands and sending its military and coastal guard to patrol the disputed waters – caused global political concern and even resulted in the Philippines taking China to court.¹⁶⁷ Yet China employs another strategy in supporting its territorial claims: utilizing underwater cultural heritage.

In recent years China has initiated a comprehensive underwater archaeological survey of the South China Sea, founded the “China Center of Underwater Cultural Heritage Protection”, opened several shipwreck museums, launched its first underwater archaeological vessel (the *Kaogu-01*), and approved plans for constructing the “National Underwater Cultural Heritage South China Sea Base”.¹⁶⁸ These are commendable actions that help promote preservation of underwater cultural heritage, however, these actions are also used as a means to a different end: supporting the Chinese claims to the disputed waters. Liu

(emphasis added).

164. Ameya Charnalia, *New footage offers look into HMS Erebus wreck*, GLOBE AND MAIL (Apr. 16, 2015), <http://www.theglobeandmail.com/news/national/new-footage-offers-look-into-hms-erebus-wreck/article23993670/>. Note that the British and Canadian Governments have signed an agreement according to which the two governments share the archaeological finds (see *supra* note 77). This, of course, is welcome cooperation, nevertheless, it does not diminish the problems associated with the way Canada exploits underwater cultural heritage to claim territory or settle maritime territorial disputes. An additional difficulty relating to the Canadian-British agreement regards the lack of proper consultation with the Inuit people. See Dean Beeby *Inuit press claim for co-ownership of Franklin artifacts*, CBC NEWS (July 24, 2016), <http://www.cbc.ca/news/politics/franklin-hms-erebus-inuit-parks-canada-hms-terror-1.3689503>.

165. With \$5.3 Trillion in total trade passing in these waters annually, and 11 billion barrels of oil and 190 cubic feet of natural gas buried in its ground, it is easy to understand the waters’ potential, and the potential meaning of controlling them. COUNCIL ON FOREIGN RELATIONS, CHINA’S MARITIME DISPUTES, <http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#1/p31345>.

166. There are over 60 disputes concerning maritime boundaries, less than 30 percent have been resolved thus far. Barry Wain, *Latent Danger: Boundary Disputes and Border Issues in Southeast Asia*, SOUTHEAST ASIAN AFF. 38, 52 (2012).

167. On July 12, 2016, the Permanent Court of Arbitration ruled in favor of the Philippines against China. It held that China cannot claim historical rights based on the nine-dash line (a demarcation line on an old map used by Taipei and later also by Beijing to make territorial claims in the South China Sea). *South China Sea (Phil. v. China)*, Case No. 2013-19, (Perm. Ct. Arb. 2016).

168. Erickson & Bond, *supra* note 1.

Shuguang, head of the Chinese government's Center of Underwater Cultural Heritage explained that these actions are indeed aimed at establishing China's sovereignty to the disputed waters, saying that "[w]e want to find more evidence that can prove Chinese people went there and lived there, *historical evidence that can help prove China is the sovereign owner of the South China Sea*".¹⁶⁹ Similarly, in 2015, when the controversies regarding the Parcel Islands in the South China Sea peaked (the islands are also claimed by Taiwan and Vietnam), China sent a team of underwater archaeologists to the islands. Xiaojie Li, the (then) director of the State Administration of Cultural Heritage of China explained in an interview that "underwater archaeology plays an important role in safeguarding national interests, highlighting state sovereignty, and providing historical evidence thereto."¹⁷⁰

iii. *Russia's Annexation of Crimea*

In 2011, Vladimir Putin personally retrieved two ceramic jars from a wreck in the submerged harbor of the city of Phanagoria, an ancient Greek city on the Taman Peninsula, a few miles from Crimea.¹⁷¹ Putin's political allies are claimed to have invested \$3.5 billion in archaeological research in Phanagoria.¹⁷² While the investment of resources in cultural heritage was supposed to be welcome news, many in the archaeological community were alarmed, seemingly because they feared of ulterior political motives given that Russian nationalists view Phanagoria's ancient kings as proto-Russians.¹⁷³ Three years later, Putin justified the annexation of Crimea mainly by highlighting Russia's historical ties to the peninsula. On December 4, 2014, in his Presidential Address to the Russian Federal Assembly, Putin stated that the peninsula is "the spiritual source" of the Russian nation and state, maintaining that Grand Prince Vladimir was baptized in Crimea.¹⁷⁴

169. Page, *supra* note 3 (emphasis added).

170. Guojia Wenwu Juzhang Li Xiaojie: *Nanhai Shuixia Kaogu ke Zhangxian Zhuquan* (国家文物局长励小捷: 南海水下考古可彰显主权) [*Director of the State Administration of Cultural Heritage Xiaojie Li: South China Sea Underwater Archeology Can Demonstrate Sovereignty*], GUANCHAZHE (观察者), (June 7, 2015 9:01 AM), http://www.guancha.cn/local/2015_06_07_322442.shtml.

171. Tom Parfitt, *Vladimir Putin's Greek Urns Claim Earns Ridicule*, GUARDIAN (Aug. 12, 2011), <http://www.theguardian.com/world/2011/aug/12/vladimir-putin-greek-urns-ridicule>; *see also Prime Minister Vladimir Putin Visits the Excavation Site of the Ancient Greek City of Phanagoria on Russia's Taman Peninsula*, GOV'T OF THE RUSSIAN FED'N (Aug. 10, 2011), <http://archive.government.ru/eng/docs/16171/>.

172. Peter Campbell, *Could Shipwrecks Lead the World to War?*, N.Y. TIMES (Dec. 18, 2015), http://www.nytimes.com/2015/12/19/opinion/could-shipwrecks-lead-the-world-to-war.html?_r=0.

173. *Id.* Indeed, it has been suggested that the Russian contingency plans for the annexation of Crimea have likely been prepared since, at least, the 1990s. *See* Anton Bebler, *Crimea and the Russian-Ukrainian Conflict*, 15 ROM. J. EUR. AFF. 35, 39 (2015).

174. Bebler, *supra* note 172, at 45; *see also* Presidential Address to the Federal Assembly, The Kremlin (Dec. 4, 2014), <http://en.kremlin.ru/events/president/news/47173>.

Soon after the annexation, the Russian authorities provided UNESCO with “Information on the Situation in the Republic of Crimea (Russian Federation) in the Fields of UNESCO Competence, Received from Russian Competent Authorities.”¹⁷⁵ Despite Russia not being a part of the Convention, the document provides a comprehensive account on actions concerning underwater cultural heritage carried out by the Russians in Crimea.¹⁷⁶ This document exemplifies how Russia uses underwater cultural heritage as a means to advance its annexation of Crimea.

The issue of the utilization of underwater cultural heritage as a means to advance national claims to sovereignty over disputed territory introduces a real challenge: on the one hand, allocating resources to underwater cultural heritage is timely and vital. The historical, cultural, and educational significance of discoveries like the *HMS Erebus* or the Chinese merchant ships in the South China Sea is self-evident, and governments’ involvement also provides added protection to precious cultural heritage. On the other hand, exploitation of underwater cultural heritage for political means goes against the spirit of positive cooperation amongst nations; harms the public’s appreciation of, and the ability to enjoy, the educational and cultural benefits from this human heritage; and turns cultural artifacts into artifacts of conflict. The Convention, however, might prove helpful in preventing such undesirable outcomes.

First, and foremost, the Convention clearly states that “[n]o act or activity undertaken on the basis of this Convention shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction.”¹⁷⁷ This provision is unequivocal, and is in stark contrast to the attempts to prove sovereignty by using underwater “historical evidence.”¹⁷⁸

Second, the Convention stipulates that any state party may declare its interest in being consulted on how to ensure the effective protection of underwater cultural heritage that is found in the Exclusive Economic Zone, Continental Shelf, or the Area.¹⁷⁹ Although the provisions provide that such a declaration shall be based on a verifiable link to the underwater cultural heritage in question, it seems that such links will not be hard to establish as these can be any “cultural, historical or archaeological link[s].”¹⁸⁰ For example, the shipwrecks found in the South China Sea have historical and cultural significance to many of the nations that share, and dispute the sovereignty of, the South China Sea. Similar links exist in Crimea,

175. The Delegation of the Russian Federation to UNESCO, Information on the Situation in the Republic of Crimea (Russian Federation) in the Fields of UNESCO Competence, Statement Submitted by the Director General to UNESCO, U.N. Doc. 195 EX/5.INF.5 (Oct. 21, 2014), *available at* <http://unesdoc.unesco.org/images/0023/002303/230360E.pdf> .

176. *Id.*

177. The UNESCO Convention, *supra* note 6, art. 2(11).

178. It is interesting to note that neither Canada nor China or Russia are members to the Convention.

179. The UNESCO Convention, *supra* note 6, art. 9(5) (regarding the Exclusive Economic Zone and Continental Shelf) and art. 11(4) (regarding the Area).

180. *Id.* art. 9(5).

where the wrecks are significant to Russia, but also to Greece, Italy, and Ukraine. This means that the coordinating party (China and Russia in the above examples) has a duty to consult and coordinate with the other interested states about the measures taken with regards to the underwater cultural heritage. Consultations and coordination between interested parties, founded on the acknowledgment that other states have links and interests in the underwater cultural heritage, diminishes states' ability to base sovereignty claims on underwater cultural heritage.

Third, one of the Convention's underlying principles, articulated in article 19, is that of cooperation and collaboration between states.¹⁸¹ Any act of abuse of underwater cultural heritage as a means to settle territorial disputes in a unilateral and non-cooperative manner is incompatible with the Convention.

Fourth, the Convention states that nothing therein "shall prejudice the rights, jurisdiction and duties of states under international law, including [UNCLOS]."¹⁸² UNCLOS provides clear rules as to the definition of maritime boundaries which are based on law, not archaeology.¹⁸³ The finding of underwater cultural heritage can of course prove economic, historic, and cultural ties, but it cannot establish or prove sovereignty under international law including under UNCLOS.

V.

GAPS, DRAWBACKS AND POSSIBLE SOLUTIONS

The Convention, as the previous discussion suggests, is adequately equipped to cope successfully with many of the current challenges that underwater cultural heritage governance faces. Nonetheless, the Convention is far from being a perfect apparatus. There still remain issues that the Convention is seemingly ill-equipped to properly address. This part discusses several such matters. I will propose some initial thoughts on how these might be overcome, and suggest that despite its flaws the Convention's advantages outweigh its possible drawbacks.

Sunken ships can sometimes pose risks to the ships floating above them. Many submerged warships, especially those from conflicts in the 20th century, carry aging ammunition which can detonate, thus proving a potential hazard to ports, other vessels at sea, divers, and the marine environment.¹⁸⁴ A notable example is the *SS Richard Montgomery*, which was wrecked off Sheerness, England in 1944 with around 1,400 tonnes of explosives on board—explosives that still pose an actual threat to the port in which it sunk.¹⁸⁵ Another hazard that

181. *Id.* art. 19.

182. *Id.* art. 3.

183. *See supra* Part I.

184. *See* Forrest, *supra* note 61.

185. On the U.K.'s actions regarding handling the ship, which is classified as a dangerous wreck under the Protection of Wrecks Act 1973 (U.K.) see MAR. & COASTGUARD AGENCY, REPORT ON THE WRECK OF THE SS RICHARD MONTGOMERY (2000), http://webarchive.nationalarchives.gov.uk/20121107103953/http://www.dft.gov.uk/mca/2000_survey_report_montgomery.pdf; *see also* Sam Webb, *WWII shipwreck packed bombs that could destroy a Kent port pictured using high-tech sonar*, DAILY MIRROR (Jan. 3, 2016),

several wrecks pose regards navigation. Ships that foundered close to the sea surface restrict the available sea room, thus not leaving enough clearance for modern ships to navigate freely.¹⁸⁶ In 2007-2008, for example, the British authorities had to relocate a sunken German submarine from World War I that was deemed a danger to ships sailing in the Dover Straits.¹⁸⁷ Third, some lost ships damage marine and coastal environments, usually due to the substances that they were carrying when they foundered.¹⁸⁸ The Convention does not provide clear instructions as to how to deal with underwater cultural heritage that is potentially hazardous. This can result in legal and political complications: for example, does the removal of such a sunken state vessel harm the flag state's sovereign immunity? Who is responsible for the removal—the flag state or the coastal state? What happens when archaeological principles and in particular *in situ* preservation conflict with the removal strategy? And so on. The lack of clear rules may also lead to an inconsistent international practice, with different countries practicing different schemes.

Another problem touches on the definitions in the Convention. In order to avoid ownership-related problems, the Convention provisions that submerged traces of human existence become underwater cultural heritage only after 100 years have passed since their sinking.¹⁸⁹ This means that vessels that were submerged less than a hundred years ago—such as World War II vessels—are not legally protected by the Convention, despite the fact that many such vessels are of great cultural heritage significance. The lack of legal protection exposes these vessels to the risk of being looted and disrupted. This is not just a theoretical concern: some governments permit industrial salvagers to recover lost vessels from both World Wars and use their metal for scrap.¹⁹⁰

Additionally, the Convention defines underwater cultural heritage as “all traces of human existence,” explicating that this translates to *tangible* objects such as sites, structures, buildings, and vessels.¹⁹¹ This definition takes what can be

<http://www.mirror.co.uk/news/uk-news/wwii-shipwreck-packed-bombs-could-7110626>.

186. Forrest, *supra* note 61.

187. *Dover Strait U-boat to be moved*, BBC NEWS (Aug. 19, 2007, 11:30 AM), http://news.bbc.co.uk/2/hi/uk_news/england/kent/6953664.stm. For a general discussion on sunken warships that potentially pose threats see Forrest, *supra* note 61 (noting the Convention's failure to adequately address the issue of potentially dangerous underwater cultural heritage).

188. Forrest, *supra* note 61, at 80–81.

189. Panayotopoulos, *supra* note 49, at 29, 33.

190. See *supra* Part IV. Relatedly, several provisions in the Convention carry some ‘constructive’ ambiguities. Commentators have suggested that the Convention *deliberately* includes ‘constructive ambiguities’ that can be interpreted in different ways, so that as many countries as possible will consider joining the Convention. See Alves, *supra* note 70, at 49; Dromgoole, *supra* note 8, at 23, 27. This is not unique to the Convention. Constructive ambiguities can be found in many international arrangements where in order to reach a wide as possible consensus some provisions are intentionally phrased vaguely so that each party can interpret its obligations in a manner it deems favorable. In the upcoming years we are likely to witness some of the constructive ambiguities in the Convention clarified. It can be argued that countries that do not join the Convention will have limited ability to impact the interpretation of the ‘constructive ambiguities’ in a manner they deem favorable.

191. The UNESCO Convention, *supra* note 6, art. 1.

described as a Western approach to cultural heritage.¹⁹² The Convention does not cover intangible aquatic cultural heritage, such as sacred lakes and rivers. Intangible aquatic cultural heritage is sometimes at the very heart of certain communities, religious groups, and indigenous peoples' heritage.¹⁹³ This means that not only does the Convention not provide legal protection to this aquatic cultural heritage, but that it possibly has adverse effects as it alienates certain religious groups and indigenous peoples and precludes non-Western concepts of culture and heritage.

It can also be argued that the Convention is ill equipped to deal with possible future threats to underwater cultural heritage. One such example is the potential impacts of climate change on underwater and terrestrial cultural heritage. Due to change in sea levels, some terrestrial cultural heritage sites will possibly become submerged.¹⁹⁴ Estimates have placed this number at over 130 sites considered as cultural and historical treasures by UNESCO, by the year 2100.¹⁹⁵ Conversely,

192. A "Western" approach to cultural heritage is typically understood as emphasizing tangible aspects of cultural heritage rather than intangible aspects. Namely, "heritage" is linked to a physical consistency. See Lyndel V. Prott & Patrick J. O'Keefe, 'Cultural Heritage' or 'Cultural Property'?, 1 INT'L. J. CULTURAL. PROP. 307, 313 (1992) (holding, *inter alia*, that "[w]hile cultural heritage is seen to merit protection in virtually every community, different relationships to land or objects of ritual in certain societies may be difficult for Western lawyers to understand and accept although they represent concepts of importance in cultural heritage law."); Marilena Vecco, *A Definition of Cultural Heritage: From the Tangible to the Intangible*, 11 J. CULTURAL HERITAGE, 321 (2010).

193. Three quick examples: The *Zuni Salt Lake* in New-Mexico is sacred to the Native American Zuni tribe. It is home to Ma'lokyattsik'i, the Salt Mother (in the early 2000s, the lake barely escaped destruction due to the suggested construction of a coal mine). See TEST. OF MALCOLM B. BOWEKATY, GOVERNOR OF THE ZUNI TRIBE, THE UNITED STATE SENATE, COMMITTEE ON INDIAN AFFAIRS, (July, 17 2002), [available at http://web.archive.org/web/20040718185853/www.sacredland.org/Bowekaty.pdf](http://web.archive.org/web/20040718185853/www.sacredland.org/Bowekaty.pdf). See also *Indigenous Religious Traditions*, COLORADO COLLEGE <http://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/zuni-salt-lake/>. *Lhamo La-tso* (or *Lha Mo Bla Mtsho*), a sacred lake in Tibet, is home to Palden Lhamo (or Dpal Idan Lha Mo), the guardian spirit that protects the lineage of the Dalai Lamas by providing visions that help discover the Dalai Lamas' reincarnations. See ROBERT E. BUSWELL & DONALD S. LOPEZ, THE PRINCETON DICTIONARY OF BUDDHISM 472 (2014). *Gosaikunda* is a sacred lake in Nepal. Hindu mythology perceives it as the abode of Hindu Deities Lord Shiva and Goddess Gauri. Its holy waters are considered of particular significance during the Gangadashahara and the 'Janai Purnima' (a sacred thread festival). See BIDYA BANMALI PRADHAN ET AL., NEPAL BIODIVERSITY RESOURCE BOOK: PROTECTED AREAS, RAMSAR SITES, AND WORLD HERITAGE SITES 85–86 (2007). An important recent development is the granting of legal personhood status to the Whanganui River in New-Zealand. The river has a strong spiritual meaning to the indigenous Whanganui Iwi people – Kevin Lui, *New Zealand's Whanganui River Has Been Granted the Same Legal Rights as a Person*, TIME (Mar. 15, 2017), <http://time.com/4703251/new-zealand-whanganui-river-wanganui-rights/>; Daniel Melfi, *New Zealand grants Whanganui River legal personhood, settles case dating back to 1870s*, NATIONAL POST (Mar. 15, 2017), <http://news.nationalpost.com/news/world/new-zealand-grants-whanganui-river-legal-personhood-settles-case-dating-back-to-1870s>.

194. *Mapping Choices, Carbon, Climate, and Rising Seas, Our Global Legacy*, CLIMATE CENTRAL (Nov. 2015), <http://sealevel.climatecentral.org/uploads/research/Global-Mapping-Choices-Report.pdf>.

195. Ben Marzeion & Anders Levermann, *Loss of Cultural World Heritage and Currently Inhabited Places to Sea-Level Rise*, 9 ENVTL. RES. LETTERS 7 (2014).

some submerged cultural heritage sites will surface and eventually dry-out.¹⁹⁶ Furthermore, changes in temperature and the chemical composition of the water in some of the world's seas as well as changes in ocean currents are projected.¹⁹⁷ This means that the marine environment that now safeguards the underwater cultural heritage might become less protective, and might even have a negative impact on the cultural heritage. These predictions question whether *in situ* preservation is indeed the best method of preservation.

The question of effective enforcement and compliance is yet another issue that requires more work. Article 17 of the Convention discusses 'sanctions'; however, these sanctions are directed at inner-jurisdiction enforcement.¹⁹⁸ Namely, the state parties are required to implement laws against actors who violate the Convention's measures such as illegal salvagers, unauthorized treasure-hunters, etc. within their jurisdictions. But the Convention does not deal with violations carried out by states themselves.¹⁹⁹ Article 25 merely lays out a mechanism aimed at the "peaceful settlement of disputes".²⁰⁰ The lack of enforcement mechanisms is not unique to the Convention and is apparently commonplace in international cultural heritage frameworks.²⁰¹ It can be argued that the lack of a meaningful enforcement or compliance mechanism renders the Convention less effective.

196. Cathy Daly, *Climate Change and the Conservation of Archaeological Sites: A Review of Impacts Theory*, 13 CONSERVATION & MGMT. ARCHAEOLOGICAL SITES 293, 299 (2011); Elena Perez-Alvaro, *Climate Change and Underwater Cultural Heritage: Impacts and Challenges*, 21 J. CULTURAL HERITAGE 842 (2016). A famous example is "Jesus' Boat", a 2,000-year-old boat found in the Sea of Galilee in 1986 after several years of drought which saw the lake's water levels at an all-time low, thus exposing this rare boat. After extensive preservation by the Israeli Antiques Authority, it is now on display in a museum. See SHELLY WACHSMANN, *THE SEA OF GALILEE BOAT: A 2000-YEAR-OLD DISCOVERY FROM THE SEA OF LEGENDS* (1995); Orna Cohen, *Conservation of the Ancient Boat from the Sea of Galilee*, 50 ATIQOT 219 (2005).

197. Daly, *supra* note 196, at 299; Perez-Alvaro, *supra* note 196; Mark Dunkley, *The Potential Effects of Oceanic Climate Change on the Management and Curation of Underwater Archaeological Remains*, 89 ARCHAEOLOGIST 60, 61–62 (2013).

198. The UNESCO Convention, *supra* note 6, art. 17.

199. Article 17 of the Convention (*supra* note 6) states as follows:

Each State Party shall impose sanctions for violations of measures it has taken to implement this Convention.

Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activities.

States Parties shall cooperate to ensure enforcement of sanctions imposed under this Article. The UNESCO Convention, *supra* note 6, art. 17.

200. The UNESCO Convention, *supra* note 6, art. 25. During the negotiations, some countries suggested that disputes relating to the Convention and its interpretation be brought to the International Court of Justice. This was rejected by other states (apparently due to the interfaces between UNCLOS and the Convention) – Chechi, *supra* note 101, at 112.

201. Francesco Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW, *supra* note 74, at 17.

It can also be argued that while it is compelling to protect underwater cultural heritage, there are other options that states can consider in lieu of joining the Convention. For example, states can enter bilateral or multilateral agreements which can be more conducive to the specific countries' interests.

All the above concerns require serious attention. Due to the confines of this paper, I will not lay out a full account of possible ways to address them, but will rather suggest some initial thoughts as to possible solutions. With regard to hazardous wrecks, the Nairobi International Convention on the Removal of Wrecks ("Nairobi Convention") can provide some useful guidance:²⁰² In brief, the Nairobi Convention provides rules as to actions that can be taken by a state that is negatively affected by wrecks of a ship registered in another country. These rules establish the scope of the measures to be taken, and the criteria for the determination of hazard, liability, etc. Despite the Convention and the Nairobi Convention being concerned with two different issues (cultural heritage as opposed to the removal of wrecks), the latter can still provide the former with helpful guidance when the issue of the removal of culturally-significant wrecks arises.²⁰³

As for underwater artifacts that have been submerged for less than 100 years, a possible partial solution arises from the principle of state immunity. Sunken state vessels enjoy immunity despite being submerged less than 100 years.²⁰⁴ While this is not a solution with regard to privately owned vessels – the *Titanic* being a notable example thereof – it nevertheless means that at least for state-owned vessels, there exists protection from salvage and interference.²⁰⁵ Additionally, if a global regime for the protection of underwater graves is established, a part of the privately owned vessels might enjoy some protective measures as underwater gravesites.

It is rather hard to work around the tangibility criterion in the definition of underwater cultural heritage; however, other existing international law frameworks might be able to provide some protection for intangible aquatic cultural heritage. One such framework is the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage ('the Intangible Heritage Convention').²⁰⁶ The Intangible Heritage Convention defines cultural heritage as "practices, representations, expressions, knowledge, skills – as well as the

202. Convention on the High Seas, *supra* note 75.

203. See Sarah Dromgoole & Craig Forrest, *The Nairobi Wreck Removal Convention 2007 and Hazardous Historic Shipwrecks*, LLOYD'S MAR. & COM. L. Q. 92 (2011) (suggesting that the Nairobi Convention might be used to guide countries in the removal of wrecks and protection of underwater cultural heritage); see also Jhonnie M. Kern, *Wreck Removal and the Nairobi Convention – A Movement Toward a Unified Framework?*, 3 FRONTIERS IN MAR. SCI. 1 (2016) (outlining the Nairobi Convention's features and holding that, despite ambiguities, it may prove beneficial to a unified wreck removal regime).

204. See *supra* Part II.

205. The *Titanic* constitutes a *sui generis* case in that it has been subject to an *ad hoc* international agreement. Agreement Concerning the Shipwrecked Vessel RMS *Titanic*, *supra* note 100.

206. Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 3.

instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”.²⁰⁷ This naturally includes intangible aquatic cultural heritage.²⁰⁸ It should be noted, however, that the Intangible Heritage Convention’s provisions include only a vague ‘best efforts’ requirement that does not impose strong obligations on the member states.²⁰⁹ Nonetheless, it can be a first step towards a more inclusive definition of underwater cultural heritage.

With regard to potential impacts of climate change on underwater cultural property, it seems that the overarching principle of preservation in accordance with archaeological standards can be a solution. Archaeological standards should be interpreted as meaning to provide stable and lasting preservation. So, for example, if environmental scientists and archeologists identify possible perils to a particular underwater cultural artifact or artifacts in a certain marine area, then archaeological standards should dictate other methods of preservation rather than *in situ*.

The lack of an effective enforcement mechanism is not unique to the Convention and not uncommon in international law apparatuses.²¹⁰ As Brunnée and Toope suggest, compliance in international law is often the consequence of dynamics of state identities such as interactions, persuasion, norms, policy, and standards.²¹¹ Given the growing consensus around the Convention and its substantive provisions, it seems that its coercive power and ability to advance compliance is substantial; and with the Convention’s growing momentum, this power and ability are becoming even stronger. Additionally, the strong assertion of immunity of sunken state vessels by the flag states provides that violations thereof will probably be scarce and that matters will usually be settled amicably.²¹²

207. *Id.* art. 2.

208. *But cf.* Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a critical appraisal*, 56(1) MUSEUM INT’L 66, 70 (2004) (claiming that “the [Intangible Heritage] Convention, in effect, operationally makes the intangible tangible, [and so] the conceptual distinction and separation of the two domains is problematic”).

209. Article 11(a) of the Convention for the Safeguarding of the Intangible Cultural Heritage states: “Each State Party shall take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory”. Convention for the Safeguarding of the Intangible Cultural Heritage, *supra* note 206. This is indeed a vague ‘best efforts’ requirement. While the Convention too has some vague language, many of its provisions create stronger obligations. *See also* Paul Kuruk, *Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage* 1 MACQUARIE J. INT’L & COMP. ENV. L. 111, 128–29 (2004) (claiming that it remains unclear that the Intangible Heritage Convention creates a mechanism by which indigenous peoples can effectively influence government policy, and that the exhortatory terms in that convention substantially weaken the force of the duties that are imposed on member states).

210. Jutta Brunnée & Stephen Toope, *Persuasion and Enforcement: Explaining Compliance with International Law*, 13 FIN. Y.B. INT’L L. 273 (2002).

211. *Id.*

212. Chechi argues that due to the Convention’s subject matter and the way it is structured, we are not likely to see many cases of violation or the need to revert to courts (because of diplomacy,

Finally, it is true that the Convention is not the only way by which underwater cultural heritage can be protected. However, it seems that with the growing consensus around the Convention as *the* tool for underwater cultural heritage governance, the ability of non-member states to impact global underwater cultural heritage governance through alternative agreements is diminished. Moreover, as noted by the Dutch committee, if a non-member state wants another (member or non-member) state to protect its sunken state vessels from activities carried out against them, it needs to negotiate with the coastal state, or appeal to the interfering salvage company's flag state, or (when certain international law rules permit) act itself against the interfering vessel.²¹³ Instead of such a cumbersome solution (usually carried out *after* underwater cultural heritage is already found and interrupted, rather than before), a state can join the Convention and automatically have its sunken state vessels protected by all the other member states, many of which are coastal states.

The Convention is not perfect. Nonetheless, even with its gaps and drawbacks, it seems that its benefits outweigh its disadvantages. The main apparent gain from not joining is assuring that coastal states do not *possibly* acquire *limited* jurisdiction over underwater cultural heritage in the Exclusive Economic Zone and the Continental Shelf.²¹⁴ Not joining the Convention means, *inter alia*, a limited ability to impact international underwater cultural heritage governance and limited aptitude to demand action (or inaction) from other countries. To that, the advantages of joining should be added: The Convention can actually be seen as a useful tool for reinstating sovereignty over sunken state vessels and adhering to international law with regard to marine jurisdiction; it can be used as a constructive instrument to reconcile post-colonies' claims with post-colonial powers' interests; and it can be a significant apparatus for establishing an international regime for the protection and preservation of underwater gravesites and preventing abuse of underwater cultural heritage. In short, a cost-benefit analysis supports the claim that the Convention's advantages outweigh its shortcomings.

CONCLUSION

Since its institution, the Convention has accomplished some notable achievements: it helped raise global awareness of the importance of protecting underwater cultural heritage, inspired international cooperation towards that end, and developed an ever-growing international consensus around its principles. Concerns expressed by notable maritime powers when it was negotiated – that it might dilute certain international law principles, particularly, that it might compromise sovereign immunity of sunken state vessels and disrupt the delicate

respect amongst sovereigns, the general adherence to archaeological standards, etc.). Chechi, *supra* note 101, at 128, 186–92.

213. *Dutch Report*, *supra* note 126, at 14.

214. Coastal states, as noted, already enjoy the rights to the natural resources in these waters.

balance achieved in UNCLOS concerning coastal states' jurisdiction in international waters – did not materialize, as this paper suggests.

Despite the Convention's many achievements, the protection and governance of underwater cultural heritage is still facing troubled waters. Unauthorized salvage and looting remain an acute threat to this richness of humankind legacy. Alongside these, new challenges arise. These include recognizing contradicting interests of former colonies and former colonial powers in underwater cultural heritage, devising a global policy for the protection of underwater gravesites, and preventing the exploitation of underwater cultural heritage as a means for asserting territorial claims. The Convention—the international framework aimed at the protection and governance of underwater cultural heritage—can be a bridge over these troubled waters. As this paper discusses, the Convention's provisions regarding *in-situ* preservation and international cooperation can mitigate former colonies and former colonial powers' interests, providing a win-win situation in which both international principles of immunity and patrimonial ties are respected. The Convention can fill the void in international law concerning underwater graves by utilizing the historical opportunity in which World War I's sunken war vessels legally become underwater cultural heritage to create an international regime for the protection of underwater graves. The provisions prohibiting the use of the Convention as grounds to assert national sovereignty claims, along with the cooperation and coordination mechanisms, and the provisions acknowledging possible joint links to underwater cultural heritage set in the Convention, illustrate that the Convention can be an important tool in the prevention of exploiting underwater cultural heritage as a means to assert territorial claims. This, the Convention does while upholding, and perhaps even strengthening, international law of marine jurisdiction and sovereign immunity.

The Convention still contains some gaps and drawbacks that need to be settled: It lacks a clear mechanism for dealing with hazardous underwater cultural heritage; its definition of underwater cultural heritage excludes recently submerged artifacts (even if they carry significant cultural value), and excludes intangible aquatic cultural heritage (thus failing to recognize non-Western perceptions of heritage); it lacks practical enforcement mechanisms; and it is perhaps not well equipped to tackle possible threats related to climate change. Nonetheless, the Convention's advantages outweigh its disadvantages.

Joining the Convention is, therefore, the way forward. Strengthening the Convention is paramount not merely because it protects precious cultural heritage, but also because its principles have the power to mitigate current challenges and construct wise choices for the future.