PART XVI
GENERAL PROVISIONS

Article 300
Good faith and abuse of rights

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

Bibliography: *Bin Cheng*, General Principles of Law as Applied by International Courts and Tribunals (1953); *Georg Dahm/Jost Delbrück/Rüdiger Wolfrum*, Völkerrecht, vol. I/3 (2nd edn. 2002); René-Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. I (1991); *Guy S. Goodwin-Gill*, State Responsibility and the 'Good Faith' Obligation in International Law, in: Malgosia Fitzmaurice/Danesh Sarooshi (eds.), Issues of State Responsibility before International Judicial Institutions (2004), 75–103; *Tariq Hassan*, Good Faith in Treaty Formation, VJIL 21 (1981), 443–481; *Alexandre Kiss*, Abuse of Rights, MPEPIL, available at http://www.mpepil.com; *Robert Kolb*, Principles as Sources of International Law, NILR 53 (2006), 1–36; *Markus Kotzur*, Good Faith, MPEPIL, available at http://www.mpepil.com; Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. V (1989); *John F. O'Connor*, Good Faith in International Law (1991); *Georg Schwarzenberger/Edward D. Brown*, A Manual of International Law (6th edn. 1976); *Michel Virally*, Review Essay: Good Faith in International Law, AJIL 77 (1983), 130–134; *Elisabeth Zoller*, La bonne foi en droit international public (1977)

Cases: ICJ, *Nuclear Tests* (Australia *v.* France), Merits, Judgment of 20 December 1974, ICJ Reports (1974), 253; ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon *v.* Nigeria), Preliminary Objections, Judgment of 11 June 1998, ICJ Reports (1998), 275; ICJ, *Southwest Africa Cases* (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Second Phase, Judgement of 18 July 1966, ICJ Reports (1966), 6; ITLOS, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile *v.* European Community), Order of 20 December 2000, ITLOS Reports (2000), 148; PCA, *Southern Bluefin Tuna Case* (Australia and New Zealand *v.* Japan), Jurisdiction and Admissibility, Award of 4 August 2000, RIAA XXIII, 1; WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* Report of the Appellate Body of 12 October 1998, WT/DS58/AB/R, available at: http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm

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I. Purpose and Function

Art. 300 of the Convention represents a specific allusion to the principle of good faith, a fundamental general principle of international law that not only applies to the rule of treaties *pacta sunt servanda* but which applies generally throughout international law.[1] Broadly speaking, in any Convention where good faith is referred to in the manner in which Art. 300 employs this principle, notwithstanding the often considerable divergences in the **1**

[1] *Bin Cheng*, General Principles of Law as Applied by International Courts and Tribunals (1953), 105; *Robert Kolb*, Principles as Sources of International Law, NILR 53 (2006), 1, 17; *John F. O'Connor*, Good Faith in International Law (1991), 119–120.

intended application of the principle, it constitutes a legally binding rule of conduct, which, if breached, can incur State responsibility.[2] Given that the UNCLOS represents an 'enormous compendium of the most diverging rights and duties granted to States with fundamentally opposed interests,'[3] which attempts to regulate as much as possible potential conflicts which may arise in the assertion of these interests by creating positive legal duties, the necessity of having a general clause with the function of balancing competing interests in the application of the terms of the Convention is evident. In particular, the large number of discretionary rights afforded to States in the Convention seems to suggest the necessity of attaching great importance to the principle of good faith as being a potential instrument of control over excessive use of such discretionary powers:

> 'Good faith in the exercise of the discretionary power inherent in a right seems thus to imply a genuine disposition on the part of the owner of the right to use the discretion in a reasonable, honest and sincere manner in conformity with the spirit and purpose, as well as the letter, of the law.'[4]

2 The important constitutional function of Art. 300 becomes apparent when one considers that the UNCLOS contains a compulsory dispute settlement scheme.[5] Indeed, Art. 300 has its genesis within the negotiations on, *inter alia,* the settlement of disputes.[6] Notwithstanding that the treaty-related aspects of good faith be taken into account, Art. 300 provides an opportunity for equitable solutions to be found by weighing up the conflicting interests of the respective parties on matters for which no specific rule was created at the negotiating conferences.

II. Historical Background

3 The 1958 Convention on the High Seas contained a provision (Art. 2) requiring that the freedoms of the high seas are to be exercised with reasonable regard to the interests of other States. From this early, implicit reference to considerations of good faith, certain negotiating parties to the UNCLOS sought to include an explicit provision along the lines of Art. 300. In the course of the negotiations, the elements of Art. 300 were touched upon during the discussions held in Negotiating Group Five, a group which was charged with the task of examining '[t]he question of the settlement of disputes relating to the exercise of the sovereign rights of the coastal States in the exclusive economic zone.'[7] This group was the scene of considerable discussion, and often disagreement, between coastal and land-locked or geographically-disadvantaged States, with the issue of recourse to compulsory adjudication where a coastal State is alleged to have abused its rights being the main bone of contention. It became clear during the course of the discussions that the coastal States would not accept compulsory adjudication but that they would, as a compromise, agree to the inclusion of a general provision in the Convention on the notion of the abuse of rights.[8] This initial compromise draft article contained no reference to good faith *stricto sensu*, concentrating, rather, as it did on the abuse of rights *simpliciter*.[9] Prior to this, however, a proposal for a draft Art. 1 had been made by Mexico which contained a reference, albeit not explicit, to the

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[2] *Georg Dahm/Jost Delbrück/Rüdiger Wolfrum*, Völkerrecht, vol. I/3 (2nd edn. 2002), 845; *Elisabeth Zoller*, La bonne foi en droit international public (1977), paras. 264, 245 *et seq*.

[3] *Kolb* (note 1), 36.

[4] *Cheng* (note 1), 135.

[5] See Part XV, Section 2.

[6] Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. V (1989), 150 (MN 300.1) and 103 (MN 297.15).

[7] UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Resumed Seventh Session contained in a Single Document both for the Purposes of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/1 (1982), OR X, 13, 117 (Results of the Work of the Negotiating Group on Item (5) of Document A/CONF.62/62).

[8] *Ibid.*, 119; *cf.* also Nordquist/Rosenne/Sohn (note 6), 151.

[9] 'All States shall exercise the rights and jurisdictions recognized in this Convention in such a manner as not to harm unnecessarily or arbitrarily the rights of other States or the interests of the international community'.

concept of abuse of rights and which also made reference to the discharging of obligations assumed under the Convention in conformity with good faith. Whereas the formulation of Art. 300 agreed upon contains a requirement to fulfil obligations assumed under the Convention in good faith, the Mexican draft proposal seemed to take a somewhat broader view of the applicability of good faith as it required parties to 'discharge in good faith the obligations entered into in conformity with the present Convention.'[10]

Despite some concerns as to the necessity of including such general provisions in the Convention at all[11] and some problems with the interpretations of the Mexican draft proposal in certain languages,[12] the inclusion of the provision seems to have become widely accepted as evinced by the number of informal proposals put forward.[13] In the Ninth Session in 1980, the Mexican proposal, as well as a proposal from the United States of America, was referred to the informal plenary.[14] The provision which was to become Art. 300 (as well as Arts. 301 and 302) was agreed upon as part of a package of general provisions by consensus in the informal plenary Conference. It was stated that the acceptance of these articles was based on the understanding that the concept of abuse of rights was to be interpreted relative to the rights of other States. Thus the *travaux preparatoires* would seem to lean towards the understanding of an abuse of rights as an abuse of a State's own rights to the disadvantage of another State or States.[15] 4

III. Elements

1. 'good faith'

The pervasive relevance of the principle of good faith has been remarked upon by the International Court of Justice (ICJ) in the following terms: 5

> 'The Court observes that the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969. It was mentioned as early as the beginning of this century in the Arbitral Award of 7 September 1910 in the *North Atlantic Fisheries case* (United Nations, *Reports of International Arbitral Awards,* Vol XI, p 188). […].'[16]

The requirement that States must fulfil their obligations assumed under the Convention most obviously reflects the fundamental rule *pacta sunt servanda* which requires that the will of the parties to an agreement 'must produce the effects it has openly sought, and they must be considered effectively bound, in accordance with their declarations.'[17] Art. 300 contains a positive injunction on the parties to act in good faith. It is more than a mere moral standard and has a definite legal content.[18] Moreover, Art. 300 contains an implicit requirement that

[10] UNCLOS III, Mexico: Draft Article 1, UN Doc. A/CONF.62/L.25 (1978), OR IX, 182.

[11] UNCLOS III, Reports of the President on the Work of the Informal Plenary Meeting of the Conference on General Provisions, UN Doc. A/CONF.62/L.53 (1980), OR XIII, 87.

[12] *Ibid.*

[13] UNCLOS III, Informal Proposal to Appear as Article 1 of the Convention, UN Doc. GP/2 (1980, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XII (1987), 297; UNCLOS III, Informal Proposal to Appear as Article … of the Convention, UN Doc. GP/2/REV.1 (1980, mimeo.), reproduced in: *ibid.*, 298; UNCLOS III, Informal Proposal by the United States of America, UN Doc. FC/15 (1979, mimeo.), reproduced in: *ibid.*, 390; and UNCLOS III, Informal Proposal by Turkey, UN Doc. FC/18 (1980, mimeo.), reproduced in: *ibid.*, 395.

[14] René-Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. I (1991), 89.

[15] This understanding of the concept of abuse of rights has also been proffered by e. g., *Alexander Kiss*, Abuse of Rights, MPEPIL, para. 1, available at: http://www.mpepil.com.

[16] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon *v.* Nigeria; Equatorial Guinea intervening), Preliminary Objections, Judgment of 11 June 1998, ICJ Reports (1998), 275, 296 (para. 38).

[17] *Michel Virally*, Good Faith in International Law, AJIL 77 (1983), 130, 132.

[18] PCA, *Southern Bluefin Tuna Case* (Australia and New Zealand *v.* Japan), Jurisdiction and Admissibility, Award of 4 August 2000, RIAA XXIII, 1, paras. 64, 105; see also *Markus Kotzur*, Good Faith, MPEPIL, para. 22, available at: http://www.mpepil.com.

the terms of the UNCLOS must be interpreted in good faith when acting to fulfil the obligations.[19] This stems from a logical reading of the provision itself which requires that all obligations be fulfilled in good faith. Any interpretation which is not made in a spirit of good faith cannot be said to conform to the requirement to fulfil the obligations in accordance with this principle.

6 In deciding whether or not the principle of good faith has been breached, one must consider whether the principle should be regarded as being objective or subjective in nature. Following the subjective approach, an act can be described as a violation of the principle of good faith in the event that a State arbitrarily or intentionally exercises a right or fails to ensure that its actions are compatible with an obligation, particularly in situations whereby the legitimate expectations of other (individual) States are not adequately respected. Yet, it is accepted that good faith aims to 'blunt the excessively sharp consequences sovereignty […] may have in the international society, in ever increasing need of cooperation.'[20] Thus, such a subjective approach is too narrow and fails to serve the purpose for which this provision was included. The violation of good faith itself is deemed to be contrary to the terms of Art. 300. Where a State acts in fulfilment of an obligation arising out of the Convention but does so with knowledge that by so doing another State will suffer a detriment, that State can be said to be in breach of Art. 300.

7 In the Statement in Response submitted by Japan in the *Southern Bluefin Tuna Case*, it was asserted that the claim made by Australia and New Zealand was made in bad faith.[21] To make such an assertion is certainly going beyond simply asserting that a particular act was carried out with a lack of good faith.[22] Notwithstanding the gravity of such an assertion, Japan went on to assert that the alleged 'forum-shopping'" being practiced by Australia and New Zealand was 'entirely at odds with the spirit and letter of UNCLOS,'[23] as it runs contrary to the peaceful settlement of disputes envisaged by the Convention. Regrettably for the purposes of this appraisal of Art. 300, Japan subsequently backtracked on its assertions regarding good faith, resulting in a continued dearth of legal pronouncements concerning the actual content of the norm at hand. Indeed, only one other reference of note has been made to Art. 300, namely in the *Swordfish Case*.[24] Once again, however, the parties merely requested the special chamber to decide whether Art. 300 had been breached[25] and, as the parties subsequently withdrew the issue from the chamber to further their negotiations, no pronouncement was made on the material effect of Art. 300.[26]

8 A further issue which remains to be examined is whether the provisions of Art. 300 apply also to the decisions reached and the actions taken by international organisations established under the Convention.[27] A literal interpretation would seem to suggest that the article only applies to States Parties. However, as ZOLLER correctly points out, '[t]he organs of the international organization can only function efficiently if they have the confidence of the States from which they emanate. Good faith clarifies the relationships between the organs and the member States.'[28] Moreover, the importance of the applicability of the principle of good faith on the organs is evident when one considers the exercise of jurisdiction(s) by the

[19] Of course, the requirements of Art. 31(1) Vienna Convention on the Law of Treaties similarly apply to the UNCLOS and require that the treaty is interpreted in good faith.

[20] *Kolb* (note 1), 18.

[21] ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, ITLOS Pleadings, Statement in Response (Japan), Minutes and Documents, vol. IV (1999), 177, available at: https://www.itlos.org/cases/list-of-cases/case-no-3-4/.

[22] *Tariq Hassan*, Good Faith in Treaty Formation, VJIL 21 (1981), 443, 450.

[23] PCA *Southern Bluefin Tuna Cases* (note 18), 182.

[24] ITLOS, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile *v.* European Community), Order of 20 December 2000, ITLOS Reports (2000), 148.

[25] *Ibid.*, para. 3(d) and (g).

[26] See *supra*, note 24.

[27] Such as the establishment of the Authority in accordance with Art. 156. See *Schatz* on Art. 156.

[28] *Zoller* (note 2), 18.

organ. Good faith, called upon to determine the extent of the jurisdiction of an organisation or whether a particular right was exercised either in bad faith or without the requisite good faith, is of fundamental importance to the achievement of the goals of the organs and, thus, a teleological reading of Art. 300 would seem to suggest that the organs created under the terms of the UNCLOS are also subject to it when fulfilling their obligations as well as exercising their rights, jurisdictions and freedoms.

2. 'the obligations assumed under this Convention'

Art. 300 refers specifically to 'the obligations assumed under this Convention', i. e. the other provisions of the UNCLOS which create obligations on the parties. Nonetheless, in this context it seems worthy of briefly considering what effect, if any, good faith itself has on the creation of original obligations. Can the principle of good faith create a legal obligation in and of itself or does it merely serve the function of regulating the exercise of pre-existing obligations? **9**

Art. 2 (2) United Nations Charter (UNC) contains a similar provision to Art. 300 UNCLOS, requiring the members of the UN to fulfil the duties arising from the terms of the Charter in accordance with the principle of good faith. The reference contained in Art. 2 (2) UNC to the fulfilment of 'obligations assumed […] in accordance with the Charter' would seem to restrict the scope of applicability of this provision.[29] However, as KOLB on the issues of principles as sources of international law suggests, good faith can have more than a merely ancillary function. Although it is fair to say that the primary function of good faith in this instance is as a legal standard which, in conjunction with the norm or principle in question, is intended to regulate situations for which no specific stipulation has been made, good faith can also have an autonomous nature.[30] KOLB seems to submit that this autonomous purpose assumes the role of an equitable function whereby good faith not only requires complicity with pre-existing positive obligations but that it is also valid as a general principle which can give rise to other obligations. It was also acknowledged by the ICJ that '[o]ne of the basic principles governing the *creation* and performance of legal obligations, […], is the principle of good faith.'[31] Considered thusly, good faith 'put[s] the emphasis on the positive regulative functions which the rules underlying the principle of good faith fulfil in delimiting the respective spheres of competing rights.'[32] Hence, a broad consideration of the understanding of the term obligations in Art. 300 could lead to further obligations being imposed upon States by way of, for example, the equitable concepts of acquiescence or estoppel. Notwithstanding the foregoing arguments, the ICJ has more recently pronounced clearly against obligations arising purely on the basis of considerations of good faith when it espoused that 'the principle of good faith […] is not in itself a source of obligation where none would otherwise exist.'[33] Thus, Art. 300 is limited in its effect to an auxiliary function of acting as 'a catalyst between the facts and the norm'[34] along the lines of the notion of reasonableness. **10**

3. 'rights, jurisdictions and freedoms'

The legal concepts mentioned at this juncture of Art. 300 are central to the structures of the entire UNCLOS and are reflected throughout in a multitude of provisions. **11**

[29] *Dahm/Delbrück/Wolfrum* (note 2), 846.

[30] *Kolb* (note 1), 16.

[31] ICJ, *Nuclear Tests Cases* (Australia *v.* France), Judgment of 20 December 1974, ICJ Reports (1974), 253, 473 (para. 49, emphasis added).

[32] *Georg Schwarzenberger/Edward D. Brown*, A Manual of International Law (6th edn.1976), 35–36; *cf.* generally *Guy S. Goodwin-Gill*, State Responsibility and the 'Good Faith' Obligation in International Law, in: Malgosia Fitzmaurice/Danesh Sarooshi (eds.), Issues of State Responsibility before International Judicial Institutions (2004), 75.

[33] *Land and Maritime Boundary between Cameroon and Nigeria* (note 16), 297 (paras. 39).

[34] *Kolb* (note 1), 17.

4. 'abuse of right'

12 The most succinct formulation of the norm prohibiting the abuse of rights was made by the Appellate Body of the World Trade Organization. It is worth quoting that statement in its entirety:

> 'The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this principle, the application widely known as the *abus de droit,* prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say reasonably'. An abusive exercise by a member of its own treaty rights results in a breach of the treaty rights of the other members and, as well, a violation of the treaty obligation of the Member so acting.'[35]

The international law of the sea is especially susceptible to rights being exercised in a manner which amount to an abuse. Indeed, the possibility of abuse would seem to be inherent in the very concept of the freedom of the high seas.[36] To prevent the creation of a legal vacuum, it was necessary for the international community to establish a legal standard capable of regulating the various rights, jurisdictions and freedoms contained in UNCLOS.

13 Three broad categories of an abuse of rights can be readily identified. First, the concept of abuse of rights serves to balance the interests of the parties where a State exercises a right and by so doing hinders another State from exercising its right which then results in an injury to the rights of the second State. This instance is particularly prevalent in the event that a shared natural resource is at stake. For example, Art. 116 provides every State with the right to engage in fishing on the high seas.[37] When, however, the exercise of this right reaches the point that it represents a danger to the fish stocks, the right to exploit this natural resource has been overstepped. The concept of abuse of rights acts to restrict this use to the benefit of other legitimate users of the right.[38] Second, an abuse of rights can be present where a right is exercised for a purpose other than that for which it was initially created. Third, an arbitrary exercise of a right by one State resulting in an injury to a second State, though without clearly violating that second State's rights, can also amount to an abuse of rights.[39] From this categorisation, it becomes evident that the prohibition against the abuse of rights becomes relevant in situations where international legal norms provide the actors with a broad, perhaps almost unlimited, discretionary power to exercise a right; it 'draws the line where other lines do not exist.'[40]

14 Art. 34 of the United Nations Fish Stocks Agreement, which contains a similar provision prohibiting the abuse of rights,[41] indicates that the principle has obtained widespread acceptance and that it is more than a mere than a mere application of other concepts such as good faith.[42] In the *Southern Bluefin Tuna Case* mentioned above,[43] aside from asserting

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[35] WTO, *United States–Import Prohibition of Certain Shrimp and Shrimp Products,* Report of the Appellate Body of 12 October 1998, WT/DS58/AB/R, para. 158, available at: http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm (accessed on 28 July 2010).

[36] Other examples include, *inter alia*, the right to lay submarine cables (Art. 112), the right to carry out high-seas fishing (Art. 116) and the rules relating to the regulation of innocent passage (Part II, Section 3, Subsection A).

[37] See *Rayfuse* on Art. 116 MN 13–16.

[38] *Dahm/Delbrück/Wolfrum* (note 2), 849.

[39] *Kiss* (note 15), para. 6. In ICJ, *Southwest Africa Cases* (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Second Phase, Judgement of 18 July 1966, ICJ Reports (1966), 6, 480–483, Liberia and Ethiopia, although no clear violation of the respective States' individual rights was apparent, argued that South Africa had, without obtaining the consent of the United Nations, 'substantially modified the terms' of the agreement to manage the territory that would later become Namibia, and that this constituted an abuse of rights.

[40] *Dahm/Delbrück/Wolfrum* (note 2), 849 (translation by author).

[41] So too does the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 5 September 2000, 40 ILM (2001), 278.

[42] *Kiss* (note 15), para. 17.

[43] See *supra*, note 21.

that Australia and New Zealand were making claims in bad faith, Japan further submitted that the acts of the applicant States amounted to an abuse of rights because the applicant States 'attempt[ed] to aggravate the dispute […] and […] create a spurious claim under UNCLOS.'[44] Japan, making specific reference to Art. 300 and relying on the definition of abuse of rights provided by the Dictionnaire de la terminologie du droit international, argued that, assuming *arguendo* the actions of Australia and New Zealand were lawful, they were nonetheless abusive. If this assertion is accepted, it must follow that neither illegality nor the *ultra vires* nature of an act is a *condito sine qua non* for the existence of an abuse of rights.[45] An act could therefore to be considered to be an abuse of a right and hence in breach of the principle of good faith without that act being illegal.

Article 301
Peaceful uses of the seas

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

Bibliography: *Boleslaw A Boczek*, Peaceful Purposes of the United Nations Convention on the Law of the Sea, ODIL 20 (1989), 359–389; *Antonio Cassese*, The Current Legal Regulation of the Use of Force (1986); *Robin R. Churchill/Alan V. Lowe*, The International Law of the Sea (3rd edn. 1999); *Francesco Francioni*, Peacetime Use of Force, Military Activities, and the New Law of the Sea, Cornell Int'l LJ 18 (1985), 203–226; *Stuart Kaye*, Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction, in: David Freestone/Richard Barnes/David Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 347–364; *Kuen-Chen Fu*, Policing the Sea, in: Myron H. Nordquist/Alfred H. A. Soons/John N. Moore/Hak-So Kim (eds.) The Law of the Sea Convention: US Accession and Globalization (2012), 371–380; *Jost Delbrück*, Proportionality, in Rudolf Bernhardt (ed.), Encyclopedia of Public International Law 7 (1984), 396–400.; *Louis Henkin*, The Reports of the Death of Article 2(4) are Greatly Exaggerated, AJIL 65 (1971), 544–548; *Francis G. Jacobs*, Recent Developments in the Principle of Proportionality in European Community Law, in: Evelyn Ellis (ed.), The Principle of Proportionality in the Laws of Europe (1999); Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. V (1989); *Fabián O. Raimondo*, General Principles of Law in the Decisions of International Criminal Courts and Tribunals (2008); *Albrecht Randelzhofer*, Article 4, in: Bruno Simma/Daniel-Erasmus Khan/Georg Nolte/Andreas Paulus (eds.), The Charter of the United Nations: A Commentary (3rd edn. 2012); *A.P.V. Rogers*, The Principle of Proportionality, in: Howard M. Hensel (ed.), The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict (2008), 189–218; Claud H. M. *Waldock*, The Regulation of the Use of Force by Individual States in International Law, RdC 81 (1951), 451–517

Documents: GA, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV) of 24 October 1970

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[44] *Ibid.*
[45] ITLOS *Southern Bluefin Tuna Cases* (note 21), 180.

I. Purpose and Function

1 Art. 301 of the Convention is a direct allusion to the prohibition on the use of force contained in Art. 2 (4) of the United Nations Charter, a provision variously referred to, among other things, as the 'heart of the UN Charter'[1] or the 'cornerstone of peace in the Charter'.[2] Art. 301 requires that the sea be used for peaceful purposes only. However, it does not do so directly. Rather than impose a positive duty on States to act in a particular manner, Art. 301 contains a negative duty to refrain from engaging in any threat or use of force contrary to the principles of international law contained in the Charter. Regulating military activities and the use of weapons on the seas was not a task with which the Conference was charged, nor was it prepared to stem such negotiations and to attempt to do so could potentially have endangered efforts to conclude a law of the sea convention.[3] Hence, incorporating the terms of the UN Charter, notwithstanding the challenges that such a step would bring, appeared a reasonable solution. Put succinctly:

> '[a] better view is that the Law of the Sea Convention (LOSC) encourages the peaceful uses of the seas, but is *lex generalis*, which must be considered in the context of the *lex specialis* dealing with the use of force at international law. The legitimate use of force under the UN Charter, either in self-defence or pursuant to a Security Council Resolution, should still be permissible in maritime areas and not restricted by the LOSC. Such an interpretation is supported explicitly in Article 301 of the LOSC.'[4]

This proposition would seem to be supported by the wording of the preamble of the Convention itself, which notes that particular obligations created elsewhere in international law (and one would assume that the UN Charter merits some considerable attention in this respect) 'continue to be governed by the rules and principles of general international law'. So viewed, this would seem to exclude any possibility of this norm having the value of customary international law.

2 Ultimately, it is apparent from the wording and context of the provision that the peaceful purposes requirement does not absolutely or even relatively prohibit military activities in any maritime zone. It would be excessive and potentially erroneous to consider the terms of Art. 301 as constituting a general limitation on military activities at sea.[5] Only those that are incompatible with the prohibition of the use of force of the United Nations Charter are forbidden. Military activities which are consistent with the principles of international law contained in the Charter are not prohibited by the Convention.[6]

3 A further function which Art. 301 serves to fulfil is to seek to provide clarification of the meaning of 'peaceful uses' in respect of how that term is used in other articles of the Convention (Arts. 88, 141 etc.), although it must be stated that such function would appear to be more coincidence than intention given that there is no indication in the *travaux preparatoires* or in the relevant literature of a direct link between the terms of Arts. 88, 141 and 301 respectively. Nonetheless, considering the common nature of the subject matter of these provisions, this 'association of ideas',[7] there is an inextricable link between the norms in question and Art. 301 acts as an aid to the interpretation of these norms.

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[1] *Louis Henkin*, The Reports of the Death of Article 2(4) are Greatly Exaggerated, AJIL 65 (1971), 544–548.

[2] Claud H. M. *Waldock*, The Regulation of the Use of Force by Individual States in International Law, RdC 81 (1951), 451, 492.

[3] *Ibid.*

[4] *Stuart Kaye*, Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction, in: David Freestone/Richard Barnes/David Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 347, 353.

[5] Sea-Bed Committee, Joint United Kingdom & United States Intervention at the Sea-Bed Committee, UN Doc. A/AC.135/SR.17 (1968).

[6] *Robin R. Churchill/Alan V. Lowe*, The International Law of the Sea (3rd edn. 1999), 431.

[7] Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. V (1989), 155.

II. Historical Background

The notion of reserving a particular area, region or space to be used exclusively for 4
'peaceful purposes' has its origin in treaties aimed at establishing international co-operation concerning spaces previously outside the regulatory competences of States, at the time at which the particular regime in question was created such as the Antarctic[8] or Outer Space,[9] for example.[10] Considered against the backdrop of the political climate prevalent when these treaties were concluded, it is not surprising that the requirement that spaces be used exclusively for peaceful purposes aimed to effect a demilitarisation of these spaces. Bearing in mind further that 'the roots of UNCLOS III can be traced back to the early concepts of the common heritage of mankind and the use of the seabed for mankind as a whole,'[11] it is evident that the Convention would, in addition to its lofty aim of providing a comprehensive framework for this exceptionally broad area of law, bring new challenges with it as well. Providing workable solutions to these challenges at a time of superpowers and considerable tension in international relations became a central challenge of the Convention. It was recognised that any attempt to legislate extensively for military activities 'would require the negotiation of a detailed arms control agreement,'[12] a task far beyond the scope of the Conference's mandate. 'The essential purpose of the Conference was to establish a viable legal basis for international cooperation without conflict and in the interest of all mankind.'[13] Prior to the negotiations at UNCLOS III, the Sea-Bed Committee of the UN General Assembly considered the question of the construction of the term 'peaceful purposes'. Broadly speaking, two propositions could be identified: the first, advanced primarily by developing States and the Soviet Union, aimed to achieve a complete demilitarisation of the seabed.[14] The second camp, consisting of most Western nations, including the United States and the United Kingdom, preferred the interpretation of peaceful uses as being uses that were consistent with the law of the UN Charter.[15] Notwithstanding the Declaration of Principles by the UN General Assembly,[16] as well as the conclusion of the Sea-Bed Arms Control Treaty,[17] it is fair to say that, prior to the Convention, there was no single, universally or even widely accepted notion of use for peaceful purposes. Nonetheless, as has been correctly pointed out in academic writings on the subject, these forerunner treaties did play a role in informing and influencing the concept and the negotiations that led to the conclusion of UNCLOS with the peaceful uses provisions as we know them today.[18]

The text of Art. 301 was first proposed by the members of the Group of 77, but it failed to 5
obtain the requisite support needed for it to be pursued. This was due to its inclusion as an addendum to Art. 88 relating to reservations of the high seas for peaceful purposes.[19] It was

[8] The Antarctic Treaty, 1 December 1959, UNTS 402, 71.

[9] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies, 27 January 1967, UNTS 610, 205.

[10] See René J. Dupuy/Daniel Vignes (eds.), A Handbook on the Law of the Sea, vol. II (1991), 1235.

[11] *Boleslaw A. Boczek*, Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea, ODIL 20 (1989), 359, 364.

[12] *Francesco Francioni*, Peacetime Use of Force, Military Activities, and the New Law of the Sea, Cornell Int'l LJ 18 (1985), 203, 222.

[13] UNCLOS III, 1st Plenary Meeting, UN Doc. A/CONF.62/SR.1 (1973), OR I, 3.

[14] See, for example, UN Doc. A/AC.125/SR.16 (1968).

[15] See UN Doc. A/AC.135/SR.17 (1968).

[16] GA, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV) of 24 October 1970.

[17] Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof (Seabed Treaty), 18 May 1972, UNTS 955, 115.

[18] *Boczek* (note 11), 363 *et seq*.

[19] UNCLOS III, Costa Rica *et al.*: Informal Proposal, UN Doc. C.2/Informal Meeting/55 (1980, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. V (1984), 60–61.

later reintroduced by the same Group of 77 as a stand-alone article.[20] Due to certain conflicts with the work being done in the Second Committee, amendments were made to the text, in particular in respect of the use of the term 'all States', which was subsequently altered to read 'all States Parties.'[21] In the final version of the text as concluded at the Conference, the word 'all' was omitted and Art. 301 'was adopted by consensus as part of a package together with Arts. 300 and 302.'[22]

III. Elements

1. 'refrain from any threat of use of force against the territorial integrity or political independence of any State'

6 The wording of Art. 301 is almost identical to the text of Art. 2 (4) UN Charter, the only slight difference being the use of the word 'any' in relation to the threat or use of force in the Convention, while the Charter simply refers to 'the' threat or use of force. Given the incorporation of the principles of the UN Charter into UNCLOS, the term 'force' is to be understood relatively narrowly. It does not include every possible type of force, rather it is limited to force by arms,[23] that is to say that political or economic force cannot be considered to fall within the ambit of this notion; it is limited to military force. Moreover, the principles contained in the Friendly Relations Declaration continue to play a role as an interpretative aid for the basic principles of the Charter as these are to be incorporated into the law of the sea on the basis of Art. 301. Bearing in mind these considerations, UNCLOS does not hamper conventional military activities where it amounts to the exercise of the sea power of a State.[24] States are entitled to use the seas for military manoeuvers, for firing conventional weapons, for installing defence mechanisms and, of particular importance, for the navigation of naval fleets, including submarines.[25]

7 It has been submitted that the basic legal principle governing the use of force at sea is the proportionality principle. This principle is an integral part of customary international law[26] and is almost certainly to be considered as a general principle of international law, in addition.[27] In deciding whether force may be used at sea, Fu makes the distinction between three separate but linked factors of the principle: the principles of relevance and necessity as well as considerations of the balance of interests. He ascribes to the concept of proportionality a definition which aims to identify situations where the use of force can be described as proportionate and hence legitimate. When assessing the proportionality of a measure, decisions must fulfil the criteria of being 'purpose-oriented, and that there must be a proper, justifiable and balanced relationship between the measures and its intended purpose.'[28] Understood in this way, it can be argued that Art. 301, and similarly Art. 2 (4) UN Charter,

[20] UNCLOS III, Costa Rica *et al.*: Informal Proposal, UN Doc. GP/1 (1980, mimeo.), Renate Platzöder, Third United Nations Conference on the Law of the Sea: Documents, vol. XII (1987), 297.

[21] UNCLOS III, Report of the President on the Work of the Informal Plenary Meeting of the Conference on General Provisions, UN Doc. A/CONF.62/L.58 (1980), OR XIV, 128.

[22] Nordquist/Rosenne/Sohn (note 7), 154.

[23] *Albrecht Randelzhofer*, Article 4, in: Bruno Simma *et al.* (eds.), The Charter of the United Nations: A Commentary (3rd edn. 2012), 73 (Art. 4 (2)).

[24] *Antonio Cassese*, The Current Legal Regulation of the Use of Force (1986), 376.

[25] *Ibid.*

[26] *A.P.V. Rogers*, The Principle of Proportionality, in: Howard M. Hensel (ed.): The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict (2008), 189, 206.

[27] *Francis G. Jacobs*, Recent Developments in the Principle of Proportionality in European Community Law, in: Evelyn Ellis (ed.), The Principle of Proportionality in the Laws of Europe (1999), 1 *et seq.*; *Fabián O. Raimondo*, General Principles of Law in the Decisions of International Criminal Courts and Tribunals (2008), 127; *Jost Delbrück*, Proportionality, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law 7 (1984), 396–400.

[28] *Kuen-Chen Fu*, Policing the Sea, in: Myron H. Nordquist *et al.* (eds.), The Law of the Sea Convention: US Accession and Globalization (2012), 371, 374.

are expressions of the principle of proportionality. Taking this reasoning to its logical conclusion, the principle of proportionality, as expressed in the prohibition on the use of force regulates the conduct of state officials and, in the event of a potentially unlawful use of force, goes some way to creating 'a legal basis for the judicial review of the necessity of their use of force.'[29]

2. 'or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations'

A further deviation from the wording of the Charter can be identified: while the wording of the Charter refers to the 'Purposes of the United Nations', the reference to 'principles of international law embodied in the Charter' in Art. 301 is considerably broader. It covers all the principles of international law contained in the Charter and is not subject to limitations in respect of certain chapters of the Charter. Given that the text of Art. 301 was a compromise between two ideologically diverse groups with one faction aiming for complete demilitarisation whereas the other faction wanted to have a limited application of the prohibition of the use of force,[30] it is understandable that a broad and somewhat imprecise wording was chosen to leave both interest groups with sufficient room for manoeuvre. Finally, this broad understanding also has as a consequence that Art. 51 of the UN Charter on the right to self defence is applicable, a fact that 'may require adaptation to the new concepts introduced by the Convention.'[31] 8

Article 302
Disclosure of information

Without prejudice to the right of a State Party to resort to the procedures for the settlement of disputes provided for in this Convention, nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security.

Bibliography: *Natalie Klein*, The Dispute Settlement Procedure under UNCLOS (2005); *Natalie Klein*, Maritime Security and the Law of the Sea (2011); Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. V (1989); *Donald Rothwell/Stuart Kaye/Afshin Akhtarkhavari/Ruth Davis*, International Law: Cases and Materials with Australian Perspectives (2014)

Documents: UNSC, Resolution 1816 of 2 June 2008 on Piracy off the Coast of Somalia, UN Doc. S/RES/1816 (2008)

Cases: ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States), Merits, Judgement of 26 November 1984, ICJ Reports (1984), 392

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[29] *Ibid.*, 378.
[30] See *supra*, MN 4.
[31] Nordquist/Rosenne/Sohn (note 7), 154.

I. Purpose and Function

1 Art. 302 is a general clause which aims to balance the interests of national security with the obligations to provide information in certain instances on actions or intended actions by States Parties at sea. Taking into consideration the dispute settlement procedures set out in other provisions of the Convention (see Part XV), Art. 302 posits a general rule that States cannot be obliged to disclose information where to do so would result in essential interests of security being prejudiced. The need for States to be able to conduct activities without being subjected to sweeping disclosure requirements is self-evident.

II. Historical Background

2 The original draft for Art. 302 was introduced in the negotiations by the United States and was subsequently introduced on another occasion in the Informal Plenary.[1] Concerns were raised at the time by others that the text, as introduced, might impinge upon the applicability and effectiveness of certain other provisions relating to (dispute settlement in) the Area, marine scientific research as well as the development and transfer of marine technology. Indeed, general criticism was levied towards the proposed text that it would have the effect of hindering the overall aims of the Convention.[2] The stumbling points also included the need for a clear indication of the consequences of a failure to disclose information as well as the subjective character of the text as it then was.[3] Further negotiations led to an amended text in its current form being adopted as part of the consensus package consisting of Arts. 300–302.[4]

III. Elements

1. 'the procedures for the settlement of disputes provided for in this Convention […]'

3 Part XV of UNCLOS contains a sophisticated and highly developed dispute settlement mechanism. Provision is made in Art. 286 *et seq.* for obligatory procedures that will result in binding decisions in relation to disputes over the interpretation or application of any provision of UNCLOS. In addition, a panoply of further dispute settlement options are enumerated, ranging from the International Tribunal for the Law of the Sea (ITLOS, Annex VI) to the International Court of Justice (ICJ) as well as Annex VII arbitral tribunals and special arbitration panels foreseen under Annex VIII.[5] The broad range of dispute settlement possibilities available reflects the diverse methods which States have employed in the past and maintains a high degree of flexibility that enables the most suitable method to be chosen. Indeed, this is reflected in the fact that non-judicial mechanisms have played a key role and that negotiations or other diplomatic means have often resulted in a satisfactory outcome without having to resort to judicial channels. Resolution through political channels prior to judicial settlement is promoted in UNCLOS through the obligation to

[1] UNCLOS III, United States of America: Informal Proposal, UN Doc. GP/3 (1980, mimeo), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XII (1987), 298.
[2] UNCLOS III, Supplementary Report, UN Doc. A/CONF.62/L.53/ADD.1 (1980), OR XIII, 87.
[3] Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. V (1989), 156.
[4] UNCLOS III, Informal Proposal to Appear as Article… of the Convention, UN Doc. GP/6 (1980, mimeo.), reproduced in: Platzöder (note 1), 300.
[5] See: *Natalie Klein*, The Dispute Settlement Procedure under UNCLOS (2005).

exchange views in situations where there is a dispute over the interpretation and application of the Convention.

2. 'nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security'

The operative part of the text of Art. 302 is largely clear: It enumerates the rule that States Parties are not required to disclose information which may have the effect of negatively impacting national security interests. Nonetheless, uncertainty remains about the notion of what constitutes security in the maritime context.[6] A clear and obvious example of a threat being posed to security within this context is that of piracy, as recognised by the UN Security Council.[7] Aside from such examples, the treaty itself makes scarce few references to security and does not in any way define the notion. KLEIN argues that an understanding of 'security' can be garnered from other provisions of the UNCLOS, e. g., the treatment of innocent passage or the identification of certain activities that could be related to the peace, order and good security of the coastal State. The author goes on to note that no attempt is made to positively define what might be essential in the interests of the security of a State but rather that UNCLOS focusses on what might compromise security.[8] On the basis of that understanding, it is possible that both military and non-military activities might compromise the 'essential interests' of a State's security. While it is clear that the maritime transport of weapons of mass destruction would impinge on State security, other acts, such as wilful or grossly negligent pollution, certain research or surveying activities or even fishing activities, could also constitute a sufficient threat. 'Maritime security threats may not necessarily be coercive in nature, and so would not amount to a prohibited threat of force under international law.'[9] 4

NORDQUIST *et al.* point to an important correlation between UNCLOS, the text of the UN Charter and the need to consider the Statue of the International Court of Justice.[10] Art. 287 UNCLOS, contained in Part XV on the settlement of disputes, gives States the freedom to choose the means and/or judicial instance by which the dispute in question can be settled. The options available include the International Tribunal for the Law of the Sea and the International Court of Justice (ICJ) as well as arbitral tribunals. Where the ICJ is deemed to be the competent body, a provision of the Statute of that Court (Art. 49) may apply, which requires parties to the dispute to produce documents prior to the hearings. Failure to do so may result in a formal note being taken of such refusal. In accordance with Art. 103 UN Charter, the Charter must always prevail over other international agreements in cases of conflict. Indeed, the Court has specifically drawn attention to the supremacy of Art. 103 in its Nicaragua judgment.[11] The Statute of the ICJ is an integral part of the UN Charter and hence ought to prevail in such cases.[12] This may impact on the application of Art. 302 UNCLOS in that the obligation to produce documents prior to the hearing under Art. 49 ICJ Statute may apply. This would seem to amount to a potential departure from the text of Art. 302 but it remains to be seen how the provision would be applied in practice. 5

[6] *Natalie Klein*, Maritime Security and the Law of the Sea (2011), 10.
[7] For example, UNSC, Resolution 1816 of 2 June 2008 on Piracy off the Coast of Somalia, UN Doc. S/RES/1816 (2008).
[8] *Klein* (note 6), 8.
[9] *Ibid.*, 10.
[10] Nordquist/Rosenne/Sohn (note 3), 157.
[11] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States), Merits, Judgement of 26 November 1984, ICJ Reports (1984), 392, 440.
[12] *Donald Rothwell et al.*, International Law: Cases and Materials with Australian Perspectives (2014), 828.

Article 303
Archaeological and historical objects found at sea

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

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

3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

Bibliography: *Anastasia Strati*, The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea (1995); *Patrick O'Keefe*, Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage (2002); Roberta Garabello/Tullio Scovazzi (eds.), The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention (2003); Sarah Dromgoole (ed.), The Protection of the Underwater Cultural Heritage – National Perspectives in Light of the UNESCO Convention 2001 (2006); *Sarah Dromgoole*, Underwater Cultural Heritage and International Law (2013); *Mariano Aznar-Gómez*, Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, IJMCL 25 (2010), 209–236; *Bernard Oxman*, The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980), AJIL 75 (1981), 211–256; *Bernard Oxman*, Marine Archaeology and the International Law of the Sea, Columbia Journal of Law & the Art 12 (1988), 353–372

Documents: Archaeological Institute of America, Comments on the UNESCO/UN DOALOS Draft Convention on the Protection of the Underwater Cultural Heritage, reproduced in: Lyndel Prott/Ieng Srong (eds.), Background Materials on the Protection of the Underwater Cultural Heritage (1999), 176

Cases: ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Netherlands/Denmark), Judgment of 20 February 1969, ICJ Reports (1969), 3; *R.M.S. Titanic v. Haver, et al.*, 171 F.3 d 943 (4th Cir. 1999) (US)

Contents

I. Purpose and Function

1 The UNCLOS does not provide a comprehensive regime for underwater cultural heritage. Only two provisions are devoted to what are called in the UNCLOS 'archaeological and historical objects', namely Art. 149, included in Part XI on the Area, and Art. 303 included in

the general provisions of Part XVI. Such a fragmentary approach raises problems of coordination between different provisions.

Art. 149, being limited to 'the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction', as the Area is defined in Art. 1 (1)(1), has a particular scope of application and consequently prevails over Art. 303 within the Area.[1] Art. 303 has a general scope of application and in principle covers the other marine spaces: internal waters, the territorial sea, the exclusive economic zone (EEZ), the continental shelf and the high seas. 2

Art. 303 includes two substantive provisions (Art. 303 (1); Art. 303 (2)) and two disclaimer provisions (Art. 303 (3); Art. 303 (4)).[2] Art. 303 (1) has a general character, and Art. 303 (2) refers to Art. 33 on the contiguous zone.[3] It is difficult to determine the relationship between the disclaimer provisions contained in Art. 303 (3) and Art. 303 (4), especially in the case where what is left unaffected by Art. 303 (3) were to be in conflict with what is also left unaffected by Art. 303 (4). This could, for instance, happen if an agreement concluded under Art. 303 (4) were in conflict with admiralty law. It is preferable to think that the two disclaimer provisions address the potential conflict between what either of them aims at preserving and the other two paragraphs of Art. 303. However, Art. 303 does not regulate the conflict between the two disclaimer provision themselves. 3

The subject matter covered by Arts. 149 and 303 also falls today under the Convention on the Protection of the Underwater Cultural Heritage (CPUCH), adopted on 2 November 2001 within the framework of the United Nations Organization for Education, Science and Culture (UNESCO).[4] A set of rules concerning activities directed at underwater cultural heritage are annexed to the CPUCH. As at July 2016, fifty-five States were parties to the CPUCH that entered into force on 2 January 2009. 4

II. Historical Background

The subject of underwater cultural heritage, which was not regulated by the previous 1958 Geneva conventions of codification of international law of the sea, was taken into consideration only in the last period of negotiations for the UNCLOS. An informal proposal made in 1980 by the United States provided for a general duty to protect objects of archaeological and historical nature, wherever found in marine waters, combined with a particular regard for the position of States that have a certain link with the objects: 5

> 'All States have a duty to protect objects of an archaeological and historical nature found in the marine environment. Particular regard shall be given to the state of origin, or the state of cultural origin, or the state of historical and archaeological origin of any objects of an archaeological and historical nature found in the marine environment in the case of sale or any disposal, resulting in the removal of such objects from a State which has possession of such objects.'[5]

Certain States were ready to extend the jurisdiction of the coastal State to the underwater cultural heritage found on the continental shelf. An informal proposal submitted in 1980 by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia provided as follows: 6

> 'The coastal State may exercise jurisdiction, while respecting the rights of identifiable owners, over any objects of an archaeological and historical nature on or under its continental shelf for the purpose of research, recovery and protection. However, particular regard shall be paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and

[1] See *Scovazzi* on Art. 149 MN 1.

[2] Although the two disclaimer provisions begin with different wordings ('nothing in this article affects' and 'this article is without prejudice to'), they should be considered as equivalent in their purpose.

[3] See generally *Khan* on Art. 33.

[4] For the relationship between the UNCLOS and the CPUCH, see *infra*, MN 39–42.

[5] UNCLOS III, Informal Proposal by United States of America, UN Doc. GP/4 (1980, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XII (1987), 299.

archaeological origin, in case of sale or any other disposal, resulting in the removal of such objects out of the coastal State.'[6]

Greece was also in favour of granting to the coastal State the right to enforce in an exclusive manner its legislation on archaeological or historical objects within a 200 NM zone:

'1. All States have the duty to protect, in a spirit of co-operation, objects of archaeological or historical value found in the marine environment.

2. Nothing in this Convention shall be deemed to prevent coastal States from enforcing, in an exclusive manner, their own laws and regulations concerning such objects up to a limit of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, while respecting the rights of identifiable owners.

The State or country of origin, or the State of cultural origin, or the State of historical or archaeological origin of the object shall enjoy preferential rights in case of sale or any other disposal resulting in its removal from the State where it is situated.'[7]

7 A very different regime was proposed in an anonymous draft also circulated in 1980.[8] It granted some limited rights to the coastal State within the 24 NM contiguous zone provided for in Art. 33 of the Draft Convention on the Law of the Sea:

'1. States have the duty to protect archaeological objects and objects of historical origin found at sea, and shall cooperate for this purpose.

2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the area referred to in that article without the approval of the coastal State would result in an infringement in its territory or territorial sea of the regulations of the coastal State referred to in that article.

3. Nothing in this article affects the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.'[9]

This proposal was based on the assumption that granting to the coastal States rights over archaeological or historical objects as far as the whole continental shelf or the 200 NM EEZ was unnecessary because most of such objects are found close to the coast, and also objectionable because it would have altered the already established balance between the rights and obligations granted to respectively the coastal State and the other States.[10] The proposal was considered 'closer to a compromise than any of the others'.[11] With some minor amendments that did not change its substance, it was accepted by consensus at the informal plenary meeting of 22 August 1980. The 1980 Informal Draft Convention[12] included a provision (Art. 303) which corresponds, with minor drafting changes, to present Art. 303.

III. Elements

1. 'objects of an archaeological and historical nature'

8 Art. 303 does not provide any definition of 'objects of an archaeological and historical nature'. The expression is, however, sufficiently broad to also cover artifacts of relatively

[6] UNCLOS III, Informal Proposal by Cape Verde *et al.*, UN Doc. C.2/Informal Meeting/43/REV. 3 (1980, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. V (1984), 51.

[7] UNCLOS III, Informal Proposal by Greece, UN Doc. GP/10 (1980, mimeo.), reproduced in: Platzöder (note 5), 302.

[8] UNCLOS III, General Provisions, UN Doc. GP/11 (1980, mimeo.), reproduced in: Platzöder (note 5), 303.

[9] *Ibid.*

[10] See *Bernard Oxman*, Marine Archaeology and the International Law of the Sea, Columbia Journal of Law & the Art 12 (1988), 363.

[11] UNCLOS III, Report of the President on the Work of the Informal Plenary Meeting of the Conference on General Provisions, UN Doc. A/CONF.62/L.58 (1980), OR XIV, 129 (para. 13).

[12] UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII.

recent origin, such as ships and aircraft sunk during the events of World War II. While these events do not enter into the sphere of archaeology, they are of an historical nature.

The CPUCH, which makes use of the more general concept of 'underwater cultural heritage', follows a different approach and sets forth a progressive time threshold. The underwater cultural heritage is defined as 9

> 'all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:
> (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
> (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
> (iii) objects of prehistoric character.'[13]

Due to the distinct character of two treaties (the UNCLOS and the CPUCH) that, for the reasons explained below, have very little in common, it can be concluded that the more precise definition in CPUCH cannot be used as a means of interpreting Art. 303.

2. 'States have the duty to protect'

Art. 303 (1) sets forth two very general obligations of protection and cooperation which apply to all archaeological and historical objects, wherever they are found at sea. Because of its rather broad content, the provision lacks precision in its drafting, but some legal consequences can be drawn from it. A State which knowingly allows the destruction of objects belonging to underwater cultural heritage or a State which persistently rejects any request by other States to cooperate in the protection of such heritage would be in breach of their obligation under Art. 303 (1) and therefore responsible for an internationally wrongful act. An obligation to cooperate can be seen as implying a duty to act in good faith in pursuing a given objective and in taking into account the position of the other interested States.[14] The duty to fulfil the obligations assumed under the UNCLOS in good faith is specifically included in Art. 300[15] and corresponds to the behaviour implied in the concept of 'cooperation'. 10

3. 'the coastal State may, in applying 33, presume […] an infringement within its territory'

The full sovereignty enjoyed by coastal States within the 12 NM territorial sea also covers archaeological and historical objects. Art. 303 (2) allows the coastal State to exercise some rights in waters between 12 and 24 NM from the baseline of the territorial sea. However, the precise content of these rights is far from being clear due to the many complications inherent in the text of the provision. 11

The main aspect of Art. 303 (2) is the reference it makes to Art. 33, according to which in the contiguous zone the coastal State may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, as well to punish infringement of the above laws and regulations committed 12

[13] Art. 1 (1)(a) CPUCH. However, 'pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage' and 'installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage' (Art. 1 (1)(b) and (c) CPUCH).

[14] As the International Court of Justice remarked in the judgment of 20 February 1969 in the *North Sea Continental Shelf* cases, 'the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation […]; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it': ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany *v*. Netherlands/Denmark), Judgment of 20 February 1969, ICJ Reports (1969), 3, para. 85.

[15] See *O'Brien* on Art. 300 MN 5.

within its territory or territorial sea. The contiguous zone needs to be proclaimed by the interested State and may not extend beyond 24 NM from the baseline from which the breadth of the territorial sea is measured.

13 If understood literally, Art. 303 (2) suggests that the removal of archaeological and historical objects located between the 12 and the 24 NM entails a violation of the domestic legislation of the coastal State on matters which have little or nothing to do with the cultural heritage, such as smuggling, public health and immigration.[16] Under the UNCLOS logic, it is only as a consequence of the competences that a coastal State can already exercise in dealing with cigarette smugglers, clandestine immigrants and infectious patients that it can exercise other competences for the protection of underwater cultural heritage. The wisdom of such a logic, which implies that underwater cultural heritage does not deserve be protected *per se*, is not fully convincing, to say the least.

14 Other problems arise from the wording of the provision. The coastal State is granted some rights only 'in order to control traffic' in archaeological and historical objects, but cannot carry out any activity to ensure the protection of such objects. While it is empowered to prevent and sanction their 'removal from the sea-bed', the coastal State is defenceless if such objects, instead of being removed, are simply destroyed in the very place where they have been found (for instance, if they are destroyed by a company holding a license for oil exploitation). Again, it is difficult to subscribe to the logic of such a result.

15 It is inevitable to ask the question why such a problematic provision was included in the UNCLOS. An answer can be found in Oxman, who explained:

> 'For reasons of principle whose importance transcended any interests in marine archaeology as such, the maritime powers were unwilling to yield to any further erosions in the freedoms of the seas, particularly regarding coastal state jurisdiction over non-resource uses beyond the territorial sea. The inclusion of paragraph 2 of article 303 in the general provisions of the Convention rather than the texts dealing with jurisdiction, and the indirect drafting style employing cross-references and presumptions, were intended to emphasize both the procedural and substantive points that the regimes of the coastal state jurisdiction as elaborated by the Second Committee of the Conference were not being reopened or changed.'[17]

16 A number of conclusions can be drawn from this explanation. First, Art. 303 (2) was proposed by the major maritime powers. Second, what is and remains an incomprehensible provision becomes, in a more diplomatically correct language, a rule elaborated in an 'indirect drafting style'. Third, it is implied that those who conceived Art. 303 (2) did not care primarily about the protection of the underwater cultural heritage, but were prompted by so-called more transcendent reasons of principle. Fourth, these reasons consisted in preventing any further erosion of the principle of freedom of the sea besides the rights over exploitation of natural resources that had already been granted to coastal States under the newly established regime of the 200 NM EEZ. Fifth, the question of underwater cultural heritage was arguably discussed too late and too hastily by the UNCLOS drafters to be addressed and solved in another way.

17 All the textual complications of Art. 303 (2) are due to the concern of the major maritime powers to avoid any words that might give the impression of any kind of coastal State jurisdiction over the underwater cultural heritage beyond the territorial sea (*horror iurisdictionis*, to say it in Latin).[18] Rather than envisaging a substantive regime to deal with the new concern of the protection of the underwater cultural heritage, they were oriented in devising legalistic lucubrations (in this case presumptions) that in fact had the result of preventing of

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[16] See *Khan* on Art. 33 MN 32.

[17] *Oxman* (note 10), 363.

[18] 'To create a new "archaeological" zone, or expressly to expand the competence of the coastal state to include regulation of diving for archaeological objects in the contiguous zone, would amount to converting the contiguous zone from an area where the coastal state has limited enforcement competence to one where it has legislative competence', *Bernard Oxman*, The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980), AJIL 75 (1981), 240.

more concrete rights being granted to coastal States over the cultural heritage found in the contiguous zone. The aim of avoiding any further erosion of the high seas freedoms was given priority.

18 Art. 8 CPUCH, which claims to be 'in accordance with' Art. 303 (2) UNCLOS, provides much more clearly that 'States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone'. This regime seems to be at the same time very sensible and very far from what Art. 303 (2) would strictly allow. In fact, without paying much attention to the wording of Art. 303 (2), a number of States have already established what can be called a 24 NM 'archaeological zone', where they apply national legislation aimed at protecting underwater cultural heritage.[19]

4. 'objects of an archaeological and historical nature found' on the continental Shelf or in the exclusive economic zone

19 While specific provisions apply to the space within 24 NM (Art. 303 (2)), on the one hand, and to the Area (Art. 149)[20] on the other, the UNCLOS does not define any regime relating to the archaeological and historical objects found on the continental shelf or in the EEZ,[21] that is the space located between the 24 NM external limit of the archaeological contiguous zone[22] and the limit of the Area.[23] The rights of the coastal State on the continental shelf are limited to the exploration and exploitation of the relevant 'natural resources', as explicitly stated in Art. 77 (1),[24] and cannot be easily extended to man-made objects, such as those belonging to the underwater cultural heritage.[25]

20 The legal vacuum left by Art. 303[26] greatly threatens the protection of cultural heritage, as it brings into the picture the principle of freedom of the seas that could easily lead to a first-come-first-served approach.[27] Availing himself of that principle, any person on board any ship could explore the continental shelf adjacent to any coastal State, bring any archaeological and historical objects to the surface, become their owner under domestic legislation (in most cases, the flag State legislation), carry the objects into certain countries and sell them on the private market. If this were the case, there would be no guarantee that the objects are disposed of for public benefit rather than for private commercial gain. Nor could a State which has a cultural link with the objects prevent the pillage of its historical heritage. The danger of freedom of fishing for underwater cultural heritage is far from

[19] For example, the legislation of Italy provides that archaeological and historical property found on the seabed of a maritime zone extending up to twelve nautical miles measured from the external limit of the territorial sea is protected pursuant to the rules concerning activities directed at underwater cultural heritage annexed to the CPUCH: Art. 94 of the Code of the Cultural and Landscape Heritage, Legislative Decree 42 of 22 January 2004, 61 (Italy).

[20] See *Scovazzi* on Art. 149 MN 1–2.

[21] The reference to the EEZ seems redundant, as the objects of archaeological or historical nature are more likely to lie on the seabed than to float in the waters of the EEZ.

[22] Or the 12 NM limit of the territorial sea, if the coastal State has not established an archaeological contiguous zone.

[23] See *Parson* on Art. 76.

[24] See further *Maggio* on Art. 77.

[25] It seems too artificial to assume that archaeological and historical objects which are found embedded in the sand or encrusted with sedentary living organisms can be likened to natural resources.

[26] Art. 59, on the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction, provides that the so-called residual rights in the exclusive economic zone could be taken into consideration as a means to fill the vacuum. It lays out that 'in cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.' See further *Proelss* on Art. 59.

[27] 'The rational understanding of the 24-mile limit on coastal state powers under article 303, paragraph 2, is that marine archaeology is preserved as a freedom of the high seas beyond that limit': *Oxman* (note 10), 369.

merely theoretical, as the activities and claims of present 'treasure hunting' companies clearly show.[28]

5. 'the rights of identifiable owners, the law of salvage and other rules of admiralty, or laws and practices with respect to cultural exchanges'

21 The danger of uncontrolled activities is further aggravated by Art. 303 (3), which subjects the general obligations provided for in Art. 303 (1) to protect archaeological and historical objects and to cooperate for this purpose to a completely different set of rules, that is 'the rights of identifiable owners, the law of salvage and other rules of admiralty, or laws and practices with respect to cultural exchanges'. Salvage law and other rules of admiralty are given an overarching status by Art. 303.[29] If there is a conflict between the objective to protect the underwater cultural heritage, on the one hand, and the provisions of salvage law and other rules of admiralty, on the other, the latter prevail.[30]

22 Neither the UNCLOS nor its drafting history clarify the meaning of 'the law of salvage and other rules of admiralty'. As outlined above,[31] these words suddenly appeared in the anonymous draft circulated during the negotiations for the UNCLOS in 1980. In many countries, the notion of salvage (*sauvetage*, in French) is only related to the attempts to save a ship or cargo on behalf of its owners from imminent marine peril, and never intended to apply to ancient sunken ships or to cargo carried by them which, far from being in peril, have been definitively lost for hundreds or thousands of years. However, in a minority of common law countries the concept of salvage law has been enlarged by some court decisions to cover activities which have very little to do with the proper sphere of salvage. For example, the United States Court of Appeals for the Fourth Circuit, in the decision rendered on 24 March 1999 (case *R.M.S. Titanic, Inc. v. Haver*)[32] stated that the law of salvage and finds is a 'venerable law of the sea.'[33] It was said to have arisen from the custom among 'seafaring men' and to have 'been preserved from ancient Rhodes (900 B.C.E.), Rome (Justinian's Corpus Juris Civilis) (533 C.E.), City of Trani (Italy) (1063), England (the Law of Oleron) (1189), the Hansa Towns or Hanseatic League (1597), and France (1681), all articulating similar principles'.[34] Looking at the conclusions reached in their decisions on underwater cultural heritage, it would seem that some American courts have access to all the ancient sources from where such a 'venerable law of the sea' can be inferred, know the languages in which the relevant rules were written, interpret such rules correctly and seize the intrinsic consistency between one source and the other. This is impressive indeed. Coming to the practical result of such a display of legal erudition, the law of finds seems to mean that 'a person who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession becomes the property's owner'. The application of the law of salvage, which seems to be something different from the law of finds, gives the salvor a lien (or right *in rem*) over the object. Thereby the expression 'the law of salvage and other rules of admiralty' simply means the application of a first-come-first-served or freedom-of-fishing approach which can only serve the interest of private commercial gain.

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[28] On the problems faced by Spain in defending sunken galleons from activities by 'treasure hunters', see: *Mariano Aznar-Gómez*, Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, IJMCL 25 (2010), 209–236.

[29] Art. 149 does not subject heritage found in the Area to salvage law and other rules of admiralty.

[30] It is difficult to interpret Art. 303 (3) as only referring to cases in which archaeological and historical objects are not involved.

[31] *Supra*, MN 7.

[32] *R.M.S. Titanic v. Haver, et al.*, 171 F.3 d 943 (4th Cir. 1999) (US).

[33] *Ibid.*, 960.

[34] *Ibid.*

It is not clear how a 'venerable' body of rules said to have developed in times when underwater cultural heritage was not considered to be an important subject could today provide any sensible tool for dealing with the protection of such heritage. The almost theological expressions employed by the supporters of the law of salvage and the law of finds ('return to the mainstream of commerce', 'admiralty's diligence ethic', 'venerable law of the sea', etc.) are euphemisms that may be interpreted as an incentive to loot underwater cultural heritage. **23**

The fact remains that the body of 'the law of salvage and other rules of admiralty' is today typical of a few common law systems but remains a complete stranger to the legal systems of other countries. Because of the lack of corresponding concepts, the very words 'salvage' and 'admiralty' cannot be properly translated into languages different from English. In the French and Spanish official texts of the UNCLOS they are rendered with expressions (*droit de récupérer des épaves et* (…) *autres règles du droit maritime*; *las normas sobre salvamento u otras normas del derecho marítimo*) which have a broader and very different meaning. During the negotiations of the Convention, in a meeting of 22 August 1980: **24**

> '[I]t was also decided that in translating the term "rules of admiralty" from the original English into other languages account should be taken of the fact that this was a concept peculiar to Anglo-Saxon law and the corresponding terms in other legal systems should be used to make it clear that what was meant was commercial maritime law.'[35]

All of this further undermines the regime established by Art. 303. Does this provision, while apparently protecting underwater cultural heritage, lead to a regime which results in the destination of this heritage only for commercial purposes? Does Art. 303 give an overarching status to a body of rules that cannot provide any sensible tool for the protection of the heritage in question? The doubt is far from being trivial.[36] **25**

There is not very much to say about the other, and less crucial, aspects of Art. 303, para. 3. The international obligation to protect archaeological and historical objects found at sea cannot affect the rights of those who, under the applicable domestic legislation, can still be identified as the owners of such objects (for instance, the owners of such objects carried as cargo on board a ship that has sunk in recent times). On the contrary, how the obligation to protect such objects could ever affect the "laws and practices with respect to cultural exchanges" is a question that still waits for a convincing answer. **26**

6. The CPUCH

The CPUH may be seen as a reasonable defence to protect the underwater cultural heritage against the counterproductive aspects of the UNCLOS regime. There are three main defensive tools, namely: the elimination of the undesirable effects of the law of salvage and finds; the exclusion of a first-come-first-served approach for heritage found on the continental shelf; and the strengthening of regional cooperation. **27**

While most countries participating in the negotiations for the CPUCH concurred in rejecting the application of the law of salvage and finds to underwater cultural heritage, a minority of States were not prepared to accept an absolute ban on it. To achieve a reasonable compromise, Art. 4 CPUCH, on the relationship to law of salvage and law of finds, provides as follows: **28**

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[35] Report of the President (note 11), 129 (para. 14).

[36] 'In recent decades treasure salvage has been added as an element of marine salvage under admiralty law. From an archaeological perspective, salvage law is a wholly inappropriate legal regime for treating underwater cultural heritage. Salvage law regards objects primarily as property with commercial value and rewards its recovery, regardless of its importance and value as cultural heritage. It encourages private-sector commercial recovery efforts, and is incapable of ensuring the adequate protection of underwater cultural heritage for the benefit of mankind as a whole', see Archaeological Institute of America, Comments on the UNESCO/UN DOALOS Draft Convention on the Protection of the Underwater Cultural Heritage, reproduced in: Lyndel Prott/Ieng Srong (eds.), Background Materials on the Protection of the Underwater Cultural Heritage (1999), 176.

> 'Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:
> (a) is authorized by the competent authorities, and
> (b) is in full conformity with this Convention, and
> (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.'

29 This provision is to be understood in connection with Art. 2 (7) CPUCH ('underwater cultural heritage shall not be commercially exploited') and with the rules contained in the Annex, which form an integral part of the CPUCH. In particular, Rule 2 of the Annex states:

> '[T]he commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.'

30 Although it does not totally exclude the application of the law of salvage or the law of finds, the CPUCH regime has the practical effect of preventing all the undesirable consequences of the application of this kind of rules. Freedom of fishing for archaeological and historical objects is definitely banned. This important result seemed generally acceptable to all the States participating in the negotiations.

31 The majority of States participating in the negotiations were ready to extend the jurisdiction of the coastal State to the underwater cultural heritage found on the continental shelf or in the EEZ. However, a minority of States assumed that the extension of the jurisdiction of coastal States beyond the limit of the territorial sea would have altered the delicate balance embodied in the UNCLOS between the rights and obligations of the coastal State and those of other States. Finally, to achieve a compromise, a procedural mechanism was envisaged which involves the participation of all the States linked to the heritage. It is based on a three-step procedure (reporting, consultations, urgent measures).[37]

32 As regards the first step (reporting), the CPUCH bans secret activities or discoveries.[38] States Parties must require their nationals or vessels flying their flag to report activities or discoveries to them. If the activity or discovery is located in the EEZ or on the continental shelf of another State Party, the CPUCH sets forth two alternative solutions:

> '(i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;
> (ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such report to all other States Parties.'[39]

States Parties must also notify the Director-General of UNESCO who must promptly make the information available to all States Parties.

33 As regards the second step (consultations), the coastal State is bound to consult all States Parties which have declared their interest in being consulted on how to ensure the effective protection of the underwater cultural heritage in question (Art. 10 (3)(a) and Art. 9 (5) CPUCH).[40] The CPUCH provides that this 'declaration shall be based on a verifiable link,

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[37] Under Arts. 11 and 12 CPUCH a similar, though not identical, three-step procedure applies to the underwater cultural heritage found in the Area.

[38] For obvious reasons, information is limited to the competent authorities of States Parties. Art. 19 (3) CPUCH: 'Information shared between States Parties, or between UNESCO and States Parties, regarding the discovery or location of underwater cultural heritage shall, to the extent compatible with their national legislation, be kept confidential and reserved to competent authorities of States Parties as long as the disclosure of such information might endanger or otherwise put at risk the preservation of such underwater cultural heritage.'

[39] Art. 9 (1)(b) CPUCH. On depositing its instrument of ratification, acceptance, approval or accession, a State Party shall declare the manner in which reports will be transmitted, Art. 9 (2) CPUCH.

[40] Here and everywhere else, the CPUCH avoids the words 'coastal State' (because of the already mentioned *horror iurisdictionis* of certain States) and chooses other expressions, such as the 'State Party in whose exclusive economic zone or on whose continental shelf' the activity or the discovery is located.

especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned.'[41]

The coastal State is entitled to coordinate the consultations, unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared an interest in being consulted shall appoint another coordinating State. The coordinating State must implement the measures of protection which have been agreed by the consulting States and may conduct any necessary preliminary research on the underwater cultural heritage. 34

As regards the third step (urgent measures), Art. 10 (4) CPUCH provides: 35

> 'Without prejudice to the right of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage, including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties.'

The right of the coordinating State to adopt urgent measures is an important aspect of the CPUCH regime. It would have been illusory to subordinate this right to the conclusion of consultations that are normally expected to last for some time. It would also have been illusory to grant this right to the flag State, considering the risk of activities carried out by vessels flying the flag of non-parties or a flag of convenience. By definition, in case of urgency a State must be entitled to take immediate measures without losing time in procedural requirements. The CPUCH clearly sets forth that in coordinating consultations, taking measures, conducting preliminary research and issuing authorizations, the coordinating State acts 'on behalf of the States Parties as a whole and not in its own interest' (Art. 10 (6) CPUCH). Any 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 UNCLOS. 36

The CPUCH devotes Art. 6 to bilateral, regional or other multilateral agreements: 37

> '1. States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention.
>
> 2. The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements.'

Art. 6 CPUCH opens the way for multiple-level protection of underwater cultural heritage. This corresponds to what has already happened in the field of the protection of the natural environment, where treaties which have a world sphere of application are often reinforced by treaties concluded at regional and sub-regional levels. The key to coordination between treaties applicable at different levels is the criterion of better protection (or of added value), in the sense that the regional and sub-regional treaties are concluded to ensure better protection than that granted by treaties adopted at a more general level.[42] 38

7. The Relationship between UNCLOS and CPUCH

The relationship between UNCLOS and CPUCH is a rather intriguing subject. The CPUCH provides as follows: 39

[41] See Art. 9 (5) CPUCH; no attempt was made to define what is a 'verifiable link'.

[42] The possibility of concluding regional agreements should be carefully considered by States bordering enclosed or semi-enclosed seas which are characterized by a particular kind of underwater cultural heritage, such as the Mediterranean, the Baltic, the Caribbean.

> 'Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.'[43]

40 Is this statement of non-prejudice correct? From a substantive point of view, a negative answer is probably to be preferred. The drafters of the UNCLOS could not foresee the subsequent progress in underwater technologies or the diffusion of treasure hunting activities in many seas of the world. They probably did not feel that the protection of the underwater cultural heritage was to be considered an urgent need. As already remarked,[44] rather than laying down a substantive regime to deal with a new concern, such as the protection of the underwater cultural heritage, the UNCLOS provisions pay greater heed to other factors, such as keeping the established balance between the rights granted to the coastal State within its own EEZ and the rights granted to other States within the same zone. The consequence is that underwater cultural heritage is left without protection from looting because if other rights were granted to the coastal States besides those relating to natural resources the balance established by the UNCLOS would be altered.

41 To depart from Art. 303, as the CPUCH did, was the only way to grant appropriate protection to underwater cultural heritage. The drafters of the CPUCH did not concentrate on any balance established by the UNCLOS. They realized that the UNCLOS regime was incomplete as regards the protection of underwater cultural heritage and could even be interpreted as an invitation to loot such heritage. They therefore tried to create a regime to remedy this situation. If the looting of cultural heritage is the result of the UNCLOS regime, it is the UNCLOS that is insufficient in this regard, irrespective of all the balances that the UNCLOS might wish to preserve.

42 A more legalistic approach to the question of the relationship between the UNCLOS and the CPUCH is to recall that Art. 303 (4) states that Art. 303 does not prejudice the 'other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature'. There is no reason why this provision refer only to agreements concluded before the adoption or the entry into force of the UNCLOS and not also to subsequent agreements, such as the CPUCH. In other words, the UNCLOS allows the drafting of more specific treaty regimes which can ensure better protection of underwater cultural heritage. The UNCLOS itself seems to encourage the filling of its gaps and the elimination of any contradictions that it has generated.

8. Specific Agreements on Certain Wrecks

43 Some specific agreements have been concluded by States interested in protecting wrecks of particular importance for their national historical and cultural heritage.[45] These agreements provide for forms of co-operation between the coastal and the flag State. Reference can be made to the 1972 agreement between Australia and the Netherlands concerning old Dutch shipwrecks, namely the Batavia, the Vergulde Draeck the Zuytdorp and the Zeewijk, which sank in 1629, 1656, 1712 and 1727 respectively; the 1989 exchange of notes between South Africa and the United Kingdom on the wreck of the British warship Birkenhead which sank in 1852; the 1989 agreement between France and the United States on the wreck of the Alabama, belonging to the Confederate States of America and lost in battle in 1864; the 1997 memorandum of understanding between Canada and the United Kingdom on the exploration, recovery and disposition of the HMS Erebus and HMS Terror, two ships lost during the

[43] Art. 3 CPUCH.

[44] *Supra*, MN 7.

[45] In some rare cases treaties establishing maritime boundaries contain provisions on underwater cultural heritage. See, for example, Art. 9 Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area known as Torres Strait, and Related Matters, 18 December 1978, UNTS 1429, 207.

attempt made in 1846 by Sir John Franklin to search for the North-West Passage; the 2001 agreement between France and the United States on the French wreck of La Belle, which sank in 1686 off the coast of Texas; and the 2000 agreement (not yet in force) between Canada, France, the United Kingdom and the United States concerning the shipwreck of the British liner Titanic, lost in 1912.[46]

9. Sunken State Ships and Aircraft

Some States take the position that no special regime should be granted to sunken State ships and aircraft. According to other States, the flag State indefinitely retains title to its sunken craft, wherever it is located, unless title has been expressly abandoned or transferred by it. While the UNCLOS does not deal with this question, the CPUCH makes a distinction depending on where such heritage is located. In the EEZ or on the continental shelf, 'no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State' (Art. 10 (7) CPUCH). However: 44

> 'within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and air craft'.[47]

The hortatory character of the latter provision ('should inform') has been criticized by the States which are in favour of the indefinite retention of title with regards to State craft.

Article 304
Responsibility and liability for damage

The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

Bibliography: *Julio Barboza*, The Saga of Liability in the International Law Commission, in: Emmanuel Decaux (ed.), L'évolution du droit international: Mélanges offerts à Hubert Thierry (1998), 5–22; *James Crawford*, State Responsibility, MPEPIL, available at: http://www.mpepil.com.; *James Crawford/Simon Olleson*, The Continuing Debate on a UN Convention on State Responsibility, ICLQ 54 (2005), 959–971; *Eric David*, Primary and Secondary Rules, in: James Crawford/Alain Pellet/Simon Olleson (eds.), The Law of State Responsibility (2010); *Thomas Gehring/Markus Jachtenfuchs*, Liability for Transboundary Environmental Damage: Towards a General Liability Regime?, EJIL 4 (1993), 92–106; Myron Nordquist/Choon-Ho Park (eds.), Report of the United States Delegation to the Third United Nations Conference on the Law of the Sea, Occasional Paper/Law of the Sea Institute 33 (1983); *Simon Olleson*, The Impact of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts: Preliminary Draft, British Institute of International and Comparative Law (2007), available at: http://www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf; *Esa Paasivirta*, Responsibility of a Member State of an International Organization: Where Will It End?, IOLR 7 (2010), 49–61; *Bruno Simma/Dirk Pulkowski*, Of Planets and the Universe: Self-Contained Regimes in

[46] Agreement between Australia and the Netherlands Concerning Old Dutch Shipwrecks, and Arrangement of 6 November 1972, [1972] ATS 18; Agreement between the Government of the United States of America and the Government of the French Republic Concerning the Wreck of the CSS Alabama, 3 October 1989, UNTS 1559, 277; Memorandum of Understanding between the Governments of Great Britain and Canada Pertaining to the Shipwrecks HMS Erebus and HMS Terror, 5, 8 August 1997, reproduced in: Roberta Garabello/Tullio Scovazzi (eds.), The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention (2003), 263; Agreement between the Government of the United States of America and the Government of the French Republic Regarding the Wreck of La Belle, 31 March 2003, TIAS 03-331; Agreement between Governments of Canada, Republic of France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America Concerning the Shipwrecked Vessel RMS Titanic, 6 November 2003, available at *www.gc.noaa.gov/documents/titanic-agreement.pdf*.

[47] Art. 7 (3) CPUCH.

International Law, EJIL 17 (2006), 483–529; *Christian J. Tams*, Unity and Diversity in the Law of State Responsibility, in: Andreas Zimmermann/Rainer Hofmann (eds.): Unity and Diversity in International Law (2005), 435–458

Documents: GA, Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies, UN Doc. A/62/62 (2007); ILC, Report of the International Law Commission: Draft Articles on the Responsibility of International Organizations, UN Doc. A/66/10 (2011), GAOR 66th Sess. Suppl. 10, 52–66; ILC, Report of the International Law Commission: Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 59–365; ILC, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex; ILC, Second Report on State Responsibility by Roberto Ago, Special Rapporteur, UN Doc. A/CN.4/233 (1970)

Cases: ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949), 174; ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10; ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

Contents

I. Purpose and Function

1 Art. 304 clarifies that the Convention's provisions addressing responsibility and liability for damage (such as Arts. 139, 235, 263 etc.) do not preclude the application of the general regime of international law. As such, Art. 304 clarifies that the Convention's regime is not (to use an often misleading term) 'self-contained' but can be complemented by external rules.[1] Whilst this is a useful statement, it is by no means revolutionary. In fact, few international agreements spell out their own particular, comprehensive regime of treaty-based responsibility and are self-contained in an exclusive sense; precisely because of this, the general regime of responsibility in international law has assumed much relevance.

2 As a 'without prejudice' clause, Art. 304 is formulated in a rather straightforward way. In order to appreciate its relevance, however, it needs to be read against the backdrop of those provisions of the Convention that expressly address responsibility and liability, as well as the 'existing […] and […] further rules regarding responsibility and liability under international law'. It should also be noted that whilst the English language version of the Convention refers to 'responsibility and liability', the other authentic language versions refer solely to 'responsibility'.[2] This discrepancy reflects the different terminological traditions as well as uncertainty about the scope of the 'without prejudice' clause.[3] However, as will be shown below, the linguistic disparity can be addressed by way of interpretation.

3 Art. 304 affirms that the Convention's provisions on responsibility and liability can be complemented by the general rules. To say so expressly was probably unnecessary, as the Convention – containing only few express secondary provisions – was never designed to be 'self-contained'. Still, it is a useful clarification. As with many other major multilateral treaties, the real challenge is to determine the relationship between the general regime of responsibility and liability on the one hand, and the existing special rules on the other. On

[1] For details on self-contained regimes, see *Bruno Simma/Dirk Pulkowski*, Of Planets and the Universe: Self-Contained Regimes in International Law, EJIL 17 (2006), 483.

[2] See e. g. the French and Spanish versions which refer to *responsabilité* and *responsabilidad* respectively.

[3] See for comment, *infra* MN 8–9.

this, the Convention – just as most other major multilateral treaties – remains silent. The brief considerations set out below suggest that in practice, the general regime applies, but, where necessary, is fine-tuned by the Convention.

II. Historical Background

As with many of the other general and final clauses of the Convention, Art. 304 was added at a reasonably late stage of the drafting process and there is little recorded drafting history. It is the result of a provision anonymously submitted to the Informal Plenary in 1980[4] and was subsequently accepted by consensus after minor amendment.[5] The provision appeared in its current form as Art. 304 in the third revision of the Informal Composite Negotiating Text (ICNT).[6] There were no subsequent changes to the text between this stage and the eventual conclusion of the Convention. 4

The US Delegation reported that this provision had been accepted 'on the tacit understanding that it facilitated acceptance of the Convention […] by the Spanish and Moroccan delegations, and might be removed if this proved not to be the case'.[7] However, Morocco signed the Convention without making any declaration (under Art. 310) on 10 December 1982. Further, although Spain made a long declaration upon signing on 4 December 1984, none of the provisions of its declaration specifically relate to the issue at hand.[8] 5

III. Elements

1. Context

As may be expected from a 'constitution of the oceans', the Convention imposes manifold obligations upon States relating to matters as diverse as fisheries, environmental protection and deep seabed mining, to name but a few. A treaty of this scope, both *ratione materiae* and *ratione personae*, is bound to be violated at some point. General international law addresses violations of treaties as part of the legal regime of responsibility, defined in the broadest sense as the 'general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom',[9] comprised of so-called 'secondary rules' regulating the attribution of conduct, the consequences of breaches and issues of implementation.[10] At the time State representatives met in 6

[4] UNCLOS III, General Provisions, UN Doc. GP/8 (1980, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XII (1987), 301.

[5] UNCLOS III, Report of the President on the Work of the Informal Plenary Meeting of the Conference on General Provisions, UN Doc. A/CONF.62/L.58 (1980), OR XIV, 128 (para. 11).

[6] UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/Rev. 3 (1980), OR VIII, 120 (Art. 304).

[7] Myron Nordquist/Choon-Ho Park (eds.), Report of the United States Delegation to the Third United Nations Conference on the Law of the Sea, Occasional Paper/Law of the Sea Institute 33 (1983), 447.

[8] *Cf.* the Spanish Declaration, Art. 310 (paras. 2–4): UN, UNCLOS Declarations Made upon Signature, Ratification, Accession or Succession, or Any Time Thereafter, available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#EndDec.

[9] ILC, Report of the International Law Commission: Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 59 (Introductory Commentary, para. 1).

[10] As noted by Roberto Ago, secondary rules would comprise 'the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility […] [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.' ILC, Second Report on State Responsibility by Roberto Ago, Special Rapporteur, UN Doc. A/CN.4/233 (1970), 2 (para. 7 (C)). For further comment, *cf. Eric David*, Primary and Secondary Rules, in: James Crawford/Alain Pellet/Simon Olleson (eds.), The Law of State Responsibility (2010).

the framework of UNCLOS III, the law of responsibility had already been discussed in some detail by the United Nations International Law Commission (ILC), which was to complete the first reading of Part One of its Articles on the Responsibility of States for Wrongful Acts in 1980, and which had also embarked on a clarification of international legal rules governing the consequences of hazardous but not unlawful activities (referred to as 'liability').[11]

7 The drafters of the Convention sensibly opted not to duplicate the ILC's codification attempts. While laying down many (primary) rights and duties of States, the Convention scantly elaborates on the 'general conditions'[12] under which States incur responsibility. As such, in the absence of specific provision, these matters are regulated by the general rules governing responsibility and liability under international law. Art. 304 ensures that the Convention's express provisions do not function to exclude the general regime. Instead, as the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) noted in its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, in dealing with issues of responsibility and liability, 'account will have to be taken of such rules under customary law, especially in light of the ILC Articles on State Responsibility'.[13] Like many other treaties, the Convention achieves this result by means of a 'without prejudice' clause.

2. Without Prejudice Clause

8 'Without prejudice' or other 'saving' clauses are common in many legal texts.[14] They clarify that the provisions of one instrument (in this case: the Convention) are not intended to override provisions traditionally dealt with separately (in this case: under the rules governing responsibility and liability). In addition to delimiting spheres of influence between different legal regimes, a 'without prejudice' clause such as Art. 304 can also be read as a *renvoi* to the separate legal regimes referred to. In the case of Art. 304, this *renvoi* is dynamic in the sense that explicit reference is made to existing rules and accommodation made for subsequent development in the law. The point was expressly made by the ITLOS Seabed Disputes Chamber in its Advisory Opinion on *Responsibilities and Obligations of Sponsoring States*, when it observed that 'article 304 of the Convention refers not only to existing international law rules on responsibility and liability, but also to the development of further rules'.[15]

9 It is slightly more difficult to determine the substantive scope of the reference, in the English language version of Art. 304, to 'responsibility and liability'. The difference in meaning of the terms 'responsibility' and 'liability' is not easy to appreciate (not the least because of the disparity between the different authentic texts[16]). The difficulties result from the inconsistent use of terminology: As was observed by the Seabed Disputes Chamber in the

[11] For comment on the ILC's work, see e. g. *Julio Barboza*, The Saga of Liability in the International Law Commission, in: Emmanuel Decaux (ed.), L'évolution du droit international: Mélanges offerts à Hubert Thierry (1998), 5; *Thomas Gehring/Markus Jachtenfuchs*, Liability for Transboundary Environmental Damage: Towards a General Liability Regime?, EJIL 4 (1993), 92.

[12] See ILC, Report of the International Law Commission: Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 59 (Introductory Commentary, para. 1).

[13] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to activities in the Area*, Advisory Opinion of 1 February 2011, para. 169, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

[14] See e. g. Art. 73 Vienna Convention on the Law of Treaties which states that its provisions 'shall not prejudge' questions that arise in relation to issues of State Succession, State responsibility and the outbreak of hostilities between States. Just as the Convention, modern texts typically avoid the terms 'shall not prejudge' and instead use 'without prejudice' clauses. For instance, ILC, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex (ASR), Article 59 states that its provisions are set out 'without prejudice' to the UN Charter, and should be interpreted in accordance with it.

[15] *Cf. Responsibilities and Obligations of Sponsoring States* (note 13), para. 211.

[16] See *supra*, MN 2.

above-mentioned Advisory Opinion, in a number of articles of the Convention the term 'responsibility' is used to refer to a primary obligation imposed on States whereas the term 'liability' is used to refer to the secondary obligation, namely, the consequences of the breach of this primary obligation.[17] This use of terminology is notably different from the meaning that both terms were given (at least unofficially) in the course of the ILC's work: as noted above, the Commission has, since the late 1960 s, understood 'responsibility' to encompass the general conditions of responsibility as well as the legal consequences triggered by wrongful conduct; by contrast, 'liability' was used to describe the Commission's (not very successful) attempts to identify legal rules governing the consequences of hazardous but lawful activities.

Art. 304 has to be seen against this background of terminological uncertainty. It does not entirely resolve the uncertainty; but from its purpose, it seems clear that the provision does not intend to impose any further primary obligations not already contained in the Convention. Instead, the *renvoi* is to the general, customary regime governing responsibility, as elaborated by the ILC. This, in fact, is not disputed, and bodies like ITLOS have applied the customary regime when called upon to decide on alleged breaches of the Convention.[18] In addition, one might wonder whether the term 'liability' in the English language version should be interpreted as a reference to the general legal regime governing consequences of hazardous but lawful activities, which, as mentioned above, is informally referred to as 'liability'. Given that other provisions of the Convention, such as Arts. 139 and 235, use 'responsibility and liability' in the context of unlawful activities,[19] this would seem unlikely. However, the terminological debate is of limited practical relevance: for one, even without an express *renvoi*, it is clear that a general regime governing consequences of hazardous but lawful activities would apply unless the Convention had contracted out of it. What is more, under modern international law, such a general regime entailing 'liability' for lawful acts is, at best, in its infancy. As was noted by the ITLOS Seabed Disputes Chamber, while then ILC had sought 'to address the issue of damages resulting from acts not prohibited under international law […], such efforts have not yet resulted in provisions entailing State liability for lawful acts'.[20] **10**

3. Responsibility and Liability for Breaches of the Convention: An Overview

Responsibility is a 'cardinal institution'[21] of international law of immense practical relevance. The notion of 'State responsibility' was the subject of decades of debate within the UN International Law Commission, which led to the adoption, in 2001, of a text of 59 Articles on the Responsibility of States for Internationally Wrongful Acts.[22] These Articles are not formally binding, but to a large extent reflect customary international law.[23] Since 2001 (and even in fact even before their adoption), they have been invoked by States and courts, both national and international,[24] and for practical purposes can today be taken as the **11**

[17] Such as Arts. 139, 235 (1) and Art. 4 (4) Annex III. See *Responsibilities and Obligations of Sponsoring States* (note 13), para. 66.

[18] See for an illustration, *infra* MN 16.

[19] See further: *Vöneky/Höfelmeier* on Art. 139; *Stephens* on Art. 235 MN 22–23.

[20] *Responsibilities and Obligations of Sponsoring States* (note 13), para. 209.

[21] See *James Crawford*, State Responsibility, MPEPIL, para. 1, available at: http://www.mpepil.com.

[22] ILC, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex (ASR).

[23] Whether the international community should proceed to adopt a binding text on State responsibility remains a matter for debate, see *James Crawford/Simon Olleson*, The Continuing Debate on a UN Convention on State Responsibility, ICLQ 54 (2005), 959.

[24] For detailed analyses of the many dozens of decisions (domestic and international) referring to provisions of the ILC's Articles between 2001 and 2007, see GA, Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies, UN Doc. A/62/62 (2007); and *Simon Olleson*, The Impact of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts: Preliminary Draft, British Institute of International and Comparative Law (2007), available at: http://www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf.

essential 'roadmap' to the law of responsibility. In the terms of Art. 304, they provide the starting-point to the analysis of the 'existing rules of responsibility', while (not being formally binding) remaining flexible enough to accommodate future developments.

12 While the law of responsibility remains one of the most complex, and controversial areas of international law, the essence of the ILC's Articles on State Responsibility can be summarised in five propositions[25]:

(i) A State incurs responsibility whenever conduct attributable to it is not in conformity with its obligations under international law (irrespective of whether this conduct was negligent or willful; and irrespective of whether it has resulted in damage).[26]

(ii) As a general rule, a State is responsible only for conduct of its organs, or individuals acting under its direction and control, but not for conduct of private individuals operating outside the State's structure.[27]

(iii) Even if conduct *prima facie* is not in conformity with the international obligations of a State, circumstances such as consent, necessity, duress, self-defence, can preclude the wrongfulness of that conduct.[28]

(iv) If a State incurs responsibility, it is under a duty to cease its wrongful conduct and to make reparation for the injury caused. Reparation will primarily require restitution, and, if this is not possible, compensation and/or satisfaction.[29]

(v) A State has standing to invoke the responsibility of another State if it has been injured by the wrongful conduct (e. g. because the obligation was owed to it) and if it can validly claim to act in defence of a collective interest (even though in this case, the scope of enforcement rights may be restricted).[30] The modalities by which responsibility can be invoked depend on the applicable legal regime and may, for instance, be clarified in a treaty.

13 While the ILC's 2001 Articles govern the responsibility of States, responsibility can be incurred by any subject of international law – in fact, the ability to incur or invoke responsibility is considered indicative of legal personality.[31] Within the framework of the Convention, the responsibility of international organizations is of relevance. This topic is addressed in the 2011 ILC Draft Articles on Responsibility of International Organizations,[32] which to a large extent follow the approach of the State responsibility text. In addition, the ILC's 2006 Draft Articles on Diplomatic Protection[33] are of considerable practical relevance: they spell out the conditions under which a State can bring claims based on injury sustained by its subjects or entities under its control.

14 All three texts referred to in the preceding paragraph lay down general, residual rules that will yield to special legal regimes.[34] As noted above, special regimes do not, as a rule, completely opt out of the residual regime.[35] However, to the extent that they address questions of responsibility at all, it must be assessed whether their special rules derogate from the general regime.[36] Three illustrative examples may serve to highlight the interrelationship between the Convention's special rules and the general regime:

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[25] For a summarised account, see e. g. *Crawford* (note 21).

[26] See ASR with Commentaries (note 9), 63–74 (Arts. 1–2).

[27] *Ibid.*, 84–122 (Arts. 4–11).

[28] *Ibid.*, 173–206 (Arts. 20–25).

[29] *Ibid.*, 216–268 (Arts. 30–37).

[30] *Ibid.*, 294–324 (Arts. 42 and 48).

[31] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949), 174.

[32] ILC, Draft Articles on the Responsibility of International Organizations, UN Doc. A/66/10 (2011), 54–68 (DARIO).

[33] ILC, Draft Articles on Diplomatic Protection, UN Doc. A/61/10 (2006), 16–21.

[34] See Art. 55 ASR, DARIO (note 32), 68 (Art. 63) and ILC Draft Articles on Diplomatic Protection (note 33), 21 (Art. 17).

[35] *Supra*, MN 1.

[36] *Cf.* generally *Christian Tams*, Unity and Diversity in the Law of State Responsibility, in Andreas Zimmermann/Rainer Hofmann (eds.): Unity and Diversity in International Law (2005), 435.

(i) In providing for a system of compulsory, binding dispute settlement (subject to limited exceptions), the Convention introduces a particularly sophisticated mechanism for the invocation of responsibility.[37] Included in this framework is Art. 292, which contains a particularly effective mechanisms of securing one particular remedy available under the general regime (namely restitution taking the form of the release of vessels). The Convention's dispute settlement mechanism complements the general, rudimentary rules governing the implementation of responsibility, which (being general in character) simply could not provide for any institutional implementation mechanism.

(ii) In laying down rules on the nationality of ships, the Convention concretises the general regime governing nationality of claims. As Art. 92 UNCLOS clarifies, flag State jurisdiction is, in principle, exclusive; however, the Convention itself recognises that in many instances, States other than the flag State (e. g. coastal States, port States) can exercise jurisdiction.[38] In addition, it has traditionally been recognised that the flag State is entitled to vindicate rights of crew members irrespective of their nationality.[39] These provisions can be seen as special rules 'channeling' law enforcement competence, which are more specific than, and occasionally qualify, the general rules.

(iii) In a number of provisions, the Convention seeks to address problems arising from the involvement of a plurality of (potentially) responsible actors. In providing that international organizations shall bear responsibility for failure to comply with the Convention within their sphere of competence, the Convention lays down a (fairly basic) rule on how to delimit the respective spheres of responsibility of member States and international organizations.[40] This special rule concretises the controversial provisions found in the ILC's Draft Articles on Responsibility of International Organizations.[41] Similarly, Art. 139 and Annex III, Art. 22 seek to determine the spheres of responsibility of States, international organizations and contractors for conduct in the area.[42]

In the light of these illustrations, the regime of responsibility for breaches of the Convention can be said to largely follow the general approach which the Convention 'fine-tunes' and refines in special circumstances. Practice and jurisprudence since the Convention's entry into force suggest that the 'refined' Convention regime of responsibility has been applied without major problems. This is well evidenced by the proceedings in the *M/V 'Saiga' (No. 2) Case*. In this particular case, Saint Vincent and the Grenadines, as the flag State, averred that in detaining the ship SAIGA through the use of force, Guinea had breached the Convention. In doing so Saint Vincent and the Grenadines drew on Art. 111 (8) and customary international rules, which (as the Tribunal explicitly noted) were applicable owing to the operation of Art. 304,[43] in successfully establishing Guinea's responsibility for breaches of the Convention.[44] The Tribunal's reasoning was based on the general rules as 'fine-tuned' by the Convention. 15

[37] See Part XV UNCLOS, especially Art. 286. For further detail, see *Treves* on Art. 286.

[38] See further: *Guilfoyle* on Art. 92 MN 8–11; *Bartenstein* on Art. 21; *König* on Art. 218.

[39] ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10, paras. 105–106.

[40] See Arts. 5 and 6 Annex IX.

[41] *Cf.* Arts. 14–18 and 58–62 ASR; for comment, see e. g. *Esa Paasivirta*, Responsibility of a Member State of an International Organization: Where Will It End?, IOLR 7 (2010), 49.

[42] For further detail, see: *Vöneky/Höfelmeier* on Art. 139; *Le Gurun* on Art. 22 Annex III.

[43] *The M/V 'Saiga' (No. 2) Case* (note 39), para. 167.

[44] *Ibid.*