General introduction

'Underwater cultural heritage' (hereafter UCH) is the term commonly used today to mean material found underwater, generally lying on – or embedded in – the seabed, which has the potential to yield information about past human existence. This information is acquired using archaeological techniques and for this reason UCH is sometimes defined in rough terms as material of archaeological interest. Although shipwrecks are the predominant form of UCH, the term encompasses far more than just shipwrecks; equally, while there is a tendency to associate archaeology with the study of very old things, the remit of modern archaeology extends to the material remains of recent times.

Archaeological remains of all kinds, by their nature, are a finite and non-renewable resource and, for various reasons, archaeological remains located in the marine environment are regarded as a particularly valuable part of that resource. Where remains are lying on or in the seabed, the water column acts as a natural shield against human interference and the rate of natural decay is likely to be slowed by the environmental conditions. Marine sites can also offer rare (sometimes unique) insights into past human life, including into matters such as the nature and extent of trade and human interaction throughout the ages; the true course of historic naval battles and engagements; and even the daily life and movements of prehistoric man. In the case of shipwrecks, an additional value is that they may form a 'closed deposit', in other words a site containing material all in use at the same time. Such 'time-capsules' are rarely found in terrestrial archaeology and contain important information for dating purposes.

Prior to the 1950s, UCH was generally well protected from human interference by its marine environment. However, since that time the combination of a revolution in marine technology and increasing

utilisation of the sea and its resources means that threats from human activities have vastly increased. Today virtually the entire global stock of shipwrecks and other UCH lying in the oceans is exposed to the possibility of human interference, deliberate or otherwise.

As in many other fields, the law has tended to respond fairly slowly and reactively to developments in relation to UCH. Nevertheless, there is now a growing body of law – at both domestic and international levels – that is designed to regulate human activity in the interests of UCH preservation. Attention to date, especially at the international level, has focused on the question of how to protect UCH from deliberate interference. In particular, the commercial exploitation of shipwrecks by those interested solely in profiting financially is a matter that has been of growing concern. For example, it has been estimated that in the last twenty years alone commercial exploitation has been responsible for the destruction of at least 345 major shipwrecks, as well as severe damage to many thousands of other sites.[1]

This extended introduction is designed primarily to provide readers (especially those who are not familiar with the subject, or do not have a legal background) with some general information they may find useful before reading other parts of the book. Section 1 provides a brief historical overview of the subject; sections 2 and 3 provide some information relating to legal matters of direct relevance; section 4 introduces the UNESCO Convention 2001; and section 5 explains the approach and structure of the book. Many of the issues raised in the General introduction are returned to in greater detail in the chapters that follow.

1. A brief historical overview

The development of interest in UCH and its legal protection took place in two distinct phases, each of which was prompted by significant technological advances.

1.1 Early developments

The recovery of material from wrecks on the seabed is an activity that is centuries old. In the seventeenth and eighteenth centuries the 'diving-bell' permitted access to wrecks lying at depths of up to eight fathoms

[1] Guérin, 'The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage', p. 5.

(approximately fifteen metres).[2] In the nineteenth century, the Deane brothers famously recovered guns from the *Royal George* off Spithead, Portsmouth, using a 'diving helmet and dress' that allowed them to descend to depths of more than twenty fathoms (approximately thirty-six metres).[3] At the start of the twentieth century, sponge divers using similar equipment made the first discovery of an ancient shipwreck on the seabed, a first-century BC wreck in fifty-five metres of water off the Greek island of Antikythera.[4] However, it was not until the invention of the aqualung in the 1940s, which led to widespread use of self-contained underwater breathing apparatus (scuba), that the need for some form of legal regulation of activities to afford protection to historically significant shipwrecks, and other UCH, began to be questioned.

In the period between 1950 and 1980, the rapid expansion of 'scuba-diving' in coastal waters for recreation and other purposes led to the discovery of many shipwrecks and other archaeological remains. In the absence of legal regulation, it also led to a great deal of damage to sites and dispersal of recovered artefacts. The impact of these developments was felt first, and most keenly, in the warm and archaeologically rich waters of the Mediterranean Sea, where many sites were ransacked in the 1950s and 1960s.[5] However, during the 1960s and early 1970s, other parts of the world were increasingly affected, including Australia, where four Dutch East Indiamen were discovered and plundered by treasure seekers, and the USA, where the proximity of sunken Spanish colonial-era shipwrecks to the coasts of Florida led to the emergence of treasure-hunting activity on an industrial scale. Even in the less hospitable waters of northern Europe, a spate of notorious incidents occurred. These included the ransacking of several historically significant shipwrecks off the coasts of the UK; the recovery of treasures from a number of Spanish Armada wrecks located off the west coast of Ireland; and the salvage of large numbers of gold and silver coins from the Dutch East Indiaman *Akerendam*, lying off the Norwegian coast.

[2] See, generally, Earle, *Treasure Hunt*. [3] See, generally, Bevan, *The Infernal Diver*.
[4] See, generally, Weinberg *et al.*, 'The Antikythera Shipwreck Reconsidered'.
[5] A survey undertaken in 1973 reported evidence of widespread looting of Classical Age wrecks off the coast of Turkey: Bass, 'Turkey: Survey for Shipwrecks, 1973'. In the early 1980s, it was reported that, off the French Mediterranean coast, divers had reputedly 'plundered every old wreck lying above a depth of 50 metres': Marx, 'The Disappearing Underwater Heritage'. (The depth of fifty metres is significant because it is the approximate limit of standard scuba equipment.)

As discoveries were made, the archaeological potential of the seas began to be appreciated. Two defining moments in the gradual evolution of maritime archaeology into a distinct sub-branch of archaeology were the employment, in the late 1950s and early 1960s, of 'classically correct' archaeological techniques by Bass and Throckmorton to investigate sites in the Mediterranean Sea,[6] and the publication – in 1978 – of Keith Muckleroy's seminal text on maritime archaeology, which set out the principles, theories and methods of the new sub-discipline.[7] The raising of the *Vasa* in Sweden in 1961, and the *Mary Rose* in the UK in 1982, demonstrated that maritime archaeology was a subject that was not only of academic interest but also one that had the potential to engage enormous public enthusiasm as well.

During the 1960s and 1970s a number of cases arose before the admiralty courts of common law jurisdictions requiring them to adjudicate on competing claims to historic shipwrecks. In doing so they used the law of salvage and other traditional principles. These are designed to determine private rights with respect to *recent* marine casualties and encourage recovery of material without regard to its potential cultural value. However, at the same time the first domestic legislation providing protection specifically for UCH was also enacted and there was a stirring of interest at both regional (specifically European) and global levels in the question of legal protection for UCH. Among other things, this led to the inclusion of two articles addressing the matter in the UN Convention on the Law of the Sea 1982 (hereafter LOSC).

1.2 1985: A turning point

In 1985, scientists from two oceanographic institutions engaged in testing the capabilities of a new generation of deep-water submersible vehicle set for themselves a particular challenge: to locate the wreck of RMS *Titanic*. Employing deep-towed submersibles equipped with sonar imagery and video equipment, they undertook systematic search operations in an area of the North Atlantic Ocean 150 square-miles in size, situated 300 miles or so from shore. After two months of effort, they found the wreck lying at a depth of approximately 3,800 metres; two years later, around 1,800 artefacts were recovered from the site with the aid of a submersible fitted with manipulator arms.

[6] Bascom, 'Deepwater Archaeology', p. 263. [7] Muckleroy, *Maritime Archaeology*.

The discovery of the *Titanic* proved to be a pivotal moment for the development of international legal protection for UCH. It represented the notional point in time when the physical protection previously afforded to UCH in the open oceans by the limitations of scuba came to an end and the question of how to protect deep-water sites lying far from shore became of some practical relevance. The discovery also sparked interest in a whole host of questions, including the ownership of the *Titanic*, its cargoes and the personal items on board; the value of the wreck in cultural and other terms; and the ethics of interfering with wreck sites, particularly where they represent major gravesites.

The *Titanic* was discovered only three years after the adoption of the LOSC and almost a decade before that treaty entered into force. However, even at this stage, there was a widespread view that the two provisions in that treaty relating to UCH did not afford adequate protection to UCH. In 1988, the International Law Association took up the task of drafting a treaty that would remedy the inadequacy.

1.3 *More recent developments*

The discovery of the *Titanic* marked the start of a revolution in marine technology and an era of deepwater exploration that continues to this day. In the late 1980s, sophisticated sonar equipment and remotely operated vehicles (ROVs) were used to locate the SS *Central America*, located at a depth of approximately 2,400 metres, and to recover a substantial quantity of gold from the wreck. In the mid-1990s, similar equipment was used to recover 179 tons of copper and tin ingots from the SS *Alpherat*, lying at a depth of 3,770 metres.[8] Today, there are ROVs capable of operating at depths in excess of 6,000 metres,[9] opening up access to virtually the entire ocean floor.

Although ultra-deep search and recovery operations (in waters exceeding 1,000 metres in depth) are still few and far between, similar tools and techniques are available for use in a wide range of applications

[8] This feat set a world record for the deepest shipwreck salvage operation, a record which may not yet have been broken (see www.bluewater.uk.com/achievements.htm). Blue Water Recoveries, the British-based company which undertook this operation, has discovered a number of deep-water shipwrecks including M/V *Derbyshire* at a depth of 4,210 metres, DKM *Bismarck* at 4,700 metres and M/V *Rio Grande* at 5,762 metres.

[9] See, for example, the capabilities of the Towed Ocean Bottom Instrument (TOBI), a deep-towed system operated by the National Oceanography Centre, Southampton (http://noc.ac.uk/research-at-sea/nmfss/nmep/tobi).

in all parts of the seas. Acoustic and magnetic imaging devices are now standard equipment for those engaged in exploring the ocean floor: side-scan and bathymetric sonar systems are employed to identify seabed protrusions and indentations; sub-bottom profilers provide cross-sectional analyses of the sub-sea strata to enable identification of material buried in sediment; and magnetometers can locate ferrous material.[10] While manned or unmanned submersibles are required to provide direct physical access to very deep parts of the seafloor, divers employing specialised gas mixtures and other sophisticated equipment now quite routinely work at depths up to and even exceeding 100 metres.[11] Since it became available for civilian use in the mid-1990s, global-positioning system (GPS) technology has become common ship-board equipment,[12] providing an indispensable tool for vessels that need to pinpoint their positions with precision, including those engaged in salvage or archaeological research in the open oceans.

The activities of an American-based marine exploration and shipwreck recovery company, Odyssey Marine Exploration (hereafter OME), illustrate how modern technology has revolutionised the field of shipwreck search and recovery. Over recent years OME has surveyed and mapped thousands of square miles of seabed and discovered hundreds of wrecks, ranging from Roman and Phoenician vessels to German U-boats and modern fishing vessels. Among its discoveries have been the eighteenth-century British warship, HMS *Victory*, in the English Channel, and the Spanish colonial-era warship, *Nuestra Señora de las Mercedes*, off the coast of Portugal. OME's activities, which are undertaken on a commercial basis but take some account of cultural values,[13] have given rise to heated debate concerning the ethics of the sale of commercially valuable cargoes from historic shipwrecks; whether it is possible to combine a profit motive with good archaeology; and whether appropriate archaeological methodology can be employed to excavate deep-water sites beyond the range of divers.

It is not just well-financed commercial organisations or oceanographic institutions that are making use of advanced technology in

[10] See, generally, Mather, 'Technology and the Search for Shipwrecks'.

[11] For example, in 2007, divers accessed the wreck of RMS *Carpathia* off the coast of Ireland, which lies at a depth of 156 metres: Parham and Williams, 'An Outline of the Nature of the Threat to Underwater Cultural Heritage in International Waters'.

[12] The Navstar global positioning system (GPS) was originally developed for US military use. It was made available to civilian users in 1996.

[13] See further, Chap. 6.

the context of UCH. Increasingly, marine archaeologists employ such technology in their day-to-day work. As a result, the full archaeological potential of the marine environment, especially with respect to *non-shipwreck* remains, is becoming better understood. In 2009, an Anglo-Greek archaeological team utilising digital technology was able to identify and map the layout of the streets and buildings of the submerged Bronze Age city of Pavlopetri, a site extending over 30,000 square metres of seabed.[14] Technology of the same kind has also enabled archaeologists to identify submerged land-surfaces on parts of the continental shelf that were exposed during the Ice Ages: recent discoveries by Scandinavian archaeologists of Mesolithic dwelling remains, graves and fishing structures illustrate the potential these land-surfaces have to yield unique evidence about the life of our early ancestors.[15]

Recoveries of large quantities of hand axes and the bones of mammoths and other land animals by fishermen and dredging operators working in the North Sea provide further evidence of the archaeological potential of the continental shelf, but also demonstrate that commonplace commercial activities in the marine environment have considerable potential to interfere with archaeological evidence. Trawling by fishermen, dredging for marine aggregates, pipeline- and cable-laying, and the construction of wind-farms and other installations all pose a substantial threat. As the scale and intensity of such activities increase, so does the risk of harm to UCH in all its forms.

Many states now have legislation in place to protect UCH in their coastal waters. While much of this legislation is designed to regulate deliberate human interference, increasingly it is being supplemented by measures to minimise incidental damage and destruction by general marine activities. Today, when domestic courts are called upon to adjudicate in cases relating to historic wrecks, they are showing increasing awareness of cultural values and considerations. After six years of effort, in 1994, the International Law Association (ILA) handed over to UNESCO a draft text for a treaty on UCH protection. This became the basis for the development of the Convention on the Protection of the Underwater Cultural Heritage, adopted in 2001.

[14] 'Lost Greek city that may have inspired Atlantis myth gives up secrets', *Guardian*, 16 October 2009.

[15] See Grøn and Mortensen, 'Stone Age in the Danish North Sea Sector'. The discoveries are apparently 'unparalleled' by dry sites.

2. Relevant branches of law

From a legal point of view, what makes this field fascinating – but at the same time complex – is that it lies at the interface between three distinct branches of law: admiralty/private maritime law, the law of the sea and cultural heritage law. These legal areas are quite different in nature and are designed to perform very different and not always compatible functions.

2.1 Admiralty/private maritime law

Admiralty law is an area of private law relating to maritime activities. As an area of private law, it governs relations between individuals or other private entities and, among other things, determines competing private rights and interests. It is administered by domestic courts and, specifically, the admiralty courts of the common law jurisdictions.

The principles applied by the early English admiralty courts were derived from classical and medieval codes originating in continental Europe; they were then developed and passed on to other common law jurisdictions, including Australia, Canada, Ireland, New Zealand, Singapore and the USA. While admiralty law is a feature of the common law world, civil law systems have their own equivalent principles for dealing with maritime disputes. However, although the common law and civil law principles have common roots, they developed along quite separate lines and operate in different ways today. In the context of UCH, it is the admiralty law of the common law world that has had the most significant impact.

Admiralty law is designed to provide certainty and predictability for private parties with respect to their dealings. It also fulfils broader public policy objectives, such as safety of life and property, and protection of the marine environment. The remit of the admiralty courts extends to the 'rescue' of maritime property in peril and the determination of rights to such property through application of the laws of salvage and 'wreck'.[16] In some jurisdictions, admiralty courts also occasionally apply the law of finds to such property. Given that admiralty law relates to trans-border activity, and ships and individuals can move about quite freely in the marine environment, there are special rules for dealing with matters of enforcement and jurisdiction.

[16] 'Wreck' is a technical term. See, further, Chap. 2, section 2, esp. n. 10.

The principles of modern admiralty law derive from domestic case law and statutes, but there is now also a significant body of relevant international law in the form of treaties developed under the aegis of international organisations such as the Comité Maritime International (CMI) [International Maritime Committee] and the International Maritime Organisation (IMO). Of particular pertinence in the present context is the IMO's International Salvage Convention of 1989.

2.2 *The law of the sea*

The law of the sea is an important sub-category of public international law, a major area of legal specialism with its own distinct principles, enforcement mechanisms and tribunals. As an area of public international law, the law of the sea is generally concerned with relations between states.

The modern law of the sea is largely a product of the twentieth century, although, like admiralty law, its roots are deep in the past. Its objective is to establish legal order over maritime space by establishing a framework of rules for determining the rights and duties of states in respect of their use of the oceans. A central feature of this framework is the division of the oceans into distinct maritime zones, each with its own specific legal regime.

Throughout its history, the law of the sea has been characterised by a tension between the concepts of 'closed seas' and 'open seas', and this tension has had a profound influence on its development. The right of a coastal state to control a narrow belt of water immediately adjacent to its shores has been accepted for centuries. However, a debate, originating in the seventeenth century and continuing to this day, concerns the extent to which the broader maritime space should be subject to national control. While the concept of open seas – embodied in the notion of freedom of the high seas – has generally tended to prevail, during the twentieth century it has been subject to a certain degree of erosion. Today, in the international arena, the debate is conducted by two opposing political groupings. The predominant interest of 'coastal states' is in preserving the integrity of their rights over their coastal waters and, at times, in extending those rights; the predominant interest of 'flag states' (or 'maritime states') is to preserve their navigational freedom so that their merchant and military fleets can move freely about the globe.

Until the twentieth century, the rules of international law of the sea had developed through the custom and practice of states. However, during that century there were a number of attempts to codify those

rules in treaty form. Most notably, the UN held three diplomatic conferences on the law of the sea. The first UN Conference on the Law of the Sea (UNCLOS I) resulted in the four Geneva Conventions of 1958: the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on the Continental Shelf; and the Convention on Fishing and Conservation of the Living Resources of the High Seas. The second conference (UNCLOS II), in 1960, failed to produce any agreement. The outcome of the third conference (UNCLOS III), which began in 1973 and concluded in 1982, was the LOSC. This treaty is the pre-eminent source of the law of the sea today.

2.2.1 UN Convention on the Law of the Sea 1982

The initial driver behind UNCLOS III was the question of governance of the deep seabed in light of growing interest in the possibility of commercially exploiting deep seabed mineral resources. There were concerns on the part of the developing world that industrialised states would be free to exploit for themselves these potentially hugely valuable resources unless a regulatory framework was put in place providing for the sharing of the resources. Another general driver behind the Conference was the emergence on the international scene of a large number of newly independent states whose interests were very different from those of the maritime powers that had dominated proceedings at UNCLOS I. The new states sought various changes to the international legal order governing the oceans, including greater rights over the natural resources of their offshore waters. It was concluded that a comprehensive review of the law of the sea needed to be undertaken and that its outcome should be a single instrument to replace the four Geneva Conventions. The ultimate objective was to produce 'a comprehensive constitution for the oceans that would stand the test of time'.[17]

After fifteen years of preparatory work, including nine years of substantive negotiations, the LOSC was opened for signature at the final session of UNCLOS III, held at Montego Bay, Jamaica, in 1982. This mammoth treaty comprised 320 articles, set out in seventeen parts, along with nine annexes. It created two new maritime zones; fixed the maximum breadth of the territorial sea at twelve miles; set out rules governing all the recognised maritime zones; created special regimes for

[17] See 'A Constitution for the Oceans: Remarks by Tommy B. Koh, President of the Third United Nations Conference on the Law of the Sea' (available at www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf).

international straits and archipelagic states; and established three new international institutions. It also made provision for a host of other matters relating to the use of ocean space, including the nationality and status of ships; immunity of warships and other ships used on non-commercial service; protection and preservation of the marine environment; and marine scientific research.

In light of the presence of a large number of newly independent states, UNCLOS III was the largest diplomatic conference ever to have been convened. There were approximately 160 participating states, almost twice the number in attendance at UNCLOS I. These states formed themselves into a range of interest groupings. In light of the huge numerical disparity between the Group of 77 (G-77), the negotiating bloc representing the interests of developing states,[18] and the small – but powerful – bloc of maritime states, the traditional system of majority voting during the development of the text of the treaty was replaced by a novel consensus procedure. Under this procedure every effort was made to reach agreement on matters of substance by way of consensus and votes were only permitted when all efforts to reach a consensus were exhausted. Session chairs produced working texts which were amended only where the chair felt that a proposed amendment would increase support for the text as a whole. The ultimate aim of this process was to produce a 'package deal' balancing the interests of all concerned.

At the end of the negotiations, dissatisfaction on the part of the USA and a number of other industrialised states with one particular aspect of the treaty – the regime for the deep seabed established in Part XI – meant that a consensus could not be reached on the final text. In consequence, the Convention was adopted by majority vote.[19] It was not until twelve years later, in 1994, that the objections were overcome by means of an 'Implementation Agreement', which introduced modifications to Part XI; in the same year, the LOSC entered into force. In the period that followed, with the exception of the USA, all the major maritime powers and most other industrialised states ratified the Convention. At the time

[18] The G-77 is an intergovernmental organisation made up of developing states. Its objective is to promote the economic and other interests of the developing world. As its name implies, it was formed by seventy-seven states, but now has 131 members (see www.g77.org/doc). During UNCLOS III, its membership comprised approximately 120 states: Churchill and Lowe, *The Law of the Sea*, p. 228.

[19] There were 130 votes in favour, 4 against and 17 abstentions. The states voting against were Israel, Turkey, the USA and Venezuela. Among the abstentions were the German Democratic Republic, the Federal Republic of Germany, Italy, the Netherlands, Spain, the Soviet Union and the UK.

of writing, there are 162 states parties: aside from the USA, other notable non-parties are Colombia, Iran, Israel, Peru, Turkey and Venezuela. Despite the fact that the USA has yet to accede to the Convention, recent US Administrations have been strongly in favour of the treaty and of US ratification.[20] Technically, the USA remains party to all four of the Geneva Conventions; in practice, it regards most of the provisions of the LOSC as reflective of customary international law and, therefore, as binding on all states, whether or not parties to the treaty.

To understand the law of the sea in general, and the LOSC in particular, it is necessary to appreciate the politically charged nature of this area of law. The respective rights of states over the oceans have huge strategic, economic, military and security implications and are therefore matters that have a major political imperative. A key policy objective of the maritime powers is to ensure that the delicate balance of rights, jurisdiction and duties of coastal states and flag states enshrined in the LOSC 'package deal' is not eroded by state practice. Of predominant concern is the question of 'creeping jurisdiction', in other words attempts by coastal states to extend their rights and jurisdiction – either geographically or functionally – beyond the position set out in the treaty.

2.2.2 Maritime zones and related terminology

The following comments are designed to provide a brief introduction to the major maritime zones recognised by international law, as well as to some related terminology. (In this section, and throughout the book, references to miles in the context of maritime zone limits are references to nautical miles from coastal baselines.)

Territorial sea. Part II of the LOSC sets out the legal regime for the territorial sea and contiguous zone. The territorial sea is an area automatically appurtenant to a coastal state, extending up to twelve miles from coastal 'baselines'.[21] In this zone the coastal state has sovereignty,[22] but its sovereignty must be exercised in accordance with the LOSC and other rules of international law.[23] The LOSC sets out detailed rules for the establishment of baselines, but the normal baseline for measuring the breadth of the territorial sea and other zones is the

[20] For example, in December 2011, US Secretary of State Hillary Clinton referred to US accession to the LOSC as a 'key piece of unfinished business' (see www.gc.noaa.gov/gcil_los.html). Ratification must be approved by the US Congress, where there is a strong body of resistance to the treaty.

[21] LOSC, Arts. 2 and 3. [22] On the notion of sovereignty, see section 3.1, below.

[23] LOSC, Art. 2(3).

low-water line.[24] With one exception, waters on the *landward* side of baselines (which may include bays and estuaries) are classified as internal waters.[25] Internal waters are treated as part of the land territory of a state,[26] the territorial sea as its maritime territory.

The contiguous zone. The contiguous zone is a zone contiguous to the territorial sea, extending no further than twenty-four miles from baselines.[27] In this zone, the coastal state may exercise the control necessary to prevent or punish infringement within its territory, or territorial sea, of its customs, fiscal, immigration or sanitary laws and regulations.[28] It can also take certain measures to control traffic in UCH.[29] Coastal states may claim a contiguous zone, but are not obliged to do so.

Archipelagic waters. Part IV of the LOSC creates a special regime which can be used by certain archipelagic states.[30] This regime permits qualifying states to draw baselines so as to enclose the islands making up the archipelago; where this is done, the maritime waters within the baselines for the most part constitute 'archipelagic waters'.[31] The archipelagic state has sovereignty over these waters, regardless of their depth or distance from the coast,[32] subject to the rights of other states set out in Part IV.

The Exclusive Economic Zone. Part V of the LOSC establishes the legal regime for the exclusive economic zone (EEZ). The EEZ was a creation of the LOSC and arose as a result of calls by some developing states to have the right to control access to fish stocks in their offshore waters. It is an area beyond and adjacent to the territorial sea,[33] extending no further than 200 miles from baselines.[34] In the EEZ, the coastal state has 'sovereign rights'[35] for the purpose of exploring and exploiting, conserving and

[24] LOSC, Art. 5.
[25] LOSC, Art. 8(1). The exception is in relation to archipelagic waters: see below.
[26] The term 'inland waters' is generally used to refer to internal waters that do not have a maritime character, including lakes, rivers and canals.
[27] LOSC, Art. 33(2). [28] LOSC, Art. 33(1). [29] LOSC, Art. 303(2).
[30] The term 'archipelagic state' is defined by the Convention to mean 'a State constituted wholly by one or more archipelagos and may include other islands': Art. 46(a). Not all states falling within this definition are able to take advantage of the special regime in Part IV. To do so, they must be able to meet the technical requirements for the drawing up of archipelagic baselines outlined in Art. 47 of the treaty.
[31] As well as being able to draw up 'archipelagic baselines' enclosing the islands making up the archipelago, archipelagic states are also entitled to draw baselines around each of the islands following the normal rules. Bays and estuaries enclosed within these baselines will constitute internal waters, not archipelagic waters.
[32] LOSC, Art. 49(1). [33] LOSC, Art. 55. [34] LOSC, Art. 57.
[35] On the meaning of sovereign rights, see, further, Chap. 7, section 3.4.

managing the natural resources of the waters superjacent to the seabed, and of the seabed and its subsoil, as well as other related rights and jurisdiction.[36] Like the contiguous zone, a coastal state has a right to claim an EEZ, but is not obliged to do so.[37]

The continental shelf. The emergence of the continental shelf as a legal (or 'juridical') zone was prompted, in some measure, by the Truman Proclamation of 1945, in which the USA unilaterally asserted rights over the natural resources of the seabed and subsoil of its continental shelf.[38] By the time of UNCLOS I, other states had claimed rights of a similar kind. The 1958 Geneva Convention on the Continental Shelf enshrined the notion that a coastal state has rights over this submarine area and its natural resources, and made provision with respect to the nature and extent of those rights. The legal regime for the juridical continental shelf is now set out in Part VI of the LOSC. This defines the continental shelf as follows:

> the seabed and subsoil of the submarine areas [of a coastal State] that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[39]

This means that, in principle, all coastal states have a juridical continental shelf extending to at least 200 miles from baselines,[40] including states whose physical continental margin does *not* extend to that distance. However, where a coastal state has a continental margin that extends further than 200 miles, its juridical continental shelf will extend to the outer edge of the continental margin.[41] States with a continental margin

[36] LOSC, Art. 56(1).

[37] If the coastal state claims both a contiguous zone and an EEZ, the contiguous zone will fall within the EEZ and will therefore be subject to Part II *and* Part V of the LOSC.

[38] Proclamation No. 2667 of 28 September 1945, 64 *Fed. Reg.* 48,701. There had been one or two earlier claims of a similar nature, but the assertion of such rights by the USA, given its political weight, was particularly influential.

[39] Art. 76(1). Rules for determining the outer limit of the continental margin are set out in Art. 76(4)–(6).

[40] Clearly, special provision needs to be made for states with coastlines facing each other that are less than 400 miles apart: see Art. 83. (Art. 83 is one of a number of provisions in the treaty that cater for delimitation of maritime borders in the case of states with opposite or adjacent coasts.)

[41] The continental margin comprises the submerged prolongation of the land mass of the coastal state (Art. 76(3)). This submerged land mass has three elements: a 'shelf', a

extending further than 200 miles are known as 'broad-margin' states and the area of continental margin *beyond* 200 miles is commonly referred to as the outer continental shelf (OCS). In contrast to the contiguous zone and the EEZ, the juridical continental shelf exists *ipso facto* and *ab initio* without the need for the coastal state to claim it.[42] Part VI of the LOSC affords the coastal state sovereign rights for the purpose of exploring and exploiting the natural resources of the continental shelf.[43] Bearing in mind that the continental shelf comprises only the seabed and subsoil and *not* the water column superjacent thereto, the natural resources referred to are primarily mineral resources and, in particular, oil and gas. However, they also include other non-living resources and living organisms closely associated with the seabed and subsoil.[44]

Where the coastal state claims an EEZ, the EEZ will coexist with the continental shelf to a distance of 200 miles and Parts V and VI – which are designed to dovetail – will apply in tandem to the area from twelve to 200 miles. The legal regime for the OCS, as well as in the area from twelve to 200 miles in circumstances where no EEZ is declared, is governed by Part VI and also Part VII relating to the high seas.

The high seas. The high seas regime, set out in Part VII of the LOSC, applies to all parts of the sea that are not included in the EEZ, the territorial sea or the internal waters of a state, or in the archipelagic waters of an archipelagic state.[45] The high seas are open to all states[46] and '[n]o State may validly purport to subject any part of the high seas to its sovereignty'.[47] Part VII sets out a non-exhaustive list of high seas 'freedoms', which include freedom of navigation and freedom of fishing.[48] These must be exercised with due regard for the interests of other states in their own exercise of the high seas freedoms.[49]

The Area. Part XI of the LOSC establishes the legal regime for the international seabed 'Area'. Like the EEZ, the Area is a creation of the LOSC. The Area comprises 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.[50] The phrase 'beyond the limits of national jurisdiction' means the seabed and subsoil beyond

'slope' and a 'rise'. The juridical continental shelf therefore does not equate to the geomorphological feature known as the continental shelf.

[42] *North Sea Continental Shelf Cases* [1969] ICJ Reports 3, at 23. [43] LOSC, Art. 77(1).
[44] See LOSC, Art. 77(4). See, further, Chap. 7, section 3.4. [45] LOSC, Art. 86.
[46] LOSC, Art. 87(1). [47] LOSC, Art. 89.
[48] LOSC, Art. 87(1). The freedom of fishing is subject to certain provisions relating to the conservation and management of the living resources of the high seas.
[49] LOSC, Art. 87(2). [50] LOSC, Art. 1(1)(1).

the limits of the juridical continental shelf. Like the continental shelf, the Area comprises the seabed and subsoil, not the superjacent water column, which is subject to the high seas regime in Part VII. Part XI (as amended by the 1994 Implementation Agreement) sets out an elaborate framework regulating activities relating to the exploration and exploitation of the mineral resources of the Area.

Three terms that are quite commonly used with respect to maritime waters are 'inshore waters', 'offshore waters' and 'international waters'. These terms are not referred to in the LOSC. However, they are generally used to mean, respectively: waters landward of the territorial sea limit; waters between the territorial sea limit and the outer limit of the juridical continental shelf; and all waters beyond the territorial sea limit. Where the terms are used in this book, these are the meanings intended.

2.3 Cultural heritage law

In contrast to admiralty law and the law of the sea, cultural heritage law is a legal area that has modern roots and is still at a relatively nascent stage of development. It includes elements of public and private law, as well as domestic and international law. In the context of this book, it is the public and international law aspects of the subject which are of most direct relevance and the following comments relate to these aspects.

Cultural heritage law is concerned with the protection of cultural heritage in the broad public interest. To date, much of the debate in this field has centred on the questions of exactly what should be protected and what 'protection' should entail. As a result, the notions of 'cultural heritage' and 'protection' are in constant flux. In its earliest stages of development, the focus of cultural heritage law was on preserving the most obvious manifestations of cultural heritage, including historic buildings and monuments, and archaeological sites and objects. Today, there is a much broader view of what merits protection and the notion of protection itself is now recognised to encompass a range of possibilities (from 'preservation in aspic' to 'managed change and decline'). Increasingly, a resource-based approach is taken to the subject and law, policy and practice with respect to cultural heritage is sometimes integrated with that for the natural environment.

Inevitably, the development of international law in this field has been influenced by national approaches and experiences. Significant distinctions between the approach and experience of states with a common law tradition and those with a civil law tradition can be a particular source of tension. Many of these distinctions derive from fundamentally different

attitudes to the treatment of private property rights and to the balance to be drawn between public, and private, rights and interests. In Europe, these distinctions have been compounded by stark differences in the scale of the task of protecting the remains of the past between the north and the south of the continent. Nonetheless, there are a growing number of treaties and other legal instruments designed to set international standards for the protection of cultural heritage.

The organisation responsible for the development of many of these instruments is UNESCO, a specialised agency of the UN. It was founded at the end of the Second World War to promote international cooperation among its member states in the fields of education, science and culture. The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 is part of an expanding portfolio of legal instruments developed by UNESCO as part of its culture brief. The earliest treaty in this portfolio was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; one of the most recent was the Convention for the Safeguarding of the Intangible Cultural Heritage 2003. Two other instruments in the portfolio that have had a major global impact are the 1970 Convention on Illicit Trade in Cultural Property and the 1972 World Heritage Convention.[51]

At a regional level, an organisation that has been particularly active in the field of cultural heritage is the Council of Europe. The Council, founded in 1949, has among its aims the promotion of legal standards, cultural cooperation and the development of Europe's cultural identity. At the time of writing, it has forty-seven member states across the continent of Europe. The Council of Europe has been responsible for several initiatives related to UCH and has played a significant role in the development of international law in this area.

3. A few observations on international law

The following observations relate to aspects of international law which are of particular significance in the context of this book. They are designed primarily to assist readers who are non-lawyers.

[51] The formal titles of these treaties are the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage.

3.1 *Sovereignty and jurisdiction*

Two interrelated concepts of major significance in the field of international law are sovereignty and jurisdiction. It is difficult to discuss these concepts in the abstract because they mean different things in different contexts. Nonetheless, a few introductory words should be said about them.

According to Lowe:

> The purpose and role of every State is to control activities within its borders so far as possible, or more accurately to ensure that activities within its borders are not regulated by another State. That idea is expressed in international law through the concept of sovereignty.[52]

As this quotation suggests, a state has sovereignty *inside* its territorial borders. Sovereignty indicates that a state has unchallengeable power over the territory and persons within that territory; however, that power may be subject to limitations under international law, for example in certain circumstances where the property or subjects of *other* states are located within the territory. One such limitation – which is placed on the sovereignty of the state with respect to its *maritime* territory (the territorial sea and archipelagic waters) – is the right of innocent passage of foreign-flagged ships.[53]

Jurisdiction has been referred to as 'an aspect of sovereignty'.[54] It encompasses the power to prescribe laws ('legislative jurisdiction') and the power to enforce laws ('enforcement jurisdiction'). These two powers frequently, but not always, go hand-in-hand. In areas over which a state has sovereignty, it has the most extensive form of jurisdiction, sometimes referred to as full or 'plenary' jurisdiction. This form of jurisdiction can be contrasted with more limited jurisdictional rights which may be enjoyed by a state in areas *beyond* its territorial borders. The sovereign rights of a state over the natural resources of its continental shelf and EEZ are an example of such rights. These rights are limited *geographically* to the seaward extent of the continental shelf and EEZ, and they are limited *functionally* to purposes connected with the natural resources of those zones.

There are various bases on which states may exercise jurisdiction beyond their territory. Some of these bases arise from general principles of international jurisdiction and some from principles related to

[52] Lowe, *International Law*, p. 138. [53] See, further, Chap. 7, section 3.2.
[54] Brownlie, *Principles of Public International Law*, p. 299.

maritime jurisdiction specifically.[55] In the context of this book, an important example of extra-territorial jurisdiction is the jurisdiction that a state has over its flag vessels. This form of jurisdiction is known as flag state jurisdiction. It is based on the notion that the authorisation to fly the flag of a state effectively confers on a vessel the nationality of the state.[56] On the high seas, ships are subject to the *exclusive* jurisdiction of their flag state, save for in exceptional circumstances.[57] Curiously, in recent years little consideration has been given to the question of whether the jurisdiction of the flag state extends to the *wreck* of a flagged vessel. However, there appears to be a general assumption that it does not.[58]

3.2 Sources of international law

There are a number of sources of international law. However, the main ones – and the ones of greatest relevance to the subject matter of this book – are international treaties and international custom.

3.2.1 Treaties

Treaties (or conventions) are agreements between two or more states that are intended by their parties to be binding upon them in international law. The binding nature of a treaty is based on the notion of consent. Therefore, in principle, a treaty is only binding on the states

[55] For further discussion, see Chap. 7, sections 2 and 3.

[56] See, further, Chap. 7, section 2.2. (It should be noted that '[t]he view that a ship is a floating part of state territory has long fallen into disrepute': Brownlie, *Principles of Public International Law*, p. 318.)

[57] LOSC, Art. 92(1). The same principle applies to the EEZ in so far as it is not incompatible with Part V of the LOSC: LOSC, Art. 58(2).

[58] According to Churchill and Lowe, the 'persistence of flag State jurisdiction over wrecks' is a 'problematic question': Churchill and Lowe, *The Law of the Sea*, p. 152. Commentators appear divided on the question of whether there may have been a customary rule of international law in the first half of the twentieth century to the effect that flag state jurisdiction persisted even after a vessel had sunk, as well as on the question of whether the 1958 Geneva Convention on the High Seas had the effect of overturning any such rule (see, for example, Caflisch, 'Submarine Antiquities and the International Law of the Sea', pp. 21–2, including accompanying footnotes, and p. 25 n. 81; cf. Nafziger, 'Finding the Titanic', p. 345; ILA, Queensland Conference (1990), International Committee on Cultural Heritage Law, First Report, p. 7). The rejection of proposals at UNCLOS III for flag states to have exclusive jurisdiction over wrecks outside territorial waters largely seems to have ended debate about the matter in the post-UNCLOS III era (although O'Connell – writing soon after the LOSC was adopted – appeared to leave the matter open: O'Connell, *The International Law of the Sea*, Vol. II, p. 911). For related discussion (in the context of sunken warships), see Chap. 4, section 2.1.

that are parties to it.[59] A state which is not a party to a treaty is known as a 'third State':[60] a treaty 'cannot, by its own force, impose an obligation on a third State, nor modify in any way the legal rights of a third State without its consent'.[61]

The main source of legal rules relating to treaties is itself a treaty, the Vienna Convention on the Law of Treaties 1969. It contains rules relating to matters such as the conclusion, application, operation and amendment of treaties. Two specific aspects of these rules that are of particular relevance to this book are the relationship between treaties relating to the same subject matter and treaty interpretation.

The relationship between treaties relating to the same subject matter. The question of the application of successive treaties relating to the same subject matter is of some significance in the present context given that the LOSC deals in part with the same subject matter as the UNESCO Convention 2001. The general rules on this matter are set out in Article 30 of the Vienna Convention. Among other things, this provides:

> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty will prevail.
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
> (a) as between States parties to both treaties the same rule applies as in paragraph 3;
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

These rules are residual in nature[62] and this means that a treaty may itself set out its relationship with other treaties. In fact, both the LOSC and the UNESCO Convention do this. The provision they make in this regard is discussed in detail later.[63]

[59] However, if the provisions of a treaty are reflective of customary international law, they will be binding on all states: see, further, section 3.2.3, below.
[60] See Vienna Convention on the Law of Treaties 1969, Art. 2(1)(h).
[61] Aust, *Modern Treaty Law and Practice*, p. 256. See, further, Vienna Convention 1969, Arts. 35 and 36.
[62] Aust, *Modern Treaty Law and Practice*, p. 227. [63] See, in particular, Chap. 8, section 2.

Treaty interpretation. Much of this book is about treaty law (the substantive provisions of treaties). In order to understand the meaning of treaty provisions, one needs to be aware that there are established rules of treaty interpretation. The key rules are set out in Articles 31 and 32 of the Vienna Convention.

Article 31(1) sets out the general rule on interpretation:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Paragraph 2 of Article 31 makes it clear that the 'context' of a treaty includes the whole of the text and its preamble and annexes, as well as any agreement or instrument concerning the treaty which was made, or agreed to, by all the parties. Together with the context, and the object and purpose of the treaty, Article 31(3) provides that account shall also be taken of:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

While usually it is the ordinary meaning of a term or phrase that one seeks to establish, according to Article 31(4), '[a] special meaning shall be given to a term if it is established that the parties so intended'.

According to Article 32:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

This article makes it clear that recourse to the preparatory work and the circumstances of the conclusion of the treaty is a *supplementary* means of interpretation only.

Treaty interpretation is a delicate matter. It requires an appropriate balancing of consideration of three elements: the text of the treaty; the object and purpose of the treaty; and the intentions of the parties as

evidenced by the preparatory work, the circumstances of the conclusion of the treaty and subsequent agreements and practice of states parties.[64] The ascertainment of the intention of the parties through the preparatory work is the aspect of treaty interpretation that can be most problematic. This is particularly the case for treaties like the LOSC and the UNESCO Convention 2001. Both were the subject of long and politically contentious negotiations. In neither case is there a full official record of the negotiations and in both the device of deliberate textual ambiguity was used to facilitate agreement on the most contentious issues. In such circumstances, recourse to the preparatory work to determine the intention of the parties is of limited assistance.[65]

3.2.2 Customary international law

Aside from treaty law, the other main source of international law is international custom. This can be defined as a practice of states that is generally recognised to be obligatory. It is important to note that there are *two* requisite elements:

(i) there must be a practice, which is both general and consistent; and
(ii) that practice must be generally accepted as law.

The second element is referred to as *opinio juris*. It requires a belief on the part of states that their conduct – or the conduct of other states – is legally obligatory, rather than undertaken for other reasons, such as diplomatic courtesy. Sources of evidence of international custom are many and various: they include official statements made by government legal advisers, or in press releases and official documentation; domestic statutes; and international and domestic judicial decisions and related pleadings.[66]

Customary law, like treaty law, is based on the notion of consent. If a customary rule is to be 'opposable' to a state, that state must be taken to have consented to the rule.[67] Assent may be presumed through acquiescence. However, where a state persistently objects to an emerging rule, it will not be bound by that rule.[68]

[64] See Aust, *Modern Treaty Law and Practice*, p. 231.
[65] See Churchill and Lowe, *The Law of the Sea*, pp. 460–1; O'Keefe, *Shipwrecked Heritage*, pp. 33–4.
[66] See Lowe, *International Law*, pp. 42–6.
[67] It should be noted that there are certain so-called 'peremptory' rules of customary international law from which no derogation is permitted because they are regarded as logical or moral imperatives: see Lowe, *International Law*, pp. 58–60. These rules are of little relevance in the present context.
[68] The role that consent plays in the formation of customary international law, and the related notions of acquiescence, persistent objection and opposability, are complex and

3.2.3 The relationship between customary international law and treaties

An international treaty may be designed to codify pre-existing customary rules of international law, to progressively develop international law by creating new rules, or to do both. Where a treaty creates new rules, those rules will be binding only on the parties to the treaty, unless practice in accordance with the conventional rule becomes so general and consistent as to produce a customary rule of international law binding on states whether or not they are parties to the treaty.

In practice, it is relatively rare for treaty provisions to be mirrored by customary international law (or, as Lowe puts it, to have a 'parallel existence').[69] This is because it will be difficult to show the requisite *opinio juris* (that state practice is conducted because of a belief that it is required by *custom*, rather than by treaty obligation).[70] However, the LOSC is an example of a treaty where most of its rules are widely regarded as representative of customary international law.[71] Its purpose was both to codify pre-existing customary law and to progressively develop international law. As far as the latter was concerned, the consensus process that formed the basis of the treaty negotiation led to a situation where the development of the treaty text, and of customary law, during UNCLOS III went hand-in-hand in such a way that many of its rules were reflected in customary law by the time of the adoption of the treaty.[72] Other rules of the treaty have become part of customary international law since that time. As a result of the remarkable consensus that has built up around the LOSC, it is widely regarded as 'the benchmark against which state actions are judged in the law of the sea'.[73]

4. UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001

The LOSC provides the general international legal framework within which activities in the marine environment are conducted. Among other things, it sets out the rights, jurisdiction and duties of coastal states and

controversial matters. For further discussion in the context of the law of the sea, see Churchill and Lowe, *The Law of the Sea*, pp. 8–11. For a more detailed discussion of the formation of customary international law generally, see Lowe, *International Law*, pp. 36–63.

[69] Lowe, *International Law*, p. 86. [70] See *ibid.*, pp. 84–6.

[71] The 1969 Vienna Convention on the Law of Treaties is another example.

[72] See Lowe, *International Law*, pp. 83–6; see also Harrison, *Making the Law of the Sea*, pp. 51–9.

[73] Harrison, *Making the Law of the Sea*, p. 56.

flag states in the various maritime zones. It also includes two articles – Articles 149 and 303 – that provide for UCH. These articles establish a duty on states to protect UCH, and to cooperate for that purpose.[74] They also make some specific provision for UCH located in the contiguous zone and in the Area.[75] That provision is limited and widely regarded as inadequate to deal with circumstances in which UCH located anywhere in the marine environment is vulnerable to human interference.

The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 is the international community's response to this inadequacy and to concerns about the increasing incidence of commercial exploitation of shipwrecks. It is the product of thirteen years of preparatory work, including four years of formal negotiations, and its purpose is to afford a comprehensive legal regime for UCH in all maritime zones and one which will ensure that this important aspect of cultural heritage is preserved for the benefit of the whole of humanity. At the core of the Convention is a complex regime that enables states – working individually and collectively – to regulate activities in international waters. The primary objective of this regulation is to ensure that any intentional interference with UCH sites is undertaken in accordance with internationally accepted archaeological principles and standards of behaviour. The archaeological principle that is central to the treaty's framework and ethos is that there should be a presumption in favour of preservation *in situ* until such time as intervention is justified for scientific or protective purposes.

The general principles and objectives of the UNESCO Convention 2001 are rooted in law and practice related to cultural heritage. However, the fact that the treaty is designed to regulate activities at sea means that it does not fall purely within the sphere of cultural heritage law, but is also a part of the law of the sea. Its hybrid character means that it has the potential to impact on matters of general oceans governance which are of far greater political import for many states than the matter of heritage protection. This helps to explain why the gestation period of the Convention was almost as long as that for the LOSC and also why the Convention is such a politically controversial instrument.

From the outset, those involved in the drafting of the new treaty knew a number of contentious issues would need to be satisfactorily addressed if the initiative was to have any prospect of achieving a universally acceptable outcome. Foremost among these was the question of precisely

[74] LOSC, Art. 303(1). [75] LOSC, Art. 303(2) and Art. 149 respectively.

how the Convention would relate to the LOSC, given the pre-eminent status of that treaty. More specifically, how would it approach the matter of coastal state jurisdiction in the EEZ and on the continental shelf given that, under the LOSC, that jurisdiction is firmly tied to the matter of natural resource exploration and exploitation? Another area of difficulty was the question of the material scope of application of the new treaty: in other words, how was UCH to be defined for the purposes of the treaty? This question was problematic at a general level, given differing national approaches and views on the matter, and it was also problematic with respect to one very specific question: should sunken warships be included in the conventional framework? While such wrecks may be of great historical significance, they also give rise to issues of considerable political sensitivity. Other areas where there were serious differences of view in the international community related to the relationship between the new treaty and private maritime law. It was recognised that a potential 'deal-breaker' was the question of how the Convention dealt with the law of salvage and the related law of finds: should they be excluded from application to UCH, or should they continue to play a role? A related question was the approach the Convention should take to the commercial exploitation of UCH: in particular, should the regime permit some participation by commercially motivated parties in activities on UCH sites? A further important question was: where there are identifiable ownership rights in UCH, how should they be dealt with?

Despite the challenges faced, there was considerable political commitment to the process and many of those involved in the negotiations worked tirelessly to find acceptable compromises on the core areas of contention. Inevitably, the traditional tension characterising the law of the sea played an important part in the overall political dynamic. Although the maritime powers accepted the need for action, their overriding concern was to ensure that the new treaty did not prejudice their wider political imperatives: they therefore resisted pressure from the G-77 and other states for coastal states to be given direct jurisdiction over UCH on the continental shelf. Mirroring the process at UNCLOS III, the chair of the formal sessions played a vital role in the development of the text and in facilitating compromise on areas of difficulty. However, the eventual outcome also mirrored that at UNCLOS III. A consensus could not be reached on the wording of a number of key provisions and the negotiations concluded with a majority vote. A substantial proportion of those present (and, by the end of the negotiations, there were a

large number of states present)[76] voted in favour of the Convention, but a small minority either abstained, or voted against, including the USA and a number of other maritime powers.[77] These states had concerns about two particular aspects of the text. First, they regarded the regulatory framework for the continental shelf and EEZ established by the Convention as prejudicial, or at least potentially prejudicial, to the 'package deal' enshrined in the LOSC; secondly, they were dissatisfied with the Convention's treatment of sunken warships.

The UNESCO Convention entered into force internationally on 2 January 2009, three months after the deposit of the twentieth instrument of ratification.[78] At the time of writing, it has forty-one states parties.[79] These states are engaged in establishing institutional structures and other arrangements for the implementation of the Convention and, as yet, there has been little state practice under its regime. At the present time none of the maritime states listed above has ratified the Convention. The particular significance of this fact is that the regulatory regime the Convention establishes is heavily reliant on flag state jurisdiction and the participation of these states is crucial if the regime is to be fully functional and effective.

5. The approach and structure of this book

This book is concerned with the relationship between UCH and international law, and with the many and varied influences which have shaped that relationship. At present and for the foreseeable future there are essentially two parallel international legal regimes in place relating to UCH protection: the UNESCO conventional regime and the general international legal framework outside that regime, which is governed largely by the LOSC. For this reason the book does not focus solely on the

[76] At the fourth and final meeting, almost ninety states were represented: see Garabello, 'The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage', p. 91.

[77] For voting details, see Chap. 1, section 3.1.2. (It is worth comparing these details with those for the states that voted against the LOSC or abstained from the vote in 1982: see n. 19, above.)

[78] As required by Art. 27.

[79] Albania, Argentina, Barbados, Benin, Bosnia and Herzegovina, Bulgaria, Cambodia, Croatia, Cuba, Democratic Republic of the Congo, Ecuador, Gabon, Grenada, Haiti, Honduras, Iran, Italy, Jamaica, Jordan, Lebanon, Libya, Lithuania, Mexico, Montenegro, Morocco, Namibia, Nigeria, Palestine, Panama, Paraguay, Portugal, Romania, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Slovakia, Slovenia, Spain, Trinidad and Tobago, Tunisia and Ukraine.

UNESCO Convention. Nonetheless, it uses the Convention as a prism through which to explore the subject as a whole. In particular, it takes as its focal points the issues that posed the greatest challenges at the UNESCO negotiations. These issues lie at the heart of the subject and at the heart of the book.

The first two chapters are essentially introductory in nature. Chapter 1 outlines the evolution of international law in this area from the genesis of Articles 149 and 303 of the LOSC to the adoption of the UNESCO Convention. Chapter 2 explores how these treaties and other legal instruments have defined UCH in order to establish their material scope of application. Chapters 3 to 6 examine in turn a number of the core areas of contention: the question of ownership rights and other types of interest in UCH; the status of sunken warships; the application of salvage law and the law of finds; and commercial exploitation. The general background to each of the issues is explored, as well as the approach taken by general international law and by the UNESCO Convention. The thorniest question of all – jurisdiction – is dealt with in two chapters: Chapter 7 considers the matter of the rights, jurisdiction and duties of states with respect to UCH under general international law and Chapter 8 examines the jurisdictional mechanisms established by the UNESCO Convention. Chapters 9 and 10 give some consideration to aspects of the UNESCO Convention's regime that have not otherwise been addressed, including questions relating to the practical and technical implementation of the Convention. The final section of the book reflects on the future prospects for international law in this field.

Unless the context indicates otherwise, the abbreviation 'UCH' is used to refer to underwater cultural heritage broadly defined and the expression 'general international law' is used to mean the international legal framework outside the UNESCO conventional regime.