

BOOK REVIEW

Wolfgang Graf Vitzthum and Stefan Talmon, *Alles Fließt: Kulturgüterschutz und innere Gewässer im Neuen Seerecht*. Nomos, Baden-Baden 1998. Pp. 203. ISBN 3-7890-5725-8. DM 89.00. Reviewed by Lyndel V. Prott.*

This book asserts the sensible maxim, poetically expressed, that the law of the sea is in constant flux (p. 6). The detailed regulation apparently provided by the United Nations Convention on the Law of the Sea of 1982 (UNCLOS) has already been shown to have several deficiencies, of which adequate protection for the underwater cultural heritage is one. In examining current practice, the authors aim to show the need for steps to stabilize, complete and update ocean law. Following the simile of Heraclitus, they describe the law of the sea, and indeed international law itself, as a river, where the water continually changes but the river itself remains.

There have so far been only two other extensive works devoted to the law of the sea and its impact on underwater archaeology: Anastasia Strati's excellent work¹ and Luigi Migliorino's study.² The monograph reviewed here is the most recent.

Looking at Articles 149 and 303 of UNCLOS, the authors point to their gaps and defects. It is probable, they argue, that because these articles refer only to "archaeological and historical objects," they do not apply to complete sites, unless a teleological interpretation is used. The lack of agreement on the definition of "archaeological or historical nature" leaves the scope of the articles vague, although the authors point out that an interpretation that maximizes protection would include everything over 100 years old, and that designating wrecks from the sixteenth to the nineteenth centuries as not historic would seem odd (pp. 28–29).

The book briefly traces recent work through the abortive Draft European Convention on the Protection of the Underwater Cultural Heritage of 1985 (completed but never adopted) and the draft of the International Law Association,³ to the most recent, the UNESCO/DOALOS⁴ draft, considered at a meeting of governmental experts at UNESCO Headquarters in Paris (June 30–July 2, 1998).

The authors see the duty to cooperate for the protection of the underwater heritage imposed by Article 303(1) as being properly implemented by the efforts of the Council of Europe and UNESCO to give content to this duty to protect. The lack of content in the provision itself makes the article largely meaningless in practice. An attempt to clarify the exact reach of the "contiguous zone" provision in Article 303(2) finds it opaque; existing attempts, such as Strati's, to give it mean-

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ing are not satisfactory, and the authors' attempts to do so are not successful either (pp. 34–41). In their analysis of the provisions of UNCLOS for the continental shelf, exclusive economic zone and the deep seabed, as well as of customary law, the authors' conclusion is that no power is given to any State to regulate the protection of the underwater cultural heritage in any of these areas (pp. 41–50). Such controls as do exist reside only in the flag State of a salvage ship or of the finder (pp. 50–54). They agree that this situation is unsatisfactory (p. 55). However, this is hardly a novel finding, a detailed analysis of the unsatisfactory nature of the UNCLOS provisions having already been made in 1984.⁵

The authors go on to consider claims for the return of cultural objects found underwater. They take the view that the wording of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Cultural Property does not give rise to such a claim. This is arguable, since the wording “cultural property stolen from a religious or secular public monument or similar institution” ([Art. 7(b)(i)]) may well be interpreted to cover artifacts in a declared “underwater museum” or from shipwrecks given special status under protective legislation of the State in whose territorial sea they are located). Where a State claims title in such items, they may well be considered as stolen when removed contrary to the provisions of that legislation. The authors do not discuss at all the provisions of the Protocol to the 1954 Convention for the Protection of Cultural Heritage in the Event of Armed Conflict (the Hague Convention) which do require the return of cultural property (and nothing in the definition suggests that this should not cover underwater cultural heritage) that has been wrongfully exported from occupied territory.

The authors do see a right to restitution of underwater cultural heritage in both the European Directive of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State⁶ and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.⁷ The Directive would, they say, allow European Union Member States to declare discovered but not yet excavated heritage in their territorial waters to be national cultural treasures and thus to recuperate them if they are unlawfully removed and subsequently found in another member State. The term “unlawfully removed” would cover objects excavated contrary to laws regulating activities concerning underwater cultural heritage. This would offer a new, if limited, way for States to provide in situ protection of their important underwater sites. A parallel discussion of the UNIDROIT Convention would suggest a similar interpretation for States that are party to that Convention; this is clearly right, since Article 3(2) of that Convention provides that “a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.”

The authors note that these instruments contain no requirement for States to control the removal of objects from these sites: that duty, they argue, is however imposed by Article 303(1) of UNCLOS. They do not mention, however, that for the sixteen Parties to the 1992 European Convention on the Protection of the Archaeological Heritage (Revised), such an obligation is clearly provided—as are a number of important others, such as inventorying, the creation of archaeological reserves, mandatory reporting of finds, supervision of exploration, prevention of illicit excavation, control of detection equipment, a planning process, financial support for archaeological research, and cooperation to prevent illicit traffic.

The discussion on the international conventions raises a number of other interesting questions that need further consideration, although there is no room to do them justice here. Not all interpret the Directive as requiring specific, rather than generic, nomination of cultural objects of importance. Many States declare undiscovered antiquities to be the property of the State (deemed “stolen,” according to the UNIDROIT Convention) that may well be covered by UNIDROIT even without specific laws controlling underwater excavation. Finally, the duty of a State to take measures for the protection of the cultural heritage (not excluding underwater sites) also exists for the 153 States Parties to the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.

The second half of the book is given over to the application of the current law of the sea in the internal waters of Germany, including its impact on cultural heritage and environmental law. A good deal of attention is paid to the demarcation of the territorial sea and of control of pollution by port and coastal States (pp. 69–140).

In their conclusion, the authors put down UNCLOS’s weakness on the protection of the underwater cultural heritage to the lack of State will to give priority to this need, among the priority interests of security, transport, fisheries, energy, and natural resources, because of their fear of “creeping jurisdiction.” Efforts at creative interpretation of the provisions to fill this gap in the law, which the authors describe, have not, they argue, solved the problem. Why, they ask, has the idea of a cultural heritage zone not been accepted when extended zones for fisheries and other economic interests have (p. 142)? Oddly, they see that recovery of underwater wrecks has economic implications but do not discuss the essential historical value, which cannot be measured in economic terms, of this heritage.

In seeking a solution, the authors, curiously, do not analyze in detail the provisions of the UNESCO/DOALOS Draft Convention scheme of control, although individual items of the draft are referred to throughout the study. They are cautious about the implications of the supplementary agreements to UNCLOS such as the Seabed⁸ and Straddling Fish Stocks⁹ agreements (p. 143). However,

their proposal to consider new provisions on the protection of the underwater cultural heritage as part of a general project intended for the purposed completion of the whole existing system of the new law of the sea may be too ambitious. UNCLOS dealt with so many issues and its negotiation was such a huge undertaking that necessarily, though regrettably, some important issues were left unresolved in order to ensure the achievement of major ones such as security, rules as to natural resources, uniformity of demarcation rules, and so on. A complete review of the law of the sea to deal with the gaps is neither feasible nor necessary. It is likely that the only way in which these issues can be resolved is piecemeal, by incremental multilateral treaty-making. At the same time, the authors' fear that provisions to protect underwater cultural heritage might be forced through in isolation, without regard to their effect on international sea law (p. 143), is hardly justified, given the painstaking efforts made by the Council of Europe (whose draft convention on the subject was abortive), the International Law Association, and UNESCO; each stage has marked increasing refinement of the text and a marked attention to the provisions of UNCLOS as well as broad consultation of interests.

The authors do call for better collaboration between experts in law of the sea and cultural heritage lawyers and seem to suggest that a solution could be found according to the environmental protection scheme of UNCLOS (Articles 192 ff.), which would authorize and even oblige coastal and port States to implement internationally agreed-upon rules for the protection of underwater cultural heritage, both in their sovereign areas and in areas of the ocean beyond the boundaries of the territorial sea, as proposed in Article 7 of the UNESCO/DOALOS Draft Convention. It is a pity that they did not expand on this suggestion. However, the relationship between these articles (UNCLOS 218 and 220 are mentioned in particular, as well as 194) (p. 144), and Article 149 of UNCLOS is not discussed. Would not reliance on these articles require at least the same degree of "creative interpretation", as they term it (p. 142), as Articles 149 and 303, which the authors do not find acceptable (pp. 25, 29)? The provisions of Article 303(4), which expressly allow for "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature," seem like a closer starting point. Another problem with this approach is that "marine environment" has to date been generally interpreted (perhaps unwisely, but certainly with a strong following) as an issue separate from underwater cultural heritage. Related reasoning that there is no right to archaeological research in foreign internal waters on the ground that Article 245 of UNCLOS reserves exclusive rights to "marine research" in internal waters to the coastal State may also not persuade those who adhere to the similar prevailing practice of not including archaeological research in that category. However, the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, which expressly applies to underwater excavations, sets out principles to encourage inter-

national collaboration in archaeological excavations, noting the importance of good scientific research for the whole of the international community, even on land sites. Such work remains under the control of the State of location, but common standards are established to facilitate international cooperation. The 1992 European Convention on the Protection of the Archaeological Heritage (Revised) also strongly encourages such collaboration.

It is strange that nowhere in the discussion do the authors even once mention the practicalities of control. Many underwater archaeologists urge that in fact the only realistic means of controlling the looting of underwater sites is by coastal States, claiming that it is bizarre to imagine that States are going to control the activities of their nationals or ships of their flag in the zones off the territorial sea of a State on the other side of the world. As the authors themselves point out, the grant of jurisdiction (under MARPOL,¹⁰ for example) to port States to act against foreign ships breaking international rules against pollution in zones outside their territorial sea has not been used. The use of port State and State of nationality jurisdictions in the UNESCO/DOALOS Ddraft is a residual provision for control of activities in the high-seas areas outside the other zones already created by UNCLOS.

Also missing is a consideration of the imperatives of the situation, which have made the finding of the solution more urgent than it was in 1982. Technology has advanced at such a pace that there is now probably no area on the seabed that is inaccessible, and this technology is becoming cheaper all the time. As has been seen in the case of the *Titanic*, the finding of an underwater site, even if the finder has no intention of exploiting it himself, is immediately followed by other adventurers, sometimes in conflict with one another, who have no hesitation in removing artifacts or parts of the shipwreck itself or interfering in other ways with the site.

The authors' conclusion is that UNCLOS has by no means stopped the continuing evolution of the law of the sea, especially since many of its articles represent only "an agreement to disagree," and others clearly require implementing provisions. This means that there are areas of flexibility and open texture that encourage further work. Yet the law of the sea, like some other key areas of international legal politics of the 1970s, is not in the forefront of international legal issues for the next century. The authors suggest that this study may even facilitate adaptation of that law to later developments, now that the major political and strategic issues have been settled, for the present, by UNCLOS.

However, the importance the authors attribute to a compatibility of new provisions for the protection of the underwater cultural heritage with UNCLOS (p. 143) overlooks several factors: the technological advances that have been made since 1982; the better appreciation of the need for heritage conservation, the doubtful compatibility of the Seabed and Fish Stocks supplementary agreements with UNCLOS; and the genuine differences of opinion on the interpretation of

numerous provisions of UNCLOS, including Article 303, which shows that what is “compatible” is not self-evident.

While it is excellent, and very timely, to have another publication on this important area of law, and while the book contains a number of valid observations, it is a pity that the authors’ work is restricted to an analysis of what already exists in legal instruments, rather than examining the real threats to the underwater cultural heritage and the finding of a suitable legal response. It is now more than ten years since the International Law Association took over the problem from the Council of Europe. We have a chance to get an international agreement to try to stop the constant degradation of an important historical legacy from which much can be learned and to prevent its (perhaps almost total) loss over the next few years. It is quite possible, if an agreement of general acceptability is not found, that regional agreements will be negotiated. And that would seem to undo much of the philosophy of UNCLOS in trying to set up a general framework to resolve all issues regarding law of the sea.

NOTES

1. Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (The Hague 1995).
2. Luigi Migliorino, *Il recupero degli oggetti storici ed archeologici sommersi nel diritto internazionale* (Milan 1984).
3. See 6 *International Journal of Cultural Property* 121–27 (1997) with note by James A. R. Nafziger.
4. United Nations Education, Scientific, and Cultural Organizations: Division of Ocean Affairs and Law of the Sea. Legal Adviser’s Office, United Nations. This draft was adopted by States as the basis for further negotiations and is therefore now better described simply as the Draft Convention.
5. P. J. O’Keefe and L. V. Protz, *Law and the Cultural Heritage Vol. 1 Discovery and Excavation* 89–106 (Professional Books, Abingdon UK 1984). Cf. also L. Caffisch, Submarine Antiquities and the International Law of the Sea, 13 *Netherlands Yearbook of International Law* 3–32 (1982).
6. See 6 *International Journal of Cultural Property* 387–95 (1997).
7. See 5 *International Journal of Cultural Property* 155–65 (1996).
8. Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York 1994).
9. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted in 1995.
10. International Convention for the Prevention of Pollution from Ships (1973) as modified by the Protocol of 1978.