

A NEW INTERNATIONAL REGIME FOR THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

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I. INTRODUCTION

In November 2001, a new weapon was added to the United Nations Educational, Scientific and Cultural Organisation's² arsenal used to protect and preserve the world's cultural heritage, in the form of the Convention on the Protection of the Underwater Cultural Heritage.³ This Convention, while not yet in force, will complement UNESCO's three other heritage conventions, the 1954 Hague Convention on the Protection of Cultural Heritage in the Event of Armed Conflict,⁴ the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1971)⁵ and the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage.⁶

The need for a comprehensive international regime for the protection of underwater cultural heritage⁷ has long been evident.⁸ Threats to this valuable but limited historical and archaeological resource include construction activities such as a harbour dredging, land reclamation schemes, and port development; activities in deeper water, such as pipeline construction, deep seabed mining, and oil and gas exploration; as well as fishing activities, particularly beam trawling. While these activities destroy or damage UCH, most cases are unintentional and occur without those undertaking the activity necessarily being aware of the UCH's existence until it is too late. Other activities, however, are consciously directed at UCH, and which similarly threaten it.

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² Hereafter 'UNESCO'.

³ Doc. 31 C/24, Paris, 3 Aug 2001. Hereafter 'the Convention'. The Convention was adopted by the General Assembly of UNESCO on 2 Nov 2001 by a vote of 81 in favour, 4 against (Russian Federation, Norway, Venezuela, and Turkey) and 15 abstentions (which included UK, France, Germany, the Netherlands, Israel, Brazil, Columbia, Greece, Hungary, and Saudi Arabia).

⁴ 294 UNTS 215.

⁵ 10 ILM 289.

⁶ 1037 UNTS 151.

⁷ Hereafter 'UCH'.

⁸ In 1966, during a UNESCO Regional Seminar on the Protection of Movable Property, held in Brisbane, Australia, it was declared that 'if positive steps are not taken immediately it is anticipated that the recent advances that have been made by treasure hunters internationally . . . will result in tragic loss of essential and important heritage.'

Most notable are the activities of salvors or 'treasure hunters'. Many objects lost to the oceans not only reveal important information about humans' past⁹ but also continue to be economically valuable.¹⁰ Unfortunately, it has not always been easy to reconcile these two competing values. However, with the recent emergence of underwater archaeology as a scientific discipline, the archaeological value of the UCH has begun to emerge as the pre-eminent value, threatening to supersede other existing values. This has resulted in a conflict developing between interest groups in UCH in international waters, which required resolution at an international level and the structuring of a management regime to deal with this resource.

This Article will consider the provisions of the Convention on the Protection of the Underwater Cultural Heritage and seeks to critically evaluate the extent to which the structure and provisions of the Convention provides a basis for an effective, reasonable, and enforceable protective regime. Attempts to provide for such a regime beyond coastal State jurisdiction began during the negotiations concerning the deep seabed in the 1970's. The Convention is a product of this ongoing process, and as such, the previous attempts will be briefly considered in order to provide a contextual explanation for some of the Convention's provisions. Of particular importance is the development of a number of principles throughout this evolutionary process upon which the Convention is based.

II. THE DEVELOPMENT OF AN INTERNATIONAL REGIME TO PRESERVE UNDERWATER CULTURAL HERITAGE

The development of the discipline of underwater archaeology began as humans first began to access UCH in the relatively shallow coastal waters. As technology developed, access to UCH in deeper waters became possible, as did access to other resources of the deep seabed. The latter initiated a review of the international law of the sea at the same time that questions regarding the management of UCH began to develop. Incidentally considered is this review

⁹ See, eg, 'Fleet of Medieval Ships Discovered in Britain', *Independent*, 24 Oct 2000.

¹⁰ Historic shipwreck (those that sunk more than a hundred years ago) that have yielded significant commercially valuable commodities include the *Duoro* (coins sold for £1.5 million, see *Diver* 'Mint Duoro coins draw the bidding' (Jan 1997), 46; *The Times* 'Golden treasure from shipwreck to fetch £1.5m', 7 Sept 1996, 11), the SS *Central America* (see G Kinder, *Ship of Gold in the Deep Blue Sea* (New York: The Atlantic Monthly Press, 1998), the *Neustra Señora de Atocha* (reputed to be worth \$250 million; see T Velocci, 'Treasure Hunting: There's Gold in Them Thar Galleons', *National Business*, Aug 1980, 58–62), the *Cazador* (worth \$50 million; see *Diver* 'Ten days on the Cazador' (June 1996), 86–9), the Nanking Cargo (sold for \$15 million at auction, see *The Times*, 'The Ocean Gold Rush' 25 Oct 1993) and the *Diana* (worth £1 million, see *The Times*, 'Shipwreck gives up her hoard of perfect porcelain', 25 Jan 1995, 4). A significant number of recovery operations undertaken by treasure salvors indicated that the recoveries were expected to yield huge fortunes, but have yet to come to fruition. See, eg, the case of the *Hanover* (reported to be worth £50 million, see *Sunday Times*, 'Wreckfinder hits £50 m crock of gold', 27 Oct 1996 at 11; *Diver* 'Will the *Hanover* yield a fortune in gold?' (Dec 1996), 59; *Diver* '*Hanover*—is the treasure still on board?' (Jan 1997), 47).

were objects of an archaeological or historical nature found on the deep seabed. At the same time, underwater archaeology in coastal waters was beginning to emerge as a scientific discipline, and so began the process of extending the scope of this discipline to UCH in international waters. Thus, two important, related negotiations occurred which inform the Convention. The first concerns the development of substantive principles relating to UCH in international waters during negotiations to conclude 1982 United Nations Convention on the Law of the Sea,¹¹ while the second relates to the attempted development of a regional agreement in the Mediterranean to structure a preservation regime for UCH. These developments directly informed the International Law Association¹² draft convention that in turn forms the basis upon which the UNESCO Convention is constructed.

UNCLOS provides the only substantive law relating to UCH in international waters, contained in only two Articles: 149 and 303.¹³ It is evident that in an attempt to reach consensus and produce a convention, the substantive provisions of Articles 149 and 303 were left vague and ambiguous, which is really not surprising as their drafting was inconsequential compared to the major issues of the Third United Nations Conference on the Law of the Sea.¹⁴

¹¹ UN Doc. A/Conf 62/122; (1982) 21 ILM 1261. Hereafter 'UNCLOS'.

¹² Hereafter 'ILA'. Founded in 1873, the International Law Association is a private non-governmental organisation of persons interested in international law. The headquarters are situated in London and has over forty branches worldwide.

¹³ Art 149 provides that; 'All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the state or country of origin, or the state of cultural origin, or the state of historical and archaeological origin', while Art 303 provides that '1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose. 2. In order to control traffic in such objects, the coastal State may, in applying Art 33, presume that their removal from the sea-bed in the zone referred to in that Art without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that Art. 3. Nothing in this Art 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 Art is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.'

¹⁴ For a more detailed discussion on Arts 149 and 303 of UNCLOS see: CJS Forrest, 'International Law and the Preservation of Underwater Cultural Heritage', unpublished PhD Thesis (2000), University of Wolverhampton, 47–58; A Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (London: Martinus Nijhoff Publishers, 1995); L Migliorino, 'In Situ protection of the underwater cultural heritage under international treaties and national legislation', 10(4) *International Journal of Marine and Coastal Law* (1995), 486; CF Newton, 'Finders Keepers? The Titanic and the 1982 Law of the Sea Convention' 10 *Hastings International and Comparative Law Review* (1986), 178; LV Prott, and PJ O'Keefe, *Law and the Cultural heritage: Volume 1, Discovery and Excavation* (Abingdon: Professional Book Ltd, 1984), 98; BH Oxman, 'Marine Archaeology and the International Law of the Sea' 12(3) *Columbia VLA Journal of Law and the Arts* (1988), 362; PJ O'Keefe, and J Nafziger, 'The Draft Convention on the Protection of the Underwater Cultural Heritage' 25 *Ocean Development and International Law* (1994), 393; L Caflish, 'Submarine Antiquities and the International Law of the Sea', 13 *Netherlands Lawbook of International Law* (1982), 20; L Migliorino, 'Submarine Antiquities and the Law of the Sea', 4(4) *Marine Policy Reports* (1982), 4; J Blake, 'The protection of the underwater cultural heritage' 45 *International and Comparative Law Quarterly* (1996), 819–43; AC Arend, 'Archaeological and Historical

Yet, these Articles do represent the only substantive international law applicable to UCH, and contain general applicable principles.¹⁵ First, while vague and ambiguous, it is evident that States do have a duty to protect UCH in various maritime zones beyond coastal State jurisdiction. Secondly, this duty is undertaken for the benefit of humankind,¹⁶ and thirdly, in fulfilling these duties, States are duty bound to cooperate. These general principles form the basis upon which the new Convention is structured.

Noting that due to the political and economic concerns of the negotiators at UNCLOS III, the question of preservation of UCH was likely to receive little attention and therefore be general and superficial, the Council of Europe recommend drafting of a European Convention to protect UCH.¹⁷ Recognising that Articles 149 and 303 did not adequately define the UCH to be preserved, the first recommendation was that the definition of UCH should extend to what is included in land heritage legislation to ensure that there were no gaps in the preservation regime and should cover all objects more than 100 years old. The second recommendation corresponded to recommendations made at the time by Greece at UNCLOS III that national jurisdiction over UCH should extend to a 200-mile limit. The third recommendation was that existing salvage law should not apply to UCH. The introducing of this recommendation reflected the growing disparity between the regimes of salvage law and cultural heritage law in the Mediterranean, and the introduction of the principle of non-economic utilisation of UCH that features so prominently in the new Convention.¹⁸ Unfortunately these recommendations proved to be overly ambitious, and when it came time to produce a convention these principles were to be sacrificed in order to reach consensus. The resulting proposal was limited so as to comply with that established in UNCLOS.¹⁹ Unfortunately, on submission of this draft, a controversy arose between Greece and Turkey concerning territorial application, and the draft has yet to be adopted.

Objects: Implications of UNCLOS III' 22 *Virginia Journal of International Law* (1982), 799; and DR Watters, 'The Law of the Sea and Underwater Cultural Resources' 48 *American Antiquity* (1983), 812.

¹⁵ Strati, above n 14, 330–4 includes a summary of the positive and negative factors of the inclusion of Arts 149 and 303 in UNCLOS.

¹⁶ Arend regards Art 149 as applying the concept of the common heritage of mankind to UCH. Arend, above n 14, 800. Caflish, however, regards Art 149 as having abandoned the principle of the common heritage of mankind by failing to designate an authority to control the recovery of objects of an archaeological and historical nature. See Caflish, above n 14, 31.

¹⁷ S Dromgoole, 'Law and the Underwater Cultural Heritage: A Legal Framework for the Protection of the Underwater Cultural Heritage of the United Kingdom' (1993), unpublished PhD Thesis, University of Southampton, 4-1.

¹⁸ Other recommendations included: (1) the drawing up of a European Convention and the setting up of a European Group for Underwater Archaeology; (2) a single authority to be given primary responsibility for dealing with land and underwater heritage finds; (3) provision to be made for appropriate enforcement measures; and (4) a determination of the minimum legal requirements that should be incorporated into national legislation.

¹⁹ For further detail on the European draft Convention, see Blake, above n 14, 820–7.

In 1988, the ILA Cultural Heritage Law Committee reviewed the preservation measures for UCH in international waters, and concluded that a convention was needed to overcome the difficulties apparent in the provision of UNCLOS. A draft Convention was adopted in 1994.²⁰ The ILA approach to the problem of preserving UCH was characterised by three specific strategies that substantially mirrored those in the Council of Europe. First, the UCH to be preserved was only that which its owners had abandoned, thus attempting to avoid any problems related to private property rights. Secondly, the preservation regime was based on coastal State jurisdiction, which was extended up to 200 nautical miles from the baseline by the discretionary creation of a cultural heritage zone; and thirdly, traditional admiralty salvage law, which has hitherto been applied to UCH in international waters, was to be excluded. Annexed to the draft was the Charter on the Protection and Management of Underwater Cultural Heritage produced by the International Council of Monuments and Sites,²¹ that sets out benchmark standards for underwater archaeology. As the ILA is a non-governmental organisation, it considered UNESCO to be the most appropriate organisation to adopt a convention, and the final draft was forwarded to UNESCO for consideration.

In 1993 UNESCO undertook a feasibility study to consider adopting a new international convention on the preservation of UCH.²² Whilst preparing this feasibility study, it became apparent that a number of crucial issues would need further investigation, and that the ILA draft convention, though providing a useful basis for consideration of a new convention, was inadequate and would need substantial amendment. In May 1996,²³ a Meeting of Experts unanimously accepted the need for a convention and the first draft was completed in April 1998.²⁴ Following two meetings of Governmental experts in 1998 and 1999²⁵ a revised draft was produced which reflected State participation in the negotiations, and which formed the basis for the third and fourth meeting of experts held in 2000 and 2001.²⁶ A draft was finally agreed at the extended fourth meeting of experts, and adopted by the General Conference on 2 November 2001.²⁷

²⁰ For a detailed discussion of the ILA draft, see O' Keefe and Nafziger, above n 14.

²¹ Hereafter 'ICOMOS'. Established in 1964 ICOMOS is a non-governmental organisation with special observer status at UNESCO, and whose primary function it is to advise Intergovernmental organisations of the steps necessary to conserve the monuments and sites of the world. The ICOMOS Charter was ratified by the 11th ICOMOS General Assembly, held in Sofia, Bulgaria, from 5–9 Oct 1996.

²² Doc. 141 EX/18 Paris, 23 Mar 1993, Resolution 5.5.1 para 20.

²³ CLT-96/CONF.605/6 Paris, 22–24 May 1996.

²⁴ CLT-96/CONF.202/5 Paris, Apr 1998.

²⁵ CLT-98/CONF.202/7, Paris 29 June–2 July 1998 and CLT-99/CONF. 204, Paris, Aug 1999.

²⁶ CLT-96/CONF.202/5 Rev 2, Paris, July 1999.

²⁷ Doc. 31 C/24, Paris, 3 Aug 2001.

III. THE PROTECTION REGIME

A. Problems and Process

Originating in the ILA Cultural Heritage Committee, this initiative to preserve the UCH has taken a decade to reach maturity. The urgency of the need to adopt a convention was expressed at the third meeting of experts by the Filipino delegate, who stated that 'even as we speak today, we all know that, in some vulnerable parts of the world, the pillaging and desecration of these cultural properties continue unabated. The major cause of this unspeakable tragedy is the absence of a single, consistent, preventive and punitive regime that deters the mercenaries of our collective underwater cultural heritage.'²⁸ While all agreed that such a convention was necessary,²⁹ difficulties went beyond simply differences with regard to the substantive provisions of the convention, but included problems associated with the manner and forum in which negotiations took place, the form any agreement should take and characteristics of the negotiating Governmental experts.

When considering the drafting of conventions related to cultural heritage, the ILA Cultural Heritage Committee noted that; 'cultural heritage law is just emerging as an important sphere of law—both nationally and internationally. The principles on which it is based are still in the process of formulation. This being so, the drafting of international instruments becomes doubly complex.'³⁰ This was particularly pertinent to the drafting of this Convention. The principles upon which the protective regime is constructed are derived from three different spheres of law; the law of the sea, admiralty law,³¹ and cultural heritage law, which have tended to work in relative isolation from one another. The Convention is a complex attempt to develop a convention at the congruence of these three spheres of law, each of which is underpinned by very different policy objectives. Not only did this have implications for consistency in international legal instruments that span different spheres of law,³² but also called into question the forum for negotiation.

²⁸ The Philippine opening statement at the 2000 meeting delivered by HE Hector K Villarroel, 3 July 2000.

²⁹ CLT-96/CONF.605/6, Paris, 22–24 May 1996, 2; CLT-98/CONF.202/7, Paris, 29 June–2 July 1998, 3; CLT-99/CONF.204, Paris, Aug 1999, 1.

³⁰ ILA Sixty-Seventh Conference, *Report of the International Committee on Cultural Heritage Law* (1996), 4.

³¹ The Convention alters aspects of existing law which determines the rights and duties of persons engaged in activities directed at UCH, which has, to a large extent, been determined according to admiralty law. Admiralty law, essentially a matter of private law, is the subject of international regulation in the form of the 1989 London Salvage Convention LEG/CONF.7/27, 2 May 1989 negotiated under the auspices of the International Maritime Organisation. Hereafter 'IMO'.

³² Consistency is important when considering the integration of these three spheres of law as each sphere is currently regulated to some extent by conventional international law. Yet few States are in fact signatories to all these conventions. For example, the only States that are signatories to the 1989 Salvage Convention, UNCLOS and the 1970 UNESCO Convention are Australia, China,

At the outset of negotiation, concerns were expressed over the jurisdiction and mandate of UNESCO and the possibility of conflict with fora and international instruments engaged in activities that have overlapping content matter. It is clear that the Convention is an integration of aspects of three spheres of law, two of which do not fall within UNESCO's mandate. It is, however, inevitable that in the international law-making process, a forum may be faced with a subject matter that concerns a number of different international bodies and law-making fora, and is tolerated as long as this process does not give rise to alterations of the fundamental structure of the other spheres of law and does not result in inconsistencies between international norms. Unfortunately, a number of States perceived some of the provisions of the Convention as having profound implications for the Law of the Sea.

The extent to which the proposals at UNESCO involved major legal reforms depended upon the specific interpretation States had taken to both the substantive provisions of the early UNESCO drafts of the Convention and those of UNCLOS. Unfortunately it became very difficult to obtain consensus on the interpretations of a number of the provisions of UNCLOS, which consequently made it difficult to determine whether the early UNESCO drafts did in fact introduce major legal reforms in this sphere of law. It was therefore unfortunate that some States did regard UNESCO as an inappropriate forum for negotiation on issues concerning the law of the sea.³³ This had implications for the form an agreement on the protection of UCH would take, as some states proposed that it should not be a self-standing convention negotiated under UNESCO, but rather an Agreement implementing provisions of UNCLOS.

The choice of UNESCO as the forum for the negotiation of this Convention, and the uncertainties as to its appropriateness, also resulted in negotiations being conducted within a cultural heritage context, though most of the State representatives were not experts in this field, and the dominant topic of negotiations in earlier meetings considered law of the sea issues. Thus, the inclusion of substantive provisions in the early drafts, which may have had global legal reform implications, resulted in the cultural heritage dimension of the regime being overshadowed by law of the sea implications. This necessitated substantive changes in regard to the jurisdictional structure of the Convention.

Egypt, Greece, India, Italy, Jordan, Mexico, Nigeria, Norway, Russia, Saudi Arabia, and Tunisia. An attempt to alter the effects of each convention in this particular forum has led to the possibility of a multitude of different bilateral or multilateral international obligations being created.

³³ Norway, for example, specifically stated for the record that it reserved its position on whether or not UNESCO is the appropriate forum for the negotiation and adoption of a convention on the protection of the underwater cultural heritage. General remarks by Mr Hans Wilhelm Longva, Director General, Department of Legal Affairs, Royal Norwegian Ministry of Foreign Affairs, 19 Apr 1999. See also PJ O'Keefe, Second Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural Heritage' 8(2) *International Journal of Cultural Property* (1999), 569.

The proposed jurisdictional regime originally proposed unleashed an array of political issues unresolved in other international fora, including the question of disputed maritime territories,³⁴ the extent of the coastal States jurisdiction over the exclusive economic zone and continental shelf,³⁵ and the importance of UNCLOS itself.³⁶ At times, negotiations resembled similar negotiation at UNCLOS III, with the same States proposing the extension of coastal State jurisdiction in regard to UCH³⁷ and the same States opposing such a regime,³⁸ leading to accusations that the UNESCO proposal was being used as a mechanism for re-opening UNCLOS negotiations. The law of the sea was not the only area that prompted political posturing. As the recovery of UCH, particularly in deep international waters, involves the use of advanced recovery technology as well as archaeological techniques and equipment, so the question of the transfer of technology to developing States was raised.³⁹ The dichotomy between developed and developing States was further emphasised with regard to the position of former colonies *vis-à-vis* the colonial powers, in particular with regard to Spain and the position of Spanish vessels that might contain valuable cargo mined from the Americas.⁴⁰

The Convention that has emerged has undergone profound change and is structured in a remarkably different way to the original ILA draft, primarily due to the extent of the politically contentious provisions contained in the latter. Many of the contentious issues of the ILA draft were thought necessary to promote the policy objectives of the 'purist' sector of the archaeological community. In retrospect, it may appear that such a strategy has done more damage to the realisation of these policy objectives than good. For example, a number of States have unilaterally extended their national legislation relating to UCH over maritime areas up to the outer extent of the continental shelf. To date, no official objections have been made with regard to these extensions. As such, States, including Australia for example, have been able to adopt a protective regime over extensive areas of the continental shelf and exclusive economic zone. Having raised this issue in an international forum, and evoked the controversial debate regarding the legality of such extensions, it may be

³⁴ Comments of Iraq, Israel, Greece, and Turkey (1999 meeting).

³⁵ Comments of many South American States (1998, 1999, and 2000 meeting).

³⁶ Some States opposed any reference to UNCLOS at all, including States that have not become Parties to UNCLOS, such as Turkey (2000 meeting) and landlocked States, such as Hungary (2000 meeting).

³⁷ Such as Greece and Turkey (1998, 1999, and 2000 meeting).

³⁸ Such as the Netherlands, UK and US (1998, 1999, and 2000 meeting).

³⁹ A number of international cultural heritage conventions promote the provision of technical assistance to States. For example, Art 33 of the 1999 Second Protocol to the 1954 Hague Convention encourages the provision of technical assistance at bilateral or multilateral level. This should encourage developed States to provide technical assistance to developing States, and may be particularly apt in cases where two States may have close links, particularly historical links, such as in the case of former colonies and the previous colonial powers.

⁴⁰ Recently, the city of Potosi, Bolivia, has claimed ownership of a cargo of silver and gold mined from the town and found on the wreck of the Spanish galleon *La Capitana*, wrecked off the shore of Ecuador in 1564.

that States opposed to such an extension may now take issue with these extensions or any further extensions.

B. The Aims and Scope of the Convention

The rationale and underlying principles of the Convention can be found in the substantive general principles articulated in Article 2, read and interpreted together with the preamble.⁴¹ The substantive general principles are of the utmost importance, as they shape the regime for protection. Although the preamble does not, in itself constitute a substantive part of the Convention, it is important in any international agreement as it provides the determining context for the interpretation of its provisions.⁴²

The convention takes as its starting point the general principles founded in Articles 149 and 303 of UNCLOS; that States have a duty to protect UCH for the benefit of mankind, and are required to co-operate for this purpose. It is noted, that while taking these UNCLOS derived principles as its starting point, the inadequacies of UNCLOS are recognised and the first general principle of the convention provides that the aim of the convention is 'to ensure and strengthen the protection of underwater cultural heritage'.⁴³ Article 2(3) states that: 'States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.'⁴⁴ The interest of humanity arises from the acknowledgement, in the preamble, of 'the importance of the underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage'. There is therefore a recognition that the threat to UCH is a global threat, and that the preservation of UCH is a necessity which States must undertake in the interests of humanity.⁴⁵ However, the interest of humanity referred to are not given any legal basis in the convention, and amount to nothing more than statements of aspirations. It is unfortunate that the substantive provisions of the Convention do little to clarify the meaning of the term

⁴¹ The preamble has changed little from the ILA draft, which had been based to a large extent on the 1985 European draft convention.

⁴² Art 31(2) of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

⁴³ Art 2(1).

⁴⁴ The UNESCO general principle is a great deal broader than that of Art 149. First, the general principle is one of preservation and not preservation OR disposal. Disposal is no longer regarded as an alternative to preservation, but rather subject to it. (CLT-99/WS/8, Paris, Apr 1999, 24) Secondly, no reference is made to the preferential rights of certain States. In light of the problems in interpretation of these terms in Art 149, this omission is welcome. The concerns of States with an historical or cultural interest may be taken into consideration in other Articles of the convention, including the proposed Articles on cooperation, notification, disposition, and on collaboration and information sharing. Thirdly, unlike Art 149, the UNESCO general principle does not apply to the area, but to all maritime zones dealt with in the convention.

⁴⁵ The preamble includes a paragraph that recognises 'the importance of protecting and preserving such underwater cultural heritage and that responsibility therefore rests with all States'.

'benefit of humanity'. The term is certainly similar to the principle contained in Article 149 of UNCLOS and in line with that, evident in a number of international conventions that aim to preserve the terrestrial cultural heritage, such as the 1970 UNESCO Convention,⁴⁶ the 1972 World Heritage Convention,⁴⁷ and the 1995 UNIDROIT Convention.⁴⁸ Whether any of these terms amount to anything more than political statements or reflections of the principle of State cooperation is uncertain.

While the draft is designated as one to 'protect' the UCH, this general principle uses the term 'preserve'. While there is no indication as to why these alternative terms have been used, the contents of the draft suggest that these terms are synonymous. Yet the preamble may be used to formulate a more precise meaning of the term 'preserve'. The preamble highlights the dangers to the UCH through the use of unscientific methods of excavation and the disturbance of UCH through commercial exploitation and other uses of the oceans. These include those emanating from uses of the oceans, such as activities related to the exploration and exploitation of the natural resources of various maritime zones, construction of artificial islands and the laying of submarine cables and pipelines as well as activities of salvors and sports divers. It thus concerns the disturbance of the UCH in a manner which is unscientific and which results in the loss of the archaeological value of the UCH. By 'preservation', the general principle must therefore be considered to mean the safeguarding and conservation of the physical integrity of the UCH and the archaeological value derived therefrom. Most urgent, therefore, is the threat to UCH, 'by unauthorised activities directed at it, and of the need for stronger measures to prevent such activities'.⁴⁹ Removal of UCH from its context unnecessarily, and without having taken the appropriate recording of all details *in situ*, leads to a deprivation of archaeological knowledge, and possibly damage to the recovered artefacts⁵⁰. It is therefore the aim of the Convention to introduce the principle of preservation *in situ*.⁵¹ The preamble

⁴⁶ 10 ILM 289.

⁴⁷ 1037 UNTS 151.

⁴⁸ See LV Prott, *Commentary on the UNIDROIT Convention* (Leicester: Institute of Art and Law, 1997).

⁴⁹ Preamble.

⁵⁰ UNESCO's concern regarding UCH was expressed in 1997, in which a UNESCO report stated that 'the recent accessibility of underwater wrecks, due to the widespread use of Self-Contained Underwater Breathing Apparatus (SCUBA), has been followed by severe looting. As early as 1974 a study made for the Turkish authorities stated that there were no classical age wreck examined off the coast of that country which had not been interfered with, in other countries, divers had used explosives to break up wrecks and make bullion readily accessible. In yet other cases, holes had been blasted in the wreck area by using "prop-wash" without regard for proper survey or mapping, thus destroying information, which could have been retrieved by scientific investigation and also destroying many artefacts, such as old ships' timbers, of great importance to the archaeological record. In many cases the desire to control severe damage of this kind has been the reason for a national State extending its jurisdiction beyond the territorial sea', Doc. 29C/22, Paris, 5 Aug 1997.

⁵¹ Art 2(5) states that 'the preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage'. This

acknowledges that it is in the interest of all nations and all people that recovery operations are conducted in a scientific manner so as to best preserve the archaeological information that can be garnered from the investigation of UCH and that can advance the knowledge of humanity. What is of concern to the archaeological community is that many of the activities that have an impact on UCH, including some commercial recovery operations, are not undertaken in accordance with acceptable standards of underwater archaeology. It is the primary task of the Convention to introduce a set of archaeological standards as benchmarks for excavation activities, which are based on those proposed by ICOMOS. Thus, the primary thrust of the rationale is the preservation of UCH, in terms of its physical integrity and the archaeological value that it embodies. Few would argue that these are not commendable and timely proposals.

This, however, is not the sole rationale for developing an international Convention. An activity which has concerned underwater archaeologists for some time, and which has not necessarily respected the fundamental principles of underwater archaeological excavation is the recovery of UCH by treasure salvors. Such concerns are expressed in the preamble, which recognises the 'availability of advanced technology that enhances discovery of and access to underwater cultural heritage' and expresses a deep concern of 'the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage'. The inclusion of these paragraphs in the preamble introduces the archaeological ethos that commercial recovery of UCH is incompatible with the preservation of this resource. While the preamble does not, however, make this explicit, the Convention itself certainly does. Article 2(7) declares that '[u]nderwater cultural heritage shall not be commercially exploited'. The Convention is not simply concerned with the preservation of the archaeological value of UCH, or simply the physical preservation of the cultural heritage so as to realise the former value, but also to eliminate recognition of the economic value of UCH. This raises complex issues regarding the manner in which various values attributable to UCH can be realised, and whether it is possible for economic values and archaeological values to coexist in some form, or whether, as the preamble and substantive provisions of the Convention suggest, these values are antithetical to one another. Whether the Convention achieves this is, however, in doubt.

is reiterated in Rule 1 of the Annex which declares that 'the protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorised in a manner consistent with the protection of that heritage, and subject to that requirement may be authorised for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.' The preamble endorses the principle of preservation *in situ*, and states that; 'committed to improving the effectiveness of measures at international, regional and national levels for the preservation *in situ* or, if necessary for scientific or protective purposes, the careful recovery of underwater cultural heritage'.

The Convention also evinces the principle of co-operation, derived from Article 303 of UNCLOS. It is recognised that any international protection regime will only be effective if there is sufficient co-operation between States. The duty to protect UCH therefore falls not only on the State most directly connected to the UCH, but with all States.⁵² The principle of co-operation is not restricted to States, but requires co-operation between interest groups such as scientific institutions, archaeologists and divers. The important role of education and training as a basic principle underlying the protection of UCH is enshrined in the Convention, which includes the public's right to non-intrusive access to UCH.⁵³ Protection through education may prove to be the most important protective measure contained in the convention. The use of draconian legislative measures may not have the desired result, and may result in more damage being done to UCH, particularly if the salvage industry is driven underground.

The development of this Convention is a result of the development in both UNCLOS and regional initiatives such as the 1985 European draft Convention. It is thus an attempt not only to reinforce standing principles, but also to introduce new principles and propose a new structure for an international preservation regime. As such, the preamble recognises not only the need to codify existing rules relating to UCH, but also to progressively develop these rules. Such development, however, must be conducted in conformity with international law and practice, including the regime applicable to UCH in international waters, UNCLOS. The actual preservation mechanism will be based on the jurisdictional competence of individual States, requiring each State to undertake to preserve UCH that falls within its competence in a prescribed manner in the interests of all humankind. Thus each State is required, *inter alia*, to establish educational and national services to preserve UCH, to impose sanctions for breaches of prescribed duties, to ensure that the benchmarking standards are adhered to and to prohibit the application of laws which promote an economic incentive to recover UCH.

1. Uncertainties Concerning the Scope of the Convention

The scope of the Convention delineates the application of the provisions of the Convention to specific UCH in specific areas. It thus required determination of what objects, sites of other physical entities might be regarded as UCH for the purposes of the Convention, determination of the activities to be regulated

⁵² Art 2(2) states that 'States Parties shall cooperate in the protection of underwater cultural heritage', while Art 2(4) declares that: 'States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.'

⁵³ Art 2(10) states, 'Responsible non-intrusive access to observe or document *in situ* underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management'.

and determination of the geographical scope of the Convention. Determination of the scope of the Convention has been a complex process resulting in dramatic changes since its origins in the ILA draft, widening considerably through the elimination of the criteria of abandonment and the inclusion of State vessels, and narrowing by limiting the scope primary to activities directed at UCH. Five discernible areas underwent vigorous discussion and analysis.

(a) Defining 'Underwater Cultural Heritage'

In order to construct a pragmatic preservation regime, it is necessary to determine which objects, sites or other physical entities might be regarded as UCH and subject to such a regime. This is no easy task given the subjectivity in defining the term 'cultural heritage'.

Underwater cultural heritage is defined in the Convention as;

all traces of human existence having a cultural, historical or archaeological character which have been partially⁵⁴ or totally underwater, periodically⁵⁵ 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.
- (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.
- (c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.

This definition does differ from some UNESCO Conventions in that it is designed with a practical objective as opposed to an abstract contemplation and, unlike many of the Conventions dealing with terrestrial cultural heritage, is broadly defined and primarily concerned with the environment in which the cultural heritage is found rather than what constitutes UCH.⁵⁶ 'All traces of human existence' would include all objects that provide evidence of humanity's past. The listed objects serve only as examples that are most likely to be found underwater and fall within the definition of UCH.⁵⁷ The hundred-year

⁵⁴ 'Partially' will refer to objects part of which remain submerged. For example, the wreck of the USS *Arizona* in Pearl Harbor, Hawaii. Though not having been submerged for over a hundred years, it does illustrate the way in which a vessel may be partially submerged.

⁵⁵ 'Periodically underwater' will refer to those objects that lie in the inter-tidal zone, and are only submerged during high tides. For example, the wreck of the VOC vessel *Amsterdam* at Hastings, UK.

⁵⁶ See CLT-99/WS/8, Paris, Apr 1999, 15. The definition is derived from the ILA definition, which itself was based on the 1985 European draft Convention.

⁵⁷ Earlier, unsuccessful proposals, included non-human resources, such as palaeontological objects as well as natural features of cultural significance to indigenous peoples that have spiritual association with the oceans. CLT-2000/CONF.201/3, Paris, Paris 2000, 3. The Archaeological Institute of America (AIA) also called for an expanded definition to include non-human archaeological objects, such as Paleo-Indian sites. Anon., 'Comments of the

time period is somewhat arbitrary and based more on administrative pragmatism than on archaeological, cultural or historical significance, though it can be presumed that objects older than 100 years are likely to be archaeologically or historically significant.⁵⁸ A problem that may arise with the hundred-years period is that it is not entirely clear from which point this time period is measured. As one of the aims of the Convention is to promote *in situ* preservation, it may be presumed that this should be calculated from the time that any activity directed at the UCH is contemplated, and not merely from the time of discovery. Thus, the determination of the time period should work in favour of preservation of UCH.

A significant point of contention which arose during negotiations was whether the definition should provide for blanket inclusion of all traces of human existence that have been underwater for over a hundred years or whether a significance requirement should be introduced. Some states argued strongly in favour of the latter, and were able to have included in the definition the phrase 'cultural, historical or archaeological character' as a qualifying criteria.⁵⁹ The interpretation of this phrase is not altogether clear, as a number of States held the view that all UCH that has been underwater for a hundred years will have such characteristics by definition, and therefore blanket inclusion is provided for. Quite clearly, States such as the US and UK will differ with regard to this interpretation.

(b) Private law issues of ownership and abandonment

The ILA and early UNESCO drafts had proposed that the Convention be applicable only to UCH that had been abandoned.⁶⁰ While this was an attempt to avoid questions of ownership, uncertainties regarding the determination of abandonment had the effect of broadening negotiation to include these issues, particularly with regard to State owned vessels.⁶¹ A great deal of litigation

Archaeological Institute of America on the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage' 7(2) *International Journal of Cultural Property* (1998), 538–44; LV Prott and I Srong (ed), *Background Materials on the Protection of the Underwater Cultural Heritage* (Paris: UNESCO/Nautical Archaeology Society, 1999), 174.

⁵⁸ A number of states have used time periods as a criteria for protection, including the Netherlands (50 years—The Monument and Historic Buildings Act 1988); Denmark (100 years—The Protection of Nature Act 1992, Act No 9 of 3 Jan 1992); Norway (100 years—The Cultural Heritage Act 1979, Act of 9 June No 50); Sweden (100 years—Act Concerning Ancient Monuments and Finds of 30 June 1988); and Greece (all UCH dating from prior to 1453, and those UCH from 1453 to 1830 on the advise of the Archaeological Council). The use of the 100 years time limit is also apparent in a number of international conventions and recommendations, including the 1970 UNESCO Convention 10 ILM 289 and the 1985 European Convention on Offences Relating to Cultural Property ETS No.119

⁵⁹ This includes Japan, Sweden, Egypt, UK, and US.

⁶⁰ The ILA draft convention, stated that: 'This Convention applies to underwater cultural heritage which has been lost or abandoned and is submerged underwater for at least 100 years.'

⁶¹ See, eg, the most recent example of uncertainties regarding ownership of State owned vessels in *Sea Hunt, Inc v Commonwealth of Virginia* 221 F 3d 634 (4th Cir 2000); on appeal from the decision in *Sea Hunt, Inc v Unidentified, Shipwrecked and Abandoned Vessel or Vessels*, 47 F Supp. 2d 678; (ED Va 1999).

with regard to UCH concerns private law issues of ownership and abandonment.⁶² Each State has jurisdiction to determine title to and disposition of UCH found in its territory and States' courts will, in accordance with its choice of law rules, determine ownership to UCH, ordinarily respecting ownership if there has not been any act of abandonment. However, these national laws differ dramatically from State to State⁶³ and there appears to be little consistency. Thus the ILA's inclusion of an Article defining abandonment, as a guide for State implementation, proved futile.⁶⁴ UNESCO also noted that no other international or regional convention aimed at the preservation of cultural heritage addresses the issue of ownership of the cultural heritage.⁶⁵ While questions of ownership and abandonment of UCH, particularly wrecks, is problematic, it should not have any effect on the preservation of the archaeological values of the wreck and the deletion of the abandonment criteria was widely welcomed.

(c) Warships and Other State-Owned Vessels

Article 2(2) of the negotiating draft stated that the Convention 'shall not apply to the remains and contents of any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, at the time of its sinking, only for government non-commercial purposes'.⁶⁶ As the scope of the draft was limited by the criteria of abandonment, the question arose as to whether the

⁶² See, eg. *Columbus–America Discovery Group v Atlantic Mutual Insurance*, 742 FSupp 1327 (EDVa. 1990); 974 F 2d 450 (4th Cir 1992); *Treasure Salvors, Inc v Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F 2d 330, 340 (5th Cir. 1978); *Pierce v Beamis (The Lusitania)* [1986] 1 QB 384 [1986] Lloyd's Rep 132.

⁶³ CLT-99/WS/8, Paris, Apr 1999, 17. For an overview of the national laws of a number of States, see S Dromgoole, (ed.), *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (The Hague: Kluwer Law International, 1999). See also ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990), 3–6.

⁶⁴ The original UNESCO draft convention held that: 'underwater cultural heritage shall be deemed to have been abandoned: (a) whenever technology would make exploration for research or recovery feasible but exploration for research or recovery has not been pursued by the owner of such underwater cultural heritage within 25 years after discovery of the technology; or (b) whenever no technology would reasonably permit exploration for research or recovery and at least 50 years have elapsed since the last assertion of interest by the owner in the underwater cultural heritage.'

⁶⁵ For example, the 1907 International Peace Conference, included provisions for the protection of cultural property in the event of armed conflict was not confined to public property, but included private property. Similarly, the 1954 Convention concerns the protection of cultural heritage 'irrespective of origin or ownership'. See G Reichelt, 'International Protection of Cultural Property' 1 *Uniform Law Review* (1985), 79–147; SA Williams, 'Recent Developments in Restitution and Return of Cultural Property', 3 *International Journal of Museum Management and Curators* (1984), 117–29; PM Bator, *The International Trade in Art* (Chicago: The University of Chicago Press, 1982); J Kifle, *International Legal Protection of Cultural Heritage* (Stockholm: Juristforlaget, 1974); PJ O'Keefe, *Trade in Antiquities: Reducing Destruction and Theft* (Paris: UNESCO Publishing, 1997).

⁶⁶ CLT-96/CONF 202/5 Rev 2, Paris, July 1999. For convenience, the term 'State vessels' will refer to 'any warship, naval auxiliary, other vessel or aircraft owned or operated by a state for non-commercial purposes'.

criteria for abandonment of 'State vessels' differed in any respect to that of merchant vessels. As such, the question concerning the inclusion of State vessels was directly related to the question of abandonment. The inclusion of an Article excluding State vessels from the provisions of the draft Convention reflected the view of many maritime nations that States do not abandon their property without an express declaration to that effect.⁶⁷ While a number of States claim that the express theory of abandonment applies to sunken State vessels,⁶⁸ there is clearly no international law rule governing the criteria for abandonment of State owned vessels.⁶⁹ While this does raise questions concerning the validity in international law of the application of the express abandonment theory to State owned vessels, the inclusion of the abandonment criteria to delimit the scope of the Convention did avoid complex issues of State immunity and flag State jurisdiction as these would not apply to abandoned State owned vessels. However, with the elimination of the criteria of abandonment as a determining factor in delimiting the scope of the convention, these complex issues arose.

It is axiomatic that remains of State owned vessels of the past may fall within the broader term 'cultural heritage' and should therefore be recovered in an archaeologically sound manner.⁷⁰ As the Convention aims to provide protection irrespective of ownership, a number of States argued for the inclusion of State owned vessels in the convention.⁷¹

⁶⁷ DJ Bederman, 'Rethinking the Legal Status of Sunken Warships' 31 *Ocean Development and International Law* (2000), 97–125.

⁶⁸ See US practise in Digest of United States Practises in International Law, vol.8, 999–1006; JA Roach, 'Sunken Warships and Military Aircraft' 20(4) *Marine Policy* (1996), 351–4.

⁶⁹ Disputes concerning the ownership of sunken State owned vessels include; the *Juno* and *La Galga*, Spanish vessels sunk in US territorial waters (see *Sea Hunt, Inc v Unidentified Shipwrecked Vessel or Vessels*, 47 F Supp. 2d 678 (ED Va. 1999); the *La Balle*, a French vessel sunk in US territorial waters; a Second World War German U-boat sunk in 1944 off Singapore (*Simon v Taylor and Another* [1975] 2 Lloyd's Rep 338 (Singapore High Court); the *Akerendam*, a VOC vessels and *U-76* in Norwegian waters. (see S Braekmus, 'Salvage of Wrecks and Wreckage Legal Issues Arriving from the Discovery of Coins at Runde in 1972', *Scandinavian Studies in Law* (1976), 39–68); and the *Birkenhead*, a UK vessel sunk in South African territorial waters (see A Kayle, *Salvage of the Birkenhead* (Johannesburg: Southern Book Publishers, 1990). In the case of the *Birkenhead* and *CSS Alabama* it is interesting to note that the flag State claims of ownership were not recognised in the Exchange of Notes. In the case of the *CSS Alabama*, France did acknowledge the US's claim in other correspondence. (JA Roach, 'France Concedes United States has title to *CSS Alabama*' 85 *American Journal of International Law* (1991), 381). Similarly, the agreement between the Netherlands and Australia regarding VOC vessels does not actually acknowledge the Dutch Government's ownership of these vessels prior to the conclusion of the agreement. (see Agreement between the Netherlands and Australia Concerning Old Dutch Shipwrecks 1972 repr in Prott and Srong, above n 57, 75–8). For a detailed discussion on the point of abandonment and ownership of State vessels, see Bederman, above n 67, 97–125.

⁷⁰ For example, the majority of wreck designated as being of historical or archaeological importance in UK territorial waters between 1973 and 1995 are warships. AJ Firth, 'Managing Archaeology Underwater', unpublished PhD Thesis, University of Southampton, 1996, 75–9. See also S Dromgoole and N Gaskell, 'Draft UNESCO Convention on the Protection of the Underwater Cultural heritage 1998' 14(2) *International Journal of Maritime and Coastal Law* (1999), 186–7.

⁷¹ This included Brazil, Korea, Finland, Costa Rica, Argentina, Iran, Dominican Republic

It is clear that the policy that guides the application of the principle of immunity of State owned vessel is based on mutual respect for each sovereign State's armed forces and governmental activities. Articles 95 and 96 of UNCLOS govern the absolute immunity from jurisdiction of State owned vessels.⁷² This immunity is extended to the salvage of such vessels.⁷³ While this application of State immunity is without doubt, it is uncertain whether this continues to apply after the vessel has sunk and a number of commentators have opined that sunken vessels cease to be ships and are therefore no longer under the exclusive jurisdiction of the flag State.⁷⁴ If this is the case, then Articles 95 and 96 will no longer apply, and State owned vessels will be subject to the same jurisdictional regime as other wrecks.⁷⁵ Most of the maritime nations, however opposed any such inference. While there are legitimate security and national intelligence reasons for granting exclusive flag State jurisdiction in the case of recently sunken State owned vessels, these considerations do not, however, apply to sunken State owned vessels that fall within the definition of UCH. Irrespective of whether or not a vessel was used for military purposes or was a State owned or operated vessel, it may still be of archaeological or historical importance. As the aim of the Convention is to preserve UCH by requiring the application of appropriate archaeological practices to the vessels, there is little reason why such vessels should not be included in the Convention. Application of the principle of State immunity to vessels of antiquity is particularly problematic, not only because Article 29 of UNCLOS,⁷⁶ which defines warship for the purposes of that Convention, is

(representing the Latin American and Caribbean nations), Cuba, Columbia, Canada, Uruguay, and Thailand. It should be noted that few of these States have extensive maritime histories, and more likely to have wrecked foreign State owned vessels lying in their territorial waters than they will have their own State owned vessel lying anywhere in the world's oceans.

⁷² Art 95, headed 'Immunity of warships on the high seas' states that; 'warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State'. Art 96, headed 'Immunity of ships used only on governmental non-commercial service' states that 'ships owned or operated by a State and used only on governmental non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the Flag State'.

⁷³ They are exempt from the Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (1910) (37 Stat. 1658, TS No 516, Art 14) and the International Convention on Salvage (1989), LEG/CONF.7/27, 2 May 1989. See further Strati, above, n 14, 220–2.

⁷⁴ Dromgoole and Gaskell, above n 70, 233; Caflish, above n 14, 25; W Riphagen, 'Some Reflections on "Functional sovereignty"' *Netherlands Yearbook of International Law* (1975), 128 and L Migliorino, 'The Recovery of Sunken Warships in International Waters', in B Vukas (ed.), *Essays on the New Law of the Sea* (Zagreb: Sveucilisna naklada Liber, 1985), 251.

⁷⁵ Malta has declared that 'the immunity afforded by the UNCLOS to warships and other government ships operated for non-commercial purposes applies only as long as they remain in operation: if wrecked, they do not continue to enjoy this immunity', *Comments of Malta Concerning the Draft Convention on the Protection of the Underwater Cultural Heritage* distributed at the 2000 meeting, 3 July 2000.

⁷⁶ Art 29 of UNCLOS reads: 'for the purposes of this Convention, "warships" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under the regular armed forces discipline.'

inappropriate as a definition for warships of earlier centuries, but also because it may be difficult to determine whether a particular historic wreck was in fact a 'State owned vessel'.⁷⁷ There could be a number of reasons for this. A wreck site may be so old that it predates any conception of 'the State' in international law, and no existing State can claim to be the flag State.⁷⁸ Alternatively, the original flag State may no longer exist as a separate entity, but has been broken up into smaller nation-States or subsumed within a larger State. It may also be that there is simply no historic evidence available to determine ownership of the vessel.

The resulting provision regarding State vessels reflects the difficulties in determining the existing legal framework with regard to abandonment and sovereign immunity and the difficulties in reaching a compromise between flag States and coastal States. The general principles of the Convention include Article 2(8) which merely state that:

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

Given that the question of the abandonment and sovereign immunity of sunken warships is uncertain, this general principle simply maintains the uncertainty *status quo*. The Convention does, however, go some way in determining what, for the purposes of the Convention, a warships or other State vessel is. The definition contained in the Convention declares that;

'State vessels and aircraft' means warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for governmental non-commercial purposes, that are identifiable as such, and that meet the definition of underwater cultural heritage.

It is clear that only State vessels that have sunk within the last hundred years are not included in the Convention, and that only those State vessels that can be identified as such are subject to the State vessel regime of the Convention. Those that cannot be clearly identified as State vessels will therefore be regarded as ordinary underwater cultural heritage to which the Convention applies. While this does not solve the problems associated with the determination of whether a shipwreck is indeed that of a State vessel, the shifting of the onus of proof onto a State to clearly be able to identify it as such ensures that all questionable shipwrecks are included in the normal regime.

The actual regime for State owned vessels in the Convention reflect the resulting compromise between flag States and coastal States. Rather than

⁷⁷ This applies to cases such as privateers, as well as to early vessels, such as those of the Vikings.

⁷⁸ This would apply in particular to vessel of antiquity, and include such famous sites as the *Uluburun*, *Geledonya*, and *Antikythera* wreck sites.

focusing on the rights of the flag State, it was agreed that a balance would be drawn between the right of the flag State and the coastal State. As such, the determination of these rights was dependent on the maritime zone in which the State vessel lies.

Within the territorial waters of a coastal State,⁷⁹ the jurisdiction of the coastal State remains unquestioned, and the coastal States is simply required to inform the flag State of the discovery of a State's vessel. The coastal States is clearly recognised as having exclusive jurisdiction in its territorial waters and that there is therefore no question of requiring the coastal State to defer to the exclusive jurisdiction of the flag State with regard to State vessels. However, it is recognised that the best way to protect State vessels would be through co-operation between the coastal State and the flag State. As such, the information passed to the flag State concerning the discovery of the State's vessel is undertaken 'with a view to cooperating on the best methods of protecting State vessels and aircraft'.⁸⁰ While the exclusive jurisdiction of the coastal State is recognised, this Article must be read with the general principles. As such, it does not purport to alter the flag State's existing rights in international law. Given that these rights are uncertain, this Article would not necessarily resolve any issues regarding abandonment and sovereign immunity.

On the continental shelf and exclusive economic zone, it was clear that UNCLOS did not grant the coastal State rights or duties with respect to UCH.⁸¹ It was recognised however, that the coastal State is best placed to provide surveillance and policing measures for UCH found in these zones, and should take the position of coordinating State in determining how the UCH should be protected. As the coastal State did not have exclusive sovereignty in these zones, the rights of the flag State were to be given greater regard than in the territorial waters of the coastal State. The resulting balance is that 'no activity directed as State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State'.⁸² The coastal State is however, granted the power to undertake emergency measures without the flag State's consent in order to 'prevent immediate danger to underwater cultural heritage, including looting'.⁸³ With regard to States vessels beyond the continental shelf or exclusive economic zone, the exclusive jurisdiction of the flag State is recognised. Article 12(7) declares that: 'no State shall undertake or authorise activities directed as State vessels and aircraft in the Area without the consent of the flag State.'

⁷⁹ This regime applies similarly to an archipelagic State with regard to foreign State vessels found in the archipelagic waters.

⁸⁰ Art 7(3).

⁸¹ See P Fletcher-Tomenius and C Forrest, 'The Protection of the Underwater Cultural Heritage and the Challenge to UNCLOS' 5(5) *Art, Antiquity and Law* (2000), 125–58.

⁸² Art 10(7).

⁸³ Art 10(4).

There is no doubt that the greatest achievement with regard to the protection of archaeologically, historically or culturally important State vessels is their inclusion in the protection regime afforded by the Convention. The benchmark archaeological standards set out in the Rules of the Annex will therefore be applicable to these vessels if the appropriate States resolve to undertake an excavation. The requirement that agreement is obtained by the flag State for the excavation of vessels beyond the territorial waters may also be regarded as an important contribution to the development of an *in situ* preservation regime. This is particularly so in regard to UCH on the continental shelf where it is expected a great number of UCH will be discovered in the near future due to further advancements in diving and underwater technology.

A number of State owned vessels are warships that have sunk in the course of battle, with the loss of service personnel. The concern is that these vessels should either not be disturbed, or if so, should be given appropriate respect. Warships that have sunk within the last 100 years will not fall within the scope of UCH, and will therefore not fall within the scope of the convention. Any attempt to protect such a vessel in international waters will have to make use of bilateral or a further multilateral treaty. However, vessels that have been submerged for more than 100 years may be considered to be a war grave. Whether such a vessel should be designated as a war grave really depends on the reason for this designation. In most cases, no human remains will be found on these vessels so, in effect, no discernible grave exists.⁸⁴ The archaeological recovery of these vessels according to the rules in the Annex will therefore not disturb any remains. If, however, remains do exist, they should be removed with due respect in accordance with standards laid down in the Annex.⁸⁵ As such, the general principles of the Convention require State Parties to 'ensure that proper respect is given to all human remains located in maritime waters'.⁸⁶

(d) Determination of the activities to be regulated

An important alteration in the scope of the Convention was proposed in 1999 that would change the emphasis of the Convention and narrow its scope. The initial UNESCO draft used the term 'activities affecting' UCH to delineate the scope of the Convention and the activities which would be subject to the

⁸⁴ Though there are exceptions. Human remains have been found to exist on UCH sites, especially wrecks, which were lost over a hundred years ago. For example, human remains were discovered on the site of the *Mary Rose*, which sank in 1545. See A McKee, *How We Found the Mary Rose* (London: Souvenir Press, 1982).

⁸⁵ Reference may be made to the International Council of Museums Code of Ethics (1986) and the Museums Association (UK) Code of Ethics for Museum Professionals (1977, amended 1987) which require ethical and legal consideration to be given to recovery of human remains. Some incidences of divers inappropriately removing human remains have been recorded. For example, it was reported that divers recovering gold bullion from the wreck of the HMS *Edinburgh* had picked up skulls and used them in conjunction with underwater torches to frighten fellow divers. See K Jessop, *Goldfinder* (London: Simon & Schuster Ltd, 1998). See also 'Divers Looting Sunken D-Day War Graves', *Independent*, 31 Oct 2000.

⁸⁶ Art 2(9).

ICOMOS charter. This included a number of activities identified in the preamble, such as the exploration of natural resources, construction, including construction of artificial islands, installations and structures, laying of cables and pipelines as well as the increasing commercialisation of efforts to recover UCH. It was noted that the use of the term 'affecting' in relation to the wide definition of UCH resulted in an excessively broad scope and that, although restricting the ambit of UCH could narrow the scope of the Convention, it was more effective to narrow the scope by limiting the nature of the activity involved. The Canadian delegation stated that 'the main thrust of the proposed convention should be to deal with treasure hunters or dive expeditions which focus on UCH, and not such activities as commercial fishing or cable-laying which only incidentally affect it'.⁸⁷ It therefore proposed that the term 'directed at' should replace the term 'affecting' in all Articles of the draft convention. Only activities that had as their aim interaction with the UCH would be subject to the mandatory provisions of the Convention. As such, the term 'activities directed at' UCH is defined in Article 1(6) as any 'activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage'.⁸⁸

Activities such as commercial fishing and cable laying may have an adverse affect on UCH.⁸⁹ However, in most cases these effects are caused inadvertently. These industries are reluctant to acknowledge the danger their activities pose to UCH, and States conscious of the importance of these industries in their economies are similarly eager to downplay their potentially destructive role. The re-orientation of the Convention dealing solely with activities directed at UCH also prompted some States to advocate the removal of any reference to other activities that have an incidental affect on UCH. The motivation for such an approach, however, does not necessarily lie in a concern with the incidental industries, but rather with the aim of dealing solely with what is regarded as the major threat to UCH; the activities of treasure hunters. The Convention defines 'activities which, despite not having under-

⁸⁷ 'Comments of Canada' working paper distributed at the Second Meeting of Governmental Experts, UNESCO Headquarters, Paris, 19–24 Apr 1999.

⁸⁸ An alternative was proposed to widen the scope by including not only activities which had UCH as its primary object, but also those which had UCH as 'its object or as one of its objects'. (WG.1/WP.12, Paris, 4 July 2000). This, it is submitted, would have been a preferable definition as it would incorporate, for example, marine scientific research operations that have investigations of marine life on UCH as its object, though not the UCH itself.

⁸⁹ The preamble to the negotiating draft of the Convention has included a paragraph which read: 'Conscious also of growing threats to underwater cultural heritage from various other activities namely exploration of natural resources of various maritime zones, constructions, including construction of artificial islands, installations and structures, laying of cables and pipelines', CLT-96/CONF.202/5 Rev 2 Paris, July 1999, 1. The International Cable Protection Committee has, however, stated that this paragraph in the preamble unduly labels as 'growing threats' activities such as laying cables', CLT-2000/CONF.201/3, Paris, Apr 2000, 3. As such, any reference to cable laying as a threat to UCH was eliminated from the Convention.

water cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage' as 'activities incidentally affecting underwater cultural heritage'. States are then required to 'use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage'.⁹⁰ This Article is substantially weaker than that originally proposed by the Canadian delegation as it leaves the determination of the 'best practicable means at its disposal' to each individual state.⁹¹ Given the inherent conflict that may arise between the protection of UCH and the economic utilisation of the resources of the sea or seabed, it is feared that this Article provides too weak an obligation on States to provide for an effective protection regime.

(e) Determination of the geographical scope of the convention

The ILA conceived of this Convention as one that would apply to UCH in international waters.⁹² In the territorial waters, it was recognised that the coastal State has absolute sovereignty and that the Convention would not impose any duties on the coastal State. Deliberations at UNESCO have, however, revealed a tendency amongst a number of States to apply the provisions of the Convention to all maritime zones, including both territorial and internal waters. In part, this tendency has arisen due to confusion regarding the meaning of the term 'internal waters', referred to in Article 7. Within the law of the sea context, 'internal waters' refers to 'waters on the landward side of the baseline of the territorial sea'⁹³ and therefore has an exclusive maritime character.⁹⁴ Geographical internal waters, which include rivers, lakes and dams are therefore not 'internal waters' in this context. Nevertheless, a number of delegations did argue that the standards that will be made applicable to the recovery of UCH in the maritime zones covered by the Convention should also apply to the UCH in the geographical internal waters.⁹⁵ Given the

⁹⁰ Art 5.

⁹¹ The Canadian delegation proposed the inclusion of the following Article: Art X: Activities incidentally affecting underwater cultural heritage. 1. Each State Party shall take reasonable measures to ensure that activities are avoided that adversely affect known underwater cultural heritage in its internal waters, archaepelagic waters, territorial sea, exclusive economic zone or on its continental shelf. 2. Where a State party designates as requiring special protection underwater cultural heritage in internal waters, archaepelagic waters, territorial sea, exclusive economic zone or on its continental shelf, it shall take all necessary measures to ensure that activities do not adversely affect such underwater cultural heritage. 3. Where UNESCO designates as requiring special protection underwater cultural heritage in the Area, each State Party shall take all necessary measures to ensure that vessel flying its flag do not undertake activities that adversely affect such underwater cultural heritage, CLT-96/CONF 202/5 Rev 2, Paris, July 1999.

⁹² O'Keefe and Nafziger, above n 14.

⁹³ Art 8 of UNCLOS.

⁹⁴ CLT-99/WS/8, Paris, Apr 1999, 29.

⁹⁵ The following States proposed the application of the convention to both maritime zones and internal waters; Hungary, Tunisia, Belgium, France, Australia, Argentina, Canada, Mexico, India, and Venezuela (2000 meeting). Similarly, Syria, Austria, Netherlands, Poland, and Spain indicated their preference for the application of the convention to the internal waters of the state.

fact that a State has absolute sovereignty in its territory, any State may, if it so wished, apply the provision of the Convention to UCH in its inland waters. It has, however, been proposed that the Convention might acknowledge such a power in international law and recognise that a State may choose to bind itself to apply the provisions of the convention to inland waters.⁹⁶ As such, Article 28 was introduced which declares that: 'when ratifying, accepting, approving or acceding to this Convention or at any time thereafter, any State or territory may declare that the Rules shall apply to inland waters not of a maritime character.'

C. A Conflict of Values

The Convention introduces the idea that the commercial recovery of UCH is incompatible with the preservation of this resource. As such, the Convention attempts to protect the archaeological value of UCH by eliminating recognition of any economic value.⁹⁷ As a consequence, the place of salvage law as a mechanism for the realisation of an economic value was a crucial issue during negotiations.

1. The Values Attributable to UCH

Many items recovered from the oceans and lakes are undoubtedly of archaeological importance. These objects may, however, have other uses, such as recreational use for divers or breeding grounds for fish stocks. Recovered artefacts may also have a high economic value, both intrinsic and attributed.⁹⁸ Historically, sunken vessels were raised solely for the purposes of reintroducing valuable items back into the stream of commerce. However, the develop-

⁹⁶ WG.1/WP 29, Paris, 6 July 2000.

⁹⁷ For a more detailed discussion of the arguments for/against commercial recovery of historic wreck, see Sweeney, 'The American Law of Treasure Salvage' and Varmer, 'Should there be Such a Thing as Treasure Salvage', papers presented at the 1998 Maritime Law Symposium: Sunken Treasure: Law, Technology and Ethics. Roger Williams University, Bristol, Rhode Island 13–15 Aug 1998; See also, WA Cockrell, 'The Trouble with Treasure: A Preservationist View of the Controversy' 45 *American Antiquity* (1980), 333–9; G Brice, 'Salvage and the Underwater Cultural Heritage' 20 *Marine Policy* (1996), 337–42; Miller, 'The Second Destruction of the *Geldermalsen*', in Prott and Strong, above n 57, 94–101; G Hutchinson, 'Threats to Underwater Cultural Heritage: The Problem of Unprotected Archaeological and Historical Sites, Wrecks and Objects Found at Sea', 20(4) *Marine Policy* (1996), 287–90; TF King, 'Losers, Weepers: The Great Historic Shipwreck Debate', paper presented at the National Trust for Historic Preservation Conference, US, 7 Oct 1992; WA Cockrell, 'Why Dr Bass Couldn't Convince Mr Grumbel: The Trouble with Treasure Revisited. Again', R Duncan Mathewson III, 'Archaeology on Trial' and P Throckmorton, 'The World's Worst Investment: The Economics of Treasure Hunting with Real-Life Comparisons', in LE Babits and H Van Tilberg (eds.), *Maritime Archaeology: A Reader of Substantive and Theoretical Contributions* (New York: Platinum Press, 1998), 75–104; K Atkinson, 'Private Enterprise in Maritime Archaeology' II *Bulletin of the Australian Institute of Maritime Archaeology* (1987), 19; DK Abbass, 'A Marine Archaeologists Looks at Treasure Salvage' 30(2) *Journal of Maritime Law and Commerce* (1999), 261–8.

⁹⁸ Above n 10.

ment of underwater archaeology as a scientific endeavour evinces a continual change in the perceived values of UCH and has resulted in a conflict between groups with divergent perceptions of the values attributable to UCH. While some States have already resolved this conflict, many have not, and there was no regime to address this issue in international waters.

The current users of UCH include archaeologists, treasure salvors, sport divers, and other sea-users, such as fisherman and the construction industry. As far as the direct users of UCH are concerned, the generalised view is that 'archaeologists value shipwrecks as a means to study past cultures, sports divers value shipwrecks for their potential as recreational sites and treasure salvors value shipwrecks for economic profit'.⁹⁹ It is these different attributable values which are perceived by many user groups as conflicting and, at times, mutually exclusive.¹⁰⁰ The mechanism through which the economic value of UCH has been realised in many States, and applicable to UCH in international waters when these States are involved, is salvage law.

2. *Salvage Law and Underwater Cultural Heritage*

Salvage may be defined as 'the compensation allowed to persons by whose voluntary assistance, a ship at sea or her cargo, or both have been saved in whole or in part from impending sea peril; or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict or recapture'.¹⁰¹ The policies that form the foundation of salvage law are to encourage individuals to voluntarily save lives and property at sea and to return such saved property to its owner for reintroduction into the stream of commerce. Before salvage law may be applied, three criteria must be satisfied;¹⁰² (a) property in marine peril on navigable waters; (b) voluntary efforts to rescue the property; (c) partial or total success; and (d) conducted *bona fide* in the interest of the owners. Whether these criteria apply to UCH has, however, been questioned. The official commentary to the ILA draft Article 4, declared:

It should be noted that the law of salvage relates solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For underwater cultural heritage, the danger has passed; either a vessel has sunk or an object has been lost overboard. Indeed, the heritage may be in greater danger

⁹⁹ AG Giesecke, 'Historic Shipwreck Resources and State Law: A Development Perspective' unpublished PhD Thesis (1992), Catholic University of America, 3; Also see JA Roach, 'Shipwrecks: Reconciling Salvage and Underwater Archaeology', paper presented at the Proceedings of the Thirty-First Annual Law of the Sea Institute, University of Miami, 30–31 Mar 1998, 8.

¹⁰⁰ E Herscher, 'Hearings Held on Historic Shipwreck Legislation' 11 *Journal of Field Archaeology* (1984), 79.

¹⁰¹ MJ Norris, *The Law of Salvage* (Mount Kisco, NY: Baker Voorhis, 1958), 157. In this sense, salvage refers to the actual award, but it may also be used to describe the type of work undertaken in order to achieve this award.

¹⁰² *Blackwall*, 77 US (10 Wall 1 19L Ed 870 (1869)); *The Sabine* 101 US 384 (1880).

from salvage operations that from being allowed to remain where it is. . . . The major problem is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.¹⁰³

As the existence of a state of marine peril is a requirement for the application of salvage law, those wishing to preserve the application of salvage law to the recovery of UCH have advocated a broad definition of the term, which relates not only to the physical threats to the objects, but also to the loss of its economic realisation. Those wishing to remove salvage law from the realm of UCH, have taken a narrower definition.¹⁰⁴ However, the courts of various jurisdictions have not offered a consistent interpretation either way.¹⁰⁵ This may be a result, not only of regional variations in the development of salvage law, but also by the IMO failing to provide a definition of marine peril in the 1989 London Salvage Convention.¹⁰⁶ Thus, due to the varying definitions of marine peril,¹⁰⁷ salvage law has not been consistently applied to the recovery of UCH. As such, salvage law does not promote a uniform system of law applicable to UCH and is therefore inappropriate as the basis for an international agreement. The creation of an international legal regime that will be applicable to the recovery of UCH, based on its historical importance, rather than the existence of marine peril, will replace the necessity of having to determine whether salvage law is applicable. The extent to which the UCH is in 'marine peril' in the sense that it is in danger of physical destruction or damage, however, will continue to be an important element of this regime as it will be a determining factor as to whether the UCH should be recovered or preserved *in situ*.

¹⁰³ O'Keefe and Nafziger, above n 14, 408; See also Brice, above n 97, 337.

¹⁰⁴ See, eg, J Barto Arnold III, 'Some thought on salvage law and historic preservation' 7 *International Journal of Archaeology* (1978), 174.

¹⁰⁵ Litigation in the US has proved to be the most illustrative of the way in which courts have interpreted 'marine peril'. See, eg, in *Platoro Ltd, Inc v The Unidentified Remains of a Vessel*, 614 F 2d 1051, at 1055–6 (5th Cir 1980); *Cobb Coin Co v Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp 540, at 557 (SD Fla 1982); *Treasure Salvors, Inc v Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F 2d 330, at 337 (5th Cir 1978); *Thompson v One Anchor and Two Anchor Chains*, 221 F 770 (WD Wis 1916); *Eads v Brazelton*, 22 Ark 499 (1861); *Wiggins v 1100 Tons, More or Less, of Italian Marble*, 186 F.Supp, 452 (ED Va 1960); *Subaqueous Exploration & Archaeology Ltd v The Unidentified Wrecked and Abandoned Vessel*, 577 F Supp, 597, at 611 (D Md 1983). See also the Canadian case, *Her Majesty The Queen in Right of Ontario v Mar-Dive Corporation et al*, 1997 AMC 1000.

¹⁰⁶ Above n 31.

¹⁰⁷ While the courts have not been able to provide a definitive interpretation of the meaning of 'marine peril', commentators on these decisions have been equally divided. Compare Brice, above n 97, 339; DR Owen, 'The Abandoned Shipwreck Act of 1987. Goodbye to Salvage in the Territorial Sea' 19 *Journal of Maritime Law and Commerce* (1988), 499–516 and TT Stevens, 'The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for States' 37(3) *Villanova Law Review* (1992), 602.

3. The Economic Value of Underwater Cultural Heritage

Salvage law is the mechanism through which the treasure salvage community is able to realise the economic value of UCH. While salvage law is indeed antithetical to the preservation of the archaeological value of UCH, it does not necessarily follow that the economic utilisation of UCH also stands in such a position.

Many in the archaeological community have suggested that treasure salvors are a major threat to UCH and should be eliminated as a user group.¹⁰⁸ Treasure salvors, however, maintain that as a user of this resource, they have less impact than any other user. This is primarily due to the fact that in international waters, a number of factors exist that significantly affect the number of UCH sites, particularly wrecks, which are viable for commercial excavation, such as depth, high costs of technology, and the low percentage of wrecks which carried cargo of high economic value.¹⁰⁹ However, the precise nature of the perceived conflict between the treasure salvage community and the archaeological community is difficult to ascertain, and characterised by generalisation made by both interest groups. Although the archaeological community would appear to have the moral advantage in the reasons for denying private ownership and the sale of UCH, the achievement of economic profits and private enterprise are no less applauded in certain sectors of society. However, some sectors of the archaeological community have argued that artefacts recovered from historic wreck should never be sold,¹¹⁰ and should not belong in private collections.¹¹¹ While this 'purist' sector of the archaeological community regard the realisation of the UCH's archaeological value as being incompatible, and mutually exclusive, from the realisation of its economic value,¹¹² others perceive the conflict as being characterised by the

¹⁰⁸ E Clément, 'Current developments at UNESCO Concerning the Protection of the Underwater Cultural Heritage' 20(4) *Marine Policy* (1996), 309; S Williams, 'Underwater Heritage: A Treasure Trove to Protect' 87 *UNESCO Sources* (1998), 7; RJ Elia, 'US Protection of Underwater Cultural Heritage Beyond the Territorial Sea: Problems and Prospects' 29(1) *International Journal of Nautical Archaeology* (2000), 43–56.

¹⁰⁹ One commercial treasure salvage company estimates that there are at most twenty or thirty shipwrecks that are economically viable to excavate. See G Stemm, 'Protection of Our Underwater Cultural Heritage: Thoughts on the Future of Historic Shipwrecks', paper presented at the Thirty-First Annual Conference of the Law of the Sea Institute, University of Miami, 30–1 Mar 1998, 7; other estimates put the number of economically viable wrecks as approximately 100–200, which would yield a salvage value of more than US\$10 million. CLT-96/CONF 605/6, Paris, 22–24 May 1996, 12.

¹¹⁰ For example, artefacts from the historically important wreck, the HMS *Invincible* was sold on auction in the UK. It was only at the discretion of the salvor that a representative sample of the artefacts was sold by private agreement with the Chatham Historic Dockyard Trust. See Dromgoole, above n 17, 2–17.

¹¹¹ PF Johnstone, 'Is it Treasure or a Worthless Piece of Ship?' 26(4) *Historical Archaeology* (1992), 118–23. It has therefore been the policy of many of the archaeological societies to oppose the commercial recovery of historic shipwrecks. See RJ Elia, 'The Ethics of Collaboration: Archaeologists and the Wydah Project' 26(4) *Historical Archaeology* (1992), 105–17.

¹¹² Elia, eg, declares that these interest groups have 'fundamentally opposed core values, goals,

nature of the activities undertaken by treasure salvors in order to obtain a profit rather than by any opposition to the policy of making a profit from the recovery of UCH. As such, opposition to the commercial recovery of UCH is directed at the excavation methodology. The archaeological community has argued that commercial recovery operations necessitate cost-effective recovery methods, which are not time consuming. This is at variance with the time consuming and detailed excavation techniques necessary to reap the full archaeological value from UCH. It is therefore argued that a salvage operation will entail the recover of the artefacts with the highest commercial value first, possibly to the detriment of cultural heritage items of less economic value.¹¹³ The primary concern of the archaeological community is the fact that these commercial operations have not adhered to appropriate scientific standards of underwater archaeology. Whilst such standards may be imposed by coastal State in waters under their jurisdiction, no such standards exists with regard to UCH in international waters. In 1995, a UNESCO feasibility study outlined these lack of standards as requiring urgent action at an international level in order to preserve the archaeological value that could be realised from UCH.¹¹⁴

It is also argued that the consequence of using salvage law to reap the economic value of UCH leads to the splitting up of collections that should be kept together for further scientific study.¹¹⁵ While it is true that this may occur, it is not necessarily inevitable, and it is certainly feasible that an entire collection could be sold as a single entity.¹¹⁶ It may also be debatable as to whether all items recovered from an UCH archaeological site form part of the artefact collection.¹¹⁷ It is argued that the collection of redundant multiple artefacts¹¹⁸ and data is 'neither good science nor a cost effective use of funds

methods and interests' and that 'commercial salvage operations are fundamentally at odds with preservation', Elia above n 108, 46 and 49.

¹¹³ Doc. 28C/39 Paris, Oct 1995 para 30; see also O'Keefe, 'Gold, Abandonment and Salvage', 1, *Lloyd's Maritime and Commercial Law Quarterly* (1994), 11. The archaeological community have pointed to examples of commercial recovery operations such as that of the Dutch-East Indiaman, the *Geldermalsen*, as illustrating the manner in which valuable archaeological and historical information has been lost whilst the economic value of the wreck is maximised. See Miller, above n 97, 94–101. See also Hutchinson, above n 97, 287–90; J Paull IV, 'Salvaging Sunken Shipwrecks: Whose Treasure Is It?: A Look at the Competing Interests for Florida's Underwater Riches' 9(2) *Journal of Land Use and Environmental Law* (1994), 359–65; and H Zhao, 'Recent Developments in the Legal Protection of Historic Shipwrecks in China' 23 *Ocean Development and International Law* (1992), 319.

¹¹⁴ Doc.146 EX/27, Paris, 23 Mar 1995.

¹¹⁵ Varmer, above n 97, 2. Nafziger states that: 'the profit basis of salvage, . . . encourages commercial salvors, who must recover their costs, to fragment or disintegrate heritage for sale and thereby disperse recovered artefacts to the detriment of historic enquiry.' JAR Nafziger, 'Historic Salvage Law Revisited', 31, *Ocean Development and International Law* (2000), 81–96.

¹¹⁶ RMST Inc, the salvors of the RMS *Titanic*, have stipulated that no artefacts from the collection would be sold individually, and that the company would only sell the collection as a single entity.

¹¹⁷ For example, coal recovered from the RMS *Titanic* is not regarded as forming part of the cultural collection of artefacts by the salvage company, RMST Inc.

¹¹⁸ The excavation of the Tudor warship the *Mary Rose* resulted in the recovery of authentic

and resources, whether they be public or private'¹¹⁹ and that to prohibit the recovery of all UCH, or to prohibit the sale of all trade goods that are found in large numbers is an unbalanced public policy. Treasure salvors have argued that commercial recovery operations do not necessarily need to sell artefacts to raise funds. Increasingly, profits are being generated through media rights, such as films, documentaries,¹²⁰ books,¹²¹ and exhibitions of recovered artefacts as well as the sale of replicas of these artefacts.¹²² More recently, treasure salvors have been raising funds by allowing tourists to accompany their expeditions.¹²³

It has been argued that any attempt to 'protect' cultural heritage by its legal elevation to a position above that of a commodity, thus attempting to eliminate the market, only results in the market going underground. The 'protection' of the terrestrial cultural heritage in this way has led to the creation of a billion dollar black-market.¹²⁴ Thus, Bator argues that 'total embargoes are not only impossible to enforce, but actually encourages the illicit market rather than remove it'.¹²⁵ The international trade in art and antiquities is thriving, and record amounts continue to be paid for unique items. The elimination of the market for UCH will not necessarily mean that UCH could not be conducted for a commercial purpose. For example, a State funded museum might

items of archery which had been extremely scarce before the excavation. Included were thousands of arrows, 'so many that they represent a real storage problem', A McKee, *How We Found the Mary Rose* (London: Souvenir Press, 1982), 121.

¹¹⁹ Roach, above n 99.

¹²⁰ See, eg, the recent documentary series viewed on the BBC in March and April 2000 covering the wrecks of the *Queens Anne's Revenge* in US territorial waters, the *HMS Pandora* in Australian territorial waters and the submarine *M2* and vessel *Swan* in UK territorial waters.

¹²¹ A number of books on discoveries and recoveries of shipwrecks have recently been published, including a number of publications on the RMS *Titanic*, such as RD Ballard, *The Discovery of the Titanic* (London: Guild Publishing, 1987); T McCluskie, M Sharpe, and L Marriott, *Titanic and Her Sisters Olympic and Britannic* (London: Parkgate Books, 1999); and S Wels, *Titanic: Legacy of the Worlds Greatest Ocean Liner* (Delmar, California: Tehabi Books and Time Life Books, 1997). Others include C Cussler, *The Sea Hunters* (London: Simon & Schuster, 1996); CM Robinson, *Shark of the Confederacy: The Story of the CSS Alabama* (London: Leo Cooper, 1995); N Pickford, *The Atlas of Shipwrecks and Treasure* (London: Dorling Kindersley, 1994); K Jessop, *Goldfinder* (London: Simon & Schuster, 1998), J Beasant, *Stalin's Silver* (London: Bloomsbury, 1995); and G Kinder, *Ship of Gold in the Deep Blue Sea* (New York: The Atlantic Monthly Press, 1998).

¹²² The huge success of the RMS *Titanic* exhibition in Greenwich, UK, and St Petersburg Florida bears testimony to the possible success of a salvage operation that does not rely on the sale of recovered artefacts.

¹²³ *St. Petersburg Times*, 'Hunt for treasure, but it'll cost a pretty boubloon', 1 Sept 2000.

¹²⁴ JAR Nafziger, 'International Penal Aspects of Protecting Cultural Property', 16, *International Lawyer* (1985), 835; id, 'Comments on the Relevance of Law and Culture to Cultural Property Law' 10 *Syracuse Journal of International Law* (1983), 325.

¹²⁵ PM Messenger (ed), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (Albuquerque: University of New Mexico Press, 1989), xxi. Similarly, in 1970, a prominent Museum Director stated, in relation to the negotiations regarding the 1970 UNESCO Convention, that 'it is unrealistic to expect to stop all trade in archaeological objects and in fact a legal trade should help to stop the illicit trade', Meyer, *The Plundered Past* (New York: Atheneum, 1974), 186.

contract a company to recover UCH, allowing the company to charge for the service and make a profit. If conducted to appropriate standards so that the archaeological value of the UCH is maximised, and the items of UCH are not subject to market forces, but vested in the museum on behalf of the public, there is no reason for the archaeological community to oppose such a commercial recovery. Indeed, this may be a particularly useful service when UCH *in situ* is in danger of being destroyed and the State does not have the wherewithal to undertake an emergency excavation. The opposition to the commercial recovery of UCH must therefore rest solely on the possibility of items of UCH being subject to market forces.

Unfortunately, it is difficult to find a balance between the recognition of the archaeological value of UCH and its economic value. Where the latter is given prominence, the former may not always be realised. It has therefore been suggested that elimination of the economic value will ensure that the archaeological value is preserved. Given the difficulties in policing the oceans, and the lessons that can be learned from the emergence of the black-market in terrestrial cultural heritage, it is unfortunate that the provisions of the Convention evince a weak and contradictory attempt to eliminate the economic value of UCH.

4. The Convention Provisions

It is unfortunate that resolving this difficult issue, including the place of salvage law, necessitated complex and protracted negotiations that have resulted in provision in the Convention which are vague and susceptible to alternative interpretations.

Rule 2 of the Annex reads as follows:

The 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.

It is clear that this rule attempts to ensure that artefacts cannot be regarded as commercial goods. However, this rule has been qualified in that it goes on to declare that:

This Rule cannot be interpreted as preventing:

- (a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorisation of the competent authorities;
- (b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the

provisions of Rules 33 and 34; and is subject to the authorisation of the competent authorities.¹²⁶

Rule 2(a) reflects the difficulty of divorcing the provision of commercial services during an excavation from the justification of an excavation. Professional archaeologists are paid to undertake scientific investigations, thus making their activity economic in nature. Similarly, the provision of services, such as the supply of diving equipment, remote-sensing devices etc, could all be supplied by a commercial enterprise. Thus Rule 2(a) was introduced to 'make specific provisions to ensure that it was clear that (in summary) professional archaeological services consistent with the Convention were not being referred to in this Rule'.¹²⁷

While the first sentence of rule 2 attempts to introduce some clarity on the issue, the inclusion of subsection (b) effectively muddies the water to such an extent as to make any interpretation possible. The failure to define what is meant by 'deposition' and identification of the place of 'deposition' leads to unfortunate ambiguities. This subsection requires that a collection of UCH can be deposited in either a private or public collection, together with the project archive as far as possible, and that such a deposition shall not be considered as the commercial exploitation of UCH. Within the context of prohibiting the commercialisation of UCH, subsection 2(b) could be viewed as an exception to the general rule, so that a collection of UCH, excavated according to the remaining Rules in the Annex and with appropriate authority from a State's authority could be sold, as a collection, to a private or public museum, for a profit. This would appear to be at odds with Article 2(7), the general principle that UCH 'shall not be commercially exploited'.

The Convention not only attempts to deal with the issue of non-commercialisation of UCH, but also the place of salvage law in the preservation regime. Article 4 provides that:

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 authorised 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.

Article 4 is structured in a similar way as to Rule 2, in that it opens by declaring a clear rule, which is then made subject to exceptions which have the

¹²⁶ Rule 33 states: 'The project archives, including any underwater cultural heritage removed and a copy of all supporting documentation shall, as far as possible, be kept together and intact as a collection in a manner that is available for professional and public access as well as for the curation of the archives. This should be done as rapidly as possible and in any case not later than 10 years from the completion of the project, in so far as may be compatible with conservation of the underwater cultural heritage.' Rule 34 states: 'The project archives shall be managed according to international professional standards, and subject to the authorisation of the competent authorities.'

¹²⁷ CLT-2000/CONF.201/10, Paris, 7 July 2000, 2

effect of negating not only the clarity of the opening rule but the very essence of the rule itself. In this case, Article 2 provides that salvage law can be applied to UCH if it is in full conformity with the Convention. Given that the application of salvage law to the recovery of UCH is fundamentally incompatible with professional archaeological practise as expressed in the Rules of the Annex, it is difficult to see how salvage law could be conducted so as to conform to this Convention. It is submitted that this Article will have the effect of undermining the Rules of the Annex and allow States to interpret these rules so as to allow the continuation of the application of a modified salvage law to UCH.

The preservation regime proposed in the Convention is centred round these attempts to preserve the archaeological value attributed to UCH at the expense of the economic value. This strategy was both politically unacceptable to a number of States, and impractical given the difficulties of policing the oceans and restricting the flow of illicitly excavated UCH¹²⁸. Some States also consider the economic value attributed to UCH could be an incentive for the search for, and recovery of, UCH in a manner that may realise both the economic and archaeological value of UCH.¹²⁹ It is therefore not surprising that such States, which include the US and UK, abstained from voting in favour of the Convention.

D. The Jurisdictional Dilemma

International cooperation is essential for the development of an effective preservation regime for UCH. This cooperation requires the delineation of responsibilities between States, and possibly international organisations such as UNESCO. This requires consideration of State's jurisdictional competencies, and therefore addresses certain jurisdictional questions that have hitherto been determined in the context of the law of the sea.¹³⁰ It is unfortunate that negotiations concerning this Convention have been embroiled with questions of jurisdictional competencies of States in international waters rather than on the structuring of a preservation regime for UCH in these waters.¹³¹ Negotiations were hampered by the fact that States' views with regard to jurisdiction are polarised, and interpretations of UNCLOS irreconcilable.¹³² In

¹²⁸ Policing underwater sites is extremely difficult, more so in international waters. A number of instances have been reported which relate to theft from UCH sites protected by national laws. See, eg, the theft of a cannon from the fifteenth-century historic shipwreck protected under the Protection of Wrecks Act 1973 in the UK. K McDonald, 'Breach of the Law', *Diver* (Dec 1999), 75. See also 'Wreck plunderers find way through law on war graves: Battleship Royal Oak', *The Times* 4 Apr 1994 and 'Divers Looting Sunken D-Day War Graves', *Independent*, 31 Oct 2000.

¹²⁹ CLT-96/CONF.605/6, Paris, 22–24 May 1996 para 45.

¹³⁰ Oxman, above n 14, 355.

¹³¹ ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990), 1–17; CLT-99/CONF.204, Paris, Aug 1999, 5–8.

¹³² For a more detailed discussion on the drafts of the Convention and UNCLOS, see Fletcher-Tomenius and Forrest, above n 81, 125–58.

particular, protracted debate concerned the extent to which the proposed extension of coastal State jurisdiction was compatible with the provisions of UNCLOS.¹³³

The primary aim of the Convention is to provide some measure of protection for UCH found beyond States' territorial jurisdiction. The question of jurisdiction in relation to UCH had been a matter of controversy at UNCLOS III, had stalled the 1985 European draft convention and had restricted the 1992 European Convention to areas over which States had already declared jurisdiction. It was therefore no surprise that the ILA proposal to extend coastal State jurisdiction over UCH found within 200 nm from the coastal State would be controversial.¹³⁴ While coastal States clearly have jurisdictional competence to protect UCH within its territorial waters,¹³⁵ the protection regime proposed by the ILA and included in the first UNESCO draft of the Convention proposed that the coastal State could have a discretionary right to extend its jurisdiction with regard to UCH over an area coextensive with the continental shelf. This extension of jurisdiction was strongly opposed by the world's maritime powers, arguing that nothing should be done to threaten the delicate balance created in UNCLOS with respect to the delimitation of rights and duties of coastal States and the freedom of the high seas. In particular, this proposal were criticised as amounting to 'creeping jurisdiction'. Those States that advocated extended coastal State jurisdiction argued that the extension was in full conformity with UNCLOS as it did not detract from existing rights and duties.¹³⁶

By the conclusion of the second meeting of experts in 1999 it was clear that it was unlikely that agreement would be reached on the jurisdiction issues as it was then being debated. Given the difficulties of extending coastal State jurisdiction and the impasse created at the end of the second meeting, a proposal was made at the third meeting in 2000 that concentrated on the areas of cooperation, notification, and collaboration, that were generally non-contentious issues, and could possible form the foundation on which a shared jurisdiction structure could be built. Article 303 of UNCLOS requires States to cooperate in the protection of UCH. This international duty is the foundation upon which the Convention is based, and the duty to cooperate is evident

¹³³ Art 3 declares that: '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.'

¹³⁴ O'Keefe and Nafziger, above n 14, 400.

¹³⁵ Art 7 of the Convention provides that: '(1) States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorise activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea. (2) Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, States Parties shall require that the Rules be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.'

¹³⁶ CLT-2000/CONF.201/3, Paris, Apr 2000, 9.

in both the preamble¹³⁷ and inherent in the general principle articulated in Article 2(2). This duty of cooperation is given specific meaning in Article 19, which requires States to consider collaborating in activities directed at UCH, as well as with regard to the sharing of information regarding seized UCH and the training and transfer of technology relating to UCH. From this principle of State cooperation emerged the jurisdictional regime in the Convention.

The jurisdictional structure of the Convention relies on the principles of nationality and flag State jurisdiction rather than on any extension of coastal State jurisdiction over maritime zones beyond the contiguous zone.¹³⁸ The regime is divided into two parts, the first dealing with reporting and notification in the exclusive economic zone and on the continental shelf¹³⁹ and the second with the implementation of the protection regime to UCH in these areas.¹⁴⁰

With regard to notification and reporting, a complex system is structured to ensure that all interested States will be notified of the discovery of, or plans to undertake any activities directed at, UCH in these maritime areas. Coastal States are required to ensure that their nationals or vessels flying their flag report finds or intended activities to it.¹⁴¹ Other States whose nationals or flag vessels find or intend to undertake activities directed at UCH on another States continental shelf or exclusive economic zone are required to report to its competent authorities and to the authorities of the coastal State. Alternatively the other States need only require that the report be made to it and it undertakes to inform the coastal State.¹⁴² States are then bound to inform the Director-General of UNESCO of any finds or reports of intended activities directed at UCH, who in turn informs all other States of any reports received.¹⁴³ Any State with a verifiable link, especially a cultural, historical or archaeological link with the UCH in question, may then declare its interest in being consulted on how the UCH may be effectively protected.¹⁴⁴

In term of providing for a preservation regime in conformity with the Convention for UCH on a coastal States continental shelf or exclusive economic zone, the coastal State is not granted exclusive jurisdiction, but rather is designated as the 'co-ordinating State' in the preservation regime.¹⁴⁵ As such it is responsible for the co-ordination with all other interested States in the protection regime, and may implement the agreed upon measures of

¹³⁷ Para.7 of the preamble declares that: 'co-operation among States . . . is essential for the protection of underwater cultural heritage.'

¹³⁸ The rights and duties of State with regard to UCH in the contiguous zone follow on from that contained in Art 303 of UNCLOS. Art 8 of the Convention states: 'Without prejudice to and in addition to Arts 9 and 10, and in accordance with Art 303 para 2 of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorise activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied.'

¹³⁹ Art 9.

¹⁴² Art 9(1)(b).

¹⁴⁵ Art 10(3).

¹⁴⁰ Art 10.

¹⁴³ Art 9(3) & (4).

¹⁴¹ Art 9(1)(a).

¹⁴⁴ Art 9(5).

protection, including the conducting of preliminary research and all subsequent authorisation allowing activities directed at the UCH.¹⁴⁶ Furthermore, the Convention allows the coastal State to take all practical measures to prevent immediate danger to UCH, include looting, before consultations with interested States take place.¹⁴⁷ These practical measures are, however, limited to the extent that they are in conformity with existing powers of coastal States in international law. This may therefore only apply to its national and flag vessels and to any other national or vessels only with the agreement of their State. The coastal State only has the power to unilaterally prevent or authorise activities directed at UCH on its continental shelf or contiguous zone in order to prevent interference with its sovereign rights and jurisdictions as provided for by international law,¹⁴⁸ including UNCLOS. With regard to UCH found in the Area, which is defined as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction', the system for reporting, notification and implementation of the preservation regime is substantially similar to that applicable to the continental shelf and exclusive economic zone, except that as there will not be a coastal state to assume the role of coordinating State, all States which have expressed an interested in being a party to a preservation regime will elect one State to act as the co-ordinating State.¹⁴⁹

While this system of coordinated jurisdiction was a necessary compromise on which to base the protection regime, it is unfortunate in that it is overly bureaucratic and potentially time consuming. The implementation of a timely and effective protection regime may be hampered by the necessity of agreeing upon the regime by any number of States. The determination of which States will be able to participate in discussion on the regime is also hampered by uncertainties regarding the basis for the determination of a verifiable link to the UCH and the body responsible for this determination. Given the international nature of seafaring, it is possible for a number of States to have such a link, requiring complex negotiations on the structure of a protection regime amongst numerous States.

E. The Preservation Regime

In 1990 the ILA stated that the 'establishment of a global regulatory body seems unrealistic at this time. The best alternative may be to allocate control of the underwater cultural heritage to States, subject to clear international standards'.¹⁵⁰ This allocation of control requires States to undertake a number of duties with regard to UCH. Central to negotiations on the structuring of the protection regime was the extent to which the duties States would undertake with regard to UCH would be onerous on developing States, necessitating consideration as to the manner in which such a duty might be imposed.

¹⁴⁶ Art 10(5).

¹⁴⁷ Art 19(4).

¹⁴⁸ Art 10(2).

¹⁴⁹ Art 12 and 13 provide for the protection of UCH in the Area.

¹⁵⁰ ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law* (Queensland, Australia, 1990), 13.

The primary aim of the Convention is to preserve the realisation of the archaeological value of UCH by imposing a set of technical standards of good archaeology on all activities directed at UCH. Whilst the technical standards have, on the whole, received support from most States, the manner in which the protection regime will be structured to achieve this purpose has been controversial. This is particularly so as the primary mechanism in the preservation regime is the elimination of any commercial incentive to recover UCH. The secondary mechanism utilised in the protection regime is derived from international cultural heritage law relating to the trafficking in illicitly recovered cultural heritage. While use of the primary mechanism for protection would ensure that no UCH was recovered for commercial purposes, it was recognised that some UCH may still be recovered in a manner not conforming to appropriate scientific standards. In these cases, it is proposed that States may seize such illicitly excavated UCH imported into its territory and impose sanctions for such importation.

1. Archaeological Standards: Rules of the Annex

The primary aim of the Convention is the preservation of UCH, which can only be achieved if appropriate scientific techniques are made applicable to any interaction with UCH. As a direct response of the decision by UNESCO to proceed with the drafting of a Convention, ICOMOS drafted the Charter on the Protection and Management of UCH.¹⁵¹ It represents the benchmark standard for underwater archaeological excavations and concerns matters such as project design, standards of preliminary investigations, project methodology and techniques, project time-tabling, competence and qualifications of personnel, material conservation, site management, project documentation, curation of project archives, and the dissemination of project results. These standards are technical standards of good archaeological practice and, subject to some changes in wording, were generally considered acceptable to the majority of States, bar one exception. This related to the inclusion of the principle of non-commercialisation of UCH, which was considered above. It was agreed that these technical Rules would be contained in an Annex, which would form an integral part of the convention so that reference to the Convention would include reference to the Rules in the annex.¹⁵²

2. Authorisation, Sanctions, and Seizure

Ordinarily, the State granted jurisdiction over either the territory in which the UCH was excavated, or the State of which the excavator is a national, will be able to determine the consequences of non-compliance with its regulations. However, the ability of an excavator to avoid these jurisdictional States

¹⁵¹ Above n 21.

¹⁵² Art 33.

requires a system that allows a third State to take some action in order to protect UCH. As this third State will have neither territorial jurisdiction over the place of the illicit activity, or nationality jurisdiction over the excavator, the only jurisdiction that it might possess must relate to the object recovered and brought into its own territorial jurisdiction. The Convention therefore requires these States to implement a system that prevents illicitly excavated UCH being brought into its territory, and to impose sanctions, including seizure of the UCH, for infringements.¹⁵³

The Convention provides that authorisation for activities directed at UCH is required to comply with the Rules in the Annex.¹⁵⁴ In areas beyond coastal State jurisdiction, this authorisation will be granted by the 'coordinating State', which in the case of UCH on the continental shelf will ordinarily be the coastal State. This authorisation would allow for the activity directed at the UCH to actually take place. As Article 14 requires States to implement a system preventing the entry into its territory of UCH not recovered in accordance with the rules of the Annex, a second authorisation may be necessary which relates solely with regard to the entry into territory of the UCH rather than its excavation. This might be the case where UCH recovered beyond coastal State jurisdiction is authorised by the coordinating State in conjunction with other interested States, but later landed in a third State. As such, the third State, if a Party to the Convention, would require authorisation for the entry of the UCH. While any reference to the use of permits was removed from the Convention,¹⁵⁵ it is expected that most States will make use of permits issued prior to any proposed activity directed at UCH.¹⁵⁶ This is to be expected as the use of permits, either import permits or excavation permits, are utilised by a number of States to regulate the recovery of both terrestrial and UCH,¹⁵⁷ and been agreed upon in conventional international law.¹⁵⁸ The use of permits will facilitate the task of ensuring activities directed at UCH are undertaken in accordance to the Rules of the Annex and therefore have a number of benefits

¹⁵³ Art 14.

¹⁵⁴ Rule 1.

¹⁵⁵ The ILA draft convention contained Art 9, which reads, '[a] State Party to this Convention may provide for the issuance of permits, allowing entry into its territory of underwater cultural heritage excavated or retrieved after the effective date of this Convention so long as the State has determined that the excavation and retrieval activities have complied or will comply with the Charter.' This was amended in the UNESCO negotiating draft to read: 'A State Party may [issue] provide for the issuance of] permits, subject to the compliance with [the Rules of the Annex], allowing entry into its territory of underwater cultural heritage', CLT-96/CONF.202/5 Rev 2 1999, 2

¹⁵⁶ For further reading on the use of permits, see McLaughlin, 'Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987' 19 *Columbia-VLA Journal of Law and the Arts* (1995), 149–98 and A Croome, 'The United States Abandoned Shipwreck Act Goes into Action: A Report' 21(1) *International Journal of Nautical Archaeology* (1992), 39–53.

¹⁵⁷ See generally Prott, and O'Keefe, above n 14; B Burnham, *The Protection of Cultural Property: A Handbook of National Legislation* (Paris: The International Council of Museums, 1974); and Anon, *The Protection of Movable Cultural Properties II Compendium of Legislative texts, Vol I and II* (Paris: UNESCO Publishing, 1984).

¹⁵⁸ For example, in the 1970 UNESCO Convention.

Protection of Underwater Cultural Heritage

in a preservation regime.¹⁵⁹ While the Convention no longer explicitly requires that permits are issued prior to any activity directed at UCH,¹⁶⁰ the Rules of the Annex require a project design to be established prior to any activity directed at UCH, so all permits would have to be issued prior to any activity directed at UCH.

A State Party is required to 'take measures providing for the seizure' of UCH recovered in a manner not conforming with the Rules in the Annex.¹⁶¹ The requirement that the State take such measures, rather than simply to seize UCH reflects the reluctance of State to be bound to achieve a result, which in practical terms might not be achievable. Originally it was proposed that this would occur whether the UCH had been brought into the territory of the State Party directly or indirectly. Thus, the duty to take measures to seize such UCH would apply irrespective of whether it was recovered and imported directly into the State or imported from another State.¹⁶² Although this original position is no longer specified in Article 10, it may be implied. A problem that might arise occurs when the UCH that has been seized by a particular State, has an identifiable owner. The national laws of the State will therefore have to determine the rights of the owner in these circumstances.¹⁶³

¹⁵⁹ The creation of a permit system must be considered in light of the system of export and import control established under conventional international law. In particular, the 1970 UNESCO Convention establishes a system of controls, which may become operative if the UCH is to be moved from the State to which it was first brought to another State, with the result that two permits may be needed.

¹⁶⁰ Art 8(2) of the secretariat draft originally contained the following provision, 'Should an excavation or retrieval of underwater cultural heritage occur without prior authorisation of a State Party, the State Party may issue permits allowing entry of such underwater cultural heritage into its territory, provided that excavation and retrieval activities have been conducted in accordance with the operative provisions of the Charter.' This Article was criticised by a number of States as undermining the permit system and this Article was subsequently deleted.

¹⁶¹ Art 18(1).

¹⁶² CLT-99/WS/8, Paris, Apr 1999, 48. Art 9(2) of the negotiating draft stated: 'a State shall seize underwater cultural heritage known to have been excavated or retrieved from the exclusive economic zone or the continental shelf of another State Party exercising control of those areas in accordance with Art 5 para 2 to 5 above only after the request or with the consent of that State.' The duty to take measures to seize UCH recovered in a manner inconsistent with the Rules in the Annex apply to UCH recovered in all maritime zones beyond the territorial jurisdiction of the coastal State. Art 9(2) therefore provides that, in areas where the coastal State does exercise jurisdiction, the right to seize UCH recovered from these maritime zones will only arise at the request of the coastal State. It is, however, unnecessary to include a paragraph specifically dealing with these zones, and that all zones beyond the territorial jurisdiction of the coastal State will fall within the scope of Art 9(1). A number of States supported the elimination of an Article dealing with any specific zones, and as such, Art 9(2) was deleted. CLT-2000/CONF.201/8, Paris, 5 July 2000. This provision is similar to that provided for under the UNIDROIT Convention and the 1954 Hague Protocol . Art 2. See CLT-99/WS/8, Paris, Apr 1999, 48.

¹⁶³ In this case, the choice-of-law rules will be determined by the national courts. Questions of ownership of a vessel will ordinarily be determined by the law of the Flag State, while questions of ownership of the cargo will be determined by the law of the nationality of the owner, if known, or the flag of the vessel on the assumption that an owner of the cargo would be a national of the Flag State. See further CLT-99/WS/8, Paris, Apr 1999, 48. See further CLT 99/CONF 204/CLD10 for an alternatively worded Article proposed by the Chairperson of the 1999 meeting.

When exercising the right to seize artefacts in accordance with Article 18(1), a State Party is under a duty to 'record, protect and take all reasonable measures to stabilise' the UCH.¹⁶⁴ Original drafts had used the term 'conserve' rather than 'stabilise' to describe the activity States were required to undertake.¹⁶⁵ Conservation of marine artefacts can be a costly and time-consuming activity, and to require all State Parties to provide such a facility may be an onerous burden. To 'stabilise' recovered artefacts might imply a less onerous duty than to 'conserve', being a short-term solution to mitigate deterioration rather than long-term conservation. The Article also does not impose a mandatory duty, but rather requires a coastal State to take all 'reasonable' measures to stabilise artefacts. What 'reasonable measures' are will depend on the coastal State's infrastructure, technical expertise, facilities, etc. Developing States may need the expertise of UNESCO and other interested States if the artefacts in these situations are to be conserved. Thus, Article 18(3) requires the seizing State to notify all other States that might have an interest in the UCH of its seizure, as well as UNESCO, and co-operate for the conservation of the UCH.¹⁶⁶

Having 'recorded, protected and conserved' the UCH, the seizing State will have to decide on the ultimate disposition of these artefacts. Article 18(4) provides that;

a State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit taking into account the needs of conservation and research; the need for re-assembly of a dispersed collection, the need for public access, exhibition and education and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, to the heritage concerned.

As Article 2(3) requires that UCH be preserved for the benefit of humanity, Article 18(4) attempts to give effect to this when a State has seized UCH. Unfortunately the term 'public benefit' might suggest a national benefit to the seizing States, and it is therefore unfortunate that terminology consistent with Article 2(3) was not used. The Article also merely suggests consideration that may be taken into account without imposing any duty to do so.

The enforcement of international cultural heritage laws relies mostly on non-criminal sanctions such as the return, restitution and forfeiture of stolen goods.¹⁶⁷ Most of the conventions and recommendations are designed to create an infrastructure that will prevent offences relating to cultural heritage

¹⁶⁴ Art 18(2).

¹⁶⁵ Art 11(1) of the negotiating draft had declared that: 'each State Party shall record, protect and take all reasonable measures to conserve underwater cultural heritage seized under this Convention', CLT-2000/CONF 201/8, Paris, 5 July 2000.

¹⁶⁶ Art 18(3).

¹⁶⁷ Nafziger, above n 124, 835–52; C Bassiouni, 'Reflections on Criminal Jurisdiction in International Protection of Cultural Property' 10 *Syracuse Journal of International Law and Commerce* (1983), 281–322.

rather than a system of penal measures.¹⁶⁸ However, it is recognised that sanctions can form an important aspect of a disincentive regime. As such the Convention requires States to impose sanction for violations of measures it takes to implement this Convention. The nature sanctions might take was discussed at length during negotiations.¹⁶⁹ It was concluded that the nature of the sanction should be left to each State to determine but that at the very least sanctions applicable ‘shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit occurring from their illegal activities.’¹⁷⁰ Article 17(3) concerning co-operation in the enforcement of sanction imposed was subject to some revision. Originally, the duty to cooperate was phrased in mandatory terms and included examples of areas in which States might co-operate, such as the production of documents or extradition.¹⁷¹ However, the complexities associated with many of these duties, especially that of extradition, proved problematic, and it was eventually agreed not to limit or list the manner in which States might cooperate.

3. Competent Authorities, Public Awareness, and Training

The preservation of the world’s cultural heritage requires every State to participate in the collective protection infrastructure. In order to do so, it is ordinarily required of trustee States that they establish national services for the preservation of this heritage,¹⁷² including the call to establish national inventories.¹⁷³ Article 22 of the Convention is therefore not unique in this respect, and requires states to ‘establish competent authorities or improve the existing one where appropriate with the aim of providing for the establishment, maintenance and updating of an inventory of underwater cultural heritage, the effective protection, conservation, presentation and management of underwater cultural heritage, as well as research and education’.

¹⁶⁸ For example, during the 1970 UNESCO Convention negotiations, proposals for the imposition of tougher criminal sanctions on those importing illicit cultural heritage were deleted in favour of a commitment from importing States to co-operate in the recovery and return of cultural heritage. (Art 9). See further Nafziger, above n.124, 838.

¹⁶⁹ CLT-2000/CONF 201/8, Paris, 5 July 2000. The Article in the original draft read, ‘Each State Party shall impose criminal, administrative [or civil] sanctions for importation of underwater cultural heritage which is subject to seizure under Art 9’, CLT-96/CONF 202/5 Rev.2, Paris, July 1999.

¹⁷⁰ Art 17(2).
¹⁷¹ Art 10(2) of the secretariat draft stated that: ‘States Parties agree to co-operate with each other in the enforcement of these sanctions. Such co-operation shall include but not be limited to, production and transmission of documents, making witnesses available, service of process and extradition’, CLT-96/CONF 202/5 Paris, Apr 1998.

¹⁷² See, eg, Arts 12–17 of the 1972 UNESCO Recommendation Concerning the Protection at National Level of the Cultural and Natural Heritage; Arts 5, 13, and 14 of the 1970 UNESCO Convention; Arts 7 and 15 of the 1954 Hague Convention; and Art 5 of the World Heritage Convention.

¹⁷³ Art 5(b) of 1970 UNESCO Convention, Art 29 of the 1972 UNESCO Recommendation and Art 4(2) 1969 European Convention.

Originally the draft convention had referred to the creation or improvement of a 'national service' that would implement the terms of Convention. The establishment of such a national service, however, requires expertise and government financing, which may be difficult for many developing States, particularly in light of the low priority UCH traditionally has for State administrations. Although UNESCO is able to provide some technical expertise, it is unable to provide the financial aid necessary to establish appropriate national services, which would include conservation laboratories, employment of appropriately qualified personnel and administrative infrastructure. The use of the term 'competent authorities' suggests an organisation that will not necessarily implement those that may be undertaken by a national service to protect UCH, but rather an administering organisation with only the aim of providing the necessary infrastructure to implement the provision of the Convention, which might include a national service. This may, however, be beneficial to developing States that could not possibly establish national services to the extent that developed States such as the US could, while still requiring those States to do whatever they possibly can.¹⁷⁴ It is therefore clear that no uniform national service can be established in all States to ensure that UCH is protected in accordance with the Convention. Article 21 therefore requires States to 'co-operate in the provision of training in underwater archaeology, in techniques for the conservation of [UCH] and, on agreed terms, in the transfer of technology relating to [UCH]'.

Article 20 of the Convention has received little comment or been the subject of much negotiation at the meeting of experts, yet it contains arguably the most important tool for the preservation of UCH.¹⁷⁵ This Article simply requires that states 'take all practical measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under the Convention'. There was, however, one alteration made during negotiations, which was to replace the term 'education' with 'public awareness'.¹⁷⁶ The latter can be regarded as a less stringent duty on States, requiring only an awareness rather than actually educating the public, which might include formal training.¹⁷⁷ As it would be impossible to

¹⁷⁴ This problem is recognised in the 1972 World Heritage Convention, which states that: 'protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific and technological resources of the country where the property to be protected is situated.'

¹⁷⁵ Education and public awareness are important features of many international conventions aimed at the protection of the world cultural and natural heritage. See, eg, Art 10 of the 1970 UNESCO Convention, Art 7 of the 1954 Hague Convention and Art 12 of the 1956 UNESCO Recommendations. See also J Gifford, M Redknapp, and N Fleming, 'UNESCO International Survey of Underwater Cultural Heritage' 16 *World Archaeology* (1985), 374.

¹⁷⁶ Art 15 of the negotiating draft provided that: 'each State Party shall endeavour by educational means to create and develop in the public mind a realisation of the value of the underwater cultural heritage as well as the threat to this heritage posed by violations of this Convention and non-compliance with the Rules of the Annex', CLT-96/CONF 202/5 Rev 2, Paris, July 1999, 11.

¹⁷⁷ A very successful educational and training programme is run by the Nautical Archaeological Society, based in the UK, and run in a number of States, including the US, South Africa, and Australia. See further <<http://www.nasportsmouth.org.uk>>.

determine the outcome of an educational or awareness process, the Article simply requires a State to take all practical measures to achieve this.¹⁷⁸

The mandatory requirement of creating a public awareness policy would supplement the requirement that States cooperate in the provision of training in underwater archaeology.¹⁷⁹ The establishment of training facilities such as those envisaged in Article 21 are not only extremely expensive but also highly technical. Very few developing States have the resources or expertise to establish such facilities.¹⁸⁰ Many of these States will require aid from developed States, particularly those with a rich tradition in underwater archaeology and UCH conservation. Thus Article 21 includes an obligation to cooperate in the transfer of technology relating to UCH. It is, however, unlikely that some States will allow the transfer of certain technology related to activities directed at UCH where the technology is connected with the defence industry.¹⁸¹ As such, the transfer of technology will be on term agreeable to the transferring State.

4. International Cooperation in the Protection of UCH

UCH, whether found in international or coastal waters, often has an international character, either in the origins of the vessel, its components, crew, cargo, or trading route. As such, it may be of archaeological, historical or cultural interest to a number of nations, thus giving rise to both a potential national interest in UCH as well as an international interest as it reflects the common heritage of humankind. It is therefore incumbent on any State engaged in any activity directed at UCH to endeavour to cooperate with any other State that might have an interest in the cultural heritage. The principle of State cooperation in the preservation of UCH, originating in Article 303 of UNCLOS, forms the foundation upon which the protection regime introduced in the Convention is based.¹⁸² While the duty to cooperate is evident both in the preamble¹⁸³ and in the general principles of the Convention,¹⁸⁴ and is

¹⁷⁸ Similar provisions are contained in Art 24 of the 1972 World Heritage Convention, Art 25 of the 1954 Hague Convention, and Art 10(b) of the 1970 UNESCO Convention.

¹⁷⁹ See Dromgoole, above n 17, 5–12 and 5–45.

¹⁸⁰ The Group of 77 stated that: 'the convention can only be effective if a sufficient level of human and technological resources for appropriate protection of underwater cultural heritage can be assured; therefore the Convention should provide a system of capacity building, transfer of technology and training related to protection', CLT-2000/CONF 201/3add, Paris, June 2000, 10.

¹⁸¹ For example, Dr Robert Ballard has made extensive use of US naval vessels and technology, particularly the nuclear submarine NR-1 to search for UCH. See 'Titanic man finds world's oldest ships 1,000ft down' *The Sunday Times*, 27 June 1999.

¹⁸² See, eg, Arts 13–20 1956, UNESCO Recommendation.

¹⁸³ The preamble declares that: 'Believing that cooperation among States, international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties and the public at large is essential for the protection of underwater cultural heritage.'

¹⁸⁴ Art 2(2) declares that: 'States Parties shall cooperate in the protection of underwater cultural heritage.'

clearly evident in the jurisdiction structure established to deal with UCH beyond coastal State jurisdiction, it has crystallised in a more concrete form in two provisions of the Convention, namely, in the collaboration of certain activities directed at specific UCH, and the development of regional agreements. Article 19 requires States to cooperate in the protection of UCH, which includes collaborating in the investigation, excavation, documentation, conservation, study, and presentation of such heritage¹⁸⁵ as well sharing information regarding discoveries of UCH, illicit excavations, scientific methodologies and technologies relating to UCH and legal developments in States to advance the protection of UCH¹⁸⁶. It was realised that information regarding discoveries of UCH might endanger it if made public. As such, when such a risk occurs, States are required, as far as their national legislation allows, to keep such information confidential.¹⁸⁷

The preservation of the cultural heritage has been the subject of a number of regional agreements or bilateral agreements.¹⁸⁸ A number of States, most notable European and Latin American/Caribbean States were concerned that the Convention would not adequately protect UCH in certain regions and wished to ensure that more stringent protective measures could be introduced on a regional basis.¹⁸⁹ The establishment of international agreements, whether

¹⁸⁵ Art 19(1).

¹⁸⁶ Art 19(2).

¹⁸⁷ Art 19(3).

¹⁸⁸ Examples of bilateral agreements include the agreement entered into between the US and Mexico (Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, 17 July 1970, United States–Mexico, 22 UST 494, TIAS no 7088); between the US and Peru (Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, 15 Sept 1981, United States–Peru, TIAS No 10136) and between US and Canada (Anon, 'Agreement Between the Government of the United States of America and the Government of Canada Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological and Ethnological Material' 8 *International Journal of Cultural Property* (1999), 245–57). See further Nafziger, 'Finding the Titanic: Beginning an International Salvage of Derelict Law of the Sea' 12 *Columbia-VLA Journal of Law and the Arts* (1988), 339–51. The use of bilateral or regional agreements may be of particular importance in the preservation of an identified wreck of archaeological or historical significance. For example, the US have attempted to conclude a multi-lateral agreement to protect the wreck of the RMS *Titanic*. Although no regional agreement exists in this respect, an agreement that may be analogous to this type may be the agreement concluded by Scandinavian Countries to protect the site of the wreck of the *Estonia*. See *Agreement Regarding the M/S Estonia* repr in 20(4) *Marine Policy* (1996), 355–6. (For a discussion on wrecks as a memorial, see BL Allen, *Coastal State Control Over Historic Wrecks Situated on the Continental Shelf as Defined in Article 76 of the UN Law of the Sea Convention 1982*, (Cape Town: Special Publication of the Institute of Maritime Law, University of Cape Town Publication no 14, 1991), 40–1). An important bilateral agreement which concerns UCH, its that entered into between the Governments of Netherlands and Australia concerning VOC wrecks lost off the coast of Western Australia. See 'Agreement between the Netherlands and Australia Concerning Old Dutch Shipwrecks 1972', as reproduced in Protts and Srong, above n 57, 75.

¹⁸⁹ The slow pace of negotiations, and the call for a further meeting of experts prompted the Latin American group, led by the delegation from the Dominican Republic, to state that, if the process was not speeded up, they would consider establishing a regional agreement on the basis of the Declaration of Santo Domingo, which purports to implement many of the provision of the UNESCO draft. The Declaration of Santo Domingo (Appendix X) was endorsed by the X Forum of Minister of Culture and Offices Responsible for Cultural policies of Latin American and the Caribbean, 4–5 December 1998.

bilateral or multilateral, global or regional, are a natural aspect of international law and reflected by the negotiations of this very Convention. As such this proposal does not provide States with any rights or duties they do not already possess as subjects in international law. Nevertheless, promotion of regional agreements may enable certain objectives of the Convention to be realised, such as assistance in the creation of public awareness and training.

It is unfortunate that there is a need to provide for such agreements in that it suggests that the protection regime provided for in the Convention may not function as effectively as many States might wish. The creation of numerous regional and bilateral agreements providing for a more stringent protective regime will unfortunately create a fragmented regime applying to UCH, so that the degree of protection of the UCH may be a function of its geographical position. Such a fragmented legal regime is quite contrary to the very aim of this Convention. Yet, in the process of international negotiation, it has been a compromise necessary to promote the effective protection of UCH in some areas, while promoting the 'idea' of protection in others. It may therefore simply be the beginning of a process of expanding effective protection to all areas.

The draft clearly maintains that the justification for the 'protection' of UCH is that it is of importance to, and an integral part of, the heritage of humanity.¹⁹⁰ It further holds that all States have a collective responsibility for achieving this protection.¹⁹¹ Recognising that UCH in international waters may originate from distant States, the Convention attempts to ensure that States with some cultural, historical, or archaeological link to the UCH be included in any co-operative protective regime. The mechanism, however, is poorly constructed, simply requiring that in entering into agreement to protect UCH on the continental shelf, any State that declares an interest to be involved in the agreement must base their declaration 'on a verifiable link' with the UCH.¹⁹² The Convention does not, however, give any direction as to how such a link should be ascertained, or by whom. Article 18 also makes use of the 'verifiable link' criteria to oblige States that have seized illicitly recovered UCH to report such seizure to States with such a link. While in this case it is clear which State may have to determine the link, again, there are no guidelines for such a determination. It is unfortunate that such a criteria was included, as it will certainly give rise to disagreements. With regard to UCH found in the Area, not only is this unfortunate criteria included, but States are also required to pay regard to 'the preferential right' of States with a cultural, historical or archaeological link to the UCH.¹⁹³ This notion of preferential rights derives from Article 149 of UNCLOS. However, as the derivation of any meaning from Article 149 has proved impossible,¹⁹⁴ its inclusion in the

¹⁹⁰ Preamble. ¹⁹¹ Art 2(2). ¹⁹² Art 9(5). ¹⁹³ Art 11(4) and 12(6).

¹⁹⁴ See MH Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol 5 (Dordrecht: Martinus Nijhoff Publishers, 1989), 1xi; Forrest above n 14, 48–56.

Convention only goes to heighten difficulties in determining which States should be party to any co-operative protection regime, clearly inviting disputes.

IV. CONCLUSION

While the provisions of the Convention do not provide for a protection regime as effective as many would have hoped, the success of the process that begun in the ILA Cultural Heritage Committee is clearly evident. The issue of the protection of UCH has once again been raised in international discourse and continued the process begun in the Seabed Committee in the later 1960s. It is a step in an evolutionary process that builds on those aspects of the UNCLOS regime that were agreed on and improves the regime by introducing further protection provision that, while not acceptable to many States thirty years ago, have matured through the years to the extent that they are now generally acceptable to States. While some provisions remain problematic, particularly the commercialisation of UCH and the inclusion of State vessels in the regime, the adoption of this Convention paves the way for the development of an effective protection regime for UCH beyond coastal State jurisdiction.