

2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage

Sarah Dromgoole*

Senior Lecturer in Law, University of Leicester, UK

ABSTRACT

The UNESCO Convention on the Protection of the Underwater Cultural Heritage, adopted in November 2001, is designed to create a legal framework to regulate interference with underwater cultural heritage (UCH) in international waters. This article briefly considers the background to the Convention and discusses its main provisions. These relate to the scope of application of the Convention; its objectives and general principles; its approach to private rights; its treatment of state vessels and the question of sovereign immunity; and its relationship with the UN Convention on the Law of the Sea 1982. The article then goes on to examine in detail the control mechanisms that the Convention adopts in respect of each maritime zone and the sanctions that contracting states will be required to impose for violations. Finally, dispute settlement procedures are briefly considered, before the article concludes with comments on the Convention's likely impact and effectiveness.

Introduction

In 1985, the *Titanic* was discovered, 2.5 miles underwater; shortly afterwards, artefacts were recovered from the site.¹ These events, which were the subject of massive publicity, served to highlight advances in deep-sea technology and the increasing vulnerability of the underwater cultural heritage (UCH). They also acted as a catalyst for international action to control such activities.

* The author would like to acknowledge the support of the University of Leicester in awarding her study leave enabling her to complete this article. She would also like to thank Nicholas Gaskell, David Jackson Professor of Maritime and Commercial Law, Institute of Maritime Law, University of Southampton, for his helpful comments on the text and Gwenaelle Le Gurun, Legal Officer, International Seabed Authority, for information provided. Any views expressed are, of course, those of the author alone.

¹ In 1987 approximately 1,800 artefacts were recovered. Further artefacts were recovered in 1993. See *RMS Titanic, Inc. v The Wrecked and Abandoned Vessel believed to be the RMS Titanic*, USCA 4th Cir., 12 April 2002 (appeal to the Supreme Court declined, 7 October 2002).

In 1993, UNESCO began to consider the feasibility of drafting an international instrument for the protection of the UCH.² While the organisation recognised that the UN Convention on the Law of the Sea 1982 (LOS) made some provision for UCH in international waters, it felt that a more detailed framework for legal protection was required. It also recognised that any instrument in this field would need to tackle a number of issues that were both controversial and complex. For example, there was a risk of interfering with the delicate compromise package achieved in the LOS, especially on the question of the extent of coastal state jurisdiction. Difficult issues also arose concerning the relationship of any instrument with salvage law and the rights of owners; its treatment of warships and the question of sovereign immunity; and the balance that should be struck between archaeological and commercial interests.

Many believed that UNESCO's initiative would ultimately end in failure, as a similar initiative had done in 1985.³ However, after three years of intense and at times febrile negotiations by government experts, a text was finally agreed upon. In November 2001 the UNESCO Convention on the Protection of the Underwater Cultural Heritage was adopted and the support shown for the Convention in the UNESCO forum suggests that it will not be long before it comes into force.⁴

The main aim of this article is to examine the mechanisms adopted by the Convention to control interference with UCH in international waters. Before doing so, the background to the Convention will be briefly explained, and its main provisions discussed. Among other things, consideration will be given to the ways in which the final text differs from the draft text produced in 1998 (and discussed in this journal in 1999).⁵

Background

As far back as 1978 there was international recognition of the need for a convention to protect the UCH.⁶ Unfortunately, an attempt to draft a European convention on the matter had to be aborted in 1985, apparently as a result of an intractable dispute between Greece and Turkey over the territorial scope of

² At its 141st Session in 1993, the UNESCO Executive Board adopted Resolution 5.5.1., para. 15, requesting the Director-General to undertake a feasibility study. For the feasibility study itself, see UNESCO Secretariat, "Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage", presented to the 146th Session of the UNESCO Executive Board, Paris, 23 March 1995, Doc. 146 EX/27.

³ See further below.

⁴ Twenty instruments of ratification, acceptance or approval are required to bring the Convention into force: see Art. 27.

⁵ See (1999) 14 IJML 171–192.

⁶ See Council of Europe Recommendation 848 (1978) on the Underwater Cultural Heritage (Doc. 4200, Strasbourg). It is interesting to note that the Council of Europe has recently adopted Recommendation 1486 (2000) on the Maritime and Fluvial Cultural Heritage. The new Recommendation relates to maritime heritage of various kinds, not solely the UCH. However, it contains a number of recommendations in respect of the UCH that have been informed by the development of the UNESCO Convention, and that are aligned with its fundamental principles.

application of the Convention. The LOSC addressed the issue, but the two articles it includes relating to the UCH are short and vague.⁷ In 1988 a new initiative commenced, when the International Law Association (ILA) established a Committee on Cultural Heritage Law, which decided that its first task should be the drafting of a convention on the protection of the UCH. The ILA eventually adopted a draft in 1994, which was submitted to UNESCO for consideration.⁸ Using the ILA draft as a basis, a preliminary draft text was prepared by UNESCO in 1998.⁹ This draft was discussed at two meetings of government experts, the first in June/July 1998 and the second in April 1999. A revised draft, adopted by the participants at the second meeting, formed the basis for work at a third meeting held in July 2000, but was not formally amended at that meeting.¹⁰ A fourth meeting was scheduled in March/April 2001 and it was made clear by the Director-General of UNESCO that this was to be the last meeting before a text was finalised.¹¹ The pressure to reach agreement on all points meant that the meeting was extended into a second session held in July. At this fourth meeting, the focus of attention was a Single Negotiating Text produced by the Chairman, Mr Carsten Lund of Denmark. Despite strenuous efforts to do so, it was not possible to achieve a consensus on all issues given the time constraints. Lund's text, with amendments, was therefore adopted at the 31st Session of the UNESCO General Conference on 6 November 2001 by 87 votes in favour, four against, and 15 abstentions.¹² The UK was one of the states that abstained.¹³

⁷ LOSC, Arts. 149 and 303. These provisions have been subjected to detailed examination and criticism over the years. See, e.g. L. Caflisch, "Submarine Antiquities and the International Law of the Sea", (1982) XIII *Netherlands Yearbook of International Law* 3; A. Arend, "Archaeological and Historical Objects: The International Legal Implications of LOSC III", (1982) 22 *Virginia Journal of International Law* 777; A. Strati, "Deep Seabed Cultural Property and the Common Heritage of Mankind", (1991) 40 *International and Comparative Law Quarterly* 859; P. O'Keefe and J. Nafziger, "The Draft Convention on the Protection of the Underwater Cultural Heritage", (1994) 25 *Ocean Development and International Law* 391.

⁸ On the basis that UNESCO was felt to be the appropriate body to take action on the matter: see UNESCO Secretariat, "Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage", presented to the 146th Session of the UNESCO Executive Board, Paris, 23 March 1995, Doc. 146 EX/27, para. 19.

⁹ Doc. CLT-96/Conf.202/5, April 1998. For a discussion of this draft, see S. Dromgoole and N. Gaskell, "Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998", (1999) 14 *IJMCL* 171–192. The text of the 1998 draft was included as an appendix to that article: see pp. 193–206.

¹⁰ Doc. CLT-96/CONF.205/5 Rev. 2, July 1999. This draft was very much a working text and will not be considered here.

¹¹ The Director-General made this clear in invitations to the fourth meeting: see P. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (2002), p. 30.

¹² Under UNESCO's procedures for the adoption of conventions, there is no signature procedure, but rather conventions are adopted at the General Conference, preferably by consensus or alternatively by vote: see O'Keefe, note 11 above, p. 1.

¹³ The others were Brazil, Czech Republic, Colombia, France, Germany, Greece, Iceland, Israel, Guinea-Bissau, Netherlands, Paraguay, Sweden, Switzerland and Uruguay. Those that voted

From early on in its initiative, the ILA recognised that a set of objective archaeological standards was required against which the appropriateness of activities affecting the UCH could be judged.¹⁴ Therefore, at its request, the International Council for Monuments and Sites (ICOMOS) produced a Charter on the Protection and Management of Underwater Cultural Heritage,¹⁵ which was attached to the ILA draft as an Annex. The scheme of the protective measures set out in the ILA draft sought to ensure that activities affecting the UCH were undertaken in accordance with the standards set out in the Annex. However, during the course of the UNESCO-led negotiations, questions arose in respect of both the status, and the content, of these standards. As far as their status was concerned, the question was whether they should form an integral part of the Convention, or simply be incorporated in a document referred to in the Convention but not part of it. Since the standards were intended to be a benchmark of archaeological good practice, ideally they should be amended from time to time to keep up with developments in that practice. The advantage of their being separate from the Convention was that the procedure for amendment could be made a great deal easier than if they were a formal part of the Convention. However, the complexities involved in working out a procedure for amendments that would be acceptable to contracting states were such that it was eventually concluded that the standards should be an integral part of the Convention.¹⁶ As far as their content was concerned, while they are based on the ICOMOS Charter, amendments were made to the wording to put it into a form that was both suitable for inclusion in a convention, and politically acceptable.¹⁷

As we shall see, the final text of the Convention differs significantly from the initial draft produced by UNESCO in 1998. As is always the case, political pressures during the negotiating process did much to shape the final form of the Convention. In particular, the USA and the UK, together with other maritime powers,¹⁸ exerted considerable influence and this influence is evidenced in many of the changes that have been made.¹⁹ The complex issue of ownership has now

cont.

against were the Russian Federation, Norway, Turkey and Venezuela. For some of the reasons for the abstentions and objections, see T. Scovazzi, "Convention on the Protection of Underwater Cultural Heritage", (2002) 32 *Environmental Policy and Law* 152–157.

¹⁴ See O'Keefe, note 11 above, p. 152.

¹⁵ Charter on the Protection and Management of Underwater Cultural Heritage (1996), ratified by the 11th ICOMOS General Assembly, held in Sofia, Bulgaria, 5–9 October 1996. This Charter should not be confused with the ICOMOS Charter for the Protection and Management of Archaeological Heritage 1990. The 1996 Charter supplements the 1990 Charter.

¹⁶ Art. 33 provides: "The Rules annexed to this Convention form an integral part of it and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Rules."

¹⁷ The wording of a rule relating to commercial exploitation caused particular difficulty. On this rule, see p. 66 below.

¹⁸ Notably France, Germany, Japan, Netherlands, Norway and Russia.

¹⁹ Despite this, all of these states—with the exception of Japan and the USA—either voted against the Convention or abstained from voting. Japan voted in favour; the USA did not have a vote, as it is not a member of UNESCO.

been left well alone: in particular, the Convention no longer applies only to UCH, which has been abandoned, and the highly controversial “deemed abandonment” provision has been omitted. The interrelationship between the Convention and the law of salvage has been clarified, and warships and other state vessels are now covered by the Convention. In general, the Convention’s provisions apply to a more limited range of activities than the 1998 draft, focusing on activities “directed at”, rather than merely “affecting”, the UCH. Finally, no attempt is now made, at least overtly, to extend coastal state jurisdiction beyond the confines of established international law and the LOSC. Instead, the drafters have resorted to some very complex mechanisms to try to control salvage activities on UCH sites beyond traditional territorial limits.

Outline of Main Provisions

The Convention comprises 35 articles, together with 36 rules in the Annex. The main provisions will be discussed here, before attention is focused on the control mechanisms.

Scope of Application

The Convention’s provisions apply to UCH as defined in Article 1. This provides that “underwater cultural heritage” means “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years”.²⁰ It then goes on to give some non-exclusive examples, including: “vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context”.²¹ Wrecks of ships are the main component of the UCH, and are the element on which this article focuses. The only types of remains that have been specifically *excluded* are pipelines and cables, whether or not in use, and other “installations” where still in use.²²

One or two points about the definition are worthy of particular note. First of all, it only covers material that has been underwater for “at least 100 years”. Therefore it will be some time before the Convention applies to wrecks such as the *Titanic* and remains from the two World Wars. The 1998 draft also used this 100-year cut-off point, but had a provision that a state could unilaterally decide to include remains *less than* 100 years old;²³ this has now been omitted. The flexibility afforded by this provision would have been useful in providing protection for more recent UCH, but the power it gave to states was so broad

²⁰ Art. 1(1)(a).

²¹ Art. 1(1)(a)(ii).

²² This provision should allay fears expressed by the cable industry about the possible impact of the Convention on its activities. It also reflects the special treatment afforded to cables, pipelines and certain other installations by the LOSC.

²³ 1998 UNESCO draft, Art. 1(b). For a discussion of this provision, see Dromgoole and Gaskell, note 9 above, p. 174.

that it could have seriously undermined the 100-year general rule. A further interesting development is that the definition now includes a “significance” criterion: it covers only traces of human existence having “a cultural, historical or archaeological character”. The question of whether or not there should be a significance criterion had been hotly debated, the attitude of states to this point largely depending on whether or not their domestic legislation included such a criterion. Generally speaking, common law countries provide protection for certain UCH sites considered of particular significance.²⁴ Civil law countries, on the other hand, tend to adopt a much more protectionist approach, providing “blanket” protection for all sites over a certain age, or otherwise classified as “antiquities” or “cultural heritage”. The fact that a significance criterion has been included suggests that proponents of such a criterion won the debate. However, the wording of the criterion really does little to restrict the scope of the Convention since arguably *anything* over 100 years of age has a “cultural, historical or archaeological character”. The fact that it has such character does not mean that it has any cultural or archaeological *value* or *importance*. The inclusion of this criterion is therefore a fudge, which is unlikely to satisfy those who argued for greater limitation of the scope of the Convention. Indeed, the UK has expressed serious reservations on this particular point.²⁵ However, the reality is that on this issue there was really no room for a compromise solution. Either one approach or the other had to be taken. The fact that it would usually be necessary to undertake extensive archaeological work on a site in order to determine its cultural value or importance meant that the adoption of a significance criterion based on such qualities would conflict with one of the fundamental principles of the Convention: that wherever possible sites should be left undisturbed and protected *in situ*.²⁶

Objectives and General Principles

The objectives and general principles of the Convention are referred to in the Preamble, set out more specifically in Article 2, and given effect to in other provisions, including the Rules in the Annex. The overall objective is clearly to “protect” the UCH.²⁷ It is also clear for whose benefit it is to be protected: for

²⁴ For example, in the UK, the Protection of Wrecks Act 1973 provides for the designation of wrecks of “historical, archaeological or artistic importance”, and under the Ancient Monuments and Archaeological Areas Act 1979 wrecks and other UCH sites can be scheduled if they are of “national importance”.

²⁵ See further pp. 77–78 below. See also the discussion on commercial participation in the underwater cultural resource at pp. 66–67 below.

²⁶ See further p. 65 below. For further arguments in favour of blanket protection, see G. Henderson, “Significance Assessment or Blanket Protection” in L. Pratt, E. Planche, R. Roca-Hachem (eds.), *Background Materials on the Protection of the Underwater Cultural Heritage* (UNESCO, 2000), vol. 2, pp. 350–352.

²⁷ See, e.g., Art. 2(1) and Art. 2(2). The Convention therefore adds flesh to the duty upon states imposed by Art. 303(1) of the LOSC to protect objects of an archaeological and historical nature found at sea.

“humanity”.²⁸ But from *what* is it to be protected? From the very beginning of the initiative, the primary threat to the UCH was recognised to come from salvage activities, particularly by treasure hunters. Such activities have been posing an increasingly serious problem because technological advances in recent years have made 98 per cent of the sea-bed accessible.²⁹ During the course of negotiations, a matter of some debate was the extent to which the threat posed to the UCH by other human activities, such as fishing, pipeline and cable laying, and drilling for oil and gas, should be dealt with by the Convention. Such activities certainly have the potential to cause serious damage to wrecks or other material lying on or in the sea-bed. However, dealing with this threat comprehensively proved to raise too many sensitive political and economic issues to be practicable. Therefore, rather than relating to “activities affecting” the UCH, as the 1998 draft had done, the final text distinguishes between activities “directed at” the UCH and those “incidentally affecting” it, and focuses on controlling the former.³⁰ Nonetheless, there is quite a broad general provision that a “State Party shall 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”.³¹

What exactly does the Convention envisage when it refers to the “protection” of the UCH? Article 2(5) makes clear that protection *in situ* “shall be considered as the first option”.³² This is in accordance with established archaeological principles, under which excavation should take place in two circumstances only: where a site is under threat, or for legitimate research purposes. The Convention clearly anticipates excavation and recovery in some circumstances, and spells out what those circumstances should be. Rule 1 of the Annex provides that activities “may be authorised for the purpose of making a significant contribution to protection or knowledge or enhancement” of UCH and Rule 4 refers to circumstances where excavation or recovery is “necessary for the purpose of

²⁸ Art. 2(3). LOSC, Art. 149 provides that archaeological objects found in the Area shall be preserved or disposed of “for the benefit of mankind as a whole”. Under the new Convention, the notion of general human benefit is extended to all maritime zones.

²⁹ E. O’Hara, “Maritime and Fluvial Cultural Heritage”, Report of the Committee on Culture and Education, Parliamentary Assembly of the Council of Europe, Doc. 8867, 12 October 2000, para. 3.4.3. Remotely operated vehicles (ROVs) can operate at depths of 6,000m. Manned submersibles can operate at depths of 3,600m: *ibid.*

³⁰ “Activities directed at underwater cultural heritage” are defined as “activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage”: Art. 1(6). “Activities incidentally affecting underwater cultural heritage” are defined as “activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage”: Art. 1(7).

³¹ Art. 5. The breadth of Art. 5 is significant. It relates to activities *under the jurisdiction* of a state party and could therefore apply to certain activities in the EEZ or on the continental shelf of a state party, as well as to activities engaged in by flag states and nationals of states parties. For a particular example of its potential impact, see p. 86 below.

³² See also the Preamble, and Rule 1 of the Annex.

scientific studies or for the ultimate protection” of UCH.³³ Within these guidelines arguably there is a considerable degree of latitude and different states parties may interpret them very differently. However, where activities are authorised, the Convention tries to ensure that they are undertaken in accordance with the benchmark rules set out in the Annex. These make provision for, *inter alia*, project funding and design, project team competence, recording of information, conservation, site management, the reporting and dissemination of finds, and curation of project archives. The standards imposed are high, although they are in accordance with standards set internationally for land sites.³⁴

What the Convention makes absolutely clear is that the sale or irretrievable dispersal of UCH is incompatible with its protection. Article 2(7) provides that “[u]nderwater cultural heritage shall not be commercially exploited” and this provision is elucidated in Rule 2 of the Annex, which provides:

“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.”

From Rule 2, it appears that commercial exploitation through, for example, the sale of films or photographs of the site, public tours and public exhibition of material will not be an infringement of the Convention, but any sale of material will be. Furthermore, any action that will lead to the irretrievable dispersal of material from a site will also be an infringement. These restrictions are clear-cut and without exception.³⁵ Their effect is to provide little room within the framework of the Convention for commercial salvors to share in the underwater cultural resource, or to co-operate with archaeologists in work on UCH sites, as

³³ See also the Preamble, which refers to the “careful recovery” of UCH “if necessary for scientific or protective purposes”.

³⁴ See, e.g., the ICOMOS Charter for the Protection and Management of the Archaeological Heritage 1990. See also the Council of Europe’s European Convention on the Protection of the Archaeological Heritage (Revised) 1992, sometimes referred to as the Valletta Convention, which entered into force in 1995. The Valletta Convention is particular relevant because it applies to UCH “located in any area within the jurisdiction of the Parties”: Art. 1(2)(iii). As the Explanatory Report makes clear, this includes parts of the marine zone, although exactly which parts is not so clear. It states that “the actual area of State jurisdiction depends on the individual States and in respect of this there are many possibilities. Territorially, the area can be coextensive with the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone or a cultural protection zone.” (The UK ratified the Valletta Convention in 2000.)

³⁵ Having said that, it should be noted that a second clause to Rule 2 makes it clear that Rule 2: (i) does not preclude the buying in of the services of archaeological consultants, and (ii) probably would not preclude sale of an assemblage to a museum or similar institution, provided it was available for professional and public access, and was not irretrievably dispersed. See further, note 43 below.

some shipwreck salvors have advocated.³⁶ Recent litigation involving RMS Titanic Inc., the company that has been exploiting the wreck of the *Titanic*, suggests that commercial exploitation through public exhibition, public tours, etc., *without* the sale of artefacts may well be financially unviable.³⁷ In the author's opinion, the restrictions on sale and dispersal of UCH sway the balance of interests between archaeologists and commercial salvors too far in the archaeologists' favour, particularly given the ineffectiveness of the significance criterion in limiting the scope of the Convention. As well as placing restrictions on the recovery of material that may be of commercial interest but of little or no cultural importance, the drafters have also missed a valuable opportunity to develop a regime that allows for some participation by commercial operators. Managed properly, this could have been of benefit to the archaeological community and humanity as a whole, by utilising the considerable financial and technological resources of commercial organisations for work on sites under threat or where research is desirable.³⁸

Exactly how it is envisaged that "humanity" will benefit from the protection afforded by the Convention to the UCH is not entirely clear. As we shall see, there is provision for the seizure of UCH, and material that is so seized must then be disposed of "for the public benefit".³⁹ Provision is also made for public access,⁴⁰ for the raising of public awareness,⁴¹ and for the establishment or reinforcement of "competent authorities".⁴² However, this provision is in very general terms and does little more than reiterate the archaeological principle that the public should have access to the cultural heritage except where such access is

³⁶ ProSEA, the Professional Shipwreck Explorers Association, argues that it is possible for shipwreck exploration to be done ethically and has developed a "Code of Ethics" for its members: see further, <http://www.prosea.org>.

³⁷ *RMS Titanic, Inc. v The Wrecked and Abandoned Vessel believed to be the RMS Titanic*, USCA 4th Cir., 12 April 2002. Appeal to the Supreme Court declined, 7 October 2002.

³⁸ It is interesting to note that on 27 September 2002 the UK government signed a "partnering agreement" with Odyssey Marine Exploration, a US company, concerning the wreck of HMS *Sussex*, a British warship that sank off Gibraltar in 1694. A Ministry of Defence press release dated 7 October 2002 states that the agreement "is an important step in the development of a 'partnering' approach to deep-sea archaeology whereby any recoveries from the wreck will be conducted under recognised and accepted archaeological methodologies, and professional official observers will be engaged in the detailed processes of any future survey and recovery activities from the site". According to the Odyssey Marine Exploration website, "[a]t approximately 3,000 feet below the surface, it will be the deepest extensive archaeological excavation of a shipwreck ever undertaken exclusively by robotic intervention". The *Sussex* was believed to have been carrying up to ten tons of gold coins and, under the terms of the agreement, Odyssey and the government will share in the financial proceeds. A memorandum of the partnering agreement has been published (see <http://www.shipwreck.net/pam/>), but the exact terms of the agreement remain confidential.

³⁹ Art. 18(4). See further, pp. 87–88 below.

⁴⁰ See the Preamble, Art. 2(10), Art. 18(4), Rules 7 and 33.

⁴¹ See, in particular, Art. 20.

⁴² Art. 22. Effective presentation of the UCH, and education, are two of the matters listed in Art. 22 as falling within the remit of such authorities.

incompatible with its protection. The Convention makes no specific provision for public funding, or for the creation or enhancement of museums, and the mechanisms whereby museums might acquire material are far from clear.⁴³ Furthermore, there is no intention to interfere with ownership rights, which presumably continue to exist,⁴⁴ and there is recognition that certain states may have a special interest in particular wrecks (referred to in the Convention as a “verifiable link”).⁴⁵ However, the Convention provides no guidance on how the interests of humanity will interact with these other rights and interests.

At the very heart of the Convention lies the principle of co-operation. The Preamble makes it clear that co-operation among states, other organisations and parties “is essential” for the protection of the UCH⁴⁶ and, as we shall see, co-operation and information sharing between states is a fundamental plank in the protective regime created by the Convention. Indeed, without such co-operation the regime simply will not work. Consequently states parties are placed under a positive duty to co-operate in the protection of UCH.⁴⁷ As well as co-operating in respect of the notification and protection regimes, the enforcement of sanctions, and other matters under the Convention, states parties are also expressly encouraged to enter into inter-state agreements to protect the UCH, provided such agreements are “in full conformity” with the Convention and do not “dilute its universal character”.⁴⁸ It is envisaged that such agreements may be successful in achieving greater, or better, protection for the UCH than the terms of the Convention.⁴⁹ Interestingly, the Convention makes provision for a

⁴³ In particular, it is unclear whether or not material that has been recovered through an authorised excavation in full conformity with the Convention could be sold to museums. This depends on the meaning of Rule 2(b) of the Annex: see C. Forrest, “A New International Regime for the Protection of Underwater Cultural Heritage”, (2002) 51 *International and Comparative Law Quarterly* 511, 540.

⁴⁴ See further below pp. 69–70.

⁴⁵ In Arts. 6(2), 7(3), 9(5) and 18(4), the Convention refers to states with a verifiable link, “especially a cultural, historical or archaeological link”. In Arts. 11(4) and 12(6), which relate to the Area, reference is made “to the preferential rights of States of cultural, historical or archaeological origin”, wording which derives from Art. 149 of the LOSC. The Convention makes provision for states with a verifiable link to UCH in certain circumstances to be consulted on what protective measures should be taken.

⁴⁶ Interestingly, the reference to “salvors” in those listed in the 1998 draft as needing to co-operate has been omitted from the final text.

⁴⁷ Art. 2(2). This provision reflects Art. 303(1) of the LOSC, which provides that: “States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.”

⁴⁸ Art. 6.

⁴⁹ See the last sentence of Art. 6(1). Such agreements could be entered into in respect of enclosed or semi-enclosed seas, e.g. the Mediterranean or the Baltic, or in respect of particular wrecks. It is perhaps worth noting here that the text of an agreement between the UK, USA, Canada and France in respect of the *Titanic* was finalised in 2000, although the agreement has not yet been signed. However, the *Titanic* does not fall within the definition of UCH in the Convention and therefore this agreement would not need to conform to the Convention.

“Meeting of States Parties” once every two years,⁵⁰ and leaves it for that Meeting to decide on its functions and responsibilities, which potentially could be quite considerable.⁵¹

Treatment of Private Rights

At present, broadly speaking, anyone is free to recover sunken property on the high seas⁵² and to then claim a salvage reward from the owner.⁵³ Until the reward is paid, the salvor will have a maritime lien on the recovered property. In cases where there is no known owner, or the owner has abandoned title, a finder may be awarded title to the property under the law of finds.⁵⁴ Where an owner can be traced, and there has been no abandonment of title, the ownership rights may be recognised even after the passage of many years. One of the most difficult issues facing the drafters of the Convention was how to deal with these private rights.⁵⁵

As far as ownership rights are concerned, any attempt in the Convention to deprive owners of their rights might lead to conflict with the domestic constitutional laws of states parties and to the possibility that compensation might need to be paid under these laws. The 1998 draft tried to avoid interfering with ownership rights by applying only to abandoned UCH. However, its definition of abandonment, which set out the circumstances in which abandonment would be “deemed”, proved highly controversial and unacceptable to many states.⁵⁶ As a consequence the deemed abandonment provision was dropped and the Convention now applies to UCH whether abandoned or not. Indeed, the final text of the Convention makes no reference to ownership at all.

⁵⁰ Art. 23. Extraordinary Meetings may also be called at the request of a majority of states parties: Art. 23(1).

⁵¹ Among other things, the Meeting of States Parties may establish a Scientific and Technical Advisory Body to assist “in questions of a scientific or technical nature regarding the implementation of the Rules”: Art. 23 paras. (4) and (5). Assistance “in implementing the decisions of the Meetings of States Parties” shall be provided by a secretariat, for which the Director-General of UNESCO will be responsible: Art. 24.

⁵² While there is some academic debate on the point, the weight of opinion seems to be that this is the position even in the case of sunken warships: see Dromgoole and Gaskell, note 9 above, p. 184.

⁵³ Whether they will be entitled to a salvage reward depends on the law that is applied by the court hearing the case. Under the Salvage Convention 1989, for example, a salvage reward can be claimed where a salvor voluntarily succeeds in saving a vessel or other property that is in danger in navigable waters. However, the Convention does not define “danger” and therefore the question of whether property that has been lying on the sea-bed, possibly for centuries, is in danger is left for determination under the applicable law.

⁵⁴ Alternatively, the state may claim ownership. For example, under the UK’s Merchant Shipping Act 1995, s.241, the Crown is entitled to unclaimed wreck found in UK territorial waters. Unclaimed wreck found outside territorial waters will be returned to the finder (*Pierce v Bemis (The Lusitania)* [1986] QB 384).

⁵⁵ For a detailed discussion of these rights, see S. Dromgoole and N. Gaskell, “Interests in Wreck” in N. Palmer and E. McKendrick (eds.), *Interests in Goods* (2nd ed., 1998).

⁵⁶ See the discussion of the deemed abandonment provision in Dromgoole and Gaskell, note 9 above, pp. 179–183.

While this was undoubtedly the easiest solution, in a sense all that it has done is to hide an issue that really needs to be addressed. There is, after all, an inevitable tension between rights of ownership and several of the Convention's fundamental principles and objectives, for example, that humanity is to benefit from the UCH, that UCH should not be sold or dispersed, that it should be preserved *in situ* wherever possible, that any activities directed at it should be undertaken in conformity with the Annex. This tension gives rise to many questions. For example, can an owner be prohibited from recovering its property in circumstances where *in situ* protection is considered a preferable option? Can an owner be made to conform to the Rules in the Annex in undertaking recovery operations? In either case if the answer is yes, then the owner's rights are being interfered with. Indeed, many of the Convention's provisions have a potential impact on ownership rights, and there is no evidence that this impact has been thought through at all.⁵⁷

Right from the start of the initiative in 1988, a question that engaged particular interest was whether or not the law of salvage should be excluded from applying to UCH as defined by the Convention. For years, many commentators have argued that salvage law is completely inappropriate to be applied to UCH since it encourages excavation and recovery, and is therefore in direct conflict with the archaeological principle of protection *in situ*.⁵⁸ Indeed, some acknowledgement that UCH may warrant special treatment was made in the 1989 Salvage Convention, which permits reservations in respect of its applicability to "maritime cultural property of prehistoric, archaeological or historical interest ... situated on the seabed".⁵⁹

In the 1994 ILA draft, salvage law was excluded from applying to the UCH.⁶⁰ However, in the 1998 UNESCO draft, the exclusion was omitted and replaced with Article 12(2), which provided for the "non-application of any internal law or regulation having the effect of providing commercial incentives for the excavation and removal of underwater cultural heritage". Since salvage law is an obvious example of a law having the effect of providing commercial incentives for removal, it was difficult to see how a state party could avoid disengaging salvage law from the UCH.⁶¹ The effect of Article 12(2) would therefore probably have been much the same as an outright exclusion. However, one problem with an outright exclusion, and probably also with Article 12(2), was

⁵⁷ See further, the discussion of Art. 4 (relating to salvage and finding) and Art. 18 (relating to seizure), below.

⁵⁸ See, e.g. L. Prott and P. O'Keefe, "Law and the Underwater Heritage" in UNESCO, *Protection of the Underwater Heritage* (1981), p. 193; A. Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (1995), pp. 45–49. On the other hand, there are those that have strongly argued for the retention of salvage law: see, e.g. G. Brice, "Salvage and the underwater cultural heritage", (1996) 20 *Marine Policy* 337; D. Bederman, "The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal", (1999) 30 *Journal of Maritime Law and Commerce* 331, 341–345.

⁵⁹ 1989 Salvage Convention, Art. 30(1)(d).

that they could lead to a possible conflict with the 1989 Salvage Convention, unless a state that was party to both Conventions had made the reservation to the Salvage Convention mentioned above.⁶²

In the final text of the Convention, the law of salvage and the law of finds are specifically addressed in Article 4. This provides:

“Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

- (a) is authorized by the competent authorities, and
- (b) is in full conformity with this Convention, and
- (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.”

This is a major retreat from an outright exclusion of salvage law. Provided the conditions in (a), (b) and (c) are met, the finder can claim a salvage reward from the owner and, where there is no owner, may be awarded the property recovered under the law of finds.⁶³ If salvage law applies, then presumably any artefacts will be returned to the owner after the payment of salvage, unless the owner agrees to sell its rights in the artefacts to the salvor. If the law of finds applies, then the finder will acquire title against all but the true owner. In either case, private individuals appear to have, or to acquire, rights of ownership and possession. But if this is the case, how will the sale and “irretrievable dispersal” of those artefacts be prevented? How will they be made available “for the benefit of humanity” if they are in a private collection?

There is less conceptual difficulty in circumstances where the conditions in (a), (b) and (c) are not met. In such circumstances, salvage and finds laws must not be applied. It is logical that a salvor who undertakes unauthorised activities or activities that are not in accordance with the Convention should not have the benefit of salvage or finds laws. Indeed, it is at least arguable that the salvor’s misconduct under the UNESCO Convention would be construed as misconduct

⁶⁰ ILA draft, Art. 4.

⁶¹ The same can also be said of the law of finds, and in this respect Art. 12(2) went further than the ILA draft.

⁶² Under Art. 30(1)(d). See text attached to note 59 above. Eleven of the 25 parties to the Salvage Convention have made this reservation: O’Hara, note 29 above, para. 5.1.2. Reservations need to be made at the time of ratification, otherwise a state would have to denounce the Convention and then re-ratify: Dromgoole and Gaskell, note 9 above, p. 190, fn. 60. The argument that is sometimes raised that an exclusion of salvage law would create a conflict with Art. 303(3) of the LOSC is probably incorrect: see *ibid.*, p. 178.

⁶³ Carducci suggests that a fourth condition should be implied in respect of the law of finds and that is that there must be clear evidence of abandonment and that it cannot be presumed: see G. Carducci, “The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law” in G. Camarda, T. Scovazzi (eds.), *The Protection of the Underwater Cultural Heritage: Legal Aspects* (2002).

under the 1989 Salvage Convention,⁶⁴ thereby avoiding conflict with that Convention. However, any deterrent effect this provision might have will be effective only where a salvor does not have a great deal of choice but to land the material recovered in a state party to the Convention. If he is able to land it in a non-state party, then he may still be able to make a claim under the laws of salvage or finds, depending on the law that is eventually applied to the claim.

It is interesting to note that what the Convention has done is to retain the laws of salvage and finds, while excluding commercial exploitation. This is directly contrary to the policy of the US Abandoned Shipwrecks Act of 1987, which excludes the laws of salvage and finds from applying to UCH to which the Act applies, but allows for “private sector recovery” so long as it is consistent with the protection of “historical values”. It has been argued quite convincingly that this approach, which recognises multiple interests in the UCH and seeks to foster a “partnership” with these interests, should have been followed by the Convention.⁶⁵

Treatment of Sunken State Vessels and Sovereign Immunity Issues⁶⁶

The 1998 UNESCO draft excluded warships and other state-owned or operated vessels and aircraft used for non-commercial purposes from the scope of application of the Convention.⁶⁷ There were understandable reasons for the exclusion: international law in relation to warships is complex and uncertain, and the issue is politically highly sensitive. Nonetheless, it meant that a very significant proportion of the UCH would not be covered by the protective regime of the Convention and for this reason the exclusion was much criticised.⁶⁸

One of the barriers to removing the exclusion was the provision in the 1998 draft for abandonment “to be deemed” in certain cases. The application of this provision to state vessels was unacceptable to many states, who strongly argue that their ownership rights can be lost only through an express abandonment.⁶⁹ Once the decision was made to delete the deemed abandonment provision, this opened the way for the inclusion of state vessels.⁷⁰ The fact that such vessels are

⁶⁴ Salvage Convention 1989, Art. 18.

⁶⁵ O. Varmer, “The Case Against the ‘Salvage’ of the Cultural Heritage”, (1999) 30 *Journal of Maritime Law and Commerce* 279.

⁶⁶ The issue of sovereign immunity in respect of sunken warships needs to be distinguished from that relating to warships and other government ships in service. Art. 13 is headed “Sovereign immunity” and is designed to relieve warships of the obligation to report since this might interfere with the need for secrecy in their operations. However, states must ensure that “as far as is reasonable and practicable” reporting requirements are met.

⁶⁷ 1998 UNESCO draft, Art. 2(2).

⁶⁸ See, e.g. Dromgoole and Gaskell, note 9 above, pp. 186–187.

⁶⁹ See *ibid.*, p. 184.

⁷⁰ Article 2(8) of the final text provides that “. . . 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” (emphasis added). As O’Keefe points out, this reference to a state’s rights apart from its sovereign immunities must refer to its rights of ownership: O’Keefe, note 11 above, p. 53.

included within the Convention's protective regime is a major achievement, since the purpose of the Convention would otherwise have been seriously undermined. The inclusion should also be viewed positively by states for the following reason: the Convention may well afford protection to various interests they may have in their sunken vessels besides any interest in their cultural significance.⁷¹ The clearest example of this is that specific provision is made in the Convention in regard to preserving the sanctity of human remains,⁷² an issue that can raise particular concerns for states where a vessel was lost in military action.

Whether or not a warship, once sunk, is subject to sovereign immunity is a matter of some debate,⁷³ but many states argue that it is, and that consequently sunken warships are subject to the exclusive sovereignty of the flag state and may only be interfered with if the express permission of that state is given. Understandably, therefore, there were concerns about the extent to which any new convention would afford coastal state jurisdiction in respect of state vessels. The final text of the Convention tries to take into account the political sensitivities in this regard and to draw a compromise between the interests of flag states and coastal states. In Article 2(8), it is made clear that "... nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities ...". The Convention then goes on to make specific provision for state wrecks⁷⁴ depending on the maritime zone in which they lie. Where a state vessel is discovered in the territorial waters of another state, a jurisdictional conflict may clearly arise. Indeed, such conflicts have arisen in the past and have eventually been settled by means of an inter-state agreement.⁷⁵ Under Article 7(3) of the Convention, where a state vessel is discovered in the territorial or archipelagic waters of a state party,⁷⁶ that state should inform the flag state (if party to the Convention) of the discovery, with a view to co-operating on the best methods of protecting the wreck. At first sight, this appears a useful provision from the point of view of flag states (provided, of course, that they are party to the Convention). However, use of the word "should" rather than "shall" has proved highly contentious. Furthermore, Article 2(8) provides room for a flag state to argue that it has the exclusive right to prohibit or regulate interference with the wreck on the grounds of its sovereign

⁷¹ For a discussion of these interests, see Dromgoole and Gaskell, note 9 above, pp. 185–186.

⁷² See Art. 2(9) and Rule 5 of the Annex.

⁷³ See Dromgoole and Gaskell, note 9 above, pp. 183–184.

⁷⁴ All the provisions apply to state aircraft as well as vessels. A definition of "state vessels and aircraft" is provided in Art. 1(8).

⁷⁵ For example, a formal agreement was signed in the dispute between France and the USA over the wreck of the Confederate raider, *CSS Alabama*, which was discovered in 1984 in French waters: see further, O'Keefe, note 11 above, pp. 76–77; see also Dromgoole and Gaskell, note 9 above, p. 186. The UK and South Africa also reached an agreement in the form of an Exchange of Notes in respect of HMS *Birkenhead*, a UK warship which sank in South African waters in 1852: see *ibid.*, p. 185.

⁷⁶ Unlike the rest of Art. 7, Art. 7(3) refers only to territorial and archipelagic waters, and not to internal waters.

immunity. The position in respect of the EEZ and continental shelf is no more satisfactory. While in this case Article 10(7) provides that no activity shall be conducted without the agreement of the flag state, this is made subject to two provisos. One is in respect of situations where emergency measures are required to prevent “immediate danger” to UCH from “human activities or any other cause, including looting”,⁷⁷ in which case the agreement of the flag state does not have to be obtained first. The second proviso relates to situations where the sovereign rights or jurisdiction of a state party in its EEZ or on its continental shelf may be interfered with unless it takes action to prohibit or authorise activities directed at UCH located in that zone. In such cases, that state party may prohibit or authorise those activities without first consulting the flag state. Clearly, flag states are bound to see the possibility of a coastal state acting under one of these provisos as an infringement of their sovereign rights, and therefore—again using Article 2(8)—they may challenge the coastal state’s right to act. Finally, in respect of state vessels located in the Area, Article 12(7) prohibits states parties from undertaking or authorising activities without the consent of the flag state. As O’Keefe points out, what is notable here is that this provision refers to the activities of *states parties*. What it does not do is to oblige states parties to prohibit their nationals or ships flying their flag from undertaking activities on the state vessels of other states.⁷⁸

Unfortunately, on the sovereign immunity issue, the Convention has failed to provide a satisfactory and workable compromise between the interests of flag states and coastal states. This is a great pity as it is likely to prove a major obstacle to the adoption of the Convention by a number of states. For example, in a note explaining the UK’s abstention from voting on the final text of the Convention, one of the two reasons⁷⁹ given for its position was the unacceptability of the text on the sovereign immunity issue:

“The United Kingdom considers that the current text erodes the fundamental principles of customary international law, codified in [the LOSC], of Sovereign Immunity which is retained by a State’s warships and vessels and aircraft used for non commercial service until expressly abandoned by that State. The text purports to alter the fine balance between the equal, but conflicting rights of Coastal and Flag States, carefully negotiated in [the LOSC], in a way that is unacceptable to the United Kingdom.”⁸⁰

⁷⁷ Art. 10(4).

⁷⁸ O’Keefe, note 11 above, p. 100.

⁷⁹ For the second reason, see pp. 77–78 below.

⁸⁰ “UK Explanation of Vote”, circulated by the Foreign and Commonwealth Office to interested parties on 31 October 2001. The warships issue was also cited by the US delegation as one of several reasons why it could not accept the Convention: see Scovazzi, note 13 above, fn. 2.

Relationship Between the Convention and the LOSC

It was of course inevitable that one of the most contentious issues concerning the Convention would be its interrelationship with the LOSC. Article 303(4) of the LOSC seemed to anticipate a subsequent international agreement in respect of the UCH, which might build on the very limited provisions in Article 303 and Article 149. However, the question was whether a new convention could extend coastal state jurisdiction to control activities affecting the UCH beyond the limits established by the LOSC. Predictably, different states held very different views about this. Flag states had the usual concerns about “creeping jurisdiction” and used the well-worn argument that the LOSC was a delicately balanced “package” that could not be disturbed.⁸¹ Other states saw little point in a new convention *unless* it went further than the LOSC.

The compromise solution that has been adopted is set out in Article 3:

“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.”

The compromise comes in the form of the references to “international law, including” the LOSC. As O’Keefe points out, this wording “allows for future developments in the interpretation of [the LOSC] and in international law through custom or other international instruments”.⁸² The interpretation of the new Convention is therefore a movable feast: it may develop and change as international law develops and changes. The nature of this compromise is clever and it also assists the overall aim of the Convention by allowing for an increasing level of protection for the UCH over time. However, the wording of Article 3 will be subject to very different interpretations and may well simply be unacceptable to some states.⁸³

The original 1994 ILA draft had proposed a “cultural heritage zone”, a new type of jurisdictional zone in addition to those already defined by international law.⁸⁴ Under the draft, a cultural heritage zone could be established by a state party over an area extending beyond its territorial sea up to the outer limit of its continental shelf. Within that area the state would have jurisdiction over

⁸¹ The UN General Assembly also made its view clear that the Convention should be in full conformity with the LOSC through a number of resolutions to this effect: see O’Keefe, note 11 above, p. 59, fn. 9.

⁸² *Ibid.*, p. 58. See also the wording of the final paragraph of the Preamble, which refers to the need to “codify and progressively develop” rules on the protection of the UCH.

⁸³ The relationship of the new Convention to the LOSC was apparently one of the objections to the final text raised by the USA: see Scovazzi, note 13 above, fn. 2.

⁸⁴ The notion of a cultural heritage zone was not new. It had originally been proposed in Council of Europe Recommendation 848 (1978).

activities affecting the UCH. However, the creation of a new zone proved particularly controversial and, in the 1998 UNESCO draft, the notion was dropped. In its place was a provision using existing maritime zones, namely the continental shelf and the exclusive economic zone (EEZ), as a basis for state control over activities affecting the UCH.⁸⁵ However, while use of the EEZ may just possibly have been justifiable under the LOSC,⁸⁶ use of the continental shelf certainly was not.⁸⁷ The maritime powers fiercely opposed any suggestion that there was evidence of developing state practice in this regard,⁸⁸ and in the end this provision too was dropped.⁸⁹

Rather than an extension of coastal state jurisdiction, what the drafters eventually opted to do was to create a series of control mechanisms that make full use of existing coastal state jurisdiction, and the flag state, nationality and territorial jurisdictional principles, but that have a built-in degree of flexibility to allow for developments in international law. Inevitably, the protective framework that results is highly complex.

Control Mechanisms

As will be seen below, Articles 7 to 12 of the Convention make specific provision for the protection of UCH in each maritime zone. The overall aim is to ensure that *in situ* protection is considered as the first option but, where it is concluded that recovery is appropriate, to ensure that it is undertaken in accordance with the terms of the Annex. Curiously, nowhere does the Convention expressly state that activities must be *authorised* before they are capable of complying with the Annex.⁹⁰ However, the whole structure of the protective framework is such that this must be a necessary implication.⁹¹ Articles 7 to 12 are supplemented with three significant general provisions. First of all, Article 14 requires states to take measures to prevent the entry into their territory of material that has been

⁸⁵ 1998 UNESCO draft, Art. 5.

⁸⁶ Art. 56 of the LOSC gives coastal states rights in respect of activities for the “economic exploitation and exploration” of the EEZ. Certainly the activities of treasure salvors can be said to be “economic”.

⁸⁷ Art. 77 of the LOSC, relating to the continental shelf, refers to coastal states’ rights in respect of “natural resources”. UCH cannot be said to be a natural resource: see the *Report of the International Law Commission to the General Assembly*, 11th Session, GAOR Supp. No. 9, UN Doc. A/3159 (1956), reprinted in (1956) 2 *Yearbook of the International Law Commission* 298.

⁸⁸ See further p. 82 below.

⁸⁹ The acutely difficult nature of this issue is illustrated by the fact that the working text produced in 1999 (see above p. 61, note 10) set out three alternative options in respect of jurisdiction.

⁹⁰ If this was not the case, a salvor could undertake activities without authorisation, but argue that they were being conducted in accordance with the Annex and were therefore not in breach of the Convention. This would undermine the principle that protection *in situ* should always be considered as the first option, since it would be left to the salvor (rather than the competent authority of a state party) to determine whether or not excavation and recovery were justifiable.

⁹¹ See, e.g. Rule 1 of the Annex, and Art. 4 (which provides that the laws of salvage and finds will not apply unless, *inter alia*, interference has been authorised).

recovered contrary to the Convention.⁹² Secondly, Article 15 requires states to take measures to prohibit the use of territory under their exclusive jurisdiction or control, including their maritime ports, in support of any activity that is not in conformity with the Convention. Thirdly, Article 16 requires states parties to take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in activities that do not conform to the Convention. These three articles need to be borne in mind when one assesses the potential effectiveness of the provisions in Articles 7 to 12 and the range of control measures available to states parties in each maritime zone. Finally, in order to deter the violation of measures taken under the Convention, each state party is required to impose sanctions, including the seizure of UCH that has been recovered contrary to the terms of the Convention.

Provisions in Respect of Existing Maritime Zones

Territorial waters, archipelagic and internal waters

Article 7(1) of the Convention reiterates the already well-established position that coastal states have an exclusive right to regulate and authorise activities in their territorial, archipelagic and internal waters.⁹³ Indeed, many states already have domestic legislation protecting UCH in these waters. However, Article 7(2) goes further by requiring states parties to apply the Rules in the Annex to activities directed at the UCH. States minded to ratify the Convention will therefore need to scrutinise their domestic legislation to ensure that it accords with these Rules. They will also need to ensure that their legislation applies to UCH *as defined by* the Convention. Indeed, for some states compliance with the definition will cause more problems than compliance with the Rules. This is certainly the case for the UK, where the two relevant statutes employ significance criteria which are much more restrictive than the “character” criterion in the Convention.⁹⁴ Indeed, the UK has cited this as a second reason⁹⁵ for its abstention from voting on the final text of the Convention:

⁹² Specifically, Art. 14 provides: “States Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention.” This article has wide ramifications and is fully discussed by O’Keefe, note 11 above, pp. 103–106. As Carducci points out, Art. 14 contributes to the “wider fight” already taking place to control the theft and illicit export of cultural material, in particular by making “a fundamental link between preventing the entry into the territory (of the receiving state) and the illicit character of the export of UCH (from the export state): see Carducci, note 63 above, p. 177. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 are specific examples of other international measures on this front.

⁹³ Although note the special rule in Art. 7(3) in respect of identifiable state vessels and aircraft. See above, p. 73.

⁹⁴ See note 24 above.

⁹⁵ The first relates to the sovereign immunity issue: see further, p. 74 above.

“The procedures for the protection of underwater archaeology adopted in the Annex are those which are already followed by the United Kingdom with regard to the designation of wreck sites within its territorial sea and internal waters. However, the text obliges signatory States to extend the same very high standards of protection to all underwater archaeology over 100 years old. It is estimated that there are probably about 10,000 wreck sites on the seabed under the United Kingdom’s territorial sea and it would neither be possible nor desirable to extend legal protection to all of them. The United Kingdom believes that it is better to focus its efforts and resources on protecting the most important and unique examples of underwater cultural heritage. It would simply be impossible to enforce the application of the rules in the Annex to every one of the thousands of wreck sites.”⁹⁶

Contiguous zone

Article 8 provides that states parties may regulate and authorise activities directed at the UCH in their contiguous zone⁹⁷ “in accordance with” Article 303(2) of the LOSC. Article 8 also makes clear that it is “without prejudice to and in addition to Articles 9 and 10”, which relate to the continental shelf and EEZ.⁹⁸ Where a state does take up its right under Article 8 to regulate and authorise activities directed at UCH, it must require that the Rules in the Annex be applied.

Article 303(2) of the LOSC provided states with an international legal basis for action to control traffic in objects of an archaeological and historical nature found within the contiguous zone. A coastal state is allowed to presume that the removal of objects from its contiguous zone without its approval would amount to an infringement within its territory or territorial sea of customs, fiscal, immigration or sanitary regulations. This legal fiction allows the state to exercise the control necessary to prevent such infringement, as permitted by Article 33 of the LOSC. However, the question has been *how* states can exercise that control, as there has been some debate about whether Article 303(2) creates only enforcement competence or legislative competence.⁹⁹ Despite this, some states have asserted legislative competence in respect of the UCH in the contiguous

⁹⁶ “UK Explanation of Vote”, circulated by the Foreign and Commonwealth Office to interested parties on 31 October 2001.

⁹⁷ The contiguous zone extends 24nm from the baseline from which the breadth of the territorial sea is measured: see LOSC, Art. 33(2). A state does not have to claim a contiguous zone, although about one-third of coastal states do: R. Churchill and A. Lowe, *The Law of the Sea* (3rd ed., 1999), p. 136.

⁹⁸ The reason for this is that the contiguous zone falls within the EEZ, which extends from the outer limit of the territorial sea: LOSC, Art. 55.

⁹⁹ See B. Oxman “The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)”, (1981) 75 *American Journal of International Law* 211, 240; Caflisch, note 7 above, pp. 19–20. See also Churchill and Lowe, note 97 above, pp. 137–139.

zone.¹⁰⁰ It should be noted, however, that Article 303(2) relates only to the *removal* of objects, and therefore does not legitimate the regulation of activities on a site that do not involve removal. Nonetheless, it is unlikely that states have, or will, make that distinction.

The power given to states parties in Article 8 is said to be “in accordance with” Article 303(2). There was no intention, therefore, that Article 8 should go beyond Article 303(2), and it cannot be interpreted as so doing. However, it does make it easier to defend the exercise of legislative rather than merely enforcement jurisdiction, and this in itself will help to contribute to the aim of protecting the UCH. Article 8 is also useful in that it reaffirms the basis for action in Article 303(2) and may therefore encourage more states to assert competence of one sort or another over this area.¹⁰¹ However, it is a pity that it is only permissive in form and therefore states parties will not be obliged to make use of it. Nonetheless, it must be borne in mind that the contiguous zone is merely a 12-mile wide strip adjacent to the territorial sea. While this zone was once believed by some to be of particular significance for the protection of the UCH because of its shallowness and proximity to the shore,¹⁰² technological advances mean that measures to protect UCH in the vast expanses of water further offshore are now of much greater consequence.

EEZ and continental shelf

The difficulty of creating control mechanisms for the EEZ and continental shelf is evidenced by the fact that the final text of the Convention has had to resort to two long and complex articles to deal with these zones. Instead of relying upon an extension of coastal state jurisdiction, as earlier drafts had done, Articles 9 and 10 of the final text make use of existing coastal state rights, and of the nationality and flag state principles of jurisdiction.

Article 9 makes it clear that states have a duty to protect the UCH in these zones, reiterating the general duty set out in Art. 303(1) of the LOSC.¹⁰³ However, it then goes on to elaborate on the LOSC by specifying the means by which this duty must be put into effect. Essentially, a state party is obliged to require its national,¹⁰⁴ or the master of a vessel flying its flag, to report any discovery of UCH or any intention to engage in activities directed at the UCH, either in its own EEZ or on its continental shelf, or in the EEZ or on the

¹⁰⁰ For example, France and Denmark.

¹⁰¹ The question arose in respect of Art. 303(2) of the LOSC, and arises again in respect of Art. 8, whether a state must formally declare a contiguous zone before it can exercise rights under these articles: on this, see Carducci, note 63 above, pp. 193–195.

¹⁰² Oxman, note 99 above, p. 240.

¹⁰³ Since Art. 303 is located in the “General Provisions” section of the LOSC, it appears that the duty set out in paragraph 1 applies to all areas of the sea.

¹⁰⁴ See O’Keefe, note 11 above, p. 84 for an interesting discussion of how the reference to a state’s “national” should be interpreted. Presumably “national” includes companies incorporated, or having their seat, in the relevant state, but *quaere*: would it include companies having their principal place of business there, but no other association?

continental shelf of another state party.¹⁰⁵ Provision is made for reports to be transmitted to interested states, including the relevant coastal state and any state with a verifiable link. All reports must also be notified to the Director-General of UNESCO, who shall promptly make the information available to all states parties.¹⁰⁶

Knowledge that UCH has been discovered, or that someone is planning to undertake activities in respect of it, is of course useful, but the crucial question is what mechanisms does the Convention afford to enable activities in the EEZ or on the continental shelf to be prohibited or regulated? Here we need to look at Article 10.

The key provision is in fact Article 10(2). This provides that:

“A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorise any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.”

This provision gives states parties a basis for acting to prohibit or authorise activities directed at the UCH in their EEZ or on their continental shelf. States are able to so act, provided that their “sovereign rights or jurisdiction” under international law, including the LOSC, are threatened. A simple reading of Articles 56 and 77 of the LOSC makes it clear that it should not be too difficult for a coastal state to claim that this is the case.¹⁰⁷ In both zones, the coastal state has rights over natural resources, both living and non-living; in the EEZ it also has rights or jurisdiction in respect of economic exploration and exploitation, installations and structures, marine scientific research, and preservation of the marine environment. With the exercise of a little imagination, the potential power of Article 10(2) quickly becomes evident. In particular, it is the coastal state’s rights over its natural resources that are likely to be most useful in providing grounds for action. Fish and other marine life tend to congregate on and in wrecks and other objects on the sea-bed, which provide them with a protective environment. In the frequent situations where this is the case, it is inevitable that activities in respect of the UCH will interfere with these natural resources. While in principle there should be some degree of proportionality between the extent of the threat to sovereign rights and the action taken in

¹⁰⁵ See Art. 9(1)(a) and (b). Note that there is a “constructive”, i.e. deliberate, ambiguity in Art. 9(1)(b) which means that it is (just about) possible to argue that the coastal state, provided that it is a party to the Convention, can require the nationals, or flag vessels, of another state (probably only if a state party) to report directly to it: see O’Keefe, note 11 above, pp. 82–83; Carducci, note 63 above, p. 198.

¹⁰⁶ See Art. 9(3) and (4). Note that provision is made for confidentiality to be maintained in cases where UCH might be put at risk by disclosure of information: see Art. 19(3).

¹⁰⁷ Art. 10(2) assumes that there may also be other rules of international law besides the provisions in the LOSC that afford sovereign rights and jurisdiction in these zones to coastal states.

response, in practice it is unlikely that any action taken by a state to protect its sovereign rights or jurisdiction would be called into question by another state.¹⁰⁸

The fact that the provision gives a coastal state the right to “prohibit”, as well as to “authorise”, activities in its EEZ or on its continental shelf is also highly significant. It means that states will now have a concrete method of preventing interference with the UCH and of implementing the principle of *in situ* protection enshrined in the Convention. If a state is alerted to the possibility of interference, either under the notification procedures in Article 9 or in any other way, it will have a basis to prevent it. Also, in circumstances where interference is considered justified, the coastal state will have a means of ensuring that any work carried out is undertaken in accordance with the Rules in the Annex.¹⁰⁹

Even where Article 10(2) cannot be used, Article 10, paragraphs (3) to (6) go on to provide for a system of consultation between states with a verifiable link and the coastal state on the best means of protecting UCH which has been discovered in the EEZ or on the continental shelf, or where it is known that someone has the intention of interfering with UCH in these zones. Provision is made for the appointment of a “co-ordinating state”, which may well be the coastal state,¹¹⁰ and, among other things, this state may be required to implement any agreed protective measures.¹¹¹ Where UCH is threatened by an “immediate danger”, including looting, the co-ordinating state may even take measures *prior* to consultation.¹¹² However, while reference is made to the taking of measures and also to the issuing of authorisations, any measures taken must be consistent with international law, including the LOSC.¹¹³ In view of this, the measures the co-ordinating state could take in practice to prohibit interference, or even to ensure that interference is conducted in accordance with the Rules in the Annex, are likely to be fairly limited. It could certainly take action in accordance with Article 16 to control the activities of its own nationals or vessels flying its flag. It could also try to ensure that other states parties take similar action. Furthermore, it could make it clear to any transgressor that measures will be taken by the co-ordinating state and other states parties under Articles 14 and 15 to prevent entry into their territory of recovered material, and to prohibit the use of their ports by the transgressor’s vessels. Over the course of time, state practice will obviously develop in this regard and it will be interesting to see how it does.

The interrelationship between Article 10(2) and Article 10, paragraphs (3) to

¹⁰⁸ See O’Keefe, note 11, p. 90.

¹⁰⁹ Strangely perhaps, Art. 10(2) does not specifically require that authorisations be in accordance with the Rules in the Annex, but this must surely be the implication.

¹¹⁰ The coastal state will be the co-ordinating state unless it declares a wish not to be. It may do this if it has concerns about the expenditure the role might involve, especially if the UCH has no direct connection with it.

¹¹¹ Unless it is agreed that another state party shall implement those measures.

¹¹² In all its actions under Art. 10, however, the co-ordinating state must act on behalf of the “States Parties as a whole and not in its own interest”: Art. 10(6).

¹¹³ In accordance with Art. 3.

(6) is extremely curious, and the article provides no guidance on this. In particular, does a coastal state acting under Article 10(2) to prohibit or authorise activities have to consult any states parties who have declared an interest in the UCH and follow the other procedures laid out in paragraphs (3) to (6)? Certainly paragraphs (3) to (6) do not expressly state that they only apply in cases where Article 10(2) is not applicable. However, the consultative procedures set out in paragraphs (3) to (6) could clearly conflict with the coastal state's "right" under Article 10(2) to act to prevent interference with its sovereign rights. Surely it cannot have been envisaged that the coastal state should have to consult with other interested states before so acting? The question also arises of what the position would be if the coastal state decides to authorise activities on a wreck site and the flag state declares an interest. In such circumstances, it would still seem to fetter the "right" of the coastal state to act, if it was *required* to consult and implement only *agreed* measures of protection. Therefore presumably the provisions of paragraphs (3) to (6) are not intended to apply in these circumstances. However, the whole scheme of the Convention is based on cooperation and therefore coastal states may feel under at least a moral obligation to consult with other interested states, and in some cases may even follow the procedures laid out in paragraphs (3) to (6).

A further interesting question arises. A number of states have acted unilaterally to assert control over UCH on the continental shelf and in the EEZ, despite the fact that there is little or no basis in treaty law for such action.¹¹⁴ What is their position if they decide to ratify the Convention? Not surprisingly, given their evident concern to protect the UCH, at least three of these states voted in favour of the Convention: Australia, Ireland and Spain.¹¹⁵ Would ratification of the Convention affect the exercise of their extended jurisdiction? O'Keefe suggests not, noting that Article 3 provides that nothing in the Convention "shall prejudice the rights, jurisdiction and duties of States under international law ...".¹¹⁶ However, this argument seems to be based on the premise that these unilateral extensions of jurisdiction are evidence of a customary rule of law in this regard, when in fact many would argue that all they evidence is creeping jurisdiction.¹¹⁷ In any event, if these states decide to ratify the Convention, it will be interesting to see to what extent—if at all—they amend their domestic legislation in order to comply particularly with the provisions of Article 10. Article 10(1) provides that:

¹¹⁴ See p. 76 above. On customary law, see note 117 below.

¹¹⁵ All of these states have asserted jurisdiction in respect of the UCH over their continental shelf. Some states, such as Morocco, have asserted such jurisdiction over the EEZ, but this is less common.

¹¹⁶ O'Keefe, note 11 above, p. 59.

¹¹⁷ Strati argues that the number of states that have expanded their jurisdiction is too limited to provide the basis for a customary rule: Strati, note 58 above, p. 269. The practice has also been inconsistent, with states expanding their jurisdiction over different areas of the sea. However, it could be argued that there is a developing international practice in this regard.

“No authorisation shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf *except in conformity with the provisions of this Article.*”¹¹⁸

Therefore, the consultation procedures in Article 10, paragraphs (3) to (6) will need to be complied with, unless it can be argued that existing legislation is justifiable under Article 10(2). The wording of Article 10(2) might allow for this, depending on one’s view of the legitimacy of the unilateral extensions of jurisdiction:

“A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorise any activity directed at such heritage to prevent interference with its sovereign rights *or jurisdiction as provided for by international law* including the United Nations Convention on the Law of the Sea.”¹¹⁹

Apparently no objections have been made to date to the unilateral extensions, but states may find it easier to object in the future by arguing that a state party to the Convention is acting contrary to its terms.¹²⁰

The Area

Finding an effective means of controlling activities in the Area, in other words the deep sea-bed beyond other zones,¹²¹ is of crucial importance because it is in the Area that the most well-preserved and undisturbed wrecks of all may be found.¹²² However, it also represented a challenge to the drafters of the Convention because of the special status of this zone under the LOSC. Articles 11 and 12 of the new Convention make provision in respect of the Area, and reflect the form (if not the entire substance) of the provisions in Articles 9 and 10 in respect of the EEZ and continental shelf.

Article 11(1) provides that states parties have a responsibility to protect UCH in the Area, in conformity both with the terms of the Convention and Article 149 of the LOSC. However, the duty in Article 11(1) is set out in broader and clearer terms than Article 149. The latter imposes a duty to “preserve” or “dispose” of “objects”, suggesting that objects have to be found, and possibly even recovered,

¹¹⁸ Emphasis added.

¹¹⁹ Emphasis added.

¹²⁰ Forrest makes a similar suggestion: note 43 above, p. 518.

¹²¹ This maritime zone was created by the LOSC, which defines the Area as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”, in other words beyond the EEZ and continental shelf of states (see LOSC, Art. 1(1)). The LOSC requires that activities in the Area be carried out for the benefit of mankind as a whole (see LOSC, Art. 140). The new Convention defines the Area in identical terms (see Art. 1(5)).

¹²² P. O’Keefe and J. Nafziger, note 7 above, p. 393. The importance of this zone was also acknowledged by UNESCO in its original feasibility study for the drafting of a new instrument: see UNESCO Secretariat, “Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage”, presented to the 146th Session of the UNESCO Executive Board, Paris, 23 March 1995, Doc. 146 EX/27, para. 10.

before the duty takes effect. The reference in Article 149 to disposing of objects also seems to conflict with the notion of preservation, which is a core feature of the new Convention. By contrast, the duty in Article 11(1) is reflective of the general aim of the new Convention to protect UCH sites *in situ* wherever possible.¹²³

As was the case with Article 9, Article 11 utilises the nationality and flag state principles of jurisdiction to establish a system for the reporting of discoveries or plans to engage in activities in the Area. States parties are obliged to require their nationals, or the master of a vessel flying their flag, to report any discovery of UCH or any intention to engage in activities directed at UCH located in the Area. States are then required to pass on reports to the Director-General of UNESCO and the Secretary-General of the International Sea-bed Authority (ISA),¹²⁴ and the Director-General of UNESCO is required to make such reports available “promptly” to all states parties.¹²⁵ States with a verifiable link to UCH may declare to the Director-General their interest in being consulted on how effective protection can be ensured.¹²⁶ Article 12 then goes on to establish a similar consultation system to that set out in Article 10, paragraphs (3) to (6). In this case, the Director-General of UNESCO must invite states that have declared an interest in the UCH to consult together on the best means of protection, and to appoint a co-ordinating state to implement agreed protective measures.¹²⁷ An invitation must also be extended to the ISA to participate in the consultations. Under Article 12(3), all states parties (rather than only the co-ordinating state) may take measures *prior* to consultation, where UCH is threatened by immediate danger.¹²⁸

In respect of the Area, considerable reliance is placed upon the office of the

¹²³ What is perhaps curious is that Art. 11 does not refer to Art. 303(1) of the LOSC, which applies to all areas of the sea including the Area, and which imposes a general duty upon states to “protect” objects of an archaeological and historical nature. However, again there is emphasis on objects rather than sites. For an interesting discussion of the duties set out in Arts. 149 and 303 and their relationship with the concept of *in situ* protection, see L. Migliorino, “*In Situ* Protection of the Underwater Cultural Heritage under International Treaties and National legislation”, (1995) 10 IJMCL 483, 485–487.

¹²⁴ Art. 11(2).

¹²⁵ Art. 11(3).

¹²⁶ Art. 11(4). In establishing a verifiable link in this case, Art. 11(4) provides that “particular regard [shall be] paid to the preferential rights of States of cultural, historical or archaeological origin”, thereby at least to some extent echoing the wording of Art. 149 of the LOSC. However, in practice qualifying as a state with a verifiable link is unlikely to be any different here from any other case under the Convention.

¹²⁷ Art. 12(2)–(5). Obviously there is no coastal state in this case to act as co-ordinating state so presumably the co-ordinating state will be one of the states with a verifiable link, although there is no requirement that this be so. The co-ordinating state must act “for the benefit of humanity as a whole, on behalf of all States Parties” and “[p]articular regard” must be paid “to the preferential rights of States of cultural, historical or archaeological origin”: Art. 12(6). Cf. Art. 10(6): see note 112 above. While the wording of Art. 12(6) is designed to reflect the content of Arts. 140 and 149 of the LOSC, it is unlikely to make any practical difference.

¹²⁸ Art. 12(3).

Director-General of UNESCO since it must act as a conduit for all reports, and must also co-ordinate declarations of interest by states with a verifiable interest. The Director-General will therefore need to set in place an organisational framework to handle these matters and UNESCO will need to devote resources for this. There will also need to be liaison between UNESCO and the ISA. The ISA was set up under the LOSC as “the organisation through which States Parties shall . . . organise and control activities in the Area, particularly with a view to administering the resources of the Area.”¹²⁹ According to Hayashi, the ISA’s role under the LOSC is limited to controlling activities connected with the exploration and exploitation of mineral resources and no role was intended for it in respect of the UCH.¹³⁰ However, the new Convention does not envisage that the ISA should have responsibility for controlling activities affecting UCH in the Area, but simply that it should be notified of finds and involved in consultations concerning how best to protect them. This involvement seems entirely appropriate. After all, it is not possible to completely separate issues relating to different activities in the Area, any more than it is in any other part of the sea. Mineral exploration and exploitation activities clearly have the potential to endanger the UCH, and measures to protect the UCH may clearly impact on such activities. Indeed, it is interesting to note that in July 2000 the ISA adopted regulations in respect of mineral exploration in the Area that require that contractors immediately notify the Secretary-General of any finds of archaeological objects, and also require that this information be transmitted to the Director-General of UNESCO.¹³¹ Furthermore, contractors must take all reasonable measures to avoid disturbing such objects.¹³²

Some idea of the potential extent of the interrelationship between the mineral exploration regime and the UNESCO Convention’s UCH regime can be gleaned from the following statement of the Secretary-General of the ISA to the ISA’s Assembly:

“In the event that the UNESCO Convention enters into force, it would appear that there are two main implications for the Authority. On the one hand, in approving an application for a plan of work for exploration in an area where a finding of underwater cultural heritage has been notified in accordance with the UNESCO Convention, the Legal and Technical Commission and the Council [of the ISA] would need to take into account

¹²⁹ LOSC, Art. 157(1). See also Art. 157(2), which provides that “[t]he powers and functions of the Authority shall be those expressly conferred upon it by this Convention. The Authority shall have such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area.”

¹³⁰ M. Hayashi, “Archaeological and Historical Objects under the UN Convention on the Law of the Sea”, (1996) 20 *Marine Policy* 291, 293.

¹³¹ See Regulations 8 and 34 of the *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area* (ISBA/6/A/18/Annex, 4 October 2000).

¹³² Regulation 34.

the existence of such finding or activity, although there is no suggestion that the mere existence of an item of underwater cultural heritage in a proposed exploration area would prevent the approval of a plan of work for exploration. On the other hand, in the event that the Authority is notified by a contractor of the finding in its exploration area of an object of an archaeological or historical nature, a State party to the UNESCO Convention may wish to invoke the provisions of articles 11 and 12 of that Convention where such object is also part of the underwater cultural heritage. It must be noted, in any event, that the rights and obligations of the contractor arise from the terms of its contract with the Authority.”¹³³

The relationship between the two regimes clearly gives rise to all sorts of interesting questions. For example, while the Secretary-General stated that “the rights and obligations of the contractor arise from the terms of its contract with the Authority”, its rights and obligations are not solely governed by that contract. In particular, a contractor may be subject to the jurisdiction of a state party to the UNESCO Convention under flag state or nationality principles of jurisdiction. It may then find itself under a duty to report a discovery of UCH to two different authorities: the Secretary-General under the mineral exploration regulations, and the state party under Article 11(1) of the Convention.¹³⁴ While the Secretary-General’s statement that “there is no suggestion that the mere existence of an item of underwater cultural heritage in a proposed exploration area would prevent the approval of a plan of work for exploration” may provide a contractor with some reassurance that reporting a find will not unduly interfere with its planned activities, the spectre of a state party to the Convention “invok[ing] the provisions of Articles 11 and 12” may cause some concern. In practice, the measures a state party could take against the contractor under Articles 11 and 12 are fairly limited, although it is interesting to note that the contractor will not be exempt from such action by reason of the fact that it will be engaged in activities “incidentally affecting”, rather than “directed at”, UCH. In particular, the contractor’s activities could justify a state party in taking emergency action under Article 12(3) to prevent “immediate danger” to UCH, since such danger may arise from any “human activity”, not just looting. While the Secretary-General did not refer to it, a state party would also be able to act under Article 5¹³⁵ if the contractor is subject to its jurisdiction under flag state or nationality principles of jurisdiction. Even the simple fact that a number of states could legitimately take an interest in the fate of the UCH under Articles 11 and

¹³³ *Report of the Secretary-General of the International Seabed Authority under article 166, paragraph 4, of the United Nations Convention on the Law of the Sea*, ISBA/8/A/5, 7 June 2002, para. 58.

¹³⁴ Although the contractor would not have an intention to engage in activities “directed at” the UCH, such intention is not necessary for the reporting requirement under Art. 11(1) to be triggered: a discovery of UCH is enough.

¹³⁵ See further p. 65, especially note 31 above.

12, may mean that the situation will look quite politically discomforting. As a result of all this, contractors may think twice about reporting any finds.¹³⁶

The drafters of the Convention have probably made the most of the opportunities open to them to create a protective regime for the Area while working within the tight constraints of the LOSC. However, the range of measures available to either the co-ordinating state or states parties in general to prevent threats to the UCH, or at least to make sure that any interference is undertaken in accordance with the Rules in the Annex, is limited in much the same way as the provisions in Article 10, paragraphs (3) to (6) in respect of the EEZ and continental shelf. Furthermore, in respect of the Area, the Convention is unfortunately unable to make available a powerful provision like Article 10(2).

Sanctions

Under Article 17 states parties are required to impose sanctions for violation of measures they have taken to implement the Convention.¹³⁷ The sanctions taken shall be:

“adequate in severity to be effective in securing compliance with [the] Convention and to discourage violations wherever they occur *and shall deprive offenders of the benefit deriving from their illegal activities*”.¹³⁸

Traditional criminal sanctions, such as fines and prison sentences, will not have the effect of depriving offenders of the benefit they derive from their activities and therefore clearly sanctions of other sorts are envisaged (presumably to be used alongside, rather than instead of, the more traditional penalties). In fact, Article 18 goes on to make provision for a specific sanction of an administrative nature that will have the effect of depriving offenders of the benefit of their activities: that is, the seizure of UCH that has been recovered contrary to the terms of the Convention. This sanction could prove a highly effective deterrent if widely implemented and properly enforced.

Article 18 imposes surprisingly onerous duties upon states parties. They must take measures providing for the seizure of UCH in their territory that has been recovered in a manner not in conformity with the Convention. These measures relate not only to UCH that is *recovered* in their territory, but to any UCH *brought into* their territory at *any* time. Furthermore, the seizure may be from anyone, not only the party who undertook the recovery. Once such seizures have been made, states parties are then required to “record, protect and take all reasonable measures to stabilise” the UCH seized, and to “ensure that its

¹³⁶ It needs to be borne in mind that only a handful of contractors are currently undertaking exploration activities on the deep sea-bed and the commercial exploitation of mineral resources seems a distant prospect. Therefore, these issues are likely to remain fairly theoretical.

¹³⁷ They are also specifically required to co-operate to ensure enforcement of sanctions that are imposed: Art. 17(3).

¹³⁸ Art. 17(2). Emphasis added.

disposition be for the public benefit".¹³⁹ Notification of seizures must be given to the Director-General of UNESCO and any state with a verifiable link, and the interests of such states must be taken into account in making decisions about the disposition of material. The implementation of these obligations will require the establishment of administrative structures¹⁴⁰ and potentially very significant expenditure on conservation, exhibition, etc. Furthermore, the co-operation and assistance of other states parties, and the provision of information about the provenance of material, will be essential if the system envisaged by the article is to work. Oddly perhaps, Article 18 does not refer specifically to co-operation and information-sharing by states parties. However, Article 19 makes specific provision in this respect. While this article relates to the protection and management of UCH under the Convention generally, it has particular import in relation to Article 18.

The seizure provisions give rise to difficult questions about the deprivation of property rights and possible entitlements to compensation. By virtue of Article 4, there will be no salvage rights or finders' rights to consider, but what about circumstances where the property has not been abandoned and the owner is known? Even where the property is seized from someone other than the owner, the provisions in Article 18(4) regarding disposition suggest that the property is not to be returned to the owner. If this is the case, will the owner be entitled to compensation?¹⁴¹ Does the material become the property of the seizing state, of a state with a verifiable link, of humankind as a whole, or does it in fact become ownerless? None of these questions are answered by the Convention, and therefore states parties will need to give some thought to how they are going to deal with these issues.¹⁴² While consistency is clearly desirable, different states may take rather different approaches, depending at least to some extent on their domestic legal backgrounds and attitudes to the concept of property.

¹³⁹ In making provision for its disposition, account must be taken of, *inter alia*, the need for conservation and research; re-assembly of a collection; and public access, exhibition and education.

¹⁴⁰ Art. 22 provides for the establishment of competent authorities or the reinforcement of existing ones to provide for the effective protection and management of the UCH including, presumably, seized UCH.

¹⁴¹ States party to the First Protocol of the European Convention on Human Rights will also need to consider the implications of Art. 1 of that Protocol. This provides that "no one shall be deprived of his possessions except in the public interest". For a discussion of the article, see P. Fletcher-Tomenius and M. Williams, "The Protection of Wrecks Act 1973: A Breach of Human Rights?", (1998) 13 IJMCL 623.

¹⁴² Questions also arise in relation to the property rights of *bona fide* purchasers. In this respect, note the interrelationship between the seizure provision in Art. 18, and Art. 14, which requires states parties to take measures to prevent "the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary" to the Convention (see above, pp. 76–77, especially note 92).

Dispute Settlement Procedures

The whole framework of the Convention is based on the principle of co-operation between states parties and the preceding discussion of the Convention's control mechanisms shows how reliant these are on states being able to reach agreement on the best means of protecting the UCH. When one examines the detail of these mechanisms, it becomes clear that there is huge potential for disputes to arise. As we have seen, the systems set up by the Convention to deal with UCH discovered in the EEZ or on the continental shelf of a state party, or in the Area, all rely to a large extent upon co-operation and agreement by two or more states. Agreement may also need to be reached between a flag state and a coastal state over measures to be taken in respect of a wrecked state vessel. Where UCH has been the subject of seizure, the seizing state will need to seek the agreement of any state with a verifiable link about the ultimate disposition of the UCH. There is clearly a danger in all these cases that consultations may reach a stalemate, resulting in delays in action and consequent risks to the UCH.

The Convention anticipates that disputes may arise by making provision for settlement procedures in Article 25. States parties in dispute may choose any means of settlement, provided it is peaceful.¹⁴³ If the dispute is not settled by those means within a reasonable time, it may be submitted to UNESCO for mediation, provided that the parties agree that this should occur.¹⁴⁴ If no settlement is reached by these means, provision is made for resort to the complex dispute settlement machinery set out in Part XV of the LOSC. A controversial question is whether or not non-state parties to the LOSC will be bound to use these procedures. This question arises because of the wording of Article 25(3):

“If mediation is not undertaken or if there is no settlement by mediation, the provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea apply *mutatis mutandis* to any dispute between States Parties to this Convention concerning the interpretation or application of this Convention, *whether or not they are also Parties to the United Nations Convention on the Law of the Sea.*”¹⁴⁵

Non-state parties to the LOSC have already expressed concern about this provision,¹⁴⁶ but O’Keefe suggests that Article 291(2) of the LOSC overrides it. This provides that the dispute settlement procedures in Part XV shall be open to non-states parties and other entities only as specifically provided for by the LOSC. Whether or not this is the case, the complexity of the LOSC machinery is likely to ensure that it will rarely if ever be resorted to. Where states parties fail to

¹⁴³ Art. 25(1).

¹⁴⁴ Art. 25(2).

¹⁴⁵ Emphasis added.

¹⁴⁶ O’Keefe, note 11 above, p. 137.

resolve a dispute themselves, the mediation services of UNESCO or, indeed, the Meeting of States Parties¹⁴⁷ should be able to negotiate a settlement.

Conclusions

Twenty-five years after the Council of Europe accorded the first international recognition of the need for a convention to protect the UCH, such a convention now exists, and there is a serious prospect of it coming into force. This, in itself, is a major achievement. The fact that it adds considerable flesh to Articles 149 and 303 of the LOSC, and creates a bold and ambitious framework for the protection of the UCH, is even more remarkable. However, the price for this may have been the failure to achieve a consensus on the final text. Nonetheless, on balance it is probably better to have a strong convention acceptable to many, than a watered-down convention acceptable to all, especially when some states—notably the USA—are unlikely to sign in any event.

The fact that the Convention relies heavily upon flag state, nationality and territorial principles of jurisdiction means that—unless it is widely adopted by both flag states and coastal states—treasure hunters will be able to evade its control mechanisms by using “flags of convenience” and “ports of convenience”. The strength of the vote in favour of the Convention in 2001 suggests that the Convention may be quite widely adopted by coastal states, but it seems unlikely that significant flag states, including the USA and UK, will sign. The holes that this will create in the protective system, together with the inevitable difficulties of enforcement (especially in the wide expanses of the open oceans), mean that the effectiveness of the Convention will probably be patchy at best.

Nonetheless, the Convention is still likely to have considerable influence. Its very existence may encourage courts and legislatures in non-contracting states to continue a process that has already begun of modifying traditional principles of salvage law to take into account archaeological considerations.¹⁴⁸ The standards set out in the Annex to the Convention may well become the benchmark for the treatment of UCH even in non-contracting states.¹⁴⁹ The fact that the Convention encourages co-operation between states and the adoption of inter-state agreements means that such agreements may become increasingly common, adopted by both states parties to the Convention and non-contracting states.¹⁵⁰

¹⁴⁷ See p. 69 above.

¹⁴⁸ For details, see P. Fletcher-Tomenius, *et al.*, “Salvor in Possession: Friend or Foe to Marine Archaeology?”, (2000) 9 *International Journal of Cultural Property* 263–314.

¹⁴⁹ The UK government, for example, has made it clear that it supports most, if not all, of the provisions in the Annex: “UK Explanation of Vote”, circulated by the Foreign and Commonwealth Office to interested parties on 31 October 2001. See also P. Roberts and S. Trow, *Taking to the Water: English Heritage’s Initial Policy for the Management of Maritime Archaeology in England* (English Heritage, 2002), para. 7.3.

¹⁵⁰ The fact that both the USA and the UK have been engaged in negotiating such an agreement in respect of the *Titanic* shows that these states are not adverse to this sort of international co-operation to protect culturally significant wreck sites. See further, note 49 above.

Furthermore, if those states that become party to the Convention assert their rights over the contiguous zone (under Article 8), and over the continental shelf and EEZ (especially under Article 10(2)), this may encourage non-contracting states to extend their jurisdictions, especially if there is seen to be a developing customary rule of law in this respect.¹⁵¹ Most significantly of all perhaps, now that the legitimacy of commercially motivated recovery of UCH has been called into question at an international level, there is likely to be a gradual hardening of attitudes towards the treasure salvage industry.¹⁵² While it presently operates openly and, indeed, courts a great deal of publicity for its exploits, within the foreseeable future there is a very real likelihood that its activities will be forced underground. If this is the case, the impact of the Convention will have been profound.

¹⁵¹ Indeed, the USA has already shown itself willing to exercise jurisdiction beyond traditional territorial limits. For example, it asserts jurisdiction in respect of submerged cultural resources in the EEZ under the National Marine Sanctuaries Act of 1972 (NMSA) (as amended in 1992): see further R. Elia, "US Protection of Underwater Cultural Heritage Beyond the Territorial Sea: Problems and Prospects", (2000) 29 *International Journal of Nautical Archaeology* 43–56. Also, under Presidential Proclamation 7219 of 2 September 1999, the USA declared a contiguous zone 24nm from baselines, and this will aid the enforcement of the NMSA and several other archaeologically-related statutes: see *ibid.* See also the *Craft* litigation outlined in O. Varmer, "United States of America" in S. Dromgoole (ed.), *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (1999), pp. 216–217.

¹⁵² Much furore has been caused by the UK government's decision to enter into an agreement with a US marine exploration company for the recovery of material from the seventeenth century warship, HMS *Sussex* (see further note 38 above). Among the arguments being used by those with serious concerns about the agreement is the fact that it appears to be in breach of the spirit, if not the letter, of the UNESCO Convention: see, e.g. the speech of Lord Renfrew of Kaimsthorn in a debate on heritage assets in the House of Lords, asking a government Treasury spokesperson to explain the "apparent disparity" between the government's action in entering into a commercial agreement in respect of HMS *Sussex* and its recorded support for the principles, if not the detail, of the UNESCO Convention: see Hansard, H.L. Col. 92, 28 October 2002.

Appendix

Convention On The Protection Of The Underwater Cultural Heritage

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 15 October to 3 November 2001, at its 31st session,

Acknowledging the importance of 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,

Realizing the importance of protecting and preserving the underwater cultural heritage and that responsibility therefor rests with all States,

Noting growing public interest in and public appreciation of underwater cultural heritage,

Convinced of the importance of research, information and education to the protection and

preservation of underwater cultural heritage,

Convinced of the public's right to enjoy the educational and recreational benefits of responsible non-intrusive access to *in situ* underwater cultural heritage, and of the value of public education to contribute to awareness, appreciation and protection of that heritage,

Aware of the fact that underwater cultural heritage is threatened by unauthorized activities directed at it, and of the need for stronger measures to prevent such activities,

Conscious of the need to respond appropriately to the possible negative impact on underwater cultural heritage of legitimate activities that may incidentally affect it,

Deeply concerned by 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,

Aware of the availability of advanced technology that enhances discovery of and access to underwater cultural heritage,

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,

Considering that survey, excavation and protection of underwater cultural heritage necessitate the availability and application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialization, all of which indicate a need for uniform governing criteria,

Realizing the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice, including the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970, the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972 and the United Nations Convention on the Law of the Sea of 10 December 1982,

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,

Having decided at its twenty-ninth session that this question should be made the subject of an international convention,

Adopts this second day of November 2001 this Convention.

Article 1. Definitions

For the purposes of this Convention:

1.
 - (a) “Underwater cultural heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:
 - (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
 - (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
 - (iii) objects of prehistoric character.
 - (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.
2.
 - (a) “States Parties” means States which have consented to be bound by this Convention and for which this Convention is in force.
 - (b) This Convention applies *mutatis mutandis* to those territories referred to in Article 26, paragraph 2(b), which become Parties to this Convention in accordance with the conditions set out in that paragraph, and to that extent “States Parties” refers to those territories.
3. “UNESCO” means the United Nations Educational, Scientific and Cultural Organization.
4. “Director-General” means the Director-General of UNESCO.
5. “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.
6. “Activities directed at underwater cultural heritage” means activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage.
7. “Activities incidentally affecting underwater cultural heritage” means activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage.
8. “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 government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.
9. “Rules” means the Rules concerning activities directed at underwater cultural heritage, as referred to in Article 33 of this Convention.

Article 2. Objectives and general principles

1. This Convention aims to ensure and strengthen the protection of underwater cultural heritage.
2. States Parties shall cooperate in the protection of underwater cultural heritage.
3. States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.
4. 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.
5. 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.
6. Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation.
7. Underwater cultural heritage shall not be commercially exploited.
8. 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.
9. States Parties shall ensure that proper respect is given to all human remains located in maritime waters.
10. 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.
11. No act or activity undertaken on the basis of this Convention shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction.

Article 3. Relationship between this Convention and the United Nations Convention on the Law of the Sea

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.

Article 4. Relationship to law of salvage and law of finds

Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

- (a) is authorized by the competent authorities, and
- (b) is in full conformity with this Convention, and

- (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

Article 5. Activities incidentally affecting underwater cultural heritage

Each State Party shall 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.

Article 6. Bilateral, regional or other multilateral agreements

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

2. The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements.

3. This Convention shall not alter the rights and obligations of States Parties regarding the protection of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adoption, and, in particular, those that are in conformity with the purposes of this Convention.

Article 7. Underwater cultural heritage in internal waters, archipelagic waters and territorial sea

1. States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize 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.

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

Article 8. Underwater cultural heritage in the contiguous zone

Without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied.

Article 9. Reporting and notification in the exclusive economic zone and on the continental shelf

1. All States Parties have a responsibility to protect underwater cultural heritage in the exclusive economic zone and on the continental shelf in conformity with this Convention.

Accordingly:

- (a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;
- (b) in the exclusive economic zone or on the continental shelf of another State Party:
 - (i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;
 - (ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.

2. On depositing its instrument of ratification, acceptance, approval or accession, a State Party shall declare the manner in which reports will be transmitted under paragraph 1(b) of this Article.

3. A State Party shall notify the Director-General of discoveries or activities reported to it under paragraph 1 of this Article.

4. The Director-General shall promptly make available to all States Parties any information notified to him under paragraph 3 of this Article.

5. Any State Party may declare to the State Party in whose exclusive economic zone or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned.

Article 10. Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf

1. No authorization shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf except in conformity with the provisions of this Article.

2. A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.

3. Where there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in a State Party's exclusive economic zone or on its continental shelf, that State Party shall:

- (a) consult all other States Parties which have declared an interest under Article 9, paragraph 5, on how best to protect the underwater cultural heritage;
- (b) coordinate such consultations as "Coordinating State", unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared an interest under Article 9, paragraph 5, shall appoint a Coordinating State.

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

5. The Coordinating State:

- (a) shall implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures;
- (b) shall issue all necessary authorizations for such agreed measures in conformity with the Rules, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations;
- (c) may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefor, and shall promptly inform the Director-General of the results, who in turn will make such information promptly available to other States Parties.

6. In coordinating consultations, taking measures, conducting preliminary research and/or issuing authorizations pursuant to this Article, the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest. Any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea.

7. Subject to the provisions of paragraphs 2 and 4 of this Article, no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.

Article 11. Reporting and notification in the Area

1. States Parties have a responsibility to protect underwater cultural heritage in the Area in conformity with this Convention and Article 149 of the United Nations Convention on the Law of the Sea. Accordingly when a national, or a vessel flying the flag of a State Party, discovers or intends to engage in activities directed at underwater cultural heritage located in the Area, that State Party shall require its national, or the master of the vessel, to report such discovery or activity to it.

2. States Parties shall notify the Director-General and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to them.

3. The Director-General shall promptly make available to all States Parties any such information supplied by States Parties.

4. Any State Party may declare to the Director-General its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link to the underwater cultural heritage concerned, particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin.

Article 12. Protection of underwater cultural heritage in the Area

1. No authorization shall be granted for any activity directed at underwater cultural heritage located in the Area except in conformity with the provisions of this Article.
2. The Director-General shall invite all States Parties which have declared an interest under Article 11, paragraph 4, to consult on how best to protect the underwater cultural heritage, and to appoint a State Party to coordinate such consultations as the "Coordinating State". The Director-General shall also invite the International Seabed Authority to participate in such consultations.
3. All States Parties may take all practicable measures in conformity with this Convention, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause including looting.
4. The Coordinating State shall:
 - (a) implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures; and
 - (b) issue all necessary authorizations for such agreed measures, in conformity with this Convention, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations.
5. The Coordinating State may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefor, and shall promptly inform the Director-General of the results, who in turn shall make such information available to other States Parties.
6. In coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations pursuant to this Article, the Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties. Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.
7. No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.

Article 13. Sovereign immunity

Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.

Article 14. Control of entry into the territory, dealing and possession

States Parties shall take measures to prevent the entry into their territory, the dealing in,

or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention.

Article 15. Non-use of areas under the jurisdiction of States Parties

States Parties shall take measures to prohibit the use of their territory, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of any activity directed at underwater cultural heritage which is not in conformity with this Convention.

Article 16. Measures relating to nationals and vessels

States Parties shall take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with this Convention.

Article 17. Sanctions

1. Each State Party shall impose sanctions for violations of measures it has taken to implement this Convention.
2. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activities.
3. States Parties shall cooperate to ensure enforcement of sanctions imposed under this Article.

Article 18. Seizure and disposition of underwater cultural heritage

1. Each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention.
2. Each State Party shall record, protect and take all reasonable measures to stabilize underwater cultural heritage seized under this Convention.
3. Each State Party shall notify the Director-General and any other State with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure of underwater cultural heritage that it has made under this Convention.
4. A State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit, taking into account the need for conservation and research; the need for reassembly 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, in respect of the underwater cultural heritage concerned.

Article 19. Cooperation and information-sharing

1. States Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage under this Convention, including, where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage.
2. To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage, heritage excavated or recovered contrary to this Convention or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage.
3. Information shared between States Parties, or between UNESCO and States Parties, regarding the discovery or location of underwater cultural heritage shall, to the extent compatible with their national legislation, be kept confidential and reserved to competent authorities of States Parties as long as the disclosure of such information might endanger or otherwise put at risk the preservation of such underwater cultural heritage.
4. Each State Party shall take all practicable measures to disseminate information, including where feasible through appropriate international databases, about underwater cultural heritage excavated or recovered contrary to this Convention or otherwise in violation of international law.

Article 20. Public awareness

Each State Party shall take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Convention.

Article 21. Training in underwater archaeology

States Parties shall cooperate in the provision of training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to underwater cultural heritage.

Article 22. Competent authorities

1. In order to ensure the proper implementation of this Convention, States Parties shall establish competent authorities or reinforce the existing ones 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.
2. States Parties shall communicate to the Director-General the names and addresses of their competent authorities relating to underwater cultural heritage.

Article 23. Meetings of States Parties

1. The Director-General shall convene a Meeting of States Parties within one year of the

entry into force of this Convention and thereafter at least once every two years. At the request of a majority of States Parties, the Director-General shall convene an Extraordinary Meeting of States Parties.

2. The Meeting of States Parties shall decide on its functions and responsibilities.
3. The Meeting of States Parties shall adopt its own Rules of Procedure.
4. The Meeting of States Parties may establish a Scientific and Technical Advisory Body composed of experts nominated by the States Parties with due regard to the principle of equitable geographical distribution and the desirability of a gender balance.
5. The Scientific and Technical Advisory Body shall appropriately assist the Meeting of States Parties in questions of a scientific or technical nature regarding the implementation of the Rules.

Article 24. Secretariat for this Convention

1. The Director-General shall be responsible for the functions of the Secretariat for this Convention.
2. The duties of the Secretariat shall include:
 - (a) organizing Meetings of States Parties as provided for in Article 23, paragraph 1; and
 - (b) assisting States Parties in implementing the decisions of the Meetings of States Parties.

Article 25. Peaceful settlement of disputes

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention shall be subject to negotiations in good faith or other peaceful means of settlement of their own choice.
2. If those negotiations do not settle the dispute within a reasonable period of time, it may be submitted to UNESCO for mediation, by agreement between the States Parties concerned.
3. If mediation is not undertaken or if there is no settlement by mediation, the provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea apply *mutatis mutandis* to any dispute between States Parties to this Convention concerning the interpretation or application of this Convention, whether or not they are also Parties to the United Nations Convention on the Law of the Sea.
4. Any procedure chosen by a State Party to this Convention and to the United Nations Convention on the Law of the Sea pursuant to Article 287 of the latter shall apply to the settlement of disputes under this Article, unless that State Party, when ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, chooses another procedure pursuant to Article 287 for the purpose of the settlement of disputes arising out of this Convention.
5. A State Party to this Convention which is not a Party to the United Nations Convention on the Law of the Sea, when ratifying, accepting, approving or acceding to this Convention or at any time thereafter shall be free to choose, by means of a written declaration, one or more of the means set out in Article 287, paragraph 1, of the United Nations Convention on the Law of the Sea for the purpose of settlement of disputes under this Article. Article 287 shall apply to such a declaration, as well as to any dispute

to which such State is party, which is not covered by a declaration in force. For the purpose of conciliation and arbitration, in accordance with Annexes V and VII of the United Nations Convention on the Law of the Sea, such State shall be entitled to nominate conciliators and arbitrators to be included in the lists referred to in Annex V, Article 2, and Annex VII, Article 2, for the settlement of disputes arising out of this Convention.

Article 26. Ratification, acceptance, approval or accession

1. This Convention shall be subject to ratification, acceptance or approval by Member States of UNESCO.
2. This Convention shall be subject to accession:
 - (a) by States that are not members of UNESCO but are members of the United Nations or of a specialized agency within the United Nations system or of the International Atomic Energy Agency, as well as by States Parties to the Statute of the International Court of Justice and any other State invited to accede to this Convention by the General Conference of UNESCO;
 - (b) by territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Director-General.

Article 27. Entry into force

This Convention shall enter into force three months after the date of the deposit of the twentieth instrument referred to in Article 26, but solely with respect to the twenty States or territories that have so deposited their instruments. It shall enter into force for each other State or territory three months after the date on which that State or territory has deposited its instrument.

Article 28. Declaration as to inland waters

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.

Article 29. Limitations to geographical scope

At the time of ratifying, accepting, approving or acceding to this Convention, a State or territory may make a declaration to the depositary that this Convention shall not be applicable to specific parts of its territory, internal waters, archipelagic waters or territorial sea, and shall identify therein the reasons for such declaration. Such State shall, to the extent practicable and as quickly as possible, promote conditions under which this Convention will apply to the areas specified in its declaration, and to that end shall also withdraw its declaration in whole or in part as soon as that has been achieved.

Article 30. Reservations

With the exception of Article 29, no reservations may be made to this Convention.

Article 31. Amendments

1. A State Party may, by written communication addressed to the Director-General, propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the next Meeting of States Parties for discussion and possible adoption.
2. Amendments shall be adopted by a two-thirds majority of States Parties present and voting.
3. Once adopted, amendments to this Convention shall be subject to ratification, acceptance, approval or accession by the States Parties.
4. Amendments shall enter into force, but solely with respect to the States Parties that have ratified, accepted, approved or acceded to them, three months after the deposit of the instruments referred to in paragraph 3 of this Article by two thirds of the States Parties. Thereafter, for each State or territory that ratifies, accepts, approves or accedes to it, the amendment shall enter into force three months after the date of deposit by that Party of its instrument of ratification, acceptance, approval or accession.
5. A State or territory which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention by that State or territory, be considered:
 - (a) as a Party to this Convention as so amended; and
 - (b) as a Party to the unamended Convention in relation to any State Party not bound by the amendment.

Article 32. Denunciation

1. A State Party may, by written notification addressed to the Director-General, denounce this Convention.
2. The denunciation shall take effect twelve months after the date of receipt of the notification, unless the notification specifies a later date.
3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Convention to which it would be subject under international law independently of this Convention.

Article 33. The Rules

The Rules annexed to this Convention form an integral part of it and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Rules.

Article 34. Registration with the United Nations

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General.

Article 35. Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

Annex*Rules concerning activities directed at underwater cultural heritage***I. General principles**

Rule 1. 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 authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.

Rule 2. 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.

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 authorization 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 authorization of the competent authorities.

Rule 3. Activities directed at underwater cultural heritage shall not adversely affect the underwater cultural heritage more than is necessary for the objectives of the project.

Rule 4. Activities directed at underwater cultural heritage must use non-destructive techniques and survey methods in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.

Rule 5. Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.

Rule 6. Activities directed at underwater cultural heritage shall be strictly regulated to ensure proper recording of cultural, historical and archaeological information.

Rule 7. Public access to *in situ* underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management.

Rule 8. International cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.

II. Project design

Rule 9. Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authorities for authorization and appropriate peer review.

Rule 10. The project design shall include:

- (a) an evaluation of previous or preliminary studies;
- (b) the project statement and objectives;
- (c) the methodology to be used and the techniques to be employed;
- (d) the anticipated funding;
- (e) an expected timetable for completion of the project;
- (f) the composition of the team and the qualifications, responsibilities and experience of each team member;
- (g) plans for post-fieldwork analysis and other activities;
- (h) a conservation programme for artefacts and the site in close cooperation with the competent authorities;
- (i) a site management and maintenance policy for the whole duration of the project;
- (j) a documentation programme;
- (k) a safety policy;
- (l) an environmental policy;
- (m) arrangements for collaboration with museums and other institutions, in particular scientific institutions;
- (n) report preparation;
- (o) deposition of archives, including underwater cultural heritage removed; and
- (p) a programme for publication.

Rule 11. Activities directed at underwater cultural heritage shall be carried out in accordance with the project design approved by the competent authorities.

Rule 12. Where unexpected discoveries are made or circumstances change, the project design shall be reviewed and amended with the approval of the competent authorities.

Rule 13. In cases of urgency or chance discoveries, activities directed at the underwater cultural heritage, including conservation measures or activities for a period of short duration, in particular site stabilization, may be authorized in the absence of a project design in order to protect the underwater cultural heritage.

III. Preliminary work

Rule 14. The preliminary work referred to in Rule 10 (a) shall include an assessment that evaluates the significance and vulnerability of the underwater cultural heritage and the surrounding natural environment to damage by the proposed project, and the potential to obtain data that would meet the project objectives.

Rule 15. The assessment shall also include background studies of available historical and archaeological evidence, the archaeological and environmental characteristics of the site,

and the consequences of any potential intrusion for the long-term stability of the underwater cultural heritage affected by the activities.

IV. Project objective, methodology and techniques

Rule 16. The methodology shall comply with the project objectives, and the techniques employed shall be as non-intrusive as possible.

V. Funding

Rule 17. Except in cases of emergency to protect underwater cultural heritage, an adequate funding base shall be assured in advance of any activity, sufficient to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination.

Rule 18. The project design shall demonstrate an ability, such as by securing a bond, to fund the project through to completion.

Rule 19. The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption of anticipated funding.

VI. Project duration – timetable

Rule 20. An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the completion of all stages of the project design, including conservation, documentation and curation of recovered underwater cultural heritage, as well as report preparation and dissemination.

Rule 21. The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption or termination of the project.

VII. Competence and qualifications

Rule 22. Activities directed at underwater cultural heritage shall only be undertaken under the direction and control of, and in the regular presence of, a qualified underwater archaeologist with scientific competence appropriate to the project.

Rule 23. All persons on the project team shall be qualified and have demonstrated competence appropriate to their roles in the project.

VIII. Conservation and site management

Rule 24. The conservation programme shall provide for the treatment of the archaeological remains during the activities directed at underwater cultural heritage, during transit and in the long term. Conservation shall be carried out in accordance with current professional standards.

Rule 25. The site management programme shall provide for the protection and management *in situ* of underwater cultural heritage, in the course of and upon

termination of fieldwork. The programme shall include public information, reasonable provision for site stabilization, monitoring, and protection against interference.

IX. Documentation

Rule 26. The documentation programme shall set out thorough documentation including a progress report of activities directed at underwater cultural heritage, in accordance with current professional standards of archaeological documentation.

Rule 27. Documentation shall include, at a minimum, a comprehensive record of the site, including the provenance of underwater cultural heritage moved or removed in the course of the activities directed at underwater cultural heritage, field notes, plans, drawings, sections, and photographs or recording in other media.

X. Safety

Rule 28. A safety policy shall be prepared that is adequate to ensure the safety and health of the project team and third parties and that is in conformity with any applicable statutory and professional requirements.

XI. Environment

Rule 29. An environmental policy shall be prepared that is adequate to ensure that the seabed and marine life are not unduly disturbed.

XII. Reporting

Rule 30. Interim and final reports shall be made available according to the timetable set out in the project design, and deposited in relevant public records.

Rule 31. Reports shall include:

- (a) an account of the objectives;
- (b) an account of the methods and techniques employed;
- (c) an account of the results achieved;
- (d) basic graphic and photographic documentation on all phases of the activity;
- (e) recommendations concerning conservation and curation of the site and of any underwater cultural heritage removed; and
- (f) recommendations for future activities.

XIII. Curation of project archives

Rule 32. Arrangements for curation of the project archives shall be agreed to before any activity commences, and shall be set out in the project design.

Rule 33. 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 ten years from the completion of the project, in so far as may be compatible with conservation of the underwater cultural heritage.

Rule 34. The project archives shall be managed according to international professional standards, and subject to the authorization of the competent authorities.

XIV. Dissemination

Rule 35. Projects shall provide for public education and popular presentation of the project results where appropriate.

Rule 36. A final synthesis of a project shall be:

- (a) made public as soon as possible, having regard to the complexity of the project and the confidential or sensitive nature of the information; and
- (b) deposited in relevant public records.