DRAFT CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

A Commentary

prepared for UNESCO

by

Dr. Anastasia Strati*

April 1999

* Lecturer in Law, Democritus University of Thrace, Greece.

CLT-99/WS/8

PREFACE

The general aim of this Commentary is to explain the provisions of the UNESCO/DOALOS Draft Convention on the Protection of Underwater Cultural Heritage so as to facilitate discussion at the second Meeting of Governmental Experts due to take place in Paris at UNESCO Headquarters from 19 to 24 April 1999.

The Commentary follows the arrangement of the Draft Convention, article by article. It includes the amendments, which were submitted during the first Meeting of Governmental Experts held at UNESCO from 29 June to 2 July 1998, as well as comments made by States at earlier stages of this drafting procedure. Furthermore, it looks at the history of the drafting of the ILA Draft Convention on the Protection of the Underwater Cultural Heritage (1994) (hereafter cited as "ILA Draft"),[1] which constitutes the basis of the UNESCO/DOALOS Draft and may, therefore, provide useful information about the origin of its provisions. At the outset, general issues relating to the protection of underwater cultural heritage are being discussed, while a review of existing international and regional instruments protecting the cultural heritage is included in an Appendix.

The success of the forthcoming Meeting of Governmental Experts is of the utmost importance, since it will report to the 30th session of the General Conference of UNESCO in October/November 1999. The first legislative attempt to develop rules for the protection of the underwater cultural heritage was undertaken at regional level by the Council of Europe. Regrettably, the Draft European Convention on the Protection of the Underwater Cultural Heritage (1985) (hereafter cited as "Draft European Convention"),[2] prepared by an *Ad Hoc* Committee of Experts, was not approved by the Committee of Ministers as there was no agreement on the crucial question of jurisdiction. Thus, no decision was taken to open the Convention for signature.

Undoubtedly, the complex legal issues involved in the protection of the underwater cultural heritage cannot be solved at once by the conclusion of any legal instrument. However, the adoption of the UNESCO/DOALOS Draft will constitute an important step towards its protection. In its present form, the Draft suffers from certain deficiencies, while it includes provisions, which many States are reluctant to accept. Nevertheless, there has already been considerable delay in the adoption of legal rules to protect underwater cultural heritage; to take a negative view towards the Draft will only result in the continuation of the existing situation and the plundering of more underwater sites.

---

[1] C.f. O' Keefe, P.J. & Nafziger, J.A.R., "Report: The Draft Convention on the Protection of the Underwater Cultural Heritage", 25 *ODIL* (1994) pp. 391-418.

[2] Council of Europe, *Ad Hoc* Committee of Experts on the Underwater Cultural Heritage (CAHAQ), "Final Activity Report", *Doc. CAHAQ(85)5*, Strasbourg, 23 April 1985. [This is not a public document].

PART I: INTRODUCTION

I. The notion of "underwater cultural heritage"

By definition, the concept of underwater cultural heritage refers to that part of the cultural heritage, which is found underwater. The term "underwater" should be understood in its widest sense so as to apply both to seas and inland waterways. There is no generally acceptable definition of the meaning of cultural heritage despite its frequent appearance in UN and UNESCO conventions and recommendations. Each instrument has employed a different definition drafted for its specific purposes (see Appendix).

The concept of "underwater cultural heritage" first appeared in Recommendation 848 (1978) of the Parliamentary Assembly of the Council of Europe[3] and was further elaborated by the Draft European Convention. Recommendation 848 (1978) of the Council of Europe covers objects that have been beneath the water for more than 100 years with potential discretionary exclusion of less important objects and inclusion of more recent ones, while Article 1 of the Draft European Convention reads:

> "1. For the purposes of this Convention all remains and objects and any other traces of human existence located entirely or in part in the sea, lakes, rivers, canals, artificial reservoirs or other bodies of water, or in the tidal or other periodically flooded areas, or recovered from any such environment, or washed ashore, shall be considered as being part of the underwater cultural heritage, and are hereinafter referred to as 'underwater cultural property'.[4]
> 2. Underwater cultural property being at least 100 years old shall enjoy the protection provided by this Convention. However, any contracting state may provide that such property which is less than 100 years shall enjoy the same protection."

The UN Convention on the Law of the Sea (1982) (hereafter cited as "LOS Convention")[5] employs the term "objects of an archaeological and historical nature" in order to define the cultural heritage to be protected (see Articles 149 and 303 respectively). Since this formula is nowhere defined, it is very difficult to identify the items that fall within its scope. However, the 100-year limit, whether in terms of age or submersion, combined with a potential extension of protection to more recent items, may provide a useful yardstick for interpreting this expression.[6]

---

[3] "Recommendation 748 (1978) on the underwater cultural heritage" in Council of Europe, *Texts adopted by the Assembly*, sessions 30-32 (1978-81). See also Council of Europe, *The Underwater Cultural Heritage*, Report of the Committee on Culture and Education, Doc. 4200-E, Strasbourg, 1978, pp. 1-4.

[4] According to the Draft Explanatory Report to the Draft European Convention: "The term property was chosen because it was more comprehensive than the term "object" which might be deemed to include only movable goods and not immovable property, such as sites and installations (e.g. a port). With regard to the latter two categories of underwater cultural property, it should be stated clearly that the expression "any other traces", appearing at the beginning of paragraph 1, was intended to embrace, in addition to those categories, geographical features of historical significance".

[5] United Nations, *The Law of the Sea*, 1983 (Sales No. E. 83.V.5).

[6] See further Strati, A., *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea,* Martinus Nijhoff, 1995 at p. 182. It is interesting to note that an early version of Article 149 had made reference to a 50-year limit as the qualifying factor for the protection of shipwrecks and their cargoes, *UNCLOS III, Off. Rec.* vol. I at p. 163. Examination of international and national instruments protecting the cultural heritage also indicates that the concept of "archaeological", let alone "historical", is not confined to items which are many hundreds of years old. Although there is no

II. Existing regime of protection

The different bodies of laws involved in the protection of the underwater cultural heritage have been described as a legal labyrinth.[7] At national level, the main bodies of laws involved are legislation relating to the protection of cultural heritage in general or specifically dealing with underwater remains, property law, admiralty law (wreck and salvage law), taxation law and laws concerning import and export, laws related to national parks, reserves and environmental protection and, finally, rules of private international law ("conflict of laws").[8] These laws must be coordinated if any conflict of objectives is to be resolved. However, an adequate legal framework for the protection and preservation of underwater remains cannot be based on national legislation alone. It must be supplemented by rules of international law.

To date, the only international instrument specifically dealing with the protection of underwater cultural heritage is Recommendation 848 (1978) of the Parliamentary Assembly of the Council of Europe. In addition, one should consider bilateral agreements, such as the Agreement between the Netherlands and Australia concerning Old Dutch Shipwrecks (1976)[9], and two drafts, the Draft European Convention and the ILA Draft. International instruments dealing with the protection of cultural heritage in general are also relevant to the protection of the underwater heritage. Some, such as the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations,[10] refer expressly to underwater remains, while others are interpreted to include submerged sites. Nevertheless, since the vast majority of cultural agreements confine their scope of application to the national territories of contracting States, even if they were interpreted to apply to underwater cultural heritage, protection would be restricted to sites found landward of the outer limit of the territorial sea. Notable exceptions are the European Convention on Offences Relating to Cultural Property (1985)[11] which permits prosecution of offences committed outside the territories of contracting States, i.e., on the high seas, and the European Convention on the Protection of the Archaeological Heritage (1992) (revised)[12] which protects "all remains and objects and any other traces of mankind from past

---

uniformity in the definitions used, or in the setting of time limits when age is established as a qualifying criterion for protection, a period of 100 years is rather common, especially amongst laws dealing with underwater remains.

[7] Korthals Altes, A., "Submarine antiquities: a legal labyrinth", 4 *Syracuse J. Int'l L. and Comm.* (1976) pp. 77-96.

[8] These rules are developed by States as part of their domestic law to resolve the problems which arise, in cases between private persons involving a foreign element, over whether the court has jurisdiction and over the choice of the applicable law.

[9] Schedule 1 to Australian Historic Shipwrecks Act 1976 in *Acts of the Parliament of the Commonwealth of Australia 1976,* Australian Government Publishing Service, 1978, pp. 1613-1616.

[10] Adopted by the General Conference of UNESCO at its ninth session, New Delhi, Dec. 5th 1956

[11] *Europ. T.S.* No. 119. The Convention has not entered into force.

[12] *Europ. T.S.* No. 143.

epochs...which are located in areas within the jurisdiction of the parties", namely the contiguous zone, the continental shelf, the EEZ or a cultural protection zone.

Overall, these instruments recognise the importance of the cultural heritage and emphasise the need to protect it by adopting the appropriate measures at national, regional and international level. The most common measures of protection are the following:

* Registration of the cultural property that constitutes the cultural heritage of contracting States.
* Creation of national inventories.
* Delimitation of archaeological sites.
* Application of scientific standards for excavations.
* Prohibition of illicit excavations.
* Prevention of illegal exportation and importation of the protected heritage.
* Duty to report the accidental recovery of cultural remains.
* Promotion of co-operation and assistance amongst States.

Such measures, however, are not capable of providing solutions to problems specifically related to marine archaeology, such as conflict between salvage law and heritage legislation, extent and scope of coastal jurisdiction over underwater cultural heritage, enforcement at sea of heritage legislation and, most importantly, protection of cultural heritage in international waters. Even the few instruments which encompass underwater cultural heritage within their ambit do not establish a satisfactory scheme of protection as, first, they cover only certain aspects of the archaeological issue, and, second, they deal exclusively with problems which are common to land and underwater heritage. Only international conventions specifically dealing with underwater cultural heritage can offer a more comprehensive regime of protection.

The location of relics on and under the seabed brings them within the scope of the law of the sea. They differ, however, fundamentally - in terms of their nature and value - from natural resources, which have traditionally been its main concern. The question, therefore, arises as to whether this body of international law has the appropriate means to regulate underwater cultural heritage effectively, considering that its safeguarding involves protection not only against the effects of time and nature, but also against theft and illicit traffic. Until recently, marine archaeology had been a neglected issue. This is not surprising, as it was underestimated by archaeologists, let alone lawyers, until the late 1950's. The absence of underwater technology made the recovery of artefacts far too remote to create jurisdictional problems. As a result, the four 1958 Geneva Conventions on

the law of the sea[13] did not include any provision on underwater relics. It was the LOS Convention, which provided for the protection of underwater cultural heritage for the first time.

Underwater remains may also fall under the protective regimes of environmental treaties. Notable examples are the Protocol concerning Mediterranean Specially Protected Areas (1982), which includes "sites of particular importance because of their scientific, aesthetic, historical, archaeological, cultural or educational interest" amongst the range of protected areas;[14] its amending Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (1995)[15] which expands its scope of application even to high seas areas, and, in the Caribbean, the Protocol concerning Specially Protected Areas and Wildlife (1990) which provides, *inter alia,* for the conservation of "areas of special archaeological value" as protected areas.[16]

Finally, of relevance to underwater cultural heritage are maritime conventions dealing with private law issues, such as salvage and removal of wrecks. One should specifically mention the International Convention on Salvage (1989),[17] which replaced the Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (1910),[18] and the Draft Wreck Removal Convention still under consideration at the International Maritime Organization (IMO).

III. The LOS Convention

The protection of the underwater cultural heritage was not one of the main issues of negotiations at the Third United Nations Conference on the Law of the Sea (hereafter cited as "UNCLOS III"). On the contrary, in the course of negotiating the various ocean regimes, regard was paid to the accidental location of submerged archaeological objects. Initially, the discussion on this issue was limited to relics found on the seabed beyond the limits of national jurisdiction. This is not surprising since UNCLOS III had its origins in the Seabed Committee which dealt with the deep seabed (the "Area"). The result of this was the adoption of Article 149 providing for historical and archaeological objects found in the Area.

---

[13] Convention on the Territorial Sea and the Contiguous Zone, 516 *U.N.T.S.* 205; Convention on the Continental Shelf, 499 *U.N.T.S. 311*; Convention on the High Seas, 450 *U.N.T.S.* 82; Convention on Fishing and Conservation of Living Resources on the High Seas, 559 *U.N.T.S.* 285.

[14] Text reprinted in Simmonds, K.R. (ed.), *New Directions in the Law of the Sea [New Series]*, J.20, Release 84-1, September 1984 and in Burhenne, W.E. (ed.), *International Environmental Law: Multilateral Treaties*, Berlin, 1982, No. 26, pp. 11-18.

[15] Reprinted in 11 *IJMCL* (1996) pp. 101-112.

[16] Reprinted in 5 *IJMCL* (1990) p. 369.

[17] Reprinted in *Lloyd's Maritime and Commerce Quarterly* (1990) p. 4. Reference should also be made to the IMO Guidelines on Particular Sensitive Sea Areas (PSSAs), which include the "historical and/or archaeological significance" of an area amongst the criteria listed for the identification of a PSSA. See Blanco-Bazan, A., "The IMO guidelines on Particular Sensitive Sea Areas (PSSAs): their possible application to the protection of underwater cultural heritage", 20 *Marine Policy* (1996), pp. 343-349.

[18] 37 *Stat.* 1658, *T.S.* No 516.

In 1979, various proposals were made in the Second Committee of UNCLOS III to include provisions defining the legal status of archaeological and historical objects situated on the continental shelf and/or the exclusive economic zone (EEZ). When suggestions were made for a general duty to protect these relics wherever found, the debate was passed to the Plenary of the Conference, which adopted Article 303 amongst the General Provisions. The regime of archaeological and historical objects found at sea was, thus, discussed by two different Committees (three if the Plenary of the Conference is also included). The fact that three separate bodies were concerned with the same issue, even successively, had far-reaching consequences. For a considerable period of time, there was even a differentiation in the formulas employed to define the protected items. Draft Article 149 referred to "objects of archaeological and historical nature", while draft Article 303 referred to "archaeological objects and objects of historical origin". It was the drafting Committee in 1982, which removed this inconsistency. Thus, Articles 149 and 303 read respectively:

> *Article 149: Archaeological and historical objects.*
> *"All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State or country of cultural origin, or the State or country of historical and archaeological origin."*
>
> *Article 303: Archaeological and historical objects found at sea.*
> *"1. States have a duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.*
> *2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.*
> *3. Nothing in this Article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.*
> *4. This Article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature."*

The LOS regime is, no doubt, far from satisfactory as it limits protection to archaeological and historical objects found within 24 miles from the coast.[19] Beyond the 24-mile limit and up to the outer limit of the continental shelf there is a lacuna. Submerged archaeological and historical objects do not feature as natural resources of the seabed and are, therefore, not subject to the sovereign rights of the coastal State over the continental shelf and the EEZ. The same applies to archaeological research, which is excluded from the scope of

[19] This is the combined effect of Articles 303(2) and 33 of the LOS Convention, which deals with the 24-mile contiguous zone. It would seem, however, that despite the limiting language of Article 303(2), which confines coastal rights to the "control of traffic" in archaeological and historical objects found on the bed of the contiguous zone, in substance far more extensive rights are recognised. The combination of Article 303(1), which advocates the general duty to protect archaeological objects, and the fiction established by Article 303(2) permits the extension of coastal legislation to the 24-mile zone. Nevertheless, the use of a legal fiction as a means of expanding coastal jurisdiction creates interpretation problems as to its precise scope and nature. Strati, *op. cit.* note 6 at p. 167 *et seq.* In contrast Allain,J., "Maritime wrecks: where the *lex ferenda* of underwater cultural heritage collides with the *lex lata* of the Law of the Sea Convention", 38 *VJIL* (1998) pp. 747-775; Oxman, B.H., "Marine archaeology and the international law of the sea", 12 *Columbia - VLA Journal of Law & the Arts* (1988) pp. 353-372, and Vitztum, W.G. & Talmon, S., *Alles fliesst. Kulturguterschutz und innere Gewasser im Neuen Seerecht*, Nomos Verlagsgesellschaft, 1998, who adopt a very restrictive interpretation of Article 303(2).

marine scientific research[20] and the consent regime of the coastal State (c.f. Article 246(2) of the LOS Convention). As a result, the protection of archaeological sites in these areas lies in principle at the discretion of flag States,[21] which even if they were willing to take the appropriate measures, lack the necessary means of enforcement. This "free-for-all" system does not acknowledge any priority to the flag State of a sunken vessel or, as the case may be, to the State of origin. On the contrary, archaeological objects found in the Area are to be "preserved or disposed of" for the "benefit of mankind as a whole", while taking into consideration the preferential rights of the "State or country of origin, or the State of cultural origin or the State of archaeological and historical origin".[22]

In concluding, the LOS Convention does not provide a comprehensive scheme of protection of underwater cultural heritage, the main deficiency being the "abandonment" of cultural heritage found beyond the 24-mile limit to flag State jurisdiction. It should not be ignored, however, that it introduced new concepts, established the duty to protect the limited cultural resources of the oceans and left room for the development of more comprehensive regimes in the future.

IV. Current developments

Once it was acknowledged that the LOS Convention did not settle the underwater cultural heritage issue adequately, the question that arose was whether it would be necessary to adopt a convention on this subject. The form of instrument for protecting the underwater cultural heritage was also debated at UNESCO. The prevailing view was that a binding international instrument was essential for the protection of underwater cultural heritage, especially for the regulation of access to and the safeguarding of sites in extraterritorial waters.[23] However, the new convention should be compatible with the LOS Convention.

---

[20] By definition, the exploration of the seabed for the location, investigation and excavation of archaeological remains is scientific research; both the scientific knowledge acquired and the employment of scientific method contribute to this conclusion. However, within the framework of the LOS Convention, archaeological endeavour does not qualify as marine scientific research which is confined to the natural environment and its resources. See further Soons, A.H.A. *Marine Scientific Research and the Law of the Sea,* T.M.C. Asser Institute, Kluwer Law and Taxation Publishers, 1982 at p. 275.

[21] A distinction, however, should be made between areas falling within and beyond the EEZ. If a coastal State has not declared an EEZ or the continental shelf extends beyond the outer limit of the EEZ, archaeological research may be exercised as a freedom of the high seas under the terms of Article 87 of the LOS Convention. However, if a coastal State has established an EEZ, the exercise of archaeological activities falls within the "grey area" where the LOS Convention does not attribute rights and jurisdiction to either coastal or flag States. In case of doubt, the issue will be resolved on the basis of equity and in the light of all the relevant circumstances (c.f. Article 59 of the LOS Convention).

[22] The significance of Article 149 is limited to a considerable extent by the absence of an international body to implement it. Archaeological activities do not qualify as "activities in the Area", which are confined to exploration and exploitation of mineral resources (c.f. Articles 1(3) and133(b) of the LOS Convention) and, as a result, the International Seabed Authority (hereafter cited as "ISA"), the overall regulatory body in the Area, does not enjoy any jurisdictional powers over underwater cultural heritage (c.f. Article 157(2)). Furthermore, Article 149 suffers from vagueness and ambiguity.

[23] The General Conference of UNESCO adopted at its 29th session Resolution 21, which, *inter alia,* invited the Director-General to prepare a first draft of such a convention and to convene a group of

The issue of compatibility with the LOS Convention has become the main topic of discussion both within and outside UNESCO. It is notable that the most recent GA Resolution on "Oceans and the law of the sea"[24] refers to this issue. More specifically, it is provided in paragraph 20 that the General Assembly,

> "Notes with interest the ongoing work of the United Nations Educational, Scientific and Cultural Organisation towards a convention for the implementation of the provisions of the Convention, relating to the protection of the underwater cultural heritage and stresses the importance of ensuring that the new instrument to be elaborated is in full conformity with the relevant provisions of the Convention".

Resolution 53/32 refers to UNESCO/DOALOS Draft as an instrument for implementing the relevant provisions of the LOS Convention. However, as will be explained in the Commentary, Article 303(4) of the LOS Convention permits the elaboration of treaties on the protection of the underwater cultural heritage by recognising that its subject matter may be governed by some other existing or future international agreement. The "without prejudice" clause of Article 303(4) grants priority to the other treaty which may supplement its provisions in a manner consistent with the general principles and objectives of the LOS Convention.

It should be recalled that both implementation agreements of the LOS Convention, the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (hereafter cited as the "Seabed Agreement") and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereafter cited as the "Straddling Fish Stock Agreement")[25] depart significantly from the LOS regime. Despite the fact that the Seabed Agreement refers to the "implementation" of Part XI, in effect, it modified it substantially without regard to the LOS provisions on amendment. This amending procedure is unprecedented in the law of treaties. Finally, some of the provisions of the Straddling Fish Stock Agreement, which is generally considered to be consistent with the LOS Convention, go well beyond the LOS regime in order to deal with fisheries management issues not foreseen in 1982.[26]

---

governmental experts to consider this draft with a view to its submission to the General Conference at its 30th session.

[24] Resolution 53/32 of 24 November 1998, Press Release GA/9541, 28 January 1999 at p. 59.

[25] 34 *ILM* (1995) p. 1542.

[26] See in particular Articles 20, 21 and 23 dealing with international, subregional and regional co-operation in enforcement and port State jurisdiction respectively. As argued, even if the letter of the LOS Convention did not spell out such mechanisms, i.e. the enforcement prerogative of "non-flag States", its spirit certainly would align with the Straddling Fish Stock Agreement for having devised an efficient scheme aimed at protecting the stocks concerned from questionable fishing practices. Tahindro, A., "Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation of Straddling Fish Stocks and Highly Migratory Fish Stocks", 28 *ODIL* (1997) pp. 1-58 at p. 50.

II. THE DRAFT CONVENTION

Preamble

The States Parties to the present Convention,

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 shared heritage;

Noting growing public interest in underwater cultural heritage;

Aware of the fact that underwater cultural heritage is threatened by unsupervised activities not respecting fundamental principles of underwater archaeology and the need for conservation and research of underwater cultural heritage;

Aware further of increasing commercialization of efforts to recover underwater cultural heritage and availability of advanced technology that enhances identification of and access to wrecks;

Conscious also of growing threats to underwater cultural heritage from various other activities, namely exploitation of natural resources of various maritime zones, construction, including construction of artificial islands, installation and structures, laying of cables and pipelines;[27]

Believing that cooperation among States, marine archaeologists, museums and other scientific institutions, salvors, divers and their organizations is essential for the protection of underwater cultural heritage;

Considering that exploration, excavation, and protection of underwater cultural heritage necessitates the 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 indicates a need for uniform governing criteria;

Recognizing that underwater cultural heritage should be preserved for the benefit of humankind, and that therefore responsibility for its protection rests not only with the State or States most directly concerned with a particular activity affecting the heritage or having an historical or cultural link with it, but with all States and other subjects of international law;

Bearing in mind the need for more stringent measures to prevent any clandestine or unsupervised excavation which, by destroying the environment surrounding underwater cultural heritage, would cause irremediable loss of its historical or scientific significance;

Realizing the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity of international law and practice, including the United Nations Convention on the Law of the Sea of 10 December 1982;

---

[27] It seems preferable to avoid using the word "construction" twice in the fifth preambular paragraph. Similarly, the reference to "various maritime zones" in the context of the exploitation of natural resources seems superfluous. Paragraph 5 should therefore read: "... *exploitation of natural resources, construction of artificial islands, installations and structures, and laying of cables and pipelines*".

Convinced that information and multidisciplinary education about underwater cultural heritage, its historical significance, serious threats to it, and the need for responsible diving, deep-water exploration and other activity affecting it, will enable the public to appreciate the importance of underwater cultural heritage to humanity and the need to preserve it; and

Committed to improving the effectiveness of measures at international and national levels for the preservation in place or, if necessary for scientific or protective purposes, the careful removal of underwater cultural heritage that may be found beyond the territories of States;

Have agreed as follows:

Proposed amendments

- *Paragraph 1*

[Turkish proposal] Substitute "being aware of" for "acknowledging", and "common heritage" for "shared heritage".

- *Paragraph 5*

[Italian proposal] Delete the fifth preambular paragraph.

[US draft] [28]

"Conscious also of the potential threats to underwater cultural heritage from various other activities, namely exploitation of natural resources of maritime zones".

- *Paragraph 6*

[Latin-American/Caribbean proposal] [29]The word "salvors" should be deleted.

[US draft] The word "industry" should be included.

- *Paragraph 7*

[US draft] Substitute "specific" for "special".

- *Paragraph 10*

[Turkish proposal] Delete the reference to the UN Convention on the Law of the Sea.

- *Paragraph 11*

[US draft] Substitute "activities" for "activity".

- *Paragraph 12*

[US draft] Substitute "at sea" for "beyond the territories of States".

- *New paragraphs*

[US draft]

"7. Understanding that the site of underwater cultural heritage may be someone's grave and contain human remains that should be respected;

8. Knowing that the harm or destruction of the natural resources surrounding the underwater cultural heritage should be avoided in managing the underwater cultural heritage;

13. Realizing the need to affirm the ownership rights of flag States to sunken warships, naval auxiliaries, and other vessels and aircraft owned or operated by a State and used, at the time they sank only for government non-commercial purposes and to their associated contents and remains, and the desire to enhance their protection."

---

[28] During the meeting of governmental experts, the US delegation (as observers only) submitted an amended draft convention. Some of these articles are identical to those of UNESCO/DOALOS Draft. As a result, only those provisions, which differ or amend the latter, are mentioned.

[29] Proposal submitted by Colombia on behalf of Argentina, Colombia, Honduras, Panama, Dominican Republic, Barbados, Cuba, Haiti, Jamaica, Mexico, Trinidad and Tobago and Uruguay.

COMMENTARY

The Preamble to an international agreement is significant in that it provides a useful aid to interpretation of its provisions. According to article 31(2) of the Vienna Convention on the Law of Treaties (1969),[30] a treaty is to be interpreted in good faith in accordance with its context, which includes, in addition to the text, its preamble and annexes.

Paragraph 1 stresses the importance of underwater cultural heritage as both an integral part of the cultural heritage of humanity and an important element in the history of peoples, nations and their relations with each other. At the same time, paragraph 9 recognizes that underwater cultural heritage should be preserved for the benefit of humankind and that therefore responsibility for its protection rests not only with the States which are most directly concerned with a particular activity affecting the heritage or having a historical or cultural link with it, but with all States and other subjects of international law. Thus, the philosophy of the Convention rejects any suggested opposition between "internationalism" and "nationalism" of cultural heritage. Underwater cultural heritage must be considered in its significance for peoples, nations and humanity as a whole.

Significantly, the Preamble mentions the irreparable damage that can be caused to underwater cultural heritage by unsupervised activities not respecting fundamental principles of underwater archaeology (paragraph 3) as well as by clandestine or unsupervised excavation (paragraph 9), and emphasizes the growing threats from various other activities, such as exploitation of natural resources, construction of artificial islands, installations and structures and laying of cables and pipelines (paragraph 5), whose damaging effect is often underestimated. The International Cable Protection Committee (ICPC) is of the view that there is no actual basis for classifying the laying of cables as a threat to underwater cultural heritage and that reference to cables should be deleted. However, it is self-evident that not all archaeological sites are detectable by non-specialists, or that many are associated with natural sites. Thus, even if major cable layers may take care to avoid destruction of archaeological sites, the potential for damage still remains. The same applies to potential threats from other seabed activities, such as exploitation of natural resources or construction of artificial islands and other installations. In this context, the proposed deletion of paragraph 5 (Italian amendment) or its restriction to exploitation of natural resources alone (US draft) seems unfortunate. Instead, the ICPC's (or other sea users') concern about infringement of their rights by the Draft Convention may be dealt with by either including a "without prejudice" clause,

[30] 1155 *U.N.T.S.* 331; 8 *ILM* (1969) p. 679.

preserving their rights as set forth in the LOS Convention[31] or by making the whole Draft a supplementary agreement to the LOS Convention.[32]

Equally threatening to underwater cultural heritage is the increasing commercialization of efforts to recover it and the availability of advanced technology that enhances identification of and access to wrecks (paragraph 4). Nevertheless, co-operation among States, museums and other institutions, salvors, divers and their organizations is considered essential for the protection of underwater cultural heritage (paragraph 6). The inclusion of "salvors" made this key statement controversial; as a result, Latin American and Caribbean States proposed its deletion from paragraph 6.

Another crucial statement is that the exploration, excavation, and protection of underwater cultural heritage necessitate the application of special scientific methods and the use of suitable techniques and equipment (paragraph 7). However, as the last paragraph of the Preamble suggests, the best way of protecting underwater cultural heritage is to keep it in place *(in situ)* unless its removal is necessary for scientific or protective purposes. Thus, all efforts must be made to prevent unscientific excavation and retrieval of heritage. Also important is paragraph 11, which mentions that information and multidisciplinary education about underwater cultural heritage will enhance the awareness of the public and its appreciation of the significance of this important source of historical material.

Finally, a key statement for the interpretation and implementation of the Convention is to be found in paragraph 10, where the need to codify and progressively develop rules relating to the protection of underwater cultural heritage is subject to conformity with international law and practice, including the LOS Convention, which now has 130 Parties. This reference is crucial in that it clarifies that the Draft Convention seeks to fulfill its objectives within the general framework of the LOS Convention. Thus, the proposed deletion of the reference to the LOS Convention seems unfortunate, especially in the light of the recent debate on the Draft's compatibility with it.

So far as the proposed new preambular paragraphs are concerned, there would appear to be no objection, as a matter of principle, in relation to paragraph 7 mandating respect for war graves and in general underwater sites containing human remains. However, the proposed paragraphs 8 and 13 are rather controversial. The issue of flag State

[31] A similar proposal was submitted by the Italian delegation, see amendments to Article 2, p. 20.

[32] A useful parallel is provided by Article 4 of the Straddling Fish Stock Agreement, which reads: "Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under 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 the United Nations Convention on the Law of the Sea." As already seen, GA Resolution 53/32 refers to the UNESCO/DOALOS Draft as an implementation agreement of the LOS Convention.

jurisdiction over sunken warships and other public vessels raised much controversy during the first meeting of governmental experts making such a clear statement in the Preamble of doubtful acceptability. Similarly, a statement on the eventual harming or destruction of natural resources by archaeological activities seems unnecessary. By definition, the management of underwater cultural heritage in compliance with the principles laid out in the ICOMOS Charter for the Protection and Management of the Underwater Cultural Heritage (hereafter cited as "ICOMOS Charter") respects the context in which the cultural heritage is found so that it can hardly pose a threat to surrounding natural resources.

Article 1
Definitions

For the purposes of this Convention:

1. *(a) "Underwater cultural heritage" means all traces of human existence underwater for at least 100 years, including:*

(i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural contexts; and

(ii) wreck such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context.

(b) Notwithstanding the provision of paragraph 1(a), a State Party may decide that certain traces of human existence constitute underwater cultural heritage even though they have been underwater for less than 100 years.

2. Underwater cultural heritage shall be deemed to have been "abandoned":

(a) whenever technology would make exploration for research or recovery feasible but exploration for research or recovery has not been pursued by the owner of such underwater cultural heritage within 25 years after discovery of the technology; or

(b) whenever no technology would reasonably permit exploration for research or recovery and at least 50 years have elapsed since the last assertion of interest by the owner in such underwater cultural heritage.

3. "Charter" means the "Charter for the Protection and Management of the Underwater Cultural Heritage" adopted by the International Council of Monuments and Sites (ICOMOS) at Sofia 1996, the operative provisions of which are annexed to this Convention.

4. "States Parties" means States which have consented to be bound by this Convention and for which the Convention is in force.

Proposed amendments

- *Paragraph 1*

[Chinese proposal] Insert "according to its law" after the word "heritage" in paragraph 1(b).

[US draft]

"Underwater cultural heritage means objects of prehistoric, archaeological, historical or cultural significance found underwater on or under the seabed, and which has been underwater for at least 50 years, including:

(i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural contexts; and

(ii) wrecks, such as their vessels, aircraft, other vehicles or any part thereof, their cargoes or other contents, together with their archaeological and natural context.

- *Paragraph 2*

[US draft] Delete paragraph 2.

[Latin-American/Caribbean proposal] Add new sub-paragraph c:

"The concept of abandonment does not apply to the underwater cultural heritage found in waters over which States Parties exercise jurisdiction".

- *Paragraph 3*

[US draft] [as paragraph 2]

"This Convention" includes the annexed International Rules for the protection and management of underwater cultural heritage."

- *Paragraph 4*

[US draft] Delete paragraph 4.

- *New paragraphs*

[Spanish proposal]

"5. The property and remains of a shipwrecked vessel whose national flag is known to be of a State Party shall not be deemed abandoned unless the said State explicitly declares its intention to abandon them".

COMMENTARY

1.1. A precise definition of the concept of "underwater cultural heritage" is very important since it delimits the scope of application of the Convention. The proposed definition, which is a combination of Articles 1(1) and 2(1) of the ILA Draft, includes a list of certain categories of material in addition to the general reference to "all underwater traces of human existence". The main reason for adopting a specific definition of underwater cultural heritage and not a more philosophical one, as for example the one contained in the 1992 European Convention on the Protection of the Archaeological Heritage (Revised), is to make it easier for administrators and courts to decide if a particular item is covered by the Convention or not.[33] The proposed definition is likely to include all aspects of the underwater cultural heritage of significance to the history of humanity. Most importantly, the context in which objects are found is itself specified as part of the underwater cultural heritage.

1.2. The definition is further qualified by the requirement that the protected objects have been submerged for at least for 100 years with potential discretionary inclusion of objects which have been underwater for less than 100 years. As already seen, the 100-year underwater qualification also appears in Recommendation 848(1978) of the Council of Europe, while the Draft European Convention employs, in addition to the qualitative criteria for protection, a fixed time period of 100 years. The 100-year underwater rule would appear to be more appropriate as, first, it avoids the undesirable situation in which the owner of an old vessel that has sunk cannot salvage his property, unless permission is obtained from the competent authorities and, second, it is useful in distinguishing the scope of application of heritage legislation from that of salvage law. Since the protected cultural property is required to have remained underwater for at least 100 years, it will almost certainly be in equilibrium with its environment. The equilibrium is normally reached after a few decades when decomposition slows down and there is little danger of further deterioration. It is, obvious, therefore, that one of the essential elements of the notion of salvage, that of "marine peril" is lacking.[34]

---

[33] *Op. cit.* note 1 at p. 406.

[34] See further Prott, L.V. and O´ Keefe, P.J. *The Law and the Cultural Heritage, vol. 1, Discovery and Excavation*, Professional Books Ltd, 1984 at p. 178.

1.3. During discussion at the first meeting of governmental experts, the period of 100 years underwater appeared to receive the support of most delegates. However, there were suggestions for the adoption of a period of 50 years or the year 1945 as the temporal limit. As a result, the Chairman proposed either the adoption of a 50-year limit without the possibility for States to provide for shorter limits in certain cases, or a 100-year limit allowing States to consider certain objects submerged for less than 100 years, in other words to retain the existing formula. Furthermore, some experts proposed that Article 1(1) should specifically refer to cargo jettisoned at sea. However, an express reference does not seem necessary since cargo lost at sea falls within the scope of sub-paragraph (a)(i), which protects individual items and artefacts found underwater. Others suggested that the definition should not be limited to human activity only, but should also include paleontology. [35] Certain other delegates felt that the definition was too broad, the reference to "all traces of human existence" being over-inclusive. Finally, there were proposals to the inclusion of the underwater cultural heritage of indigenous peoples as an integral part of the common heritage of mankind, as well as of cultural landscapes. The cultural heritage of indigenous peoples, which has recently been protected under the UNIDROIT Convention on Stolen or Illegally Exported Goods,[36] undoubtedly constitutes part of the common heritage of mankind. However, it would be more appropriate to include such a reference in the Preamble and more specifically in paragraph 1, which refers to the importance of underwater cultural heritage as an element in the history of peoples and nations. So far as the inclusion of cultural landscapes is concerned, it should be noted that this issue had been raised by some States in their written statements on the UNESCO/DOALOS Draft; more specifically, they proposed the inclusion of "natural sites", "sites and landscapes", "landscapes of great importance for the understanding of history" as well as "underwater landscapes of cultural interest". However, these proposals would require management provisions other than the ICOMOS Charter, while reference should be made to other international instruments, such as the UNESCO Convention for the Protection of the World Cultural and Natural Heritage (1972).[37]

1.4. The definition proposed by the US draft employs the criterion of archaeological and cultural significance in addition to a period of fifty years underwater. However, it is not clear how to determine the archaeological value of an object, before its removal. One

---

[35] It is notable that neither the ILA Draft nor the Draft European Convention include paleontological finds. However, an earlier version of the ILA Draft specifically referred to "fossilized and non-fossilized paleontological and other pre-historic specimens". Moreover, objects of paleontological interest are protected under the terms of the 1970 UNESCO Convention on the Means of Protecting the Illicit Import, Export and Transfer of Ownership of Cultural Property, 10 *ILM* (1971) at p. 289.

[36] See Articles 3(8), 5(3)d and 7(2) of UNIDROIT Convention, 34 *ILM* (1995) p. 1322. As argued, the term "indigenous" may be interpreted by reference to the considerable documentation, which has developed within United Nations practice. See Prott, L., *Commentary on the UNIDROIT Convention,* Institute of Art and Law, 1997 at p. 40.

must explore first in order to assess the archaeological or historical importance of a particular site. On the contrary, the blanket protection of all wrecks and sites over a certain age allows the investigation of a site to assess its importance before interference takes place.

1.5. One of the most controversial provisions of the Draft Convention is Article 1(2), which establishes a presumption of abandonment. The reason for adopting this provision in the first place, was to avoid the complex issues associated with ownership and restrict the application of the Convention to "abandoned" underwater cultural heritage – usually wrecks.[38] The requirements of abandonment differ between jurisdictions and are often difficult to prove due to lack of the requisite evidence. To overcome this problem, a number of States have enacted legislation whereby abandonment is deemed after the passage of a very short period of time, even after three years. In view of this uncertainty and its potential effect on the scope of the Convention, Article 1(2) attempts to define abandonment with more precision, but at the same time to preserve the reasonable rights of owners. The underlying notion is that abandonment takes place when the technology for reaching the wreck has existed for 25 years but the owner has not utilized it in recovery operations. In cases, where technology does not exist, the owner has to make assertions of interest every 50 years in order to keep the claim afloat.

1.6. The establishment of a presumption of abandonment is unique in international legislative practice. It is notable that none of the cultural conventions incorporate provisions in relation to the thorny question of *ownership* which is thus left open to domestic legislation. A number of them simply state that national laws are not to be affected; States are, therefore, free to adopt whatever principle they prefer. Only the Draft European Convention employs the "without prejudice" formula of Article 303(3) of the LOS Convention and specifically upholds the rights of identifiable owners. To uphold rights of ownership, however, does not mean that the particular heritage is not protected, since the identity of the owner of a relic at the time of its discovery does not dictate the degree of protection afforded to it.[39]

To sum-up, questions of ownership of submerged cultural heritage can be enormously complex. Comparative legal research will show that the legal status of historic shipwrecks and their cargoes in entangled within the various wreck, salvage and heritage laws, which differ between legal systems. The absence of international principles on the question of

---

[37] 11 *ILM* (1972) p. 1358. See also Recommendation No (95) 9 of the Committee of Ministers of the Council of Europe on the integrated conservation of cultural landscapes as part of landscape policies.

[38] In both common and civil law systems, a shipowner does not lose title to his vessel merely by its sinking. For a wrecked vessel to be considered abandoned (*res derelictae*), an effective act of abandonment must be proven.

[39] This is evidenced by the fact that the same types of control are utilised by both States with a strong commitment to private ownership and those favouring public ownership.

ownership indicates the reluctance of the international community to regulate this controversial issue, which is left open to domestic legislation. The UNESCO/DOALOS Draft does not deal with the question of title, as it is directed at interference with cultural heritage and the quality of the work done in relation to that heritage. However, the inclusion of a presumption of abandonment affects ownership indirectly.

1.7. During the meeting of governmental experts there were differences of opinion between lawyers and archaeologists over the concept of abandonment. It was argued that this concept cannot apply to underwater cultural heritage and that it does not exist in the national laws of some countries. For this reason, it should be a matter for the legislation of each State alone. There was also concern about the reference to "access to and the use of technologies". It was argued that this criterion would prejudice developing States, which do not have the means of using a technology, even if it exists; it was therefore proposed to either delete the reference to advanced technology or reformulate it. In addition, the difficulty of assessing the criterion of advanced technology was raised. The Chairman proposed that the term "abandoned" be deleted from the definition and that the question of title should not be dealt with by the Convention. It was stressed, however, that all underwater cultural heritage should be protected, regardless of ownership. In other words, the owner of a wreck may use it, but only with the consent of and according to the conditions established by the competent authorities.

1.8. The proposed paragraph 5 (Spanish proposal) appears to confuse flag-State jurisdiction with ownership rights; the identifiable flag State cannot abandon the vessel, unless of course it is also the owner. As regards the amendment proposed by Latin-American and Caribbean countries to apply the concept of abandonment only to cultural heritage found in areas beyond the jurisdiction of parties, it must be noted that its adoption will result in the application of two different regimes under the same legal instrument with major practical difficulties. The same applies to Japan's proposal to differentiate between areas landward and seaward of the outer limit of the contiguous zone with respect to the application of Article 1(1)(b) of the Draft Convention.[40]

[40] According to Japan's comments, Article 1(1)(b) which allows a State Party to decide that certain traces of human existence constitute underwater cultural heritage notwithstanding the 100 year criterion given in sub-paragraph (a), is problematic and should be redrafted. "A provision may describe the fact that, in the internal waters, territorial sea and the contiguous zone, the coastal State can decide certain traces of human existence to constitute underwater cultural heritage, notwithstanding paragraph (a); and another provision may allow any States to do seaward beyond the contiguous zone, as far as it is applicable to its nationals and its vessels". However, there seems to be confusion over the application and function of Article 1(1)(b). In Japan's view, "the current paragraph (b) as it stands cannot be applicable in internal waters, territorial sea and the contiguous zone, because it would read as if it is infringing upon this very sovereign right of the coastal State, by allowing any State to define such matters." Article 1(1)(b), which simply expands the scope of application *ratione materiae* of the Convention, functions within the therein established jurisdictional limits. Thus, within marine spaces falling under coastal sovereignty, the respective coastal State will determine whether to include objects which have been underwater for less than 100 years. The same applies to underwater cultural heritage

1.9. Paragraph 3, which defines the term "Charter" used in the Convention, may have to be redrafted if the operative provisions of the Charter are adopted as part of the Convention. During discussion, the status of the Charter in relation to the Convention was debated. However, no formal proposal was submitted for amending paragraph 3, with the exception of the US draft.

1.10. Paragraph 4 is self-explanatory. However, the Turkish proposal to substitute the term "States" for "States Parties" in the whole text "in order to give the Convention a universal effect and also to comply with the existing rules of international law, particularly with the customary rules of international law in the field", is not consistent with the law of treaties. Admittedly, both the LOS Convention and the Straddling Fish Stock Agreement refer either to States Parties or States or even to all States as subjects of rights and obligations. In spite of this wording, the rules of the 1969 Vienna Convention on the effect of treaties on third States remain applicable.[41] As a result, neither instrument creates rights and obligations directly *vis-à-vis* third parties. To the extent that they codify customary law, they bind third parties according to the rule of Article 38 of the Vienna Convention, while third States may accept the rights and obligations enshrined in their provisions under the terms of Articles 35 and 36 of the Vienna Convention.

---

found in the contiguous zone, or the continental shelf/EEZ where the particular State has exercised the control envisaged under Article 5 of the Draft Convention.

[41] Wolfrum, R., "Legal order of the seas and oceans" in Nordquist, M.H. and Moore, J.N. (eds), *Entry into Force of the LOS Convention,* Proceedings: Eighteenth Annual Seminar, Center for Oceans Law and Policy, 1994, pp. 161-185. See also Orebech, P., Sigurjonnson, K. and McDorman, T., "The 1995 United Nations Straddling and Highly Migratory Fish Stock Agreement: Management, Enforcement and Dispute Settlement", 13 *IJMCL* (1988) pp. 119-141 at 123.

Article 2

Scope of application of the Convention

1. *This Convention applies to underwater cultural heritage which has been abandoned according to Article 1, paragraph 2.*
2. *This Convention shall not apply to the remains and contents of any warship, naval auxiliary, other vessel or aircraft owned or operated by a State and used, at the time of its sinking, only for non-commercial purposes.*

Proposed amendments

- *Paragraph 1*

[Latin-American/ Caribbean proposal] Delete the reference to paragraph 2.

[Spanish proposal] Add the following: "....and with the exception of the provisions of paragraph 5".

[US draft]

"This Convention applies to underwater cultural heritage as defined in Article 1. This Convention does not apply to underwater cultural heritage recovered prior to the date of entry into force of the Convention".

- *Paragraph 2*

[Latin-American/Caribbean proposal][US draft] [42]Delete paragraph 2.

- *Proposed new paragraphs*

[Italian proposal]

"3. Nothing in this Convention shall in any way prejudice the rights relating to submarine cables and pipelines as set forth in articles 79, 87, para.1(a), and from 112 to115 of the United Nations Convention on the Law of the Sea".

[US draft]

"2. Underwater cultural heritage shall not be considered "natural resources", as that term is used in the 1982 United Nations Convention on the Law of the Sea.

3. Nothing in this Convention affects freedom of the high seas or the rights and responsibilities of States in regard to the exclusive economic zone, continental shelf, marine scientific research or the marine environment in accordance with international law, including the 1982 United Nations Convention on the Law of the Sea.

4. The legal regime of marine scientific research contained in Part XIII of the Law of the Sea Convention does not apply to activities related to underwater cultural heritage".

- *New article 2 [Chairman's proposal]*

"1. States will take all necessary measures to protect all underwater cultural heritage and shall co-operate to do so. The laws of salvage do not apply to such vessels, aircraft, or to their associated contents, which have been underwater for at least 50 years.

2. A State Party shall not salvage nor permit the salvage of vessels or aircraft, or their contents and associated remains, to which the flag State or the capturing State retains title, without the express permission of the flag or capturing State."

COMMENTARY

2.1. According to paragraph 1, the Convention covers only abandoned underwater cultural heritage. As already stated, during discussion at the first meeting of governmental experts, there were many objections to the concept of "abandonment" appearing in Article 1(2). As a result, many experts were in favour of either dropping

[42] Relevant issues are dealt with in Article 3(4) of the US draft, see p. 24.

Article 2(1) or deleting the reference to Article 1(2) so as to apply the Convention to all cultural heritage.

2.2. Paragraph 2, which excludes warships (and vessels or aircraft owned or operated by a State) from the scope of application of the Convention, is also highly controversial. The decision to exclude warships was taken after studying the attitude of major maritime powers expressed in treaties and other actions regarding such wrecks. It was obvious that those States regarded their ownership and control of these wrecks as subsisting even though more than a century had passed; notwithstanding that, other States may have control over access to the wreck because of its position within territorial waters. The subject raises serious and complex issues of sovereign immunity, which are beyond the scope of this Convention.

2.3. There is an overall absence of rules of international law, including the LOS Convention, on the legal regime of wrecks. As a result, this area remains subject to great uncertainty. It is beyond doubt that warships and State-owned or operated vessels used only on government non-commercial service, enjoy complete immunity from the jurisdiction of any State other than the flag State on the high seas (c.f. Articles 95 and 96 of the LOS Convention). As a corollary to the rule of immunity, they are exempted from the application of numerous international treaties, such as the Brussels Convention (1910) or the 1989 Salvage Convention. However, it is debatable whether *sunken* warships and public vessels still qualify as ships submitted to the exclusive jurisdiction of their flag State and enjoying immunity.[43] Even if it is accepted that recovery operations on the high seas may be undertaken by any State,[44] the ownership of a sunken vessel is not impaired or lost. For such a situation to occur, abandonment of the ship in question must be proven first. With respect to warships and other public vessels, abandonment is very difficult to prove, especially when national law requires the explicit renunciation of title. It has been suggested that such vessels retain their status as public property and that,

---

[43] See further Strati, *op.cit.* note 6 at pp. 220-222, and the therein cited bibliography. In the course of the negotiations of UNCLOS III, a number of proposals, mainly made by eastern European countries, suggested that ships and aircraft sunk beyond the limit of the territorial sea, as well as equipment and cargo on board, may be salvaged only by the flag State or with the flag State's consent. With the passage of time, the scope of these proposals was restricted to sunken warships and vessels owned or operated by a State and used only for government non-commercial purposes. However, none of these suggestions found their way into the Final Text of the Convention. Even the amendments which reserved to the coastal State the prior right to carry out salvage operations in case the services of a third State were required for the salvaging of ships and aircraft sunk in the EEZ, were not acceptable (C.2/Informal Meeting/57, 20 March 1980). "It is not easy to ascertain the reason for the failure of the Soviet block proposals, since official records make no mention of it. It has been argued that the coastal State could complain of the long presence of foreign vessels in its EEZ due to recovery operations. Furthermore, the coastal State could be interested, in case of dangerous or polluting wrecks, in intervening rapidly". Migliorino, L., "The Recovery of Sunken Warships in International Law" in Vukas, B. (ed.), *Essays on the Law of the Sea*, Sveucilisna naklada Liber, Zagreb, 1985, pp. 244-258 at p. 249.

[44] According to Migliorino, the sunken warship, having lost its previous warship characteristics, is subject to the same rules as any other sunken wreck. As a result, the freedom of the recovery of sunken military vessels applies on the high seas. *Ibid.*

therefore, "the State can prohibit any physical interference with that property even to the point of allowing its remains to lie on the bottom of the sea".[45] This conclusion is confirmed by a number of cases where coastal States had even asked the permission of the flag State to recover warships from their territorial sea. After having been denied permission, they did not recover the sunken warships. It seems, however, that in these instances in question was not the legality of the recovery operations, but the right of disposal of the wrecks concerned.[46] To conclude, current practice suggests that public vessels used for non-commercial purposes and warships retain their status as State property so that their recovery may[47] require the consent of the flag State.

2.4. Several experts proposed that if Article 2(2) were to remain, then there would be need to define precisely its scope of application so that only contemporary warships would be excluded from the Convention. In this respect, the year 1945 as a cut-off date seemed to be a reasonable time limit. In addition, a period of 100 or 50 years underwater was suggested. However, no formal amendments in this respect to Article 2(2) were proposed. Others argued for the deletion of Article 2(2) of the Draft. In particular, experts from Latin American and Caribbean States stressed the fact that the exclusion of warships from the field of application of the Convention, together with the 100-year limit would make the Convention meaningless. According to another view, immunity was crucial regardless of any time limit so that it should not be affected in any way by the Convention. It was also emphasized that the legislation of the flag State should have priority, unless there is an express renunciation of title. Special attention was also paid to wrecks representing war graves, although some experts thought that international rules protected them sufficiently and there was no need for the adoption of specific measures. Finally, reference should be made to Article 3(4) of the US draft, which provides that title to any warship or public vessel remains vested in the flag State, unless title is expressly abandoned or the vessel is captured before sinking in time of war. The laws of salvage and finds should not apply to such vessels which have remained underwater for at least 50 years, while a Party shall not permit the "salvage" of vessels to which the flag State or

---

[45] Eustis III, F.A., "The *Glomar Explorer* incident: implications for the law of salvage", 16 *V.J.I.L.* (1975) pp. 117-185 at p. 186. See also Galenskaya, L.N., "International co-operation in cultural affairs", *Hague Recueil* (1986-III) pp. 265-331 at p. 302: "In particular, naval ships are the property of a State and under the rules of State succession those States have all the rights to the wrecked ships. We cannot consider them as a prize of war or a war victim because these ships were lost in battle".

[46] Migliorino, *op. cit.* note 43 at p. 254.

[47] See also Roucounas, E., "Submarine Archaeological Research: Some Legal Aspects" in Leanza, U. (ed.), *The International Legal Regime of the Mediterranean Sea,* Giuffre editore, 1987, pp. 309-334 at p. 331: "It would therefore be more cogent with the interests at stake to say that, depending on the circumstances of each case, the flag State would have to relinquish ownership in the case of warships. Some writers maintain that States must indeed relinquish their ownership over warships but we do not have enough evidence to support this position", and more recently Caflisch, L., "La condition des epaves maritimes en droit international public" in *Droit et Justice*, Melanges Nicolas Valticos, Pedone, 1999, pp. 67-89 at p. 86, who argues that public vessels, regardless of where they are found, are covered by the immunity of the flag State to the extent that the latter demonstrates its intention to remove them.

the capturing State retains title, without its express permission. As already seen, the US draft has adopted the 50-year underwater rule as criterion of protection of underwater cultural heritage; hence the relevant reference in draft Article 3(4). However, the exclusion of salvage law should apply to all wrecks protected under the Draft Convention and not only to warships and other public vessels.

To sum-up, there were two points of view on the issue of immunity of warships: (a) to exclude warships from the Convention, and (b) to include them and set up the conditions under which they would enjoy sovereign immunity. The Chairman proposed that the Convention should apply to warships and other government ships submerged for more than 100 years. However, after consulting the Bureau, he suggested certain principles as a basis for a new draft of this article. Under this compromise formula, which excludes the law of salvage from all vessels and aircraft which have been underwater for at least 50 years, a State Party shall not "salvage" nor permit the "salvage"[48] of vessels, to which the flag State or capturing State retains title, without their express permission. This proposal reflects the discussion at the meeting and may provide a workable solution; it may be advisable, however, to delete the reference to the capturing State as it may complicate things unnecessarily. Furthermore, the reference to "vessels ... to which the flag State ... retains title" in the Chairman's draft may also cover public vessels, used for commercial services, which do not enjoy immunity under international law.

2.5. So far as the proposed new paragraphs are concerned, paragraph 3 suggested by the Italian delegation endorses the proposal submitted by the ICPC with respect to submarine cable and pipelines, while Article 3(3) of the US draft has a wider scope by reserving the freedom of the high seas and the rights and responsibilities of States with regard to the EEZ, the continental shelf, marine scientific research and the marine environment in accordance with international law, including the LOS Convention. However, there would seem to be no point in including two paragraphs, as suggested by the US draft (paragraphs 2 and 4), interpreting terms used by the LOS Convention in a treaty protecting the underwater cultural heritage, even if there is no objection as to their substance. One means to avoid unnecessary duplication would be to make the new instrument a supplementary agreement to the LOS Convention.

[48] In this context, it seems preferable to substitute "salvage" with "recovery" or "removal".

Article 3
General Principle

States Parties shall preserve underwater cultural heritage for the benefit of humankind.

Proposed amendments

- *Article 3*

[Turkish proposal]

"States within their areas of jurisdiction and also taking into account their sovereign rights, shall preserve the underwater cultural heritage for the benefit of mankind".

[Chinese proposal]

"1. States Parties shall preserve underwater cultural heritage through international co-operation for the benefit of humankind.

2.State Parties should take all necessary measures to prevent the commercial exploitation of underwater cultural heritage".

[US draft]

"1. States Parties shall protect underwater cultural heritage and shall co-operate for that purpose in accordance with this Convention.

2.Underwater cultural heritage found beyond the limits of national jurisdiction shall be preserved or disposed of in accordance with this Convention for the benefit of humankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical or archaeological origin.

3. States Parties shall facilitate multiple use of underwater cultural heritage, including research, education, public and private access and, where appropriate, recovery, consistent with this Convention.

4. Title to any warship, naval auxiliary or other vessel or aircraft owned or operated by a State and, used, at the time it sank, only for government non-commercial purposes, and to their associated contents, remains vested in the flag State of the vessel or aircraft, unless title is expressly abandoned, or relinquished in accordance with the law of the flag State, or the vessel is captured before sinking in time of war, and shall not be lost by the mere passage of time. The laws of salvage and finds do not apply to such vessels, aircraft, or to their associated contents, which have been underwater for at least 50 years. A Party shall not salvage or permit the salvage of vessels or aircraft, or their contents and associated remains, to which the flag State or the capturing State retains title, without the express permission of the flag or capturing State".

- *New article 3bis*

Applicability of the Law of Salvage and Finds

[US draft] To be considered.

COMMENTARY

3.1. This article encapsulates the principle of Article 149, cast as a general duty rather than applying only in a specific maritime area, as in the LOS Convention. Moreover, since the duty is one of preservation, no mention is made of disposal as in Article 149; necessary disposal of underwater cultural heritage should be done in such a way as to preserve it.

3.2. Article 3 is in line with other international instruments protecting cultural heritage for the benefit of mankind. The Hague Convention for the Protection of Cultural Property in

the Event of Armed Conflict (1954)[49] declares in its Preamble that damage to cultural property belonging to any people whatsoever is "damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world", while the World Heritage Convention recognises the duty of the international community as a whole to co-operate in the conservation of a heritage which is of outstanding universal value. Similarly, the UNESCO Recommendation for the Protection of Movable Cultural Property (1978) provides that "movable cultural property representing the different cultures forms part of the common heritage and every State is therefore morally responsible to the international community as a whole for its safeguarding". Up to the present time, the concept of "common heritage of mankind" has been viewed in terms of preservation and protection; a view that although adhering to the idea of a State's position of custodian does not in fact challenge its property rights. However, all these instruments confine their territorial scope of application to the national territories of States parties.

3.3. With respect to cultural heritage found in extraterritorial waters, the issue arises whether the elaboration of the notion of the common heritage of mankind in a more concrete form is needed. This may be true as regards the machinery for protection; setting up an international or a regional organ to exercise effective supervision over cultural heritage in international waters would be essential. Nevertheless, as pointed out, "the establishment of a global regulatory body would seem unrealistic at this time. The best alternative would be to allocate control of underwater cultural heritage to States, subject to clear international standards. The Draft Convention on the Protection of Underwater Cultural Heritage might begin by requiring States to exercise jurisdiction on a mixture of territorial and nationality jurisdiction principles".[50] The LOS Convention addresses this issue only with respect to archaeological and historical objects found in the Area, which are to be preserved or disposed of for the benefit of mankind as a whole.[51] One may therefore raise the following questions: Is there no need to protect archaeological and historical objects found on the continental shelf beyond the 24-mile limit for the benefit of mankind as a whole? Does the international community lose its interest in the protection of cultural heritage found within marine spaces under coastal jurisdiction? The Draft Convention aims at "filling" this gap.[52] No reference, however, is made in this context to the preferential rights of the State of origin, not even with respect

---

[49] 294 *U.N.T.S.* 215.
[50] *Op. cit.* note 1 at p. 402.
[51] The benefit of mankind as a whole under Article 149 differs in nature from this concept when used generally in the Area, where it is mainly confined to the distribution of wealth acquired by the exploitation of mineral resources. Under Article 149, the "benefit of mankind as a whole" should primarily be regarded as cultural and educational. See further Strati, *op. cit.* note 6 at pp. 879-882.
[52] In this context, the Turkish proposal to restrict the territorial scope of application of Article 3 to areas under coastal jurisdiction, would not seem to be acceptable.

to the Area, as suggested by the US draft. It was thought that the obscure language of Article 149, which uses three formulas in order to determine the State(s) of origin, would create difficulties in practice. Nevertheless, the interests of States having a historical or cultural interest in the protected underwater cultural heritage are taken into consideration in the context of other provisions, namely Article 11 on notification requirements and treatment of seized underwater cultural heritage, Article 12 on the disposition of underwater cultural heritage, and Article 13 on collaboration and information sharing.

3.4. During the meeting of governmental experts there was general consensus for redrafting/expanding Article 3, although there was not much detailed discussion about its content. Many experts wanted to add to this article the idea of international co-operation covered in Article 13. Furthermore, it was suggested that stronger wording was needed so that all necessary measures should be taken to hinder commercial exploitation of the underwater cultural heritage. In this respect, the Chinese proposal to include a separate paragraph dealing with this issue is welcome. A similar approach is undertaken by Article 3bis of the US Draft, without, however, taking a position on this issue, i.e. whether to include or exclude salvage law. In addition, the US draft proposed the obscure and rather controversial notion of "multiple user" (paragraph 3). It should be recalled that the ILA Draft excludes the law of salvage (Article 4), while the UNESCO/DOALOS Draft Convention deals with relevant issues in Article 12(2).

3.5. The essence of the law of salvage lies in the compensation of the salvor for rescuing maritime property in distress. The protection of underwater cultural heritage has never been an objective of this ancient maritime law. The salvor works for profit and this is reflected in the manner in which salvage operations are conducted. A good salvage practice might be one that destroys "piecemeal" a marine archaeological site, or neglects to record any of the finds. It is notable that in the few cases where admiralty courts required the application of archaeological principles in salvage operations, there was controversy as to whether salvors complied with it.[53] It will, no doubt, be difficult to disprove the claim of a salvor as to the nature of the work done and, in any case, this will only become an issue after the damage has been inflicted. For these reasons, the exclusion of salvage law has been recommended by Recommendation 848 (1978) of the Council of Europe as a minimum requirement of the legal protection of underwater cultural heritage at national level. Most importantly, the 1989 Salvage Convention reads in Article 30(1):

[53] To date this has not been done in circumstances involving a classic excavation. See further Strati, *op.cit.* note 6 at p. 49.

"Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply the provisions of this Convention: (d) when the property involved is maritime cultural property of prehistoric, archaeological or historical interest and is situated on the seabed". [54]

The reservation of salvage and admiralty law under Article 303(3) of the LOS Convention[55] should be interpreted to refer to cases in which archaeological and historical objects are not involved, i.e., recent objects which do not possess historical value and which are eligible for salvage. As already seen, the use of a fixed period of 100 years underwater as a qualifying factor of protection is a reasonable limit both for the determination of the scope of salvage law and the interpretation of "historical" and "archaeological" objects.[56] Article 303(3) simply emphasizes the fact that the proposed scheme of protection will not abolish the law of salvage. There is nothing in Article 303 to indicate that the commercial interests of private salvage companies should be given more weight than the protection of underwater cultural heritage. Most importantly, Article 303(3) does not prevent future Conventions from modifying or excluding the law of salvage; it refers specifically to the operation of this article and would appear to have been inserted as a safeguard, in case of derogation.[57]

3.6. Finally, reference should be made to a Russian proposal requiring all finds and discoveries of underwater cultural heritage to be reported to the authorities of the flag State, coastal State (if the discovery is made within the internal waters, territorial sea, contiguous zone, EEZ or continental shelf), to the States mentioned in Article 149 of the LOS Convention, as well as to UNESCO. In a case where the find or discovery is made in the Area, the ISA should also be informed. UNESCO and the ISA, as appropriate, are to keep a database with information about such finds and discoveries and provide the relevant information to States at their request. The Russian proposal seems impracticable as it provides for notification of a large number of States which are not always identifiable,[58] and also controversial to the extent that it envisages the possibility of States acquiring information through UNESCO about finds and discoveries of underwater cultural heritage found even in the internal and territorial waters of another State.

---

[54] To date, 12 States have submitted such reservations.
[55] Article 303(3) provides that "nothing in this article affects the law of salvage or others rules of admiralty". A similar provision is contained in Article 18(2) of the Draft European Convention.
[56] One would not, therefore, agree with the view that Article 1 "by defining maritime wrecks automatically as underwater cultural heritage, thus allowing States to bring maritime wrecks of whatever vintage under their protection, it seems to be establishing a recipe for violations of Article 303(3) of the LOS Convention". Allain, *op.cit.* note 19 at p. 771.
[57] *The Underwater Cultural Heritage: Comparison of Relevant International Instruments and Discussions at UNESCO Expert Meeting,* CLT-96/CONF.202/4, June 1998 at p. 4. However, this debate concerns only wrecks found in extra-territorial waters. Within marine spaces under coastal sovereignty, any potential conflict between admiralty law and heritage legislation will be determined by the domestic law of the coastal State.
[58] See also below pp. 33-34.

Article 4

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 affecting 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 take all necessary measures to ensure that, at a minimum, the operative provisions of the Charter be applied to activities affecting underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.*

Proposed amendments

- *Paragraph 1*

[Spanish proposal] Add the contiguous zone both in the title given to this article and in paragraph 1.

[Russian proposal][59]

"The coastal State has jurisdiction to regulate exploration and removal activities related to underwater cultural heritage, in the internal maritime waters and territorial sea and in the contiguous zone, with due regard for the interests of States mentioned in article 149, for which purpose it will consult them. It will issue relevant permits and authorizations".

[US draft]

"Subject to article 3(4), States Parties in the exercise of their sovereignty, have the exclusive right to regulate and authorise activities affecting underwater cultural heritage in their internal waters, archipelagic waters and territorial sea".

- *Paragraph 2*

[US draft] Substitute "the provisions of this Convention" for "operative provisions of the Charter".

COMMENTARY

4.1. The primary object of the Draft Convention is the protection of underwater cultural heritage in international waters. Cultural heritage found in marine spaces under coastal sovereignty, namely internal waters, territorial sea and archipelagic waters, falls within the exclusive jurisdiction of the coastal State. As a large number of States apply the same rules to land and underwater archaeology, any attempt to apply the requirements of the Convention in these areas would require changes in their national laws.[60] Furthermore, such laws may provide stronger protection in internal waters and the territorial sea. Thus, the Draft intends to establish a minimum set of rules concerning the protection of underwater cultural heritage in areas falling under the sovereignty of coastal States.

[59] The delegation of the Russian Federation proposed a set of principles as a basis for redrafting some of the articles of the Draft Convention.

4.2. Several arguments were made during the meeting of governmental experts in relation to Article 4. According to one view, no distinction should be made between the protection of underwater cultural heritage in the territorial sea and the contiguous zone on the one hand, and in the EEZ and on the continental shelf on the other. It was also suggested that Article 4 should include the contiguous zone. The reference to the contiguous zone also appears in the Spanish and Russian proposals as well as in the US draft, which, however, proposed it in substitution of Article 5 expanding coastal control over the continental shelf/EEZ. As already pointed out, Article 303(2) of the LOS Convention grants the coastal State the power to regulate underwater cultural heritage found within the 24-mile contiguous zone. However, the acknowledgement and strengthening of coastal jurisdiction in the contiguous zone should not substitute for control measures in the broader continental shelf area.

4.3. In the view of one expert, the phrase "activities affecting underwater cultural heritage" was too broad in scope and might interfere with other lawful uses of the seas, such as fishing, mining and cable-laying. Thus, it should be replaced by a more precise formula, such as "activities directed at" or "adversely affecting" underwater cultural heritage. Despite any objections one may have in the general use of the term "activities affecting underwater cultural heritage" in the Draft Convention, its inclusion in Article 4 does not create any problems, since in the maritime areas, to which this article refers, the coastal State exercises sovereignty and may regulate all such activities. Any potential conflict will be determined on the basis of coastal law with due regard to internationally recognised rights of passage.

4.4. Another argument was that the protection of Article 4 should extend to the heritage located in all internal waters and not simply in maritime areas. It should be recalled that within the context of the law of the sea, the legal notion of internal waters does not coincide with the geographical one, which includes lakes and rivers; instead, it has an exclusive maritime character. Thus, the protection of cultural remains in "fresh water" would require a provision along the lines of Article 1 of the Draft European Convention.

4.5. The Russian delegation proposed the consideration of the interests of the States of origin mentioned in Article 149 of the LOS Convention. This is an interesting proposal, since the LOS Convention does not accommodate such interests in any other maritime area than the deep seabed. Nevertheless, as will be discussed below, the determination of the State(s) of origin under Article 149 raises significant interpretation problems, while the recognition of their interests in territorial waters may be objected by some States,

---

[60] *Op. cit.* note 1 at p. 410.

even if this would only imply a duty of consultation. In any case, it would seem more appropriate to include such a provision in Article 3 dealing with general principles.

4.6. A final issue to be discussed concerns the rules which are applicable to internal, territorial and archipelagic waters under Article 4(2) of the Draft Convention. In its present form, Article 4 refers to the application at a minimum of the "operative provisions of the Charter". Does this mean that certain other provisions of the Convention, such as Articles 12 and 13 dealing with disposition of underwater cultural heritage and collaboration and information-sharing respectively are not applicable? There was some confusion over this issue at the meeting of governmental experts. It is notable that, under Article 4 of the US draft, "the provisions of the Convention" as a whole are applicable and not only the operative provisions of the Charter.

Article 5

Underwater Cultural Heritage in the Exclusive Economic Zone and on the Continental Shelf

1. *States Parties shall require the notification of any discovery relating to underwater cultural heritage occurring in their exclusive economic zone or on their continental shelf.*
2. *States Parties may regulate and authorize all activities affecting underwater cultural heritage in the exclusive economic zone and on the continental shelf, in accordance with this Convention and other rules of international law.*
3. *In authorizing any such activities, States Parties shall require compliance, at a minimum, with the operative provisions of the Charter, in particular taking into account the needs of conservation and research, including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education.*
4. *States Parties may deny authorization for the conduct of activities affecting underwater cultural heritage having the effect of unjustifiably interfering with the exploration or exploitation of their natural resources, whether living or not living.*
5. *States Parties shall make punishable all breaches of the terms of permits authorizing the conduct of activities affecting underwater cultural heritage.*

Proposed amendments

- *Paragraph 1*

[Turkish proposal]

"States due to their sovereign rights, if consent will be given for the purpose of exploration and exploitation, has the right to require the notification of any discovery relating to underwater cultural heritage occurring on their continental shelf or in the exclusive economic zone".

- *Paragraph 2*

[Turkish proposal]

"States have the right to regulate and authorize all activities whether affecting or not the underwater cultural heritage on the continental shelf or in the exclusive economic zone, taking due regard to the rights and freedoms of the third States recognised by the norms of international law on the concerned areas and also in accordance with this Convention".

- *Paragraph 3*

[Turkish proposal] The term "parties" should be deleted.

- *Paragraph 4*

[Turkish proposal]

"States, paying due regard to the recognised rights and freedoms of the other States, may deny authorization for the conduct of activities affecting underwater cultural heritage having the effect of unjustifiably interfering with the exploration or exploitation of their natural resources, whether living or not living."

- *Paragraph 5*

[Turkish proposal] The term "parties" should be deleted.

- *New paragraphs*

[Italian proposal]

"6. Nothing in this Convention shall prejudice the right of States bordering the same enclosed or semi-enclosed sea to conclude regional arrangements aiming at the preservation of their common cultural heritage".

- *New article 5*

[Russian proposal]

"Objects of underwater cultural heritage discovered outside the contiguous zone, shall not be removed until consultations are held and agreement is reached with the participation of the States mentioned in Article 149, flag State as well as coastal State (if the discovery is made within its EEZ or its continental shelf). Primary responsibility for co-ordination will rest with the flag State. However, if the flag State does not initiate such consultations within a reasonable time needed for a preliminary investigation of a discovery, any State mentioned in Article 149 as well as the coastal State may initiate consultations. After an agreement is reached, permits or authorizations will be issued by the flag State".

[US draft]

"Underwater cultural heritage in a zone contiguous to the territorial sea"

If a State Party claims a zone contiguous to its territorial sea pursuant to Article 33 of the 1982 United Nations Convention on the Law of the Sea, it shall adopt laws and regulations necessary to control all activities in that zone relating to the discovery and removal of underwater cultural heritage. This zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured."

COMMENTARY

5.1. Article 5 specifies the right of coastal States to regulate underwater cultural heritage on the continental shelf and EEZ. This article replaces Article 5 of the ILA Draft, which established a cultural heritage zone co-extensive with the continental shelf, as a compromise formula which seemed to reach some consensus at the Meeting of Experts for the Protection of Underwater Cultural Heritage, organised by UNESCO in 1996.[59] The reference to a cultural heritage zone in the original ILA draft has been omitted, but at the same time the coastal State "may regulate and authorize all activities affecting underwater cultural heritage in the EEZ and on the continental shelf" (paragraph 2). In authorizing such activities, States Parties shall require compliance at a minimum with the operative provisions of the Charter (paragraph 3). Thus, Article 5 creates no new zone nor refers expressly to "jurisdiction"[60] over underwater cultural heritage on the continental shelf/EEZ. Instead, it gives the coastal State the optional power to regulate and authorize activities affecting underwater cultural heritage in these areas.

5.2. Article 5 raised some opposition at the meeting of experts. Several participants equated Article 5 with the creation of an additional zone, while others suggested that the substance of this article amounted to an attempt to revise the LOS Convention. These participants proposed to delete paragraph 1 as well as any reference to the continental shelf or the EEZ. According to the same view, the regulation of access to archaeological

[59] "The group of experts and observers considered that it would be realistic for a future Convention to avoid referring to any new zone under coastal jurisdiction, even though some experts thought this the best solution. It was generally agreed to speak rather of the rights and duties of States beyond the territorial waters and of jurisdiction implying potential control but not control itself." Summary Report of the Meeting of Experts for the Protection of the Underwater Cultural Heritage, UNESCO, 22-24 May 1996.

[60] However, the term "jurisdiction" appears in Articles 6(1) and 7(2) of the Draft Convention.

sites in extraterritorial waters should be based on a combination of port State, national and flag State jurisdiction. On the contrary, other experts considered that Article 5 was an acceptable compromise, as it did not establish a new zone, but gave coastal States the power to control underwater cultural heritage in existing maritime zones. In their view, coastal control over activities on the continental shelf was a far more practical response to uncontrolled recovery than the flag State jurisdiction. Certain experts noted that the principle formulated in Article 5(2) had already been adopted in their national legislation, while in the view of another expert there should be reference to national legislation for the protection of underwater cultural heritage in Article 5(2) together with the requirement of States to inform UNESCO thereof. Finally, the formula "all activities affecting underwater cultural heritage" was debated; one expert suggested substituting it with the phrase "activities directed at the exploration, excavation and exploitation of the underwater cultural heritage". Similar wording is used in Article 6 of the Draft, which, however, refers to "exploration, excavation and management of underwater cultural heritage". The term "management" is definitely more appropriate than "exploitation" in the context of cultural heritage.

5.3. The Russian delegation proposed a system of co-ordinated action between coastal States, flag States and States of origin of underwater cultural heritage. According to this proposal, underwater cultural heritage discovered outside the contiguous zone, should not be removed until consultations are held and an agreement is reached with the participation of the States mentioned in Article 149. A similar proposal was submitted by the Netherlands during negotiations at the Council of Europe, which sought to grant a similar competence to that enjoyed by the coastal State to the identifiable flag State in respect of flag State objects. As explained: "Neither competence would be exclusive. Anybody wishing to search for and salvage objects of either the flag State or the coastal State would have to apply to both for authorization. In practice the two States would be compelled to reach mutual agreement on the ultimate destination of any objects removed from the sea zone". [61] In this context, the 1976 Australia/Netherlands Agreement concerning wrecked vessels belonging to the Dutch *Vereenigde Oostindische Compagnie* ("V.O.C.") and lying off the coasts of Western Australia was mentioned as a useful precedent. However, in the case of the 1976 Agreement there were certain factors, which made its conclusion simple. First, the geographical position of Western Australia and, more specifically, the lack of neighbouring countries reduced the number of States on whose continental shelf the wrecks were situated. In contrast, consider the Mediterranean, where, in a similar case, there would be a number of coastal States involved. Given that not all continental shelf boundaries are settled, the conclusion of an agreement, or better agreements, between the

[61] See further Strati, *op. cit.* note 6 at pp. 351-352.

coastal States concerned, the flag State and the State(s) of origin would be a rather difficult task to undertake. Second, in the case of V.O.C. wrecks, the Netherlands was not only the undisputed flag State, but claimed to be the legal successor to the V.O.C., the owner of the wrecked vessels.

The system proposed by the Russian delegation in 1998 is even more complicated, as it involves a greater number of States which makes the possibility of initiating negotiations, let alone concluding an agreement, remote. Most importantly, it would be very difficult to apply this regime to ancient wrecks, as it would be absurd to refer to the flag State of a ship, which has been lying for hundreds of years on the bottom of the sea, when sometimes it is not even distinguishable from the seabed. Furthermore, the Draft Convention also protects submerged settlements and individual items found at sea, which do not have a flag State and require a different regime of protection. One solution to this problem would be to interpret the term "flag State" as the "flag State of the removing vessel", but then again why should that State be granted primary responsibility for "protecting" underwater cultural heritage and issuing permits for excavation?

5.4. The practical difficulties in applying the Russian proposal were also stressed during the meeting of governmental experts. Moreover, the reference to Article 149 was opposed on the basis that it deals with the Area, a regime quite different to the EEZ. In this respect, it must be noted that in the course of the negotiations of UNCLOS III, consideration was given to the preferential rights of the State(s) of origin over archaeological and historical objects found on the continental shelf. The exercise of these rights, which featured in a number of proposals expanding coastal competence over the continental shelf, was limited to the sale or disposal of the recovered objects resulting in their removal out of the coastal State.[62] Nevertheless, these proposals did not find their way into the Final Text of the Convention.

5.5. Paragraph 1 requires the notification of *any discovery* relating to underwater cultural heritage on the continental shelf and in the EEZ. It would seem, therefore, that paragraph 1 refers to all sea-users operating in these areas, and not only to licensees of oil and mineral exploration and exploitation activities, as evident in the practice of a small group of States which oblige their concessionaires to report the accidental discovery of underwater remains.[63] Some experts wanted to make notification obligatory and more

[62] The preferential rights of the State(s) of origin were also recognised in a US proposal submitted in 1980 to the Plenary of UNCLOS III and suggesting the establishment of a general duty to protect archaeological objects found in the marine environment. In this context, their exercise was confined to the sale or other disposal resulting in the removal of such objects from a State, which had possession of such objects. Strati, *ibid* at pp. 162-164 and 350.

[63] Such practices should be considered as the undertaking of protective measures by the coastal State in the exercise of its resource-related jurisdiction over the continental shelf and not as an expansion of

strict so as to end the looting of and threats to underwater cultural heritage, while others expressed their concern as to the means foreseen for the notification of discoveries of underwater cultural heritage. Reference should also be made to article 7(2) of the US draft, which provides that the flag State should ensure that the discovery of underwater cultural heritage beyond the limits of national sovereignty or control is reported to the appropriate authority of the State or entity exercising jurisdiction over the location of the underwater cultural heritage.

5.6. Paragraph 4 recognises the right of the coastal State to deny authorization for the conduct of activities affecting the underwater cultural heritage, where they interfere with the exercise of its sovereign rights on the continental shelf and/or in the EEZ. A similar provision is to be found in Article 246 of the LOS Convention concerning the exercise of marine scientific research in these areas. According to one expert, a new paragraph should be added in Article 5 indicating that control of activities affecting the underwater cultural heritage should not interfere with or restrict the freedom of navigation.

5.7. Paragraph 5 makes all breaches of permits authorizing the conduct of underwater archaeological activities punishable. To the extent that the Convention attributes to the coastal State the power to regulate and authorize all activities affecting underwater cultural heritage, the latter is entitled to punish any breaches of permits issued in accordance with its provisions. However, one expert proposed that this paragraph should be deleted, since its drafting was too close to that of paragraph 2. It is difficult to share this view since paragraph 5 imposes sanctions for violations of permits issued under paragraph 2. Consequently, there is no overlap between the two paragraphs.

5.8. As regards the Italian proposal to add a sixth paragraph stating that the Convention does not prejudice the right of States bordering enclosed or semi-enclosed seas to conclude regional arrangements, it must be noted that the adoption of an international convention in no way precludes States from concluding regional agreements on the same topic. However, the concept of enclosed or semi-enclosed seas is controversial and since it is not related to the protection of underwater cultural heritage it seems preferable to omit it.[64] Finally, as already stated, the US proposal on Article 5 which confines exercise of coastal control over the discovery and removal of underwater cultural heritage in the contiguous zone, could be acceptable as supplementary to, but not as a substitute of, the original draft.

---

coastal heritage legislation in this area. See also Article 17 of the Draft European Convention, as well as the Turkish draft amendment to paragraph 1.

[64] Under Article 123 of the LOS Convention, States bordering such seas *should* co-operate with each other in the exercise of their rights and the performance of their duties. Such co-operation is exclusively specified in matters related to the management and conservation of living resources, the protection of the environment and scientific research.

5.9. There can be no doubt that Article 5 is the most controversial provision of the Draft Convention. Three views were expressed during the meeting concerning its compatibility with the LOS Convention. According to the first view, Article 303 does not confer jurisdiction on coastal States to protect archaeological heritage, but does not prohibit it either. Under the second view, Article 5 is not consistent with the LOS Convention, while according to the third view, its compatibility with the LOS Convention depends on the interpretation of Article 303(4).

5.10. As already stated, Article 303(4) of the LOS Convention provides that "this Article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature". Article 303(4) should not be interpreted to refer exclusively to existing international agreements, as it primarily promotes the elaboration in the future of more comprehensive regimes of protection. It clearly covers treaties, which may be enacted in the future, as well as future rules of customary law. Furthermore, Article 311 provides in paragraphs 3 and 5 respectively:

> "3. Two or more States may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
> 5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention".

As argued: "Paragraph 5 preserves the *lex specialis* of other relevant provisions of the Convention and this can be illustrated by Article 237(1). Although doubts were expressed as to the necessity for this paragraph, its presence has the effect of precluding any argument of possible inconsistency between the *lex generalis* of Article 311 and the *lex specialis* of the other articles".[65] Article 303(4) features amongst the articles which refer specifically to the possibility that the subject matter of a given article may be governed by some other existing or future international agreement.[66] "The terms of these articles vary considerably in relation to their own subject matter and where appropriate Article 311 grants priority to the other treaty. Article 311 suggests that in applying other relevant agreements the universalism of the Convention is a relevant factor".[67] In case of dispute over the interpretation or application of Articles 303 and 311, Part XV of the LOS Convention on settlement of disputes will be applied.

It seems, therefore, that the drafters of the LOS Convention acknowledged the possibility of regulating underwater cultural heritage by other international or regional instruments which

---

[65] Rosenne, S. & Sohn, L.B. (eds), *United Nations Convention on the Law of the Sea 1982 - A Commentary*, vol. V, Center for Oceans Law and Policy, University of Virginia, Martinus Nijhoff, 1989 at p. 243.
[66] "This paragraph, which is self-explanatory is also mandated by article 311(5)", *ibid* at p. 161.

would further and supplement the general principles set forth in the LOS Convention. As already pointed out, the LOS regime of underwater cultural heritage is incomplete, while the archaeological issue has not been traditionally dealt with by the law of the sea. During discussion at the meeting of governmental experts there was broad agreement that Article 5 attempted to implement Article 303 of the LOS Convention. The "without prejudice" clause of Article 303(4) permits the adoption of measures which may even go beyond its provisions in order to deal with issues not foreseen in 1982.

5.11. In any case, it is difficult to ascertain whether Article 5 is *stricto sensu* incompatible[68] with the LOS Convention, since the latter is silent on the legal regime of underwater cultural heritage found on the continental shelf beyond the 24-mile limit and the applicable rules must be inferred from basic principles, such as the freedom of the high seas under Article 87, or the residual rule of Article 59 involving the notion of "equity" as regards the EEZ.[69] The lack of positive rules of international law on this issue permits varying interpretations and claims. A number of States already exercise jurisdiction over underwater cultural heritage on their continental shelf/EEZ, while others claim residual rights, or sovereign rights over "all resources" and/or jurisdiction over "any research" conducted in the EEZ.[70] Submerged cultural objects are inevitably connected with the continental shelf, since they are located on or under the seabed. Whatever the legal regime of their protection, it will "overlap" with the continental shelf regime. Coastal States may claim that archaeological operations interfere with their resource-related rights and deny the right of flag States to conduct archaeological research on their continental shelf without their consent. The practice of some Latin-American States, which confiscate objects recovered from their continental shelf as evidence of illegitimate exercise of exploration activities in the area, is illustrative of this attitude.[71] It has been argued that "legislators have a simple weapon to control the activities of marine archaeologists on the continental shelf, and that is to regulate the disturbance of the seabed. So, a wreck site embedded in coral could be immunised by the expedient of forbidding interference with the coral, which is a 'natural

---

[67] *Ibid* at p. 241.

[68] The relation of the LOS Convention to other international treaties was first discussed in the Informal Plenary of UNCLOS III in 1979. According to the President's summary of the debate: "The standard of determining incompatibility should be whether or not bilateral or multilateral agreements either on specific subjects or of a regional nature, adversely affect the rights and duties of third party States under the Convention". Reproduced in Platzoder, R., *The Third United Nations Conference on the Law of the Sea. Documents,* vol. XII at p. 390.

[69] As already stated, within the 200-mile EEZ, there is no presumption in favour of either coastal or flag-State jurisdiction with respect to archaeological activities, see footnote 21.

[70] Strati, *op. cit.* note 6 at pp. 270 and 287.

[71] Roucounas, *op. cit.* note 47 at p. 323. According to article 19 of the Chilean Supreme Decree No 711 of 22 August 1975 approving regulations governing the supervision of marine scientific and technological research conducted in the martime zone under national jurisdiction, which states that: "Any breach of these regulations shall be punished by the maritime authority....this does not preclude the confiscation of the articles and data obtained through research..", *The Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National Jurisdiction*, UN, 1989, at p. 68.

resource' of the continental shelf."[72] Within the EEZ, where coastal rights are more extensive, it will be even more difficult for third States to oppose coastal control of underwater cultural heritage.[73]

It may, therefore, be advisable to expand coastal control over the continental shelf/EEZ by convention, instead of leaving this matter to the national law of individual States. If coastal rights are precisely defined and flag State rights respected, then the possibilities of "creeping jurisdiction"[74] are minimised. Probably the least controversial argument for extending control by coastal States over underwater cultural heritage on the continental shelf is its effectiveness. Only the recognition of the competence of the coastal State can ensure an effective regime of protection. Article 5, which grants the coastal State the right to regulate and authorize all activities affecting underwater cultural heritage on the continental shellf/EEZ is certainly aligned with the spirit of the LOS Convention, which requires all States to protect archaeological and historical objects found at sea and to co-operate therefor.

[72] O'Connell, D.P., *The International Law of the Sea*, vol. I, Clarendon Press, 1982 at p. 918.
[73] Coastal States may take advantage of their extensive rights in the 200-mile EEZ and exercise control over underwater cultural heritage indirectly; i.e., by employing Article 60 of the LOS Convention which grants them a wide range of powers over the construction and use of installations on the seabed.
[74] Within UNCLOS III, the main reason for rejecting the proposed expansion of coastal jurisdiction over archaeological and historical objects on the continental shelf/EEZ, was the fear that the extension over the continental shelf of a set of rights which bore no relation to natural resources would alter overtime the conceptual character of the regime applicable to this area. Strati, *op. cit.* note 6 at p. 164.

Article 6

Non-use of Areas under the Jurisdiction of the Coastal State

1. *No State Party shall allow use of its territory, including its maritime ports and off-shore terminals, or other area under its jurisdiction such as the continental shelf or exclusive economic zone, in support of any activity affecting underwater cultural heritage and inconsistent with the operative provisions of the Charter.*
2. *This provision shall apply to any such activity beyond that State's territorial sea but not within an area over which another State exercises controls over exploration, excavation and management of the underwater cultural heritage in accordance with Article 5(2) of this Convention unless requested by that State.*

Proposed amendments.

- *New article 6 [US draft]*

"*Non-use of areas under the sovereignty of the coastal State.*

No State Party shall allow use of its territory, including its maritime ports and off-shore terminals, or other area under its sovereignty, in support of any activity affecting underwater cultural heritage in a manner inconsistent with the Annex to this Convention."

COMMENTARY

6.1. Article 6 prohibits the use of the territory as well as other areas under the jurisdiction of States Parties, such as the continental shelf and the EEZ,[75] in support of activities violating the Charter. Such a regulation was considered necessary, as even if all the countries in a particular region were parties to the Convention, no constraint could be imposed on activities violating Charter criteria, but taking place in areas outside their jurisdiction. Article 6 primarily intends to deny port State support to such activities.

6.2. As a general rule, foreign ships searching for or recovering underwater relics use local ports as operational bases. The successful completion of a research project depends, to a large extent, upon the possibility of calling at such ports. In the absence of express provisions to the contrary, there are no additional requirements for the call of archaeological vessels at foreign ports. Ports are presumed to be open unless entry is restricted or prohibited.[76] However, as the whole issue lies within the discretionary authority of the port State, the latter may make entry to its ports dependent upon compliance with

[75] It is notable that paragraph 1 refers to the continental shelf and the EEZ as zones under the "jurisdiction" of the coastal State, while paragraph 2 uses the more modest term "control". This differentiation may be explained by the fact that Article 6(1) prohibits the use of areas over which coastal States enjoy jurisdiction for a number of purposes *in support of* activities affecting underwater cultural heritage. It should be emphasised, however, that the notion of jurisdiction is more limited that that of 'sovereignty' or 'sovereign rights' and refers to specific purposes. Jurisdiction may be defined as "the power of a State to create or affect legal interests (legislative jurisdiction) and to enforce its laws (enforcement jurisdiction)".

conditions concerning the removal of underwater cultural heritage. The main disadvantage of this scheme is that the enforcement jurisdiction of the coastal State is confined to its ports. If a ship does not enter the port, it lies beyond its authority. In open sea areas, where the use of alternative foreign ports is not possible, the effectiveness of this regime will be greater. Article 211(3) of the LOS Convention specifically recognises the right of coastal States to establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports. Although its purpose is to reduce vessel-source pollution, Article 211(3) is based on the assumption that the port State has the discretionary authority to permit or deny entry of foreign vessels into its maritime ports. The same idea was expressed in a proposal made during the negotiations of UNCLOS III concerning coastal rights over archaeological objects found in extra-territorial waters.[77] The right of the coastal State to make access to its maritime ports dependant on conditions relating to the removal of underwater relics was suggested as an effective solution to the archaeological issue. However, this proposal did not find its way into the Final Text of the Convention.[78] Under Article 6 of the Draft Convention, the port State is not only entitled to regulate access to its ports, but it has also the duty to prohibit the use of its ports and other areas under its jurisdiction for support of activities adversely affecting underwater cultural heritage.

6.3. During discussion one expert raised the question whether Article 6 contradicted other conventions on access to and use of ports. The most significant multilateral agreement in the field is the Geneva Convention and Statute on the International Regime of Maritime Ports (1923).[79] Under Article 2 of the Statute, contracting parties are obliged, subject to certain exceptions, to grant on the basis of reciprocity the vessels of other contracting parties freedom of access and equality of treatment with their own vessels in maritime ports. However, only a relatively small number of States have ratified the 1923 Convention, which is generally considered as unsatisfactory. Most importantly, coastal authority to deny access is implied by Article 211(3) of the LOS Convention and it is assumed in a number of multilateral treaties relevant to marine pollution.[80]

6.4. According to another expert, States could not be permitted to have a legal right of intervention on the high seas; it would therefore be necessary to establish a clause to ensure compatibility with the LOS Convention. However, as drafted, Article 6 does not

---

[76] See further Lowe, A.V., "The right of entry into maritime ports in international law", 14 *San Diego L. Rev.* (1977) pp. 597-622.
[77] Treves, T., "Rassegne: La Nova Sessione della Conferenza Sul Diritto del Mare", 63 *Rivista di diritto internazionale* (1980) pp. 432-463 at p. 441.
[78] However, it may still be used as a supplementary basis for exercising control over underwater cultural heritage in international waters.
[79] 58 *L.N.T.S.* 285.

require intervention on the high seas. Other experts rejected the phrase "other area under its jurisdiction such as the continental shelf and the exclusive economic zone" in Article 6(1) as they did not accept expansion of coastal jurisdiction over underwater cultural heritage in this area, and suggested replacing it by "other area under its sovereign jurisdiction". A similar approach was adopted by the US draft, which refers to "other area under its sovereignty". On the contrary, it was argued that if Article 6 were rejected, wrecks in the EEZ and on the continental shelf would not be protected; coastal control was not incompatible with the LOS Convention, since the latter was silent on this matter.

6.5. Finally, paragraph 2 specifies that the prohibition in paragraph 1 shall not apply in relation to activities which take place in an area over which another State exercises controls over "exploration, excavation and management of underwater cultural heritage", unless requested by that State. There seemed to be no major concern about this provision. It must be noted, however, that the terminology used in Article 6(2) is different from that in Article 5(2), where, as already seen, there is reference to the right to regulate and authorize "all activities affecting underwater cultural heritage". Similar wording is used in Article 4, which, however, concerns areas over which the coastal State exercises sovereignty. It seems preferable to use the wording in Article 6(2) throughout the Draft, as it is more precise and limited in scope.

[80] See, for example, Article 5(3) of the 1973 International Convention for the Prevention of Pollution from Ships, as amended in 1978 (MARPOL 73/78), 17 *ILM (*1978*)* at p. 546. Kassoulides, G.C., *Port State Control and Jurisdiction: Evolution of the Port State Regime*, Martinus Nijhoff, 1993 at p. 19.

Article 7

Prohibition of Certain Activities by Nationals and Ships

1. *A State Party shall take such measures as may be necessary to ensure that its nationals and vessels flying its flag do not engage in any activity affecting underwater cultural heritage in a manner inconsistent with the principles of the Charter.*
2. *Measures to be taken by a State Party in respect of its nationals and vessels flying its flag shall include, among others, the establishment of regulations:*

   (a) to prohibit activities affecting underwater cultural heritage in areas where no State Party exercises its jurisdiction under Article 5 otherwise than in accordance with the terms and conditions of a permit or authorisation granted in compliance with the provisions of the Charter;

   (b) to ensure that they do not engage in activities affecting underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises its jurisdiction under Article 5, in a manner contrary to the laws and regulations of that State.

Proposed amendments

- *New article 7 [US draft]*

"Regulation and Prohibition of Certain Activities by Nationals and Ships.

1. A State Party shall take such measures as may be necessary to ensure that its nationals and vessels flying its flag do not engage in any activity affecting underwater cultural heritage in a manner inconsistent with this Convention.
2. Measures to be taken by a State Party in respect of its nationals and vessels flying its flag shall include, among others, the establishment of regulation to:

   (a) prohibit activities affecting underwater cultural heritage in areas where no State Party exercises its sovereignty or control otherwise than in accordance with the terms and conditions of a permit or authorization granted in compliance with the provisions of this Convention;

   (b) ensure that they do not engage in activities affecting underwater cultural heritage within the sovereignty or control of another State Party which exercises its sovereignty or jurisdiction under articles 5 and 6, in a manner contrary to the laws and regulations of that State;

   (c) ensure that the discovery of underwater cultural heritage beyond the limits of national sovereignty or control is reported to the appropriate authority of the State or entity exercising jurisdiction over the location of underwater cultural heritage".

COMMENTARY

7.1. Article 7 establishes the obligations of flag States in respect of vessels flying their flag and in general of all States Parties in respect of their nationals for the protection of underwater cultural heritage. It deals primarily with the protection of underwater cultural heritage found in areas beyond national jurisdiction. Nationality is a valid basis of jurisdiction, to which States have frequently resorted to deal with situations where territorial jurisdiction is ineffective. One relevant example is the Protection of Military Remains Act (1986), under which the United Kingdom protects the site of British vessels and aircraft that sank or crashed on military service, even if the site is in international

waters. It is an offence for British nationals to take any action in respect of such a site without a licence.[81]

7.2. Paragraph 1 provides that States Parties shall take such measures as may be necessary to ensure that their nationals and vessels flying their flag do not engage in any activity affecting underwater cultural heritage in a manner inconsistent with the Charter.

7.3. Paragraph 2 specifies the measures to be taken by States Parties in order (a) to prohibit such activities in areas where no State Party exercises "jurisdiction"[82] under Article 5, and (b) to ensure that its nationals and vessels flying its flag do not engage in activities affecting underwater cultural heritage within the EEZ or the continental shelf of a State Party which exercises its "jurisdiction" under Article 5, in a manner contrary to the laws and regulations of that State. Sub-paragraph (b) is drafted along the lines of Article 18(3)(iv) of the Straddling Fish Stock Agreement and deals with measures that the flag State may take to prevent illegal activities regarding underwater cultural heritage in the EEZs and continental shelves of other States Parties.

7.4. During the meeting, one expert firmly supported the idea underlying Article 7, but pointed out that, as for Article 6, it partly dependent on the decision of Article 5. This view was shared by several participants who argued that Articles 6 and 7 raised the same considerations as Article 5. It is notable that in the US draft all references to the continental shelf and the EEZ have been deleted so that Article 7 applies to all areas beyond the territorial sea or the contiguous zone. Another expert pointed out that this article, if used alone, illustrated the problem of control over underwater cultural heritage; it would be fanciful to believe that a scheme based on flag State jurisdiction would prevent the looting of underwater cultural heritage from the continental shelf of another State party. In this context, the need to look at practical means of control and to avoid a slow and bureaucratic system was stressed.

[81] Protection of Military Remains Act, 1986, *C.35.* Section 3(1).
[82] There is an inconsistency between Article 7(2) and Article 6(2) of the Draft which, as already seen, refers to the continental shelf and the EEZ as areas over which a State Party exercises 'control' over underwater cultural heritage.

Article 8
Permits

1. *A State Party may provide for the issuance of permits, subject to compliance with the operative provisions of the Charter, allowing entry into its territory of underwater cultural heritage.*
2. *Should an excavation or retrieval of underwater cultural heritage occur without a prior authorization of a State Party, the State Party may issue permits allowing entry of such underwater cultural heritage into its territory, provided that excavation and retrieval activities have been conducted in accordance with the operative provisions of the Charter.*

Proposed amendments

- *New article 8 [US draft]*

1. A State Party may provide for the issuance of permits, consistent with the rules contained in the Annex, regulating excavation and removal of underwater cultural heritage pursuant to Articles 4 and 5, and entry into its territory of such underwater cultural heritage.
2. Should an excavation or removal of underwater cultural heritage occur without a permit from a State Party, that Party may issue a permit allowing entry of such underwater cultural heritage into its territory, provided that excavation and removal has been conducted in accordance with the rules set out in the Convention.
3. In issuing any such permits, States Parties shall require compliance, at a minimum, with the provisions of Annex to this Convention, in particular taking into account the needs of conservation and research, including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education.
4. States Parties may deny permits for the conduct of such activities that would have the effect of unjustifiably interfering with the exploration or exploitation of their natural resources, whether living or not living, or causing significant damage thereto.
5. States Parties may deny permits for activities that would cause significant harm to natural resources under its sovereignty or control or unduly disturb human remains.
6. In considering the issuance of such permits, States Parties shall take into account the views of other States having an interest in the protection and management of such underwater cultural heritage, including the State or country of origin, the State of cultural origin, the State of historical or archaeological origin, and the views of States or entities with jurisdiction over the site where the underwater cultural heritage is located.
7. States Parties shall make punishable all breaches of laws and regulations relating to the discovery and removal of underwater cultural heritage pursuant to this Convention.
8. The International Seabed Authority should take into account the need to protect underwater cultural heritage when issuing permits regarding the Area as defined in the 1982 United Nations Convention on the Law of the Sea."

COMMENTARY

8.1. Paragraph 1 gives States Parties an optional power to issue permits allowing entry into their territory of underwater cultural heritage, which has been excavated or removed in accordance with the operative provisions of the Charter in areas beyond their jurisdiction. Such a permit could be issued before the work begins, subject to a condition that activity be conducted in accordance with the provisions of the Charter. According to

paragraph 2, however, the permit could be issued after the work was done provided the issuing State has been satisfied that the work was conducted in a manner that complied with the Charter. When, and if, the permit is issued is a matter for the individual State Party.[83]

8.2. The permit system may provide an effective means of protecting underwater cultural heritage in areas beyond national jurisdiction, as the closing of the lucrative markets of some "art-importing" States may deter speculative attempts to retrieve objects from underwater sites. It is notable that in an attempt to prevent the salvaging of the wreck site of the *Titanic* by the French Institute for Maritime Research and Exploration (IFREMER), the US Congress considered a ban on the importation for commercial gain of any object from the wreck. The bill, which was never enacted, provided for termination of the embargo whenever the *Titanic* became bound by international agreement governing its exploration and salvage.[84]

8.3. During the meeting of governmental experts, one delegate expressed reservations as to the introduction of a permit system, which might not be acceptable to all States. In addition, many experts were in favour of redrafting Article 8(2), since in its present form, they thought it would permit a looted object to enter legally the territory of another State. As explained above, this is a misunderstanding: the permit would be granted only if the object concerned had been excavated in accordance with the Charter.

8.4. As regards the amendments to Article 8 proposed by the US draft, in paragraph 1 there is provision for the issuance of permits for both excavation and importation of underwater cultural heritage. Paragraphs 3, 4 and 7 are identical to paragraphs 3, 4 and 5 of article 5 of UNESCO/DOALOS Draft, while paragraph 5 refers to the possible harm caused to natural resources or disturbance of human remains. As already seen, a similar statement was suggested by the US delegation for inclusion in the Preamble. Paragraph 6 provides for the consideration of the interests of States having an interest in the protection and management of underwater cultural heritage, including the States of origin mentioned in Article 149, and the views of States or entities with "jurisdiction" over the site where the underwater cultural heritage is located, and paragraph 8 for the need to protect underwater cultural heritage when issuing permits in the Area. It is difficult to understand why all these issues are brought together in a redrafted Article 8 in an unnecessarily complicated manner. Most importantly, the US draft envisages permits for excavation and import of underwater cultural heritage found within areas under the

---

[83] *Op. cit.* note 1 at p. 411. As explained, this provision was intended to assist persons who wanted to excavate a site and be sure that any material raised will be allowed entry when brought to shore, without the possibility of seizure.

[84] S.1581, 100 Cong. 1st Sess, 133 *Cong. Rec.* SS.1150-1151 (Aug. 3, 1987).

sovereignty or control of the coastal State, i.e. landward of the outer limit of the contiguous zone. It would, therefore, transform the whole function of Article 8, whose aim is to assert control over material excavated outside the territorial and jurisdictional limits of States, but later brought within their territories. Under the Draft Convention, all issues relating to excavation of underwater cultural heritage found within areas of national jurisdiction are dealt with in Article 5.

Article 9

Seizure of Underwater Cultural Heritage

1. *Subject to Article 8, each State Party shall provide for the seizure of underwater cultural heritage excavated or retrieved in a manner not in conformity with the operative provisions of the Charter, which is brought to its territory, either directly or indirectly.*
2. *A State Party shall seize underwater cultural heritage known to have been excavated or retrieved from the exclusive economic zone or the continental shelf of another State Party exercising control of those areas in accordance with Article 5, paragraphs 2 to 5 above only after the request or with the consent of that State.*

Proposed amendments

- *New article 9 [US draft]*

1. Each State Party shall provide for the seizure of underwater cultural heritage excavated or removed in a manner not in conformity with this Convention, which is brought to its territory, either directly or indirectly.
2. Notwithstanding paragraph (1), a State Party shall seize underwater cultural heritage known to have been excavated or removed from the territorial sea or contiguous zone of another State Party exercising sovereignty or control over those areas only upon the request or with the consent of that State.

COMMENTARY

9.1. Article 9 provides for the seizure[85] of underwater cultural heritage, which is excavated or removed in a manner not in conformity with the operative provisions of the Charter and is brought within the territory of a State Party. This innovative provision was considered necessary so as to increase the effectiveness of the Convention. As argued, if a vessel containing cargo excavated in non-compliance with the Charter in areas beyond national jurisdiction enters the territorial waters of a State Party, the latter should seize the excavated material.[86] Article 9 aims at securing application of the standards of the Convention to underwater cultural heritage in international waters. As pointed out, States are encouraged to assume jurisdiction over any object whose excavation even

[85] To date, the few international instruments, which envisage seizure of cultural heritage, allow this in the general context of restitution. Thus, Article 8 of the Cultural Offences Convention provides for the seizure and restitution of cultural property found on the territory of the requested party subsequent to an offence relating to cultural property. Furthermore, Article I(2) of the Protocol to the 1954 Hague Convention establishes the duty of contracting States to take into their custody cultural property imported into their territory either directly or indirectly from any occupied territory, while Article 7(b)(ii) of the 1970 UNESCO Convention provides that States Parties undertake, at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of the Convention, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. At national level, seizure of cultural heritage is designed either as a penalty or as a means of protecting cultural heritage, especially in cases where it applies irrespective of ownership or punishment of the wrongdoer.

[86] *Op. cit.* note 1 at p. 411. However, if a vessel is exercising the right of innocent passage and is merely passing through the territorial sea without entering internal waters, the coastal State will not be entitled to stop it and seize the material in question. Under both conventional and customary law, the enforcement jurisdiction of the coastal State is excluded when the crime was committed before the ship entered the territorial sea and the latter is merely passing through the territorial sea without entering internal waters, There is only one exception to this rule; under Article 27(5) of the LOS Convention, coastal jurisdiction is upheld with respect to vessel-source pollution under Part XII, i.e. Article 220 (3), (5) and (6) viz. violations committed in the EEZ, and violations of laws and regulations adopted in accordance with Part V of the LOS Convention, i.e. the EEZ.

outside their territories or offshore zones of control was deemed to violate the standards of the Charter.[87]

9.2. More specifically, it is stated that seizure will occur where heritage has been brought within the territory of a State Party, "directly or indirectly". Thus, the obligation to seize underwater cultural property remains, regardless of an intervening sale or other transactions in the excavated material. This provision was arguably inspired from the treatment meted theft under the UNIDROIT Convention as well as article 2 of the 1954 Hague Protocol. It must be noted, however, that if the Convention eventually applies to all underwater cultural heritage, as opposed to abandoned, as it is evident from the discussion at the meeting of experts in 1998, problems may arise in case the identifiable owner claims the seized property. Inevitably, such issues will be determined by local courts.[88]

9.4. Paragraph 2 provides that seizure of underwater cultural heritage retrieved from the EEZ or the continental shelf of another State Party will take place only with its consent. The purpose of this provision is to make clear that a State can only seize underwater cultural heritage from areas under the control of another party if the latter requests or acquiesces in the seizure. This is to prevent the seizing State from applying more stringent provisions than the State in whose maritime areas the objects were found.

9.5. So far as the proposed amendments to Article 9 are concerned, the US draft limits the scope of application of paragraph 2 to cultural heritage excavated or removed from the territorial sea or the contiguous zone of a State Party. On the contrary, paragraph 1 would appear to encompass underwater cultural heritage originating from high seas areas.

---

[87] *Ibid* at p. 402. In other words, Article 9 enables port States to exercise jurisdiction over foreign vessels which have plundered archaeological sites on the high seas and are voluntarily within their ports. A similar regulation is to be found in Article 23 of the Straddling Fish Stock Agreement in relation to enforcement of conservation and management measures on the high seas. Both provisions constitute progressive development of the law and go beyond the LOS Convention, which confines the extended enforcement jurisdiction of the port State to pollution matters (c.f. Article 218(1) of the LOS Convention).

[88] As in most cases a choice of law problem will not be avoided, it will be the choice-of-law rules of the forum to determine which substantive law is applicable to underwater cultural heritage Thus, the question of ownership of a vessel lying on the high seas would be one for the law of its flag. Similarly, the question of ownership of its cargo would seem to be one for the law of the owner, if he can be identified, or of the law of the flag upon the supposition that the owner was of the same nationality of the ship.

Article 10

Other Sanctions

1. *Each State Party shall impose criminal or administrative sanctions for importation of underwater cultural heritage which is subject to seizure under Article 9.*
2. *States Parties agree to co-operate with each other in the enforcement of these sanctions. Such co-operation shall include but not be limited to, production and transmission of documents, making witnesses available, service of process and extradition.*

Proposed amendments

- *Paragraph 1*

[Latin-American/Caribbean proposal] Add civil sanctions.

[US draft]

"Each State Party shall impose criminal or administrative sanctions regarding any violation of this Convention."

COMMENTARY

10.1. Paragraph 1 requires States, as a basic obligation, to impose criminal or administrative sanctions for what, in effect, are activities affecting the underwater cultural heritage in ways contrary to its provisions. However, this obligation is expressed specifically in terms of importation, in order to avoid controversy that might cripple any attempt to extend penal sanctions to other aspects of the regime.[89] The nature of sanctions is left to each State. Furthermore, paragraph 2 provides that States Parties will co-operate with each other in the enforcement of these sanctions. Specific reference is made, in this context, to production and transmission of documents, making witnesses available, service of process and extradition.

10.2. Some experts sought the insertion of civil penalties in paragraph 1, while others wanted the reference to criminal and administrative penalties to be omitted. It was argued that it would be difficult to apply these provisions, as penalties would not be applicable when the objects were transferred into the territory of another State. In addition, it was proposed that in paragraph 2, either only the first sentence should be kept, or the word "shall" should be replaced by the word "may". Finally, it was pointed out that extradition might raise difficult issues requiring careful study.

10.3. As regards the proposed amendments to Article 10, the US draft refers generally to criminal and administrative sanctions regarding any violation of the Convention, without mentioning importation. As explained above, the reason for restricting the scope of application of Article 10 of UNESCO/DOALOS Draft to importation was that the

---

[89] It should be recalled that Article 10 refers exclusively to underwater cultural heritage which is subject to seizure, i.e. heritage excavated in areas beyond national jurisdiction, or in areas within the jurisdiction of another State Party, but with the consent of that State. Concerning underwater cultural heritage found in the EEZ or on the continental shelf, Article 5(5) provides that all breaches of the terms of permits authorizing the conduct of activities affecting it shall be punishable.

underwater cultural heritage to which it refers in principle originates from areas beyond the jurisdiction of the State Party imposing sanctions. It may be advisable, however, to include a more general and comprehensive provision on sanctions which would combine all relevant provisions, namely Article 5(5) dealing with breaches of permits authorizing the conduct of activities affecting underwater cultural heritage on the continental shelf/EEZ, and Article 10. It is notable that, in its present form, the UNESCO/DOALOS Draft does not envisage sanctions for violations of Article 7 prohibiting certain activities by nationals and ships, even though they are implicit in the wording of Article 7(1) which provides that "States shall take such measures as may be necessary to ensure that their nationals or ships flying their flag do not engage in any activity affecting underwater cultural heritage in a manner inconsistent with the principles of the Charter",

Article 11

Notification Requirement and Treatment of Seized Underwater Cultural Heritage

1. *Each State Party undertakes to record, protect and take all reasonable measures to conserve underwater cultural heritage seized under this Convention.*
2. *Each State Party shall notify its seizure of underwater cultural heritage under this Convention to any other State Party which is known to have a cultural heritage interest therein.*

Proposed amendments

- *Paragraph 2*

[Latin-American/Caribbean proposal]

"Each State Party shall notify the seizure of underwater cultural heritage under this Convention to the competent international organisation so that in its turn it will notify the other member States".

COMMENTARY

11.1. Paragraph 1 deals with the issue of treatment of seized underwater cultural heritage. The obligation to record and protect the seized material is regarded as the primary duty, but States Parties are also required to take *all reasonable measures* to conserve it. This qualification was thought to be desirable, as conservation is very expensive and could require unforeseen expenditure by a State. However, it should also be considered that unless the seized material is rapidly and skilfully treated, it may suffer irreparable damage, such as corrosion, and loss of scientific value.[90]

11.2. Paragraph 2 provides for the notification of the seizure to any State Party with a cultural heritage interest in the seized material. Some experts considered that this system was too bureaucratic and asked for direct notification to a central authority. A similar proposal was submitted by Latin-American and Caribbean States. Others stressed the difficulties in assessing the interests of a State in a cultural object, while it was also argued that it would be premature to deal fully with Articles 8 to 11 as long as there was no consensus on the question of jurisdiction.

[90] As pointed out, *op. cit.* note 1 at p. 413, it seems unlikely that material, which is particularly expensive to conserve, such as wood, would often be seized. Persons raising this kind of material would be more likely to do so in accordance with the provisions of the Charter, with the result that it would not be subject to seizure.

Article 12

Disposition of Underwater Cultural Heritage

1. *A State Party which has seized underwater cultural heritage shall decide on its ultimate disposition for the public benefit taking into account the needs of conservation and research, including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education, and the interests of those States which have expressed a national heritage interest in it.*
2. *States Parties shall provide 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.*

Proposed amendments

- *Paragraph 1*

[Spanish proposal]

Delete "... and of the interests of the State that have expressed their interest in that object in relation to their national heritage" and replace with:

"Wherever the objects of an archaeological or historical nature are related to the historical or cultural heritage of another State Party, a joint agreement will be reached with this other State Party on the fate of the said objects, particular regard being paid to the preferential rights of the State of cultural, historical or archaeological origin".

[Latin-American/Caribbean proposal]

"A State Party which has seized underwater cultural heritage found beyond the limits of jurisdiction of coastal States shall decide on its ultimate disposition for the public benefit taking into account the needs of conservation and research, including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education, and the interests of those States which have expressed a national interest in it."

- *Paragraph 2*

[US draft]

"[States Parties shall provide 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 in a manner inconsistent with this Convention]."

COMMENTARY

12.1. Paragraph 1 deals with disposition of seized underwater cultural heritage. As pointed out, this provision incorporates Article 149 of the LOS Convention to the effect that underwater cultural heritage found outside national jurisdiction shall be managed for the benefit of mankind. It also recognises the interests of States with a "national heritage interest" in the seized underwater cultural heritage, but avoids the ambiguous wording of Article 149. Each State Party which has seized underwater cultural heritage shall decide on its ultimate disposition for the public benefit, while taking into account the needs of conservation and research as well as public access, exhibition and education. Since objects are seized, they should be used for the public benefit for educational purposes. However, what is actually done with the objects would depend on their condition and the

needs of conservation. For example, public access may have to be limited if the objects are fragile.

12.2. According to one expert, paragraph 1 is confusing as it does not specify whether it refers to underwater cultural heritage found within or beyond national jurisdiction. As already explained, Articles 9 to 12 of the Draft Convention dealing with seizure refer in principle to underwater cultural heritage found beyond the territorial and jurisdictional limits of States Parties, i.e. either on the high seas or in another State's offshore zone of control provided that the latter consents to the seizure. Along these lines, the Latin-American and Caribbean States proposed to limit the scope of Article 12(1) to underwater cultural heritage found beyond the limits of jurisdiction of coastal States.

12.3. Furthermore, the need to clarify the distinction between "cultural heritage interest" in Article 11(2) and "national heritage interest" in Articles 12(1) of the Draft Convention was stressed.[91] The UNESCO/DOALOS Draft uses these expressions as an alternative to the ambiguous wording of Article 149 of the LOS Convention, which refers to the "State or country of origin", "the State of cultural origin" and the "State of historical and archaeological origin" without, however, defining these terms or establishing priorities between them.[92] For example, which criteria distinguish the "State of origin" from the "State of cultural origin"? What are the differences between "cultural" and "historical and archaeological origin"? How can one define or even distinguish a "State" and a "country"? It is difficult to give an answer to these questions as these terms were never intended to be used cumulatively. The term "State of cultural origin" gives emphasis to the cultural link between an object and a "State", while the term "State of the country of origin", as it appeared in the original Turkish proposal, gave preference to the State that exercises sovereignty over the country of origin of the discovered cultural heritage.[93] The identification problem is, no doubt, acute, as in most cases the determination of the State of origin is extremely difficult. For example, which State is to be considered as the successor of a past civilisation, which overlays contemporary national boundaries? Most of the difficulties arise in respect of ancient remains. Relatively recent heritage presents less problems in relation to the identification of the State of origin, as the geographical

---

[91] The expression "national heritage interest" also appears in Article 13(1) of the Draft, while in the Preamble there is reference to States "having an historical or cultural link" with the heritage. However, this differentiation was not deliberate; it appears to be a drafting oversight.

[92] It is notable, however, that in a number of proposals submitted during the meeting of governmental experts there was provision for the preferential rights of the States of origin, as defined by Article 149 of the LOS Convention. See also the Spanish amendment to Article 12(1) which suggests the use of the term "State of cultural, historical or archaeological origin". More specifically, it is stated that "wherever the objects of an archaeological or historical nature are related to the historical or cultural heritage of another State Party, a joint agreement will be reached with this other State Party on the fate of the said objects, particular regard being paid to the preferential rights of the State of cultural, historical or archaeological origin". It is difficult to understand the distinction between the State to whose historical or cultural heritage the objects are related and the "State of cultural, historical or archaeological origin".

[93] See further Strati, *op. cit.* note 6 at p. 308.

distribution of States remains similar. However, even if under the circumstances it is possible to identify traces of origin, the qualification of more than one State as claimant to the recovered objects may create considerable difficulties. Inevitably, conflicts will arise as to which State has priority over the discovered relics. What is needed is the establishment of criteria on the basis of which the decision can be made whether a particular object belongs to the cultural heritage of one State or another. An examination of the relevant international and domestic instruments shows that the main criteria for defining "national cultural heritage" are the "territorial link" of cultural heritage and "nationality".[94] With respect to cultural heritage found in extraterritorial waters, the decisive criterion would seem to be that of nationality. In case of conflict, the "effective link" of nationality envisaged by the ICJ in the *Nottebohm Case* in 1955 may be useful as a criterion for resolving the dispute. Preference should be given to "the real and effective nationality, that which accords with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved". [95] In other words, preference should be given to the State to whose cultural heritage the object in question is more closely linked.[96] In this context, it would seem preferable to use the term "cultural heritage interest" throughout the Draft Convention; it has a broader scope than the term "national heritage interest" and is evidently less controversial.

12.4. It was also suggested that Article 12(1) should require the return of underwater cultural heritage taken from the territorial waters of a State and illegally exported when this State expressed an interest in these objects. According to other experts, this would occur in any event. The Draft Convention is notably silent on this issue. The reason for this omission would appear to be the fact that the Convention primarily deals with cultural heritage found beyond the territorial sea. It was, therefore, thought preferable to avoid regulating this controversial issue. Inevitably, such matters will be governed by the provisions of other applicable international instruments, such as the 1970 UNESCO Convention and the UNIDROIT Convention. However, one may reasonably argue that the State Party which has seized underwater cultural heritage excavated from the EEZ or the continental shelf of another State Party exercising control in accordance with Article 5 of the Draft Convention, should return the seized material. As currently drafted, Article 12 does not establish such an obligation, even though under Article 9(2), the consent of the

---

[94] See, *inter alia*, Article 4 of the 1970 UNESCO Convention and Article 5 of the Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (1976), 15 ILM (1976) at p. 1350.

[95] *Nottebohm Case (Liechtenstein v. Guatemala)* (second phase), Judgement of April 6thy, 1955; *I.C.J. Reports* (1955) p. 4 at p. 22.

[96] According to the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, the country of origin may be defined as that "to whose cultural tradition the objects is linked". CLT/CH.4.82, Paris, 11th June, 1982.

State from whose continental shelf the object was recovered, is required. Similar issues are dealt with by Article 14 of the Draft European Convention, which reads:

> "Each contracting State shall take all practicable measures towards the restitution of underwater cultural property located within that State, which has been illegal recovered in the area of another contracting State or illegally exported from such a State."

Thus, under the Draft European Convention, the concept of restitution is confined to cultural heritage illegally recovered in the "area" of a contracting State, i.e. the territorial sea and the contiguous zone, or illegally exported from such a State. However, the obligation of parties to return such property is qualified by the words "all practicable measures". Underwater cultural heritage illegally recovered or exported will be returned to its State of origin only when the domestic legislation of the State concerned permits this and it is considered to be practicable in the relevant circumstances

12.5. Article 12(1) makes specific reference to the need for re-assembly of a dispersed collection. Archaeologists have often emphasised the fact that when the legislation does not provide for the preservation of the material of the wreck in a collection, it does not in fact protect the wreck. Individual items, even those of outstanding value, are of marginal significance outside their contexts. There are, no doubt, many practical difficulties in re-assembling a dispersed collection. However, this can be achieved provided that there has been meticulous recording of the objects and their place of dispersal, i.e. a division between respected museums would not cause serious problems, and that the nature of the material permits it. In this respect, one should specifically refer to the 1976 Australia/Netherlands Agreement which regards the sharing of material from an archaeological site as the accommodation in several localities of a corporate entity rather than its division into parts. In case the contents of an archaeological site are to be apportioned, the total assemblage should be capable of re-assembly for further research. Where unique or rare objects themselves form a meaningful assemblage within the whole, this assemblage should not be split or, if split, perfect replicas be made to complete the assemblage. The incorporation of these principles can ensure that important collections of archaeological material from shipwrecks will not be over-fragmented and that future research will be possible.

12.6. As to Article 12(2) requiring non-application of "commercial incentives" for excavation and removal of underwater cultural heritage, the majority of experts stated that they agreed with this principle. One expert insisted on the ethical dimension of present and future knowledge of underwater remains and called on the meeting to exercise vigilance as to the meaning given to the notion of "commercial incentives"; examples such as sale of television rights or paying school excursions for children were considered by some to be acceptable, sale of objects to finance "bad" excavation was not. However, according to another view, commercial incentives are sometimes required.

In this context, it was proposed that the contents of ships be privatised. In response, it was argued that the private sector looted and pillaged wrecks so that all commercial exploitation of underwater cultural heritage should be opposed as fundamentally incompatible with its preservation; trade and speculation create urgency for excavation and hence the destruction of the heritage and its context.

Commercial incentives are contrary to the ICOMOS Charter which specifically states that "commercial exploitation of underwater cultural heritage for trade or speculation is fundamentally incompatible with the protection and management of the heritage" and that "project funding must not require the sale of underwater cultural heritage or the use of any strategy that will cause underwater cultural heritage and supporting documentation to be inevitably dispersed". It should be recalled that Article 12(2) replaces Article 4 of the ILA Draft providing for the exclusion of salvage law in an attempt to achieve a compromise solution. However, during the meeting of governmental experts in 1998, there was substantial support for the non-application of salvage law to underwater cultural heritage. Two views were expressed: either to retain Article 4 of the ILA Draft or to deal with this issue within the framework of Article 12(2).[97] Other delegates reserved their position on the subject.[98] The Chairman stressed the fact that the reference to commercial incentives under Article 12(2) intended to come as close as possible to the substance of the ICOMOS Charter. However, in his view, there seemed to be agreement that some commercial activities related to archaeology, such as televisions programs, or other sponsorships, could be legitimate provided that they respect the rules of the Charter.[99]

In concluding, it would seem preferable to include a separate provision on salvage law, along the lines of Article 4 of the ILA Draft, instead of dealing with this controversial issue within the limited scope of Article 12(2). There are many aspects of salvage law, quite apart from the application of commercial incentives, which are inconsistent with the regime established by the Charter.

---

[97] It should be recalled that the Chinese delegate proposed the inclusion of a separate paragraph in Article 3 preventing commercial exploitation of underwater cultural heritage, while the Chairman's draft of Article 2 also excluded the law of salvage from vessels which have been underwater for at least 50 years.

[98] See also Article 3bis of the US draft, where the relevant provision on salvage law is in brackets.

[99] As will be seen, Article 18 envisages the participation of "interested parties" in the preservation and study of the underwater cultural heritage and in support of archaeological research.

Article 13

Collaboration and Information-Sharing

1. *Whenever a State Party has expressed a national heritage interest in particular underwater cultural heritage to another State Party, the latter shall consider collaborating in the investigation, excavation, documentation, conservation, study and cultural promotion of the 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, such as but not limited to, discovery of heritage, location of heritage, heritage excavated or retrieved contrary to the operative provisions of the Charter or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to heritage.*
3. *Whenever feasible, each State Party shall use appropriate international databases to disseminate information about underwater cultural heritage excavated or retrieved contrary to the operative provisions of the Charter or otherwise in violation of international law.*

Proposed amendments

- *Paragraph 3*

[US draft] Substitute "contrary to the rules set out in the Annex" for "contrary to the operative provisions of the Charter".

- *Paragraph 4*

[US draft] Substitute "contrary to the rules set out in the Annex" for "contrary to the operative provisions of the Charter".

COMMENTARY

13.1. Article 13 deals with two highly controversial issues concerning underwater cultural heritage: collaboration and information-sharing. Paragraph 1 provides for collaboration with States Parties having expressed a national heritage interest in particular underwater cultural heritage in the investigation, excavation, documentation, conservation, study and cultural promotion of that heritage, while paragraph 2 for information-sharing with other *States Parties* concerning, *inter alia,* discovery and location of heritage, heritage excavated or retrieved contrary to the operative provisions of the Charter or otherwise in violation of international law, pertinent scientific methodology and technology as well as legal developments relating to heritage.

13.2. A similar provision is included in the Draft European Convention. Article 4 reads:

> "Where underwater cultural property is of particular interest to other contracting States, contracting States should consider providing information about the discovery of such property and collaborating in the investigation, excavation, documentation, conservation, study and cultural promotion of the property to the extent permitted by their legislation".[100]

[100] In view of the fact that the number of States which provide for the notification of, or the co-operation with, the State of origin is considerably small, the practical significance of this provision is limited.

In addition, a number of UN General Assembly Resolutions on the Restitution or Return of Cultural Property to the Countries of Origin[101] invited States seeking the recovery of cultural and artistic treasures from the seabed to facilitate the participation of States having a historical and cultural link with those treasures. Admittedly, only a few would object to the recognition of the continuing interest of the identifiable State of origin in the discovered cultural property; however, the attribution of specific rights is not always welcomed. Even the use of the term "participation" in the UN General Assembly Resolutions has been criticised. As already pointed out, this objection is mainly based on the fact that the identification of a modern State as the State of origin of submerged cultural heritage is often difficult.

13.3. The LOS Convention recognises the preferential rights of the State(s) of origin only with respect to archaeological and historical objects found in the Area. The Draft Convention does not recognize any specific rights to the State of origin, but requires States Parties "to collaborate" with the State with a national heritage interest in the particular underwater cultural heritage. In addition, there is provision for the sharing of information with other States Parties concerning the underwater cultural heritage. As pointed out, "there are serious problems that inhere in determining a single country of origin. Even though it may be possible to establish a single country of origin, when it is evident that seized material has connections with other parts of the world, States should contact other States Parties that may have some substantial connection with the material, in order to collaborate in dealing with the material. Rarely does the underwater cultural heritage beyond the territorial sea concern only a single, still existing State. If a shipwreck, the vessel will often have been making for a port in what is now another State. The site will reveal information about trading routes as well as details of the lives of the crew and passengers, construction of the vessel and so on. It is essential that this information be distributed as widely as possible between interested parties, not only so that others know of what has been found but also so that their expertise may be brought to bear on interpretation and understanding on the information."[102]

It should be recalled, however, that during the meeting of governmental experts, a number of proposals provided for the recognition of the preferential rights of the States of origin. Thus, the US draft proposed the inclusion of a new paragraph in Article 3 recognising such rights in relation to underwater cultural heritage found beyond the limits of national jurisdiction, as well as their consideration by States Parties when issuing permits (c.f. Article 8(6) of the US draft). Most importantly, the Russian delegation suggested consultation with the States of origin in relation to underwater cultural heritage

[101] See footnote 127.
[102] Op. cit. note 1 at p. 414.

found both within marine spaces under coastal sovereignty (c.f. amendments to Article 4) and on the continental shelf/EEZ (c.f. amendments to Article 5).

13.4. According to one expert, Article 13 should be read together with Articles 15 and 16 dealing with education and training in underwater archaeology. However, transfer of technology, existing in informal fashion, should also be institutionalised. Moreover, it was argued that problems might arise in so far as Article 13 commended the exchange of information, which might engender disputes, when the interest in a given heritage is divided between several countries. Other delegates argued that co-operation with other States Parties should be obligatory and apply to discoveries both within and beyond the 24-mile limit. In this respect, one expert asked whether Article 13(1) applied to territorial waters, as this would be a potential source of conflict. As to Article 13(2), according to the same view, the information process should be constructed differently so that every discovery be declared to UNESCO which would then inform the States.

13.5. Finally, paragraph 3 refers to the necessity for rapid dissemination of information about underwater cultural heritage excavated or retrieved contrary to the operative provisions of the Charter or in violation of international law, and the use of databases to achieve this. It is essential that information on illegal excavations be distributed as widely as possible.[103]

[103] See also paragraph 30 of the 1956 UNESCO Recommendation on international principles applicable to archaeological excavations.

Article 14

Underwater Cultural Heritage in the Area

Any discovery of underwater cultural heritage in the Area, as defined in Article 1, paragraph 1(1) of the United Nations Convention on the Law of the Sea, shall be reported by the finder to the Secretary-General of the International Seabed Authority, which shall transmit the information to the Director-General of the United Nations Educational, Scientific and Cultural Organisation.

Proposed amendments

[US draft] Delete article 14.[104]

COMMENTARY

14.1. Article 14 deals with underwater cultural heritage found in the Area without, however, incorporating the principles of Article 149 of the LOS Convention. As already seen, the substantive content of Article 149 is incorporated in other provisions of the Draft, such as Article 3 providing for the preservation of underwater cultural heritage for the benefit of mankind, and Article 13 accommodating the interests of the States of origin. Article 14 simply provides that every finder of underwater cultural heritage in the Area should report it to the ISA, which will then transmit the information to the Director-General of UNESCO.

14.2. According to one expert, this article must be read in close connection with Articles 5, 6 and 7 so as to ensure the broadest possible protection. He noted, however, that any provision concerning the Area must include three points: (a) underwater cultural heritage belongs to humanity; (b) international co-operation must be increased through international organizations endowed with sufficient means; (c) every excavation should be authorized and supervised by international organizations. In any zone, or in the Area, whether under or out of water, in a public or private museum, underwater cultural heritage must be notified to the competent organisation which should then inform the States Parties.

14.3. As regards the notification procedure under Article 14, some delegates questioned the relevance of the ISA, whose principal task is prospecting, exploration and the future exploitation of mineral resources, and already has too many responsibilities; instead, they would prefer notification to UNESCO. Another view was that both mechanisms could be used. In the case of ISA, this could be done through the "Mining Code", still under preparation, which requires in its present draft notification of archaeological finds once a year. Other delegates argued that UNESCO should always be informed of finds anywhere, whereas the Authority would only be informed of finds in the Area. It must be

[104] Relevant issues are dealt with by the US draft in Article 8(8), see p. 44.

noted, however, that the Mining Code will bind only contractors; users other than those engaged in "activities in the Area" will not be affected by these regulations, as they do not operate under the jurisdiction of the Authority. Article 14 goes beyond this by providing that any discovery in the Area should be reported to the Authority. Other experts wanted to refocus the debate on protection; preservation *in situ* is very important and this should be reflected in Article 14. It was stressed that notification alone was not sufficient for the protection of cultural heritage in the Area and States should take responsibility to manage it for the benefit of all humanity. Since the ISA does not enjoy any jurisdictional powers over underwater cultural heritage, the designation of a qualified international body to exercise effective supervision over deep seabed remains and to ensure compliance with the standards of the Convention would be essential. Otherwise, action would be limited to a notification of the existence of the underwater cultural heritage and the Area should become a field of uncontrolled excavation.

14.4. Finally, the controversial issue of sale of underwater cultural heritage was raised. According to one expert, only developed countries had sufficient resources to enforce the prohibition of sale; the least developed States would not be able to protect the heritage and prevent its commercialization. It was, therefore, important that the Draft envisaged a system of international co-operation for the protection of underwater cultural heritage under Articles 13 and 14.

Article 15
Education

Each State Party shall endeavour by educational means to create and develop in the public mind a realisation of the value of the underwater cultural heritage as well as the threat to this heritage posed by violations of this Convention and non-compliance with the Charter.

Proposed amendments

[US draft] Substitute "non-compliance with the rules set out in the Annex" for "non-compliance with the Charter".

COMMENTARY

15.1. The effectiveness of any scheme of protection of underwater cultural heritage depends to a considerable extent on the co-operation of the public, particularly that of interest groups, such as underwater explorers and hobby-divers. Since legal action has its limits, educating the public may prove to be more effective than the enactment of draconian measures which cannot be enforced. It is, therefore, important that positive action is taken not only in the legislative sphere, but also to ensure that the public is properly educated and the law is rigorously enforced. Article 15 provides that States Parties shall endeavour by educational means to create and develop in the public mind a realisation of the value of underwater cultural heritage as well as the threats posed to it. "Educational means" includes formal training, but also other activities, such as exhibitions of recovered underwater cultural heritage, production of leaflets and provision of background material to journalists.[105] It is also important to change the public image of looters as adventurous persons which bring to surface treasures from the past, to an understanding of the losses to history and humanity's heritage that such looting causes.[106]

15.2. At the meeting of governmental experts, many delegates found that the scope of Article 15 was too limited; education, training and public awareness should all be covered. The interdisciplinary nature of research was highlighted and the view was expressed that "education" referred to archaeology as a university subject, while "training" related to technical training. Furthermore, some participants called for national information campaigns on the protection of underwater cultural heritage. Education should be undertaken at many levels: resource managers, the public at large as well as local groups assisting in protection.

---

[105] *Op. cit.* note 1 at p. 414.

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

Article 16

Training in Underwater Archaeology

States Parties shall take measures to further research in accordance with the operative provisions of the Charter by providing training in underwater archaeological investigation and excavation methods and in techniques for the conservation of underwater cultural heritage, or by encouraging the competent bodies or organisations to do so.

Proposed amendments

[US draft] Substitute "in accordance with the rules set out in the Annex" for "in accordance with the operative provisions of the Charter"

COMMENTARY

16.1. Training in underwater archaeology has been a rather neglected issue and this is illustrated by the lack of specialised marine archaeologists. It is therefore important that Article 16 requires States Parties to promote the furtherance of research by providing training in archaeology, both in investigation and excavation methods and in conservation techniques.[107]

16.2. During discussion, it was argued that States ought to take all steps to encourage training in underwater archaeology, without necessarily being under the obligation to do so. It should be borne in mind that the budget of a marine archaeological project is between twenty and fifty times the budget required for a similar project along the coastline. As a result, developing States may not have the financial means to promote and back-up this field of research. According to one expert, when budgetary means do not permit the protection of wrecks at national level, action should be taken at international level. Similar arguments were raised in relation to incorporating into Article 16 the idea of international co-operation and transfer of technology. Finally, it was pointed out that in some States training schemes have turned former looters into allies and protectors. In this respect, reference was made to the training course for amateurs offered by the Nautical Archaeology Society in the UK and the training model prepared under the aegis of the Commission of Science and Technology of the Council of Europe.

[107] Similar provisions are contained in Article 5(e) and 22(e) of the 1972 World Heritage Convention and Article 25 of the 1954 Hague Convention.

Article 17

Assistance of UNESCO

1. *States Parties may call upon UNESCO for technical assistance concerning underwater cultural heritage as regards information and education, consultation and expert advice, co-ordination and good offices, or in connection with any problem arising out of the application of the present Convention or the operative provisions of the Charter.*
2. *The Organization shall accord such assistance within the limits fixed by its programme and by its resources.*
3. *The Organization may, on its own initiative, conduct research and public studies on matters relevant to the protection of the underwater cultural heritage.*

Proposed amendments

- *Paragraph 1*

[US draft] Substitute " the Annex" for " the operative provisions of the Charter".

- *Paragraph 2*

[US draft] Delete paragraph 2.

- *Paragraph 3*

[US draft] Delete paragraph 3.

- *New paragraphs*

[Spanish proposal]

"4. The Organization shall inform the States Party about any activities to recover the remains of shipwrecked vessels or objects that may form part of a cultural heritage, by furnishing any information that may determine the historical or cultural origin of that heritage together with the sources of such information should these exist".

COMMENTARY

17.1. According to paragraph 1, States Parties may refer to UNESCO for assistance both in terms of education and consultation and in connection with the application of the Convention or the Charter.[108] Contrary to the Draft European Convention which envisages the establishment of a Standing Committee to keep under review the implementation of its provisions,[109] the UNESCO/DOALOS Draft does not provide for a monitoring body. Nevertheless, Article 17 would appear to attribute to UNESCO a similar role, even though of a more limited scope.

17.2. Paragraph 2 clarifies that UNESCO shall accord such assistance within the limits fixed by its programme and its resources, while paragraph 3 envisages the possibility of UNESCO conducting its own research and public studies on matters relevant to the protection of underwater cultural heritage.

---

[108] Similar provisions are contained in Article 23 of the 1954 Hague Convention and Article 17 of the 1970 UNESCO Convention.

[109] This is standard practice within the Council of Europe. See, for example, the relevant provisions of the Convention for the Protection of the Architectural Heritage of Europe (1985), *Europ. T.S.* No. 121, and the 1992 (revised) Archaeological Convention.

17.3. As already pointed out, during the meeting of governmental experts, the majority of delegates were in favour of granting UNESCO a central role in implementing the Convention, in particular in matters relating to notification of discovery of underwater cultural heritage and other related issues. Along these lines, the Spanish delegation proposed that UNESCO should inform States Parties "about all activities to recover the remains of objects forming part of a cultural heritage" as well as to provide information on its historical and cultural origin. As explained in the introductory note to the Spanish proposal, "there is need for the existence of an international authority to oversee the activities involved in the recovery of the remains of shipwrecked vessels or objects that may form part of the cultural heritage of a State Party, by making a record of them and disclosing them to all States. Not only would this avoid any disputes arising between States with regard to priority in the research, but also any interested States could be made aware of them and exercise any rights they have under the Convention." However, many questions are raised in relation to the Spanish proposal. First, it is often difficult to ascertain whether underwater cultural heritage originates from a particular country, thus forming part of its cultural heritage before the site is investigated. Second, the proposal does not specify its territorial scope of application, even though it may be deduced from the introductory note that it applies to extra-territorial waters. There can be no doubt that most States would be reluctant to accept supervision of activities in their territorial waters or other areas under their jurisdiction or control. Third, the undertaking of this task would place a considerable administrative burden on UNESCO.

Article 18
National Services

1. *In order to ensure effective implementation of this Convention, States Parties undertake to expand the activities of existing competent national services or, if appropriate, to establish national services for that purpose.*
2. *National services should actively encourage the participation of interested persons in preservation and study of the underwater cultural heritage and in support of archaeological research. This participation is subject to the authorisation and control of the national services concerned and must respect the operative provisions of the Charter.*
3. *States Parties shall establish an internal procedure or procedures for resolving disputes concerning whether or not an activity affecting underwater cultural heritage is in conformity with the operative provisions of the Charter.*

Proposed amendments

- *Paragraph 2*

[US draft] Substitute "the rules set out in the Annex" for ""the operative provisions of the Charter".

- *Paragraph 3*

[US draft] Substitute "the rules set out in the Annex" for ""the operative provisions of the Charter".

COMMENTARY

18.1. Article 18 deals with issues relating to the implementation of the Convention by States Parties. In this context, national services play a very important role both in terms of management and protection of underwater cultural heritage. According to paragraph 1, States Parties should either expand the activities of existing national services or, if appropriate, establish services for that purpose. [110]

18.2. Paragraph 2 provides that national services should encourage the participation of "interested persons" in the preservation and study of underwater cultural heritage and in support of archaeological research. As explained, Article 18(2) encourages co-operation between salvors, divers and local historians; short training courses for such persons and their co-operation in archaeological surveys, where appropriate, have proved beneficial in a number of national contexts. However, the participation of salvors is controversial, even if it is subject to prior authorization and compliance with the operative provisions of the Charter. In their vast majority, national heritage laws do not allow the participation of commercial interests in archaeological activities, whether on land or underwater; in some cases, foreign scientific institutions and archaeological schools are entitled to undertake only a limited number of excavations *per annum* under strict conditions. Nevertheless, if salvage law is to be excluded from the scope of application of the Convention, then

[110] Similar provisions are contained in Article 5 of the 1970 UNESCO Convention and Article 5(b) of the 1972 World Heritage Convention.

Article 18(2) may provide a compromise solution for those States whose national law permits the operation of commercial interests. In any case, paragraph 2 should be redrafted so as to ensure a strict application of the operative provisions of the Charter as well as specify the term "interested persons" and the scope of their "participation in support of archaeological research".

18.3. According to paragraph 3, States Parties shall establish internal procedures for resolving disputes over compliance with the operative provisions of the Charter. As a result, it is left to each State Party to determine how disputes should be resolved in accordance with its own practice; still, there is no reference to court proceedings. If it is considered that the Convention provides for the seizure of underwater cultural heritage excavated or removed not in compliance with the provisions of the Charter, it is highly possible that there will be disputes on this point. It is therefore essential that States Parties adopt a definitive procedure both for determining compliance and for resolving disputes.

Article 19

Peaceful Settlement of Disputes

Any dispute between two or more States Parties concerning the interpretation or application of the present Convention or the operative provisions of the Charter and not settled by negotiation shall, at the request of any of the parties to the dispute, be submitted to arbitration. If the States Parties are unable to agree on the constitution of the arbitral tribunal within six months from the date of the request for arbitration, any of the parties to the dispute may refer the dispute to the International Court of Justice.

Proposed amendments

[Russian proposal] In case of a dispute, the procedure for dispute settlement provided for in UNCLOS shall be applied.

[Turkish proposal]

"Any dispute between States concerning the interpretation of the Convention or the operative provisions of the Charter ought to be settled primarily by means of meaningful negotiations or by any other peaceful means referred to in article 33 of the United Nations Charter".

[Israeli proposal]

"Any dispute between two or more States Parties concerning the interpretation or the implementation of the Convention or the operative provisions of the Charter shall be settled by peaceful means agreed to by the Parties involved such as consultations, negotiations, conciliation, mediation or any other peaceful means of their choice".

COMMENTARY

19.1. Article 19 deals with settlement of disputes concerning the interpretation or application of the Convention and the operative provisions of the Charter. As a first step, the Parties shall negotiate in an attempt to solve the dispute. If negotiations are not successful, at the request of any of the parties to the dispute, it will be submitted to arbitration. If, however, the parties are unable to agree on the constitution of the arbitral tribunal within six months from the date of the request, then any of the parties to the dispute may refer it to the International Court of Justice. It is notable that the Draft European Convention contains no provision on this issue.

19.2. As an alternative, the application of the dispute settlement mechanism of the LOS Convention was considered. However, arbitration was preferred as the judges of the recently established International Tribunal for the Law of the Sea, although eminent experts in the law of the sea, would not have expertise in cultural heritage matters. The issue is still pending, as it is evident from the relevant Russian proposal and comments at the meeting. If the Draft Convention is agreed to be a supplementary agreement to the LOS Convention, some might prefer the use of the LOS mechanism for settlement of disputes. According to Article 287 of the LOS Convention, States may choose one or

more of four different procedures for compulsory settlement. These are: (a) the International Tribunal for the Law of the Sea, (b) the International Court of Justice, (c) arbitration, and (d) special arbitration. A declaration indicating their preferred choice of compulsory procedures can be made by States Parties at any time and revoked or modified on three months' notice. If no declaration is made or if the parties to a dispute have made different choices, arbitration becomes the residual procedure, unless the parties otherwise agree.[111]

19.3. Under the Turkish proposal any disputes concerning the interpretation or the implementation of the Convention should be settled by negotiations or any other peaceful means referred to article 33 of the UN Charter. A similar proposal was submitted by Israel, which suggests settling disputes through "consultations, negotiations, conciliation, mediation or any other peaceful means". However, such methods are not effective as they do not entail binding adjudication of the dispute.

[111] It is notable that the Straddling Fish Stock Agreement provides for the *mutatis mutandis* application of the mechanisms for settlement of disputes of the LOS Convention. More specifically, Article 30(1) of the Agreement provides that Part XV of the LOS Convention, including Section 2 involving compulsory procedures entailing binding decisions, shall apply to any disputes between parties to the Agreement concerning its interpretation or operation, even if they are not parties to the LOS Convention. In order to accommodate non-parties to the Convention, the Agreement allows the latter to elect a procedure when signing, ratifying or acceding to the Agreement, in accordance with Article 287 of the LOS Convention.

Article 20

Ratification, Acceptance, Approval or Accession

1. *Member States of UNESCO, as well as Non-member States of UNESCO which have been invited by the Executive Board of UNESCO, may become Parties to this Convention by depositing with the Director-General of UNESCO an instrument of ratification, acceptance, approval or accession.*
2. *The Convention shall enter into force three months after the deposit of the fifth instrument referred to in paragraph 1, but solely with respect to the five States that have so deposited their instruments. It shall enter into force for each other State three months after that State has deposited its instrument.*

Proposed amendments

- *New articles [US draft]*

Article 18bis. Signature.

"This Convention shall be opened for signature by all States [for two years from the date of its adoption], and thereafter open to accession".

Article 19. Entry into force.

1. States may express their consent to be bound by the Convention by:
   a. signature without reservation as to ratification, acceptance or approval;
   b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or
   c. accession.
2. The Convention shall enter into force 90 days after five States have expressed their consent to be bound in accordance with paragraph1.
3. For each State consenting to be bound after date of entry into force of the Convention. The Convention shall enter into force for that State 90 days after the deposit of its instrument expressing its consent to be bound.

COMMENTARY

20.1. Article 20, as most of the final clauses of the Draft Convention, are based on standard UNESCO practice and do not call for particular comment. Paragraph 1 provides that a State may become party to the Convention by depositing its instrument of ratification, acceptance, approval or accession. In accordance with the Rules of Procedure concerning Recommendations to Member States and International Conventions, such instruments are adopted at the General Conference of UNESCO by a two-thirds majority. Participation takes place by the deposit of one of the instruments concerned. Under paragraph 1, accession is possible at any time and not only after the Convention has entered into force, as for example in the 1954 Hague Convention. Furthermore, as specifically stated, only Member States of UNESCO may become parties to the Convention. Non-member States may be invited by the Executive Board of UNESCO to participate.

20.2. According to paragraph 2, the Convention shall enter into force three months after the deposit of the fifth instrument of ratification, acceptance, approval or accession. For each State ratifying, accepting, approving or acceding thereafter, the Convention is to enter into force three months after the deposit of its instrument expressing its consent to be bound.

20.3. The US draft proposes a more detailed provision on the entry of the Convention into force, providing also for the possibility of signature without reservation to ratification, accession or approval. Furthermore, it includes a separate article on signature; according to article 18bis, the Convention will be open for signature for a period of two years, and thereafter to accession. However, the proposed US draft amendments do not conform to the aforementioned UNESCO rules on the adoption of international conventions.

Article 21

Reservations and Exceptions

No reservations or exceptions may be made to this Convention.

Proposed amendments

[Turkish proposal]

"States when signing, ratifying, accepting, approving or acceding to this Convention, may make reservations or exceptions not incompatible with the object and purpose of this Convention".

[Israeli proposal]

"Upon signature, ratification, acceptance, approval or accession to the Convention, States may make reservations that are not incompatible with the object or purpose of the Convention".

[US draft] Reservation and declarations [numbered as article 20].

1. No reservations or exceptions may be made to this Convention.
2. Paragraph 1 does not preclude a State, when consenting to be bound by the Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonisation of its laws and regulations with the provisions of the Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of the Convention in their application to the State.]

- *New article [US draft]*

Article 20bis. Territorial application.

1. Any State may declare that its signature, ratification, acceptance or approval does not apply to any one or more of its territories for the foreign relations of which such State is responsible.
2. Any State may subsequently declare that it extends application of this Convention to anyone or more of its territories for which it has excluded application under paragraph 1."

COMMENTARY

21.1. The Convention does not allow reservations or exceptions[112] to its provisions. The general question of reservations to multilateral treaties has been a troublesome one since it was first raised. The power to exclude or modify the legal effect of individual provisions of an international convention may disturb the delicate balancing of interests achieved during negotiations and a carefully negotiated structure. Often, the acceptance of individual provisions depends on correlative provisions in other parts of the document. Thus, for some States, the decision taken on the question of jurisdiction or the scope of application of the Draft Convention would be critical for the acceptance of other articles or the whole of the Convention. Most importantly, the Draft Convention deals with a very specialized topic; as a result there would be few reservations which would not affect its object and purpose.

21.2. A different approach is undertaken by the Turkish proposal which accepts reservations or exceptions not incompatible with the object of the Convention, while the

[112] According to Article 19 of the Vienna Convention on the Law of Treaties, a reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".

US draft adopts a provision similar to article 310 of the LOS Convention by enabling States to make declarations or statements with a view to the harmonisation of their laws and regulations with the provisions of the Convention, provided that such declarations do not have the legal effect of reservations.

Article 22
Amendments

1. *A State Party may, by written communication addressed to the Director-General of UNESCO, 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 General Conference of the UNESCO for adoption.*
2. *Once adopted, amendments to this Convention shall be subject to ratification, acceptance, approval or accession by the States Parties, unless otherwise provided in the amendment itself.*
3. *Articles 21 and 23 shall apply to all amendments to this Convention.*
4. *Amendments to this Convention shall enter into force for the States Parties accepting or acceding to them three months after the deposit of the instruments referred to in paragraph 2 by two thirds of the States Parties. Thereafter, for each other State Party it shall enter into force three months after the deposit of its instruments.*
5. *An amendment may provide that a smaller or a larger number of acceptance or accessions shall be required for its entry into force than are required by this article.*
6. *A State which becomes a Party to this Convention after the entry into force of amendments in accordance with paragraph 4 shall, failing an expression of different intention by that State:*
    (a) be considered as a Party to this Convention as so amended; and
    (b) be considered as a Party to the unamended Convention in relation to any State Party not bound by the amendment.

Proposed amendments

- *Paragraph 1*

[Turkish proposal]

A State may, by written communication addressed to the General Director of UNESCO, propose amendments to this Convention. The General Director shall circulate such communications to *all the parties*. If within six months from the date of the circulation of the communication, if *not less than one third of the States* reply favourably to the request, the General Director of the UNESCO shall present the proposal to the General Conference of the UNESCO for adoption *by a two-thirds majority of the States present and voting.*

[Israeli proposal]

"A State may, by written communication addressed to the Director-General of UNESCO, propose amendments to this Convention. The Director-General shall circulate such communications to all States Parties. If within six months from the date of circulation of the communication, not less than half of the States Parties reply favourably to the request, the Director-General shall present the proposal to the General Conference of UNESCO for adoption *by two-thirds majority of the States Parties present and voting.*

- *New article 21 [US draft]*

1. A State Party may, by written communication addressed to the Director-General of UNESCO, propose amendments to this Convention *and its Annex*. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, *at least* one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the General Conference of the UNESCO for adoption.

2. *[Amendments shall be adopted by - % of Parties and voting favourably at the General Conference of UNESCO].*
3. Once adopted, amendments to this Convention shall be subject to ratification, acceptance, or approval (or accession) by the States Parties, unless otherwise provided in the amendment itself.
4. *Articles 22 and 25* shall apply to all amendments to this Convention.
5. Amendments to this Convention shall enter into force for the States Parties *ratifying*, accepting or acceding to them three months after the deposit of the instruments referred to in paragraph 3 by two thirds of the States Parties. Thereafter, for each other State Party it shall enter into force three months after the deposit of its instrument *of ratification, acceptance or approval.*
6. A State which becomes a Party to this Convention after the entry into force of amendments in accordance with paragraph 4 shall, failing an expression of different intention by that State:
    a) be considered as a Party to this Convention as so amended; and
    b) be considered as a Party to the unamended Convention in relation to any Party not bound by the amendment."

COMMENTARY

22.1. Article 22 establishes a procedure for amending the Convention. Under paragraph 1, any State Party may propose an amendment. The text will be communicated to the Director-General who will then transmit it to the other Parties. If within six months from the date of circulation, not less of one half of the States Parties reply favourably, the Director-General shall present the proposal to the General Conference for adoption.

22.2. Paragraph 2 provides that amendments shall be subject to ratification, acceptance, approval or accession unless otherwise provided, while paragraph 3 clarifies that article 21 prohibiting reservations and Article 23 dealing with denunciation are applicable to all amendments.

22.3. As regards their entry into force, according to paragraph 4, amendments shall be binding for the States Parties accepting or acceding to them three months after the deposit of instruments expressing consent to be bound by the Convention by two thirds of the States Parties. Thereafter, for each other State Party, it shall enter into force three months after the deposit of its instrument of ratification acceptance or approval. However, a different number of acceptance or accessions may be applicable, if it specifically provided for in the amendment.

22.4. Paragraph 6 provides that a State which will become a party to the Convention after the entry into force of amendments, shall be considered as a party to the Convention as amended, unless a contrary intention is expressed. However, in relation to parties not bound by the amendment, it shall be considered as a party to the unamended Convention.

22.5. It should be noted that the procedure for adoption amendments to a UNESC O Convention needs to comply with the Resolutions of the UNESCO General Conference for the adoption of standard-setting norms.

Article 23

Denunciation

1. *A State Party may, by written notification addressed to the Director-General of UNESCO, 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.*

Proposed amendments

[US draft] *Article 22*

1. Any Party may denounce this Convention twelve months after the date on which it notifies the Depositary in writing of its intention to denounce, unless the notification specifies a later date.
2. This 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."

COMMENTARY

23.1. Article 23, which follows closely the provisions of article 317 of the LOS Convention, recognises the right of States Parties to withdraw from the Convention. According to paragraph 1, each State Party shall notify the Director-General of UNESCO of its intention to denounce the Convention. However, as specifically stated in paragraph 2, denunciation only takes effect twelve months after the date of receipt of the notification, which must be circulated to all parties to the Convention.

23.2. Finally, paragraph 3 follows article 43 of the Vienna Convention by providing that denunciation shall not in any way affect the duty of a State Party to fulfil obligations embodied in the Convention to which it would be subject under international law independently of the Convention.

Article 24
The Charter

1. *The operative provisions of the Charter annexed to this Convention form an integral part of it, and, unless expressly provided otherwise, a reference to this Convention or to one of its Parts includes a reference to the operative provisions of the Charter relating thereto.*
2. *The Charter may be revised from time to time by the International Council of Monuments and Sites. Revisions of the operative provisions shall be deemed to be revisions of the annexed operative provisions. The Director-General of the United Nations Educational, Scientific and Cultural Organisation shall notify all States Party to this Convention of the text of such revisions. States Parties shall be bound by the revisions, except those States Parties that notify the depositary of their non-acceptance in writing. Such notification shall be made within six months after the receipt of the notification of the text of revisions.*
3. *A State which becomes a Party to this Convention after the adoption of amendments to the operative provisions of the Charter in accordance with paragraph 2 shall:*
   (a) be considered to have accepted the operative provisions of the Charter as so amended; and
   (b) be considered as having accepted the unamended operative provisions of the Charter in relation to any State Party not bound by the amendments to the operative provisions of the Charter.

Proposed amendments.

- *Paragraph 2*

[Israeli proposal]

"Revisions of the operative provisions of the Charter may be proposed from time to time by the International Council of Monuments and Sites. The proposed revisions shall be submitted to the Director-General of UNESCO who shall circulate them to all States Parties to the Convention. If, within six months from the date of circulation of the revisions, not less than one third of the States Parties reply favourably to the request for revision, the Director-General shall present the proposal to the General Conference of UNESCO for adoption by a two-thirds majority of the States Parties present and voting. The revised text shall be deemed to replace the appropriate operative provisions."

[Turkish proposal]

"The Charter may be revised from time to time by the International Council of Monuments and Sites. Revisions of the operative provisions shall be deemed to be revisions of the annexed operative provisions. The General Director of UNESCO shall notify the parties on the text of such revisions at least six months before the General Conference of UNESCO. The General Conference will adopt this amendment by a two-thirds majority of the members present and voting. These amendments will come into force by the procedure referred to in Article 20. "

[Latin American/Caribbean proposal]. Amendments to the ICOMOS Charter should be subject to Article 22 of the Convention.

[US draft]. Delete article 24.

COMMENTARY

24.1. One of the most innovative features of the Draft Convention is the incorporation by reference of standards adopted by ICOMOS, an internationally recognised body with expertise in the field of cultural heritage.[113] More specifically, activities affecting underwater cultural heritage will be judged against the standards contained in the ICOMOS Charter on the Management and Protection of the Underwater Cultural Heritage, which was adopted in Sofia in 1996.[114] Paragraph 1 provides that the operative provisions of the Charter form an integral part of it and, unless expressly provided otherwise, a reference to this Convention or to one of its Parts includes a reference to the operative provisions of the Charter.

24.2. The principles contained in the Charter may well change over time as the discipline of archaeology develops and technology changes. Paragraph 2 deals with the controversial issue of revision. Under its terms, the Charter may be revised from time to time by ICOMOS. Such revisions, which shall be deemed to be revisions of the annexed operative provisions, shall be circulated by the Director-General of UNESCO to States Parties. Unless States Parties notify the depository of their non-acceptance in writing within six months after the receipt of the notification, they will be bound by these provisions. As explained by the Chairman of the ILA Committee on Cultural Heritage Law,[115] "the purpose is to allow the standards to be updated as archaeological and technical developments occur while avoiding the protracted and complicated procedures

---

[113] ICOMOS, the International Council for the Protection of Monuments and Sites, is a non-governmental organization which has been in existence since 1964 and has official relations with UNESCO. It is recognised in the 1972 World Heritage Convention as the expert advisory body on cultural sites being nominated for the World Heritage List, and in the Second Protocol (1999) to the 1954 Hague Convention as one of the advisory bodies to the intergovernmental committee established under that instrument. Its Members are frequently sent on mission to evaluate the state of conservation of sites and to make recommendations for their better protection and management. It is responsible for the Venice Charter for the Conservation and Restoration of Monuments and Sites (1964), the Charter for the Conservation of Historic Towns and Urban Areas (1987) and the International Charter for the Protection and Management of the Archaeological Heritage (1990). The Sofia Charter on the Underwater Cultural Heritage is thus simply a continuation of its work in setting appropriate standards for the protection and management of the whole area. Furthermore, Members of ICOMOS have been active in formulating important UNESCO Recommendations, such as the 1956 Recommendation on International Principles Applicable to Archaeological Excavations, the 1962 Recommendation concerning the Safeguarding and Character of Landscapes and Sites, the 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, the 1972 Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, and the 1976 Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas.

[114] The ICOMOS Charter was developed in direct response to the need to set professional standards for the handling of the underwater cultural heritage in connection with the decision of the UNESCO General Conference to develop an international instrument on the subject. It was drafted by the International Committee on Archaeological Sites through its Sub-Committee on the Underwater Cultural Heritage which is composed of experts in the discipline. The principles in the Charter have been taken from the best experience made in preservation and protection and are based on projects which have been judged by peer professionals to have had the best results.

[115] O' Keefe, P.J., "Protecting the underwater cultural heritage -The International Law Association Draft Convention", 20 *Marine Policy* (1996) pp. 297-307 at pp. 301-302.

involved in amending an international convention. On the other hand, if that were all, States would find themselves bound by provisions to which they had not consented. Accordingly, there is qualification whereby, within six months of the effective date of the revision, States could notify the Director-General of UNESCO that they refuse to accept it. This could mean that over time States will come to apply different standards. However, it was felt that the provision effectively balanced the interests of States with the need for ease of revision. The technical nature of some amendments also means that it is unlikely that States would object".

24.3. Paragraph 3 refers to States which will become parties to the Convention after the adoption of the amendments. More specifically, it is stated that such States shall be considered to have accepted the operative provisions of the Charter as amended. However, in relation to States Parties, which are not bound by these amendments, they shall be considered as having accepted the unamended provisions of the Charter.

24.4. At the meeting, the experts considered both the standards established by the Charter and the method of integrating it within the Convention. One view was to annex the Charter to the Convention. However, there were differences of opinion as to whether the Annex should be detailed or contain general principles not requiring major amendments. According to another view, only the operative provisions of the Charter should be included in the Convention; the Charter as a whole could not be integrated into the text, since it has a non-legal and non-obligatory character and many of its provisions were too detailed and already reflected in the Convention.[116] Furthermore, it was stated that the instrument should be flexible enough to allow for future developments. This could be achieved by different means: (a) by providing for a different procedure for amending the Charter, less rigid than for amendments to the Convention, (b) by providing for a group of experts to meet once a year to propose amendments which would then be submitted to State Parties, or (c) by providing for a regular meeting of States Parties every five years to consider developments and propose amendments. Despite reluctance by some to setting up a bureaucratic procedure, some experts insisted that the persons chosen for the group of experts, would have to be official representatives of the States Parties. As regards the "silent" procedure of Article 24(2), some experts thought that something more was required, while others remarked that Article 24(2) would risk creating problems if some States accept and others reject amendments.

[116] A similar approach was undertaken during the Meeting of Experts for the Protection of Underwater Cultural Heritage held at UNESCO in 1996. It was considered that not all principles had the appropriate normative shape of obligations between States and some principles were rather in terms which would work between individuals, groups and/or governmental bodies working on a site. A selection should be made of principles applicable between States and others equally fundamental, but more applicable between archaeologists and governments. Yet other principles would be used as guidelines for proper practice which could be annexed in a new Convention. It was proposed that States should undertake an obligation to adopt these principles in their national legislation.

24.5. The IMO representative described the amendment procedure used for the International Convention for the Safety of Life at Sea (SOLAS, 1974) and the International Convention for the Prevention of Pollution from Ships (MARPOL, 1973). These instruments together with the Convention on the International Regulations for Preventing Collisions at Sea (1972) incorporate a procedure involving the "tacit acceptance" of amendments by States. Instead of requiring that an amendment shall enter into force after being accepted by, for example, two thirds of the Parties, the "tacit procedure" provides that an amendment shall enter into force at a particular time unless, before that date, objections to the amendment are received from a specified number of Parties. Furthermore, reference was made to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972), where amendments, drafted by scientists, are considered for adoption every second year by the annual meeting of States Parties. Finally, it was proposed that the ICOMOS International Committee on the Underwater Cultural Heritage should be responsible both for the permanent follow-up of the Charter and for proposing amendments to be adopted by the General Conference of UNESCO.

24.6. So far as the substantive provisions of the Charter are concerned, the vast majority of experts were in favour of including a prohibition of commercial incentives; however, it was also pointed out that in some States national law allows recovery by commercial entities. Finally, it was proposed to add to the Charter rules on management, such as impact assessment and rules for mitigation of impact.

24.7. In the US draft, Article 24 is deleted. Instead, International Rules for the Protection and Management of Underwater Cultural Heritage are incorporated in an Annex.

Article 25

Authoritative texts

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

Proposed amendments

New article 22bis [US draft]

The Depositary

1. The originals of the Convention shall be deposited with the Director-General of UNESCO, who shall serve as the Depositary.
2. The Depositary shall transmit certified copies of the Convention to all signatories and Parties.
3. The Depositary shall inform all signatories and Parties to the Convention of:
   a. all channels of communication for verifying ownership of shipwrecks and sunken aircraft and for facilitating protection of ownership rights identified by other Parties.
   b. All signatures, ratifications, acceptances, and approvals deposited pursuant to Articles 20 and 21.
   c. The dates of entry into force of the Convention pursuant to Article 21.
   d. All declarations made pursuant to Article 22.
   e. All declarations of territorial application under Article 23.
   f. All proposals to amend the Convention made pursuant to Article 24.
   g. All notifications of withdrawal pursuant to Article 25.

4. The Depositary shall register this Convention with the United Nations pursuant to Article 102 of the Charter of the United Nations".

COMMENTARY

25.1. The authentic texts of the Convention are in Arabic, Chinese, French, Russian and Spanish, the six texts being equally authoritative so that interpretation of the text must be based on all six versions. It should be noted, however, that the multiplicity of authentic texts may create interpretation difficulties, especially if there are discrepancies.

25.2. The US proposed a new article specifically dealing with the duties of the Depositary, i.e. the Director-General of UNESCO. These duties include the normal custodial and transmittal functions of the depositary of a multilateral treaty, additional functions arising out of the substantive provisions of the Convention, such as notification of "all channels of communication for verifying ownership of shipwrecks and sunken aircraft and for facilitating protection of ownership rights identified by other Parties", and the duty to register the Convention with the United Nations.

PART III. CONCLUSIONS

It is obvious from the above analysis that the Draft Convention raised a lot of discussion during the first meeting of governmental experts. Although it appeared to provide an acceptable basis for negotiating an international convention on the protection of underwater cultural heritage, a number of delegates raised objections to some of its provisions, in particular those dealing with the question of jurisdiction. The major issues requiring consideration at the next meeting in April are the following:

a. Jurisdiction

The UNESCO/DOALOS Draft combines three well-established bases of jurisdiction to deal with underwater cultural heritage, namely coastal State, national/flag State and port State jurisdiction. Some States expressed major concern about expanding coastal control over the continental shelf/EEZ, primarily because of its alleged incompatibility with the LOS Convention. As an alternative, it was proposed to restrict coastal jurisdiction to the outer limit of the contiguous zone and deal with underwater cultural heritage found beyond the 24-mile zone exclusively on the basis of national/flag State jurisdiction. However, rejection of Article 5 would deprive the Draft Convention of most of its substance. As a compromise solution it could be agreed to limit the scope of coastal powers on the continental shelf/EEZ. For example, instead of recognising the right to regulate "all activities affecting underwater cultural heritage", coastal rights may be confined to "exploration, excavation and management of underwater cultural heritage", as provided for in Article 6(2) of the Draft.

b. Scope of application of the Convention

At the meeting, most delegates were in favour of protecting all underwater cultural heritage, as defined by Article 1(1)a, instead of abandoned heritage as provided for in Article 2(1) of the Draft. Furthermore, a number of delegates suggested the inclusion of warships and other public vessels after a specified date, i.e. those sunk before the year 1945. Finally, there were proposals to apply the Convention as a whole within marine spaces under the sovereignty of the coastal State, instead of applying at a minimum the operative provisions of the Charter.

c. Exclusion of salvage law

The majority of experts were in favour of excluding salvage law. There are two alternatives on the table for discussion, either to include a provision along the lines of Article 4 of the ILA Draft or to deal with this issue within the framework of Article 12(2) of the UNESCO/DOALOS Draft.

d. Permits

Problems may arise in relation to the application of the proposed system of import control by States Parties, which are Members States of the European Union. Since 1 January 1993 and the completion of the internal market, EU Member States are no longer entitled to carry out their customs controls and formalities at the Community's internal frontiers, despite the fact that they retain the right to define their national treasures and to take the necessary measures to protect them. As a result, EU Member States may issue permits for importation of underwater cultural heritage from third countries, but not from other EU Member States.

In this respect, one may refer to Article 13(3) of UNIDROIT Convention, which allows contracting States, which are also members of organizations of economic integration or regional bodies, to declare that they will apply, in their relations with each other, the internal rules of these organizations or bodies and "will not therefore apply the provisions of the Convention the scope of application of which coincides with that of those rules". However, such an arrangement would exclude the whole European group from the scope of application of Articles 8 and Article 9 of the Draft Convention.

e. Seizure

If the Convention applies to all, instead of abandoned, underwater cultural heritage problems may arise if the identifiable and claims the seized material. These problems will be exacerbated if warships and other State vessels are to be included in the Convention. Thus, there may be need for the adoption of a provision along the lines of Article 303(3) of the LOS Convention reserving the rights of identifiable owners.

f. Respect for third States rights

A number of delegates were in favour of including a "without prejudice clause" with respect to third State's rights set forth in the LOS Convention. Alternatively, this issue could be dealt with by making the new instrument a supplementary agreement to the LOS Convention.

g. Accommodation of the interests of the State(s) of origin

As already seen, the Draft Convention deals with this issue in a number of provisions, namely Articles 11, 12 and 13. However, both discussion at the meeting in 1998 and the proposed amendments reveal a tendency to recognise particular cultural interests in all marine spaces. It is notable that most proposals employed the terms used by Article 149 of the LOS Convention.

h. Notification of discovery of underwater cultural heritage

The Draft aims at ensuring that all activities affecting underwater cultural heritage are notified to and/or authorized by either coastal or flag States so that the provisions of the Charter will be applied in all cases. Furthermore, there is provision for the notification of the seizure of underwater cultural heritage to States with a cultural heritage interest to it as well as for information-sharing with other State Parties. During the meeting, a number of delegates suggested that the information process should be constructed differently so that every discovery be declared to UNESCO which would then inform the States Parties. Although UNESCO may perform a central role in implementing the Convention, such proposals are impractical and would create a bureaucratic regime.

i. The ICOMOS Charter

The majority of experts rejected the method of integrating the ICOMOS Charter within the Convention as well as its amending procedure under Article 24. They were in favour of both annexing the Charter to the Convention and adopting a more traditional procedure for amending it. However, the standards established by the Charter should also be considered at the next meeting.

In concluding, to be truly effective, the Convention will need the co-operation of a large number of States Parties. Moreover, membership will need to include "art market" States and other States whose nationals have access to advanced technology. It is, therefore, important to adopt a Convention which in principle would have the support of most States, but would also provide an effective and useful basis for protecting underwater cultural heritage.

APPENDIX: INTERNATIONAL AND REGIONAL INSTRUMENTS RELEVANT TO THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

I. PROTECTION AT INTERNATIONAL LEVEL

1. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (UNESCO, 1954)[117]

In time of war, the 1954 Hague Convention declares the duty of both the territorial State and its enemies to respect movable and immovable property of great importance to the cultural heritage of every people, irrespective of ownership or origin. They should refrain from any use of the property and its immediate surroundings, which are likely to expose it to destruction or damage, and from any act of hostility directed against it. Furthermore, States parties undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property. Provision is also made for special protection of property of very great importance and the refuges intended to shelter it.

However, the issue of restitution of cultural property removed during armed conflicts is not addressed by the Hague Convention. This is dealt with by an additional Protocol, which was adopted at the same day. Under the 1954 Protocol, parties undertake to prevent the exportation of the protected cultural property from occupied territories and to take into their custody such property imported into their territories. In case cultural property is exported from an occupied territory, at the close of hostilities, this property must be returned to the competent authorities of the territory previously occupied. Such property shall never be retained as war reparations. The State party whose obligation was to prevent such exportation shall pay an indemnity to the holders in good faith of any cultural property, which has to be returned.

2. Convention on the Means of Protecting the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970)[118]

In time of peace, the 1970 UNESCO Convention aims at putting an end to the illegal trade and transfer of ownership of cultural property. Primary responsibility has been given to exporting countries, which should protect their cultural property by establishing national services and by maintaining export controls. In particular, they should establish and keep up to date national inventories of protected property; organise the supervision of archaeological excavations; ensure the preservation *in situ* of certain cultural property;

---

[117] *Op..cit.* note 49.
[118] *Op. cit.* note 35.

protect certain areas reserved for future archaeological research, and establish, for the benefit of those concerned (curators, collectors, antique dealers etc.), rules in conformity with the ethical principles set forth in the Convention. Regrettably, the 1970 Convention did not introduce a corresponding import control system that could ensure an efficient scheme of protection. Importing countries shall only co-operate in the recovery and retrieval of cultural property, which has been illegally exported *after* the entry into force of the Convention. More specifically, they shall take the necessary measures to: (a) prevent museums within their territories from acquiring cultural property which has been illegally exported, (b) prohibit the import of cultural property stolen from a museum or a public institution, and (c) at the request of the State of origin, recover and return any such cultural property imported after the entry into force of the Convention, under the condition that the requesting State shall pay just compensation to the *bona fide* purchaser. Requests for recovery and return shall be made through diplomatic offices.

The definition of "cultural property" under the 1970 Convention is broad enough to include wrecks and other elements of underwater cultural heritage, provided that they are specifically designated as being of importance and are located landward of the outer limit of the territorial sea.[119]

3. Convention for the Protection of the World Cultural and Natural Heritage (UNESCO, 1972)[120]

The 1972 UNESCO Convention recognises both the interest and the duty of the international community to participate in the protection of the cultural and natural heritage of outstanding value. International protection of the world's cultural and natural heritage should be taken to mean the establishment of a system of international co-operation and assistance to support States parties to the Convention in their efforts to conserve and identify this heritage. In this respect, the 1972 Convention established an Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, the "World Heritage Committee". On the basis of the inventories submitted by States, the World Heritage Committee establishes, keeps up to date and publishes under the title of "World Heritage List", a list of properties forming part of the cultural and natural heritage protected by the Convention. Whenever circumstances so require, the Committee establishes, keeps up to date and publishes, under the title of

[119] According to Article 1, "the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: (c) products of archaeological excavations or discoveries; d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic items, such as: (ii) original works of statuary art and sculpture in any material." On the territorial scope of application of the Convention see Article 4.

"List of World Heritage in Danger", a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under the Convention.

Submerged sites and monuments of outstanding universal value may be protected as part of the world cultural heritage, under the terms of the 1972 UNESCO Convention. Such sites should be located landward of the outer limit of the territorial sea.[121]

4. UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects (1995)[122]

The UNIDROIT Convention, which supplements the provisions of the 1970 UNESCO Convention,[123] deals with issues related to the "restitution" and "return" of cultural objects. The term "restitution" is used in cases of stolen cultural objects and the term" return" in cases where a cultural object has been removed from the territory of a contracting State contrary to its export legislation. Whereas the Convention establishes the absolute duty to return a stolen object, illegally exported objects shall be returned only if the requesting State proves an impairment of one or more of the following interests: the physical preservation of the object or its context; the integrity of a complex object; the preservation of information of, for example a scientific or historical character; the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for it. A claim for restitution or a request for return must be brought before the courts or other competent authorities of the contracting State, where the cultural object is located. Different limitation periods apply, with an absolute limit of 75 years for claims for restitution of cultural objects displayed from monuments, archaeological sites or public collections, and a limit of 50 years for requests for return. Furthermore, the *bona* fide possessor of a stolen cultural object is entitled to payment of fair and reasonable compensation. Similarly to the 1970 UNESCO Convention, the UNIDROIT Convention does not have a retroactive effect; however, as expressly stated, it does not legitimise any illegal transaction of whatever nature which has taken place before its entry into force.

---

[120] *Op. cit.* note 37.

[121] According to Article 2, as "cultural heritage" shall be considered: *"monuments*: elements or structures of an archaeological nature, cave dwellings and combinations of futures, which are of outstanding universal value from the point of view of history, art or science; groups of buildings or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding value from the point of view of history, art or science; *sites:* works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view". The territorial scope of application of the Convention is expressed in Article 3.

[122] *Op. cit.* note 36.

[123] As noted, the 1970 UNESCO Convention deals with the problem of illicit traffic by means of administrative procedures and State action, while the UNIDROIT Convention provides a direct access to the courts of one State by the owner of a stolen object or by a State from which it has been illegally exported. See further Prott, *ibid* at p. 15.

Underwater cultural heritage falls within the scope of the UNIDROIT Convention, which defines "cultural objects" as objects which on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex.[124]

5. Recommendations and Resolutions

One should also mention the numerous UNESCO and UN Recommendations and Resolutions which deal with specific aspects of the protection of cultural heritage. Amongst them, the *1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations*[125] extends its scope of application to the bed and subsoil of internal and territorial waters, while the *1978 UNESCO Recommendation for the Protection of Movable Cultural Property*[126] encompasses "products of archaeological exploration and excavations conducted on land and underwater" within the protected property.

Furthermore, the General Assembly of the United Nations has since 1973 adopted a series of *Resolutions on the restitution of works of art to their countries of origin*. Some of these invite, *inter alia*, "member States engaged in seeking the recovery of cultural and artistic treasures from the seabed, in accordance with international law, to facilitate by mutually acceptable conditions the participation of States having a historical and cultural link with those treasures".[127] The significance of the UN Resolutions is twofold: first, they recognise the continuing interest of the States of origin in cultural "treasures" recovered from the sea, and second, the accommodation of these interests is regarded as part of the general question of the return of cultural heritage to the countries of origin. Although the general language of the text permits their application to objects found within and beyond the territorial sea, there is no reference either to the scope or nature of the "participation" of the States concerned in the recovery operations. The whole issue is to be dealt with by mutually acceptable conditions and in accordance with international law. It must be noted, however, that the most recent UN General Assembly Resolutions on this topic do not include a similar provision.[128]

---

[124] These categories are identical to those appearing in the definition of "cultural property" under the 1970 UNESCO Convention. There is, however, an important difference, as in the case of the UNIDROIT Convention the "objects" do not have to be specifically designated by each State as being of importance. Furthermore, for the purposes of the UNIDROIT Convention, a cultural object, which has been unlawfully excavated or lawfully excavated but unlawfully retained, shall be considered stolen when consistent with the law of the State where the excavation took place. As noted, "excavation" applies to underwater sites in accordance with the usual interpretation applied in national legislation and the express provisions of the 1956 UNESCO Recommendation on the International Principles Applicable to Archaeological Excavations (paragraph 1). *Ibid* at p. 34.

[125] *Op. cit.* note 10.

[126] Adopted by the General Conference of UNESCO at its twentieth session, Paris, Nov. 28th 1978.

[127] See, *inter alia,* Resolution 38/34 of 25 November 1983; 40/19 of 21 November 1985; 42/7 of 22 October 1987; 44/18 of 6 November 1989; 46/10 of 22 October 1991, and 48/15 of 2 November 1993.

[128] See in this respect Resolution 52/24 of November 1997.

II. PROTECTION AT REGIONAL LEVEL

A. THE COUNCIL OF EUROPE

1. European Cultural Convention (1954) [129]

As early as 1954 the European Cultural Convention was adopted. The Convention pursues a policy of common action to safeguard and encourage the development of European culture. Article 5 provides that each contracting party shall regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe, shall take appropriate measures to safeguard them and shall ensure reasonable access thereto. In addition, contracting parties undertake to promote cultural activities of European interest and to facilitate the movement and exchange of persons as well as of objects of cultural value.

2. European Convention on the Protection of the Archaeological Heritage (1969) [130]

The 1969 European Archaeological Convention declares that the first step towards protecting the European archaeological heritage is the application of the most stringent scientific methods to archaeological heritage and discoveries. In this context and with the object of ensuring the protection of deposits and sites, contracting parties shall delimit and protect sites and areas of archaeological interest, create reserve zones for the preservation of material evidence for future research, and give full scientific significance to archaeological excavations. The 1969 Convention was replaced in 1992 by the European Convention on the Protection of the Archaeological Heritage (revised).

3. European Convention on the Protection of the Archaeological Heritage (revised) (1992)[131]

The aim of the revised Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study. The broad definition of the archaeological heritage adopted by article 1 enables the protection of all remains and objects and any other traces of mankind from past epochs together with their context, whether situated on land or underwater. So far as the protection of underwater cultural heritage is concerned, the Convention constitutes an important landmark in that it expands the scope of its application so as to include "any area within the jurisdiction of the parties". As explained in the Explanatory Report: "In itself, this is merely stating what is inherent in any international convention. Here it emphasises that the actual

---

[129] 218 *U.N.T.S.* 139.
[130] *Europ. T.S.* No. 66.
[131] *Op. cit.* note 12.

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. Among the members of the Council of Europe some States restrict their jurisdiction over shipwrecks, for example to the territorial sea, while others extend it to their continental shelf. The Revised Convention recognises these differences without indicating a preference for one or another".

Furthermore, each party undertakes to: (a) institute a legal system for the protection of the archaeological heritage, making provision for the maintenance of an inventory, the creation of archaeological reserves and the mandatory reporting to the competent authorities of chance discoveries; (b) ensure that archaeological excavations and prospecting are undertaken in a scientific manner by qualified specially authorised persons; (c) implement measures for the physical protection of the archaeological heritage, and (d) ensure that environmental impact assessments and the resulting decisions involve full consideration of archaeological sites and their settings. Provision is also made for the financing of archaeological research and conservation, the collection and dissemination of scientific information, the promotion of public awareness, the prevention of the illicit circulation of elements of the archaeological heritage, and for mutual technical and scientific assistance.

4. European Convention on Offences relating to Cultural Property (1985)[132]

The Cultural Offences Convention recognises the common responsibility and solidarity of the member States of the Council of Europe in the protection of the European cultural heritage and adopts all necessary measures, both criminal and administrative, to prevent and punish offences against cultural property. More specifically, they undertake to: (a) take measures to enhance public awareness of the need to protect cultural property, (b) co-operate with a view to the prevention of offences against cultural property, (c) acknowledge the gravity of any act or omission that affects cultural property, and (d) take the necessary measures for adequate sanctioning. However, the main part of the Convention deals with restitution. In this respect, provision is made for a notification procedure concerning cultural property, which has been removed from, or found on the territory of a State party, and for the execution of "letters rogatory".

The Convention is applicable to cultural property found on the bed of internal waters and the territorial sea of States parties. Amongst the categories of cultural property enumerated in paragraph 1 of Appendix II feature "products of archaeological exploration and

[132] *Op. cit.* note 11.

excavation (including regular and clandestine) conducted on land and underwater".[133] Where such property is the victim of an offence falling within the scope of the Convention and is subsequently removed to the territory of another party, it should be handed to its lawful owners. In addition, the Convention enables States to prosecute offences, which are committed outside their territory by one of their nationals\residents on board ships flying their flag or they are directed against cultural property originally found within their territory or belonging to one of their nationals.

5. Convention for the Protection of the Architectural Heritage of Europe (1985)[134]

The 1985 Architectural Convention protects the architectural heritage which "constitutes an irreplaceable expression of the richness and diversity of Europe's cultural heritage, bears inestimable witness to our past and is a common heritage of all Europeans". Although the 1985 Architectural Convention is not particularly relevant to the protection of underwater sites, the latter may be covered under its scope provided of course that they are found within the territories of States parties. The Convention specifically states that its provisions shall not prejudice the application of more favourable measures concerning the protection of the architectural heritage as embodied in the 1972 World Heritage Convention and the 1969 Archaeological Convention.

6. Recommendations and Resolutions

A considerable number of Recommendations and Resolutions of the Committee of Ministers and of the Parliamentary Assembly of the Council of Europe concern the protection of cultural property. One should specifically mention *Recommendation 848 (1978) of the Council of Europe on the Underwater Cultural Heritage.*[135] Recommendation 848 (1978) recognises the historical and cultural significance of the underwater cultural heritage and suggests:

(a) the drawing up of a European Convention;

(b) the declaration of 200 mile protection zones wherever the limit is in keeping with geographical realities;

(c) the administration, in co-operation with UNESCO and ICOM, of the application of the convention at regional level;

(d) the setting up of a European Group for Underwater Archaeology and

---

[133] With respect to property listed in paragraph1 of Appendix II, the implementation of the Convention is mandatory. However, the scope of the latter may be enlarged so as to include one or more of the categories of property listed in paragraph 2, or property not listed in Appendix II but declared to be protected by a contracting State.

[134] *Op. cit.* note 109.

[135] *Op. cit.* note 3.

(e) in an Annex, the minimum legal requirements which should be incorporated into national legislation.

Furthermore, *Recommendation 883 (1984) of the Parliamentary Assembly on the United Nations Convention on the Law of the Sea* suggests that the Committee of Ministers do whatever is in its power to accelerate the drawing up and implementation of a European Convention on the protection of the underwater cultural heritage and promote continued European co-operation in this field, in particular on such questions as relations between professional and amateur interest in the underwater heritage, and means of ensuring that cultural heritage protection has precedence over salvage", and *Recommendation 997 (1984) of the Parliamentary Assembly on regional planning and protection of the environment in European coastal regions* invites, *inter alia,* States parties to promote the drawing up, ratification or implementation of European Conventions on the architectural, archaeological and underwater cultural heritage.

7. Draft European Convention on the Protection of the Underwater Cultural Heritage (1985)[136]

The Draft European Convention provides one of the most comprehensive schemes of protection of underwater cultural heritage. It has not only employed a broad definition of the protected cultural property, but is has also adopted a wide variety of measures which encompass all aspects of the protection of underwater cultural property. The advocation of the fundamental principle of *in situ* protection of underwater cultural property is accompanied by the duty of the parties to take all appropriate measures to conserve recovered property as well as to fully record finds. Discoveries of underwater cultural property within the area of a contracting state should be reported to the competent authorities; the discoverers being required to leave the property where it is situated. Contracting States, however, may require their nationals to notify the competent authorities about discoveries made in places where no State exercises control over such property. Contracting States are required to take appropriate measures to ensure the proper documentation of recovered property, to promote public appreciation of the underwater cultural heritage and the need to protect it, and to further underwater research.

The control of traffic in underwater cultural property and the restriction of its illegal circulation is another fundamental objective of the Convention. In this respect, each party shall make available evidence of any lawful export of such property and notify the other contracting states about the illegal recovery or export of such property. As regards restitution, a moderate solution is provided by Article 14, which reads:

---

[136] *Op. cit.* note 2.

> "Each contracting State shall take all practicable measures towards the restitution of underwater cultural property located within that State, which has been illegal recovered in the area of another contracting State or illegally exported from such a State."

As already stated, the obligation of parties to return such property is qualified by the words "all practicable measures". Underwater cultural property illegally recovered or exported will be returned to its State of origin only when the domestic legislation of the state concerned permits this and it is considered to be practicable in the relevant circumstances. The Draft Convention also emphasises the fact that the proposed regime will not interfere with property rights, the law of salvage or laws and practices with respect to cultural exchanges. Nor will it prejudice any jurisdiction or rights, which contracting States may otherwise have under international law in respect of the protection of the underwater cultural property. The implementation of the Convention is to be kept under review by a Standing Committee.

So far as the territorial scope of application of the Draft European Convention is concerned, Article 2 provides that:

> "1. For the purposes of this Convention, the 'area' of a contracting State means its territorial sea and, in respect of a contracting State which has established it, the zone referred to in paragraph 2.
> 2. A contracting State which has established a contiguous zone in conformity with international law may presume that removal of underwater cultural property from the seabed in that zone without its approval would result in infringement within its territory or territorial sea of laws and regulations applied in that zone."

Thus, the Draft European Convention adopted a provision similar to Article 303(2) of the LOS Convention in order to define its scope of application. There is, however, an important difference between the two articles. Article 2 requires the prior establishment of a general contiguous zone, while, as argued, Article 303(2) does not establish the declaration of the contiguous zone as a prerequisite for its application.

Finally, Article 17 of the Draft Convention enables contracting States to take all appropriate measures to protect underwater cultural property while exercising their resource-related jurisdiction on the continental shelf. Such measures should not be viewed as an expansion of coastal jurisdiction over the continental shelf, but rather as an expression of the duty to protect underwater cultural heritage.

B. THE ORGANISATION OF AMERICAN STATES (OAS)

1. Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (San Salvador) (1976)[137]

The San Salvador Convention purports to identify, register, protect, and safeguard the property making up the cultural heritage of the American nations, so as to prevent illegal exportation or importation of cultural property, and to promote co-operation among the American States for mutual awareness and appreciation. In this context, it is emphasised

that regulations on ownership of cultural property and its transfer within the territory of each State shall be governed by domestic legislation. Among the proposed measures, the following are included: (a) registration of collections and of transfer of protected cultural property, (b) registration of transactions by establishments engaged in the sale and purchase of such property, and (c) prohibition of imports of cultural property from other States without appropriate certificate and authorisation. Furthermore, the establishment of inventories and records of cultural property, the delimitation and protection of archaeological sites and places of historical and artistic interest, and the prevention of unlawful excavations are declared.

The San Salvador Convention provides one of the most efficient schemes for protecting cultural property, in particular for preventing its illegal exportation and importation and returning it to its State of origin. The same applies to the envisaged scheme of restitution, which covers all cultural property illegally exported.[138] Similarly, the definition of "cultural property" under the Convention is more precise than most of the definitions featuring in regional or international cultural conventions and enables the protection of underwater cultural heritage found landward of the outer limit of the territorial sea. [139]

C. EUROPEAN UNION

1. Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods[140]

Both Council Regulation No. 3911/92 and Directive 93/7/EEC on the return of cultural objects deal with issues relating to the circulation of cultural goods within the Community after the completion of the internal market in 1992 and the abolition of internal borders. Whereas Member States retained the right to define their national treasures and to take the necessary measures to protect them in this area without frontiers, under the terms and within the limits of Article 36 of the EC Treaty, rules on trade with third countries were needed for the protection of cultural goods. According to Article 2 of the Regulation, the export of all cultural goods outside the customs territory of the Community shall be subject

---

[137] *Op. cit.* note 94.

[138] According to Article 11, the State petitioned shall employ all available lawful means to recover and return the cultural property claimed, including judicial action if its laws so require.

[139] Article 2 reads: "The cultural property referred to in the preceding article is that included in the following categories: Monuments, objects, fragments of ruined buildings, and archaeological materials belonging to American cultures existing prior to contact with European culture, as well as remains of human beings, fauna and flora related to such cultures; b. Monuments, buildings or ... objects of an artistic, utilitarian and ethnological nature, whole or in fragments from the colonial era and the Nineteenth century; d. All objects originating after 1850 that have been recorded as cultural property, provided that they have given notice of such registration to other parties to the treaty; e. All cultural property that any of the States parties particularly declares to be included within the scope of this Convention." See also Article 5 on the territorial scope of application of the Convention.

[140] *OJ L* 395/1992 at p.1, as amended by Council Regulation (EC) No. 2469/96 of 16 December 1996,

to the presentation of an export licence. The export licence shall be issued by a competent authority of the Member State in whose territory the cultural object in question was lawfully and definitively located on 1 January 1993, or, thereafter, by a competent authority of the Member State in whose territory it is located following either lawful and definitive dispatch from another Member State, or importation from a third country, or re-importation from a third country after lawful dispatch from a Member State to that country. Amongst the categories of cultural objects covered by the Regulation and listed in an Annex, feature "archaeological objects more than 100 years old which are the products of land or underwater excavations or finds".

2. Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State [141]

For the purposes of the Directive, cultural objects mean those objects which are classified, before or after their unlawful removal from the territory of a Member State, amongst the "national treasures possessing artistic, historic or archaeological value" under national legislation or administrative procedures within the meaning of Article 36 of the Treaty, and belongs to one of the categories listed in the Annex,[142]or form an integral part of public collections listed in the inventories of museum, archives or libraries' conservation collection and the inventories of ecclesiastical institutions. A cultural object is unlawfully removed from the territory of a Member State if it is removed in breach of either that Member State's rules on the protection of national treasures or the aforementioned Regulation (EEC) No 3911/92 or it is not returned after lawful temporary removal. The requesting State may initiate, before the competent court in the requested Member State, proceedings against the possessor or failing him the holder with the aim of securing the return of a cultural object which has been unlawfully removed for its territory. The return proceedings may not be brought more than one year after the requesting State became aware of the location of the cultural object and of the identity of its possessor or holder. Such proceedings may, at all events, not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State, or 75 years in the case of objects forming part of public collections and inventories of ecclesiastical institutions. Where return of the objects is ordered, the competent court shall award fair compensation to the possessor, provided that he exercised due care and attention in acquiring the object. Such compensation shall be paid by the requesting Member State upon return of the object. The Directive does not have a retroactive effect; it applies only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993.

OJ L 335/1996 at p. 9.

[141] *OJ L* 74/1993 at p. 74 as amended by European Parliament and Council Directive 96/100/EC of 17 February 1997, *OJ L* 60/1999 at p. 59.

C. MISCALLANEOUS

1. Protocol concerning Mediterranean Specially Protected Areas (1982)[143]

The parties to this Protocol, who are also parties to the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution[144] agreed to establish protected areas to preserve "sites of particular importance because of their scientific, historical, archaeological, cultural or educational interest" and, in conformity with international law, to progressively take the required measures. Such measures may include "the regulation of any archaeological activity and the removal of any object which may be considered as an archaeological object" and "the regulation of trade in and exportation of archaeological objects which originate in protected areas and are subject to measures of protection". The area to which the Protocol applies is limited to the territorial waters of the parties and may include internal waters, extending to watercourse up to the fresh water limit. In other words, the 1982 Protocol is not applicable to archaeological sites found either in lakes and rivers or in international waters.

2. Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (1995)[145]

The 1995 Protocol, which is specifically stated to replace upon its entry into force the Protocol on Mediterranean Specially Protected Areas, provides for the establishment of specially protected areas in order to protect, preserve and manage "areas of cultural value" [Article 3(1)(a)] in the "marine and coastal zones subject to its sovereignty or jurisdiction" (Article 5(1). Furthermore, there is provision for the drawing up of a List of Specially Protected Areas of Mediterranean Importance (SPAMI List), which may include sites which "are of special interest at the scientific, aesthetic, cultural or educational levels" even on high seas areas.[146]

3. Protocol concerning Protected Areas and Wildlife (1990)[147]

The Kingston Protocol, which was signed by States Parties to the Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (1990), provides for the establishment of protected areas in areas over which each Party exercises "sovereignty, or sovereign rights or jurisdiction" [Article 4(1)]. Such areas shall be established in order to conserve, maintain and restore, in particular "(d) areas of special... archaeological value". Amongst the protective measures that each

---

[142] The Annex covers the same categories of cultural goods as the Regulation. However, under the terms of the Directive, as only those objects which are classified as national treasures may be returned.
[143] *Op.cit.* note 14.
[144] 15 *ILM* (1976) p. 290.
[145] *Op. cit.* note 15.
[146] Article 9(2)(b) of the 1995 Protocol reads: "Proposals for inclusion in the List may be submitted... by two or more neighbouring parties concerned if the area is situated, partly or wholly, on the high seas".

party is entitled to take, in conformity with its national laws and regulations and international law, is "the regulation of any archaeological activity and of the removal or damage of any object which may be considered as an archaeological object" [Article 5(2)(i)].

III. BILATERAL AGREEMENTS

Agreement between the Netherlands and Australia concerning Old Dutch Shipwrecks (1976)[148]

This bilateral agreement concerns vessels, which belonged to the Dutch *Vereenigde Oostindische Compagnie (V.O.C.)* and which were wrecked off the coast of Western Australia. The two parties agreed that the Netherlands should transfer to Australia all its rights, title and interest in and to wrecked vessels of the V.O.C. lying on or off the coast of the State of Western Australia, and that Australia should accept such rights, title and interest. Australia agreed to make no claim on the Netherlands for reimbursement of any cost incurred, while, at the same time, it recognised the continuing interest of the latter, particularly for historical and other cultural purposes, in articles recovered from any of the vessels. To give effect to this, it was agreed to establish a Committee which would determine the disposition and subsequent ownership of the articles between the Netherlands, Australia and the State of Western Australia. Within this context, the sharing of material from an archaeological site is considered as the accommodation in several localities of a corporate entity, rather than its division into parts.

The Australia/Netherlands agreement constitutes a remarkable attempt to regulate the dispersal of archaeological material from shipwrecks and should be used as a basis for the modelling of other similar inter-State agreements.

---

[147] *Op. cit.* note 16.
[148] *Op. cit.* note 9.