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**The Salvage of Historical Shipwrecks and How It  
Will Change Due to the UNESCO Convention on  
the Protection of Underwater Cultural Heritage**

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**Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in Marine & Environmental Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.**

**I hereby declare that I have read and understood the regulations governing the submission of LLM in Marine & Environmental Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.**

Signed by candidate

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## Table of Contents

Table of Contents .....	2
Bibliography.....	4
I. Introduction.....	10
1. General situation.....	10
2. Interested groups.....	11
3. Scope of the thesis .....	13
II. History of the UNESCO Convention on the Protection of Underwater Cultural Heritage.....	14
III. Definition of historical shipwrecks .....	16
1. The Definition of Art. 1 of the Convention on the Protection of Underwater Cultural Heritage.....	16
2. State vessels and aircraft.....	18
3. Excursus: Exceptions .....	19
IV. Ownership of historical wrecks .....	20
1. Abandonment .....	20
2. State-owned vessels.....	21
V. The regime for historical shipwrecks prior to the UNESCO Convention on the Protection of Underwater Cultural Heritage .....	23
1. Underwater cultural heritage in the Law of the Sea Convention from 1982.....	23
a. Art. 149 UNCLOS.....	23
b. Art. 303 UNCLOS.....	24
c. Part XIII. UNCLOS .....	26
d. Conclusion .....	27
2. Jurisdiction.....	28
a. Territorial sea .....	28
b. Contiguous zone .....	28
c. Exclusive economic zone.....	29
d. Continental shelf .....	29
e. The high seas.....	30
f. The Area .....	30
g. Conclusion .....	31
3. The Law of salvage versus the law of finds .....	31
a. The law of salvage .....	32
b. The law of finds .....	35
4. The International Convention on Salvage.....	36
a. Introduction .....	36
b. The regulations .....	36
5. Conclusion.....	38
VI. The UNESCO Convention on the Protection of the Underwater Cultural Heritage.....	39
1. Reasons for a new Convention.....	39
2. The regulations.....	39
a. General principles and objectives (Preamble; Art. 2) .....	39
b. Definitions (Art. 1) .....	41
c. Relationship to UNCLOS (Art. 3).....	42

d.	Relationship to the law of salvage and the law of finds [Art. 4; Art. 2 (7)]	43
e.	Activities incidentally affecting underwater cultural heritage (Art. 5)	45
f.	Multilateral agreements (Art. 6)	46
g.	Duties, obligations and rights of State parties in regard to the different maritime zones (Art. 7-13)	46
h.	Measures and sanctions (Art. 14-18)	53
i.	Cooperation and public awareness (Art. 19-21)	56
j.	Institutions and dispute settlement (Art. 22-25)	58
k.	Reservations and declarations (Art. 28-30)	59
l.	The Rules (Art. 33; the Annex)	60
m.	Formal provisions (Art. 26-27, 31-32, 34-35)	60
3.	Conclusion	61
VII.	Conclusion	64

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## I. Introduction

### 1. General situation

For a long time most of the shipwrecks in our oceans were out of reach for scientists or treasure hunters. With technological progress this changed. Today there is virtually no spot left that cannot be reached, investigated, and from which objects cannot be recovered. In 1994 the company Ocean Engineering was able to locate the wreck of the bulk carrier Derbyshire in less than four days although it had only a very broad indication of the ship's last position and the wreck was located more than 4,000 meters below the sea. The same company needed only one day to find the cargo door of a Boeing 747 near Hawaii in deep water as well.<sup>1</sup> These examples show that access to the oceans today is restricted by cost alone.

According to UNESCO three million wrecks are scattered on the ocean floor. Several ten thousand ships sank in the last 2000 years. Eg, half of the Spanish Armada attacking England in 1588 went missing without a trace and riches beyond all measure. Or, eg, during its existence 250 ships of the Dutch East-India Company were lost at sea, 150 of them with valuable cargo. The most valuable of these missing ships though seems to be the 'Flor de la Mar', a Portuguese ship presumed to have been lost near the eastern coast of Sumatra with a cargo of booty taken during the sack of Malacca – the estimated value of the cargo being up to 7.5 billion Euros.<sup>2</sup> One of the most valuable shipwrecks discovered so far is the 'Sussex', which sunk 1694 near Gibraltar with a cargo of gold estimated to have a value of up to four billion Euros.<sup>3</sup> No wonder that Peter Hess, an U.S.-American lawyer specialising in

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<sup>1</sup> Gillian Hutchinson 'Threats to Underwater Cultural Heritage: The Problems of Unprotected Archaeological and Historic Sites, Wrecks and Objects Found at Sea' (1996) 20 *Marine Policy* 287 at 288

<sup>2</sup> Klaus Brinkbäumer, Clemens Höges, Jürgen Kremb and Erich Wiedemann 'Pyramiden der Tiefsee' in 2006 Vol.3 *Spiegel Spezial: Versunkene Welten – Tauchfahrten in die Vergangenheit* 8 at 14

<sup>3</sup> Udo Ludwig 'Mutter aller Schatzschiffe' in 2006 Vol.3 *Spiegel Spezial: Versunkene Welten – Tauchfahrten in die Vergangenheit* 86 at 88

Due to differing legal opinions between the State of Spain and Odyssey Marine as the discoverer of the wreck salvage has not started yet although the wreck was already located in 2001

the often difficult litigations of this area of the law states that '[w]e are witness to the start of the great age of underwater exploration'.<sup>4</sup>

## 2. Interested groups

As in every part of life though, there are different groups of people interested in exploiting these new possibilities and these groups seem to have interests, which are opposite to each other.

For underwater archaeologists, shipwrecks are like a time machine giving them insight in long gone times through objects – inconspicuous as well as for sale purpose valuable ones – as well as through the arrangement and position of these objects on the wreck. In addition underwater cultural heritage sites are often much better preserved than comparable sites on land. The lack of oxygen prevents the deterioration of biological material. And being inaccessible, until recently that is, these sites were not subject to plunder or casual destruction. All these factors make underwater cultural heritage so unique and valuable. For instance, the wreck of the *Mary Rose*, an English warship which sank after a battle with French vessels in 1545 near the Isle of Wight, is the only known source of English long-bows, a weapon made famous by the legend of Robin Hood and that in the year 1415 historically marked the end of the dominance of knights on European battlefields when an English army mainly composed of yeoman equipped with these bows defeated a much larger and better rested French army fielding the pride of European knighthood in Agincourt.<sup>5</sup>

Another 'big player' in this field are the professional treasure hunters. And this is a boom business. These days 20 large and some hundred small companies try feverishly to open the lid of the treasure chest which are our oceans using state-of-the-art detection technology including companies listed on the stock markets like Subsea Resources or Odyssey Marine.<sup>6</sup> These

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<sup>4</sup> Brinkbäumer supra note 2 at 11

<sup>5</sup> UNESCO *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage – Frequently asked questions*. Available at [http://portal.unesco.org/culture/en/files/35838/12248552343FAQ\\_en.pdf/FAQ%2Ben.pdf](http://portal.unesco.org/culture/en/files/35838/12248552343FAQ_en.pdf/FAQ%2Ben.pdf) (Accessed 15 February 2009)

<sup>6</sup> Brinkbäumer supra note 2 at 11;

companies work in a financially risky environment – the cost of searching for the valuable wrecks on the ocean floors easily reaches a multiple million Euro level – and more often than not nothing of value can be found and the investment is lost. This pressures these companies to salvage the valuable parts of the cargo as fast as possible, damaging or destroying in the process the rest of the site due to no regard to the historic and scientific value of the other parts of the site. Some companies try to work jointly with the scientific community, giving underwater archaeologists the possibility to take part in the excavation of the site, the black sheep are far more numerous though.

And then there is a third group, the tourists. Today diving is not only a means for scientific underwater exploration anymore but became a recreational activity. This is owed to the invention of SCUBA equipment in the 1940s and its development since then. Today wreck diving is very popular.<sup>7</sup> Over 400 people have visited the wreck of the 'Andrea Doria' although this ship can only be reached by well-trained divers with specialized equipment. And the most famous of all wrecks, the 'RMS Titanic', can be visited by tourists for a fee of about \$35,000 on board a mini-sub.<sup>8</sup> It is without a doubt that tourism has a derogating effect on those historical sites. There are individuals who collect souvenirs as mementos of their visits, thereby ignoring any rules established to protect the sites they admire. And even if the larger part of them adheres to these rules their sheer number in mass tourism alone will nevertheless have a negative impact.<sup>9</sup>

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Subsea Resources is not listed anymore due to financial problems in 2008 and has ceased to exist; Odyssey Marine is currently listed at the NASDAQ and got wide publicity through a TV-contract

<sup>7</sup> Dirk H.R. Spennemann 'Extreme Cultural Tourism - From Antarctica to the Moon' in (2007) 34 *Annals of Tourism Research* 898 at 900

<sup>8</sup> Spennemann supra note 7 at 901

<sup>9</sup> Spennemann supra note 7 at 898

### **3. Scope of the thesis**

Before this background with these three differing interest groups the UNESCO Convention on the Protection of Underwater Cultural Heritage (in the following CPUCH or the Convention) came to be in 2001.

This thesis will summarize shortly the history of the Convention and then examine the regime of 'salvage' and protection in regard of historic shipwrecks before CPUCH and how this regime will change with the adoption of this new Convention.

## II. History of the UNESCO Convention on the Protection of Underwater Cultural Heritage

It took a long time for CPUCH to come into being with early initiatives in this special area starting already in 1976 with the Culture and Education Commission of the Council of Europe undertaking a study of the subject of the protection of underwater cultural heritage.<sup>10</sup>

Its history began in 1994 with the International Law Association presenting its proposal for a Convention on underwater cultural heritage to different organisations of which only UNESCO showed interest. This led to a feasibility study in 1995 and a first open expert meeting in 1996 at which the need for binding legal instruments and urgent action was recognized. Proper negotiations on the Convention started in 1998 and continued until 2001 with four more expert meetings and the participation of more than 100 States.<sup>11</sup> In the final vote on 2 November 2001 the Convention was adopted by a vote of 87 in favour, 4 against and 15 abstentions.<sup>12</sup> The original target to reach consensus has not been achieved.<sup>13</sup> It entered into force on 2 January 2009 with currently 20 States being parties to the Convention.<sup>14</sup>

The Annex of the Convention with the actual archaeological rules and principles is widely based on the International Charter for the Protection and Management of Underwater Heritage (the Sofia Charter).<sup>15</sup> In 1992 the International Council for Monuments and Sites (ICOMOS) created a committee named ICUCH (the International Committee on the Underwater

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<sup>10</sup> UNESCO *The History of the 2001 Convention on the Protection of the Underwater Cultural Heritage*. Available at [http://portal.unesco.org/culture/en/files/35294/11932236503chronology\\_english.pdf/chronology%2Benglish.pdf](http://portal.unesco.org/culture/en/files/35294/11932236503chronology_english.pdf/chronology%2Benglish.pdf) (Accessed 15 February 2009)

<sup>11</sup> Carsten Lund 'The Making of the 2001 UNESCO Convention' in Lyndel V. Prott *Finishing the Interrupted Voyage - Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of Underground Heritage* 14 at 16

<sup>12</sup> The four countries opposed are Russia, Norway, Turkey and Venezuela. The 15 countries abstaining include the United Kingdom, France, Germany, the Netherlands, Israel, Brazil, Colombia, Chile, Uruguay, Greece, Hungary, and Saudi Arabia. The United States as observer would have abstained as well.

<sup>13</sup> Guido Carducci 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage' (2002) 96 *The American Journal of International Law* 419 at 420

<sup>14</sup> Reference date 31 December 2008

<sup>15</sup> Lund *supra* note 11 at 16

Cultural Heritage) which prepared the Sofia Charter and it was adopted by ICOMOS in 1996.

'The aim of the Convention is to take the underwater cultural heritage out of the commercial market.'<sup>16</sup> No wonder that it was attacked by the treasure hunter industry as being completely one-sided as it will greatly reduce their area of operations, actually destroying it virtually. In addition there have been some serious objections by important maritime States like the United States<sup>17</sup> or the United Kingdom to the new Convention. Coastal State rights in the form of 'creeping jurisdiction' and the sovereign immunity of sunken warships and other State vessels was one of their major concerns. They also supported a differing definition of underwater cultural heritage that included a significance criterion to ensure that the Convention only deals with sites of particular historical importance.<sup>18</sup> These objections will be examined in more detail later in this thesis but they explain why it took eight years to reach the necessary 20 State parties needed for the Convention to enter into force and of these only Portugal, Spain, and Lebanon have a history of once being a major maritime power.<sup>19</sup>

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<sup>16</sup> Lund supra note 11 at 18; see Art 2(7) CPUCH

<sup>17</sup> The United States themselves were at this time not a member of UNESCO but they nevertheless were participating in the negotiations as an observer.

<sup>18</sup> Sarah Dromgoole 'The International Agreement for the Protection of the Titanic: Problems and Prospects' (2006) 37 *Ocean Development and International Law* 1 at 2

<sup>19</sup> The State parties so far are Barbados, Bulgaria, Cambodia, Croatia, Cuba, Ecuador, Lebanon, Libya, Lithuania, Mexico, Montenegro, Nigeria, Panama, Paraguay, Portugal, Romania, Saint Lucia, Slovenia, Spain and Ukraine.

### III. Definition of historical shipwrecks

#### 1. The Definition of Art. 1 of the Convention on the Protection of Underwater Cultural Heritage

According to Art. 1 (1) (a) of the Convention '[u]nderwater cultural heritage' means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as: [...] (ii) vessels, aircraft, other vehicles or any part thereof, their cargo, or other contents, together with their archaeological and natural context; [...].'

These will be the parameters used in this thesis with the term shipwreck being used in a broad definition including all aspects of Art. 1 (1) (a) (ii) of the Convention.

The prerequisite of 'traces of human existence' means that the object in question has to be somehow connected to humanity<sup>20</sup>, a requirement that shipwrecks as having been used by humans to travel on water or as merchandise in the case of the cargo fulfil easily.

The shipwreck must have been partially or totally underwater, a term that is rather straightforward and includes 'partial or periodic submersion'<sup>21</sup> excluding thereby purely land based cultural heritage.

In addition the shipwreck must have been partially or totally underwater for at least 100 years. This artificial time limit is not based on any scientific data. 'It is purely a device for excluding material of more recent origin for purposes of administration'<sup>22</sup> and it was chosen to make the Convention consistent with national and international legislation and documents in regard of cultural heritage.<sup>23</sup> With the aims of the Convention in mind, ie the in situ preservation of the underwater cultural heritage, it seems reasonable that this

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<sup>20</sup> Patrick J. O'Keefe *Shipwrecked Heritage – A Commentary on the UNESCO Convention on Underwater Cultural Heritage* 41

<sup>21</sup> O'Keefe supra note 20 at 42

<sup>22</sup> O'Keefe supra note 20 at 41

<sup>23</sup> Eke Boesten *Archaeological and/or Historic Valuable Shipwrecks in International Waters – Public International Law and What it Offers* 43; with reference to *Recommendation 848 (1978), Council of Europe on the Underwater Cultural Heritage*; *Article 1 Draft European Convention on the Protection of the Underwater Cultural Heritage 1985*; *Article 1 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property 1970*

time period will be calculated from the point of time that any activity directed at it is contemplated.<sup>24</sup> The 1998 draft of the Convention still included 'a provision that a State could unilaterally decide to include remains less than 100 years old [but] this has now been omitted.'<sup>25</sup>

Lastly, the shipwreck has to have a 'cultural, historical or archaeological character', a term, which was subject to some, heated debates. In itself the term does not enter a new requirement as everything that fulfils the requirements of 'traces of human existence' and 'being underwater for at least 100 years' is in its very nature of an historical or cultural character. The United Kingdom and the U.S.A. wanted originally to include the requirement that the underwater cultural heritage has to be 'significant' to be protected under the Convention.<sup>26</sup> They and some other States 'regard the definition of underwater cultural heritage as too broad for any effective implementation as it would include anything lost a hundred years ago or more.'<sup>27</sup> In the end they only succeeded with including this requirement and it seems reasonable that in their interpretation this would constitute some kind of qualification that prevents a blanket protection. However, as in my opinion the term character can only be interpreted in the broad sense mentioned above, they did not succeed though without any doubt there will be some heated debates forthcoming if any of these States become a party to this Convention.

It is rather puzzling that especially the champions of the salvage industry are in favour of the significance attribute. The argument against the blanket protection is that the meagre State resources should not be wasted to protect insignificant objects like, for example, trash.<sup>28</sup> What seems to be forgotten though is that, in order to be worthwhile for the treasure salvage industry, the salvage object has to have a significant commercial value. But a site with the commercial value to pay for the salvage costs – as mentioned before a sum easily in the multi-million Euro area – will almost definitely be historically

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<sup>24</sup> Craig Forrest 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51 *International and Comparative Law Quarterly* 511 at 524

<sup>25</sup> Sarah Dromgoole '2001 UNESCO Convention on the Protection of Underwater Cultural Heritage' (2003) 18 *The International Journal of Marine and Coastal Law* 59 at 63

<sup>26</sup> O'Keefe *supra* note 20 at 42

<sup>27</sup> Boesten *supra* note 23 at 139

<sup>28</sup> Graeme Henderson 'Significance Assessment or Blanket Protection?' (2001) 30 *The International Journal of Nautical Archaeology* 3 at 3

significant. The introduction of this criterion would not change the situation for these sites at all and there would be no gain for the salvage industry in its introduction.

## 2. State vessels and aircraft

State vessels constitute a special problem. In the Convention State vessels and aircraft mean warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.<sup>29</sup> The problem in State vessels is that their legal status 'in international law was felt by many to be certain as long as they are vessels navigating under flag State jurisdiction, but rather uncertain when they sink and lose the ability to navigate as "ships".<sup>30</sup>

Customary international law recognizes that warships and State-owned vessels are entitled to immunity from coastal State enforcement authority within waters of national jurisdiction.<sup>31</sup> In the past this was held up in regard to salvage law in various Conventions, the latest being the 1989 Salvage Convention which states that 'this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under general principles of international law unless that State decides otherwise.'<sup>32</sup>

The Convention deals with State vessels in several articles.<sup>33</sup> These define certain obligations for State parties in regard to sunken State vessels in different maritime zones, requiring 'at least giving information to, and at the most getting the agreement and consent of, the flag State before an activity directed at [these shipwrecks] can be conducted.'<sup>34</sup> Apart from these special

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<sup>29</sup> Art. 1 (8) CPUCH

<sup>30</sup> Carducci supra note 13 at 423

<sup>31</sup> R. R. Churchill and A. V. Lowe *The Law of the Sea* 99

<sup>32</sup> Art. 5 International Convention on Salvage from 1989

<sup>33</sup> Art. 7(3); 10(7); 12(7) CPUCH

<sup>34</sup> Carducci supra note 13 at 423

duties they are treated in the same way as any other underwater cultural heritage.

With this speciality in mind the subject of sunken State vessels will be addressed specifically in the following analysis.

### 3. Excursus: Exceptions

With the first undersea telegraph cable laid in 1850 between England and France the ocean floor was for the first time utilised for the support of an ever-increasing number of human-made constructs that, after being submerged, are still in use.<sup>35</sup> Included in this are items like Sosos, the American military underwater listening posts installed in the North Atlantic as early as 1952 and now in use for various scientific programs.<sup>36</sup> As these objects are partly still in use the Convention excludes '[p]ipelines and cables placed on the seabed' completely<sup>37</sup> and '[i]nstallations other than pipelines and cables, placed on the seabed' as long as they are still in use.<sup>38</sup> Why there is a complete exclusion for cables and pipelines remains a secret. The first telegraph cable, if it were still in position, surely would constitute as an underwater cultural heritage, as the first of its kind it would even fulfil the not realized requirement of significance. As this thesis is about historical shipwrecks, these objects are beyond its scope, though, and will therefore not be examined.

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<sup>35</sup> [http://en.wikipedia.org/wiki/Submarine\\_communications\\_cable](http://en.wikipedia.org/wiki/Submarine_communications_cable) (Accessed 15 February 2009)

<sup>36</sup> <http://en.wikipedia.org/wiki/Sosos> (Accessed 15 February 2009)

<sup>37</sup> Art. 1 (1)(b) CPUCH

<sup>38</sup> Art. 1 (1)(c) CPUCH

## IV. Ownership of historical wrecks

Whenever an object is found or retrieved from the ocean another question must be answered: Is the object abandoned or is it owned by a – natural or juristic – person. This is important to determine the applicable law and to establish which flag State's jurisdiction applies.

If there is no identifiable last owner, it is safe to presume that the ship has been abandoned. Otherwise it has to be determined whether the last owner still can claim his property rights by examining if the legal principle of abandonment might apply.

### 1. Abandonment

Under common law an object has been abandoned if it was cast away or left behind with the specific intent to desert and relinquish it. If the loss was unintentional, as it will almost always be the case with shipwrecks, it will be regarded as abandoned if all attempts to seek, find and reclaim the object are given up. Abandonment therefore is a question of determining the intent of the last owner in light of all circumstances.<sup>39</sup> The mere passage of time is therefore not enough to establish abandonment, although an American court stated that '[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd length.'<sup>40</sup> These attempts to reclaim the wreck do not need to be active actions if the chance of success is minimal as long as the owner still intends to reclaim it when success is possible.<sup>41</sup>

Ownership in this regard can of course differ from object to object at the wrecksite. The owner of personal belongings of a crewman would be this crewman or his heirs or successors in title, the same for the cargo, the ship,

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<sup>39</sup> R. Brown cited in H. Peter DeI Bianco, Jr. 'Underwater Recovery Operations in Offshore Waters: Vying for Rights to Treasure' (1987) 5 *Boston University International Law Journal* 153 at 161

<sup>40</sup> *Treasure Salvors I*, 569 F. 2d 330, 337 (5th Cir. 1978) cited in Daniel P. Larsen 'Ownership of Historic Shipwrecks in US Law' (1994) 9 *The International Journal of Marine and Coastal Law* 31 at 39

<sup>41</sup> Boesten *supra* note 23 at 112

personal belongings of the passengers, etc. This successor in title can of course be an insurance company as well.<sup>42</sup>

The question of ownership and its difficulty in regard to ancient shipwrecks have lead some countries to pass legislation which should make the protection of underwater cultural heritage easier. The U.S.A. for example have vested title in all abandoned shipwrecks in an area three miles from the baseline to the federal government, thereby giving the State power to manage and protect these objects.<sup>43</sup>

## **2. State-owned vessels**

Once again warships and State-owned vessels on non-commercial service constitute a special problem in this regard. A warship is defined in UNCLOS as 'a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.'<sup>44</sup> This might be easy to determine with modern-day warships, but what about the fleet of longboats of a Danish king plundering the coast of England? These were owned by different lords or even free man who took part in the expedition because of an oath or merely the promise of profit. And what about the status of privateers in the time of the Spanish colonial empire in America? These ships were privately owned, but they were fighting in the war with the consent of their government. Ships of the British East-India Company were merchant ships but they were also armed and used to fight pirates and as a mean of power projection in areas far from home. All in all the distinction between commercial and non-commercial in regard to State-owned ships is a rather new development as many ships fulfilled a double role in this regard, eg, the Spanish treasure galleons. To prove that a State-owned vessel has been used only in non-commercial activity at the time of its sinking will therefore be more difficult, the older the wrecksite is. For most of

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<sup>42</sup> Boesten supra note 23 at 111

<sup>43</sup> Larsen supra note 40 at 34-35

<sup>44</sup> Art. 29 UNCLOS

the older wrecks it will not be possible at all, thereby excluding them from the special regulations for State-owned vessels.

To make matters even more complicated customary international law lacks a consistent approach to this problem. There are those who are of the opinion that, '[i]f the wreck is a warship or a State-owned vessel which was not engaged in commercial trading, then it is generally regarded as the inalienable property of the flag State, regardless of where it lies on the seabed.'<sup>45</sup> In a statement of U.S. policy in 1996 it was said that 'title to such vessels [...] is lost only by capture or surrender during battle, by international agreement, or by an express act of abandonment, gift, or sale by the sovereign in accordance with the relevant principles of international law and the law of the flag State governing the abandonment of governmental property. [...] [T]itle to such vessels [...] is not lost by mere passage of time.'<sup>46</sup> On the other hand U.S. courts treated State vessels, foreign and U.S., most of the time in the same way as they treated the wrecksites of privately owned vessels. There was no prerequisite of an express abandonment used.<sup>47</sup> However, the prevailing rule used by courts internationally in the last 200 years has been to apply the regular definition of abandonment with its consideration of all of the circumstances rather than to demand an express act of abandonment.<sup>48</sup>

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<sup>45</sup> Hans D. Smith and Alastair D. Couper 'The Management of the Underwater Cultural Heritage' (2003) 4 *Journal of Cultural Heritage* 25 at 31

<sup>46</sup> J. Ashley Roach 'Sunken Warships and Military Aircraft' (1996) 20 *Marine Policy* 351 at 352

<sup>47</sup> David J. Bederman 'Rethinking the Legal Status of Sunken Warships' (2000) 31 *Ocean Development & International Law* 97 at 101

<sup>48</sup> Bederman *supra* note 47 at 101

## V. The regime for historical shipwrecks prior to the UNESCO Convention on the Protection of Underwater Cultural Heritage

Before the Convention there was no single international body of law addressing the specific problems of underwater cultural heritage protection. So which law was applicable and what were its consequences?

### 1. Underwater cultural heritage in the Law of the Sea Convention from 1982

In the Law of the Sea Convention from 1982 underwater cultural heritage played a minor role. While Greece and Turkey were the main proponents for including a regime for these, the U.S. was the champion of the opposition.<sup>49</sup> This led to only two paragraphs to be included into the UNCLOS, namely Art. 149 in regard of the Area and Art. 303 as a general provision.

#### a. Art. 149 UNCLOS

Art. 149 UNCLOS states that '[a]ll objects of an archaeological and historical nature found in the Area<sup>50</sup> shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.'<sup>51</sup>

But what is the meaning of the term 'preserved or disposed of', what do preferential rights mean and which State – or maybe States – would have preferential rights (for example in the case of the wreck of a Roman merchant ship from around 100 AD with the port of origin in Spain and a cargo of Greek statues from Miletos – now Turkey – discovered by a British expedition in French waters)?<sup>52</sup> Italy, Spain, Greece, Turkey, France or the UK? Unfortunately these questions are not answered by UNCLOS. This Article seems to be more an agreement to disagree than anything with legal

<sup>49</sup> Patrick J. O'Keefe 'International Waters' in Sarah Dromgoole *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* 223 at 224

<sup>50</sup> For a definition of the Area see chapter V.2.f.

<sup>51</sup> Art. 149 UNCLOS

<sup>52</sup> For example O'Keefe *supra* note 49 at 224

significance. Already there is no definition of an object of an archaeological or historical nature. In 1974 and 1975 draft versions the term referred to objects which are more than 50 years old,<sup>53</sup> a requirement that was deleted without putting a new definition in its place. Furthermore these early drafts invested the Authority with the power to regulate the handling of archaeological and historic objects. The dismissal of this paragraph implies 'that the Conference has chosen not to confer on the International Seabed Authority any role with regard to [these] objects found in the Area.'<sup>54</sup>

With the reference to the benefit of mankind as a whole for which underwater cultural heritage shall be preserved or disposed of UNCLOS recognizes that the need to protect it arises out of itself and not out of the concerns and interests of specific States.<sup>55</sup> But because of so many vague concepts without establishing any rules to assert the general obligation to protect shipwrecks Art. 149 UNCLOS is a blunt weapon.

#### **b. Art. 303 UNCLOS**

'States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.'<sup>56</sup> With this general duty starts Art. 303 UNCLOS. Art. 303 UNCLOS is 'placed in Part XVI of the Convention entitled "General Provisions", [and therefore] should apply to all seabed areas, irrespective of the nature of coastal States' jurisdiction.'<sup>57</sup> As well as Art. 149 UNCLOS it does not provide us with a definition for an 'object of an archaeological and historical nature.' For this definition of an object being of a historical nature it was even suggested by a member of the U.S. delegation to use the year of 1453 AD, the fall of Constantinople as threshold, a point of view that did not meet with widespread acceptance and certainly does not correspond with current

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<sup>53</sup> Art. 20 3 UNCLOS OR at 163, U.N. Doc. A/CONF.621 C./L.3 (1974) cited in Cynthia Furrer Newton 'Finders Keepers? The Titanic and the 1982 Law of the Sea Convention' (1986) 10 *Hastings International and Comparative Law Review* 159 at 177

<sup>54</sup> Moritaka Hayashi 'Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea' (1996) 20 *Marine Policy* 291 at 293

<sup>55</sup> Carducci supra note 13 at 424

<sup>56</sup> Art. 303 (1) UNCLOS

<sup>57</sup> Hayashi supra note 54 at 291

historical scholarship or legislative practice.<sup>58</sup> The nature of the duty to protect and co-operate is not given any specific content as well, leaving it to the differing legal interpretations to establish its meaning. Thus Art. 303 (1) UNCLOS, as Art. 149 UNCLOS, seems to be the 'statement of a general principle without any specific standard of performance expected.'<sup>59</sup>

Article 303 (2) UNCLOS creates a legal fiction allowing the coastal State to presume that the removal of archaeological and historical objects from the seabed in the contiguous zone would result in an infringement of its fiscal or customs laws.<sup>60</sup> However this does not include any jurisdiction if the objects in question, 'instead of being removed, are simply destroyed in the very place where they have been found.'<sup>61</sup> The legal protection shipwrecks receive by this provision is therefore very limited. To hamper this legal fiction even more it only applies, as already mentioned, to the contiguous zone, an area adjacent to the territorial sea and within 24 nautical miles of the coastline. This, so it seems was believed at this time, included the whole area in need of regulation. 'The Vice-Chairman of the delegation of the U.S.A. stated: "... the vast seaward reaches of the economic zone and continental shelf were really not relevant to the problem."<sup>62</sup> This point of view was already proven wrong with the rediscovery of the wreck of the RMS Titanic in 1985 but still it is the legal situation in regard of UNCLOS.

Paragraph 3 states that '[n]othing 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.' This is rather straightforward. It does not establish a general prohibition of underwater cultural heritage law to affect those rights and laws, it only states that this article does not do so. This point of view was obviously shared by the drafters of the International Convention on Salvage 1989. This Salvage Convention allows its member States to 'reserve the right not to apply the provisions of this Convention (a) [...] (d) when the property involved is maritime cultural property of prehistoric,

<sup>58</sup> O'Keefe supra note 20 at 18

<sup>59</sup> Boesten supra note 23 at 59

<sup>60</sup> Art. 303 (2) UNCLOS

<sup>61</sup> Roberta Garabello and Tullio Scovazzi *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* 6

<sup>62</sup> O'Keefe supra note 49 at 225

archaeological or historic interest and is situated on the sea-bed.<sup>63</sup> But there are interpretations, which give this paragraph a much broader meaning, astonishingly with conclusions completely opposing each other. Some see this provision as a general embodiment of the rules of salvage law and the law of finds in regard to historic shipwrecks<sup>64</sup>, interpreting its scope much broader than the term '[n]othing in this article' actually allows for. Others take the point of view that it does the opposite by 'explicitly exclud[ing] salvage from the regulations dealing with marine archaeology'<sup>65</sup> but it remains unclear how they verified this interpretation. Both interpretations have to be rejected, though. Especially with knowledge about the background of this article and the widely differing legal positions of the States participating in its drafting there is no space to actually believe that it is intended to make a final decision in the dispute between supporters and opponents of the application of salvage law in marine archaeology.

Finally, '[p]aragraph 4 of article 303 UNCLOS is intended to harmonize the rules of the law of the sea regarding marine archaeology with the content of the emerging law of archaeology and cultural artefacts.'<sup>66</sup> It states that '[t]his article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature',<sup>67</sup> thereby recognizing that there will be more specific agreements in the future.<sup>68</sup>

### c. Part XIII. UNCLOS

Part XIII of UNCLOS deals with marine scientific research. In Art. 246 (1) it states that '[c]oastal States, in the exercise of their jurisdiction, have the right to regulate, authorise and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with

<sup>63</sup> Art. 30 (1)(d) Salvage Convention 1989

<sup>64</sup> Anne M. Cotrell 'Comment: The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks' (1994) 17 *The Fordham International Law Journal* 667 at 710

<sup>65</sup> Anthony Clark Arend 'Archaeological and Historical Objects: The International Legal Implications of UNCLOS III' (1982) 22 *Virginia Journal of International Law* 777 at 778-779 note 8

<sup>66</sup> Bernhard H. Oxman 'Marine Archaeology and the International Law of the Sea' (1988) 12 *Columbia-VLA Journal of Law and the Arts* 353 at 364

<sup>67</sup> Art. 303 (4) UNCLOS

<sup>68</sup> O'Keefe supra note 20 at 19

the relevant provisions of the Convention.' It could be argued that underwater archaeology as scientific research in the oceans is marine scientific research and therefore Part XIII of UNCLOS would be applicable, along with its consequences of coastal State jurisdiction in the extended economic zone and on the continental shelf. Unfortunately there are some serious objections to this point of view. For one why would there be a need to include Art. 303 (2) UNCLOS, an article which was added after Part XIII was already settled, if the coastal State was already felt to have jurisdiction in regard of underwater cultural heritage?<sup>69</sup> Furthermore, although the term marine scientific research itself is not defined, Art. 243 UNCLOS states clearly that it means 'studying the essence of phenomena and processes occurring in the marine environment and the interrelations between them.' These provisions lead to the conclusion that Part XIII only deals with the natural marine environment and not with manmade objects and underwater cultural heritage.<sup>70</sup> Part XIII therefore is not applicable to shipwrecks.

#### **d. Conclusion**

In a preliminary study by the UNESCO for the preparation of a Convention to protect the underwater cultural heritage it was stated that '[t]hese articles, according to archaeologists and lawyers concerned with the preservation of the underwater cultural heritage, are insufficient for the protection of the cultural heritage.'<sup>71</sup> With Part XIII not applicable and Art. 303 and 149 UNCLOS only providing general duties, that – with the exception of Art. 303 (2) UNCLOS – are not equipped with the necessary instruments to prevail, UNCLOS does not provide us with a regime to deal with underwater cultural heritage. Still UNCLOS established an improvement to the prior situation by creating these general obligations in an international framework. With the amount of problems and disputes in drafting UNCLOS and marine archaeology being only a small matter in comparison to the 'big picture' it

<sup>69</sup> Oxman supra note 66 at 366

<sup>70</sup> Oxman supra note 66 at 367

<sup>71</sup> 'UNESCO General Conference, Twenty-eighth Session, Paris 1995 (28 C/39) – Item 7.6 of the provisional agenda' in Etienne Clément 'Current Developments at UNESCO Concerning the Protection of the Underwater Cultural Heritage – Presentation Made at the First and the Second National Maritime Museum Conference on the Protection of Underwater Cultural Heritage (Greenwich, 3 and 4 February 1995) (London, IMO, 25 and 26 January 1996) (1996) 20 *Marine Policy* 309 at 315

seems that more refined legal instruments would have been too much to ask for.

## 2. Jurisdiction

After analysing the provisions of UNCLOS specific to underwater cultural heritage we now need to discuss shortly the jurisdiction applicable in the different maritime zones in regard of these objects.

### a. Territorial sea

The territorial sea extends up to 12 nautical miles from the baseline of the coastal State.<sup>72</sup> Art. 2 (1) UNCLOS states that the coastal State has sovereignty over its territorial sea, inland waters and – in case of archipelagic States – archipelagic waters. 'The coastal State undoubtedly has the right to regulate and control marine archaeology in areas subject to its sovereignty.'<sup>73</sup> Its only international obligation herein is the general duty of Art. 303 (1) UNCLOS. The way States designed their applicable law differs considerably. Some States used specific legislation, eg the UK with the 'Protection of Wrecks Act 1973' or the American 'Abandoned Shipwreck Act', some used their general legislation on the protection of cultural heritage and introduced in it a specific section for the marine environment, eg Norway with the 'Act of 9 June 1978 No. 50 Concerning Cultural Heritage', and in other States their general legislation applies.<sup>74</sup> In this maritime zone there therefore exist a wide range of differing approaches with differing degrees of protection.

### b. Contiguous zone

The contiguous zone is the area next to and seaward of the territorial sea out to a maximum of 24 nautical miles from the baseline.<sup>75</sup> 'A coastal nation may regulate customs and impose fiscal regulations in this area [providing it with] a certain level of sovereignty [...].'<sup>76</sup> The legal fiction of Art. 303 (2)

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<sup>72</sup> Art. 3 UNCLOS

<sup>73</sup> Oxman supra note 66 at 358

<sup>74</sup> Patrick J. O'Keefe 'Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention' (1996) 20 *Marine Policy* 297 at 298

<sup>75</sup> Art. 33 UNCLOS

<sup>76</sup> Cotrell supra note 64 at 677

UNCLOS allows the coastal State to presume that the removal of cultural heritage constitutes an infringement of these customs and fiscal regulations. The coastal State therefore has jurisdiction over underwater cultural heritage in the contiguous zone as long as it is removed from the seabed, but not if somebody destroys it.

### c. Exclusive economic zone

The exclusive economic zone is defined in Part V UNCLOS as the 'area beyond and adjacent to the territorial sea'<sup>77</sup> extending up to 200 nautical miles from the baseline.<sup>78</sup> In this maritime zone the coastal State enjoys extensive rights in relation to natural resources and related subjects, leaving the freedom of navigation and overflight and the laying of cables and pipelines for third States to enjoy.<sup>79</sup> This includes jurisdiction over marine scientific research<sup>80</sup>, which, as shown before, does not include marine archaeology. There is no jurisdiction 'specifically recognized over activities related to the removal of archaeological and historical objects [...]'<sup>81</sup> as these, being manmade, are not natural resources and therefore are not governed by Part V UNCLOS. In conclusion underwater cultural heritage in the economic zone is governed by the freedom of the high seas.

### d. Continental shelf

The continental shelf is defined in Part VI UNCLOS. It comprises 'the seabed and subsoil of the submarine areas that extend beyond [the coastal State's] territorial sea [...] to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines [...] where the outer edge of the continental shelf does not extend up to that distance.'<sup>82</sup> Art. 77 (1) UNCLOS explicitly states that the coastal State may exercise sovereign rights over the continental shelf 'for the purpose of exploring it and exploiting its natural resources.' These natural resources are defined in Art. 77 (4) UNCLOS as 'the mineral and other non-living resources of the seabed and

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<sup>77</sup> Art. 55 UNCLOS

<sup>78</sup> Art. 57 UNCLOS

<sup>79</sup> Churchill *supra* note 31 at 160

<sup>80</sup> Art. 56 (1)(b) UNCLOS

<sup>81</sup> Hayashi *supra* note 54 at 295

<sup>82</sup> Art. 76 (1) UNCLOS

subsoil together with [certain] living organisms'. As early as 1956 it has been clarified by the International Law Commission that this does not include underwater cultural heritage.<sup>83</sup> With no jurisdiction for the coastal State in this regard, these objects therefore fall under the freedoms of the high seas on the continental shelf.

Although they do not have the legal right under UNCLOS to do so, some States have extended their jurisdiction in regard of underwater cultural heritage to the continental shelf, eg Australia and Ireland for historic wrecks and Spain for cultural heritage.<sup>84</sup> Others impose a duty to report the discovery of cultural heritage to the coastal State, eg the Netherlands.<sup>85</sup>

#### **e. The high seas**

According to Art. 86 UNCLOS the high seas comprise 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State or in the archipelagic waters of an archipelagic State.' Its legal regime 'has traditionally been characterised by the dominance of the principles of free use and the exclusivity of flag State jurisdiction, in sharp contrast to the powers of States over their coastal waters.'<sup>86</sup> The Geneva Convention on the High Seas, a predecessor of UNCLOS and the base of the relevant provisions of its successor, did not mention marine archaeology or treasure salvage specifically. Nevertheless it was then believed to be included by the freedoms of the high seas and there is no indication for a change in this opinion in the drafting process of UNCLOS.<sup>87</sup> As such it may 'be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas'.<sup>88</sup>

#### **f. The Area**

In Art. 1 (1) UNCLOS the Area is defined as 'the seabed and ocean floor and subsoil thereof, beyond the limits of natural jurisdiction'. Art. 149

<sup>83</sup> Hayashi supra note 54 at 294

<sup>84</sup> O'Keefe supra note 74 at 299

<sup>85</sup> O'Keefe supra note 74 at 299

<sup>86</sup> Churchill supra note 31 at 203

<sup>87</sup> Hayashi supra note 54 at 294

<sup>88</sup> Art. 87 (2) UNCLOS

UNCLOS is applicable to this area, but, as shown before, too vague to be of any practical use. The Authority, which has some rights in regard to natural mineral resources, has not been vested with any role in regard to underwater cultural heritage. So the freedoms of the high seas govern underwater cultural heritage in this zone.

### **g. Conclusion**

As shown, the coastal State has exclusive jurisdiction over underwater cultural heritage in its territorial sea, inland waters and archipelagic waters. In addition it may exercise jurisdiction if such objects are removed from its contiguous zone, though there is no such right in regard of their mere destruction. Apart from these two zones, activities related to underwater cultural heritage are governed by the freedom of the sea under which 'anyone is free to take objects of historical and cultural value from the seabed beyond national jurisdiction and dispose of them subject only to what can be complex claims of ownership and rights and rewards of salvage.'<sup>89</sup>

## **3. The Law of salvage versus the law of finds**

The two bodies of law used prior to the Convention to resolve juridical issues with the utilisation of shipwrecks in maritime zones not under the jurisdiction of coastal States are the law of salvage and the law of finds. Simplified the law of salvage applies to shipwrecks which are owned by somebody, the law of finds to abandoned shipwrecks. A proper salvage claim will vest in the salvor a possessory interest in the salvaged object. He will not become the owner of this object. Salvage law can be applied even if the owner of a wreck is not known. In this case the salvor sues the wreck itself in an *in rem* procedure. In the law of finds on the other hand the finder will get complete and unchallengeable ownership of the object found.<sup>90</sup> The question of how to determine if an object is still owned or has been abandoned has already been answered above. Now the legal consequences of this condition will be shown.

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<sup>89</sup> Alastair Couper 'Editorial: The principal issues in underwater cultural heritage' (1999) 20 *Marine Policy* 283 at 283

<sup>90</sup> Bianco *supra* note 39 at 158

### a. The law of salvage

The law of salvage has evolved from Roman law. It awards a compensation from the owner to those who preserved, protected or improved his property on a voluntarily basis.<sup>91</sup> There are three conditions, which must be fulfilled for the salvor to establish a valid claim. The object in question must be in marine peril, the services rendered must be voluntarily, eg there must not be an existing duty to act, and the rescue of the object in question must be at least partially successful.<sup>92</sup> If these conditions are met the salvor is entitled to his claim of an award. The size of this award will be determined by the courts which take factors like the amount of work extended by the salvor, the skill he presented by salvaging, his risk, the value of the salvaged object and the risk the object was under of being lost into account.<sup>93</sup> In regard to underwater cultural heritage this award can become quite substantial. 'A costly salvage effort that rescues items of historical and archaeological value may justify an award approaching 100 per cent of the value.'<sup>94</sup> To be able to assert his claim the salvor establishes by his action a maritime lien as a security. A maritime lien is 'a privileged claim upon maritime property arising in respect of service done to it.'<sup>95</sup>

Especially the question whether a shipwreck, which has been lying undisturbed on the bed of the sea for several centuries, is in marine peril has been subject to some heated debates. Marine peril means that the object must be at risk of loss, destruction or deterioration.<sup>96</sup> As this has already happened to the underwater cultural heritage – otherwise the ship would not be a wreck on the floor of the ocean – there are opinions, which deny that such an object is still in marine peril. In fact there are voices that point out that such a wreck would be in greater danger if it was removed from the ocean floor where it was in a state of equilibrium whereas its removal and the following contact with oxygen would endanger the recovered material. The

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<sup>91</sup> Michael G. Collins 'The Salvage of Sunken Military Vessels' (1976) 10 *The International Lawyer* 681 at 684

<sup>92</sup> Bianco supra note 39 at 158-159

<sup>93</sup> Bianco supra note 39 at 159

<sup>94</sup> Frank L. Maraist and Thomas C. Galligan *Admiralty in a nutshell* 144

see as well eg *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.* (4th Cir. 1995)

<sup>95</sup> Boesten supra note 23 at 98

<sup>96</sup> Boesten supra note 23 at 102

Swedish ship *Vasa*, sunk in 1628, recovered in 1961 and today one of Sweden's foremost tourist attractions, is a great example for the amount of work needed to protect and preserve a shipwreck properly.<sup>97</sup> To still apply the principles of salvage law to underwater cultural heritage there was therefore the need for a broad definition of marine peril. American case law stated that '[m]arine peril includes more than the threat of storm, fire or piracy to a vessel in navigation. [...] Even after discovery of the [shipwreck's] location it is still in peril of being lost through the actions of the elements.'<sup>98</sup> In another case the court states that '[b]ecause the defendant vessel was still in the peril of being lost through the action of the elements or of pirates and was not successfully salvaged when the plaintiff undertook its salvage operation, it was subject to a marine peril for purposes of the plaintiff's salvage claim.'<sup>99</sup> In yet another case it was even argued that, if the underwater cultural heritage consist of objects of high economic value, the fact that this value is lost for productive economic use constitutes a marine peril.<sup>100</sup> All these arguments stretch the historical definition of marine peril as far as possible to include underwater cultural heritage. 'American law [obviously] prefers to apply the law of salvage to the law of finds: the power to award salvage gives greater control over recovery operations.'<sup>101</sup> And the courts can use this broad definition and in consequence the law of salvage to protect shipwrecks from treasure salvors who do not proceed with the necessary archaeological caution. For example: another judgment used this broad approach while at the same time denying the plaintiff his salvage award because 'they have not sought to preserve the archaeological integrity of the Area.' The reasoning behind this was that one cannot save an object from peril while putting it in

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<sup>97</sup> [http://en.wikipedia.org/wiki/Vasa\\_\(ship\)](http://en.wikipedia.org/wiki/Vasa_(ship)) (Accessed 15 February 2009);

To prevent the hull from deterioration once it was recovered, the ship was sprayed with glycol for 17 years followed by a period of 9 years of slow drying. Still the restored ship is in danger of rapid deterioration and in constant need constant expensive action to be safed.

<sup>98</sup> *Treasure Salvor I* 569 F 2d 330, 337 (5<sup>th</sup> Cir. 1978) cited in cited in Larsen supra note 40 at 48

<sup>99</sup> *Cobb Coin II* 549 F Supp. 540 at 547 cited in Bruce E. Alexander 'Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations' (1989) 20 *Journal of Maritime Law and Commerce* 1 at 15

<sup>100</sup> Craig J. S. Forrest 'Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?' (2003) 34 *Journal of Maritime Law & Commerce* 309 at 329 note 92

<sup>101</sup> Geoffrey Brice 'Salvage and the Underwater Cultural Heritage' (1996) 20 *Marine Policy* 337 at 341

even greater danger.<sup>102</sup> Although the argument for a narrow definition of marine peril seems more reasonable, one can not deny that the approach courts – at least the U.S. courts – prefer is the broad definition, thereby allowing the application of the law of salvage for underwater cultural heritage

In addition to the object being in marine peril, the salvor must act voluntarily, meaning without any pre-existing duty. This may be excluded, if the salvor acts under contract with the owner of the shipwreck. But even under contract, salvage law still applies and gives the salvor a maritime lien if the service was rendered on a 'no cure, no pay' basis.

Finally the salvage must have been at least partially successful. This condition made another extensive interpretation necessary. As a treasure salvor normally will file his claim before starting the recovery of the shipwreck in order to make sure that he has exclusive rights of salvage, success has often not yet been achieved when the court has to pronounce a judgment.<sup>103</sup> As a consequence the salvor only has to show a likelihood of success of his future salvage operation. Actual success is not needed if he has not already salvaged the property.<sup>104</sup> The question of success allows the courts to include archaeological care as a criterion. Where the salvor, by salvaging an underwater cultural heritage site, destroys the archaeological context in taking care only of the economic value, the court might deny him the salvage award.<sup>105</sup>

With these three conditions fulfilled the salvor can claim a salvage award. The size of this award will be assessed by the court, taking into consideration the above mentioned factors. Once again this is a point where archaeological care can be introduced in the court's decision by taking it into account when evaluating the degree of skill used by the salvor.<sup>106</sup> Still the size of the award is limited by the economic value of the salvaged object. Although it can be seen as a valuable contribution 'in order to make [salvage law] suitable for

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<sup>102</sup> *MDM Salvage v Unidentified, Wrecked and Abandoned Sailing Vessel* 631 F. Supp. 308, 312 (S.D. Fla. 1986) cited in Larsen *supra* note 40 at 49

<sup>103</sup> Boesten *supra* note 23 at 104

<sup>104</sup> Larsen *supra* note 40 at 50

<sup>105</sup> Boesten *supra* note 23 at 105

<sup>106</sup> Boesten *supra* note 23 at 106-107

application to the recovery of the [historical] wrecks<sup>107</sup> it still has several shortcomings. In cases where the economic value is lower than the cost of using appropriate archaeological standards would be, there is no incentive for the salvor left to apply these standards. In the end, even after these additions and changes in definition, the law of salvage remains an institution, which is concerned and designed for economic reasons, not as a mean to protect cultural or historic objects.

#### **b. The law of finds**

The common law of finds treats property that is abandoned as returned to the state of nature and thus equivalent to property, such as fish or ocean plants, with no prior owner. The finder can reduce such property to "possession", either real or constructive, and thus becomes its owner.<sup>108</sup> The two prerequisites for a salvor to claim ownership under the law of finds are that the shipwreck must have been abandoned and that he has reduced it to his possession. How to determine whether a shipwreck is still owned by somebody or if it has been abandoned has already been examined.

To show that the finder has possession of the shipwreck can be difficult, especially in regard to the fact that these wrecks might be located thousands of meters below the surface of the sea in remote areas. Being the one who located the wrecksite is not enough to fulfil this condition. American courts therefore accepted possession if the finder can prove that he knows where the wreck is located, that he is capable of recovering it and that he is currently doing so.<sup>109</sup>

In regard to the protection of underwater cultural heritage the law of finds leaves no incentives for the salvor to apply archaeological care. In salvage law, the court has the power to determine the size of the award or whether to present the salvor with one at all. In the law of finds, the salvor becomes the owner of the wreck and can deal with it as he pleases as long as he does not violate domestic law that might limit his discretionary power of disposition.

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<sup>107</sup> Boesten supra note 23 at 108

<sup>108</sup> Bianco supra note 39 at 160-161

<sup>109</sup> Larsen supra note 40 at 43

## 4. The International Convention on Salvage

### a. Introduction

The target of the International Convention on Salvage from 1989 (Salvage Convention) is to unify the principles on the law of salvage internationally. It entered into force on 14 July 1996 and currently 54 States are parties to this Convention, including Russia, China, the United Kingdom and the United States but excluding flags of convenience like Panama and Liberia.<sup>110</sup>

This Convention is applicable to historical shipwrecks although it does not include any specific regulations in this regard. It does however allow its State parties 'at the time of signature, ratification, acceptance, approval or accession, [to] reserve the right not to apply the provisions of this Convention [...] when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.'<sup>111</sup> Nine State parties made use of this possibility and excluded historic shipwrecks in this way.

### b. The regulations

The Salvage Convention is applicable for 'any salvage operation [...]'<sup>112</sup> with salvage operation being defined as 'any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.'<sup>113</sup> Vessel herein means 'any ship or craft, or any structure capable of navigation'<sup>114</sup> and property 'any property not permanently and intentionally attached to the shoreline and [this definition] includes freight at risk.'<sup>115</sup> Warships and State vessels are excluded from its scope.<sup>116</sup> Even if it would be arguable whether a sunken ship, which has been submerged for centuries, would still be considered a structure capable of navigation it definitely can be considered as property in the sense of this

<sup>110</sup> <http://www.comitemaritime.org/ratific/imo/imo13.html> (Accessed 15 February 2009)

<sup>111</sup> Art 30 1.d) International Convention on Salvage from 1989

<sup>112</sup> Art. 6 (1) International Convention on Salvage from 1989

<sup>113</sup> Art. 1 (a) International Convention on Salvage from 1989

<sup>114</sup> Art. 1 (b) International Convention on Salvage from 1989

<sup>115</sup> Art. 1 (c) International Convention on Salvage from 1989

<sup>116</sup> Art. 4 (1) International Convention on Salvage from 1989

Convention. Historic shipwrecks therefore fall under the scope of the Salvage Convention, especially as there is no mention of the age of the property.<sup>117</sup>

There are not many provisions in the Salvage Convention which are important in regard to the salvage of underwater cultural heritage. Obviously historic shipwrecks were not an important issue in the drafting of the Salvage Convention. Namely these articles are Art. 13 – Criteria for fixing the reward, Art. 18 – The effect of salvor's misconduct, and Art. 30 – Reservations.

Art. 13 of the Salvage Convention deals with the fixing of the size of the reward and lists criteria which are to be taken into account by doing so. These criteria do not differ from the ones already used by the courts prior to this Convention. For the protection of underwater cultural heritage the most important are 'the measure of success obtained by the salvor'<sup>118</sup> and 'the skill and efforts of the salvors in salvaging the vessel, other property and life.'<sup>119</sup> These criteria can be interpreted and applied to provide an incentive for the salvor to use proper archaeological care while salvaging the shipwreck. That courts used them in this way in the past was already shown.<sup>120</sup> The same applies for Art. 18. Hereunder '[a] salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct.' This article allows an interpretation, under which the destruction of archaeological data makes proper scientific research and the 'salvage' of this data more difficult, thereby allowing the court to reduce the salvage award.<sup>121</sup>

In Art. 30 we find the above mentioned reservation, which States can make in regard of the application of the Salvage Convention to underwater cultural heritage.

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<sup>117</sup> Brice *supra* note 101 at 339

<sup>118</sup> Art. 13 (1)(c) International Convention on Salvage from 1989

<sup>119</sup> Art. 13 (1)(e) International Convention on Salvage from 1989

<sup>120</sup> see V.3.a

<sup>121</sup> Boesten *supra* note 23 at 123

The Salvage Convention deals with underwater cultural heritage in the same way as the common law of salvage already did. There are no new provisions, which improve or aggravate the situation.

## **5. Conclusion**

From an archaeologist's point of view, the legal protection of underwater cultural heritage prior to the UNESCO Convention is mediocre. UNCLOS provides just two articles and both only provide general duties without installing a regime for these duties to prevail. The practical use of these provisions is very limited. The area of the ocean floor under coastal State jurisdiction in regard to underwater cultural heritage is very limited as well, including only the territorial sea and – because of the legal fiction of Art. 303 (2) UNCLOS – the contiguous zone, an area which can reach 24 nautical miles from the baseline into the oceans if the coastal State used the full amount of possibilities UNCLOS provides it with. Most States did not. What remains are the vast reaches of the ocean and the laws of salvage and finds. The major concern of salvage law is of retrieving and saving commercial value, a concept that normally does not go too well with archaeological research. At least here the courts have the possibility to intervene and provide at least a basic level of protection to wrecksites. Under the law of finds this possibility does not exist.

For the salvors, the situation is, if not ideal, at least favourable. They have the possibility to follow their profession with some legal security and a minimum of obligations and regulations to obey. The same applies for the recreational divers.

## **VI. The UNESCO Convention on the Protection of the Underwater Cultural Heritage**

### **1. Reasons for a new Convention**

Especially the application of salvage law in regard to underwater cultural heritage has been criticised by the archaeologist faction. Their major concern has been summarized in Article 4 of the official commentary of the International Law Association's draft as follows: 'It should be noted that the law of salvage relates solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For underwater cultural heritage, the danger has passed; either a vessel has sunk or an object has been lost overboard. Indeed, the heritage may be in greater danger from salvage operations than from being allowed to remain where it is. [...] The major problem is that salvage is motivated by economic consideration; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.'<sup>122</sup>

These concerns led to the adoption of the UNESCO Convention on the Protection of Underwater Cultural Heritage.

### **2. The regulations**

The Convention comprises 35 articles and an Annex with further 36 rules, which will be examined in the following paragraphs.

#### **a. General principles and objectives (Preamble; Art. 2)**

The preamble of an international Convention is part of its context, provides the general principles and objectives and guides in its interpretation.<sup>123</sup> It is therefore necessary to examine it closely.

In the preamble of the Convention the State parties 'acknowledge the importance of underwater cultural heritage as an integral part of the cultural

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<sup>122</sup> Cited in Forrest *supra* note 100 at 328-329

<sup>123</sup> Art. 31 (2) Vienna Convention on the Law of Treaties

heritage of humanity' and that it is important to protect and preserve it.<sup>124</sup> The need for cooperation among 'States, international organisations, scientific institutions, professional organizations, archaeologists, divers, other interested parties and the public at large' is emphasised as well.<sup>125</sup> Noteworthy in this extensive list is that the salvage industry is not mentioned. In former drafts they were part of the list but due to opposition at the 2001 meeting – it was believed that the salvors were more part of the problem than part of the solution – they were removed.<sup>126</sup> The aim of the Convention is 'to ensure and strengthen the protection of underwater cultural heritage'<sup>127</sup> and State parties 'shall cooperate [in this regard]'<sup>128</sup> as well as 'preserve the underwater cultural heritage for the benefit of humanity',<sup>129</sup> a terminology we already know from Art. 149 UNCLOS.

Two major principles are used in the Convention to regulate how this shall be done.

For one, according to established archaeological standards an excavation shall only take place if the site is under threat or for legitimate research purposes.<sup>130</sup> This concept can be found in the Convention as it envisages *in situ* protection as the first option for underwater cultural heritage.<sup>131</sup> The Annex clarifies this by stating that activities concerning underwater cultural heritage may be authorised if they make a significant contribution to protection, knowledge or enhancement of the underwater cultural heritage as long as the authorisation is consistent with the protection of the site.<sup>132</sup> Scientific studies or the protection of the heritage objects might make it necessary to recover the objects though and this is acknowledged by the Convention as well.<sup>133</sup> However even then the recovery 'must be as non-

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<sup>124</sup> Preamble CPUCH

<sup>125</sup> Preamble CPUCH

<sup>126</sup> Boesten *supra* note 23 at 136

<sup>127</sup> Art. 2 (1) CPUCH

<sup>128</sup> Art. 2 (2) CPUCH

<sup>129</sup> Art. 2 (3) CPUCH

<sup>130</sup> Dromgoole *supra* note 25 at 65

<sup>131</sup> Art. 2 (5) CPUCH

<sup>132</sup> Annex Rule 1. CPUCH

<sup>133</sup> Annex Rule 4. CPUCH

destructive as possible [...] contribute to the preservation of the remains [and be conducted in a manner that complies with the Convention].<sup>134</sup>

The second principle is that underwater cultural heritage 'shall not be commercially exploited'.<sup>135</sup> The Annex adds substance to the meaning of this. It states that '[t]he commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.'<sup>136</sup> Following this there are two exceptions listed which make clear that this does not exclude the excavation of the site to be commercially motivated, eg in the case of a professional salvage company working under contract where the excavation itself is in full conformity with the Convention.<sup>137</sup> Neither is this a prohibition of exhibitions with a commercial background or another form of commercial disposition of the antiquities, as long as they correspond to the regulations of the Convention.<sup>138</sup>

## **b. Definitions (Art. 1)**

Art. 1 provides the definitions, especially the definition for underwater cultural heritage. This definition and the concerns regarding the wide scope used for underwater cultural heritage have already been elaborated on in this dissertation.<sup>139</sup>

Art. 1 also defines the term 'activities directed at underwater cultural heritage' and 'activities incidentally affecting underwater cultural heritage'. Both definitions have as a prerequisite that they may 'physically disturb or otherwise damage' the protected objects, the difference being that the former has to be directed at the underwater cultural heritage while the latter does so

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<sup>134</sup> Annex Rule 4. CPUCH

<sup>135</sup> Art. 2 (7) CPUCH

<sup>136</sup> Annex Rule 2. CPUCH

<sup>137</sup> Annex Rule 2.(a) CPCUH

<sup>138</sup> Annex Rule 2.(b)

<sup>139</sup> See II

only incidentally, eg the laying of a cable near a wrecksite or fishing with a net dragging over the ocean floor.<sup>140</sup>

### c. Relationship to UNCLOS (Art. 3)

Art. 3 of the Convention states that nothing in it 'shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea [... and that it] shall be interpreted and applied in the context of and in a manner consistent' with these bodies of law.<sup>141</sup>

Compatibility of the UNESCO Convention with UNCLOS is a major issue as many important maritime states such as The United Kingdom, France, Russia and the U.S.A. expressed their concern 'that the extension over the continental shelf and the exclusive economic zone of coastal States rights which bore no relation to natural resources would promote creeping jurisdiction.'<sup>142</sup> These concerns found their expression as well in resolution 54/31 of the United Nations General Assembly. In this resolution it was recognized that underwater cultural heritage is in need of protection.<sup>143</sup> Still, with explicit mentioning of the UNESCO draft Convention the 'importance of ensuring that the instrument to be elaborated is in full conformity with the relevant provisions of the Convention' was emphasized.<sup>144</sup>

It is true that early draft versions of the Convention did propose the installation of a cultural heritage zone extending to the end of the continental shelf and, as this met resistance, the provisions provided for the use of the existing zones as a basis for State control. As the concerns mentioned above show, this was opposed as well so that the current regime discussed below was implemented.<sup>145</sup> These different approaches lead to the insertion of this

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<sup>140</sup> Art. 1 (6), (7) CPUCH

<sup>141</sup> Art. 3 CPUCH

<sup>142</sup> Keun-Gwan Lee 'An Inquiry into the Compatibility of the UNESCO Convention 2001 with UNCLOS 1982' in Lyndel V. Prott *Finishing the Interrupted Voyage - Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of Underground Heritage* 20 at 20

<sup>143</sup> Preamble UN General Assembly Resolution 54/31

<sup>144</sup> Paragraph 30 UN General Assembly Resolution 54/31

<sup>145</sup> Dromgoole *supra* note 25 at 76

article to ensure the interpretation of the Convention in a manner consistent with UNCLOS. The concerns still exist though.

#### **d. Relationship to the law of salvage and the law of finds**

**[Art. 4; Art. 2 (7)]**

As shown in the reasons for the Convention another major concern was the application of the law of salvage and the law of finds in regard to underwater cultural heritage. Their application was therefore prohibited in the ILA Draft of 1994 and this idea had strong support up until the end of the negotiations.<sup>146</sup> The final version did however allow for exceptions in this regard. Art. 4 states that '[a]ny activity relating to underwater cultural heritage to which [the] Convention applies, shall not be subject to the law of salvage or law of finds, unless it (a) is authorised by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.' The application of the law of salvage or the law of finds is therefore only admitted if all of these three prerequisites are fulfilled. There seem to be no problem in regard to the authorisation. Ensuring maximum protection can be done by using corresponding obligations will issuing the authorisation. But what about the full conformity of the activity with the Convention? To fulfil this, the protection of the underwater cultural heritage must not be commercially exploited. But the law of salvage and the law of finds are in essence commercially motivated legal concepts. The Opinion exists that it is difficult to see how these 'could be conducted so as to conform to this Convention.'<sup>147</sup> This provision, so it is feared, 'will have the effect of undermining the rules of the Annex and allow States to interpret these rules so as to allow the continuation of the application of a modified salvage law to [underwater cultural heritage].'<sup>148</sup> And this objection seems valid as there are enough States which did not consent with the abolition of these concepts of law. Anyhow the salvor would still have to apply the standards of the Convention such as in regard to funding and conversation, a feat, which will be difficult to accomplish as most companies working in this

<sup>146</sup> Carducci supra note 13 at 425

<sup>147</sup> Forrest supra note 24 at 541

<sup>148</sup> Forrest supra note 24 at 541

area are on a rather tight budget. In addition the only possible commercial exploitation of the recovered objects would be to use exhibitions as long as this does correspond to Rule 2 of the Annex. But just as merchandising in the film industry has become more and more important in regard of the overall profit, there are means for salvage companies to increase their financial success as well. The example of Odyssey Marine Exploration proves that these companies can earn additional money through TV-contracts and similar means. Though whether this would be enough to finance an expedition, the excavation, and especially the long-term conservation required in the Convention remains to be seen.

As the application of the law of salvage and the law of finds seems to be effectively prohibited, another issue has to be addressed in regard to States which are party to both this Convention and the Salvage Convention without making a reservation in regard of the application of the law of salvage to underwater cultural heritage pursuant to Art. 30 (1)(d) Salvage Convention. Experts from the IMO were of the opinion, that 'because of the private-law non-mandatory nature of the [Salvage] Convention, the right to exclude the application of salvage law exists even without express reservation.'<sup>149</sup> However this opinion must be rejected as the Salvage Convention still, as an international Convention, imposes obligations on its State Parties.<sup>150</sup> To find a solution the Vienna Convention on the Law of Treaties has to be considered. Art. 30 of the Vienna Convention states that, if successive treaties relate to the same subject, as is the case in regard to these two Conventions, and the more recent Convention, ie the UNESCO Convention, does not include all the parties to the earlier one, as is the case so far and for the foreseeable future, between State parties to both Conventions the rules of the older Convention do only apply so far as they are compatible with the latter ones. If one State is party only to one Convention, the other to both, then the Convention to which both States are a party applies. However, as the matter regulated by the Salvage Convention is a matter of private-law, this would mean that a salvor from a State being a party to the Salvage

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<sup>149</sup> Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage, UNESCO Doc. CLT-96/CONF.605/6, May 1996, at note 152; cited in Forrest *supra* note 100 at 347

<sup>150</sup> Forrest *supra* note 100 at 347

Convention but not to the UNESCO Convention, could file a claim under the law of salvage in a State being party to both Conventions while a domestic salvor would be excluded from this possibility.<sup>151</sup> This would lead to the discrimination of the States own nationals, a fact that not every legal system allows for. According to the International Maritime Committee (CMI), a private organisation of maritime lawyers, parties to the Salvage Convention that did not make a reservation in regard to underwater cultural heritage cannot adopt the CPUCH as this would result in the above mentioned conflict. Such a State must denounce the Salvage Convention prior to becoming a party to the UNESCO Convention. They can adopt the Salvage Convention again, but they have to make a reservation under Art. 30 to not to apply it to underwater cultural heritage.<sup>152</sup>

**e. Activities incidentally affecting underwater cultural heritage (Art. 5)**

Activities incidentally affecting underwater cultural heritage are defined in Art. 1 of the Convention and include any activity which may damage an object considered to be underwater cultural heritage while not being directed at this object at all.<sup>153</sup> This includes such activities as cable laying, fishing and mining. Originally there was a proposal that the Convention should be limited to those activities that are directed at underwater cultural heritage as it was felt by some States that the scope would otherwise be too broad, but eventually the feeling that these activities needed to be addressed as well prevailed.<sup>154</sup> The Convention obliges its State parties to prevent damage to underwater cultural heritage by these incidental activities by using the best practicable means.<sup>155</sup> These means, however, will practically be balanced with economical needs. For known sites the concerned State can impose certain obligations and duties to protect them. Still undiscovered sites, on the other hand, would require extensive and expensive research for, eg, an oil drilling company to assess whether there are any underwater cultural

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<sup>151</sup> Forrest supra note 100 at 347-348

<sup>152</sup> Report of the CMI Working Group *Consideration of the UNESCO Convention on the Protection of Underwater Cultural Heritage* Paragraph 8c. Available at [http://www.comitemaritime.org/year/pdfiles/cons\\_unesco.pdf](http://www.comitemaritime.org/year/pdfiles/cons_unesco.pdf) (Accessed 15 February 2009)

<sup>153</sup> Art. 1 (7) CPUCH

<sup>154</sup> Boesten supra note 23 at 153

<sup>155</sup> Art. 5 CPUCH

heritage sites in the area of their project. While this might theoretically be possible, a fishing boat will definitely not be able to do the same for the vast area it uses while working. There would be a considerable financial obligation for ocean-going companies and this would eventually influence the economy of the concerned State, a fact which will surely reduce the level of protection from these activities considerably.

**f. Multilateral agreements (Art. 6)**

As in many other Conventions States are encouraged to 'enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage.'<sup>156</sup> These agreements have to be in conformity with the Convention, but they may impose regulations that provide better protection than those of the Convention. The Convention reminds the drafters of such agreements that States with a verifiable link to the underwater cultural heritage concerned will have an interest in these although they might not be situated near the area covered by this agreement.<sup>157</sup> The United Kingdom is an example of such a State as its ship will be found on the seabed of the whole planet.

In addition this article recognizes that such agreements were concluded before the Convention came to be. To protect the position of State parties, which are part to such agreements, Art. 6 (3) clarifies that the rights and obligations of State parties under these agreements will not be altered as long as it was concluded before the adoption of the Convention.

**g. Duties, obligations and rights of State parties in regard to the different maritime zones (Art. 7-13)**

Art. 7-12 of the Convention provides provisions for the protection of underwater cultural heritage in the different maritime zones.

Art. 7 deals with the territorial sea. After stating the well established fact that State parties have exclusive rights in regard to underwater cultural heritage in these waters, the Convention requires its parties to apply the rules

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<sup>156</sup> Art. 6 (1) CPUCH

<sup>157</sup> Art. 6 (2) CPUCH

of the Annex to activities directed at underwater cultural heritage in this maritime zone, therefore imposing an obligation in an area under complete national jurisdiction. Sunken State vessels are explicitly mentioned and require additionally that the coastal State informs the flag State party and any other State with a verifiable link to the underwater cultural heritage about the discovery of the wrecksite. There is no requirement for the flag State to consent to the measures the coastal State might use in protecting the wrecksite.

The contiguous zone is addressed in Art. 8. It refers to Art. 303 (2) UNCLOS and states that the coastal State 'may regulate and authorise activities directed at underwater cultural heritage' in accordance with the rules in the Annex. As discussed before, under UNCLOS the coastal State has jurisdiction over underwater cultural heritage in the contiguous zone only in case of the removal of the objects. Activities directed at underwater cultural heritage is a broad term including the removal but not limited to it. Regulating and authorising other activities, eg diving trips, would therefore go beyond the scope of the rights under UNCLOS although it would be consistent with the definition of such activities, a fact which lead to the opinion that, in interpreting Art. 8, it must be read as dealing only with activities directed at underwater cultural heritage that are resulting or likely to result in the removal of these objects.<sup>158</sup> This interpretation is confirmed by the express statement that this article must be applied in accordance with Art. 303 (2) UNCLOS.<sup>159</sup>

With Art. 9-10, which address the exclusive economic zone and the continental shelf, we enter maritime zones where the protection of underwater cultural heritage is not part of the national jurisdiction according to UNCLOS. The provisions are divided in two articles, one dealing with a reporting and notification system, the other with the protection of underwater cultural heritage in these zones.

Art. 9 begins with the general statement that all State parties have to protect underwater cultural heritage in these zones. The reporting system to be implemented by the State parties requires that any national of a State

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<sup>158</sup> Boesten supra note 23 at 161

<sup>159</sup> Art. 8 CPOCH

party or the master of a vessel flying its flag, which 'discovers or intends to engage in activity directed at underwater cultural heritage' in the exclusive economic zone of a State party shall report this to his own State and the coastal State (alternatively instead of the national or vessel reporting to the coastal State directly this can be made an obligation of its home State).<sup>160</sup> In turn the State parties are under the obligation to notify the Director-General of UNESCO, which will then make the information available to all States party to the Convention.<sup>161</sup> Any State with a verifiable link to the site, emphasised are cultural and historical links, may then declare its interest in being consulted on the management of the underwater cultural heritage site to the coastal State.<sup>162</sup> In regard to this reporting system it is general consensus that a national does not mean every person on the ship. As today the crew of ocean-going vessels is normally diverse involving many different nationalities and as, eg in the case of a 'treasure hunt', there could be a non-disclosure clause in the contract of a crewman, this extensive interpretation was seen as not practicable. Instead it is confined to the leader of the operation.<sup>163</sup>

The protective regime of the Convention in these zones can be found in Art. 10. Here a general statement is made that an authorisation for an activity directed at underwater cultural heritage shall be granted by a State party only in conformity with Art. 10.<sup>164</sup> This is a general duty and does not belong to the coastal State but to all State parties to the Convention. In addition the coastal State 'has the right to prohibit or authorise any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including [UNCLOS].'<sup>165</sup> The meaning of this will be elaborated upon after addressing the other paragraphs of this article. These deal with the system of protection for discovered sites or those sites where an activity directed at it is intended. The coastal State has the obligation to consult all States that have declared an interest according to Art. 9 (5) on how best to protect the wrecksite. For these consultations the coastal State is established as the coordinating State unless it expressly

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<sup>160</sup> Art. 9 (1) CPOCH

<sup>161</sup> Art. 9 (3), (4) CPOCH

<sup>162</sup> Art. 9 (5) CPOCH

<sup>163</sup> O'Keefe *supra* note 20 at 84

<sup>164</sup> Art. 10 (1) CPOCH

<sup>165</sup> Art. 10 (2) CPOCH

declares to not wish to do so, in this case all interested States have to appoint such a coordinating State.<sup>166</sup> This coordinating State is part of the consulting States and is vested with certain rights. First it 'may take all practicable measures and/or issue any necessary authorisations in conformity with [the] Convention [...] to prevent any immediate danger to the underwater cultural heritage.'<sup>167</sup> This may be done even before consultations if necessary and assistance by other State parties can be requested.<sup>168</sup> Furthermore it is responsible for implementing the protective measures agreed to by the consulting States and granting all necessary authorisations for such measures in accordance to the Annex although the consulting States may decide to vest another State with these duties.<sup>169</sup> The coordinating State can also conduct and authorise necessary preliminary research but it has to promptly inform the Director-General of the results of this research which in turn will make this information available to the other State parties.<sup>170</sup> The role of the coordinating State is further clarified in that he has to act on behalf of all State parties and not in its own interest alone. It is further stressed that this does not constitute any new jurisdictional rights not in accordance with international law including UNCLOS.<sup>171</sup>

In this protective system the coordinating State is vested with a package of rights that give it a lot of power, especially in regard to preliminary research and measures prior to consultations. As these obligations may go beyond the financial, technical or administrative abilities of States, they can be delegated to other States to ensure the protection of the wrecksite. The coastal State has been provided with kind of a veto right in regard to these measures as it may prohibit or authorise any activity which might infringe in his rights under UNCLOS. This paragraph has been interpreted as giving the coastal State additional power due to the fact that a heritage site almost surely will have become the habitat for maritime life forms and therefore every activity directed at it will affect its rights under UNCLOS.<sup>172</sup> The

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<sup>166</sup> Art. 10 (3) CPUCH

<sup>167</sup> Art. 10 (4) CPUCH

<sup>168</sup> Art. 10 (4) CPUCH

<sup>169</sup> Art. 10 (5)(a), (b) CPUCH

<sup>170</sup> Art. 10 (5)(c) CPUCH

<sup>171</sup> Art. 10 (6) CPUCH

<sup>172</sup> Dromgoole *supra* note 25 at 80

consequence would be that the coastal State has the right to prohibit or authorise any activity directed at underwater cultural heritage. This interpretation would also mean that the system of paragraph 3-5 only 'applies in situations where the coastal State cannot, or does not, act under paragraph 2.'<sup>173</sup> But this provision does not provide us with a new jurisdictional right of the coastal State it merely repeats the fact that this State has the exclusive right to regulate natural resources in these zones and may prohibit any activity which affects this right. If this extensive interpretation would have been permissible then all the underwater cultural heritage sites in the exclusive economic zone and on the continental shelf would have been already under the protection of the coastal State using the provisions of UNCLOS. In my opinion, this provision must be interpreted as protecting the rights of the coastal State in regard to the measures decided upon by the consulting States as a whole. As the consulting States may decide to implement extensive protective measures without the approval of the coastal State and which may infringe in his rights, for example declaring a protective zone of 10 nautical miles around the wreck where no fishing or oil drilling or similar activity is allowed, the coastal State can prohibit this measure and demand a more reasonable one. This shifts the interpretation of Art. 10 from a provision giving extensive rights to the coastal State – which could be interpreted as creeping jurisdiction – with cooperation – on which the Convention should have been based – playing only a minor role, to a regime where the consulting States are the ones to decide with the coastal State being merely one of them although equipped with a shield to protect its other interests in the zones to which this article applies to.

Another veto right not mentioned so far has been given to the flag State of a sunken State vessel in Art. 10 (7). According to this provision all activities in regard to such a vessel in the exclusive economic zone or on the continental shelf of a State party have to be agreed upon by its flag State and need the collaboration of the coordinating State, giving the flag State considerable additional power compared to his rights in the territorial sea. This right is limited only by the right of the coastal State to prohibit or

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<sup>173</sup> O'Keefe *supra* note 20 at 90

authorise those activities infringing its jurisdiction, the requirement of the coastal States collaboration, and the right of the coordinating State to take measures to prevent any immediate danger to the heritage.<sup>174</sup> It may be noted that the flag State is not required to be a party to the Convention. If it is not, obviously the normal rules of international law would apply to it and only the State parties are bound by this provision.

Art. 11 and 12 address the Area in a similar manner as Art. 9 and 10 did in regard to the exclusive economic zone and the continental shelf. The reporting system matches the one outlined in Art. 9. Differences exist only in regard to the States to be informed by the national or the master of the vessel – as there is no coastal State there is no obligation to inform one – and the recipient of the declaration of interest – instead of the missing coastal State the Director-General takes this part. In addition Art. 11 makes reference to Art. 149 UNCLOS.<sup>175</sup>

Like Art. 11 Art. 12 mirrors the protective provisions of Art. 9 in regard to the Area. Any reference to the coastal State is missing of course, the invitation to the interested States to form the consulting States will be arranged by the Director-General<sup>176</sup> and the consulting States definitely have to decide upon a coordinating State. These invitations will include the International Seabed Authority to participate in the consultations although the Authority is not vested with any powers in regard to underwater cultural heritage under UNCLOS.<sup>177</sup> The right to take and authorise protective measures in case of immediate danger is vested now not only in the coordinating State – this would not exist in cases where this immediate danger occurs prior to the election of a coordinating State – but in all State parties of the Convention.<sup>178</sup> The duties of the coordinating State are changed as well. In the exclusive economic zone and on the continental shelf it was acting on behalf of the State Parties as a whole, in the Area for the benefit of mankind. In addition the coordinating State has to pay particular regard to the preferential rights of States of cultural, historical or

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<sup>174</sup> Art. 10 (7) CPOCH

<sup>175</sup> Art. 11 CPOCH

<sup>176</sup> Art. 12 (2) CPOCH

<sup>177</sup> Art. 12 (2) CPOCH

<sup>178</sup> Art. 12 (3) CPOCH

archaeological origin of the underwater cultural heritage.<sup>179</sup> These latter changes correspond to Art. 149 UNCLOS and their purpose seems to ensure conformity with it. State parties to the Convention will almost always be party to UNCLOS as well and therefore have to apply Art. 149 UNCLOS. In addition the self-image of the Convention is that it is build on the framework of UNCLOS and delivers the means on how to protect underwater cultural heritage as required by the obligations of UNCLOS. How States, which are not party to the Convention, can influence the decisions of the consulting States and whether they may take part in these consultations is not answered though. The last difference to Art. 10 applies to State vessels. In Art. 10 (7) it is stated that no activity regarding these shall be authorised or undertaken by any State Party without the consent of the Flag State. The coordinating State is not needed to collaborate anymore.<sup>180</sup>

These provisions are supplemented by an exception in Art. 13 providing that Warships and other State vessels on non-commercial operations, including military airplanes, are not obliged to fulfil the reporting obligations under these articles in the maritime zones beyond the contiguous zone as long as they are not engaged in activities directed at underwater cultural heritage. The State party shall however ensure that they still comply to these rules as long as this does not interfere with their normal mission.

The major concern of creeping coastal State jurisdiction has shaped these provisions. The reporting and protection system established here relies on nationality and flag State jurisdiction. It does not extend the jurisdiction of the coastal State to the area beyond the contiguous zone.<sup>181</sup> The Convention tries to ensure compatibility with UNCLOS all the time as well, eg by incorporating Art. 149 UNCLOS into its protective regime for the Area and by demanding that any measures taken under these provisions are in accordance not only with this Convention but also with international law and UNCLOS as well. Although there are some interpretative questions left open as in regard to Art. 10 (2) or the role of States not party to this Convention in regard to the Area, the regime developed by these provisions seems quite

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<sup>179</sup> Art. 12 (6) CPOCH

<sup>180</sup> Art. 12 (7) CPOCH

<sup>181</sup> Forrest *supra* note 24 at 543

reasonable. Especially the possibility to choose the State responsible in coordinating or implementing the protective measures allows States with little funding, lacking technological or scientific knowledge, or insufficient administrative possibilities to take an active part in the protection of underwater cultural heritage. It surely depends on the participation of as many States as possible, but that's something most Conventions do.

#### **h. Measures and sanctions (Art. 14-18)**

The Art. 14-18 provide the State parties with instruments to enforce compliance to the Convention.

In Art. 14 the States are obliged to install a system, which will 'prevent the entry into their territory of, the dealing in, or the possession of underwater cultural heritage [where this] has been illicitly exported and/or recovered, where recovery was contrary to this Convention.' Illicitly exported as the first alternative means exported contrary to the law.<sup>182</sup> The only qualification of such an object is that it has to be underwater cultural heritage. The State that did forbid its export does not have to be a party to the Convention. As long as the exportation of the object did violate the domestic law of its State of origin, this provision can be invoked.<sup>183</sup> Such underwater cultural heritage would also fall under the scope of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property from 1970, already mentioned in the preamble, and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects from 1995 so that no special implementation for parties to these Convention is needed as the obligation would already be fulfilled. This applies even though underwater cultural heritage is not explicitly mentioned as such in these Conventions.<sup>184</sup>

The second alternative is a bit more difficult to understand. Is the underwater cultural heritage required to have been illicitly recovered, with this recovery being conducted in a manner contrary to the Convention as

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<sup>182</sup> O'Keefe *supra* note 20 at 105

<sup>183</sup> O'Keefe *supra* note 20 at 104

<sup>184</sup> O'Keefe *supra* note 20 at 105

understood by some?<sup>185</sup> Or does illicit apply only to export and the requirement is therefore only that the object has been recovered contrary to the Convention?<sup>186</sup> There is no qualification to whether the recovery would have been obliged to comply to the Convention which means that the word recovered applies to every object ever recovered from the floor of the ocean. If illicit is part of the alternative, then the question remains why it is explicitly mentioned that the recovery must have been conducted contrary to the Convention? This would mean that recovery operations that did comply with the rules in the Annex but were illegal would fall out of the scope of this article. However it is hard to imagine a situation where this would be the case as the principles of the Convention and the standards set out in the Annex actually do not leave any room for illegal activities. What remains is the question whether objects from nearly every recovery operation ever undertaken on the seas would be enough to trigger this provision or whether the legal system of the State under which the recovery did commence has to deem it as illegal. In regard to practicability issues, the later seems more reasonable. The extensive interpretation would include such objects as the ones recovered from the Titanic and other cultural treasures that might have been on exhibition in museums around the world for decades and therefore prevent their exhibition in States party to this Convention as they are prohibited from entry to these States. Furthermore, as the possession of these objects shall be prevented as well, additional questions arise concerning private property laws. Art. 18 allows for the seizure of any underwater cultural heritage found in its territory that has been recovered in a manner not in conformity with the Convention but it does not deal with the legal consequences. Does the State that did seize the object become the owner of it or a State with a verifiable link or maybe even somebody else? Will there be compensation? That the seizure under Art. 18 applies to every underwater cultural heritage recovered in a manner not in conformity with the Convention seems to be consensus.<sup>187</sup> And if Art. 18 is interpreted in this manner, there is no room for using the prerequisite illicit in the recovery

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<sup>185</sup> Forrest *supra* note 24 at 546

<sup>186</sup> O'Keefe *supra* note 20 at 106

<sup>187</sup> see O'Keefe *supra* note 20 at 115; Forrest *supra* note 24 at 547; Dromgoole *supra* note 25 at 87

alternative as it would make no sense to allow for the seizure of all these objects but not require the State parties to implement the prohibition of possessing them privately. In spite of all the administrative and legal problems that the implementation of this interpretation creates, it seems to be the correct one.

Art. 15 states that the parties 'shall take measures to prohibit the use of their territory, including their maritime ports as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of any activity directed at underwater cultural heritage which is not in conformity to this Convention.' This provision allows coastal States to hamper activities directed at underwater cultural heritage where neither the vessel nor the person in charge are under the jurisdiction of a State party. Under international law, including UNCLOS, every State has a right to close its ports to protect its vital interests, in this case the protection of underwater cultural heritage.<sup>188</sup> As the parties to the Convention do not have any jurisdiction over above mentioned persons or vessels, they cannot oblige them to fulfil the requirements of the Convention. This is therefore one of the few possibilities to affect them.

In Art. 16 the State parties are obliged to ensure the enforcement of the provisions of the Convention by taking 'all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in any manner not in conformity with this Convention.' The term nationals has to be interpreted as in the Art. 7-12 meaning only the person in charge and not every person taking part in the operation as a crewman. Apart from that the obligation of the State party from this article is rather straightforward and requires only national implementation through acts and administrative bodies.

Art. 17 requires State parties to 'impose sanctions for violations of measures it has taken to implement [the] Convention.' It states that these sanctions 'shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they

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<sup>188</sup> O'Keefe *supra* note 20 at 107

occur and [they] shall deprive offenders of the benefit deriving from their illegal activities' and that the State parties shall cooperate in this matter.<sup>189</sup> These sanctions will include criminal penalties or fines and, as a mean to deprive the offender of his benefit, seizure, which is dealt with in Art. 18. The extend to which underwater cultural heritage shall be seized and the legal implications of this have already been elaborated upon earlier. In the following paragraphs Art. 18 deals with the measures to be taken after underwater cultural heritage has been seized. It imposes on the seizing State the duty to record, protect and stabilize the heritage,<sup>190</sup> to ensure its disposition for the public benefit (factors to be considered are conservation, research, reassembly of dispersed collections, public access and the interests of States with a verifiable link),<sup>191</sup> and to notify the Director-General of UNESCO and any other State with a verifiable link of the seizure.<sup>192</sup>

All together these measures and sanctions are quite extensive. They prohibit the entry of any underwater cultural heritage that was recovered in a manner that did not comply with the provisions of the Convention into the area of jurisdiction of the State parties while at the same time making provisions for the dispossession of any such objects already inside of this area, thereby closing these States for the commercial exploitation of this heritage. It is a shortcoming of the Convention that it did not deal with the question of ownership that naturally will arise after seizure. This shortcoming is however understandable as it would have extended the scope of the Convention considerably and thereby would have reduced the chance of success as these new issues surely would have been argued about. Still this means that these provisions will be interpreted and implemented in different ways in each country which does not convey uniformity.

#### **i. Cooperation and public awareness (Art. 19-21)**

The State Parties shall 'cooperate and assist each other in the protection and management of underwater cultural heritage',<sup>193</sup> 'share information [...]

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<sup>189</sup> Art. 17 CPUCH

<sup>190</sup> Art. 18 (2) CPUCH

<sup>191</sup> Art. 18 (4) CPUCH

<sup>192</sup> Art. 18 (3) CPUCH

<sup>193</sup> Art. 19 (1) CPUCH

including discovery of heritage, location of heritage, heritage excavated or recovered contrary to this Convention or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage',<sup>194</sup> keep the shared information regarding the discovery or location of wrecksites 'confidential and reserved to competent authorities [...] as long as the disclosure of such information might [...] put at risk the preservation of such [...] heritage',<sup>195</sup> and disseminate information about underwater cultural heritage recovered contrary to the Convention or other international law.<sup>196</sup> They shall raise public awareness in regard to underwater cultural heritage and the importance of protecting it,<sup>197</sup> and cooperate in training in regard to conservation techniques and technology relating to underwater cultural heritage.<sup>198</sup> These articles have in common that they regard information and its handling. The transfer of technology and knowledge and the cooperation in training are necessary to enable those developing States, which do not have the resources or expertise needed so far, with the means to fulfil their obligations under the Convention and protect the underwater cultural heritage found in their area of the oceans without the help of a developed State. Information regarding illicit recovery operations and objects recovered in that way are necessary to enforce compliance with the Convention as the measures and sanctions provided for can only be effective with these information being widely spread. Art. 19 (4) suggests the use of an international database in this regard though this would still have to be founded. And the disclosure of heritage sites not yet preserved is a necessary tool, as this information would otherwise lead treasure hunters directly to the site the Convention tries to protect from them. Public Awareness is another important issue. As mentioned in the introduction, salvage companies specialised in treasure hunting use the media to earn profit, thereby advancing their point of view. Most of the information in the introduction was cited from the special issue of an important German political magazine considered to be rather objective. Still most of the articles were inspired by the adventurous and somehow mystic aura treasure hunting still

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<sup>194</sup> Art. 19 (2) CPUCH

<sup>195</sup> Art. 19 (3) CPUCH

<sup>196</sup> Art. 19 (4) CPUCH

<sup>197</sup> Art. 20 CPUCH

<sup>198</sup> Art 21 CPUCH

has. For the general public the salvage industry is associated with romantic dreams of the tropical sun, adventurous travels and chests full of gold. The importance of preserving this heritage is not seen, as objects covered by the oceans seem far away. All these arguments show the need to improve the public perception of the archaeological point of view.

**j. Institutions and dispute settlement (Art. 22-25)**

On the institutional side, each State party to the Convention has to establish competent authorities (or vest already existing ones with the necessary rights) to ensure the implementation of the Convention. Information regarding the name and address of these authorities has to be communicated to the Director-General of UNESCO.<sup>199</sup>

The Convention installs a Meeting of the State parties that is to convene at least every two years and decide upon its functions, responsibilities, rules of procedure and the establishment of a Scientific and Technical Advisory Board.<sup>200</sup> The Director-General functions as a Secretariat of the Convention and is in this role responsible for the organisation of the Meetings and for assisting States in the implementation of the Meetings decisions.

Art. 25 provides the provision for dispute settlement. These refer to the provisions of UNCLOS in case negotiations or other peaceful means of settlement were not successful and mediation by UNESCO either did not succeed as well or was not undertaken.<sup>201</sup> This provision might cause problems in case of States not being party to both Conventions as Art. 291 (2) UNCLOS states that its dispute settlement procedures 'shall be open to entities other than State parties only as specifically provided for in [the Law of the Sea Convention].' It remains to be seen what effect this provision will have although the widespread acceptance with currently 157 State parties to UNCLOS makes this situation very unlikely.

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<sup>199</sup> Art. 22 CPOCH

<sup>200</sup> Art. 23 CPOCH

<sup>201</sup> Art. 25 CPOCH

### **k. Reservations and declarations (Art. 28-30)**

State parties may declare to apply the Annex to 'inland waters not of a maritime character.'<sup>202</sup> This provision came to be as the emphasis in the Convention was mostly on maritime waters. Some States, eg Hungary and Belgium, were of the opinion that the rules in the Annex should apply to these inland waters as well as there is no logical reason for excluding them and there are many important cultural heritage sites in those waters that need protection as well. The contrary opinion argued that these waters are already under protection in some countries by national legislation and that these acts would have to be amended if the Convention would apply to them as well. To solve this issue the Convention provided its State parties with the right to choose.<sup>203</sup>

The only reservation possible to the provisions of the Convention can be found in Art. 29. Herein States may declare that the Convention shall not apply to specific areas under its national jurisdiction. This reservation must be accompanied by the reason for it and it allows only for a temporary exclusion. The State has to promote conditions that allow for the Convention to apply to these areas as well and withdraw this reservation as soon as possible.<sup>204</sup> This reservation was included to allow federal States, in which the jurisdiction over cultural heritage might not belong to the federal government but to the member States, to become members to the Convention.<sup>205</sup> It is nevertheless not a real federal State clause as the State using it is still under the duty to promote the application of the Convention in these areas whereas in other Conventions the federal government only has to inform its member States about the Convention and recommend its adoption.<sup>206</sup>

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<sup>202</sup> Art. 28 CPUCH

<sup>203</sup> O'Keefe supra note 20 at 144

<sup>204</sup> Art. 29 CPUCH

<sup>205</sup> Boesten supra note 23 at 192

<sup>206</sup> O'Keefe supra note 20 at 145-146

Apart from this, the Convention explicitly states that 'no [other] reservation may be made.'<sup>207</sup>

### **I. The Rules (Art. 33; the Annex)**

Art. 33 declares the Annex to 'form an integral part of [the Convention].'  
This Annex contains rules concerning activities directed at underwater cultural heritage. As mentioned above<sup>208</sup> they are widely based on the Sofia Charter and represent benchmark standards for underwater archaeological excavations in regard to matters as project design, preliminary work, project objective, methodology and techniques, funding, project timetable, competence and qualifications, conservation and site management, documentation, safety, the environment, reporting, curation of project archives, and dissemination.<sup>209</sup> The rules apply a high standard to these archaeological activities but they are still in conformity with comparable rules regarding terrestrial sites.<sup>210</sup> In an early draft ICOMOS was specified to recommend revisions of the rules to UNESCO, which in turn would inform the parties of the Convention about the changes. After six months the parties would have been deemed to have accepted these amendments if they did not declare their rejection. However this provision was rejected as some States did not want to embody a private body with the right to propose amendments and the possibility to reject the amendment would have meant that different standards would have been applied by the State parties.<sup>211</sup>

### **m. Formal provisions (Art. 26-27, 31-32, 34-35)**

Finally we have the provisions regarding the ratification, acceptance, approval or accession,<sup>212</sup> entry into force,<sup>213</sup> amendments,<sup>214</sup> denunciation,<sup>215</sup>

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<sup>207</sup> Art. 30 CPOCH

<sup>208</sup> See II.

<sup>209</sup> Annex to the CPOCH

<sup>210</sup> Dromgoole supra note 25 at 66;

Examples listed there include the ICOMOS Charter for the Protection and Management of the Archaeological Heritage 1990 and the Council of Europe's European Convention on the Protection of the Archaeological Heritage (Revised) 1992

<sup>211</sup> Boesten supra note 23 at 193

<sup>212</sup> Art. 26 CPOCH

<sup>213</sup> Art. 27 CPOCH

<sup>214</sup> Art. 31 CPOCH

<sup>215</sup> Art. 32 CPOCH

registration with the United Nations,<sup>216</sup> and authoritative texts.<sup>217</sup> These provisions do not provide any surprises, are beyond the scope of this thesis and will therefore not be examined any further.

### 3. Conclusion

Having discussed the provisions of the Convention it can be said that the archaeological group did succeed in implementing their interest nearly completely. The Convention removes in the area of its State parties underwater cultural heritage from the commercial market, establishes a high set of standards every activity directed at this heritage must follow and leaves virtually no room for the application of the law of salvage or the law of finds in regard to these wrecksites. The definition of underwater cultural heritage is extensive and provides for the protection of a wide array of items.

However there are some difficulties that should not be forgotten.

For one the removal of underwater cultural heritage from the commercial market may result in a thriving black market. This has happened in the case of terrestrial cultural heritage where there is now an established black market believed to have a volume of a billion dollars.<sup>218</sup> Although one should not abstain from implementing regulations that are considered necessary and the right thing to do only because this will give rise to a new field for criminals, the overall goal of achieving maximum protection means that these consequences should be taken into consideration. The complete commercial exclusion of these items seems excessive where it results in the storage of objects without any archaeological value, eg coins in great quantities. The scientific value of keeping those objects away from the commercial market does not seem to make any sense. If there really is any value in doing so then it is clearly a matter of insufficient public awareness, a matter addressed by the Convention.

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<sup>216</sup> Art. 34 CPUCH

<sup>217</sup> Art. 35 CPUCH

<sup>218</sup> Forrest *supra* note 100 at 320

The second important shortcoming of the Convention is that it does not address the problem of ownership of underwater cultural heritage. Here it apparently assumes that this is governed by the applicable private law rules without elaborating upon the issue.<sup>219</sup> However this has been criticized as the very principals of the Convention have an impact on ownership rights.<sup>220</sup> The preference of in situ preservation and the obligation not to sell or disperse the underwater cultural heritage interfere with the owners right to recover his property and do with it as he pleases. Under the Convention even possession of these objects is prohibited. Different national legal systems will have different answers in regard to the permissibility of such interferences, a situation the Convention does not deal with at all.

The issue of creeping jurisdiction however has been successfully solved, although this opinion seems to be rejected by some. According to a statement of the U.S. government giving the reasons for its opposition to the adoption of the Convention it criticised especially the provision of the Art. 7-13. According to their point of view the duty to report a find in the exclusive economic zone or on the continental shelf of a State party not only to the flag State but to the coastal State as well does create a new right of the coastal State thereby upsetting the delicate balance of rights and interests developed under UNCLOS. The same argumentation applies to the protection regime under Art. 10 and the extensive rights of the coordinating State.<sup>221</sup> In this latter case though the U.S. position clearly makes the fault of vesting these rights in the coastal State, which, if it were the case, would support their position. But these rights belong to the coordinating State; they do exist even when there is no coastal State (Art. 12) although in slightly modified form. To install the coastal State as the coordinating State is a matter of practicability as this is the State closest to the heritage site to be protected. And Art. 10 itself states that it does not constitute the basis for the assertion of any

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<sup>219</sup> Carducci supra note 13 at 424

<sup>220</sup> Dromgoole supra note 25 at 70

<sup>221</sup> Statement of Robert C. Blumberg, U.S. Observer Delegate to the 31<sup>st</sup> UNESCO General Conference, Before Commission IV of the General Conference, Regarding the U.S. Views on the UNESCO Convention on the Protection of Underwater Cultural Heritage, Paris, France (Oct. 29, 2001) (on file at GWU); cited in Sean d. Murphy (ed) 'Contemporary Practice of the United States Relating to International Law' (2002) 96 *The American Journal of International Law* 461 at 469-470

preferential or jurisdictional rights.<sup>222</sup> The Convention uses nationality, flag State and port jurisdiction to achieve the establishment of a protective regime; it does not create new areas of coastal State jurisdiction.

Furthermore the Convention has been criticised for its over-inclusive definition of underwater cultural heritage.<sup>223</sup> Of course it is true that the definition used by the Convention is quite extensive and requires considerable financial resources in its protective regime. On the other hand the inclusion of the requested qualification of the heritage to be significant however would mean that every site would have to be assessed in order to decide about its value. And even though the quantity of underwater cultural heritage is larger when applying the current definition, there will be a great number of sites where the need to instantly take actual protective measures apart from acknowledging the existence of the site and regulating access to it will not exist. Such sites will not put any stress on the available financial resources.

Lastly, the Convention abolished the commercial salvage of historical shipwrecks, thus removing any incentive to recover underwater cultural heritage privately.<sup>224</sup> This point of criticism cannot be discarded. This is a question of politics, of whether to regard underwater cultural heritage as a normal commodity or as an unmarketable integral part of the cultural heritage of humanity. The Parties to the Convention did decide that it is the latter.

These objections prove that the UNESCO Convention on the Protection of Underwater Cultural Heritage deals with a highly controversial subject. Still it is a sound accomplishment in regard to the protection of underwater cultural heritage.

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<sup>222</sup> Art. 10 (6) CPUCH

<sup>223</sup> David J. Bederman 'The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal' (1999) 30 *Journal of Maritime Law and Commerce* 331 at 332-334

<sup>224</sup> Bederman *supra* note 223 at 341-345

## VII. Conclusion

The regime applicable to historical shipwrecks prior to the UNESCO Convention on the Protection of Underwater Cultural Heritage has been discussed. It has been shown that UNCLOS provides only general duties without allocating the tools to enforce these. Although UNCLOS made the general decision that underwater cultural heritage shall be protected for the benefit of mankind as a whole the question of how this can be achieved remained unanswered. With no protective regime installed in the areas beyond the territorial sea and, to some extent, the contiguous zone, admiralty law, especially the law of salvage and the law of finds, was used to regulate underwater cultural heritage. It has been shown that the law of salvage, primarily in U.S. case law, was modified to provide at least some protection. The law of finds does not allow for such modifications. This situation was found to be favourable for the salvage industry and recreational divers as it did not impose extensive duties, if any at all, upon them in utilizing wrecksites. Archaeologists considered this system to be insufficient as valuable historical information could be – and often was – destroyed under this regime.

Then the UNESCO Convention on the Protection of Underwater Cultural Heritage was discussed. The regulations of this Convention were found to establish an extensive protective system. It abolishes the commercial exploitation of underwater cultural heritage and effectively excludes the law of salvage and the law of finds from being applied to this underwater cultural heritage. It uses a broad definition of underwater cultural heritage that clarifies the status of any site without the need of an extensive assessment of significance. Its provisions provide for a protective regime in the oceans apart from the areas under the jurisdiction of States not party to the Convention. Still the Convention does comply with the rules of international law including UNCLOS.

Of the three identified interested groups the archaeological community does gain the most from extensive ratification of the Convention, as its position under UNCLOS and in admiralty law was not strong. The salvage

industry, on the other hand, will lose the commercial incentive for treasure salvaging with the implementation of the Convention. The third group, the recreational divers, has been ignored in this dissertation so far. Although they will have to adhere to more regulations in regard to wrecksites, in the end this group did not really lose. In situ protection as provided for by the Convention means that more wrecksites will be available for recreational diving as the already discovered ones will not be salvaged and destroyed while newly discovered sites will be added.

At the end it remains the fact that these two systems are antithetic to each other. Acceptance of the Convention or preference of the system using admiralty law is a question of belief. Shall it be possible for underwater cultural heritage to be privately owned or shall States be its trustee for the benefit of humanity?