

INTRODUCTORY NOTE TO UNESCO: CONVENTION ON THE PROTECTION OF THE UNDERWATER  
CULTURAL HERITAGE, BY K. RUSSELL LAMOTTE\*

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Introduction

This multilateral treaty, negotiated under the auspices of UNESCO, sets rules governing the regulation of activities directed at "underwater cultural heritage" ("UCH") located in maritime waters. This agreement reflects the international community's effort to respond to three closely related developments. First, recent technological advances in underwater survey and recovery techniques have meant that human artifacts located on the sea floor — consisting primarily of shipwrecks and related debris — have become increasingly accessible. Second, there has been a growing awareness that such wrecks are a valuable historical and archeological resource. And third, it has become increasingly clear that they lack sufficient protection under existing rules of maritime law.

Background and Context

Prior to the adoption of the UNESCO Convention, there was no clear international legal regime for the regulation of activities affecting UCH located in international waters. The 1982 UN Convention on the Law of the Sea (the "LOS Convention") addresses the protection of UCH, but its regime is complex and, most agree, incomplete. Under that regime, coastal states have jurisdiction to regulate activity that affects UCH in areas over which they have sovereignty, including the territorial sea (*i.e.*, out to 12 miles from the baseline).<sup>1</sup> Coastal states also have authority to exercise control over the removal of "objects of an archaeological and historical nature" in the zone contiguous with the territorial sea (*i.e.*, out to 24 miles from the baseline).<sup>2</sup>

Beyond 24 miles, however, the LOS Convention did not establish or recognize any special role for the coastal state in the protection or regulation of UCH. Instead, it set out only a general principle that "States have the duty to protect objects of an archaeological or historical nature found at sea and shall cooperate for this purpose."<sup>3</sup> With respect to "the Area" (the deep seabed located beyond the limits of national jurisdiction), the LOS Convention further provides that UCH "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 . . . of origin . . . ."<sup>4</sup>

In short, the LOS Convention treats UCH differently from other living and non-living resources located in the Exclusive Economic Zone (*i.e.*, out to 200 miles) and on the continental shelf, over which coastal states have sovereign rights and regulatory authority.<sup>5</sup> Negotiators of the LOS Convention did consider a proposal to extend coastal state jurisdiction over UCH to the limits of the continental shelf, but that proposal was expressly rejected during the negotiation.<sup>6</sup> As a result, in this zone — where much of the newly discovered UCH has been found, especially in the Mediterranean Sea — the coastal state's rights and obligations regarding UCH are essentially governed only by general international law.

Not long after the adoption of the LOS Convention, commentators identified this jurisdictional "gap" as a central flaw in the legal regime for protecting UCH. A number of proposals then followed for the establishment of a "cultural heritage zone" between the territorial sea and the outer limits of the continental shelf, where the coastal state would have the power and obligation to regulate access to UCH. These proposals were opposed by countries — mainly the maritime powers — that did not want to alter the balance of rights and duties that was struck in the LOS Convention, and therefore fought proposals to extend coastal state jurisdiction. Those countries instead argued that UCH located in international waters could be effectively protected using a combination of port State and flag State controls.

In 1997, UNESCO jumped into the fray with a decision by the 29th General Conference to authorize a process to develop an international convention to protect UCH. The UNESCO Director-General was authorized to prepare a first draft, which he submitted to a meeting of government experts in June 1998. After three subsequent meetings, the

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meeting of government experts finally submitted a draft Convention to the 31st UNESCO General Conference in October/November 2001. In the end, after a contentious debate and divided vote, the Conference adopted the draft Convention without amendment.

### The Convention

In general, the Convention is designed to require that activities directed at UCH are conducted in accordance with an Annex containing rules and standards for underwater archaeology. Within the territorial sea and contiguous zone, for example, Parties must require that the Annex be applied.<sup>7</sup> Other provisions target the use of ports and other territory to support activities directed at UCH<sup>8</sup> and require Parties to regulate the activities of their nationals and flagged vessels.<sup>9</sup>

Regarding the controversial issue of who may regulate UCH in international waters, the Convention adopts a novel approach: Article 9 creates a reporting and notification scheme to provide information about discoveries and planned activities on the continental shelf to the coastal state. Article 10 provides that the coastal state shall coordinate consultations among interested states regarding the treatment of the UCH in question. Pending the outcome of such consultations, the "coordinating state" is authorized to take "all practicable measures" to prevent danger to the UCH from any source. In effect, the coastal state may control access to UCH on its continental shelf, including requiring application of the Annex, but the Convention achieves that result indirectly and without expressly adopting a "cultural heritage zone." A separate provision on the relationship with the law of the sea provides that the Convention shall be "interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea."<sup>10</sup>

The definition of UCH was another controversial issue during the negotiations. The Convention defines UCH broadly to include "all traces of human existence having a cultural, historical or archaeological character" that have been underwater for at least 100 years.<sup>11</sup> It therefore excludes (at least for the time being) shipwrecks dating from the first and second world wars. Conversely, the absence of a "significance" criterion for the definition will mean that the Convention and its archaeological rules will apply to every remain under water for more than 100 years.

The treaty is not limited to UCH that has been abandoned, in large part due to difficulties with defining the notion of abandonment. As a result, the interests of owners of property that fits the definition are likely to be directly affected by its application. On a related matter, the convention addresses the application of the law of salvage and finds: it provides that UCH shall not be subject to those laws except where authorized and in full conformity with the Convention.<sup>12</sup>

The treaty includes a number of other noteworthy provisions. Of particular importance is the Annex, which provides mandatory rules and archaeological standards that will govern the conduct of all activities directed at UCH. The Convention contains a strong but rebuttable preference for *in situ* preservation.

The Convention also requires Parties to prevent the entry into their territory and possession of UCH "illicitly exported and/or recovered, where recovery was contrary to this Convention,"<sup>13</sup> and requires the seizure of UCH that "that has been recovered in a manner not in conformity with this Convention."<sup>14</sup> Presumably these provisions will not apply to UCH recovered prior to the entry into force of the Convention, although the text is not clear on that point.

Also of note is a complex dispute resolution mechanism<sup>15</sup> that incorporates by reference the binding dispute settlement procedure set out in the LOS Convention.

### The Future

Pursuant to UNESCO's apparently unique treaty practice, the Convention has not been opened for signature by States. Instead, following its adoption at the 31st UNESCO General Conference, the text was signed by the President of the Conference and by the Director-General of UNESCO. Countries may now choose to deposit an instrument of

accession, adherence, acceptance or ratification.<sup>16</sup> The Convention will enter into force after 20 countries have deposited their consent to be bound.<sup>17</sup>

Given the breadth of the Convention's obligations, it is likely to be some time before countries are in a position to implement it in full. Indeed, despite widespread concerns about protecting UCH, few coastal states have taken advantage of the jurisdictional authority that they already possess to regulate access to UCH within their territorial seas and contiguous zones. Most countries planning to join the Convention will therefore face the hurdle of establishing entirely new regulatory regimes and enforcement authorities in their national laws.

Even if the Convention does enter into force within a short time, it remains to be seen whether the protection of UCH will improve. Ultimately, the most important factor for the Convention's effectiveness is its membership. The Convention did not attract universal approval within the international community: it was adopted by a divided vote (87-4-15) rather than by consensus. Most importantly, nearly all of the states with the capacity to conduct significant underwater archaeology (including France, Germany, the Netherlands, Norway, Russia and the United Kingdom) either abstained from voting or voted no. The United States — whose nationals and vessels are the most active in the field — is not a member of UNESCO, but it did participate as an active observer throughout the negotiations. Although it had no vote in the proceedings, the U.S. delegation made a statement opposing its adoption. The main points of objection focussed on the Convention's jurisdictional framework, which alters the balance of coastal State rights and duties under the LOS Convention, and its treatment of warships, which some countries consider inadequate in its protection of flag State rights.

If these and other key States elect to remain outside of the UNESCO regime, the Convention's expansive jurisdictional provisions are likely to have a significantly limited impact on the conduct of underwater archaeology, since its rules and jurisdictional provisions can only apply as among Parties.

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## ENDNOTES

1. Arts. 2 and 7, U.N. Convention on the Law of the Sea 1982 (21 ILM 1263 (1982)).
2. Arts. 303(2) and 33(1), *ibid.*
3. Art. 303(1), *ibid.*
4. Art. 149, *ibid.*
5. Arts. 56 and 77, *ibid.*
6. See *The United Nations Convention on the Law of the Sea 1982: A Commentary, Volume 5*, at 161 (Nordquist, ed.).
7. Arts. 7 and 8, UNESCO Convention on the Protection of the Underwater Cultural Heritage (41 ILM 40 (2002)).
8. Art. 15, *ibid.*
9. Art. 16, *ibid.*
10. Art. 3, *ibid.*
11. Art. 1, *ibid.*
12. Art. 4, *ibid.*
13. Art. 14, *ibid.*
14. Art. 18, *ibid.*
15. Art. 25, *ibid.*
16. Art. 26, *ibid.*
17. Art. 27, *ibid.*