

## **IWT SBO PROJECT 120003 “SEARCH”**

### **Archaeological heritage in the North Sea**

Development of an efficient assessment methodology and approach towards a sustainable management policy and legal framework in Belgium.

### ***Archeologisch erfgoed in de Noordzee***

*Ontwikkeling van een efficiënte evaluatiemethodologie en voorstellen tot een duurzaam beheer in België.*



## **Assessment of international and European law related to or affecting underwater cultural heritage**

### **WP 2.1.1.**

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**Table of abbreviations**

1969 Convention	European Convention on the Protection of the Archaeological Heritage of 1969
BPNS	Belgian Part of the North Sea
CMI	Comité Maritime International
EC	European Commission
EEZ	Exclusive Economic Zone
Faro Convention	Faro Framework Convention on the Value of Cultural Heritage for Society of 2005
Granada Convention	Convention for the Protection of the Architectural Heritage of Europe of 1985
ICOMOS	International Council On Monuments and Sites
IMO	International Maritime Organization
Landscape Convention	European Landscape Convention of 2000
Linked States	States with a verifiable link, especially a cultural, historical or archaeological link
MSP	Maritime Spatial Planning
Paris Convention	European Cultural Convention of 1954
ProSea	Professional Shipwreck and Explorers Association
Salvage Convention	International Convention on the Law of Salvage of 1989
Second Protocol	The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999
The Advisory Body	The Scientific and Technical Advisory Body
The Annex	The Annex with the UNESCO Convention on the Protection of Underwater Cultural Heritage of 2001
The Code	Code of Ethics for Diving on Submerged Archaeological Sites
The Committee	The World Heritage Committee
The Fund	The Underwater Cultural Heritage Fund
The Hague Convention	Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954
The Manual	The manual for Activities directed at Underwater Cultural Heritage
The Rules	Rules Concerning Activities Directed at Underwater Cultural Heritage
UCH	Underwater Cultural Heritage
UN	United Nations
UNCLOS 1982	UN Convention on the Law of the Sea of 1982
UNESCO 1970	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970
UNESCO 1972	Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972
UNESCO 2001	Convention on the Protection of Underwater Cultural Heritage of 2001
UNESCO	United Nations Educational, Scientific and Cultural Organisation

Valletta Convention

European Convention on the Protection of the Archaeological  
Heritage (Revised) of 1992

## **I. Introduction**

The international legislative framework for the protection of Underwater Cultural Heritage (UCH) can be found in international and European conventions. Some conventions are fully dedicated to UCH, while in other conventions UCH references form only a small section.

In this part of the SeArch project we assess the international legal framework (rights and obligations) for the protection of UCH relevant in the Belgian part of the North Sea (BPNS). Provisions in conventions dealing with UCH protection in the high seas are systematically left out since they do not apply in the BPNS or the North Sea. Each convention is shortly situated and its territorial scope of application is linked to the North Sea. The protective measures that can be taken by coastal States, such as Belgium, are discussed and critically analysed based a literature study.

First, the international conventions with a clear focus on UCH, either general or more specific, are discussed and analysed profoundly. This is the case with the United Nations Convention on the Law of the Sea (1982), the Convention on the Protection of Underwater Cultural Heritage (2001), the law of salvage and finds, as well as the International Convention on Salvage (1989). The international conventions that do not deal with UCH as such, but that can have an effect on the protective framework of UCH, are briefly discussed as well. These are the Convention concerning the Protection of the World Cultural and Natural Heritage (1972), the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954).

In the second part the conventions of the Council of Europe, in particular the European Convention on the Protection of the Archaeological Heritage (Revised) (1992), are dealt with. The Faro Framework Convention on the Value of Cultural Heritage for Society (2005), the European Landscape Convention (2000), the Convention for the Protection of the Architectural Heritage of Europe (1985) and the European Cultural Convention (1954) are given minor attention due to the fact that they only offer limited added value for UCH protection.

In a third part the EU proposal for a draft directive on Maritime Spatial Planning is briefly mentioned.

## **II. Universal Conventions**

As a general remark it must be stated that compliance with international conventions by its States Parties can be enforced through the dispute settlement mechanisms incorporated in the convention or through the general international enforcement mechanisms (for example a case before the Court of Justice). This increases the legal value of the conventions and allows a stronger protection for UCH.

### 1. The UN Convention on the Law of the Sea 1982 (UNCLOS 1982)<sup>1</sup>

UNCLOS 1982 was signed in Montego on 10 December 1982 and entered into force on 16 November 1994. Belgium signed UNCLOS 1982 on 5 December 1984 and ratified it on 13 November 1998.<sup>2</sup> At the end of 2013, 165 States, including all the States bordering the North Sea<sup>3</sup>, and the EU have ratified the Convention.<sup>4</sup>

One of the key elements of UNCLOS 1982 is the consolidation of maritime zones (territorial sea, continental shelf, high seas), their boundaries and the introduction of a new zone, called the exclusive economic zone (EEZ). An overview of these zones is necessary since States have different rights and obligations therein. It is crucial to know what these entail to get a better understanding of the rights and obligations of States concerning the protection and management of UCH.



Source:<http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/unesco-manual-for-activities-directed-at-underwater-cultural-heritage/unesco-manual/context/>

<sup>1</sup> The UN Montego Convention on the Law of the Sea of 10 December 1982, *UNTS*, vol. 1833, 3.

<sup>2</sup> Law of 18 June 1998 approving the Convention of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982 and the Agreement on the Implementation of Part XI of the Convention of the United Nations Convention on the Law of the Sea of 10 December 1982, done at New York on July 28, 1994, *BS* 16 September 1999, 34484;

Decree of the Flemish community of 14 July 1998 approving the Convention of the United Nations on the Law of the Sea, and its Annexes, signed at Montego Bay on 10 December 1982 and the Agreement on Implementation of Part XI of the Convention of the United Nations Convention on the law of the Sea of 10 December 1982, and the Annex, signed in New York on July 28, 1994, *BS* 22 August 1998, 27094;

Decree of the Walloon Region of 5 February 1998 approving the Convention of the United Nations on the Law of the Sea and the Annexes, signed at Montego Bay on 10 December 1982 and of the Agreement relating to the implementation of Part XI of the ratified the United Nations Convention on the law of the Sea of 10 December 1982 and the Appendix, signed in New York on July 28, 1994, *BS* 27 February 1998, 5420;

Ordinance of 29 October 1998 approving the Convention of the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982 and the Agreement on Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, signed in New York on 28 July 1994, *BS* 10 December 1998, 39483.

<sup>3</sup> Belgium, the Netherlands, France, Germany, The United Kingdom, Denmark and Norway.

<sup>4</sup> UN Oceans and Law of the Sea, *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013*, [www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm).



## 1.1. The legal regime of the maritime zones

### Internal waters and the territorial sea

The territorial sea has a breadth of 12 nautical miles measured from the baseline, which can be a normal or a straight baseline (art.3). Ports, low-tide elevations and roadsteads have an effect on the normal baseline and subsequently on the outer boundary of the territorial sea (artt. 11-13). In bays (art. 10) and rivers/estuaries (art. 9) a straight baseline can be drawn connecting the river mouth. In the territorial sea, the coastal State has sovereignty, only limited by the right of innocent passage for ships flying a foreign flag (artt. 17-26).

Water landwards of the baseline is internal water. Here States have full sovereignty. In case a straight baseline is drawn in estuaries and bays, water landwards of the baseline becomes internal water, where before this water was part of the territorial sea. In this situation a right of innocent passage for ships under a foreign flag remains (art. 8). Under UNCLOS 1982, no right of innocent passage exists in a State’s original internal waters, meaning the internal waters that have not been created by the drawing of a straight baseline.

The sovereignty of a coastal State extends beyond its territory and internal waters, to its territorial sea (art.2). This entails that the protection of cultural heritage in the territorial sea and internal waters falls under the full jurisdiction of the coastal State.

### Contiguous zone

The contiguous zone begins from the outer limit of the territorial sea and “may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.” The coastal State has competence in four areas in its contiguous zone: fiscal, customs, immigration and sanitary laws; and is competent to punish infringements in these matters (art 33).

### Exclusive Economic Zone (EEZ)

The EEZ can have a breadth up to 200 nautical miles measured from the baseline (art. 57). In the EEZ States have “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil” (art. 56). The natural resources are divided in two categories: living and non-living resources. Living resources include all types of fish, crustaceans, sea mammals, corals, underwater plants, fungi... Non-living resources include minerals, gas, oil, sand... UCH as such cannot be seen as a natural resource. Ship wreck sites for example do attract all kinds of living resources, such as animals and plants that attach themselves to the wreck and fish that congregate around the wreck sites. Therefore these sites may form an artificial reef and become a very attractive habitat for all kinds of fauna and flora. Interference with the wreck can disturb or harm the living resources that have made this wreck into their habitat.<sup>5</sup> As mentioned above States have the right to explore and exploit their natural living resources, and consequently also have the duty to protect these, including

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<sup>5</sup> S. Dromgoole (2013), *Underwater Cultural Heritage and International Law*, New York, Cambridge University Press, 267-268. (hereafter: Dromgoole 2013)

the habitat of these living resources. This can in certain cases lead to an indirect protection of a shipwreck, serving as a habitat.<sup>6</sup>

The coastal State has the right to construct artificial islands, installations and structures (art. 60). All States have the right to lay submarine cables and pipelines in the EEZ of another State (art.58). This right has to be exercised in such a way that it is compatible with the other provisions of UNCLOS 1982, including article 303 concerning the protection of UCH as discussed below (art. 58). For determining which route the pipelines will follow, consent from the coastal State is required (see *infra* under 'continental shelf').<sup>7</sup>

### **Continental shelf**

The continental shelf is the natural prolongation of the land territory of the coastal State to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline (art. 76)<sup>8</sup>. In this zone the coastal State has the sovereign right to explore and exploit its natural resources, which are however limited to the "mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species" (art.77). Opposite to what was the case in the EEZ, a shipwreck cannot be protected indirectly on the basis of it forming a habitat relying on the provisions dealing with the continental shelf. The reason is that for the EEZ, States parties have the duty to protect the marine environment (art.56), logically including the habitat of its living species. For the continental shelf however, no similar provision exists under UNLCOS 1982.

All States have the right to lay submarine pipelines and cables on the continental shelf of another State. (art. 79) The State placing these can however not randomly do this where ever it pleases. The coastal State preserves the right to take reasonable measures for the exploration of its continental shelf and the exploitation of its natural resources. These 'reasonable measures' can include imposing the route that submarine cables and pipelines must follow. Under UNCLOS 1982 States are obliged to ask the coastal State's consent for the determination of the route that pipelines should follow on its continental shelf (art. 79(3)). No similar provision exists for cables, but in practice this issue will as well be presented to the coastal State for its consent. The latter will therefore look at the routes of the existing cables and pipelines on the continental shelf.<sup>9</sup> When cables or pipelines enter the territory or the territorial sea of the coastal State, the latter can impose several types of conditions, since here the coastal State has sovereignty (art.79(4)).

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<sup>6</sup> Under international conventions such as the Convention on Biological Diversity of 5 June 1992, *UNTS*, vol. 1760, 79 and the Convention on Wetlands of International Importance especially as Waterfowl Habitat of 2 February 1971, *UNTS*, vol. 996, 245; and under European Conventions, such as the Convention on the Conservation of European Wildlife and Natural Habitats of 1979, *CETS*, no. 104, States have a duty to protect certain types of habitats.

<sup>7</sup> E. Somers (2010), *Inleiding tot het Internationaal Zeerecht*, Mechelen, Kluwer, 135-136. (hereafter: Somers 2010)

<sup>8</sup> The precise rules on determining the breadth of the continental shelf are somewhat more complicated, see art. 76 UNCLOS 1982. For the North Sea however, these rules will not have to be applied, since the entire North Sea consists of continental shelves. The boundary where the continental shelf ends and the high seas begin, must therefore not be determined.

<sup>9</sup> Somers 2010, *supra* note 7, 185.

## 1.2. Provisions for the protection of UCH

The articles explicitly dealing with the protection of UCH in UNCLOS 1982 are very limited. Article 149 provides the legal regime for UCH in the Area. It sets out two important principles, namely the principle of preserving or disposing UCH for the benefit of mankind and secondly the importance of paying attention to preferential rights of other States.<sup>10</sup> Since this provision is only applicable in the Area, no further attention will be paid to it in this report.

The second article concerning UCH protection is article 303 UNCLOS 1982.

### Article 303 UNCLOS

This article is found in part XVI of the Convention, which contains the general provisions. It reads as follows:

*"Archaeological and historical objects found at sea*

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature."

Article 303(1) imposes on States the duty to protect and cooperate. Since no further clarification is given as to on which States this duty is imposed, it may be assumed that the duty applies to all States, whether coastal, landlocked or flag States, that have ratified UNCLOS 1982.<sup>11</sup> Article 303(2) on the other hand is directed solely at coastal States, creating no rights for landlocked or flag States.

The territorial scope of article 303 is cause for discussion amongst legal experts. There are two separate visions. The first vision brings forward that the whole of article 303 is solely applicable to a coastal State's contiguous zone; the second vision entails that article 303(2) is applicable to a coastal State's contiguous zone, but that article 303 (1), (3) and (4) are applicable to all the maritime zones.

The authors that adhere to the first vision are amongst others Boesten, Newton and Migliorino. Article 303 in its entirety can only be applied to a State's contiguous zone. If this article would be applicable to all the maritime zones, this could result in the requirement of legislative competence for States to protect UCH (art.303(1)) in zones where they do not have this competence according to the other provisions of UNCLOS 1982. This could lead to an extension of jurisdiction, which, according to the drafting history of article 303, was not the purpose. Two reasons can be identified to explain why then article 303 was placed under the general provisions: 1. to keep the heritage

<sup>10</sup> Article 149 UNCLOS 1982: "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin".

<sup>11</sup> E. Boesten (2002), *Archaeological and/or Historical Valuable Shipwrecks in International Waters, Public International Law and what it offers*, The Hague, T.M.C. Asser press, 57. (hereafter: Boesten 2002)

discussion separated from the discussion regarding the EEZ and the continental shelf, this way avoiding the danger of creeping jurisdiction<sup>12</sup>, and 2. that the negotiations on the contiguous zone were already completed and closed at the time of drafting article 303, and would have had to be reopened.<sup>13</sup> The wording of article 303(2) supports the first vision by granting States special jurisdictional rights for objects that are being recovered from its contiguous zone.<sup>14</sup> (*infra*) Newton and Migliorino explain their viewpoint by making reference to article 149 UNCLOS 1982. At first sight it would seem that article 303 overlaps with the rules set out in article 149 concerning the Area since the heading of article 303 gives the impression that it applies to archaeological and historical objects found *anywhere at sea*. However, since article 149 was drafted in the early sessions of the negotiations on the Convention, when the focus lay with the Area, it is clear that the intention of article 149 was to apply strictly and exclusively to the Area, excluding all other provisions. As a consequence article 303 cannot be applicable in the high seas and only applies to the contiguous zone.<sup>15</sup>

Proponents of the second vision are Dromgoole, Strati, Oxman and Watters. They argue that article 303(2) is indeed solely applicable to a coastal State’s contiguous zone, but article 303 (1), (3) and (4) apply to all the maritime zones. Authors like Strati<sup>16</sup>, Oxman<sup>17</sup> and Watters<sup>18</sup> give no justification as to why article 303 (1), (3) and (4) would apply to all the maritime zones. The simple fact that the heading of article 303 states that the article deals with ‘*Archaeological and historical objects found at sea*’, seems to be sufficient to conclude that the territorial scope of the article goes beyond the contiguous zone of a coastal State. For Dromgoole it suffices that article 303 is located in Part XVI of UNCLOS 1982, which contains the general provisions. This renders article 303, with the exception of paragraph 2, generally applicable to all the maritime zones.<sup>19</sup> To interpret article 303 otherwise, would mean that no provisions for the preservation of UCH in the EEZ and on the continental shelf exist. Using article 303 in such a broad way does create an overlap with article 149 when dealing with objects found in the Area. This problem can however be solved by using the maxim *lex specialis derogat legi generali*. Article 149 being *lex specialis* and article 303 *lex generali*.<sup>20</sup>

#### *Article 303(1): duty to protect and cooperate*

Article 303(1) imposes the duty on States to protect the archaeological and historical objects found at sea. There has been some discussion on how wide this ‘duty’ has to be interpreted. For O’Keefe,

<sup>12</sup> C.F. Newton (1986), *Finder Keepers? The Titanic and the 1982 Law of the Sea Convention*, *HICLR*, 10, 159-197. (hereafter: Newton 1986)

<sup>13</sup> C. Forrest (2010), *International Law and the Protection of Cultural Heritage*, Oxon, Routledge, 324. (hereafter: Forrest 2010)

<sup>14</sup> Boesten 2002, *supra* note 11, 58.

<sup>15</sup> Newton 1986, *supra* note 12, 159-197.

L. Migliorino (1995), *In Situ Protection of the Underwater Cultural Heritage under International Treaties and National Legislation*, *IJMCL*, 10(4), 483- 495. (hereafter: Migliorino 1995)

<sup>16</sup> A. Strati (1995), *The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea*, *The Hague, Kluwer Law International*, 124-125 and 224-225. (hereafter: Strati 1995)

<sup>17</sup> B. Oxman (1988), *Marine Archaeology and the International Law of the Sea*, *Columbia-Volunteer Lawyers Association Journal of Law and the Arts*, 12, 353-371 ((hereafter: Oxman 1988);

<sup>18</sup> D.R. Watters (1983), *The law of the sea and underwater cultural resources*, *American Antiquity*, 48(4), 808-816. (hereafter: Watters 1983)

<sup>19</sup> Dromgoole 2013, *supra* note 5, 33-34.

<sup>20</sup> Forrest 2010, *supra* note 12, 325.

the obligation is very extensive, comprising maintenance of sites, excavation of known sites, conservation and display of material and the spreading of the information obtained.<sup>21</sup> Strati gives a rather wide interpretation as well and considers that the duty to protect includes the duty for States to incorporate in their national legislation the obligation for finders to report to the competent archaeological authorities, the obligation to take all the necessary interim measures to protect this heritage -even the provisional shutting down of construction works-, the duty to preserve the heritage *in situ*, and the task of conserving, proper presenting and restoring the recovered objects.<sup>22</sup> Newton argues that the duty to protect is the same as the one States have to salvage property in marine peril<sup>23</sup>, while for Migliorino this duty at least contains the obligation not to destroy, damage or mutilate the heritage<sup>24</sup>. The duty to protect is nowhere further defined in UNCLOS 1982. Under no circumstances however does this duty allow States to expand their jurisdiction beyond the territorial sea.<sup>2526</sup>

In article 303(1) a second duty is included, namely the obligation to cooperate. Again there is some room for interpretation, although fewer authors seem to feel the need to further clarify this principle. Strati considers that a similar wide interpretation has to be used as was the case with the duty to protect. The duty to cooperate includes, *inter alia*, the exchange of scientific information, the undertaking of joint archaeological projects and the coordination of the fight against illicit trade in artefacts. Boesten believes that this obligation must be explained in the light of achieving a purpose (*in casu* the protection of UCH). Cooperation should be done with those that can help achieve the protection of 'objects of an archaeological and historical nature found at sea'. This cooperation must not necessarily be limited to States.<sup>27</sup> The examples in note 26 clarify what Boesten means by 'not necessarily be limited to States': States can rely on their own competent national entities or even nationals for support and cooperation. To contribute a more extensive interpretation to the words of Boesten, namely that States would be allowed to directly address the competent authorities of another State, without sending a request for cooperation to that State itself, would go too far. States are bound by the duty to cooperate and can ask their national authorities to assist them in this, but since international treaties have no direct effect, the nationals of a Party to UNCLOS 1982 are not bound by it (unless the State Party has converted the Convention in national law) and therefore are not obliged to offer cooperation to a third State upon its demand. In order to facilitate cooperation an international agency, or in the absence thereof, national bureaus developing guidelines for cooperation will play an important role.<sup>28</sup>

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<sup>21</sup> P.J. O' Keefe and J. Nafziger (1994), The Draft Convention on the Protection of the Underwater Cultural Heritage, *ODIL*, 25(4), 391-418.

<sup>22</sup> Strati 1995, *supra* note 16, 124.

<sup>23</sup> Newton 1986, *supra* note 12, 159-197.

<sup>24</sup> Migliorino 1995, *supra* note 15, 483- 495.

<sup>25</sup> Forrest 2010, *supra* note 12, 323-326.

<sup>26</sup> In the light of the analysis of article 303(2), this statement will be nuanced.

<sup>27</sup> For example in the UK, the government works together with the Archaeological Diving Unit to protect sites. In the Netherlands cooperation is set up between the Institute for Nautical Archaeology and organisations representing sports divers, as well as with individuals to protect certain wreck sites. Boesten 2002, *supra* note 11, 59.

<sup>28</sup> Boesten 2002, *supra* note 11, 59.

*Article 303(2): removal without approval in the contiguous zone*

Paragraph 2 departs from a double presumption concerning UCH found in the contiguous zone and recovered from it.<sup>29</sup>

The first presumption enunciates that where an offence is committed in the contiguous zone, it may be dealt with as if it were committed in the coastal State’s territorial sea.<sup>30</sup> To have any significance, this presumption must be non-rebuttable. If this were not the case, any State involved in the recovery of UCH in the contiguous zone, would simply have to prove that the object in fact does not originate from the territorial sea, but from the contiguous zone, to evade the jurisdiction of the coastal State.<sup>31</sup> Not only would this minimize the significance and effectiveness of article 303, but such an interpretation would not be justifiable when taking into account the preparatory works.<sup>32</sup>

The second presumption links article 303(2) to article 33 UNCLOS 1982 and introduces the fiction that removing UCH from the seabed in the contiguous zone constitutes a breach of the coastal State’s customs, fiscal, immigration and sanitary laws.<sup>33</sup> Under article 33, a State is competent to take action in its contiguous zone to prevent an infringement within its territory or territorial sea of its customs, fiscal, immigration and sanitary laws, as well as to punish those that commit such an infringement. The coastal State cannot create laws or regulations that are applicable to the contiguous zone itself. In other words article 33 does not accord any legislative power. The question that arises is whether article 303(2) -like article 33- only accords the jurisdiction to enforce or goes beyond that and grants the coastal State legislative jurisdiction as well. There are two separate views on this:

The first is the restrictive view. Under this viewpoint article 303(2) affords a State enforcement power over UCH in the contiguous zone, which cannot be exercised through the making of legislation dealing with UCH protection.<sup>34</sup> Oxman believes that the result of this presumption is that in its contiguous zone a coastal State has the control (meaning enforcement power), and not the jurisdiction (meaning legislative power), over marine archaeology.<sup>35</sup> According to Forrest the jurisdictional reach of a coastal State under article 303(2) will “be limited to legislation conforming to the scope of its customs and fiscal legislation that regulates the traffic in underwater cultural heritage removed from the seabed.”<sup>36</sup>

The second view is a more liberal one.<sup>37</sup> Strati for example advocates that since the coastal State is the only State that can remove cultural heritage from the contiguous zone, it can impose its cultural heritage laws in that zone in order to comply with its obligation under article 303(1). States are even able to establish a 24-mile ‘archaeological zone’ under article 303(2). In this zone, the heritage laws are not applicable to the recovery of underwater cultural heritage alone, but as well to the search for

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<sup>29</sup> Strati 1995, *supra* note 16, 166.

<sup>30</sup> Strati 1995, *supra* note 16, 194.

<sup>31</sup> Forrest 2010, *supra* note 12, 327.

<sup>32</sup> Strati 1995, *supra* note 16, 166-167.

<sup>33</sup> Strati 1995, *supra* note 16, 166.

<sup>34</sup> Dromgoole 2013, *supra* note 5, 250-251.

<sup>35</sup> Oxman 1988, *supra* note 17.

<sup>36</sup> Forrest 2010, *supra* note 12, 327.

<sup>37</sup> Dromgoole 2013, *supra* note 5, 252.

this heritage. Strati believes that the application of a State's heritage legislation in the 'archaeological zone' is justified even when the coastal State has not declared a contiguous zone. The reasoning behind this is that article 303 is located in the chapter about the general provisions, rather than in that about the contiguous zone, implying that the archaeological zone stands apart from the contiguous zone.<sup>38</sup> Alexander, another supporter of the liberal view, believes that a coastal State's custom and fiscal law must include its cultural heritage regulations as well.<sup>39</sup> Aznar reasons that if a State has no legislative jurisdiction, this would contradict the text of article 303(2), since it explicitly refers to the possibility for a coastal State to give its approval. Allowing States the competence to give their approval, necessarily implies the need for a "legislative term of reference". Therefore the coastal State's jurisdiction in its contiguous zone includes both legislative and enforcement power.<sup>40</sup>

These two viewpoints were reconciled in article 303(2) by creating a constructive ambiguity. It is nonetheless difficult to see how article 303(2) can be implemented without an appropriate legislative framework. The legislation dealing with customs, fiscal, immigration and sanitary matters is clearly inappropriate. The application in the contiguous zone of the heritage laws that apply in a coastal State's territorial sea would serve the purpose of protecting UCH much better. Article 303(2) however only affords limited jurisdiction, since a State can only take action in the case of the removal of objects. The application of a country's heritage laws in the contiguous zone would therefore go too far. The institution of a permit system regulating recovery on the other hand, would appear to be permissible. An argument that can be made is that since States have a general duty to protect under art. 303(1), they are allowed to take legislative measures to protect heritage in their contiguous zone, which are not limited to the removal of UCH. It is true that every State Party has the general duty to protect under article 303(1), but as discussed, there is a lot of uncertainty on the scope of this duty. Under no interpretation however does a coastal State have the right to for example impose obligations on nationals of other States when finding UCH on the coastal State's continental shelf. Under this general duty, States can impose obligations on their own nationals on how to deal with findings and are obliged themselves to preserve UCH, by cooperating with other States. This is not the same as unilaterally imposing legislation dealing with UCH found in the coastal state's contiguous zone applicable to everybody.

State practice however demonstrates a tendency towards the liberal view.<sup>41</sup>

#### *Article 303(3): rights of identifiable owners and the law of salvage*

Article 303(3) is firstly about the rights of identifiable owners. These cannot be affected by any provision in article 303 UNCLOS 1982. This means that the matter of ownership has to be dealt with at the national level.<sup>42</sup> States must keep into account the (both in domestic and in international law) well-established principle that there can be no interference with property rights without compensation.<sup>43</sup>

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<sup>38</sup> Strati 1995, *supra* note 16, 167-168 and 183-184.

<sup>39</sup> B.E. Alexander (1989), *Treasure salvage beyond the territorial sea : an assessment and recommendations*, *JMLC*, 20(1), 1-19.

<sup>40</sup> M.J. Aznar (2014), *The Contiguous zone as an Archaeological Maritime Zone*, *IJMCL*, 21(1), 1-51.

<sup>41</sup> For a discussion on State Practice and the rights of coastal States in their contiguous zone, see the exposition under article 8 UNESCO 2001 (*infra*).

<sup>42</sup> Forrest 2010, *supra* note 12, 328.

<sup>43</sup> Boesten 2002, *supra* note 11, 60.

The second part of article 303(3) states that nothing in this article can affect the law of salvage or other rules of admiralty. Since States are under an obligation to preserve UCH (art. 303(1)), the law of salvage must be applied in such a way that it provides for this protection. This might be problematic. In the law of salvage, there is no requirement for a salvor to obtain permission prior to a salvage operation in the contiguous zone. On the other hand article 303(2) allows the coastal State to regulate the recovery of cultural heritage within its contiguous zone. This may include a requirement of prior consent before removing UCH from the seabed on the contiguous zone and contradicts the law of salvage. A conflict arises here between the right for coastal States to regulate the removal of UCH from their contiguous zone and the obligation of article 303(3) to respect the law of salvage<sup>44</sup> (see *infra* under the law of salvage).

*Article 303(4): international agreements*

Paragraph 4 of this article was added to make the connection between the law of the sea and other international agreements concerning the protection of archaeological objects and objects of a historical nature.<sup>45</sup> It is without prejudice to other international agreements and rules of international law that deal with protecting objects that have an archaeological or historical nature. So UNCLOS 1982 allows the drafting of more specific protective regimes that can better protect UCH, and that fill the gaps and clarify the contradictions created by UNLCOS 1982.<sup>46</sup>

The international agreements that are referred to in article 303(4) are those that are captured under article 311(5) UNCLOS 1982. This article states that it “does not affect international agreements expressly permitted or preserved by other articles of this Convention”, suggesting that the prejudice test of article 311(3) UNCLOS 1982<sup>47</sup> does not apply to UNESCO 2001. This would imply that alterations in the rights and jurisdiction relating to ‘objects of an archaeological and historical nature’, as set out in article 303 are allowed. Article 3 UNESCO 2001 however provides a counterbalance, creating a mechanism to avoid conflicts. This article states that “nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.” According to Cogliati-Bantz and Forrest, article 3 UNESCO 2001 indeed requires UNESCO 2001 to be compatible with UNCLOS 1982, since the rights and duties under UNCLOS 1982 must remain unaffected. However, amongst these unaffected rights that States Parties have under UNCLOS 1982, is of course the right under article 311(3) to “conclude agreements modifying or suspending the operation of provisions of this Convention” as long as these do not prevent the effective execution of

<sup>44</sup> Forrest 2010, *supra* note 12, 328.

<sup>45</sup> Oxman 1988, *supra* note 17; Watters 1983, *supra* note 18.

<sup>46</sup> T. Scovazzi, *The 2001 Convention on the Protection of Underwater Cultural Heritage*, [www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CFYQFjAE&url=http%3A%2F%2Fwww.biicl.org%2Ffiles%2F1394\\_scovazzi.doc&ei=14lxU4G2E5DxhQfNvoD4Cg&usq=AFQjCNGIXALkdGfmlmEhdzTkwrXqoICMUw&sig2=fsCZzBM2fGKhDQm0y7WH5g&bvm=bv.63587204,d.bGE](http://www.biicl.org/files/2F1394_scovazzi.doc&ei=14lxU4G2E5DxhQfNvoD4Cg&usq=AFQjCNGIXALkdGfmlmEhdzTkwrXqoICMUw&sig2=fsCZzBM2fGKhDQm0y7WH5g&bvm=bv.63587204,d.bGE), *s.d.*, 15.

<sup>47</sup> “Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.” Art. 311(3) UNCLOS 1982.



the object and purpose of UNCLOS 1982 and that its basic principles remain unaffected.<sup>48</sup> This allows UNESCO 2001 to divert from article 303 UNCLOS 1982, as long as the obligations under article 311(3) are respected.<sup>49</sup>

### 1.3. Conclusion

Authors stand opposite to each other on the question whether article 303 (1),(3) and (4) UNCLOS 1982 are applicable in all the maritime zones or if their scope is limited to the contiguous zone alone.

Most experts agree that there is a lack of substance in article 303, meaning that no full protective scheme for UCH can be found there. However this does not mean that UNCLOS 1982 is without value for the protection of UCH. Article 303 introduced some of the most important principles<sup>50</sup>, especially the duty for States to protect UCH and to cooperate (art 303(1)), that are further elaborated in conventions such as the UNESCO Convention on the Protection of Underwater Cultural Heritage 2001.<sup>51</sup> The large number of States that ratified UNCLOS 1982 results in almost every State having a duty to protect UCH and to cooperate for this purpose. This is the most crucial contribution UNCLOS 1982 makes to the protection of UCH.

Unfortunately not all principles mentioned in article 303 UNCLOS are equally beneficial for the protection of UCH. Article 303(3) gives priority to the law of salvage, which, as will be discussed further in this report, is driven by economic reasons rather than by the idea of protecting UCH.

## 2. The UNESCO Convention on the Protection of Underwater Cultural Heritage 2001 (UNESCO 2001)<sup>52</sup>

The UNESCO Convention on the Protection of Underwater Cultural Heritage 2001 (UNESCO 2001) was adopted on 6 November 2001 in the 31th session of the UNESCO General Conference. There were 87 votes in favor, 4 against and 15 abstentions.<sup>53</sup> UNESCO 2001 entered into force on 2 January 2009. At the end of 2013, 45 States had ratified the Convention. As for the States bordering the North Sea, only France and Belgium have ratified the Convention: France on 7 February 2013 and Belgium on 5 August 2013<sup>54 55</sup>.

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<sup>48</sup> V.P. Cogliati-Bantz and C. Forrest (2013), Consistent: the Convention on the Protection of the Underwater Cultural Heritage and the United Nations Convention on the Law of the Sea, *CJICL* 2(3), 536–561.

<sup>49</sup> When discussing the Salvage Convention this issue will be mentioned again upon looking at the compatibility between article 30(1)(d) of the Salvage Convention and article 303(3) of UNCLOS 1982.

<sup>50</sup> For a summary of the positive and negative aspects of including article 303 in UNCLOS 1982 see Strati 1995, *supra* note 16, 330-334.

<sup>51</sup> Forrest 2010, *supra* note 12, 328-329.

<sup>52</sup> The Paris Convention on the Protection of the Underwater Cultural Heritage of 2 November 2001, 41 *ILM* 37.

<sup>53</sup> S. Dromgoole (2003), 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *IJMCL*, 18(1), 58-91. (hereafter: Dromgoole 2003)

<sup>54</sup> Law of 6 July 2013 approving the Convention on the Protection of the Underwater Cultural Heritage, adopted in Paris on November 2, 2001, *BS* 25 October 2013, 82228;

Decree of the Flemish government of 16 July 2010 approving the Convention on the Protection of the Underwater Cultural Heritage, adopted in Paris on November 2, 2001, *BS* 9 August 2010, 50843;

Decree of the Walloon Public Service of 26 April 2012 approving the Convention on the Protection of the Underwater Cultural Heritage, adopted on 2 November 2001 and made in Paris on 6 November 2001, *BS* 22 May 2012, 29469;

UNESCO 2001 sets out the basic principles for the protection of UCH, provides the practical guidelines to ensure the implementation of this Convention and contains provisions needed for an international cooperation scheme. UNESCO 2001 consists of two parts, namely a main part that sets out the principles for the protection of UCH as well as the rules for coordinating and reporting to enable States to provide this protection, and the Annex that gives widely recognized and applied rules (the Rules) for the treatment of/ and research on UCH.<sup>56</sup>

UNESCO 2001 provides for the instatement of the Meeting of States Parties (art 23). At least once every two years the director-general of UNESCO convenes an ordinary Meeting of States Parties. At the request of the majority of the States Parties an extra-ordinary Meeting can be convened. The task of the Meeting of States Parties is to further elaborate on the practical implementation of UNESCO 2001. Already four meetings took place: At the first Meeting (26-27 March 2009) the rules of procedure were agreed on and the decision was made to establish the Scientific and Technical Advisory Body (the Advisory Body), as well as to adopt its statutes.

At the second meeting (1-2 December 2009) the elaboration on the Operational Guidelines for the practical implementation of UNESCO 2001 began, including the investigation of the possibility to create an UCH Fund. At the third Meeting of States Parties (13-14 April 2011) the adoption of the Operational Guidelines was further discussed, together with the question which NGO's should be accredited with the Advisory Body.<sup>57</sup> At the fourth session (28-29 May 2013) the Operational Guidelines were finally adopted. The most important novelties introduced by these Guidelines are mentioned throughout this report when dealing with the relevant articles of UNESCO 2001.

Already four meetings of the Advisory Body took place (2010,2011,2012 and 2013). One of the Advisory Body's main achievements was the proposal to the Meeting of States Parties of the 'UNESCO Code of Ethics for Diving on Underwater Cultural Heritage sites' (the Code).<sup>58</sup> The Meeting of Parties adopted the Code rendering it now applicable in all States Parties.

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Decree of the French Community of 19 April 2012 approving the Convention on the Protection of the Underwater Cultural Heritage, adopted on 2 November 2001 and made in Paris on 6 November 2001, *BS* 26 June 2012, 35504;

Ordinance of 4 September 2008 approving the Convention on the Protection of the Underwater Cultural Heritage, adopted on 2 November 2001 and made in Paris on 6 November 2001, *BS* 30 September 2009, 51223; Decree of the German-speaking Community of 19 March 2012 approving the Convention on the Protection of the Underwater Cultural Heritage, adopted in Paris on 2 November 2001, *BS* 18 April 2012, 24188.

<sup>55</sup> UNESCO, *Convention on the Protection of Underwater Cultural Heritage of 2 November 2001*, [www.unesco.org/eri/la/convention.asp?KO=13520&order=alpha](http://www.unesco.org/eri/la/convention.asp?KO=13520&order=alpha), (consulted 15 January 2014).

<sup>56</sup> UNESCO, *The UNESCO Convention on the Protection of Underwater Cultural Heritage, Information brochure on the 2001 UNESCO Convention*, [www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/](http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/), 10-11.

<sup>57</sup> Article 1(e) of the Statutes of the Advisory Body proclaims that this Body "shall consult and collaborate with non-governmental organizations (NGOs) having activities related to the scope of the Convention, namely ICUCH, as well as other competent NGOs accredited by the Meeting of States Parties", UNESCO, *Statutes of the scientific and technical advisory body, 2009*, Document 1CLT/CIH/MCO/2009/PI/100.

<sup>58</sup> UNESCO, *Code of Ethics for Diving on Underwater Cultural Heritage Sites. I protect, I preserve!*, [www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/divers/code-of-ethics/](http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/divers/code-of-ethics/).

The Advisory Body further endorsed the making of ‘The manual for Activities directed at Underwater Cultural Heritage’ (The Manual)<sup>59</sup>. This Manual is designed to help specialists and decision makers better understand the Rules incorporated in the Annex, and to facilitate their practical application.<sup>60</sup> The Meeting of States Parties further asked the Advisory Body to make a ‘draft of Guidelines for the Establishment of National Inventories’ to guarantee the long term interchangeability between States Parties of information contained in national inventory databases. The Advisory Body is currently working on that.<sup>61</sup>

Besides these achievements, the Advisory body elaborates on all kinds of issues relating to UNESCO 2001, such as education and awareness raising, UCH and sustainable development, and licensing for scientific divers. The recommendations made to the States Parties in 2013, based on the report and recommendations of the Advisory Body are discussed later on in this chapter; as well as the final recommendations made by the Advisory Body in 2013.

## 2.1. Analysis of UNESCO 2001

### Article 1 – Definitions

“For the purposes of this Convention:

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

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<sup>59</sup> T. Maarleveld, U. Guérin and B. Egger (eds.) (2013), *Manual for Activities directed at Underwater Cultural Heritage*, Paris, UNESCO. (hereafter: Maarleveld, Guérin and Egger 2013)

<sup>60</sup> Maarleveld, Guérin and Egger 2013, *supra* note 59, 7.

<sup>61</sup> UNESCO, *The Results of the Work of the Advisory Body*, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/advisory-body/results/>.

7. “Activities incidentally affecting underwater cultural heritage” means activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage.

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

9. “Rules” means the Rules concerning activities directed at underwater cultural heritage, as referred to in Article 33 of this Convention.”

#### Article 1(1)

The central criterion of the definition in article 1(1) is that ‘Underwater Cultural Heritage’ includes ‘all traces of human existence’, indicating that the scope of UNESCO 2001 is not limited to shipwrecks, but applies to numerous types of heritage.<sup>62</sup> To demonstrate this, a non-exhaustive list containing categories of objects is added to the definition. This makes it easier for administrators and courts to decide on whether or not an item is covered by the Convention.<sup>63</sup>

The scope of UNESCO 2001 is not limited to historic objects as such, but expands to include ‘their archaeological and natural context’. This incorporates the idea that the context of a found objects is equally important as the object itself. Further details on this matter are provided for in the discussion on *in situ* preservation (*infra*).

UNESCO 2001 is the first Convention to include aircrafts in its definition. This stems from the increasing interest in aviation archaeology. Especially the aircrafts lost during World War I and II are of great interest.<sup>64</sup> Airplanes from World War II however will not yet be included under UNESCO 2001 because of the 100 year cut-off (*infra*). The airplanes originating from World War I will potentially start to fall under the scope of the Convention over the next couple of years<sup>65</sup>.

A specific form of heritage expressly mentioned under article 1 is ‘objects of prehistoric character’. These have to be evidence of human existence or at least form part of a trace that proofs human existence. During the negotiations a number of States tried to include prehistoric landscapes and natural sites in the Convention as well. It seems that this has not been pursued, since the Convention does not guarantee protection for these types of ‘heritage’.<sup>66</sup>

The definition contains three criteria defining traces of human existence. They have to be met cumulatively:

1. The trace must have ‘a cultural, historical or archaeological character’
2. It must have been ‘partially or totally under water, periodically or continuously’
3. And for a period of at least 100 years

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<sup>62</sup> Dromgoole 2013, *supra* note 5, 87-88.

<sup>63</sup> A. Strati, M. Gavouneli and N. Skourtos (eds.) (2006), *Unresolved issues and new challenges to the law of the sea. Time before and after*, Leiden, Martinus Nijhoff Publishers, 41. (hereafter: Strati, Gavouneli and Skourtos 2006)

<sup>64</sup> Dromgoole 2013, *supra* note 5, 87-88.

<sup>65</sup> In 2018 World War I will have ended 100 years ago, meaning that all the UCH that is found from that period and that fulfils the other conditions from article 1 UNESCO 2001 (*infra*), can fall under the scope of UNESCO 2001.

<sup>66</sup> Dromgoole 2013, *supra* note 5, 88-89.

As for the second criterion, it seems logic that in order for an object to qualify as UCH, it must have a physical connection with water. On this requirement not many problems arise. The same can however not be said about the first and last criterion.

#### *Time cut-off of 100 years*

The 100 year period seems somewhat arbitrary and is based on administrative pragmatism rather than on 'archaeological, cultural or historical significance'. Some countries<sup>67</sup> proposed more recent thresholds to include more UCH.<sup>68</sup> There was however a consensus that objects older than 100 years are most likely to have archaeological or historical significance. Certain countries, such as Sweden, Denmark and Norway already used a 100 years cut-off at the time of the negotiations. In a number of international conventions and recommendations this 100 time limit can be found as well, for example in the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1985 European Convention on Offences Relating to Cultural Property.<sup>69</sup> The 100 year threshold was also proposed in the 1985 Draft Convention on the Underwater Cultural Heritage of the European Council<sup>70</sup> and the 1978 Recommendation 848 on the Underwater Cultural Heritage of the Council of Europe. In the 1985 Draft Convention the proposal was somewhat different in the sense that the object had to be 100 years old, rather than 100 years underwater.

An important difference between UNESCO 2001 and the Draft Convention is that in UNESCO 2001 the possibility to include objects in its scope that have been underwater for less than 100 years or the possibility to exclude less important objects from its scope that have been underwater longer than 100 years, does not exist. Boesten claims that there is no scientific proof that the majority of wrecks and other objects that have been underwater for 100 years, have a certain 'cultural heritage significance'. So any option that foresees the possibility to exclude certain wrecks and objects from protection, would be preferable to a system protecting every object on the mere basis of a time cut off. This way resources could be saved and the focus can lay with the really valuable UCH. Judging on a case by case basis would allow States to decide on whether they are willing and capable to spend the necessary resources to protect UCH. Under the current Convention, States Parties must not only have the means to protect all wrecks and objects that have been underwater for at least 100 years, but must use these means to such purpose immediately after it becomes clear that such a need exists.<sup>71</sup>

By using a 100 year cut-off however, some difficult issues were avoided. In particular younger wrecks that still have an owner whose interests are conflicting with the protection of the wreck. Also, wrecks that sunk more recently are often gravesites<sup>72</sup> whereby family members of the deceased are still

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<sup>67</sup> Poland wanted to include all wrecks from before 1945 and the US proposed a time cut-off of 50 years. Dromgoole 91.

<sup>68</sup> Dromgoole 2013, *supra* note 5, 90-91.

<sup>69</sup> Forrest 2010, *supra* note 12, 335.

<sup>70</sup> This draft Convention was never signed. R. Garaballo and T. Scovazzi (2003), *The Protection of the Underwater Cultural Heritage*, Leiden, Martinus Nijhoff Publishers, 104.

<sup>71</sup> Boesten 2002, *supra* note 11, 140-141.

<sup>72</sup> See *infra* discussion on article 2(9) UNESCO 2001.

alive.<sup>73</sup> This would bring with it some additional issues and would call for regulations concerning property rights and taking into account the international rules concerning underwater gravesites and human remains.<sup>74</sup>

*A cultural, historical or archaeological character*

A 'trace of human existence' must have 'a cultural, historical or archaeological character' to qualify as UCH, a qualification on which only late in the negotiations an agreement was reached. There were different views on the inclusion of a so called 'significance' criterion. A significance criterion entails that the assessment of whether an object found underwater can constitute UCH, is not done on the basis of mere objective criteria (such as a time limit or whether the find can be placed under a certain category of objects such as buildings, sites, monuments...), but as well on the basis of the importance and significance of the object. This subjective criterion allows states a certain margin of discretion in selecting the objects that they wish to preserve. The common law countries were in favor of this more selective approach, while the civil law countries wanted a so called 'blanket protection'. The latter does not incorporate any type of significance criterion and ensures that every object that has been under water for at least 100 years is automatically protected from the moment of its discovery. The argument of the civil law countries was that first having to look at the significance of an object would take time and require a physical intervention to conduct this research. The introduction of a subjective criterion could undermine the idea of an overall universal protective status for UCH.<sup>75</sup>

The final outcome was the inclusion of the criterion 'cultural, historical or archaeological character' in the UCH definition. At first sight it would seem that the common law countries got their way, but according to Dromgoole the used criterion is very weak. The word 'character' hardly has any real value. It can be compared to the term 'nature' which is rather wide. Almost everything that has been underwater for 100 years will have a cultural, historical or archaeological character.<sup>76</sup> It would have been a more stringent criterion if the word 'value' instead of character was used.<sup>77</sup> Strati agrees that it is clear that the 'cultural, historical, archaeological character' criterion is meaningless; it adds nor detracts anything from the scope of the Convention.<sup>78</sup> Forrest holds a different opinion. According to him the interpretation by States Parties of the 'character' criterion is not unequivocal since a number of States hold the view that this criterion does allow a selection in determining which objects to protect, while other States feel that everything that has been underwater for at least 100 years has such a character, allowing no selection at all. Therefore, Forrest believes there is scope for each State to apply evaluative criteria to limit the scope of UNESCO 2001 to objects that are considered significant. He feels that even though in the definition of UCH, no criteria for significance have been

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<sup>73</sup> Older ships can of course be gravesites as well, for example The Mary Rose, a flag ship of Hendrik VII that sunk in 1545, contained remains of about 45% of the entire crew. (The Mary Rose museum, *Skeletons and Human Remains*, [www.maryrose.org/discover-our-collection/her-crew/skeletons-and-human-remains/](http://www.maryrose.org/discover-our-collection/her-crew/skeletons-and-human-remains/)) The chance that living relatives of such a crew can still be found is of course small. Nevertheless today living relatives are still known of the captain of the 18<sup>th</sup> century ship HMS Victory who drowned as his ship sank, M. Pieters, Feedback via e-mail, 4 April 2014.

<sup>74</sup> Dromgoole 2013, *supra* note 5, 90-91.

<sup>75</sup> Dromgoole 2013, *supra* note 5, 91-94.

<sup>76</sup> *Ibid.*

<sup>77</sup> Dromgoole 2003, *supra* note 53.

<sup>78</sup> Strati, Gavouneli and Skourtos 2006, *supra* note 63, 41.

included, States can apply their own criteria. This way a State Party can choose for itself how wide the scope of UNESCO 2001 should be.<sup>79</sup> Finally Carduzzi argues that the definition as can be found in article 1(1) rejects the insertion of a significance test. However this does not entail that UNESCO 2001 uses the blanket approach as was adhered to by the civil law countries. Judging the quality of the cultural, archaeological or historical character of a find, allows for a more flexible interpretation, giving States the possibility to exclude certain objects from UNESCO 2001 that have been underwater for 100 years. This interpretation must however be “kept within due limits of a bona fide interpretation of the Convention and the general duty to cooperate for the protection of the underwater cultural heritage”, inevitably resulting in a broad definition of UCH.<sup>80</sup>

The main reason why the definition of UNESCO 2001 does not contain any significance criteria derives from the difficulty to measure significance since its perception can differ on a local, national or international level; and can depend for example on the strength of historic relations. ‘Significance’ can also alter in the course of time. Sites that are of great importance now, might not be in the future and vice versa. This awareness has had an influence on heritage policies worldwide. The possibility to review the significance of a site over time has been taken up in many of them.<sup>81</sup>

In the UNESCO 2001 UCH definition there is also no requirement of singularity or representativity. When an item is found, the fact that already similar items have been found before does not change its character as UCH under the Convention. Repetitiveness of findings can be valuable to gain knowledge on for example the size of trade, vehicles, armament or the pressure put on a population to obtain the objects in question.<sup>82</sup>

It appears to be a positive development that the UCH definition is rather wide, allowing UNESCO 2001 to establish a comprehensive protective framework. Nevertheless, for a State Party it can be inopportune to protect all sites that are being discovered, for example due to a lack of financial means. The United Kingdom made a statement during the negotiations of UNESCO 2001 where it declared to have over 10000 wreck sites in the British territorial sea and indicated that it is not opportune nor possible to protect them all. The declaration puts forward that it would be better to use the available means to protect only the most important and unique sites.<sup>83</sup> This figure of 10000 shipwrecks that the UK invoked at the time of the negotiations, must however be nuanced. A review in 2010 of the national records (pertaining to England, Scotland, Wales and Northern Ireland ) showed that the number of known wrecks, meaning “wrecks which have been located and that are known to exist on the seabed”<sup>84</sup>, that would be considered as UCH under UNESCO 2001 in the UK territorial sea is less than 1000. This 2010 study indeed showed that national records include about 7900 wrecks in total, which approaches the number of 10000 wrecks given by the UK in 2001.

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<sup>79</sup> Forrest 2010, *supra* note 12, 334.

<sup>80</sup> G. Carduzzi (2002), *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, *AJIL*, 96(2), 420-434.

<sup>81</sup> UNESCO, *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage and its Context*, [www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO2001Def.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO2001Def.pdf), 3.

<sup>82</sup> UNESCO, *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage and its Context*, [www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO2001Def.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO2001Def.pdf), 2-3.

<sup>83</sup> Dromgoole 2013, *supra* note 5, 93-94.

<sup>84</sup> UK UNESCO 2001 Convention Review Group, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: An Impact Review for the United Kingdom*, 2014, ISBN 978-0-904608-03-8, 61-62, 63.

However, about 3700 of these wrecks are not dated and would therefore not be subject to UNESCO 2001. Of the wrecks that are dated, only 936 are over 100 years old. Even when the shipwrecks from World War I are included in the count, which will start to qualify as UCH under UNESCO 2001 over the next couple of years, the number of known wrecks in the territorial sea of the UK will only grow to about 2800 by 2018.<sup>85</sup>

#### *Exclusions from the scope*

There are two main exclusions from the scope. The first is in respect with pipelines and cables and the second deals with ‘installations other than pipelines and cables’. These installations can be military, installations linked to the exploration and exploitation of the natural resources, or even linked to marine scientific research.

With the second exclusion, dealing with ‘installations other than pipelines and cables’, the words ‘and still in use’ are added. This means that installations that are not being used any more, can fall under the scope of UNESCO 2001. This phrase is not added to the exclusion concerning cables and pipelines, meaning that they are excluded from the scope regardless of whether they are still in use or not.

#### Article 1(8)

The definition of ‘State vessels and aircrafts’ begins with the referral to warships. Nowhere in UNESCO 2001 is ‘warship’ further defined. However, the preamble states that UNESCO 2001 must be interpreted in conformity with UNCLOS 1982. Article 29 of UNCLOS 1982 does give a definition on a warship: “‘warship’ means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.” The criteria set forth by this definition are intended for modern vessels. This makes it difficult to determine whether an ancient ship qualifies as a warship. The second part of the definition incorporates ‘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’. To determine whether a ship falls under this definition, is a matter of fact to whereby all the relevant circumstances must be looked into. The concept of ‘State’ and ‘non-commercial purposes’ will have to be defined in the light of the time and location of the sinking of the vessel.<sup>86</sup>

#### **Article 2 – Objectives and general principles**

- “1. This Convention aims to ensure and strengthen the protection of underwater cultural heritage.
2. States Parties shall cooperate in the protection of underwater cultural heritage.
3. States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.

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<sup>85</sup> UK UNESCO 2001 Convention Review Group, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: An Impact Review for the United Kingdom*, 2014, ISBN 978-0-904608-03-8,61-62.

<sup>86</sup> P. J. O’Keefe (2002), *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester, Institute of art and Law, 46. (hereafter: O’Keefe 2002)



4. States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.
5. The preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.
6. Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation.
7. Underwater cultural heritage shall not be commercially exploited.
8. Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.
9. States Parties shall ensure that proper respect is given to all human remains located in maritime waters.
10. Responsible non-intrusive access to observe or document in situ underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management.
11. No act or activity undertaken on the basis of this Convention shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction."

#### Article 2(1)

Protection of UCH is the overall goal of UNESCO 2001, which is reflected in all the principles and provisions of this Convention.

#### Article 2(2)

Cooperation in the protection of UCH is another key principle of the Convention. This general duty to cooperate encompasses different aspects:

"States Parties should, in particular, endeavor to:

- a.) share information about envisaged, on-going and completed projects;
- b.) make available expertise and expert advice;
- c.) facilitate the setting up of, and participation in, capacity-building programmes, the creation of specialized museums, the implementation of educational programmes (at an undergraduate, graduate and postgraduate level) and the exchange of exhibitions; and
- d.) put in place mechanisms and measures facilitating and enhancing the sharing of expertise and best practices."<sup>87</sup>

The Convention includes more specific forms of cooperation in the different provisions. For example, an international cooperation scheme in the EEZ and on the continental shelf that encompasses reporting and consultations, is established. The precise content of this cooperation scheme will be clarified in the discussion on articles 9 and 10 (*infra*). The principle of international cooperation is also dealt with in Rule 8 of the Annex. International cooperation must be encouraged in order to promote the exchange and use of archaeologists and other professionals. This should stimulate States to act in the interest of all States Parties, rather than solely in their own interest. Several meetings and organizations offer the possibility to facilitate international cooperation, for example

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<sup>87</sup> UNESCO, *Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage*, 2013, Document CLT/CEH/CHP/2013/OG/H/1, 8-9. (hereafter: Operational Guidelines UNESCO)

the Meetings of States Parties, The Scientific Advisory Body, the regional meetings and training programs of UNESCO, ICOMOS...<sup>88</sup>

#### Article 2(3)

UCH has to be preserved for the benefit of humanity. This means that it has to serve to the advantage of society and not just to the benefit of private interests. This principle has some far reaching consequences. The rights that an individual might have on an object that is part of UCH are made subsidiary to the interests of that UCH and the claims society has on it. UNESCO 2001 itself however does not have any effect on property rights as regulated at national level.<sup>89</sup>

The principle that heritage has to be preserved for the benefit of humanity can be further clarified by two principles that effectuate this. The first is that public access to *in situ* protected heritage has to be promoted, except when this is not compatible with the protection and management of the heritage (Rule 7 Annex). A balance has to be made between the importance of public access and the damage that this might cause to the UCH site. A lot will depend on how well control and supervision can be exercised over the site and whether good agreements can be made with, *inter alia*, divers.

The second principle is the duty to cooperate as was already explained *supra* under article 2(2).

#### Article 2(4)

States Parties must take all appropriate measures under this Convention and international law that are necessary for the protection of UCH. What these measures are, will become clear in the exposition that follows. States Parties must use 'for this purpose the best practicable means at their disposal and in accordance with their capabilities'. The obligation to protect UCH, takes into account a State's means and capabilities. This can be understood as meaning that when a State does not have the financial means to protect a certain object or is not capable to sufficiently guard an UCH site, the loss of that site does not constitute a violation of UNESCO 2001. Although, since there is a duty to cooperate, other States Parties are obliged to take their responsibility as well.

#### Article 2(5)

The Convention determines that *in situ* preservation must be considered as the first option. Only when it is "necessary for scientific or protective purposes", heritage can be recovered (preamble UNESCO 2001).

A question that inevitably arises is 'why is it so important to preserve UCH as much as possible *in situ*?'. Firstly by taking an object out of its context, you lose a lot of information about the heritage. Article 1(1) UNESCO 2001 recognizes that the 'archaeological and natural context' of an object is as valuable as the object itself, and may even form a part of that UCH. The best way to protect an object as well as its context is by *in situ* preservation. The second reason is that UCH is finite. It must be considered whether it is interesting to research a site now or to preserve it for future investigations. We do not know what technological progress will be achieved in the future. There might be innovative techniques in trace analysis that can be beneficial for archaeological research. So it would

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<sup>88</sup> Maarleveld, Guérin and Egger 2013, *supra* note 59, 49-58.

<sup>89</sup> Maarleveld, Guérin and Egger 2013, *supra* note 59, 49.

be ideal to preserve at least one site of every type for future investigation. This should be taken into account when allocating the available funds and research capacity.<sup>90</sup>

Although *in situ* preservation is preferred, it is impossible to preserve all heritage sites like this. There are insufficient funds, the capacity of heritage agencies is limited and there are not enough qualified archaeologists. Even if all of this would be available, than there are still external factors that affect underwater sites and their surroundings rendering *in situ* preservation undesirable<sup>91</sup>. An assessment has to be made of the archaeological, historical, artistic... value to see which sites should be preserved *in situ* for future generations and future researchers.<sup>92</sup> UNESCO 2001 does not further elaborate on when a site must be preserved *in situ* and when it should be excavated, but Rule 1 of the Annex, The Manual and the Operational Guidelines provide for some clarification.

The Operational Guidelines of UNESCO 2001 state that *in situ* preservation is the first option, but before deciding on preservation measures, an assessment must be made of:

- “a.) the significance of the concerned site;
- b.) the significance of the expected result of an intervention;
- c.) the means available; and
- d.) the entirety of the heritage known in the region.”

Recovery or excavation can be necessary for the conduct of a scientific study or for the ultimate protection of the heritage. In this case the methods and techniques used must be as nondestructive as possible.<sup>93</sup>

The Advisory Body proclaims that the decision whether to preserve a site *in situ* or to excavate it, should be based on a comparison of its significance with that of other sites.<sup>94</sup> This gives States Parties a wide discretion to determine what sites are significant and what sites are not, especially since no significance criteria are included in the Convention (*supra*).

The Manual on the other hand seems to handle more stringent criteria to decide whether or not to preserve a site *in situ*. The Manual, like UNESCO 2001 itself, recognizes *in situ* preservation as the first option. This is not the same as the only or preferred option. Under certain circumstances (partial) excavation can be preferable. The question of course is, what these circumstances are. There are two types of reasons to decide against *in situ* preservation: external reasons that exclude the possibility of *in situ* preservation and substantive reasons to excavate. These substantive reasons are threefold: 1. the intention to make a significant contribution to the protection of UCH; 2. the intention to make a significant contribution to the knowledge of UCH; or 3. the intention to make a significant contribution to the enhancement of UCH. Normally these reasons will be intertwined, but in some cases they can each on their own be a reason for (partial) excavation. There always has to be a substantive reason. Just an external one is not enough. The Manual gives two examples of what an external reason could encompass: 1. the case where a site has to make way for the development of a

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<sup>90</sup> Maarleveld, Guérin and Egger 2013, *supra* note 59, 23.

<sup>91</sup> For example climate change, currents, marine activities such as trawling and dredging.

<sup>92</sup> Maarleveld, Guérin and Egger 2013, *supra* note 59, 25.

<sup>93</sup> Operational Guidelines UNESCO, *supra* note 87, 9-10.

<sup>94</sup> Meeting of States Parties, *Considerations of the report and the recommendations of the Scientific and Technical Advisory Body*, 2013, Document UCH/13/4.MSP/220/4 REV 4.

new project or 2. when excavation is needed to protect a site from an instable environment that might harm it and whereby stabilizing the environment would be so expensive that *in situ* preservation is not the preferred option at all.<sup>95</sup> It is positive that besides an external reason, a substantive reason is required before deciding on the excavation of a site. This way the excavation will always serve the benefit of UCH as well, and cannot be done randomly just because for example a project developer wants to use an area for the development of new projects.

The manual clearly applies a higher threshold before deciding against *in situ* preservation, since the excavation must be beneficial for the UCH itself. The test given in the Operational Guidelines and by the Advisory Body allows for more flexibility looking at the significance of a site. This approach takes better account of the limits of available means and the practical feasibility of preserving a site *in situ*. However, since the significance of a site is one of the criteria that should be used when making such an assessment, it would have been preferable to include some significance criteria in the Convention itself.

#### Article 2(6)

UCH should be treated in such a way to ensure its long term preservation. This principle is reflected in several provisions throughout the Convention, for example *in situ* preservation and the preservation for the benefit of humanity (entailing preservation for more than one generation).

#### Article 2(7)

It is prohibited to commercially exploit UCH. Even though the Convention does not deal with property law<sup>96</sup>, it determines that heritage has to stay in the public domain. It is essential that all parts of the same site are kept together, since a great part of the (cultural and archaeological) value of heritage is derived from its context.

It is prohibited to trade, sell, buy or barter UCH as a commercial good with two exceptions:

*“(a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities;*

*(b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; [...] ; and is subject to the authorization of the competent authorities” (Rule 2 Annex).*

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<sup>95</sup> Maarleveld, Guérin and Egger 2013, *supra* note 59, 26-27.

<sup>96</sup> In the Convention nothing is determined concerning property rights. This aspect was left out deliberately because trying to include this, would have jeopardized the entire Convention.

The very rules inscribed in the treaty however do have the effect of interfering with ownership.

For example the rule that the first option has to be *in situ* preservation limits the rights of the owner that in principle has an absolute freedom to do with his property as he pleases. The same can, for example, be said about the prohibition of commercial exploitation and the obligation to respect the rules of the annex when undertaking activities directed at UCH.

The fact that the Convention is only applicable to wrecks that have been underwater for over 100 years, mitigates this effect slightly. It is however not unlikely that ownership claims over older wrecks will appear as well. Dromgoole 2013, *supra* note 5, 116-119.

The first exception allows archaeological activities to be motivated by economical motives, as long as the activities are permitted in conformity with the Rules of the Convention and that the objects found at sea are not part of the economical equation. The second exception concerns the bringing of a collection to a suitable stocking area. When the conditions set in this exception are fulfilled, this transaction does not fall under the prohibition of commercial exploitation.<sup>97</sup>

Forrest states that these exceptions are ambiguous at best. In the second exception the term ‘deposition’ is not further defined, nor is the place of deposition. Rule 2(b) therefore can be interpreted as allowing a collection of UCH that has been excavated in accordance with the Rules of the Annex, to be sold to for example a museum, as long as the competent authorities give their authorization. This seems to be contradictory to the general rule as stated in article 2(7) that imposes a general prohibition on the commercial exploitation of UCH and that applies throughout the entire Convention. Since the Rules must be interpreted in the light of the general principles this renders the exceptions in Rule 2 very ambiguous, or even void.<sup>98</sup>

By prohibiting the commercial exploitation of UCH, a complicated search for financial means to ensure that humankind can benefit from UCH, becomes inevitable. At the 1999 UNESCO expert meeting a proposal was made by the Professional Shipwreck and Explorers Association (ProSea). In this proposal ‘trade goods’ were distinguished from ‘Underwater Cultural Heritage which must be kept as a unit for the preservation of knowledge’. According to Boesten, this could serve as a starting point for rethinking the prohibition of commercial exploitation. The future will show that an opportunity has been missed to find the balance between the raising of funds through, *inter alia*, travelling exhibitions or even the sale of artefacts and the protection of UCH.<sup>99</sup> The prohibition on commercial exploitation does not however entail a general prohibition to generate economic benefits from UCH by allowing visitors and sustainable tourism. It is allowed to for example charge money for diving excursions or to ask an admission fee to enter a museum.<sup>100</sup>

#### Article 2(8)

This article guarantees that the international legal status of sunken State vessels<sup>101</sup> will not be affected by UNESCO 2001. There are a few fundamental principles that define this legal status: the title of the flag State, sovereign immunity of the vessel<sup>102</sup> and the rule of express abandonment<sup>103</sup>. A sunken State vessel remains the property of the State that owned this vessel at the time of sinking, regardless of the location or of the time elapsed since that moment. Only when a State “explicitly

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<sup>97</sup> Maarleveld, Guérin and Egger 2013, *supra* note 59, 33-35.

<sup>98</sup> Forrest 2010, *supra* note 12, 345.

<sup>99</sup> Boesten 2002, *supra* note 11, 153.

<sup>100</sup> Maarleveld, Guérin and Egger 2013, *supra* note 59, 33-35.

<sup>101</sup> As a general conception, a ship is a vessel that is employed in navigation. When the employment ceases (due to sinking), the vessel will no longer be eligible for such a qualification under the Convention. However, supported by State practice, a wrecked and sunken warship remains State property and as such remains immune. (Boesten 2002, *supra* note 11, 145-146)

<sup>102</sup> The immunity of state owned ships is partly regulated in the 1926 Brussels International Convention for the Unification of Certain Rules concerning the Immunity of State-Owned Ships, *LNTS*, vol. 179, 199.

<sup>103</sup> For more explanation on the term ‘abandonment’ see *infra* the chapter on the law of salvage and finds.

and formally relinquishes its ownership”, that State will no longer have the property right. A State vessel “cannot be salvaged without the express consent of the flag State.”<sup>104</sup>

When drafting UNESCO 2001 there was a lot of discussion between States that wanted to exclude State vessels from the scope of the Convention and States that wanted to include them, under the condition that the flag State retained exclusive immunity. There was even a third option to include the State owned vessels and to exclude the principle of immunity or to limit it by referring to a time period. The current Convention is a compromise between the rights of the coastal States and those of the flag States.<sup>105</sup>

Only ships that can be identified as State ships fall under the special regime for State vessels and aircrafts. The burden of proof lies with the flag State. If it cannot prove that a ship is indeed a State vessel, the general regime will apply. The advantage of requiring actual proof is that the Convention has the widest possible scope but at the same time grants States Parties the possibility of a differential protection regime for State vessels. The criteria in the definition have to be fulfilled at the moment of the sinking of the ship. It would seem that when a State is no longer the owner of the ship at the moment of its retrieval, for example because it has abandoned it, the rules for State vessels still apply.<sup>106</sup>

The special regime for State vessels can be found in several articles throughout the Convention, namely in Article 7(3) and Article 10(7). (*infra*) Article 7 of UNESCO 2001 has some controversy over it in this context. The article states that States Parties “should” inform the flag State Party when finding a State vessel or aircraft in their territorial sea or archipelagic waters. By using the word “should” instead of “shall”, no obligation was imposed to inform the flag State Party. Most flag States however not only want to be informed, but consulted as well prior to any interference with the wreck. The combination of an obligation to inform with ‘a view to cooperate’ could have served this purpose. Unfortunately, this is not the case. Although there is no obligation to inform the flag State Party under UNESCO 2001, this does not mean that there is no obligation to inform the flag State Party at all. It is generally accepted international customary law that State vessels and aircrafts fall under the sovereign immunity of a State. Article 2(8) of UNESCO 2001 states that State practice and international law have to be taken into consideration when applying the rules of the Convention. This would mean that in practice no decision can be made without the consent of the flag State Party. Moreover, all the Parties are under a strict duty to cooperate, so it is almost unthinkable that a State Party would not inform the flag State when the latter is also a party to the Convention. So in practice, the use of the word “should” instead of “shall” does not affect the obligation to inform the flag State Party in case of the discovery of a State vessel or aircraft.<sup>107</sup>

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<sup>104</sup> M.J. Aznar (2010), *Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, *IJMCL*, 25(2), 209-236.

<sup>105</sup> C. Forrest (2003), *An International Perspective on Sunken State Vessels as Underwater Cultural Heritage*, *ODIL*, 34(1), 41-57.

<sup>106</sup> Dromgoole 2013, *supra* note 5, 155-156.

<sup>107</sup> Dromgoole 2013, *supra* note 5, 157-162.

### Article 2(9)

Human remains can be found buried in submerged landscapes or in shipwrecks. It sometimes happens that human remains are found in archaeological shipwrecks<sup>108</sup>. This is of course not always the case, since in the event of distress, normally the ship is being abandoned. Only when sailors get caught in for example a net, under heavy equipment or in a closed compartment, their bodies can later be found in the shipwreck. This is more likely to happen with modern or technically advanced ships since watertight doors can easily trap persons. The most likely place however to find human remains underwater is in sunken warships. On major battlegrounds cemeteries have been dedicated, and to guarantee mutual respect for these cemeteries and war graves, negotiations have occurred during peace settlements that resulted in mutual and multilateral agreements between States. These agreements include “respect for the location of military ships that foundered with great loss of life”<sup>109</sup> Also on the national level legislation has been made on how to handle war graves for example the Protection of Military Remains Act of 1986<sup>110</sup> in the UK.

The issue of the protection of human remains has not been added to the Convention until the final version. The main question was whether military graves should be addressed separately and whether the time limit of 100 year should be applicable here. If there is no time limit than wrecks such as the Titanic and the Estonia could be included. Finally the drafters decided on a provision that is rather general: “States Parties shall ensure that proper respect is given to all human remains located in maritime waters”. Since no time limit is imposed and since the term ‘maritime waters’ is not further defined, this provision leaves room for interpretation under international law.<sup>111</sup>

### Article 2(10)

The different aspects of this article are covered throughout the exposition of UNESCO 2001.

### Article 2(11)

It speaks for itself that UNESCO 2001 cannot change anything concerning the jurisdiction and sovereignty of States as has already been established under other international conventions.

## **Article 3 – Relationship between this Convention and the United Nations Convention on the Law of the Sea**

“Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.”

It is of great importance that UNESCO 2001 is in conformity with the Law of the Sea as it derives its legitimacy thereof.<sup>112</sup> In the preamble UNESCO 2001 recognizes “the need to codify and progressively develop rules relating to the protection and preservation of UCH in conformity with international law

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<sup>108</sup> On warships for example the crew got tangled in the nets that were used to avoid the enemy from entering their ship. M. Pieters, Feedback via e-mail, 4 April 2014.

<sup>109</sup> Maarleveld, Guérin and Egger 2013, *supra* note 59, 42-47.

<sup>110</sup> The text of this act can be found on the official legislation website of the UK: <http://www.legislation.gov.uk/ukpga/1986/35>.

<sup>111</sup> Boesten 2002, *supra* note 11, 137.

<sup>112</sup> Boesten 2002, *supra* note 11, 149.

and practice, including (...) the United Nations Convention on the Law of the Sea of 10 December 1982”. UNESCO 2001 is generally seen as a Convention that is adopted under article 303(4) UNCLOS 1982.

#### **Article 4 – Relationship to law of salvage and law of finds**

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

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

Article 4 of UNESCO 2001 excludes the application of the law of salvage and the law of finds under conditions (*infra*). Only when three conditions are cumulatively fulfilled the law of salvage/finds can be applied. As for the first condition the competent authorities are bound to consider *in situ* preservation as a first option. Only when it is necessary for “scientific or protective purposes” (preamble UNESCO 2001), the heritage can be recovered (*supra*). To fulfill the second condition, the Rules in the Annex must be complied with. This is something that most salvors should be able to do. However the problem is that when the recovery of the UCH is based on reasons of economic interest, this may go against the prohibition on commercial exploitation (Rule 2 Annex). Also the general rule is that an adequate funding must be guaranteed before any activity takes place (Rule 17). This as well can form an issue.

The last condition poses the most problems, since the recovery must guarantee the maximum protection for UCH. To achieve this maximum protection all the Rules and provisions set out in UNESCO 2001 must be complied with. Mostly salvage operations end with a court-ordered sale of the recovered material in order to pay the salvage award. This automatically creates a breach of several rules of UNESCO 2001: for example the prohibition of commercial exploitation (Rule 2), the rule that all recovered objects from one site must be kept together as a whole as much as possible (Rule 33) or the rule that UCH shall be preserved for the benefit of humanity (Art. 2(3)). It may be said that using the law of salvage/ finds will be extremely hard, if not impossible, in the framework of UNESCO 2001.<sup>113</sup>

#### **Article 5 – Activities incidentally affecting underwater cultural heritage**

“Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.”

By adding an article that deals with ‘activities incidentally affecting underwater cultural heritage’, all the potential threatening activities are covered. This article acknowledges the fact that fishing, oil exploration and exploitation, the laying of cables, mining and gas exploitation pose a serious threat to UCH.

Article 5 entails that an economic balance of interests must be made. Difficult questions will have to be addressed such as “who will be responsible for the expertise surveys, who will finance such projects” and who will pay for the delay in the activities of commercial companies. It is not easy to weigh the protection of UCH, a project absorbing financial resources, against other projects that bring in money and provide for jobs. According to Boesten this issue should be resolved by applying a

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<sup>113</sup> Dromgoole 2013, *supra* note 5, 202-204.



case-by-case approach assessing the cultural heritage value of a site based on a good domestic system of criteria, accompanied by a duty to support the management of UCH sites.<sup>114</sup>

#### **Article 6 – Bilateral, regional or other multilateral agreements**

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

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

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

States Parties can ‘enter into bilateral, regional or other multilateral agreements or develop existing agreements’ in order to strengthen the protection given to UCH. Other States ‘with a verifiable link, especially a cultural, historical or archaeological link’ (linked States) can be invited to join such an agreement. These other States do not have to be Parties to the Convention.

Throughout UNESCO 2001 the phrase “States with a verifiable, especially a cultural, historical or archaeological link” is used to identify which States have an interest in UCH. Strati finds this wording to wide, and proclaims that it would have been better to use the phrase “cultural link” to avoid the collision of the three different criteria: “cultural”, “archaeological” and “historical”.<sup>115</sup>

#### **Article 7 – Underwater cultural heritage in internal waters, archipelagic waters and territorial sea**

“1. States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

2. Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, States Parties shall require that the Rules be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

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

In these three zones States have sovereignty (art. 2 and 49 UNCLOS 1982). This means that the coastal State alone has the right to take measures for the protection and preservation of UCH in these zones. The general principles of UNESCO 2001 have to be respected and applied to activities directed at UCH found in these zones.

<sup>114</sup> Boesten 2002, *supra* note 11, 155-156.

<sup>115</sup> Strati 1995, *supra* note 16, 57.

The first paragraph of article 7 is unnecessary, since it merely repeats the rights that coastal States already had under UNCLOS 1982.

In the second paragraph however an important novelty is cited, namely the duty for States Parties to apply the Rules to activities directed at UCH in their internal waters, archipelagic waters and territorial sea. This requirement brings with it some considerable budgetary implications. A well-functioning national system is necessary to guarantee compliance with the Rules.<sup>116</sup> So whether a State Party can comply with this requirement will depend on its financial and political situation. To prevent non-compliance, assistance should be offered at an international or inter-state level.<sup>117</sup> In the Operational Guidelines of the Convention (August 2013) the Underwater Cultural Heritage Fund (the Fund) was established as a Special Account under the Financial Regulations of the Special Account for Underwater Cultural Heritage<sup>118</sup> as was prepared for the second Meeting of States Parties 2009. This special account is created in accordance with article 6(6) of the UNESCO financial regulations.<sup>119</sup> The purpose of the Fund is to “finance activities decided by the Meeting of States Parties on the basis of guidelines determined by the Meeting of States Parties to the Convention”<sup>120</sup> The Fund will consist of voluntary contributions from States Parties, institutions or private entities. It will be used “as decided by the Meeting of States Parties and in conformity with the provisions and the spirit of the Convention and in complement of national efforts to finance in particular: a.) the functioning of the Convention and its State Cooperation Mechanism; b.) international cooperation projects in relation to the scope of the Convention; c.) the building of capacity in States Parties; and d.) the enhancement of the protection of the underwater cultural heritage.” The Meeting of States Parties will evaluate all requests for financial assistance, giving priority to developing States Parties and projects enhancing cooperation involving more than two States Parties.<sup>121</sup> In the future this Fund might create a solution for States Parties that do not have the financial means to comply with their obligations under the Convention. However, since this Fund is based on voluntary contributions, it remains questionable whether sufficient funding will be found to assist all States Parties in need of additional finances.

Paragraph 3 indicates that the coastal State ‘should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link’. As already discussed under article 2(8) there is some controversy concerning the fact that this paragraph uses the word ‘should’ instead of ‘shall’ (*supra*). The linked State does not have to be a State Party. It can be any State. The reason is that the linked State does not get any real participatory rights under this provision. It will only be informed.<sup>122</sup>

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<sup>116</sup> This is true throughout the entire Convention, since the Rules must be respected and complied with in all maritime zones.

<sup>117</sup> Boesten 2002, *supra* note 11, 160.

<sup>118</sup> Meeting of States Parties, *Establishment of a Special Account for the Underwater Cultural Heritage*, 2009, Document UCH/09/2.MSP/220/8.

<sup>119</sup> UNESCO, *Financial Regulations*, 1951 (last amendment 2009), [http://portal.unesco.org/en/ev.php-URL\\_ID=48889&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=48889&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>120</sup> Meeting of States Parties, *Establishment of a Special Account for the Underwater Cultural Heritage*, 2009, Document UCH/09/2.MSP/220/8, article 3 Annex.

<sup>121</sup> Operational Guidelines UNESCO, *supra* note 87, 12-14.

<sup>122</sup> Dromgoole 2013, *supra* note 5, 127-131.

**Article 8 – Underwater cultural heritage in the contiguous zone**

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

The rights conferred under article 8 solely apply to ‘activities directed at underwater cultural heritage’, meaning “activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage”(art. 1(6)).

Article 8 grants application to articles 9 and 10 in the contiguous zone. The use of the consultation system as set forth in articles 9 and 10 (*infra*) could diminish the rights that a coastal State has in its contiguous zone under article 303(2) UNCLOS 1982. A solution for this problem could be to interpret articles 9 and 10 as “simply accommodating the “interests” of States Parties with a cultural, historical or archaeological verifiable link to the underwater cultural heritage and not affecting the otherwise applicable jurisdiction of the coastal State”.<sup>123</sup> Another option is to argue that the regime of article 8 is only available for States that have declared a contiguous zone<sup>124</sup>; and irrespective of whether or not a State has declared such a zone, this reference entails that the coastal State may exercise the powers provided for in article 10 (*infra*). As is stated in article 8, the coastal State can “without prejudice” and “in addition” to the rights from article 10, regulate and authorize activities directed at UCH in its contiguous zone. The UNESCO Convention encourages States to cooperate, as is regulated in article 10, but when cooperation is not possible, for example due to a lack of interested States, the coastal State can still regulate and authorize activities directed at UCH in its contiguous zone.

Article 8 explicitly refers to article 303(2) UNCLOS 1982. This leaves room for two possible interpretations:

1) The reduction of the scope of article 8 to the interpretation as is given in article 303(2) UNCLOS 1982. This interpretation is supported by, amongst others, Dromgoole<sup>125</sup> and Boesten<sup>126</sup>. According to Aznar however, this interpretation conflicts with the definition given of ‘activities directed at UCH’ in article 1(6) (*supra*). This definition not only covers the removal of UCH, but any other kind of activity related to UCH as well.

2) The second interpretation would be to logically interpret the term “approval” as is mentioned under article 303(2) UNCLOS 1982. As was discussed above this “necessarily implies a legislative term of reference”.<sup>127</sup> Therefore the referral to article 303(2) can be seen as another constructive ambiguity to be filled in by State practice.

Aznar concludes that article 8 adds legislative jurisdiction to the enforcement jurisdiction that already existed under article 303(2). This can be seen as a form of creeping jurisdiction. However, as will be demonstrated below, this is in line with current State practice.<sup>128</sup>

<sup>123</sup> Strati, Gavouneli and Skourtos 2006, *supra* note 63, 44.

<sup>124</sup> M. Rau (2002), The UNESCO Convention on the Protection of Underwater Cultural Heritage and the International Law of the Sea, *Max-Planck Yearbook of United Nations Law*, 6, 387–472.

<sup>125</sup> Dromgoole 2013, *supra* note 5, 288.

<sup>126</sup> Boesten 2002, *supra* note 11, 161.

<sup>127</sup> Aznar 2014, *supra* note 39, 7.

<sup>128</sup> Aznar 2014, *supra* note 39.

*State practice*

Aznar divides State practice in the conventional practice and in unilateral practice. Under the conventional practice he examined State practice concerning UNCLOS 1982, UNESCO 2001 and other treaties. Under UNCLOS 1982, State practice was indecisive in determining how the regime for the contiguous zone should be applied. Under UNESCO 2001, as has been mentioned, article 8 accords legislative rights to coastal States. Upon adopting the Convention, no State opposed to this creeping jurisdiction, except for Turkey. The only concern that States had with creeping jurisdiction, was the reference to the cooperative schemes in the EEZ and on the continental shelf, as set out in articles 9 and 10 of the Convention. This means that the legislative jurisdiction incorporated in article 8 UNESCO 2001 has been generally accepted.<sup>129</sup> As for the other Conventions examined, Aznar found a couple of regional conventions, such as the European Convention on the Protection of the Archaeological Heritage (Revised) (*infra*), the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean<sup>130</sup> and the Protocol Concerning Specially Protected Areas and Wildlife<sup>131</sup>, allowing States, to a certain extent, to extend their legislative rights concerning UCH protection to their contiguous zone. On the basis of this research he concluded that State practice demonstrates that States’ domestic legislation has progressively enlarged the territorial scope “from a material protection based on a legal fiction in the LOSC, through a specialised geographical extension in the Valletta Convention and the Mediterranean and Caribbean Protocols, towards a more general and complete jurisdiction in the 2001 UNESCO Convention”<sup>132</sup>.

A similar tendency can be found in unilateral State practice,. Upon declaring their contiguous zones some States made not only reference to their rights under article 33 UNCLOS 1982, or even 303(2) UNCLOS 1982, but went further. Cyprus declared having the power to issue regulations to avoid and control traffic in objects of an archaeological and historical nature in its contiguous zone. Yugoslavia claimed sovereign rights for the exploration and exploitation of archaeological objects in its contiguous zone. Mauritius and South Africa declared a ‘maritime cultural zone’ giving them the power to regulate and authorise activities directed at UCH in their contiguous zones or even granting them the same rights over objects of an archaeological or historical nature found in the contiguous zone, as would be the case if they were found in the territorial sea. Other States declared the extension “of their licensing, authorization or protective domestic legislation on cultural heritage to their contiguous zone by means of national cultural legislation.”<sup>133</sup> As for the States bordering the North Sea, France, The Netherlands, Denmark and Norway extended their legislative and

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<sup>129</sup> 45 states have ratified UNESCO 2001. Nevertheless, during the general assembly of UNESCO 2001, 88 states voted in favour of the Convention, of course including article 8. Since none of these States made its intention clear not to become a party to the Convention, they are bound by the obligation under article 18 of the Vienna Convention (The Vienna Convention on the Law of Treaties of 23 May 1969, *UNTS*, vol. 1155 331) Some of the abstaining States (during the vote on UNESCO 2001) decided that they wanted to become a party to the Convention after all, for example France and Paraguay, or that have initiated a process to become a party, for example the Netherlands.

<sup>130</sup> Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean of 10 June 1995, *UNTS*, vol. 2102, 203.

<sup>131</sup> Protocol Concerning Specially Protected Areas and Wildlife of 18 January 1990, text available at [www.cep.unp.org /cartagena-convention/spaw-protocol](http://www.cep.unp.org/cartagena-convention/spaw-protocol).

<sup>132</sup> Aznar 2014, *supra* note 39, 20-21.

<sup>133</sup> For example Australia, Canada, Denmark, Greece, Ireland, The Netherlands and the United States.

enforcement rights to protect UCH in their contiguous zones, based on either national legislation or on an international Convention<sup>134</sup>.

Aznar concludes that “conventional and unilateral State measures (...) show a general and constant practice in favour of the existence of a crystallised customary rule recognizing, as a matter of law, legislative and enforcement rights in favour of coastal States for the protection of underwater cultural heritage in the contiguous zone.”<sup>135</sup> The adoption of UNESCO 2001 “has facilitated the crystallisation of a new customary rule that recognizes coastal State power to legislate and enforce in the declared contiguous zone the necessary rules to protect underwater cultural heritage.”<sup>136</sup> This customary rule can be considered as establishing a Maritime Archaeological Zone. Aznar did not find sufficient consistent State practice to conclude that the establishment of a Maritime Archaeological Zone without first having declared a contiguous zone, would fall under customary law as well.<sup>137</sup>

#### **Article 9 – Reporting and notification in the exclusive economic zone and on the continental shelf**

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

Accordingly:

(a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;

(b) in the exclusive economic zone or on the continental shelf of another State Party:

(i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;

(ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.

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

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

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

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

All States Parties have the responsibility to protect UCH in the EEZ and on the continental shelf. The first aspect of this responsibility entails that States Parties impose a duty on their nationals and on vessels flying their flag to report the discovery of UCH or the intent to engage in activities directed at UCH in its own EEZ or on its continental shelf (Art. 9(1)(a)).

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<sup>134</sup> For France this is UNESCO 2001.

<sup>135</sup> Aznar 2014, *supra* note 39, 45.

<sup>136</sup> Aznar 2014, *supra* note 39, 51.

<sup>137</sup> Aznar 2014, *supra* note 39.

When this discovery or this activity takes place in the EEZ or on the continental shelf of another State Party, paragraph 1(b) offers two possible alternative approaches, of which the first alternative can be interpreted in two different ways, rendering this article rather ambiguous.

In the first interpretation of article 9(1)(b)(i) the wording ‘States Parties’ entails ALL States Parties, giving the coastal State of the EEZ or the continental shelf where the discovery has been made/ activity is being conducted, the right to require reporting of this discovery/activity. The flag State Party as well as the State Party who’s national<sup>138</sup> is master of the expedition can require reporting as well to themselves. The second interpretation of article 9(1)(b) refers back to paragraph (1)(a). In this interpretation the term “States Parties” does not include all States, but only the flag State, as well as the state whose national is leading the expedition. The coastal state on whose continental shelf or in whose EEZ the object was discovered/activity was conducted, would only be the recipient of the report, but no jurisdiction or control can be exercised by the latter.

Article 9(1)(b)(ii) is an alternative to article 9(1)(b)(i). On receiving a report from the vessel flying its flag or its national leading the expedition, this State must rapidly transfer the report to all the other States Parties. When the coastal State is not a party to the Convention, this would have the bizarre effect that all States Parties get informed of a discovery or activity directed at UCH, except for the coastal State. This second alternative also brings with it the requirement of an effective communication system from the ship to the flag State or State whose national is master of the expedition and from this State to all the other State Parties. Thirdly, when a ship is far away from the flag State or State whose national is master of the ship, it becomes very hard to enforce this obligation. A final issue is that this article places a lot of responsibility on the flag State. In practice however, many ships fly under flags of convenience. These States are not very likely to become Party to UNESCO 2001, which partly undermines the whole system<sup>139, 140</sup>.

The informed State Party notifies the UNESCO director-general of the discovery or activities mentioned in the report it has received (Art. 9(3)), who at his turn informs all the States Parties (Art. 9(4)). This obligation can lead to States being informed twice of the same discovery/activity when article 9(1)(b)(ii) was applied. On the basis of a verifiable historical, cultural or archaeological link a third State Party can declare that it wants to be consulted on the protection of the UCH (Art. 9(5)). The reason why only Parties to the Convention can declare an interest here, unlike in article 7(3), is that they will be actively participating in the framework of the Convention, which goes beyond simply providing information.<sup>141</sup>

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

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

<sup>138</sup> In the Plenary session of the Fourth Meeting of Experts was agreed that the term ‘national’ would be confined to the leader of the expedition or other operation. O’Keefe 2002, *supra* note 86, 84.

<sup>139</sup> These commentaries apply (partly) to the second interpretation of article 9(1)(b)(i) as well.

<sup>140</sup> O’Keefe 2002, *supra* note 86, 82-84.

<sup>141</sup> Dromgoole 2013, *supra* note 5, 127-131.

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

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

(a) consult all other States Parties which have declared an interest under Article 9, paragraph 5, on how best to protect the underwater cultural heritage;

(b) coordinate such consultations as "Coordinating State", unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared an interest under Article 9, paragraph 5, shall appoint a Coordinating State.

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

5. The Coordinating State:

(a) shall implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures;

(b) shall issue all necessary authorizations for such agreed measures in conformity with the Rules, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations;

(c) may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefore, and shall promptly inform the Director-General of the results, who in turn will make such information promptly available to other States Parties.

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

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

Article 10(2) gives States Parties the right to prohibit or authorize activities directed at heritage in their EEZ or on their continental shelf when the State's sovereign rights or jurisdiction under international law, including UNCLOS 1982, are being threatened. Under UNCLOS 1982 the coastal State has the right to exploit the living and non-living natural resources in its EEZ and the right to exploit the non-living resources of its continental shelf. In its EEZ it also has jurisdiction over installations and structures, marine scientific research and the preservation of the marine environment (art. 56 UNCLOS 1982).

When a State Party finds out about a potential interference, it can prevent this until its competent authorities can determine whether the activity is justified or not. If it is, the State Party can make

sure that the activity is conducted conform the Rules of the Annex. States Parties are very likely to have jurisdiction under article 10(2): since an object has to be underwater for at least 100 years in order to qualify as UCH, it will most likely have become a part of the marine environment, and any interference would have an impact on the natural resources.<sup>142</sup>

In the case where article 10(2) cannot be applied, paragraphs 3 to 6 of article 10 provide for an alternative. This alternative is based on consultation between the coastal State and any State Party that has declared an interest in the UCH. The goal is to agree on the best way to protect the UCH.<sup>143</sup> The coastal State will fulfill the role of Coordinating State during this cooperation (unless this State explicitly declares not wanting to fulfill this role after which it is assigned to another State). The task of the Coordinating State is threefold: 1. it has to monitor the effectuation of the agreed protective measures, 2. permit the execution of these measures and 3. conduct the necessary prior research, hand out permits that facilitate this research and inform the director-general of UNESCO of the results (art. 10(3)(b) and (5)).

The Coordinating State has to implement protective measures which have been agreed upon by the consulting States. This gives the impression that States would have to consent unanimously. Especially when a large number of States are involved, this can create problems. All States declaring an interest in a find, will have a shared responsibility in terms of providing the financial resources that are necessary for the management of a site. Nowhere in the Convention is referred to this crucial aspect. The Coordinating State, flag State or any other State with a verifiable interest, will have to find the capacity to analyze all the received information, to disperse all their findings to the other States Parties, control the co-ordination of their responses and manage the protective measures that have to be taken. This requires a good functioning national bureau.<sup>144</sup>

The idea of consultation as is proclaimed in article 10, is in practice not easy to execute. When discovering a shipwreck, it may easily take months or even years to find out the identity of the wreck. So contrary to what is stated in article 10, it will often only be the coastal State or perhaps the coastal State and the flag State of the reporting vessel that in the early stages make the crucial decisions. This does not mean that consultation will not take place, but it is possible that it will take months or even years before consultation with all the interested States becomes an option.<sup>145</sup>

Concern exists as to the rights that the Coordinating State has under article 10(4). The first issue is that the Coordinating State can take measures prior to consultation, thereby undermining the idea of the implementation of agreed measures. Secondly the Coordinating State can take 'all practical measures' to prevent immediate danger. The measures that can be taken are undefined and unlimited. Depending on the meaning of 'all practicable measures', this could be an expansion of the coastal State's jurisdiction.<sup>146</sup>

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<sup>142</sup> Dromgoole 2013, *supra* note 5, 290-291.

<sup>143</sup> *Ibid.*

<sup>144</sup> Boesten 2002, *supra* note 11, 167-168.

<sup>145</sup> Dromgoole 2013, *supra* note 5, 304.

<sup>146</sup> Dromgoole 2013, *supra* note 5, 300-301.



Now that the two different possible approaches under article 10 have been discussed, it is important to notice that nowhere in the Convention the relation between article 10(2) and article 10(3-6) is further clarified. Does the coastal State have to consult other States Parties that declared an interest, and follow the other procedures set forward under paragraph 3-6, when acting under article 10(2) of the Convention? According to Dromgoole, it cannot be envisaged in the Convention that the coastal State can only implement agreed measures of protection in the case that there is interference with its sovereign rights under international law. For this reason article 10(2) can be seen as a stand-alone provision. However, since the general scheme of UNESCO 2001 is based on the principle of cooperation, a coastal State may at least morally feel obliged to consult with other interested States before it takes action under article 10(2).<sup>147</sup>

Article 9 and 10 are deliberately kept vague, for example as to which State has primary control over an operation. Also on how to deal with the situation where the flag State or a State having a clear interest in the find is not a party to the Convention remains unclear. The system as set out in article 9 and 10 also completely depends on the willingness of the finder to declare its find. When he does not do this, the system will not function. Realizing how important the role of the finder is, yet no provisions are included to safeguard his interests in the find, or to award him a reward upon reporting. An incentive should be given to finders, or to persons wishing to engage in activities directed at potential UCH.<sup>148</sup>

#### **Article 11 – Reporting and notification in the Area and Article 12 – Protection of underwater cultural heritage in the Area**

These articles deal with the legal framework concerning UCH found in the Area. As already mentioned in the introduction, this will not be dealt with in this report.

#### **Article 13 – Sovereign immunity**

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

Article 13 aims to regulate the situation where a warship or any other government ship that enjoys sovereign immunity and that is engaged in an operation controlled by the flag State Party accidentally discovers UCH. The duty to report the find could force a State to reveal details on the operation it was conducting, that it would like to keep a secret. There are three cumulative criteria in order for a ship to be excluded from the reporting duty under articles 9 and 10: 1. it must be ‘operated for non-commercial purposes’, 2. ‘undertaking their normal mode of operations’ and 3. not ‘engaged in activities directed at underwater cultural heritage’.

<sup>147</sup> Dromgoole 2013, *supra* note 5, 292.

<sup>148</sup> Boesten 2002, *supra* note 11,167.

It is not always clear when a government ship is operating for non-commercial purposes. O'Keefe gives an example of a situation where there could be some discussion: "would a naval vessel appearing in a commercial film with the permission of the authorities and on payment of a nominal sum be non-commercial, particularly if the authorities allowed its use for recruiting and image creation as well as the payment?" This situation could be solved by looking at the second criteria and stating that the vessel was not used in its normal way. To determine a vessel's normal way of operating, not only the technical abilities are taken into account, but as well the normal way in which it is used. Using the vessel as a film prop can clearly not be qualified as using the vessel in its normal way.<sup>149</sup>

The last sentence of this article was added to oblige States Parties to comply with the article 9 and 10 of the Convention, as far as is reasonably and practically possible, when a discovery is made by a warship or other government ship that fulfils the above mentioned criteria, but where there is no need for secrecy.

#### **Article 14 – Control of entry into the territory, dealing and possession**

"States Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention."

Article 14 applies in three situations: 1. when UCH has been illicitly exported, 2. when UCH has been recovered contrary to the Convention or 3. or when UCH has been illicitly exported AND recovered contrary to the Convention. What is meant by 'illicit' export is not defined in UNESCO 2001. However, the term 'illicit' is used as well in article 3 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970. In relation to this Convention, the term 'illicit', is used in the sense meaning 'contrary to law'.<sup>150</sup>

It is up to the States Parties to decide which measures to take (UNESCO 2001 does not state that all measures or all necessary measures must be taken) in order to effectively comply with their duties under article 14. To this end, States Parties must respect the obligations they have under the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995<sup>151 152</sup>.

A helpful tool in complying with article 14 would have been the incorporation of a solid system of permits in UNESCO 2001. The 2000 meeting (third preparatory meeting to UNESCO 2001) agreed that a permit would be linked to the retrieval consistent with the provisions of the Annex, and that this could provide useful documentation to be presented to the port State or other States to prevent

<sup>149</sup> O'Keefe 2002, *supra* note 86, 101.

<sup>150</sup> O'Keefe 2002, *supra* note 86, 103-104.

<sup>151</sup> Of all the States bordering the North Sea, only Denmark ratified the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995, 34 *ILM* 1322.

UNIDROIT, *Status- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome 1995)*,

<http://www.unidroit.org/status-cp> (last update 21 February 2014).

<sup>152</sup> O'Keefe 2002, *supra* note 86, 103.

interference with a legitimate operation. However in the final version of UNESCO 2001 the idea of a uniform permit has been put aside. Under the current system, customs officials are given the responsibility to make the prime assessment on whether the import of an object could possibly constitute a violation of article 14. If such a violation is found, States Parties will need a good functioning internal system with sufficient experts that are able to determine whether the imported object amounts to UCH and if so, if it has been recovered contrary to UNESCO 2001 and/or exported illicitly. Finally customers that purchase an artefact must also be aware of what they purchase in order to protect their property from confiscation. Achieving this is very difficult without a global permit system.<sup>153</sup>

#### **Article 15 – Non-use of areas under the jurisdiction of States Parties**

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

The purpose of this article is to deny access to certain facilities for persons that perform activities directed at UCH that are not in conformity with the Convention. This provision gives no new powers to States Parties, but rather obliges them to use the ones they already had under UNCLOS 1982.<sup>154</sup> The measures a State Party can take are limited to prohibiting the use of territory or structures that are under its exclusive jurisdiction or control.<sup>155</sup> In order for measures to be effective, coordination is necessary on a regional basis, allowing all the bordering States to participate, leaving no option but to respect UNESCO 2001 provisions.<sup>156</sup>

#### **Article 16 – Measures relating to nationals and vessels**

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

Article 16 obliges the States Parties to have legislative and administrative provisions in place to prevent nationals flying their flag from engaging in activities contrary to the Convention.<sup>157</sup> From the perspective of a coastal State this article gives the opportunity to call on other States Parties for cooperation when nationals of those States consistently violate UNESCO 2001. This can be a practical solution for coastal States of which the waters are rich in heritage, but that lack the means to police their waters.<sup>158</sup>

#### **Article 17 – Sanctions**

“1. Each State Party shall impose sanctions for violations of measures it has taken to implement this Convention.

2. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activities.

<sup>153</sup> Boesten 2002, *supra* note 11, 174.

<sup>154</sup> O’Keefe 2002, *supra* note 86, 108.

<sup>155</sup> O’Keefe 2002, *supra* note 86, 107-108.

<sup>156</sup> Dromgoole 2013, *supra* note 5, 284.

<sup>157</sup> O’Keefe 2002, *supra* note 86, 109.

<sup>158</sup> Boesten 2002, *supra* note 11, 174-175.

3. States Parties shall cooperate to ensure enforcement of sanctions imposed under this Article.”

Paragraph 2 of article 17 puts forward that the sanctions must be ‘adequate in severity’. It is hard to determine what these sanctions should entail, since what is an adequate sanction in one part of the world, might not be adequate in another part.<sup>159</sup> Sanctions must also ‘deprive offenders of the benefit deriving from their illegal activities’. This can pose some difficulties, for example when the offender and the UCH that has been illicitly excavated are situated in two different countries. Another issue is that with UCH not only the nominal value must be taken into account, but as well the benefit of aesthetic appreciation.

A prison sentence of sufficient severity and length at first sight seems to fulfil both the goals set forward in article 17 (a severe enough sanction and depriving offenders from the benefit of their illegal activities). The problem here however is that imprisonment is hard to reconcile with one of the current theories explaining the purpose of imprisonment, namely that this serves as a way to rehabilitate the prisoner rather than reflecting a punishment. According to O’Keefe the best way to prevent damage to UCH remains seizure under article 18, since it removes every incentive to excavate in a way not conform with the Convention.<sup>160</sup>

#### **Article 18 – Seizure and disposition of underwater cultural heritage**

“1. Each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention.

2. Each State Party shall record, protect and take all reasonable measures to stabilize underwater cultural heritage seized under this Convention.

3. Each State Party shall notify the Director-General and any other State with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure of underwater cultural heritage that it has made under this Convention.

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

Article 18(1) applies not only to UCH found in the territory of the State Party, but as well to UCH that at some time has been brought there. The seizure may be from anyone and not just from the parties involved in the recovery.<sup>161</sup> This can create a problem when a third person has purchased the good *bona fide*.

Under article 18(2) States Parties are obliged to ‘record, protect and take all reasonable measures to stabilize’ the seized UCH. This imposes a burden on States Parties since technology, specialists and financial resources will need to be made available. No standards have been set for conservation, but it may be assumed that this should be done according to the provisions of the Annex. In addition, States Parties have to ‘ensure that the disposition of the seized material will be for the public benefit,

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<sup>159</sup> For example, financial sanctions in Europe must be much higher than financial sanctions in a developing country to generate the same effect.

<sup>160</sup> O’Keefe 2002, *supra* note 86, 111-112.

<sup>161</sup> Dromgoole 2013, *supra* note 5, 330-331.

taking into account the need for conservation and research; the need for the reassembly of a dispersed collection, the need for public access, exhibition and education; and the interests of States with a verifiable link.’ Article 18(4) in practice might be difficult to live up to. It will require considerable financial resources and a good management plan. The question rises what will happen when a State seizes an object, but does not have sufficient funds to live up to the duties under paragraph 4?<sup>162</sup> Or will these duties perhaps even prevent States from seizing? A last issue is who is responsible for the seized objects? Any State with a verifiable link can have its interests taken into account. Whether ‘having your interests taken into account’ also entails an obligation to contribute financially is not clear. Boesten suggests that a system should be put in place whereby States that declare an interest and are willing to contribute financially to the management plan, are rewarded preferential rights over States that declare an interest without the willingness to participate in the management.<sup>163</sup>

Under paragraph 3 all these States ‘with a verifiable link, especially a cultural, historical or archaeological link’, whether or not they are a party to the Convention, shall be notified. This is the only place in the entire Convention where a linked State gets an enforceable right since here the word ‘shall’ is used.<sup>164</sup>

#### **Article 19 – Cooperation and information-sharing**

“1. States Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage under this Convention, including, where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage.

2. To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage, heritage excavated or recovered contrary to this Convention or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage.

3. Information shared between States Parties, or between UNESCO and States Parties, regarding the discovery or location of underwater cultural heritage shall, to the extent compatible with their national legislation, be kept confidential and reserved to competent authorities of States Parties as long as the disclosure of such information might endanger or otherwise put at risk the preservation of such underwater cultural heritage.

4. Each State Party shall take all practicable measures to disseminate information, including where feasible through appropriate international databases, about underwater cultural heritage excavated or recovered contrary to this Convention or otherwise in violation of international law.”

Paragraph 1 gives States Parties the duty to cooperate and assist each other in the protection and management of UCH under UNESCO 2001. The impact of this article is somewhat toned since in the summary of the most important aspects of this cooperation the words ‘when practicable’ were inserted. The duty to cooperate however does have a general application, meaning that all States Parties must cooperate and not just the States that have declared an interest.

Paragraph 2 deals with the sharing of information. For States Parties to comply with this duty they will have to, amongst others, encourage researchers to publish their results in accordance with Rule

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<sup>162</sup> The commissioning of the Fund might provide for a (partial) answer to this question.

<sup>163</sup> Boesten 2002, *supra* note 11, 179.

<sup>164</sup> Dromgoole 2013, *supra* note 5, 127-131.

36 of the Annex and share information concerning heritage that is excavated or recovered contrary to UNESCO 2001<sup>165,166</sup>. Paragraph 3 was added in the 2000 meeting as a result of discussions concerning the issues that States had with the sharing of information on technology and the location of the UCH.

The last paragraph deals with the use of international databases for the dissemination of information. It was recognised that not all States would be able to implement a high-level technology system and so the phrase 'shall take all practicable measures' was added.<sup>167</sup> This way paragraph 4 imposes an obligation of means and not one of results.

#### **Article 20 – Public awareness**

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

The obligation to raise public awareness concerning the importance of UCH is quite extensive. States should amongst other measures:

- a.) "cooperate in regional or international awareness raising campaigns;
- b.) foster the publication of information on the protection and the value of underwater cultural heritage via the media and the Internet;
- c.) facilitate community, group or public events focusing on the enhancement or protection of the underwater cultural heritage, including, in particular, programs for divers, fishermen, sailors, coastal developers and marine spatial planners;
- d.) make available general information on underwater cultural heritage located on their territory, as appropriate;
- e.) inform the public about activities directed at underwater cultural heritage and the recovery of artefacts from sites, including about their final storage; and
- f.) take any other appropriate measures."<sup>168</sup>

For Boesten this article specifically deals with the aspect of raising awareness towards the importance of protecting and preserving heritage, and not with the more general obligation of raising awareness towards the existence of UCH.<sup>169</sup>

#### **Article 21 – Training in underwater archaeology**

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

Numerous courses on underwater archaeology and on the conservation of UCH exist in Europe, North America and Australia. The duty to cooperate, as mentioned under article 21, can exist in the opening of educational centres in parts of the world where there are none yet, or in providing places in the already existing centres for people from those parts of the world.

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<sup>165</sup> These obligations will help States Parties to comply with articles 14,15,16 and 18 as well.

<sup>166</sup> O'Keefe 2002, *supra* note 86, 121-123.

<sup>167</sup> Boesten 2002, *supra* note 11, 180.

<sup>168</sup> Operational Guidelines UNESCO, *supra* note 87, 11-12.

<sup>169</sup> Boesten 2002, *supra* note 11, 181-182.

The transfer of technology is a more sensitive aspect, since this raises issues of patents and finances that go far beyond the scope of UNESCO 2001. By adding the words ‘on agreed terms’ to this provision, the Convention recognizes these difficulties.<sup>170</sup>

#### **Article 22 – Competent authorities**

“1. In order to ensure the proper implementation of this Convention, States Parties shall establish competent authorities or reinforce the existing ones where appropriate, with the aim of providing for the establishment, maintenance and updating of an inventory of underwater cultural heritage, the effective protection, conservation, presentation and management of underwater cultural heritage, as well as research and education.

2. States Parties shall communicate to the Director-General the names and addresses of their competent authorities relating to underwater cultural heritage.”

The success of UNESCO 2001 depends on two aspects. Firstly a significant number of States must sign and ratify the Convention to give effect to the notification, reporting and protection mechanisms. Secondly, States need to have sufficient competent authorities to support the execution of those mechanisms.<sup>171</sup> These authorities should prepare inventories of UCH. When doing so, it is very useful to consider common standards for all national inventories of the States Parties<sup>172</sup>. This way the data are easily interchangeable and scientific research is facilitated. To obtain this data, cooperation is encouraged with for example coast guards, dredging services, fishery monitoring services...<sup>173</sup>

States should have national rules that regulate the authorization of interventions on UCH sites. These rules also have to cover activities that accidentally affect UCH, as well as apply to areas where there is no certainty of the existence of heritage sites, but where the possibility exists that such sites could be found. Local communities that have a direct link with UCH sites should be involved in activities directed at UCH.<sup>174</sup>

#### **Article 23 – Meetings of States Parties**

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

2. The Meeting of States Parties shall decide on its functions and responsibilities.

3. The Meeting of States Parties shall adopt its own Rules of Procedure.

4. The Meeting of States Parties may establish a Scientific and Technical Advisory Body composed of experts nominated by the States Parties with due regard to the principle of equitable geographical distribution and the desirability of a gender balance.

5. The Scientific and Technical Advisory Body shall appropriately assist the Meeting of States Parties in questions of a scientific or technical nature regarding the implementation of the Rules.”

Below some of the most important recent recommendations of the Meeting of States Parties and of the Advisory Body are discussed. It is interesting to have a look at these, to see what is being

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<sup>170</sup> O’Keefe 2002, *supra* note 86, 127-129.

<sup>171</sup> Boesten 2002, *supra* note 11, 185.

<sup>172</sup> As is one of the main goals of the “Guidelines for the Establishment of National Inventories” that are currently being drafted by the Advisory Body.

<sup>173</sup> Operational Guidelines UNESCO, *supra* note 87, 10.

<sup>174</sup> *Ibid.*

expected from Belgian legislation as well. The Meeting of States Parties made several recommendations to the States Parties at their fourth session in May 2013. The most relevant ones are mentioned below:

States have to raise the awareness of development promoters, resource extractors, divers, fishermen... When allowing a development project or resource extraction project States Parties have to make sure that the presence of UCH is being taken into account.<sup>175</sup> In the document presented for authorization of the project, a mandatory assessment of the area as well as the identification of UCH present in that area has to be included. The national authorities competent for UCH have to be involved in the authorization process. The criteria used to assess the plan must include the impact that the project will have on UCH.

The developers of a project are responsible for the assessment of the area, the prevention of any impact on the UCH caused by the project, the mitigation of any negative effects that occur, the conservation of the UCH and finally the promotion of the affected UCH and spread of the knowledge concerning this heritage. Alternatively a levy can be imposed on all relevant infrastructure and extraction works, to create a fund to fulfill the above mentioned obligations.

As for fishing and trawling activities States Parties have to encourage the creation of physical protection measures for UCH and their related protected areas. The protection of UCH should be integrated in fishery policies, and special protection areas should be established in which fishing is prohibited.

States Parties have to encourage collaboration with and awareness raising of diving operators towards protecting UCH. This can be done by promoting the ‘UNESCO Code of Ethics for Diving on Submerged Archaeological Sites’, and by giving them incentives to bring finds to the national competent authorities.<sup>176</sup> The Code was adopted by the Meeting of States Parties on the proposal of the Advisory Body. It gives some fundamental rules to divers that have to be taken into account when discovering or diving to an UCH site, such as: ask permission to dive a site, only archaeologists may remove an object from a site, respect the measures that have been taken to protect a site, report any findings to the competent authority and hand over the objects that you have taken (only take objects from a site when they are at extreme risk of loss), document the site, do not sell our heritage, be safe and be a role model.<sup>177</sup>

States Parties should provide sufficient funds and technical means to their national authorities so that they can properly manage UCH. They are being encouraged to develop UCH register sheets in line with national legislation dealing with UCH inventory, or to use the Model Sheet for Inventories. Also education, awareness raising and gaining public interest are promoted. The creation of a website is an important feature in this.

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<sup>175</sup> The latest version of the European draft directive for Maritime Spatial Planning includes this obligation under article 8 (*infra*).

<sup>176</sup> Meeting of States Parties, *Considerations of the report and the recommendations of the Scientific and Technical Advisory Body*, 2013, Document UCH/13/4.MSP/220/4 REV 4.

<sup>177</sup> UNESCO, *Code of Ethics for Diving on Underwater Cultural Heritage Sites. I protect, I preserve!*, [www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/divers/code-of-ethics/](http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/divers/code-of-ethics/).



The Meeting of States Parties tries to encourage States Parties to work together on very specific subjects, namely, archaeological research in inland water, sea routes and submerged prehistoric landscapes and sites, especially in relationship to the implementation and promotion of instruments concerned with environmental protection.<sup>178</sup> There also has to be an obligation for the authorities that undertake activities on the seabed or riverbed to confidentially communicate all information on the found UCH or on performed activities affecting UCH.<sup>179</sup>

The Advisory Body recommended the Meeting of States Parties to encourage States Parties to review their national legislation concerned with protecting UCH. This legislation should at least contain rules on the intervention of UCH sites, including on activities that accidentally affect UCH or that affect areas where UCH sites could potentially be located, and where permission of the national authorities is required for an intervention. National legislation should also state that nationals and vessels flying its flag cannot perform any activity directed at UCH that is not in conformity with the Convention.<sup>180</sup>

The last meeting of the Advisory Body (30 May 2013) took place after the last Meeting of States Parties. A few important recommendations were made there as well. As for the issue of how to present and interpret UCH sites for the general public, three important factors were identified: 1. create an adequate legislative framework that implements and promotes the guidelines created for UNESCO 2001, 2. educate the public so that they become aware of UCH and the dangers it faces, and 3. promote access the UCH sites to raise awareness amongst the public. Priority must be given to the protection of the submerged site, but authorities must try to ensure access for the general public to as many sites as possible. Secrecy towards the public may in no way be an option. To achieve this, the idea of a Best Practice List was put forward.<sup>181</sup>

A second recommendation the Advisory Body made to the Meeting of States Parties was “to cooperate with the accredited non-governmental organizations in the promotion of the ratification of the 2001 Convention, capacity-building activities and organization of events (...) to join forces with the non-governmental organizations in organizing common public outreach activities regarding the general public as well as divers, identifying and assessing pressing questions of underwater archaeology”<sup>182</sup>

A final recommendation that was made to the Meeting of States Parties dealt with education and awareness raising. States Parties should be invited “to introduce underwater cultural heritage into their national school curricula and to train teachers in this regard.”<sup>183</sup>

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<sup>178</sup> Meeting of States Parties, *Considerations of the report and the recommendations of the Scientific and Technical Advisory Body*, 2013, Document UCH/13/4.MSP/220/4 REV 4.

<sup>179</sup> UNESCO, *The results of the work of the Advisory Body*, [www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/advisory-body/results/](http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/advisory-body/results/).

<sup>180</sup> *Ibid.*

<sup>181</sup> Technical Advisory Body, *Report, Recommendations and Resolutions of the fourth meeting of the Scientific and Technical Advisory Body*, 2013, Document UCH/12/4.STAB/220/6, 3-4. (hereafter: Report 2013)

<sup>182</sup> Report 2013, *supra* note 181, 6.

<sup>183</sup> Report 2013, *supra* note 181, 7.

### Article 24 – Secretariat for this Convention

“1. The Director-General shall be responsible for the functions of the Secretariat for this Convention.

2. The duties of the secretariat shall include:

(a) organizing Meetings of States Parties as provided for in Article 23 paragraph 1; and

(b) assisting States Parties in implementing the decisions of the Meetings of States Parties.”

UNESCO is the secretariat of UNESCO 2001. It is given the task to organize the Meetings of States Parties and to promote and administrate the Convention. These Meetings shall occur at least every two year and at the request of the majority of States Parties an extraordinary meeting can be convened. In compliance with article 23 of the Convention a Scientific and Technical Advisory Body has been established. It provides its expertise to the Meeting of States Parties on scientific or technical questions.<sup>184</sup>

### Annex: Rules Concerning Activities Directed at Underwater Cultural Heritage

The Annex attached to UNESCO 2001 contains the international standards that have to be taken into account and respected when conducting activities directed at UCH. Their negotiation was no sinecure. The main issue was whether the Rules had to be a part of the Convention or included in an Annex. The final version of the Rules was based on the ICOMOS Charter for the protection and management of UCH of 1990.<sup>185</sup> States raised objections against the attachment of the Charter itself to the Convention, so an alternative set of rules was created based on the rules of the Charter. This led to the realization of the ‘Rules concerning activities directed at underwater cultural heritage’ and was annexed to the Convention.<sup>186</sup>

The Annex contains three main types of Rules. The first set of Rules deals with regulations on the design of a project, the second with clarifications on what competences and qualifications a person undertaking activities must possess, and lastly of course rules concerning methodologies on the conservation and management of a site. Every professional working in the field of UCH should comply with the Rules in the Annex.<sup>187</sup>

## 2.2. Conclusion

UNESCO 2001 is by far the most important international convention for the protection of UCH. The Convention introduces rules for the protection of UCH in the internal waters, archipelagic sea, territorial sea, EEZ, on the continental shelf (and in the Area). Respecting the State’s sovereignty in the territorial sea, but also the interests of other States in the EEZ and on the continental shelf,

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<sup>184</sup> UNESCO, *Information brochure on the 2001 UNESCO Convention*, [http://www.unesco.org/culture/underwater/infokit\\_en/](http://www.unesco.org/culture/underwater/infokit_en/),17.

<sup>185</sup> ICOMOS is a “global non-government organisation (...) which is dedicated to promoting the application of theory, methodology, and scientific techniques to the conservation of the architectural and archaeological heritage”. (ICOMOS, *Introducing ICOMOS*, <http://www.icomos.org/index.php/en/about-icomos/mission-and-vision/mission-and-vision>. The ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage 1996 was developed by the International Committee on the Underwater Cultural Heritage (ICUCH). The purpose of this Charter is to assist in the management and protection of underwater cultural resources. In 2001 the annex of UNESCO 2001 was based on this Charter. The 1996 Charter supplements the Charter for the Protection and Management of the Archaeological Heritage (1990).

<sup>186</sup> Boesten 2002, *supra* note 11, 132-133.

<sup>187</sup> UNESCO, *Information brochure on the 2001 UNESCO Convention*, [http://www.unesco.org/culture/underwater/infokit\\_en/](http://www.unesco.org/culture/underwater/infokit_en/),16.

UNESCO 2001 is a compromise that attempts to accommodate all parties. These compromises often lead to ambiguous and vague provisions that can be interpreted in different ways and give rise to questions on how to practically implement them. Clarification on these provisions can be found in the existing doctrine (although many viewpoints are not shared by all authors), in the Recommendations from the Meeting of States Parties and in the Operational Guidelines.

Besides the provisions that are applicable in the different maritime zones, the Convention gives some crucial general principles that always have to be respected when dealing with UCH. The conservation for the benefit of mankind, the prohibition of commercial exploitation, the preservation *in situ*, the respect for human remains, the long-term preservation of UCH and the duty to cooperate are just some of them.

Besides the provisions that can be found in the Convention itself, the Annex contains the Rules that must be taken into account and respected when conducting activities directed at UCH. These put forward technical and practical guidelines for archaeologists on the requirements for the conduct of research and correct preservation. The Annex helps national competent authorities to know when a permit can be given for archaeological research and what conditions will have to be satisfied.

### **3. Law of Salvage/ finds and The International Convention on Salvage (London 1989)<sup>188</sup>**

#### **3.1. Law of finds**

The law of finds is an old concept that has been incorporated in the common law of property. It grants title to property according to the principle of 'finders keepers'. In order to obtain ownership rights, the finder must prove that the property was 1. never owned or 2. owned at a certain point in time, but then abandoned.<sup>189</sup> The difference between lost and abandoned property is that in case of loss, the owner can still claim his title, while in case of abandonment the finder can almost immediately become the new legitimate owner.<sup>190</sup> An object can be abandoned in two ways: firstly by an express declaration and secondly following an implied act by which the owners desert their property without any hope of recovering it or intention to return to it.<sup>191</sup> Abandonment must be proven by clear, strong evidence such as an express declaration from the owner abandoning his title.<sup>192</sup> The mere passing of time is not sufficient.<sup>193</sup> It is important to know if a property is abandoned to establish whether the law of salvage or the law of finds should apply. The actual possession by the finder combined with the intention to acquire the property<sup>194</sup> creates an interest in that property and can in the absence of a better possessory interest lead to the finder obtaining a clear title.<sup>195</sup>

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<sup>188</sup> The London Salvage Convention of 28 April 1989, *UNTS*, vol. 1953, 193.

<sup>189</sup> J.S. DuClos (2007), A Conceptual Wreck: Salvaging the Law of Finds, *JMLC*, 38(1), 25-38. (hereafter: DuClos 2007)

<sup>190</sup> Dromgoole 2013, *supra* note 5, 171-172.

<sup>191</sup> Boesten 2002, *supra* note 11, 110.

<sup>192</sup> D.W. Nixon (1994), *Marine and Coastal law- Cases and Materials*, Westport, Praeger Publishers, 296.

<sup>193</sup> Boesten 2002, *supra* note 11, 111.

<sup>194</sup> Boesten 2002, *supra* note 11, 109.

<sup>195</sup> DuClos 2007, *supra* note 189.

The law of finds can only be used for property that is situated within the jurisdiction of the court, and in other words property that has been recovered. Opposite to the law of salvage (*infra*), a court cannot protect a find during the process of recovery. This leads to salvors operating secretly in the hope to avoid a possible claim from owners, to prevent competition from other potential salvors and to ensure that they obtain sufficient possession over the find.<sup>196</sup>

### 3.2. Law of salvage

The law of salvage is a very old concept and has its origin in the sea law of Byzantium and the Mediterranean seaport cities.<sup>197</sup> Salvage law, as we know it today, has become customary law and has been adopted by most legal systems. It is frequently being used, especially in common law countries. It was codified in the 1910 Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, which was later replaced by the 1989 International Salvage Convention.<sup>198</sup> (*infra*)

The law of salvage states that anyone who recovers another person's ship or cargo that is in marine peril, is entitled to an award that corresponds with the value of the saved property. In order to have a valid salvage claim three requirements must be fulfilled: 1. there has to be a marine peril, 2. the salvage has to be done as a voluntary act, and 3. the salvage must be successful in whole or in part whereby the service rendered by the salvor contributed to this success.<sup>199</sup>

Marine peril - The property must be saved from a risk of loss, destruction or deterioration. When ships have sunk, marine peril mostly entails damage from fishing nets, dredging, the laying of cables and pipelines or of course competing salvors; as well as damage from storms, currents and waves.<sup>200</sup> The proponents of including UCH under the law of salvage submit that as long as commercially valuable shipwrecks and artifacts lay on the bottom of the sea, this constitutes an economic loss. The failure to reap the value of the shipwreck and its artifacts might in itself create a marine peril, allowing a salvage operation to take place.<sup>201</sup> This seems to be rather farfetched, since the peril taken into account is not the peril that a ship is in, but a financial peril for the productive economy.

Voluntary efforts - The idea that a salvage action must be voluntary encourages the salvaging of property without prior consent from the owner. This is linked to the 'imminent marine peril' from which the property must be saved, creating the consequence that asking for the owner's permission would cost time and might lead to the destruction of the property. For UCH however, it seems very unlikely<sup>202</sup> that it faces such an immediate threat, that asking the owner's prior consent becomes problematic. Nevertheless, the broad definition of 'marine peril' has enabled salvors to recover UCH without prior consent.<sup>203</sup>

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<sup>196</sup> Boesten 2002, *supra* note 11, 109.

<sup>197</sup> M.A. Wilder (2000), Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries, *DCJ*, 69(1), 92-105.

<sup>198</sup> E. Gold (1989), Marine Salvage: Towards a New Regime, *JMLC*, 20(4), 487-503.

<sup>199</sup> Dromgoole 2013, *supra* note 5, 168-171.

<sup>200</sup> Boesten 2002, *supra* note 11, 102.

<sup>201</sup> C. Forrest (2003), Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *JMLC*, 34(1), 309-349. (hereafter: Forrest 2003)

<sup>202</sup> Unless of course in case of a nature disaster, such as an earthquake or volcanic activity on the seabed.

<sup>203</sup> Forrest 2003, *supra* note 201.

Success – Traditionally the success of a salvage operation lies in saving the property from marine peril. It however remains hard to apply this requirement in the context of a salvage operation on UCH due to the fact it is not always entirely clear what ‘success’ would entail in this case<sup>204, 205</sup>.

### Proceedings before the court

A salvage petition brought before the competent national court can be divided in two distinct proceedings: the first proceeding is aimed at gaining the status of “exclusive salvor-in-possession”, while the second proceeding serves to claim an award once the property has been salvaged and is in the possession of the salvor.

The first proceeding is done preliminary. Exclusive salvage rights can be granted by the court to the salvor who has 1. constructive possession over the property, and 2. the intention and capability to perform the salvage operation successfully. The importance of granting a salvor exclusive rights flows from the need to prevent the situation where different salvors compete over the same wreck, potentially leading to dangerous situations for the salvors involved and even harm the integrity of the ship wreck. The notion of ‘constructive possession’ is based on “the legal fiction that the *res*, is a unified object, and recovery of any piece of it, including one or a few artifacts, is constructive possession over the whole of it.” When the two requirements mentioned-above are fulfilled, the court can order that the salvor has the exclusive right to save the shipwreck, excluding all others. However, when the salvor’s capability to effectively recover the shipwreck seizes, the court is enabled to declare the shipwreck open to everyone that elects to overtake the salvage operation.<sup>206</sup>

During the second proceeding, the court is entitled to grant an award. However, such an award can only be granted once the salvage operation has been successful, meaning that the shipwreck must be in the actual possession of the salvor. Normally the salvaged property will either be deemed ownerless (meaning that it has never been owned or that it has been abandoned) in which case an award will be given either through a judicial sale or *in specie*; or the salvaged property will be deemed owned, leading the court to order the owner to pay the salvor an award “for having returned a present value to the property that once was in distress.”<sup>207</sup>

A problem can arise when during the first proceeding the court grants exclusive salvor rights to the salvor while in the second proceeding the conclusion is reached that the sunken property has been abandoned<sup>208</sup>. In such a hypothesis the exclusive salvor-in-possession status could coexist with the salvor asking for the application of the law of finds in the second proceedings, This entails that the salvor would become the owner of the salvaged property. In normal situations a salvage operation

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<sup>204</sup> Following the principle of most international and European Conventions, UCH must be preserved as much as possible *in situ*. When this is not possible, for example due to some kind of marine peril, depending on which Convention is being applied, all sorts of measures must be taken to protect the UCH, such as documenting the site, prior archaeological research, gathering sufficient funding... The mere salvage of the UCH, bringing it to the surface, can therefore not always be perceived as a success in the view of cultural heritage protection.

<sup>205</sup> Forrest 2003, *supra* note 201.

<sup>206</sup> DuClos 2007, *supra* note 189.

<sup>207</sup> *Ibid.*

<sup>208</sup> Abandonment brings with it the legal fiction that the whole world has an equal right to the property. This right ends as soon as actual possession has been taken of the property, or sometimes even when very strong constructive possession can be proven. DuClos 2007, *supra* note 189.

can only lead to a financial award or an award *in specie*. Obtaining ownership rights over the salvaged property is not possible under the law of salvage, only under the law of finds.

However, in legal literature, several policy arguments are submitted which might justify a combination of these two regimes. First and foremost it is contended that if a court would not allow a salvor to become the exclusive salvor-in-possession, the salvor would have to fight off competitors and operate in a hostile environment. Evidently, such an outcome would jeopardize the integrity of the property as well as the lives of those involved in the salvage operation. Conversely, if it would be impossible for a salvor to gain title over the salvaged property as an award, the salvor might opt out of the title of exclusive salvor-in-possession for a chance at ownership rights instead of only a salvage award. "The law of salvage encourages more controlled conduct and conduct overseen by the courts, while the application of the law of finds encourages something more like a free market." In other words, if the courts are not allowed to use both doctrines to one salvage operation, the petitioner will have to choose between these doctrines, creating the possibility that they might choose the free market approach because of the benefits it offers.<sup>209</sup>

### Salvage law and UCH

At the end of the day, it remains useful to recall that salvage law is driven by commercial and economic motives. Only the components holding economic value are relevant for the salvor, since his award is calculated on the basis of the value of the salvaged goods. Since archaeological and historical value are hard to validate in money, the salvor has no reason to pay attention to these when conducting its salvage activity. The law of salvage therefore is in nature detrimental to UCH.<sup>210</sup> Some nuances should however be made to this statement. Firstly, referral can be made to certain cases of the American admiralty courts, in which due regard is paid to the archaeological value of a shipwreck. For instance in the *Cobb Coin* case<sup>211</sup> the Florida District Court suggested that "in order to state a claim for a salvage award on an ancient vessel of historical and archaeological significance, it is an essential element that the salvor document to the Admiralty Court's satisfaction that it has preserved the archaeological provenance of the shipwreck". In the *Klein* case<sup>212</sup> the Court of Appeal refused a salvage award due to the unscientific excavation methods used, that did not protect the historical and archaeological value of the shipwreck.

Arising from the above, authors such as Boesten, point out that one of the most important criteria to determine a salvage award is the skill that the salvor displayed to preserve the archaeological integrity of the shipwreck. This trend was set in the two above-mentioned cases where it was said that the receiving of a salvage award is conditional on how well the archaeological provenance of the wreck was protected. However, it must be pointed out that this principle only takes effect after the claim has been brought to court. Accordingly, such determination can only be made after the start of

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<sup>209</sup> DuClos 2007, *supra* note 189.

<sup>210</sup> Forrest 2010, *supra* note 12, 342.

<sup>211</sup> *Cobb Coin Co. Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, United States District Court, S.D. Florida, 549 F.Supp. 540 (1982).

<sup>212</sup> *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, Court of Appeal, 11th circuit, 758 F.2d 1511 (1985).

the salvage operation. Hence there is no guarantee that the initial search and finding of the wreck has been done with sufficient attention for archaeological heritage.<sup>213</sup>

Other authors disagree with the idea that this approach from the courts would sufficiently protect UCH. One of the main arguments raised in this context has to do with the fact that no monetary value can be given to pure knowledge. Moreover, it is widely known that there are great difficulties in applying the concept of salvage law on sites where the cultural and historical value of the objects in their context outweigh the economic value.<sup>214</sup> Forrest substantiated this criticism by adding that the American courts only look whether the salvor has sufficiently respected the archaeological and historical provenance of the shipwreck, when determining the height of the salvage award. In other words, the skills that a salvor displays to protect a shipwreck’s archaeological and historical value, merely constitutes a criteria for determining the height of the award. As long as the preservation of the archaeological value of UCH is not one of the criteria used to determine success of the salvage operation, salvage law will not preserve the entire value of UCH.<sup>215</sup>

### 3.3. The International Convention on Salvage 1989

In the early twentieth century the Comité Maritime International (CMI) decided to create uniform rules on salvage practices. This led to the 1910 Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea (Brussels), which was later replaced by the 1989 International Convention on Salvage (Salvage Convention). The latter was drafted by the CMI, but adopted by the International Maritime Organization (IMO).<sup>216</sup> The Salvage Convention of 28 April 1989 entered into force on 14 July 1996. In Belgium, it only entered into force on 30 June 2005.<sup>217</sup> All the other States bordering the North Sea have ratified the Salvage Convention.<sup>218</sup>

#### Protection of UCH

The Salvage Convention defines a salvage operation 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” (art.1). The Convention applies whenever a judicial or arbitral proceeding is brought in a State Party (art 2). It can however not be applied to warships and other State owned vessels used for non-commercial purposes (art.4).

It must be reiterated that the Salvage Convention as such was not drafted to protect UCH. Its purpose was to regulate the different aspects of the law of salvage such as the duties that the salvor and owner have towards each other and the methods used for the determination of the size of the

<sup>213</sup> Boesten 2002, *supra* note 11, 106-107.

<sup>214</sup> L.V. Prott and P.J. O’Keefe (1984), *Law and the Cultural Heritage: Discovery and excavation*, Abingdon, Professional Books Limited, 123.

<sup>215</sup> Forrest 2003, *supra* note 201.

<sup>216</sup> Dromgoole 2013, *supra* note 5, 172-173.

<sup>217</sup> Law of 13 May 2003 approving the International Convention on Salvage, done in London on April 28, 1989, *BS* 18 August 2004, 62125;

Decree the Flemish community of 7 May 2004 approving the International Convention on Salvage 1989, drawn up in London on April 28, 1989, *BS* 14 July 2004, 55275;

Decree of the Walloon Region of 29 January 2004 approving the International Salvage Convention of 1989, signed in London on 28 April 1989, *BS* 1 March 2003, 11511;

Ordinance of 5 December 2003 approving the International Convention on Salvage, done at London on 28 April 1989, *BS* 22 January 2004, 03922.

<sup>218</sup> Australian Maritime Safety Authority, *IMO documentation*, <https://imo.amsa.gov.au/public/parties/salvage89.html> (consulted 18 February 2014).

award. As a result, the Convention does not lay down any rules concerning the protection of shipwrecks that are part of a State’s cultural/ historical/ archaeological heritage, except for the very important article 30 of the Salvage Convention. Article 30(1)(d) proclaims that States can reserve the right not to apply the provisions of the Salvage Convention “when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed”. Thus a State Party is enabled to make a reservation against the application of the rules from the Salvage Convention on UCH. This possibility has been used by several States bordering the North Sea. Germany, France, The Netherlands, Norway and the United Kingdom made a declaration under this article to exclude UCH from the scope of the Convention. This means that, at present, Belgium and Denmark are the only two ‘North Sea States’ where the Salvage Convention applies to UCH with a prehistoric, archaeological or historic interest.<sup>219</sup>

On the other side, the possibility to exclude UCH from the scope of the Convention, does create some controversy. In fact, possible conflict may arise between article 30(1)(d) and article 4 of UNESCO 2001. Article 4 of UNESCO 2001 can be interpreted as practically excluding the application of the law of salvage to UCH (*supra discussion on article 4 UNESCO 2001*). When a State has ratified both the Salvage Convention and UNESCO 2001, but forgot to make a reservation under article 30(1)(d), this creates a conflict. At the 1996 meeting of experts it was stated that “because of the private-law non mandatory nature of the Convention, the right to exclude the application of salvage law exists even without express reservation”<sup>220</sup>. However, Gaskell and Dromgoole point out that if this were the case, there would be no point in providing for the possibility to make a reservation.<sup>221</sup> Yet, other authors disagree with what has been contended by the aforementioned authors. Forrest, amongst others, further clarified that the Salvage Convention is concerned with private law, but since it is an international Convention, does impose international obligations on State Parties. A State Party to the Salvage Convention that has not made a reservation under article 30(1)(d) will have to apply salvage law in any case that involves a foreign salvor that is a national of another State Party to the Salvage Convention, unless the latter has made a reservation under article 30(1)(d). When States are parties to the Salvage Convention and to UNESCO 2001, the provisions of the more recent treaty, in this case UNESCO 2001, would prevail. In my view, since UNESCO 2001 deals with the specific matter of protecting UCH and is of a later date than the Salvage Convention, it is clear that parties to UNESCO 2001 and to the Salvage Convention cannot use the law of salvage on UCH unless the requirements of article 4 UNESCO 2001 are fulfilled, even when no reservation has been made under article 30(1)(d) of the Salvage Convention.<sup>222</sup>

Article 303 UNCLOS 1982, rendering the law of salvage applicable on archaeological and historical objects found at sea, of course still needs to be respected. So making a reservation under article 30(1)(d) of the Salvage Convention, only partly solves the problems of the applicability of salvage law on UCH.<sup>223</sup> O’Keefe however explains that the possibility given in article 30(1)(d) of the Salvage

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<sup>219</sup> Ministry of foreign affairs of The Netherlands, *International Salvage Convention 1989* [www.minbuza.nl/producten-en-diensten/verdragen/zoek-in-de-verdragenbank/1989/4/003805.html](http://www.minbuza.nl/producten-en-diensten/verdragen/zoek-in-de-verdragenbank/1989/4/003805.html) (consulted 2 February 2014).

<sup>220</sup> Forrest 2010, *supra* note 12, 259.

<sup>221</sup> S. Dromgoole and N. Gaskell (1999), Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *IJMCL*, 14(2), 171-192.

<sup>222</sup> Forrest 2010, *supra* note 12, 259-260.

<sup>223</sup> Boesten 2002, *supra* note 11, 126.



Convention renders the proof that article 303(3) UNCLOS 1982 is not preventing States to exclude UCH from the salvage regime.<sup>224</sup> In other words, when a reservation has been made under article 30(1)(d) of the Salvage Convention, a State has excluded the application of the law of salvage to UCH, even when that State is also bound by article 303(3) UNCLOS 1982.

### 3.4. Conclusion

On general grounds, it can be concluded that the law of salvage and finds are not made to protect UCH and in many ways are detrimental to it. The fact that commercial value is the key motivation to salvage a wreck, conflicts inevitably with the goal of preserving all archaeological and historical aspects of a shipwreck. However this conclusion must be somewhat mitigated in the lights of the discussed case-law of the US-Court where it became clear that when salvaging a ship, its archaeological and historical value cannot completely be ignored. Letting the amount of the salvage award partly depend on this, creates a positive input towards UCH protection. As for the Salvage Convention, no provisions on UCH protection can be found, except for the possibility to exclude the application of salvage law on UCH all at once, which has been used by most States bordering the North Sea.

## 4. Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris 1972)<sup>225</sup>

The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972 (UNESCO 1972) was adopted by the UNESCO General Conference at its 17th session in Paris on 16 November 1972. UNESCO 1972 entered into force on 17 December 1975 and Belgium ratified the Convention on 24 July 1996<sup>226</sup>. The other States bordering the North Sea have ratified/ accessed UNESCO 1972 as well.<sup>227</sup>

### 4.1. Scope

UNESCO 1972 is applicable to both cultural and natural heritage on land and underwater. The protection of natural heritage is not addressed in this report.

Article 1 gives the definition of cultural heritage as:

“monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

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<sup>224</sup> O’Keefe 2002, *supra* note 86, 179.

<sup>225</sup> Paris Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972, *UNTS*, vol. 1037, 151.

<sup>226</sup> Decree of the Flemish community of 1 June 1994 on the adoption of the Convention on the protection of cultural and natural heritage of the world, done in Paris on 16 November 1972, *BS* 5 August 1994, 20001; Decree of the Walloon region of 7 July 1994 on the adoption of the Convention on the protection of cultural and natural heritage of the world, done at Paris on 16 November 1972, *BS* 26 July 1994, 19225; Ordinance of 17 March 1994 approving the Convention on the protection of cultural and natural heritage of the world, done at Paris on 16 November 1972, *BS* 19 May 1994, 13574; Decree of the German-speaking Community of 19 December 1994 approving the Convention on the protection of cultural and natural heritage of the world, done at Paris on 23 November 1972, *BS* 25 April 1995, 10877.

<sup>227</sup> UNESCO, *States Parties: Ratification Status*, <http://whc.unesco.org/en/statesparties/> (last updated 19 September 2012).

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”

Article 1 holds two criteria which must be fulfilled in order for an element to be considered as ‘cultural heritage’ and to fall under the legal protection of UNESCO 1972. The first criterion consists of three categories of objects that could be considered as cultural heritage: 1. monuments, 2. groups of buildings and 3. sites. In other words, only immovable objects can qualify as world heritage. UNESCO considers a shipwreck as being a moveable object, meaning that it cannot be protected as world heritage.<sup>228</sup> A second criterion that can be distinguished, confines the scope considerably: the cultural heritage must be of ‘outstanding universal value’ from a historical, aesthetic, scientific... point of view (art.2). In order to be of ‘outstanding universal value’, a monument/ group of buildings/site must meet at least one of the criteria as set out in the Operational Guidelines for the Implementation of the World Heritage Convention<sup>229</sup>. These criteria are revised on a regular basis by the World Heritage Committee (the Committee) (chapter III UNESCO 1972) to reflect the evolution of the concept ‘world heritage’. The criteria as they were written down in the Operational Guidelines of 2013 are the following:

- “(i) to represent a masterpiece of human creative genius;
- (ii) to exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;
- (iii) to bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;
- (iv) to be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history;
- (v) to be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change;
- (vi) to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria);
- (vii) to contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;
- (viii) to be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features;
- (ix) to be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals;

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<sup>228</sup> M. Pieters, Feedback via e-mail, 4 April 2014.

<sup>229</sup> “An Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, called “the World Heritage Committee”, is hereby established within the United Nations Educational, Scientific and Cultural Organization” (Art. 8).

(x) to contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.

The protection, management, authenticity and integrity of properties are also important considerations.”<sup>230</sup>

When proposed by a State Party, the Committee will investigate whether a piece of heritage fulfils one of these ten criteria rendering it of ‘outstanding universal value’, When the investigation reaches a positive outcome, the Committee will place this heritage on the World Heritage list or on the list of World Heritage in Danger (art. 11).

Only 733 cultural sites and 29 mixed sites (cultural and natural sites) are on the World Heritage list and 26 cultural sites are on the list of Heritage in Danger.<sup>231</sup> Of the sites inscribed on the first list, only 46 are World Marine Heritage sites, amongst which there is not one cultural site. The Marine heritage under UNESCO 1972 contains 4 mixed sites and 42 natural sites.<sup>232</sup> There is however one site, which is not on the list of World Marine Heritage sites, but that is inscribed on the World Heritage list and offers protection for certain shipwrecks. This is the Bikini Atol site, which can be found nearby the Marshall Islands. This site is a former test site for nuclear weapons. The ships that have been sent to the bottom of the lagoon during the testing are now protected under this World Heritage Site.<sup>233</sup> This is rather exceptional since UNESCO 1972 normally does not apply to shipwrecks.

#### 4.2. Obligations

UNESCO 1972 ensures a rather high level of protection throughout the Convention for world heritage. UNESCO 1972 applies a double responsibility for the protection of world heritage, namely at a national and at the international level.

At a national level, States Parties have “the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage” with or without international assistance and cooperation (art. 4). In order to ensure that effective measures are taken to fulfil the above mentioned duties States Parties must, *inter alia*, integrate the protection of heritage in comprehensive planning programmes; set up services for the protection, conservation and presentation of the heritage; do research and perform scientific and technical studies to enable States to counteract the threats for this heritage; and take all appropriate measures to identify, protect, conserve, present and rehabilitate the heritage (art.5). These obligations are essential, but at the same time can be perceived as rather wide and vague. This grants States a large amount of discretionary power, which is not always used in a way beneficial for world heritage. For example, in the beginning of 2014, the great Barrier Reef Authority has approved the dumping of three million cubic metres of sediment in the Great Barrier Reef Marine Park for the purpose of expanding a nearby port.<sup>234</sup>

<sup>230</sup> Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention*, 2013, Document WHC. 13/01.

<sup>231</sup> UNESCO, *World Heritage list*, <http://whc.unesco.org/en/list/> (consulted 12 February 2014).

<sup>232</sup> UNESCO, *World Heritage Marine Programme*, <http://whc.unesco.org/en/marine-programme/> (consulted 12 February 2014).

<sup>233</sup> UNESCO, *Bikini Atoll Nuclear Test Site*, <http://whc.unesco.org/en/list/1339>, (consulted 4 April 2014).

<sup>234</sup> B. Jabour, “Great Barrier Reef authority approves dredging and dumping to expand port”, *The Guardian*, 31 January 2014, [www.theguardian.com/environment/2014/jan/31/great-barrier-reef-dredging-spoil-dumping-](http://www.theguardian.com/environment/2014/jan/31/great-barrier-reef-dredging-spoil-dumping-)

The protection at the international level is divided in two parts: 1. when requested by another State, States Parties have to offer their help in identifying, protecting, conserving and presenting heritage that is included in one of the two above mentioned heritage lists, and 2. States Parties cannot take any deliberate measures that might damage directly or indirectly the heritage situated on the territory of another State Party (art.6). This last obligation goes quite far. The term 'deliberate measures' is explained very wide. When for example Belgium would give money to build a dam in a developing country, and the construction of this dam causes harm to a world heritage site, this would constitute an infringement under UNESCO 1972. However, no international case law can be found dealing with this type of infringement.<sup>235</sup>

#### 4.3. Conclusion

Even though UNESCO 1972 has a relatively high protection standard and could certainly be of use for the protection of UCH, it is unlikely that in the BPNS a monument, group of buildings or site would be found that complies with the criteria to be marked as 'of outstanding value'. Besides this, the Convention would have been of more value for UCH if UNESCO qualified shipwrecks as immovable goods as well so that they can be included in the scope of UNESCO 1972. Strangely, the only UCH site that is protected consists of, *inter alia*, shipwrecks under the Bikina Atol site. The fact however that only one underwater cultural heritage site is protected, can lead to the conclusion that it is extremely difficult to get UCH qualified as world heritage.

#### 5. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris 1970)<sup>236</sup>

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970 (UNESCO 1970) entered into force on 24 April 1972. Belgium ratified this Convention on 31 March 2009<sup>237</sup>. All the other States bordering the North Sea ratified the UNESCO 1970 as well.<sup>238</sup>

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<sup>235</sup> A. Cliquet, Course International and European biodiversity law, 30 October 2013.

<sup>236</sup> Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970, *UNTS*, vol. 823, 231.

<sup>237</sup> Law of 13 May 2003 approving the Convention relating to the measures to be taken to prevent the illicit import, export and transfer of ownership of cultural property adopted in Paris on November 14, 1970, *BS* 19 June 2009, 42801;

Decree of the Flemish government of 6 February 2009 approving the Convention relating to the measures to be taken to prevent the illicit import, export and transfer of ownership of cultural property adopted by the UNESCO General Conference at its sixteenth session in Paris on 14 November 1970, *BS* 11 March 2009, 21435; Decree of the Walloon Region of 25 March 2004 approving the Convention relating to the measures to be taken to prevent the illicit import, export and transfer of ownership of cultural property adopted in Paris on 14 November 1970, *BS* 7 April 2004, 19281;

Decree of the French Community of 12 May 2004 approving the Convention on the measures to be taken to prohibit and prevent the import, export and unauthorized transfer of ownership of cultural property adopted in Paris on 14 November 1970, *BS* June 4, 2004, 42854;

Ordinance of 3 March 2005 approving the Convention relating to the measures to be taken to prevent the illicit import, export and transfer of ownership of cultural property adopted in Paris on 14 November 1970, *BS* 22 March 2005, 12841;

### 5.1. Scope

UNESCO 1970 was already mentioned under the analysis of article 14 UNESCO 2001 concerning the 'control of entry into the territory, dealing and possession' of illicitly exported and/or recovered UCH. There it was said that States have to respect their obligations under UNESCO 1970 when taking measures in the framework of article 14. What these obligations exactly entail, is discussed below.

The Convention applies to heritage found in the territory of States (preamble and art.4). How far this territory reaches is not further specified. In my opinion it may at least be assumed that the Convention applies to a State's territorial sea as well.

Before a State may assert an interest in any cultural property, a double standard must be fulfilled, namely the definitional test that determines whether an object is in fact 'cultural property' (art 1) and the connection test that determines whether a State has a close enough relationship with the 'cultural property' to make a claim (art. 4).<sup>239</sup>

#### "Article 1

For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manu-factured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs ;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments."

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Decree of the German-speaking community of 30 October 2006 approving the Convention relating to the measures to be taken to prevent the illicit import, export and transfer of ownership of cultural property adopted in Paris on 14 November 1970, *BS* 4 January 2007, 00171.

<sup>238</sup> UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris 1970, <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha>, (consulted 12 January 2014).

<sup>239</sup> J.B. Gordon (1971), The UNESCO Convention on the Illicit Movement of Art Treasures, *Harv. Int'l. L. J.*, 12, 537-557. (hereafter: Gordon 1971)

As already cited above, for an item to be protected, it must meet a dual standard. The first part, namely the definitional test of article 1, holds two criteria. First the property must be “on religious or secular grounds, (...) specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and secondly the property must belong to one of the categories as mentioned in article 1(a-k). These categories are rather wide and seem to encompass almost all types of heritage including UCH. Not only sites, monuments, buildings<sup>240</sup> and shipwrecks, but also individual objects found at sea and elements of submerged sites can fall under UNESCO 1970 when they are designated to do so.<sup>241</sup> According to Gordon the term ‘designated to do so’ can be interpreted in three different ways. The first is that States would have to designate all the property at once (a sort of national inventory of cultural property), the second would be that the designation takes place when the owner or possessor chooses to transport its property over the national boundaries (a sort of passport system), and the third is that no meaning at all should be attached to this phrase.<sup>242</sup> Denmark, France and Sweden made a declaration upon ratifying the Convention identifying which properties qualify as designated properties under article 1. This practice is in accordance with Gordon’s first interpretation.

#### “Article 4

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

- (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
- (b) cultural property found within the national territory;
- (c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
- (d) cultural property which has been the subject of a freely agreed exchange;
- (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.”

The second test is the connection test. This test determines whether a piece of cultural property is part of a State’s cultural heritage. By determining this, an assessment can be made to see whether the cultural property is sufficiently connected to a State in order to give that State preference over other countries. This test can easily lead to discussion, for example when a citizen from one country temporarily lives in another country and there creates something; which then could be claimed by both the person’s country of origin as well as by the country of temporal residence. The Convention

<sup>240</sup> Since the Paris Convention deals with the import, export and transfer of cultural property, buildings and monuments that are still complete and are preserved *in situ*, will obviously not fall under this Convention. Only when for example a piece of an underwater ruin has been removed and is being transferred, the Paris Convention will apply.

<sup>241</sup> Strati 1995, *supra* note 16, 71-72.

<sup>242</sup> For further explanation and an assessment of the advantages and disadvantages of each interpretation see Gordon 1971, *supra* note 239.

does not define which of the criteria under article 4 would be decisive in case of a conflict, nor does it establish any tribunal or agency for the settlement of disputes<sup>243</sup>. As a general rule, it may be assumed that the Convention is meant to legitimate the situation as it was at the time of ratification.<sup>244</sup>

## 5.2. Obligations

The most important obligations that States Parties have under UNESCO 1970 are the following:

Every State Party must set up one or more national services. These have several tasks such as keeping a list of important cultural property; promoting the development of institutions that are responsible for the preservation and presentation of heritage; ensuring that certain heritage is preserved *in situ*; and that certain areas are preserved for archaeological research in the future (art. 5).

A certificate for the export of cultural property has to be introduced and all export from the States Party's territory must be prohibited when the cultural property is not accompanied by such a certificate (art. 6). The requirement of a certificate can partly satisfy the need there is under UNESCO 2001 for an universal permit system. It does not fully compensate this need because 1. this certificate system is not an universal system, since every State can fill in this obligation differently and 2. the certificate only serves to regulate the export of the heritage, and not the excavation.

The difference between UNESCO 1970 and article 14 UNESCO 2001 is that under the former the emphasis is on preventing illicit *import*. According to Strati, under UNESCO 1970, the exporting States carry the major part of the responsibility to put an end to illegal trade and transfer of the ownership of Cultural Property.<sup>245</sup> Nevertheless under this Convention States Parties also have obligations concerning the prevention of illicit *import*. They must “take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned” and “prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention”.(art 7)

UNESCO 1970 applies to cultural property that has been ‘illegally exported’ or ‘stolen’ after the entry into force of the Convention, namely after 24 April 1972. When the State Party of origin asks for the recovery and return of cultural property that was imported after 24 April 1972, the State Party of import must take appropriate steps to facilitate this. UNESCO 1970 has no retroactive effect, meaning that it cannot provide a basis for a claim to recover heritage that was wrongfully removed before the Convention entered into force.<sup>246</sup>

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<sup>243</sup> Except for the provision in article 17(5): “At the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, UNESCO may extend its good offices to reach a settlement between them.”

<sup>244</sup> Gordon 1971, *supra* note 239.

<sup>245</sup> Strati 1995, *supra* note 16, 70.

<sup>246</sup> C. Graber, K. Kuprecht and J. Lai (eds.) (2012), *International trade in indigenous cultural heritage (legal and policy issues)*, Cheltenham, Edward Elgar publishing, 100.

### 5.3. Conclusion

UNESCO 1970 gives additional protection for UCH, by regulating its import and export. In doing so, the duties incumbent on the States Parties are rather comprehensive since obligations are imposed both on the exporting and on the importing State. Hence leaving the duties in this Convention more extensive than the ones under article 14 UNESCO 2001. That said, UNESCO 1970 is surely not a flawless legal instrument. For instance, there are certain provisions in UNESCO 1970 that could use some more clarification, such as 'when and how is a property exactly designated' (art.1) and 'what happens when the test from article 4 creates disagreement amongst States'.<sup>247</sup> Additionally, it remains unsettled how far the scope of UNESCO 1970 reaches, but it is likely that at least aspects of UCH found in the territorial sea fall under this Convention and are protected by it.

### 6. Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague 1954)<sup>248</sup>

The Convention for the Protection of Cultural Property in the Event of an Armed Conflict of 14 May 1954<sup>249</sup> (The Hague Convention) entered into force on 7 August 1956. Belgium ratified the

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<sup>247</sup> For more information on these issues see, *inter alia*, I.A. Stamatoudi (2001), *Cultural Property Law and Restitution – A commentary to international conventions and European Union law*, Cheltenham, Edward Elgar Publishing Limited, 31-66 and Gordon 1971, *supra* note 239.

<sup>248</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, *UNTS*, vol. 249, 215.

<sup>249</sup> There are two protocols to this Convention: The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, *UNTS*, vol. 249, 358 (First Protocol), Ratified by Belgium: Law of 10 August 1960 approving the following international instruments: a) Convention for the Protection of Cultural Property in the Event of Armed Conflict, Rules of Implementation Final Act and Resolutions b) Protocol for the Protection of Cultural Property in the Event of an armed conflict, signed on 14 May 1954, in The Hague, *BS* 16 November 1960, 8868; and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, 38 *ILM* 769 (Second Protocol), Ratified by Belgium: Law of 30 September 2005 approving the Second Protocol to the Convention of The Hague of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 26 March 1999, *BS* 3 January 2001 3; Decree of the Flemish government of 10 July 2010 approving the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 26 March 1999, *BS* 6 August 2010, 50691; Decree of the Walloon Region of 27 May 2004 approving the Second Protocol on the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 26 March 1999, *BS* 16 July 2004, 55770; Decree of the French Community of 12 May 2004 approving the Second Protocol to the Hague Convention of 1954 for the protection of cultural property during armed conflict, done at The Hague on 26 March 1999, *BS* 8 June 2004, 43463; Ordinance of 30 March 2006 on approval of Second Protocol to the Convention of The Hague of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 26 March 1999, *BS* 13 April 2006, 20474; Decree of the German-speaking Community of 17 March 2008 approving the Second Protocol on the Convention of The Hague of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 26 March 1999, *BS* 9 April 2008, 19185.



Convention on 16 September 1960<sup>250</sup>. All the other States bordering the North Sea, except for the United Kingdom, ratified the The Hague Convention as well.<sup>251</sup>

### 6.1. Scope

"Article 1. Definition of cultural property

For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership<sup>252</sup>:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'."

The definition of cultural property is very broad, allowing both underwater and terrestrial heritage to fall under it. Not only sites, monuments and buildings are included, but also any other objects of 'artistic, historical or archaeological interest' (ships for example). The list is not exhaustive, meaning that other objects can be added. The most determinative criterion is that it must be 'movable or immovable property of great importance to the cultural heritage of every people'. This is a very wide and vague criterion, which can incorporate almost any type of property.

Article 3 of the Convention indicates that States must protect the cultural property situated within their territory. Similar to UNESCO 1970, no further clarification is given on how wide this territory can be perceived. It may however once again be assumed that this term at least comprises the State's territorial sea.

The The Hague Convention is very limited in its temporal scope, since it only provides for protection in the event of an armed conflict:

"Article 18. Application of the Convention

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by, one or more of them.

<sup>250</sup> Law of 10 August 1960 approving the following international instruments: a) Convention for the Protection of Cultural Property in the Event of Armed Conflict, Rules of Implementation Final Act and Resolutions b) Protocol for the Protection of Cultural Property in the Event of an armed conflict, signed on 14 May 1954, in The Hague, BS 16 November 1960, 8868.

<sup>251</sup> UNESCO, Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague 1954, <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha>, (consulted 15 January 2014).

<sup>252</sup> When applying a parallel interpretation as the one used under the Faro Convention (*infra*), the wording 'irrespective of ownership' would entail that "the qualification of an object as cultural heritage leaves the private proprietary status that a person or group might have on this item undisturbed".

2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared, that it accepts the provisions thereof and so long as it applies them."

"Article 19. Conflicts not of an international character

1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

2. The parties to the conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention"

The The Hague Convention applies to all possible kinds of armed conflicts, regardless of the parties and nature of the conflict.

## 6.2. Obligations

States Parties must take all measures they consider appropriate during times of peace to protect the cultural property situated in their territory against any foreseeable effects of an armed conflict (art.3). These measures "shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property" (Art.5 Second Protocol). It is forbidden to use heritage in such a way as to damage or destroy it in the event of an armed conflict. States Parties must prohibit any form of theft, pillage or misappropriation and any act of vandalism directed at cultural property. No actions can be taken as a way of reprisal against cultural property (art.4). When occupying (part of) another State's territory, the State Party must (help to) safeguard and preserve the cultural property there present (art 5).

Besides these rather fundamental principles, the The Hague Convention offers a lot more protective measures for cultural property in the event of an armed conflict. However, since the scope of this Convention is limited to times of armed conflict, these will not be analysed further in detail.<sup>253</sup>

## 6.3. Conclusion

The The Hague Convention would certainly serve its purpose in case of an armed attack, prohibiting States to damage or destroy any heritage and obliging them to safeguard and protect it. This Convention is very limited in temporal scope, since it only applies during an armed conflict. Therefore this Convention does not in general offer a lot of added value for UCH protection in the North Sea.

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<sup>253</sup> For more information on the protection of cultural property in armed conflicts and the The Hague Convention see N.E. Stanislaw (1975-1976), International Law and the Protection of Cultural Property in Armed Conflicts, *The Hastings L.J.*, 27, 1069-1088.

### III. Regional Conventions of the Council of Europe

An important remark must be given before discussing the Conventions of the Council of Europe. A great deal of a Convention's legal strength, depends on in which way compliance of States Parties can be enforced. There is a difference between EU legislation whereby in case of non-compliance a proceeding can be brought by the EC before the Court of justice, and the compliance mechanism under the conventions discussed below. Within the Council of Europe a Committee of Ministers is established. This Committee can make non-binding recommendations to the Member States in case of non-compliance in accordance to article 15b of the Statute of the Council of Europe. This is not a strong enforcement mechanism, meaning that States cannot be obliged to comply with the Conventions they have signed in any way.<sup>254</sup>

#### 1. European Convention on the Protection of the Archaeological Heritage (Revised) (Valletta 1992)<sup>255</sup>

In the 1980's the Council of Europe began revising the European Convention on the Protection of the Archaeological Heritage of 1969 (1969 Convention). The idea was to include UCH in its scope.<sup>256</sup> The European Convention on the Protection of the Archaeological Heritage (Valletta Convention) was signed in Valletta, Malta on 16 January 1992 and entered into force on 25 May 1995. Belgium ratified this Convention on 8 October 2010 and it entered into force 9 April 2011<sup>257</sup>. All the other States bordering the North Sea have ratified the Valletta Convention as well.<sup>258</sup>

To the Valletta Convention, an Explanatory Report is added. This is the case with most of the Conventions of the Council of Europe. The committee of experts that drafted the convention prepares the Explanatory Report as well. It is published when the convention is adopted by the Committee of Ministers. The purpose of these reports is to facilitate the implementation of the provisions of the convention. This is however not an authoritative interpretation, meaning that it is not binding.<sup>259</sup> Nevertheless, these reports offer an indication of how the provisions were meant to

<sup>254</sup> Council of Europe, *About the Committee of Ministers*, [http://www.coe.int/T/CM/aboutCM\\_en.asp#P131\\_10512](http://www.coe.int/T/CM/aboutCM_en.asp#P131_10512).

<sup>255</sup> The European Valletta Convention on the Protection of the Archaeological Heritage of 16 January 1992, *CETS*, no. 143.

<sup>256</sup> Dromgoole 2013, *supra* note 5, 45.

<sup>257</sup> Law of 23 June 2008 approving the European Convention for the Protection of the Archaeological Heritage (Revised), done in Valletta on January 16, 1992, *BS* 30 March 2011, 21162;

Decree of the Flemish government of 11 June 2010 approving the European Convention for the Protection of the Archaeological Heritage (revised), prepared in Valletta on January 16, 1992, *BS* 19 July 2010, 46835;

Decree of the French Community of 17 December 2003 approving the European Convention on the Conservation of the Archaeological Heritage (Revised), done at Valetta, on 16 January 1992, *BS* 21 January 2004, 03754;

Ordinance of 20 May 1994 approving the (Revised) European Convention on the Protection of the Archaeological Heritage, done at Valetta on 16 January 1992, *BS* 3 October 2002, 45015.

<sup>258</sup> Council of Europe, *European Convention on the Protection of the Archaeological Heritage (Revised)*, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=143&CM=8&DF=&CL=ENG> (Consulted 14 February 2014).

<sup>259</sup> Council of Europe, *About Conventions in the Council of Europe Treaty Series (CETS)*, [http://www.conventions.coe.int/?pg=/general/IntroConv\\_en.asp](http://www.conventions.coe.int/?pg=/general/IntroConv_en.asp), (consulted 6 April 2014).

be understood and that is why the Explanatory Report of the Convention is frequently used while discussing the Valletta Convention, as well as while discussing the other Conventions below.

### 1.1. Protection of UCH

“Article 1 – Definition of the archaeological heritage

1. The aim of this (revised) Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study.
2. To this end shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs:
  - i. the preservation and study of which help to retrace the history of mankind and its relation with the natural environment;
  - ii. for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and
  - iii. which are located in any area within the jurisdiction of the Parties.
3. The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water.”

Article 1 gives three criteria for an element to be considered as ‘archaeological heritage’: 1. there must be a remain, an object, or even a trace, which originates from human existence of past epochs, 2. the preservation and study thereof must improve the knowledge we have of our history and the relation of mankind with its natural environment and 3. the main source of information must come from excavations, discoveries or any other type of research. In the last paragraph a non-exhaustive list of examples containing several types of elements that can be captured under ‘archaeological heritage’ is included (Explanatory Report art.1).

Unlike in UNESCO 2001, article 1 does not incorporate a time cut-off<sup>260</sup>. The only time indication given is that the cultural heritage must be a remain, object or trace from the past epochs. When examining this phrase, it would appear that findings from the current epoch are excluded. Since most modern archaeologists however see time as a continuum, the determining factor to protect findings will be more whether the preservation and study can ‘help to retrace the history of mankind and its relation with the natural environment’.<sup>261</sup>

The drafters wanted to refine two points in particular in comparison with the definition of the 1969 Convention. Firstly, it is stressed that remains or traces of human existence may be as important as any other object constituting archaeological heritage. In that regard, the example is presented of a discoloration in the soil or an ancient human footprint. For this reason the phrase “elements of the archaeological heritage” is used in article 1. It emphasizes that not only objects are important. “Any evidence, of whatever nature, that can throw light on the past of mankind is important. If that evidence meets the criteria set in paragraph 2, then it is an element of the archaeological heritage”

<sup>260</sup> An implicit time indication is included in article 1. Paragraph 2 states that, *inter alia*, excavations or discoveries must be a main source of information. It is of course possible to conduct archaeological research to learn about more recent objects and traces, but it is hard to consider that excavations would be the main source of information in that case. In this sense article 1(2) holds a hidden time indication, M. Pieters, Feedback via e-mail, 4 April 2014.

<sup>261</sup> Dromgoole 2013, *supra* note 5, 84-85.

(Explanatory Report art.1). Secondly the Valletta Convention brings forward that the context in which an element is found is as important as the element itself. When an object is found in its original context and preserved that way, this adds a lot of extra value to the UCH site for archaeologists conducting research.<sup>262</sup>

In paragraph 3 it is explicitly stated that the Valletta Convention applies to both elements that are situated on land or under water. This provision must be read in the light of point iii under paragraph 2, namely that the element must be located within the area of jurisdiction of a State. This emphasises that the area of State jurisdiction can differ between the individual States. Jurisdiction can extend to the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone or even to a cultural protection zone. Some States of the Council of Europe for example restrict their jurisdiction over shipwrecks to the territorial sea, while others extend this jurisdiction to their continental shelf. The Valletta Convention recognises these differences without indicating any preference towards one or another practice (Explanatory Report art.1).<sup>263</sup>

#### “Article 2

Each Party undertakes to institute, by means appropriate to the State in question, a legal system for the protection of the archaeological heritage, making provision for:

- i. the maintenance of an inventory of its archaeological heritage and the designation of protected monuments and areas;
- ii. the creation of archaeological reserves, even where there are no visible remains on the ground or under water, for the preservation of material evidence to be studied by later generations;
- iii. the mandatory reporting to the competent authorities by a finder of the chance discovery of elements of the archaeological heritage and making them available for examination.”

Nor the size that a protected area under article 2(i) should have, nor the activities that should be prohibited in such an area, are specified in the Valletta Convention. The individual States must decide on this, taking into account the circumstances and the type of site that is encountered (Explanatory Report art.2). There must be specific controls over activities within this area.<sup>264</sup> A buffer zone around monuments and sites should be provided for. This zone can be fixed in size by law, or can be flexible leaving it to the national authorities to determine the appropriate size in each individual case. It can be concluded that the Convention leaves a lot of leeway for States to create their own policies and rules on this matter.

By creating a reserve under article 2(ii), the piece of land constituting that reserve is not per se excluded from further economic use. The designation as a reserve only entails that operations that disturb the ground cannot be allowed, or must be cleared by the competent authorities first. “Any excavation must be subjected to severe scrutiny in the light of scientific objectives” (Explanatory Report art.2).

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<sup>262</sup> Dromgoole 2013, *supra* note 5, 84.

<sup>263</sup> States must however be careful not to violate their obligations under UNCLOS 1982 and UNESCO 2001 when creating for example a legal framework for UCH found in their EEZ or on their continental shelf.

<sup>264</sup> Council of Europe (2002), *European Cultural Heritage (Volume II) - A review of policies and practice*, Strasbourg, Council of Europe Publishing, 55.

The Convention further establishes a licensing scheme under which a permit to interfere with UCH can be granted. Such a permit can only be issued when it is justified by an overriding public interest or a private interest of very great importance, and under the condition that the license holder provides for proper archaeological investigation and documentation.<sup>265</sup>

“Article 3

To preserve the archaeological heritage and guarantee the scientific significance of archaeological research work, each Party undertakes:

- i. to apply procedures for the authorisation and supervision of excavation and other archaeological activities in such a way as:
  - a. to prevent any illicit excavation or removal of elements of the archaeological heritage;
  - b. to ensure that archaeological excavations and prospecting are undertaken in a scientific manner and provided that:
    - non-destructive methods of investigation are applied wherever possible;
    - the elements of the archaeological heritage are not uncovered or left exposed during or after excavation without provision being made for their proper preservation, conservation and management;
- ii. to ensure that excavations and other potentially destructive techniques are carried out only by qualified, specially authorised persons;
- iii. to subject to specific prior authorisation, whenever foreseen by the domestic law of the State, the use of metal detectors and any other detection equipment or process for archaeological investigation.”

Under article 3(i), States Parties are required to establish a system that regulates the conduct of archaeological activities. The most common way to do this, is by introducing a system of permits. (Explanatory Report art. 3).

Excavation must be regarded as the last step in the search for information. Non-destructive techniques must be preferred as much possible. When as a last option a site is being excavated, certain facilities for conservation as well as a management plan dealing both with what is excavated, as well as with what remains on the site, must be in place. The conserved objects must be cleaned and stored rendering them available to future generations of researchers. This brings with it the need for a known depository containing a data base covering any excavation or discovery (Explanatory Report art. 3).

“Article 4

Each Party undertakes to implement measures for the physical protection of the archaeological heritage, making provision, as circumstances demand:

- i. for the acquisition or protection by other appropriate means by the authorities of areas intended to constitute archaeological reserves;
- ii. for the conservation and maintenance of the archaeological heritage, preferably in situ;
- iii. for appropriate storage places for archaeological remains which have been removed from their original location.”

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<sup>265</sup> *ibid.*

"Whereas Articles 2 and 3, paragraph *i*, deal with the setting up of legal and administrative systems to enable the establishment of archaeological reserves as well as the conservation and management of excavated sites and objects, Article 4 imposes on States the obligation to actually take physical measures to bring these about" (Explanatory Report art.4). Notwithstanding the use of the phrase "as circumstances demand", States Parties are obliged to allocate both physical and human resources to fulfil their duties. Article 4 requires States Parties to ensure that "the public authorities are aware of the desirability of establishing archaeological reserves and have the means to do this. It is a continuing obligation, as creation of a reserve is but the beginning of a process of maintenance" (Explanatory Report art. 4).

#### "Article 5

Each Party undertakes:

- i to seek to reconcile and combine the respective requirements of archaeology and development plans by ensuring that archaeologists participate:
  - a in planning policies designed to ensure well-balanced strategies for the protection, conservation and enhancement of sites of archaeological interest;
  - b in the various stages of development schemes;
- ii to ensure that archaeologists, town and regional planners systematically consult one another in order to permit:
  - a the modification of development plans likely to have adverse effects on the archaeological heritage;
  - b the allocation of sufficient time and resources for an appropriate scientific study to be made of the site and for its findings to be published;
- iii to ensure that environmental impact assessments and the resulting decisions involve full consideration of archaeological sites and their settings;
- iv to make provision, when elements of the archaeological heritage have been found during development work, for their conservation *in situ* when feasible;
- v to ensure that the opening of archaeological sites to the public, especially any structural arrangements necessary for the reception of large numbers of visitors, does not adversely affect the archaeological and scientific character of such sites and their surroundings."

In certain cases, projects must go ahead, even if certain aspects of archaeological heritage will suffer damage because of that. In this situation, according to the ICOMOS Charter (*supra* note 163), excavation should be carried out (Explanatory Report art.5). This is dealt with in article 5(ii)(b), where States Parties are required to ensure that consultation between archaeologists and town and regional planners takes place to allocate "sufficient time and resources for an appropriate scientific study to be made of the site and for its findings to be published". Article 6 indicates the source of funds thereto (Explanatory Report art.5). When excavations are being done for development work, sometimes sites come to light. According to article 5(iv), these must be preserved *in situ* as much as possible. How this will be done in practice depends on the nature of a site and what is being constructed. One method would be to excavate the site, cover over the remains and let the construction take place on top of the site. This way the site is recorded and available for future researchers (Explanatory Report art.5).

#### "Article 6

Each Party undertakes:

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- i. to arrange for public financial support for archaeological research from national, regional and local authorities in accordance with their respective competence;
  - ii. to increase the material resources for rescue archaeology:
    - a. by taking suitable measures to ensure that provision is made in major public or private development schemes for covering, from public sector or private sector resources, as appropriate, the total costs of any necessary related archaeological operations;
    - b. by making provision in the budget relating to these schemes in the same way as for the impact studies necessitated by environmental and regional planning precautions, for preliminary archaeological study and prospection, for a scientific summary record as well as for the full publication and recording of the findings.

A significant point in article 6 is that the Valletta Convention requires States wanting to join the Convention to arrange for public financial support for all kinds of archaeological research. The organisation of archaeological research and its administration can differ between countries. For this reason the Convention requires that public financial support comes from 'national, regional and local authorities in accordance with their respective competence' (Explanatory Report art.6).

When archaeological activities are made necessary due to development projects, article 6(ii) places the burden to gain sufficient funding to finance these activities on those who are responsible for the development projects. This approach is not solely used in the Valletta Convention, it can also be found in the UNESCO Recommendation concerning the Preservation of Cultural Property endangered by Public or Private Works (19 November 1968), in the Council of Europe Recommendation No.R(89)5 and in the ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage 1996. According to the Valletta Convention the archaeological heritage is "a source of the European collective memory" and in the words of the ICOMOS Charter is "common to all human society". However, the costs of this protection should not be borne by the public, when the cause of these costs lies with private interests and benefits.<sup>266</sup> The persons benefiting from the development work are responsible for the preservation of what their activities have disturbed. "Major public or private development schemes should provide for archaeological survey work and a full recording of the findings in the same way that provision is made for environmental impact studies"(Explanatory Report art.6). Provisions should be made that allow archaeological excavations as required by article 5 ensuring that the full cost is met by public or private resources. An important aspect of these costs is the full recording and publication of finds (the stages of work after the excavation). Therefore the funds must contain an assessment where the potential of the recovered data is ascertained, and the nature of further studies is identified (Explanatory Report art.6).

#### "Article 7

For the purpose of facilitating the study of, and dissemination of knowledge about, archaeological discoveries, each Party undertakes:

- i. to make or bring up to date surveys, inventories and maps of archaeological sites in the areas within its jurisdiction;
- ii. to take all practical measures to ensure the drafting, following archaeological operations, of a publishable scientific summary record before the necessary comprehensive publication of specialised studies."

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<sup>266</sup> A similar approach can be found in the environmental 'polluter pays' principle.



Article 7 (ii) does not oblige publication, but does require that States Parties take all practical measures to ensure the publication of "firstly, a scientific synthesis, or preliminary report, of the archaeological operation, and, secondly, a final, comprehensive study. The first would reveal what was discovered during the operation, the second would be a comparative analysis of the results of the operation"(Explanatory Report art.7).

"Article 8

Each Party undertakes:

- i. to facilitate the national and international exchange of elements of the archaeological heritage for professional scientific purposes while taking appropriate steps to ensure that such circulation in no way prejudices the cultural and scientific value of those elements;
- ii. to promote the pooling of information on archaeological research and excavations in progress and to contribute to the organisation of international research programmes."

Under this article States Parties are required "to work positively to establish a climate conducive to exchanges by, for example, establishing bilateral arrangements and procedures facilitating the process" (Explanatory report art.8).

"Article 9

Each Party undertakes:

- i. to conduct educational actions with a view to rousing and developing an awareness in public opinion of the value of the archaeological heritage for understanding the past and of the threats to this heritage;
- ii. to promote public access to important elements of its archaeological heritage, especially sites, and encourage the display to the public of suitable selections of archaeological objects."

When access to a site is being denied, States Parties must investigate "alternative methods of presenting the site, for example full-scale replicas or interpretative displays" (Explanatory Report art.9).

"Article 10

Each Party undertakes:

- i. to arrange for the relevant public authorities and for scientific institutions to pool information on any illicit excavations identified;
- ii. to inform the competent authorities in the State of origin which is a Party to this Convention of any offer suspected of coming either from illicit excavations or unlawfully from official excavations, and to provide the necessary details thereof;
- iii. to take such steps as are necessary to ensure that museums and similar institutions whose acquisition policy is under State control do not acquire elements of the archaeological heritage suspected of coming from uncontrolled finds or illicit excavations or unlawfully from official excavations;
- iv. as regards museums and similar institutions located in the territory of a Party but the acquisition policy of which is not under State control: to convey to them the text of this (revised) Convention;
- v. to spare no effort to ensure respect by the said museums and institutions for the principles set out in paragraph 3 above;

- vi. to restrict, as far as possible, by education, information, vigilance and co-operation, the transfer of elements of the archaeological heritage obtained from uncontrolled finds or illicit excavations or unlawfully from official excavations.”

To prevent the illicit circulation of any part of the archaeological heritage, article 10 imposes a number of obligations on States Parties. ‘Illicit circulation’ in this context means “dealing in objects coming from illicit excavations or unlawfully from official excavations” (Explanatory Report art.10). Article 10 does not oblige States Parties to take positive actions, for example actively seek for information on illicit excavations. Only when such illicit excavations come to the State’s attention, is it required to take action (Explanatory Report art.10). When this illicitly excavated heritage is being exported or imported, the provisions of the UNESCO 1970 can become applicable as well.

Article 11 further deals with “bilateral or multilateral treaties between Parties, concerning the illicit circulation of elements of the archaeological heritage or their restitution to the rightful owner.” In Article 12 of the Valletta Convention provision is made for “mutual technical and scientific assistance”. This obligation entails, *inter alia*, that specialists should be exchanged between countries. These specialists include not only archaeologists and personnel trained for the interpretation of data, but as well specialists that are concerned with presenting sites to the public (Explanatory Report art. 12). Finally article 13 foresees in the establishment of a Committee of Experts that reports periodically, proposes measures and makes recommendations to the Committee of Ministers of the Council of Europe.

The Valletta Convention holds a considerable amount of useful provisions for the protection of UCH, but it is far from perfect. In recent literature, the following deficiencies are highlighted: First, the Valletta Convention nowhere mentions the law of salvage or any other laws that are applicable in the marine environment. The reason behind this is that the Valletta Convention is a general Convention, applying both to underwater and terrestrial cultural heritage. Therefore there is no need to draw a clear line between the general rules applicable on the sea and the application of this Convention.<sup>267</sup> This results in an approach where no attention has been paid to the specific circumstances of heritage under water.<sup>268</sup> It would seem however that the application of salvage law is limited anyway because prior authorization for the disturbance of a site must be given by the competent authorities.<sup>269</sup> Second, the implementation of the Valletta Convention depends for a great part on the classical town and country planning system<sup>270</sup>, of which only rarely an equivalent exists under water. Potentially resolving this issue, there is a tendency towards developing maritime spatial plans. At the European level (see *infra* discussion on the Draft directive for Maritime Spatial Planning) general rules on developing maritime spatial plans are proposed, which member States must use as a guideline when drafting their own plans. At national level, Belgium has adopted the Royal Decree on Determining a Maritime Spatial Plan of 20 March 2014<sup>271</sup>. The Royal Decree does not mention UCH protection. In the second annex to the Royal Decree, it is stated that for UCH no separate areas must

<sup>267</sup> Dromgoole 2013, *supra* note 5, 83-86.

<sup>268</sup> A. Bowens (ed.) (2009), *Underwater Archaeology: The NAS Guide to Principles and Practice*, Wiley-Blackwell, West-Sussex.

<sup>269</sup> *Ibid.*

<sup>270</sup> In the preamble is stated “that the need to protect the archaeological heritage should be reflected in town and country planning and cultural development policies” (Preamble Valletta Convention).

<sup>271</sup> Royal decree on Determining a Maritime Spatial Plan of 20 March 2014, *BS* 28 March 2014, 26936.

be foreseen. It should be investigated in what ways UCH can profit from protective measures in the framework of for example nature protection or energy generation. Further it is recognized that certain shipwrecks have an ecological value forming a habitat for all types of fauna and flora.<sup>272</sup> Taking all of this into account, it seems that UCH protection is not a very high priority in the new Belgian legislative framework concerning maritime spatial planning.

Another regrettable point of the Valletta Convention is that the territorial scope of the Convention largely depends on the national attitudes of every State concerning its jurisdiction. For example the Valletta Convention does not oblige States to apply its provisions to their continental shelf, but allows States to determine for themselves (in accordance to international law) how far their jurisdiction in the matter of UCH goes and therefore in which maritime zones the provisions should be applied. Finally, the Valletta Convention is a regional convention, which means that it will not contribute to the protection of UCH at the global level.<sup>273</sup>

The Valletta Convention is perceived as being successful. It entered into force in 1995 and was ratified and implemented by 42 States over the whole of Europe. European scientists and heritage managers see it as an effective standard setting instrument. However, the last couple of years some authors have submitted that it has become outdated and is being superseded by a new generation of instruments, for example the The Faro Framework Convention on the Value of Cultural Heritage for Society of 2005 and the European Landscape Convention of 2000. These are both applicable to UCH in general terms (*infra*).<sup>274</sup>

## 1.2. Conclusion

The Valletta Convention is widely seen as a valuable instrument for the protection of UCH. The territorial scope can be rather wide since it can include a State’s continental shelf and EEZ (although States must still comply with their obligations under UNCLOS 1982 and UNESCO 2001). Since there is no real time cut-off, sunken heritage from for example World War I and II can be included under the Convention.

At the same time this Convention is a general convention (applicable to both terrestrial and UCH). This helps to explain why no attention is paid to issues specifically relating to UCH. Since the Valletta framework is for a large part based on the existence of some type of country and town planning system, it might be contended that this Convention does not offer the ideal protective regime for UCH. Nevertheless, the Convention still has some provisions that can be of great use for UCH protection, such as the obligation to establish a legal and procedural framework for the protection of heritage under articles 2 and 3, as well as physical protective measures imposed under article 4. Also the preference for *in situ* preservation and the obligation to foresee sufficient funding to enable archaeological activities where necessary, can certainly be beneficial for UCH protection.

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<sup>272</sup> Royal decree on Determining a Maritime Spatial Plan of 20 March 2014, Annex 2: long term vision, goals, indicators and spatial policy choices, 48.

<sup>273</sup> Dromgoole 2013, *supra* note 5, 48.

<sup>274</sup> Dromgoole 2013, *supra* note 5, 47.

## 2. Framework Convention on the Value of Cultural Heritage for Society (Faro 2005)<sup>275</sup>

The Faro Framework Convention on the Value of Cultural Heritage for Society of 27 October 2005 (Faro Convention) entered into force on 1 June 2011. Belgium signed this Convention on 25 June 2012, but by the end of 2013 had not yet ratified it. Norway ratified the Faro Convention on 1 June 2011. All the other States bordering the North Sea have not signed the Convention yet.<sup>276</sup>

### 2.1. Scope

“Article 2 – Definitions

For the purposes of this Convention,

a cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time;”

The definition of cultural heritage in the Faro Convention is “the broadest proposed by any international instrument to date” (Explanatory Report art.2). No substantial criteria can be found in this definition, except perhaps that cultural heritage must be ‘inherited from the past’.

By recognizing that human and natural influences in a landscape are inseparable, the definition pays special attention to the environmental dimension. The Convention “thus goes beyond the concept of “historic environment”, which tends to be concerned mainly with tangible aspects of the inherited environment” (Explanatory Report art.2). As for the territorial scope of the Faro Convention, each of the States Parties may specify in which territory the Convention applies (art.20).

Interestingly, this Convention mentions that the qualification of an object as cultural heritage leaves the private proprietary status that a person or group might have on this item undisturbed (“independently of ownership” art 2). However, limiting the exercise of private rights for the public interest can be justified when these limitations are proportionate<sup>277</sup> to the value placed on the item (Explanatory Report art.2). A similar provision cannot be found under UNESCO 2001, since property law had to be left out in order to establish a Convention.

The protection of cultural heritage as such is not the Convention’s main purpose (art.1):

“Article 1 encapsulates the aims of the convention in three assertions, involving:

- a. the existence of rights relating to cultural heritage, derived as an unavoidable consequence of the internationally accepted right to participate in cultural life,
- b. the fact that a right to cultural heritage creates inescapable responsibilities towards that heritage,

<sup>275</sup> The Faro Framework Convention on the Value of Cultural Heritage for Society of 27 October 2005, *CETS*, no.199.

<sup>276</sup> Council of Europe, *Council of Europe Framework Convention on the Value of Cultural Heritage for Society*, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=199&CM=8&DF=&CL=ENG>, (updated 31 March 2014).

<sup>277</sup> “Exercise of the right to cultural heritage may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others.”(art 4); “The Parties undertake to (...) recognise the public interest associated with elements of the cultural heritage in accordance with their importance to society” (art. 5).

c. the fact that the ultimate purpose behind the conservation of cultural heritage and its sustainable use is the development of a more democratic human society and the improvement of quality of life for everyone.” (Explanatory Report art.1)

As can be derived from the aims of the Faro Convention, the responsibility to protect cultural heritage is the inevitable consequence of the right to enjoy cultural heritage. Indeed, the ultimate purpose behind the protection of cultural heritage is “the development of a more democratic human society and the improvement of quality of life for everyone”. To this end the idea of ‘Common Heritage of Europe’ was introduced. This concept entails “all forms of cultural heritage in Europe”, as well as “the ideals, principles and values, derived from the experience gained through progress and past conflicts” (art. 3).

## 2.2. Obligations

In the Faro Convention not many obligations for the actual protection of cultural heritage can be retrieved.

In article 4 the Parties recognize that “everyone, alone or collectively, has the responsibility to respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe;” This seems similar to the duty to protect from article 303(1) UNCLOS 1982 and UNESCO 2001. However, this provision does not seem to impose a real enforceable duty for States to protect their cultural heritage. It is merely stated that the Parties ‘recognize’ that protecting cultural heritage is the shared responsibility of everyone. The other obligations that States Parties have under the Faro Convention are more focussing on the accompanying measures for heritage protection, instead of the core principles needed for protection. These obligations concern, *inter alia*, cultural heritage and dialogue (art.7); environment, heritage and quality of life (art.8), and sustainable use of the cultural heritage (art.9). These aspects are an important part of UCH protection as well, but the Faro Convention as such does not provide the necessary provisions to create a complete framework for the preservation of UCH. Article 6 strengthens this idea by clarifying that no enforceable provisions were meant to be included under the Faro Convention. This provision has the potential of prejudicing the entire Convention, reducing its legal value significantly. The Explanatory Report explains the reasoning behind this provision: “It was thought advisable, for absolute clarity, to emphasise that this Convention does not create any enforceable rights in respect of the subjects with which it deals. Rights of such a character may only be created by national legislative action” (Explanatory Report art.6).

## 2.3. Conclusion

The Faro Convention can assist UNESCO 2001 to better achieve certain goals, such as the raising of public awareness and the long term preservation of UCH, yet it does not deal with the core issues that have to be faced when dealing with the protection of UCH. Moreover, since of all the North Sea States only Norway has ratified the Convention, it will not have a significant impact on UCH in the North Sea. Conclusively, it can be held that the Faro Convention for the time being, adds little value to the general legislative framework protecting UCH in the North Sea.

### 3. European Landscape Convention (Florence 2000)<sup>278</sup>

The European Landscape Convention (Landscape Convention) was signed on 20 October 2000 and entered into force on 1 March 2004. Belgium ratified the Landscape Convention on 28 October 2004.<sup>279</sup> It has been signed and ratified by France, Denmark, Luxembourg, The Netherlands, Norway and the UK. Only Germany did not sign the Convention yet.<sup>280</sup>

#### 3.1. Scope

“Article 2 – Scope

Subject to the provisions contained in Article 15, this Convention applies to the entire territory of the Parties and covers natural, rural, urban and peri-urban areas. It includes land, inland water and marine areas. It concerns landscapes that might be considered outstanding as well as everyday or degraded landscapes.”<sup>281</sup>

The definition used to determine the scope of the landscape Convention is wide and narrow at the same time: narrow because the scope is limited to landscapes, meaning that buildings, monuments, ships, objects... do not fall under the protection of this Convention, and wide because there are no criteria set out in the definition meaning that all types of landscapes can fall under this definition, both terrestrial and situated in ‘*marine areas*’. The Explanatory Report however clarifies that the term “marine areas”, only encompasses the State’s coastal waters and territorial sea (Explanatory Report art.2). So landscapes that are situated on the continental shelf are excluded from the definition of article 2.

The aim of the Landscape Convention is “to promote landscape protection, management and planning, and to organise European co-operation on landscape issues” (art.3). In the preamble and in the Explanatory Report it is said that “the convention is part of the Council of Europe’s work on natural and cultural heritage, spatial planning (...)”. The Landscape Convention compliments the existing conventions concerned with heritage such as the Valletta Convention and UNESCO 1972 (Explanatory Report Preamble).

#### 3.2. Obligations

States Parties have obligations both at the national level and at the international level under the Landscape Convention.

<sup>278</sup> The Florence European Landscape Convention of 20 October 2000, *CETS*, no. 176.

<sup>279</sup> Law of 15 June 2004 approving the European Convention relating to the landscape, made in Florence on October 20, 2000, *BS* 24 November 2004, 77487;

Decree of the Flemish community of 18 July 2003 approving the European Landscape Convention, signed in Florence on October 20, 2000, *BS* 5 September 2003, 44970;

Decree of the Walloon Region of 20 December 2001 approving the European Landscape Convention, signed at Florence, on 20 October 2000, *BS* 30 January 2002, 03037;

Decree of the French Community of 19 December 2002 approving the European Landscape Convention, signed at Florence, on 20 October 2000, *BS* 22 January 2003, 02150;

Decree of the German-speaking Community of 17 May 2004 approving the European Landscape Convention, signed in Florence on 20 October 2000, *BS* 30 July 2004, 58444.

<sup>280</sup> Council of Europe, *European Landscape Convention*, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=176&CM=8&DF=&CL=ENG> (updated 4 February 2014).

<sup>281</sup> Article 15 of the Landscape Convention deals with the territorial application of the Convention. States Parties can choose for themselves in which territory the Landscape Convention will apply (within the limits of their obligations under international law).

The national obligations consist of a number of general measures and specific measures. The most important general measures are: 1. The establishment and implementation of landscape policies concerned with protecting, managing and planning through the adoption of specific measures; 2. The establishment of 'procedures for the participation of the general public, local and regional authorities'; and 3. The integration of landscape in the regional and town planning policies as well as in 'cultural, environmental, agricultural, social and economic policies', or any other policy that potentially has an impact on landscapes (art.5). For the realization of these landscape policies specific measures must be taken. These include measures concerning awareness-raising, training and education, identification and assessment, landscape quality objectives and implementation (art.6). The obligations that States Parties have at the national level are very essential, but rather wide and general. States Parties are obliged to make policies and procedures, but the Convention does not further specify in detail what these policies and procedures should entail. This gives the States Parties a rather wide discretion.

The international obligation that a State Party has is the so-called 'European Cooperation'. The Parties undertake to cooperate in the "consideration of the landscape dimension of international policies and programmes" (art 7). To achieve the aim of the Landscape Convention, States Parties will exchange information and landscape specialists, as well as offer each other technical and scientific assistance (art 8). Trans-frontier cooperation is encouraged, both on a local and regional level, including, where necessary, the preparation and implementation of joint landscape programmes (art 9).

Finally the Landscape Convention gives a distinction in the form of a landscape award that may be conferred "on local and regional authorities and their groupings that have instituted, as part of the landscape policy of a Party to this Convention, a policy or measures to protect, manage and/or plan their landscape, which have proved lastingly effective and can thus serve as an example to other territorial authorities in Europe. The distinction may also be conferred on non-governmental organisations having made particularly remarkable contributions to landscape protection, management or planning" (art.11). The goal is to stimulate the process of "encouraging and recognising quality stewardship of landscapes" (Explanatory Report art.11).

### **3.3. Conclusion**

The Landscape Convention offers a range of protective measures for underwater landscapes both at national and at international level. Underwater landscapes can certainly benefit from these provisions. Unfortunately the protection of underwater landscapes is limited to the States Parties' coastal waters and territorial sea ('marine areas' art. 2). It is positive that States Parties have to make landscape policies and integrate these, as well as procedures for participation of the general public. However, all these obligations are rather general leaving the responsibility to elaborate them to the national authorities. The international framework of European cooperation can, when used to its full extend, certainly assist the protection of underwater landscapes, especially when these landscapes are situated on the territory of more than one state.

#### 4. Convention for the Protection of the Architectural Heritage of Europe (Granada 1985)<sup>282</sup>

The Convention for the Protection of the Architectural Heritage of Europe of 3 October 1985 (Granada Convention) entered into force on 1 December 1987. Belgium ratified the Convention on 17 September 1992.<sup>283</sup> All the other States bordering the North Sea ratified the Granada Convention as well.<sup>284</sup>

##### 4.1. Scope

Based on UNESCO 1972 (Explanatory Report art.1) "'architectural heritage' shall be considered to comprise the following permanent properties:

1. monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings;
2. groups of buildings: homogeneous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest which are sufficiently coherent to form topographically definable units;
3. sites: the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest." (Art. 1)

This definition lays down both qualitative criteria and certain categories of property that can be protected: the property must be of a 'historical, archaeological, artistic, scientific, social or technical interest' (qualitative criteria) and the it must belong to one of the three categories mentioned above (monuments, groups of buildings or sites). When the latter is the case and the property complies with one or more, or even all, of the qualitative criteria, it may be deemed a part of the architectural heritage (Explanatory Report art.1(a)).

As was the case with UNESCO 1972, the scope is rather wide, covering monuments, groups of buildings and sites, but not encompassing other categories such as individual objects or human remains. The Explanatory Report however does indicate the importance of moveable objects that have a particular historical association with the buildings protected under the Granada Convention and points out that, consideration can be given to the possible extension of the protection to these objects (Explanatory Report art.1(b)).

In the Granada Convention, contrary to UNESCO 1972, no requirement is included that the heritage must be of 'outstanding universal value' to fall under the Convention. As for the territorial scope of this Convention, each of the States Parties can for themselves specify the territory in which the Granada Convention applies (art.24).

<sup>282</sup> The Granada Convention for the Protection of the Architectural Heritage of Europe of 3 October 1985, *CETS*, no. 121.

<sup>283</sup> Law of 8 June 1992 approving the European Convention for the protection of the architectural heritage of Europe, drawn up in Granada on 3 October 1985, *BS* 29 October 1993, 23685.

<sup>284</sup> Council of Europe, *Convention for the Protection of the Architectural Heritage of Europe*, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=121&CM=8&DF=&CL=ENG>, (last updated 31 March 2014).



#### 4.2. Obligations

States Parties have to maintain inventories and in the event of a posing threat, they must prepare documentations as soon as possible (art.2). The Parties must take statutory measures to protect the architectural heritage, and within these statutory measures they must make provisions to protect monuments, groups of buildings and sites (art.3).

In order to “prevent the disfigurement, dilapidation or demolition of protected properties”, States Parties must introduce legislation which, *inter alia*, requires the submission of a scheme to the competent authorities for the demolition or alteration of protected monuments, or for the demolition, erection and alteration of buildings that would affect a protected group of buildings or a site. (art. 4)

The removal of protected monuments must be forbidden (in whole or in part), unless this is necessary for its material safeguarding (art. 5). The policies that are made for the protection of archaeological heritage must be integrated in town and country planning, as well as in environmental, cultural and planning policies (art. 10). Finally, the Granada Convention gives a number of more general, nevertheless very important, obligations that can be found in other heritage Conventions as well, such as the duty to: cooperate (art.17), get sufficient financial means (art.6), develop public awareness (art.15), promote training (art.16) and promote scientific research (art.8).

The obligations for the protection of heritage under the Granada Convention are much stricter than those that can be found under for example the Faro and Landscape Convention. This significantly increases the value of the Granada Convention for the protection of heritage. Unfortunately however, the Convention gives the overall feeling that it was not designed for UCH protection. Certain provisions are specifically designed for the protection of terrestrial heritage and have (practically) no added value for UCH. Article 10 for example states that the integration of heritage policies a State’s the town and country planning. As was already mentioned no similar planning exists underwater (although this can quickly change with the drafting of Maritime Spatial Plans). Article 11 submits that States Parties should try to convert old buildings to use them for new purposes. This provision has no relevance for the protection of UCH. Article 4 regulates the erection of new buildings or the alteration of existing ones, in order not to harm any heritage. This provision as well was clearly drafted for the benefit of terrestrial heritage and has little or no purpose for UCH. extend be applied to UCH.

#### 4.3. Conclusion

The Granada Convention holds rather strong legal obligations for the protection of cultural heritage, and some of these obligations can certainly assist to the protection of UCH . Other provisions are not at all relevant for UCH, creating the general impression that the Granada Convention was not intended as a tool for UCH protection.<sup>285</sup> In conclusion it can be said that the Granada Convention is a strong Convention, but with a limited value for UCH protection.

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<sup>285</sup> Strati 1995, *supra* note 16, 80.

## 5. European Cultural Convention (Paris 1954)<sup>286</sup>

The European Cultural Convention of 19 December 1954 (Paris Convention) entered into force on 5 May 1995. Belgium ratified the Paris Convention on 11 May 1955<sup>287</sup>. All the other States bordering the North Sea have ratified this Convention as well.<sup>288</sup>

### 5.1. Scope

The main purpose of the Paris Convention is for States Parties to “take appropriate measures to safeguard and to encourage the development of its national contribution to the common cultural heritage of Europe”(art.1). Nowhere in the Convention is clearly defined what this ‘common cultural heritage of Europe’ entails. In article 5 is stated that every State Party “shall regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe”. The wording “under its control” allows for an extensive application of the scope of the Paris Convention to areas outside the territorial sea of a State Party. Since, for instance, article 303(2) UNCLOS 1982 places the contiguous zone under the control of the coastal State<sup>289</sup>, it might be argued that objects found on a state’s continental shelf, can be regarded as a part of the ‘common cultural heritage of Europe’.

### 5.2. Obligations

Contracting Parties shall promote and facilitate the study of the languages, history and civilisation of the other States Parties, by its own nationals, as well as the study of its own languages, history and civilisation by nationals of the other States Parties (art. 2). Consultation within the Council of Europe for the promotion of cultural activities of European interest is mandatory (art.3 ). To implement articles 2 and 3, the Contracting Parties must “facilitate the movement and exchange of persons as well as of objects of cultural value”, insofar as possible (art.4).

### 5.3. Conclusion

For the protection of UCH, the Paris Convention has no value, since the obligations are very general and are for a large part directed at intangible heritage, such as languages, history and civilisation.

## IV. Maritime Spatial Planning

As indicated in the above parts, several conventions explicitly provide for clear links between the protection of cultural heritage and spatial planning.

In March 2013, the EC adopted a proposal to create a common framework for maritime spatial planning (MSP) and coastal zone management. The explanatory report accompanying this proposal explains what can be understood under MSP and what its purpose is: “Maritime spatial planning is commonly understood as a public process for analysing and planning the spatial and temporal

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<sup>286</sup> The Paris European Cultural Convention of 19 December 1954, *CEYS*, no. 18.

<sup>287</sup> European Cultural Convention, signed 19 December 1954, in Parijs, *BS* 7 Oktober 1995; I. De Troyer (1988), *Repertorium van de door België gesloten verdragen 1941-1986*, Wommelgem, Smits.

<sup>288</sup> Council of Europe, *European Cultural Convention*, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=018&CM=&DF=&CL=ENG>, (last updated 31 March 2014).

<sup>289</sup> Strati 1995, *supra* note 16, 77.

distribution of human activities in sea areas to achieve economic, environmental and social objectives. The ultimate aim of maritime spatial planning is to draw up plans to identify the utilisation of maritime space for different sea uses.”<sup>290</sup> The EC took action to contribute to a more coherent policy.<sup>291</sup> The implementation of MSP remains the responsibility of the Member States. When performing the subsidiarity test, the EU can offer an added value by providing an appropriate framework that allows Member States to adopt “comprehensive, co-ordinated planning and management mechanisms that ensure an integrated maritime planning and coastal management process in European marine regions”. Another added value is the facilitation of cooperation between States that share a marine region with the aim to achieving long-term planning in cross-border seas. There would be no added value in getting the EU involved in the planning process as such, nor in letting the EU to determine the details of the processes.<sup>292</sup> In other words, under the terms of the draft MSP directive, Member States should still be able to plan their own maritime activities.<sup>293</sup>

To demonstrate how difficult it is to decide on how and to what extent the protection of UCH should be incorporated in MSP, an overview is given of the different viewpoints of the Commission, the European Parliament and the Council concerning the place of UCH in the new directive. In this discussion articles 5 and 7 of the proposal play a dominant role. Finally, the latest draft MSP directive (11 March 2014) is discussed.

The original proposal from the EC did not explicitly mention the protection of UCH. Article 7 provided a list of infrastructures/ sites/ activities that Member States must take into account when establishing maritime spatial plans, such as “oil and gas extraction sites and infrastructures”, “submarine cables and pipeline routes” and “nature conservation sites”.<sup>294</sup> The protection of UCH was not included in that list.

In December 2013, the European Parliament amended the EC proposal. In amendment 36 the Parliament altered article 5 of the proposal, which was concerned with ‘objectives of maritime spatial plans’ (and integrated coastal management strategies), by adding cultural heritage protection as an objective of MSP. Article 5 then read as follows: “Maritime spatial plans and integrated coastal management strategies may aim to contribute to further national objectives, such as: (...) (c) ensuring the preservation and protection of cultural heritage”<sup>295</sup>. Amendment 44 on article 7 introduced

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<sup>290</sup> Proposal for a directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal management of 12 March 2013, COM(2013)133final, 2.

<sup>291</sup> European Commission, *Maritime Spatial Planning in the EU - achievements and future development*, Luxemburg, Publications Office of the European Union, 2011, 3.

<sup>292</sup> European Commission staff, Impact assessment accompanying the document proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal management, COM(2013)133final, 32-35.

<sup>293</sup> European Commission - Maritime Affairs, *Maritime Spatial Planning*, [http://ec.europa.eu/maritimeaffairs/policy/maritime\\_spatial\\_planning/index\\_en.htm](http://ec.europa.eu/maritimeaffairs/policy/maritime_spatial_planning/index_en.htm) (consulted 21 February 2014).

<sup>294</sup> Article 7 Proposal for a directive the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal management of 12 March 2013, COM(2013)133 final.

<sup>295</sup> Amendments adopted by the European Parliament on 12 December 2013 on the proposal for a directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal maritime spatial planning and integrated coastal management, P7\_TA(2013)0588, amendment 36. (hereafter: Amendments 2013)

another reference to cultural heritage. The Parliament added “cultural heritage protection sites”<sup>296</sup> to the list in article 7 containing infrastructures/sites/ activities that shall be taken into account by Member States when establishing MSP.<sup>297</sup>

Subsequently, the Council reviewed the proposal and completely altered article 5 by stating that “The provisions of this Directive are without prejudice to the competence of Member States' to determine how and the degree in which the different objectives are reflected in their maritime planning processes and resulting plan or plans.”<sup>298</sup> The Council also altered article 7 to include UCH protection: Member States shall take into consideration “relevant interactions of activities and uses” when establishing maritime spatial planning which can include “underwater cultural heritage”. So the more general term “cultural heritage protection sites” that the Parliament proposed in its amendment was changed in “UCH”.<sup>299</sup>

In the 2014 Presidency compromise proposals, reference to the protection of cultural heritage in article 5, as proposed by the Parliament, was left out and replaced by “The provisions of this Directive are without prejudice to the competence of Member States' to determine how the different objectives are reflected and weighted in their maritime spatial plan or plans”, as was proposed by the Council.<sup>300</sup> In article 7 the idea of the Council was retained and the terminology “UCH” was used.<sup>301</sup>

In the latest draft MSP directive of 11 March 2014, the text of the afore-mentioned provisions are amended again. In article 5 ‘objectives of Maritime Spatial Planning’, there is no reference to UCH anymore. However in the preamble of the this draft, UCH is recognized as an activity demanding maritime space.<sup>302</sup> This is of course not the same as stating that UCH is an objective of MSP. The preamble only recognizes the existence of UCH, but gives no guarantees that Member States will have to take this into account when developing their MSPs. Article 7 became article 8 in this draft. Article 8 states that when setting up MSPs “Member States shall take into consideration relevant interactions of activities and uses. Without prejudice to Member States' competences, possible activities and uses and interests may include: (...) underwater cultural heritage”. As a result, article 8 obliges States to consider UCH when drafting their MSPs.<sup>303</sup>

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<sup>296</sup> Amendments 2013, *supra* note 295, amendment 44.

<sup>297</sup> The European Parliament speaks of Cultural Heritage in general, rather than specifically about UCH. In my view, the reason for this is that the Parliament wanted the MSP directive to include integrated coastal management as well. In the amendments of the Council, as well as in the Presidency compromise proposals and in the latest draft MSP directive, the reference to integrated coastal management has been left out.

<sup>298</sup> Working Document of the General Secretariat of the Council of 19 February 2014, working document 2014/14, 13-14. (hereafter: Working Document 2014)

<sup>299</sup> Working Document 2014, *supra* note 298, 18.

<sup>300</sup> Working Document 2014, *supra* note 298, 13-14.

<sup>301</sup> Working Document 2014, *supra* note 298, 18.

<sup>302</sup> Council of the European Union, Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning, 11 March 2014, Document 2013/0074 (COD), 4 and 16. (hereafter: Proposal 2014)

<sup>303</sup> Proposal 2014, *supra* note 302, 18.

## V. Conclusion

Throughout this report the different international and European heritage conventions have been studied with the objective to assess their value for the protection of UCH in the North Sea and to get a clear view on the regulatory framework in which Belgium operates when establishing its UCH policy and legislation. For the benefit of the SeArch project a few conclusions can be made.

First and foremost, it must be mentioned that an important difference between international conventions and the conventions of the Council of Europe lies in their enforceability. Compliance with international Conventions can be enforced by the dispute settlement mechanisms incorporated in the conventions or by general international mechanisms. Enforcement of compliance with the conventions of the Council of Europe is softer. The Committee of Ministers can solely give non-binding recommendations in case of non-compliance of one of the States Parties.

Secondly, throughout this report, it has been established that the most important provisions for UCH protection are found at international level rather than at the level of the Council of Europe. UNESCO 2001 is by far the most valuable convention to create an international framework for UCH protection, as well as to base national UCH legislation on. At the end of 2013, only Belgium and France as North Sea States ratified UNESCO 2001. In contrast to this, all the States bordering the North Sea have ratified UNCLOS 1982, obliging them all to, at least, protect UCH and to cooperate for this purpose. A downside to both Conventions dealing specifically with UCH, is the incorporation of constructive ambiguities as a result of compromises made to achieve a consensus. As a result the provisions in UNESCO 2001 and UNCLOS 1982 are general and vague, often leading to different interpretations.

Thirdly, other conventions, both international as well as from the Council of Europe, are dealing with aspects of heritage protection that can be applied to UCH as well. These Conventions however have a few important limitations. They only deal with a very specific aspect indirectly related to UCH protection (import and export, protection during armed conflicts...), or only with a certain type of heritage (landscapes; monuments, groups of buildings and sites of outstanding universal value...). These conventions can therefore not serve as a comprehensive overall protective framework for UCH, but only have value for the specific topics they are dealing with. Some have a few provisions that can help with the protection of UCH, but were not drafted for this purpose, such as the Granada Convention. Other conventions were designed to address both terrestrial and UCH, such as the Valletta Convention, but do not pay any regard to the typical issues of UCH protection. In the Valletta Convention this manifested itself by the lack of a reference to the law of salvage and the fact that the Convention was largely based on the implementation of heritage protection in town and country planning. Finally, certain conventions allow for a rather wide scope such as the Valletta Convention, while in others the scope is limited to internal waters and the territorial sea, as is the case with the Landscape Convention. To get a comprehensive framework for the protection of UCH in the North Sea, it is crucial that every State's contiguous zone and EEZ are included under the protective regime as well.

The European draft directive on Maritime Spatial Planning, aims to introduce general guidelines for national maritime spatial planning, with major focus on procedural issues. After several

amendments, UCH protection has been incorporated in the preamble and in article 8 of the draft directive. In contrast, the Belgian Royal Decree on Maritime Spatial Planning pays no attention to the protection of UCH.

On the application of the law of salvage and finds cases before the American admiralty courts have demonstrated that the law of salvage is not per se irreconcilably with the protection of UCH. Although, this was only in a limited way and the remark was given that the criterion of protecting the archaeological integrity of a salvaged site should not only be taken into account for determining the height of the salvage award, but also for determining whether the salvage operation was successful. Regardless of the fact whether salvage law can be considered as UCH friendly or not, the 1989 Salvage Convention still provides the possibility to exclude UCH from its scope. All the States bordering the North Sea, except for Belgium and Denmark, have made use of this possibility.

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