

applying them to unilateral acts such as promises, waivers, recognition, and protests.⁴⁰ In making distinctions between these categories, Ambassador Rodríguez Cedeño relied upon comments received from governments in their statements in the Sixth Committee of the General Assembly and in response to the questionnaire prepared by the Commission in 1999.⁴¹

The report also considered the interpretation of unilateral acts and urged that close attention be paid to establishing applicable rules in this regard. The special rapporteur proposed two draft articles drawn from Articles 31 and 32 of the Vienna Convention on the Law of Treaties dealing with the interpretation of treaties.⁴² In addition, the report addressed the creation of a unilateral act, the production of legal effects, the enforceability and opposability of the act, and the causes of its invalidity.

A working group on the topic met in the second half of the session and, inter alia, encouraged the special rapporteur to submit further questions to governments. The Commission also drew attention to the questionnaire previously prepared by the special rapporteur and “encourage[d] Governments to reply to that questionnaire as soon as possible.”⁴³

VI. LONG-TERM PROGRAM AND CONCLUSION

The Commission affirmed its intention to commence work in 2002 on two of the five topics listed in its long-term program of work.⁴⁴ One of the two new topics is likely to be responsibility of international organizations. The Commission intends to select both new topics as near to the beginning of the session as possible, which would enable it to make the most effective use of its time, including by gaining the maximum benefit from its current practice of splitting the session into two parts.

The achievement of the draft on state responsibility leaves little room to question the quality of the Commission’s work. It now remains for the ILC to organize itself and for the special rapporteurs to adhere to deadlines and goals so that the Commission can maximize the quantity as well as the quality of its output.

ROBERT ROSENSTOCK AND MARGO KAPLAN*

NEW DEVELOPMENTS IN THE LAW OF THE SEA: THE UNESCO CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

November 2, 2001, marked an event of great importance to the whole community concerned with the protection of culture and underwater archaeology: the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Protection of Underwater Cultural Heritage (Convention),¹ concluding a complex and difficult process. The formal negotiations lasted for four years within UNESCO, while the whole process, beginning with the first proposals and the draft prepared by the International Law Association and transmitted to UNESCO in 1994,² took at least twice as long.

⁴⁰ For the full text of the proposed articles, see Victor Rodríguez Cedeño, Fourth Report on Unilateral Acts of States, UN Doc. A/CN.4/519, para. 154 (2001), available at <<http://www.un.org/law/ilc/sessions/53/53docs.htm>>.

⁴¹ *Id.*, paras. 9–10.

⁴² *Id.*, paras. 101–52. For the draft articles, see *id.*, para. 154.

⁴³ 2001 Report, *supra* note 1, para. 25.

⁴⁴ For a full discussion of the long-term program of work, see *id.*, paras. 255–60.

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¹ Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 ILM 40 (2002) [hereinafter Convention], available at <http://www.unesco.org/culture/laws/underwater/html_eng/convention.shtml>.

² International Law Association, Draft Convention on Underwater Cultural Heritage (1994), reprinted in Patrick J. O’Keefe & James A. R. Nafziger, *Report: The Draft Convention on the UCH*, 25 OCEAN DEV. & INT’L L. 391 (1994) [hereinafter ILA Draft].

As the specialized body on culture within the UN system, UNESCO provided the negotiations with a framework specific to the cultural dimension of underwater cultural heritage (UCH) and different from the more general framework of the negotiations of the Third United Nations Conference on the Law of the Sea (UNCLOS III) that resulted in the adoption in 1982 of the United Nations Convention on the Law of the Sea (LOS Convention).³ Within the broad structure of the law of the sea and in conformity with the balance of interests set out in the LOS Convention, the new universal instrument stands as a *lex specialis* for UCH and its protection, whereas the LOS Convention remains an authoritative *lex generalis* for the whole law of the sea and, in principle, for all issues related to it.⁴ Though more “specific” and “technical” because they were limited to the protection of UCH, the UNESCO negotiations encountered most of the difficulties met during UNCLOS III, such as the uncertainties linked to the formation of customary international law and the possibility of unilateral claims to rights at sea. More specific difficulties arose from the different views on the extent UCH should be protected as opposed to accommodating interests (mainly economic) often seen as somehow conflicting with such protection, and the maintenance of freedom of the high seas.

During the negotiations the UNESCO director-general established consensus as the preferred means of reaching agreement. Though consensus has also been used in the maritime sector, as for the 1995 UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, which was adopted without a vote, and most of the delegations within UNESCO took its achievement seriously and engaged in intense and constructive formal and informal negotiations, consensus was not reached.⁵ On November 2, 2001, the General Conference in plenary adopted the Convention by a vote of 87 in favor, 4 against, and 15 abstentions. A few days earlier, on October 29, Commission IV (Culture) of the General Conference had already adopted the same draft by a vote of 94 in favor, 5 against, and 19 abstentions. Despite having thus come close to consensus, this Convention is neither the first, nor will it probably be the last—in general, as well as in UNESCO practice—to be adopted by vote. In itself, lack of consensus is not an obstacle to achieving extensive ratification in the future. To look at the bright side, the Convention seems unaffected by a frequent drawback of consensus-adopted instruments, that is, a weakness of content resulting from resort to stock solutions.

The UNESCO initiative aimed at protecting UCH more substantially and extensively than had been done under international law so far. The latter, as codified by the LOS Convention, establishes a duty (*sui generis*) to protect UCH without spelling out its precise content, the minimum threshold of protection, or even a definition of UCH. This vagueness (with reference to the scope *ratione materiae*) and weakness concern both Article 303 and Article 149 on historical and archaeological objects. Paragraph 1 of Article 303 is *lex generalis*, as in principle it covers UCH located anywhere within the scope of the LOS Convention. On the other hand, paragraph 2 of Article 303 and Article 149 are *lex specialis*, the former for UCH only in the contiguous zone whose maximum extent is 24 miles, and the latter for UCH only in the area beyond national jurisdiction (Area). The Convention therefore accommodates the recognized need and logic for protecting UCH stated by the LOS Convention and establishes the new *lex specialis* for UCH whose desirability was already implicitly acknowledged in 1982.⁶ From a more technical standpoint, the Convention implements the weak and in-

³ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397 [hereinafter LOS Convention].

⁴ One should not lose sight of the fact that, at least according to the preamble to the LOS Convention, the desire was “to settle . . . all issues related to the law of the sea.” The preamble also recognizes, however, that there are matters “not regulated” by the LOS Convention. They continue to be governed by the rules and principles of general international law.

⁵ As early as July 7, 2001, the last day available for the meeting of governmental experts, the delegation of the Russian Federation called for a vote, which resulted in the adoption of the draft by that group by 49 in favor, 4 against, and 8 abstentions.

⁶ LOS Convention, *supra* note 3, Art. 303(4).

sufficient rules of the LOS Convention by specifying the definition of UCH and the minimum threshold of its protection by means of a high-standard system. To this extent, the Convention "implements" the directives set out in the LOS Convention.⁷

The increasing number of intrusive and destructive operations on, and looting of, UCH suggests that the weakness of the existing regime under the LOS Convention may prove even more unsatisfactory than previously. This predatory practice has generated wide concern for the protection of UCH, recently confirmed by universal instruments, such as Resolution 54/31 of the UN General Assembly,⁸ and statements at the national level.⁹ The increase in this practice has been greatly facilitated by technological developments that have made it possible to engage in underwater activities at radically wider areas and greater depths,¹⁰ and have opened them to many more persons, including nonprofessionals in maritime archaeology who are not necessarily keen on its preservation or schooled in techniques for achieving it. These technological developments are enormous, even if compared to a past no more distant than the time of negotiation of the four 1958 Geneva Conventions. Somewhat paradoxically, these technological developments have constituted both an opportunity and a danger for UCH, as it gained greater access to maritime archaeology, scientific knowledge, and preservation techniques, but progressively lost most of the natural protection ensured by depth and physical laws. The international community represented in UNESCO has strongly resisted the uncontrolled removal and looting of UCH, which deprives society of valuable knowledge, by elaborating the new Convention and investing it with a content of both a high standard and a uniform character for the protection of UCH.

This short Note focuses on the content of the new Convention,¹¹ dealing in part I with the general regime of protection of UCH, and in part II with the different regimes for the various maritime zones.

I. THE GENERAL REGIME APPLICABLE TO ALL MARITIME ZONES

Even though it represents *lex specialis* for UCH, the new Convention is linked to the LOS Convention and its undeniable authority as the general treaty on the law of the sea and a treaty in force for more than 135 states. Article 3 of the Convention expresses this link by stating that nothing in the latter "shall prejudice the rights, jurisdiction and duties of States

⁷ The idea of "implementation" of the LOS Convention by the new Convention, often mentioned during the debates, remains fragile to the extent that the scope of application (*ratione materiae*) of the two conventions is not easily comparable, as the LOS Convention never defined its notion of the objects referred to in its Articles 149 and 303 (paragraphs 1 and 2). The correspondence of these objects to the notion of UCH in the Convention is here simply assumed *brevitatis causa* to enable a comparison of the two instruments.

⁸ Oceans and the Law of the Sea, GA Res. 54/31, pmbl. (Jan. 18, 2000).

⁹ E.g., George W. Bush, Statement on United States Policy for the Protection of Sunken Warships, 37 WKLY. COMP. PRES. DOC. 195, 195 (Jan. 22, 2001) ("The unauthorized disturbance or recovery of these sunken State craft and any remains of their crews and passengers is a growing concern both within the United States and internationally.")

¹⁰ For instance, as stated in the *R.M.S. Titanic* case: "Because the wreck lies under 2.5 miles of water, where there is virtually no light, the water is frigid, and the water pressure beyond general comprehension, only the most sophisticated oceanographic equipment can explore the site and recover property." *R.M.S. Titanic v. Haver*, 171 F.3d 943, 966 (4th Cir. 1999).

¹¹ Detailed commentary on each provision cannot be provided here. For commentary on the provisions of the LOS Convention on UCH and elements of domestic and international practice, see ANASTASIA STRATI, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA* (1995); Jean-Paul Beurrier, *Pour un Droit international de l'archéologie sous-marine*, 93 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* [RGDIP] 45 (1989); Lucius Caflisch, *Submarine Antiquities and the International Law of the Sea*, 1982 *NETH. Y.B. INT'L.L.* 3; Raymond Goy, *L'Épave du Titanic et le droit des épaves en haute mer*, 1989 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* 752; Umberto Leanza, *La Zona archeologica marina e la protezione dei beni culturali subacquei*, in *LA PROTEZIONE INTERNAZIONALE E LA CIRCOLAZIONE COMUNITARIA DEI BENI CULTURALI MOBILI* 91 (Pasquale Paone ed., 1998); Tullio Treves, *Stato costiero e archeologia marina*, 76 *RIVISTA DI DIRITTO INTERNAZIONALE* 698 (1993); Philomène A. Verlaan, *Marine Archaeology: A Trojan (Sea) Horse?* 1989 *OCEAN Y.B.* 231; Ingo von Münch, *Schiffswracks. Völkerrechtliche Probleme*, 20 *ARCHIV DES VÖLKERRECHTS* 183 (1982).

under international law, including the United Nations Convention on the Law of the Sea," and that the interpretation and application of the Convention shall be "in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea." This language resulted from a long debate between the more "conservative" delegations, which favored a strong link to the LOS Convention, and the more "innovative" ones, which argued for more autonomy for the new Convention. Article 3 attests that between 1982 and 2001 no conspicuous or revolutionary change in the delicate balance between the general prerogatives of coastal states and flag states as codified in the LOS Convention was either meant to occur, or in fact occurred, at UNESCO. This continuity, however, does not obscure the fact that the two Conventions are autonomous instruments with their own content and scope of application, and that some flexibility is therefore necessary in handling the rather standard formulas of Article 3.¹² Though this provision does not mention the need to interpret the Convention uniformly as much as possible, in conformity with its international character, as is clearly expressed in some other treaties,¹³ this need also implicitly applies to the new Convention.¹⁴ Adjudicators and arbitrators should develop a uniform interpretation of the Convention and UNESCO may contribute by collecting the elements of interpretation embodied in awards or judgments and making them available to other adjudicators and arbitrators.

A key issue of the negotiation, especially in the early stage, was to define this rather indefinable "cultural" characterization of property and objects. Beyond an appearance of universality of culture, legal characterizations of "cultural" property are often "unilaterally oriented" and usually understood by each state according to its own criteria for the legal and material protection of the objects in its territory. This character is not irrelevant and creates a sort of power of attraction (*vis attractiva*) that makes the drafting, and later to some extent even the operation, of a uniform definition in an international convention problematic.¹⁵ After considering a number of proposals and counterproposals, the delegates adopted a broad definition of UCH: it covers "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."¹⁶ The breadth of the definition is self-explanatory; the list that follows it¹⁷ is merely open-ended and descriptive of the main examples of heritage; and the potential reach of the definition is subject only to a time limit: an underwater presence, periodic or continuous, for at least one hundred years. As adopted, the definition

¹² For instance, strictly applying the statement(s) that the Convention shall not "prejudice" the duties of states parties under, inter alia, the LOS Convention and/or that its interpretation and application shall be "in a manner consistent with," inter alia, the LOS Convention may end up paralyzing the new Convention, whose regime certainly elaborates on, and increases the substance and reach of, the duties to protect UCH for states parties. On the other hand, no particular precaution seems needed concerning the interpretation in the context of the LOS Convention of those other provisions of the Convention that are not substantial and innovative rules but simply references to notions codified in the LOS Convention such as "continental shelf" (not defined in the new Convention) and "Area" (defined in Article 1(5), following Article 1(1)(1) of the LOS Convention).

¹³ That is the case especially in private law international conventions. See, e.g., United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, Art. 7(1), 19 ILM 668 (1980).

¹⁴ As already for other existing maritime conventions. See generally Francesco Berlingieri, *Diritto marittimo uniforme e attuazione delle convenzioni internazionali*, in L'UNIFICAZIONE DEL DIRITTO INTERNAZIONALE PRIVATO E PROCESUALE 37 (1989).

¹⁵ For a further analysis of these difficulties for movable cultural property, which may apply also to UCH once recovered, displaced, and subject to different legal systems and regimes, see GUIDO CARDUCCI, LA RESTITUTION INTERNATIONALE DES BIENS CULTURELS ET DES OBJETS D'ART: DROIT COMMUN, DIRECTIVE CEE, CONVENTIONS DE L'UNESCO ET D'UNIDROIT 214-40 (1997).

¹⁶ Convention, *supra* note 1, Art. 1(a).

¹⁷ *Id.* It is a three-branched list: "(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."

rejects the proposal of some delegations to limit it through the insertion of a "significance" test.¹⁸ This rejection does not necessarily imply what was occasionally stated, i.e., that the definition imposes an extreme obligation to protect any human trace with a presence in water since at least a century ago. Actually, the quality of a cultural, historical, or archaeological "character" does allow for some flexibility of interpretation, which, once kept within the due limits of a bona fide interpretation of the Convention¹⁹ and the general duty to cooperate for the protection of UCH,²⁰ should prevent such extreme readings, though the definition of UCH remains broad.

The status of state vessels and aircraft arose from the beginning of the debates. As the legal status of warships in international law was felt by many to be certain as long as they are vessels navigating under flag state jurisdiction, but rather uncertain when they sink and lose the ability to navigate as "ships," a provision specific to state vessels and aircraft was ruled out at first. It was later inserted in the Convention on a compromise basis. Its notion of "State vessels and aircraft" covers a wide category of UCH: "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."²¹ The regime applicable to these vessels and aircraft reflects different compromises reached for each maritime zone: they require at least giving *information* to, and at the most getting the *agreement* and *consent* of, the flag state before an activity directed at this particular UCH can be conducted.²² As such state vessels and aircraft are considered UCH, therefore *objects* of protection, they should in no way be confused with warships and other government ships or military aircraft with sovereign immunity that are still in operation and are considered to be *means* of protection of UCH under a different provision of the Convention.²³

While the Convention had to deal with the most delicate political and legal issues, the technical nature of the annex that was attached to it shielded it, in a way, from these complexities and resulted in a valuable codification of homogeneous and rigorous rules based on the 1996 International Charter on the Protection and Management of the Underwater Cultural Heritage.²⁴ These rules establish a high standard of effective protection of UCH before and during activities directed at it.

In view of the variety of underwater activities that have a possible link to UCH, the Convention draws an important line. Activities "directed at underwater cultural heritage" have UCH as a primary object and may, directly or indirectly, physically disturb or otherwise damage it.²⁵ Activities "incidentally affecting underwater cultural heritage" do not have UCH as a primary object or one of their objects but may nevertheless physically disturb or otherwise damage it.²⁶ Though the Convention and the annex focus on the former category of activ-

¹⁸ For an argument in favor of this test by a commentator who did not participate in the negotiations, see David J. Bederman, *The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal*, 30 J. MAR. L. & COM. 331, 332-34 (1999).

¹⁹ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 31(1), 1155 UNTS 331.

²⁰ Convention, *supra* note 1, Art. 2(2).

²¹ *Id.*, Art. 1(8).

²² *See id.*, Arts. 7(3), 10(7), 12(7).

²³ *Id.*, Art. 13.

²⁴ The charter was adopted by the International Council on Monuments and Sites (ICOMOS), a nongovernmental organization, on October 9, 1996, in Sofia and ratified by the ICOMOS General Assembly with representatives from more than eighty countries. International Charter on the Protection and Management of the Underwater Cultural Heritage (Oct. 9, 1996), at <http://www.international.icomos.org/under_e.htm> [hereinafter ICOMOS Charter].

²⁵ Convention, *supra* note 1, Art. 1(6).

²⁶ *Id.*, Art. 1(7).

ities, they in no way ignore the latter category. The Convention requires each state party to use the best practicable means at its disposal to prevent or mitigate any adverse effect on UCH that might arise from these activities under its jurisdiction.²⁷ As regards activities directed at UCH, the Convention clearly sets forth its objectives and general principles. States parties have a general duty to cooperate in the protection of UCH²⁸ and to preserve UCH for the benefit of humanity in conformity with the Convention.²⁹ This reference to the benefit of humanity is an important recognition that UCH deserves protection in itself and not just as a concern of a specific state. This reference may also be interpreted as implicitly acknowledging that the Convention does not address issues of exclusive rights such as ownership of UCH. This gap reflects two implicit assumptions about the difficulty of establishing ownership of UCH. First, from a historical standpoint, the variety of origins of cargo and vessels often links UCH, especially if underwater since earlier times, to various cultures and states. This variety may be even more complex nowadays, since cultures evolve in their geographic reach and, to a lesser extent, the territories formerly belonging to a given state may now be under the sovereignty of different states. Second, from a technical and legal standpoint, the issue of ownership of UCH was too complex and time-consuming for a negotiation that was already difficult enough. Though justifiable, the exclusion of ownership is a gap in the Convention. The latter assumes ownership to be governed by the applicable (domestic) private law rules—as does the LOS Convention³⁰—and to provide title to the one who owned the UCH until abandonment.³¹

In accordance with other general principles, states parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with the Convention and with international law that are necessary to protect UCH. While existing international law does not provide clear rules on either the priorities of preservation or the technical aspects of activities directed at UCH, the Convention and its annex set forth both kinds of rules and adopt an important principle for underwater archaeology: preservation *in situ* of UCH “shall be considered as the first option” before allowing or engaging in any activities directed at UCH.³² This principle originated in the 1996 ICOMOS Charter³³ and implicitly rejects the idea that UCH is in danger because of the simple fact that it is underwater and therefore needs to be recovered.³⁴ The Convention takes a further clear position: UCH “shall not be commercially exploited.”³⁵ The annex adds substance to this position: “commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage,” and the latter “shall not be traded, sold, bought or bartered as commercial goods.”³⁶ Though this rule was unanimously adopted, a degree of flexibility was granted at the request of some delegations.³⁷ Under the principle of preservation *in situ*, activities directed at UCH shall be authorized in a manner consistent with the protection of that heritage and, subject to this requirement, for the purpose of making a significant contribution to the protection or knowledge or enhancement of UCH.³⁸ The high standard set by the annex is also reflected in the

²⁷ *Id.*, Art. 5.

²⁸ *Id.*, Art 2(1), (2).

²⁹ *Id.*, Art. 2(3).

³⁰ LOS Convention, *supra* note 3, Art. 303(3).

³¹ This assumption is also implied where the Convention refers to the law of finds. Convention, *supra* note 1, Art. 4.

³² *Id.*, Art. 2(5).

³³ ICOMOS Charter, *supra* note 24.

³⁴ See Convention, *supra* note 1, Art. 4 (salvage law).

³⁵ *Id.*, Art. 2(7).

³⁶ *Id.*, annex, Rule 2.

³⁷ *Id.*, annex, Rule 2, para. 2 (rule paras. are unnumbered).

³⁸ *Id.*, annex, Rule 1.

further conditions that are placed on these activities. The annex does not omit the crucial issue of exceptions to the principle of *in situ* preservation.³⁹

One of the major achievements of the Convention is the compromise solution on the crucial issue of the status, if any, to grant to the law of salvage and the law of finds in relation to UCH. These regimes have long applied to “ordinary” objects—the law of salvage essentially to vessels in peril, and the law of finds to sunken and abandoned vessels—but their application to UCH was not believed to be automatic during the negotiations. The ILA Draft of 1994 had precluded the application of the law of salvage to UCH.⁴⁰ Seven years later, an Italian and Greek proposal recommended barring the law of salvage and the law of finds from the scope of application of the Convention on UCH⁴¹ and the majority of delegations that expressed their views on the issue agreed.⁴² This proposal reflected similar provisions in domestic law. For instance, as early as 1961, the French decree on “épaves maritimes” (maritime wrecks) excluded the law of finds.⁴³ The 1989 law on cultural maritime goods (*biens culturels maritimes*) excluded both the law of finds and the law of salvage,⁴⁴ as did the United States Abandoned Shipwrecks Act of 1988.⁴⁵

At the request of the maritime powers, however, an informal discussion was reopened mainly with the Italian and Greek delegations. It resulted in the compromise finally adopted in plenary: any activity relating to UCH to which the Convention applies shall not be subject to the law of salvage or the law of finds, unless it (a) is authorized by the competent authorities, and (b) is in full conformity with the Convention, and (c) ensures that any recovery of the UCH achieves its maximum protection. These conditions are clearly cumulative, so that only where all three are met may salvage law or the law of finds apply to UCH under the Convention. The importance of this solution is, first, that it emerged at all, because for quite a while the issue of salvage and the law of finds appeared to be a possible deal breaker for the whole negotiations. A second important factor is that it achieved a real consensus-oriented regime that bypasses the diverse legal traditions of (private) comparative law and the various current policies on UCH. Third, the regime is acceptable to the majority of states⁴⁶ and at the same time ensures a high threshold of protection for UCH, inter alia, well beyond that afforded by the LOS Convention. The latter preserved the law of salvage and other rules of admiralty (Art. 303(3)), although this provision is usually interpreted as not overriding the duty to protect UCH and to cooperate for this purpose (Art. 303(1)).⁴⁷ While this duty establishes no requirement, the new Convention requires three conditions to be met, which converge in setting requirements before, during, and after the salvage operations. Furthermore, these conditions negate, *mutatis mutandis*, the assumption implicit in the 1989 International Convention on Salvage that its regime for “commercial” salvage and “ordinary” vessels and objects also applies to UCH unless a reservation to the contrary is made.⁴⁸ In any

³⁹ If excavation or recovery appears necessary for the purpose of scientific studies or for the ultimate protection of the UCH. *Id.*, annex, Rule 4.

⁴⁰ ILA Draft, *supra* note 2, Art. 4.

⁴¹ Doc. WP 13 (Mar. 27, 2001).

⁴² Outside the UNESCO negotiations, although criticism has been addressed to the exclusion of salvage in the ILA Draft, see Bederman, *supra* note 18, at 344 n.22, other views have been expressed in favor of the exclusion of salvage for UCH, e.g., Society for Historical Archaeology, Statement of Principles on the Revised UNESCO Draft Convention (June 28, 2000), at <<http://www.sha.org/UNESCOd.htm>>; Ricardo J. Elia, *US Protection of Underwater Cultural Heritage Beyond the Territorial Sea: Problems and Prospects*, 29 INT'L J. NAUTICAL ARCHAEOLOGY 43, 51 (2000); Ole Varmer, *The Case Against the “Salvage” of the Cultural Heritage*, 30 J. MAR. L. & COM. 279 (1999).

⁴³ Decree No. 61-1547 of Dec. 26, 1961, Art. 24, J.O., Jan. 12, 1962, p. 374 (fixant le régime des épaves maritimes).

⁴⁴ Law No. 89-874 of December 1, 1989, J.O., Dec. 5, 1989, p. 15,033; D.L. 1989, 368 (relative aux biens culturels maritimes).

⁴⁵ Abandoned Shipwrecks Act, Pub. L. No. 100-298, §7, 102 Stat. 434 (1988) (codified at 43 U.S.C. §2106 (2000)).

⁴⁶ At least to those represented in UNESCO.

⁴⁷ See GEOFFREY BRICE, MARITIME LAW OF SALVAGE 261, paras. 4–22 (3d ed. 1999).

⁴⁸ International Convention on Salvage, Apr. 28, 1989, Art. 30(1)(d), at <<http://www.jus.uio.no/lm/imo.salvage.convention.1989/doc.html>>.

event, this assumption refers to the ordinary form of salvage (i.e., “spontaneous” salvage); if it is a matter of “contractual” salvage, the 1989 Convention can be contracted out of,⁴⁹ obviating its application and with it its assumption about UCH.

Though time sufficed to establish only three conditions for the application of the law of salvage and the law of finds to UCH under the Convention, a fourth condition is implied, in our view, concerning the applicability of the law of finds: previous abandonment of ownership is required and never presumed.⁵⁰ If this principle of previous abandonment appears certain and well rooted in practice, the real issue is the *degree of certainty* of abandonment, and therefore the *forms* and/or *acts* accepted as proving it. Not surprisingly, practice reveals no uniform and standard degree but several degrees.⁵¹ As the Convention lacks a provision on this issue, in our view it should be resolved through a strong presumption against abandonment of ownership by the owner. This presumption would simply be rebuttable and not conclusive. It aims at protecting the rights of the owner under the Convention, just as (*mutatis mutandis*) the LOS Convention preserved the rights of identifiable owners.⁵²

Although its title suggests that the Convention may apply exclusively to UCH *stricto sensu*, it is actually also designed to protect UCH after its recovery from underwater. The regime applicable to recovered UCH may vary substantially under private (international) comparative law, depending on its situation and the acts of transferring it; and the financial means of the national authorities of states parties to protect UCH differ considerably worldwide. For these reasons, the Convention requires cooperation and information sharing relating to cultural heritage still underwater⁵³ or already recovered,⁵⁴ as well as a uniform standard of protection: recovered UCH “shall be deposited, conserved and managed in a manner that ensures its long-term preservation.”⁵⁵ Awareness of the risk of illicit traffic and speculation in cultural heritage explains the duty to treat information shared between state parties, or between them and UNESCO, as confidential and reserved to the national authorities. This duty applies to the extent compatible with national legislation⁵⁶ and as long as disclosure of the information concerned might endanger the UCH.⁵⁷

Following the logic underlying the principle that UCH shall not be traded, sold, bought, or bartered as commercial goods,⁵⁸ state parties are to “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.”⁵⁹ This article

⁴⁹ With an important exception (*unlikely* to concern salvage of UCH directly) regarding the duties to prevent or minimize damage to the environment. *Id.*, Art. 6.

⁵⁰ See, e.g., *Columbus-Am. Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 464 n.5 (4th Cir. 1992) (“Such abandonment must be proved by clear and convincing evidence, though, such as an owner’s express declaration abandoning title.”)

⁵¹ This is already true in the practice of the United States. For instance, in *Fairport International Exploration Inc. v. Shipwrecked Vessel*, 177 F.3d 491, 499 (6th Cir. 1999), the lapse of time alone was not deemed to establish abandonment. In the *Columbus-America Discovery Group* case, a narrower view of abandonment, close to a simple presumption because the vessel remained underwater for a long time after sinking, was presented by dissenting Circuit Judge Widener. 974 F.2d at 474. One step further in this direction, which means one degree lower in the protection of the owner, was provided by the even narrower view expressed by the U.S. Court of Appeals for the Fifth Circuit in *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337, paras. 8–10 (5th Cir. 1978).

⁵² LOS Convention, *supra* note 3, Art. 303(3).

⁵³ Convention, *supra* note 1, Art. 19(1), (2), (3).

⁵⁴ *Id.*, Art. 19(3), (4).

⁵⁵ *Id.*, Art. 2(6).

⁵⁶ During the negotiations some delegates wished to limit this compatibility test to national rules only of absolute importance to the states parties, i.e., basically constitutional rules or constitution-level rules. This view was not adopted, as is reflected by the final language.

⁵⁷ Convention, *supra* note 1, Art. 19(3).

⁵⁸ *Id.*, annex, Rule 2, para. 1.

⁵⁹ *Id.*, Art. 14.

is fairly self-explanatory. Because of its generality, the term “entry” was preferred to the more technical “importation.” The “illicit” character of recovery is to be assessed in accordance with the Convention. The illicit character of the export of UCH requires assessment on the basis of the national legislation of the “exporting” state.⁶⁰ More than any other rule in the Convention grounded in a similar philosophy,⁶¹ the provision on “illicitly exported and/or recovered” UCH makes an important contribution to the wider fight against the illicit removal and looting of movable cultural property. These practices often result in illicit export for commercial or “laundering” purposes, which is already prohibited by the 1970 UNESCO Convention,⁶² and especially by the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.⁶³

A provision based on a similar philosophy to the one just mentioned states: “Each State Party shall also 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.”⁶⁴ Once seized, UCH must be recorded and protected, and all reasonable measures taken to stabilize it.⁶⁵ The seizing state shall notify the UNESCO director-general and any state with a verifiable link, especially a cultural, historical, or archaeological link (“characterized link”⁶⁶), to the seized UCH.⁶⁷

As one among the present and future bilateral, regional, and multilateral agreements with rules on the protection of UCH, the Convention encourages state parties to enter into future (bilateral, regional, or multilateral) agreements, or to develop existing agreements, for the preservation of UCH as long as these agreements conform fully with the Convention and do not dilute its universal character. The protection regime of the Convention, obviously including the annex and its high “technical” standards, stands as a substantial *minimum* threshold for protecting UCH in future agreements or in developing existing agreements where at least one party is a state party to the Convention.⁶⁸

II. THE REGIMES OF PROTECTION IN THE VARIOUS MARITIME ZONES

Before arriving at the final balance of interests inherent to each of these regimes and maritime zones, the delegations presented a considerable number of proposals and counterproposals. Not surprisingly, like other maritime negotiations such as UNCLOS III, these debates illustrated the two poles of interests, those of coastal states and those of flag states.

UCH in Internal Waters, Archipelagic Waters, and the Territorial Sea

The Convention recognizes that the coastal state, in the exercise of its sovereignty, enjoys the exclusive right to regulate and authorize activities directed at UCH in its internal and

⁶⁰ As well as on the basis of the international rules, if any, applicable to this issue in the legal system of the “exporting” state.

⁶¹ See, e.g., Convention, *supra* note 1, Art. 19(4).

⁶² Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 UNTS 231.

⁶³ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, at <<http://www.unidroit.org>>.

⁶⁴ Convention, *supra* note 1, Art. 18(1).

⁶⁵ *Id.*, Art. 18(2). The term “stabilize” and the French “stabilisation” were adopted as specific underwater archaeology terminology.

⁶⁶ *Brevitatis causa*, by “characterized” link is meant in this Note a “cultural, historical or archaeological” link with the UCH.

⁶⁷ Convention, *supra* note 1, Art. 18(3).

⁶⁸ Article 6(1) refers to states parties (to the Convention).

archipelagic waters and territorial sea.⁶⁹ Useful uniformity is ensured by requiring the coastal state to apply the annex, without prejudice to other possible rules.⁷⁰ The delegations extensively debated the issue of state vessels and aircraft in these waters and sea. Nevertheless, even after the adoption of a compromise solution, some states may find it an obstacle to ratification. The compromise concerns archipelagic waters and territorial sea, but not expressly internal waters.⁷¹ It sets the following balance between coastal and flag states' interests: in the exercise of their sovereignty and in recognition of the general practice of states, and with a view to cooperating on how best to protect state vessels and aircraft, states parties should inform the flag state party and, if applicable, other states with a characterized link to the discovery of identifiable state vessels and aircraft in archipelagic waters or the territorial sea. The compromise nature of the provision is clear. The key element is the statement that the coastal state "should inform" the flag state party. This language was felt to be an important part of the whole package on which agreement could be reached by most of the delegations, and on more than one occasion they did not accept more comprehensive and binding language like "shall consult," which some maritime powers proposed. At any rate, these language and drafting differences should not be exaggerated and should not jeopardize the objective of an extensively ratified instrument to protect UCH, which is, after all, the only real object of the Convention. The adopted language "should inform" does not in itself exclude evolution toward the more extensive interpretation "should consult," and maybe even "shall consult,"⁷² in view of the general principle of states parties' duty to cooperate in the protection of UCH.⁷³

UCH in the Contiguous Zone and the "Archaeological" Zone

Some *incidental* protection of UCH may be effective within the more traditional concept of the contiguous zone. Actually, this would not take the form of protecting the archaeological object itself but would control the activities of import and export of UCH made in violation of customs regulations, as long as the foreign vessel was within the contiguous zone and these regulations also applied to UCH. These incidental forms of protection of UCH are not excluded from the coastal state's prerogatives in the contiguous zone under treaty and customary law, and have gained in potential since the zone was extended to twenty-four miles.⁷⁴ However, a state has to proclaim a contiguous zone before being able to exercise rights pertaining to the zone.

As may be recalled, during the negotiations at UNCLOS III, several Mediterranean states argued that coastal states' prerogatives over UCH should be extended to the continental shelf,⁷⁵ but more restrictive views led to the present provision in the LOS Convention. Article 303(2) lays down a legal fiction allowing the coastal state to presume that the unauthorized removal of UCH in the contiguous zone is an infringement within its territory or territorial sea of its laws and regulations. Thus, the provision grants the coastal state an "archaeologi-

⁶⁹ Convention, *supra* note 1, Art. 7(1).

⁷⁰ That is, rules, if any, deriving from other international agreements or international law. *Id.*, Art. 7(2).

⁷¹ The exclusive right of the coastal state granted by Article 7(1) covers three areas (as does the whole title of Article 7), while the exception for state vessels and aircraft (Art. 7(3)) covers only archipelagic waters and the territorial sea.

⁷² This language, though mentioned earlier, was formally proposed by the United Kingdom and the Russian Federation, and by France late in the negotiations. UNESCO Docs. 31 C/COM.IV/DR.5, 31 C/COM.IV/DR.4 (Oct. 26, 2001).

⁷³ Convention, *supra* note 1, Art. 2(2).

⁷⁴ The same baselines apply to the delimitation of the contiguous zone and the territorial sea.

⁷⁵ See generally Umberto Leanza, *Le Régime juridique international de la Méditerranée*, 236 RECUEIL DES COURS 129, 252 (1992 V).

cal" zone of jurisdiction where it can exercise exclusive rights over UCH. The 1994 ILA Draft proposed that states parties may establish a "cultural heritage zone" where they would have jurisdiction over activities affecting the UCH, extending to the outer limit of the continental shelf.⁷⁶ A similar rule can be found in state legislation: Australia unilaterally enacted the Historic Shipwrecks Act of 1976 whose coverage includes UCH in waters above the Australian continental shelf.⁷⁷ To the extent that no other states have complained about this statute, its coverage of UCH does not appear inconsistent with internationally shared concerns, if not practice.

In any case, after quite a number of different proposals were considered, the final balance achieved within UNESCO allows states parties to regulate and authorize activities directed at UCH within their contiguous zone, without prejudice to the regimes on the exclusive economic zone (EEZ), the continental shelf, and the Area, and in accordance with Article 303(2) of the LOS Convention.⁷⁸ The latter reference is self-explanatory. Though there is clear continuity between the Convention (Art. 8) and the LOS Convention (Art. 303(2)), the former provision improves the protection of UCH in at least two respects. First, the *object* of the regime has gained *wider scope (ratione materiae)*. Under the LOS Convention, the object of the provision is the unauthorized removal of UCH in view of the coastal state's control of traffic in such objects, while under the new Convention, the coastal state has the right to regulate and authorize activities directed at UCH. This right covers a variety of activities beyond the unauthorized removal of UCH from the contiguous zone. Second, the *content* of the regime has gained in *uniformity*. While the above provision of the LOS Convention sets no minimum content for the measures the coastal state is enabled to take to protect UCH in the "archaeological" zone, the Convention provides for a valuable uniform content of these measures by obliging states parties to require the rules of the annex to be applied to activities directed at UCH in such a zone.

UCH in the EEZ and on the Continental Shelf

The Convention distinguishes between the regimes on the EEZ and the continental shelf, and the one on the Area; and between an information regime, through reporting and notification duties,⁷⁹ and a protection regime.⁸⁰ Both regimes represent compromises between diverging views and interests. The regime on the EEZ presupposes that the coastal state has claimed an EEZ that may coexist with the continental shelf, as well as the contiguous zone. The LOS Convention contains no specific rules on the protection of UCH in the EEZ or on the continental shelf. Under the Convention, however, all states parties have the responsibility to protect UCH in conformity with the Convention⁸¹ and two main obligations. First, in case of the discovery of UCH or an intention to engage in activities directed at UCH in the EEZ or on the continental shelf of a state party, (a) this shall require its national, or a vessel flying its flag, to report that discovery or activity to it. Second, in case of the discovery of UCH or an intention to engage in activities directed at UCH in the EEZ or on the continental shelf of *another* state party, (b) states parties shall require (i) the national or the master of the vessel to report that discovery or activity to them and to that other state party or,

⁷⁶ ILA Draft, *supra* note 2, Arts. 1(3), 5.

⁷⁷ Historic Shipwrecks Act, 1976, §1, at <<http://www.austlii.edu.au>>. See, for instance, §13(1)(d) for the case of removal of a historic shipwreck or a historic relic from Australia, from Australian waters, or from waters above the Australian continental shelf.

⁷⁸ Convention, *supra* note 1, Art. 8.

⁷⁹ Respectively, Articles 9 (EEZ and continental shelf) and 11 (Area).

⁸⁰ Respectively, Articles 10 (EEZ and continental shelf) and 12 (Area).

⁸¹ Convention, *supra* note 1, Art. 9(1).

alternatively, (ii) a state party shall require the national or the master of the vessel to report that discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other states parties.

Though presented as “alternatively” applicable, the difference in regimes between items (i) and (ii) of Article 9(1)(b) is substantial. It affects both (1) a *direct* report to the coastal state—in (i) such a report is allowed, whereas in (ii) it is denied; and (2) the *number* of beneficiaries of the report—in (ii) all other states parties receive such a report but exclusively on an *indirect* basis. Each state party will declare the manner in which these reports will be transmitted.⁸² It should be noted that under (b), states parties (i) or a state party (ii) shall require “the national” or “the master of the vessel” to report discoveries or activities directed at UCH, and not “their” or “its” national or master of the vessel. These terms “their” and “its” were proposed on several occasions but implicitly rejected by most of the delegations because they felt that the resulting “constructive ambiguity” would help achieve agreement on a package of mutual concessions and compromises. From a more technical standpoint and contrary to what was sometimes said during the negotiations, the absence of these terms does not in itself make the Convention binding on third parties. Further provisions ensure a more global information scheme, through the notification of discoveries and activities to the UNESCO director-general, that will make them promptly available to all states parties.⁸³

As for the regime of protection, no activity directed at UCH can be authorized except in conformity with it. The Convention grants the coastal state party the right to prohibit or authorize any activity on UCH located in its EEZ or on its continental shelf so as to prevent interference with its sovereign rights or jurisdiction as provided for by international law, including the LOS Convention.⁸⁴ This rule is also quite innovative: the right to prohibit or authorize activities directed at UCH granted to the coastal state is in no way granted under the LOS Convention, though it is functionally limited to the prevention of interference with the coastal state’s sovereign rights or jurisdiction. Nevertheless, the practical reach of this right is significant, as it covers—just taking the LOS Convention into consideration⁸⁵—jurisdiction over marine scientific research and preservation of the marine environment in the EEZ,⁸⁶ and sovereign rights for the purposes of exploring the continental shelf and the EEZ and exploiting their natural resources,⁸⁷ including the exclusive right to authorize and regulate drilling.⁸⁸ As regards cases of the discovery of UCH in the EEZ or on the continental shelf that do not involve interference with a coastal state’s sovereign rights or jurisdiction, that state plays a role unknown under the LOS Convention: it shall consult all other states parties that have declared an interest⁸⁹ in how best to protect this UCH, and shall coordinate such consultations as “Coordinating State,” unless it refuses this status.⁹⁰ The Convention wisely goes beyond existing international law and the LOS Convention by focusing on the ever more

⁸² This declaration is to be made on depositing the instrument of ratification, acceptance, approval, or accession. *Id.*, Art. 9(2).

⁸³ *Id.*, Art. 9(3), (4).

⁸⁴ *Id.*, Art. 10(2).

⁸⁵ Since, according to Article 10(2) of the Convention, other sovereign rights or jurisdiction may be granted to the coastal state by other rules of international law.

⁸⁶ As well as jurisdiction over the establishment and use of artificial islands, installations, and structures. LOS Convention, *supra* note 3, Art. 56(1)(b).

⁸⁷ *Id.*, Arts. 56, 77. Article 85 on the right of the coastal state to exploit the subsoil by means of tunneling may also be concerned in some circumstances.

⁸⁸ Concerning the continental shelf. *Id.*, Art. 81.

⁸⁹ Which means only those states parties which have a verifiable link, especially a characterized link, to the UCH concerned. Convention, *supra* note 1, Arts. 9(5), 10(3)(a).

⁹⁰ In that case, the coordinating state will be appointed by the states that have declared an interest. *Id.*, Art. 10(3)(b).

frequent and important cases of “immediate danger” to UCH, including looting: to prevent these cases, all states parties shall take all practicable means in accordance with international law to protect UCH; and, in addition and without prejudice to the latter duty, the coordinating state, normally the coastal state, may take, *prior to consultations* if necessary,⁹¹ all practicable measures and/or issue any necessary authorizations in conformity with the Convention to prevent any immediate danger to the UCH, including looting, whether arising from human activities or any other cause. Concerns expressed especially by maritime powers are reflected in the statement that in coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations pursuant to Article 10, the coordinating state, normally the coastal state, shall act on behalf of the states parties as a whole and not in its own interest, and any of these actions shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the LOS Convention.⁹²

Not surprisingly, the degree of exception adopted for state vessels and aircraft in the EEZ and continental shelf regimes is higher than that for the regime concerning archipelagic waters and the territorial sea. In the latter regime the coastal state should inform the flag state party; by contrast, no activity directed at state vessels and aircraft in the EEZ or on the continental shelf shall be conducted without the agreement of the flag state and the collaboration of the coordinating state. This exception is made “subject to” the two main provisions of this regime concerning activities that may interfere with the sovereign rights or jurisdiction of the coastal state and cases of immediate danger to UCH. The language “notwithstanding,” which was proposed at a later stage but not adopted,⁹³ would have been a substantial modification to the extent that it would have made this exception override those two provisions.

UCH in the Area

The Convention states generally that all states parties shall be responsible for protecting UCH in conformity with its provisions and with Article 149 of the LOS Convention. The two regimes on reporting and protection, including emergency measures, are similar in their structure to those for the EEZ and the continental shelf. The main difference is that the role played by the coastal state in the context of the EEZ and the continental shelf is generally entrusted to the UNESCO director-general for the notification and reporting regime and to an appointed state for the protection regime with respect to the Area. The provisions on reporting and notification stipulate that a state party shall require its national or the master of the vessel flying its flag to report to it any discovery or any intended activity directed at UCH located in the Area.⁹⁴ This reported information shall then be notified by states parties to the UNESCO director-general and to the secretary-general of the International Seabed Authority. The former shall promptly make this information available to all states parties.⁹⁵

Under the new regime of protection, the UNESCO director-general shall invite the states parties that have declared such an interest to consult on how best to protect the UCH concerned and to appoint a state party to coordinate those consultations (coordinating state). The International Seabed Authority shall also be invited to participate in such consultations.⁹⁶

⁹¹ In taking such measures, assistance may be requested from other states parties. *Id.*, Art. 10(4).

⁹² *Id.*, Art. 10(6).

⁹³ Article 10(7) states, “[s]ubject” to the provisions of paragraphs 2 and 4. Later, “[n]otwithstanding” was suggested by the United Kingdom delegation and was also subsequently presented by it as a draft resolution, together with the Russian Federation. On a different issue, this draft resolution also proposed the deletion of “and the collaboration of the Coordinating State.” UNESCO Doc. 31 C/COM.IV/DR.5 (2001).

⁹⁴ Convention, *supra* note 1, Art. 11(1).

⁹⁵ *Id.*, Art. 11(2), (3).

⁹⁶ *Id.*, Art. 12(2).

An important and sensible rule allows all states parties to take all practicable measures in conformity with the Convention, *if necessary prior to consultations*, to prevent any immediate danger to UCH, including looting.⁹⁷ While the coordinating state may conduct any necessary preliminary research on the UCH,⁹⁸ its duties are to implement measures of protection agreed to by the consulting states, which include the coordinating state, and to issue all necessary authorizations for those measures in conformity with the Convention and its annex.⁹⁹ A rule that also appears in partial form in the regime for the EEZ and the continental shelf applies *a fortiori* in its philosophy to the Area: in coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations, the coordinating state shall act for the benefit of humanity as a whole, on behalf of all states parties. Particular regard shall be paid to the preferential rights of states of cultural, historical, or archaeological origin with respect to the UCH concerned.¹⁰⁰ This final part of the provision clearly follows the language of the LOS Convention.¹⁰¹

A brief comparison between the 1982 and 2001 Conventions may be useful in this regard. One must emphasize that the compromise and relatively vague language of “preferential rights” adopted in 1982 has not yet been given precise *content*, not even nearly two decades later and in a convention dealing *specifically* and *exclusively* with UCH.¹⁰² Between 1982 and 2001, however, the *function* of these preferential rights indirectly, but expressly, gained a *second* and *selective accessory function*, as these rights now mainly indicate those states parties¹⁰³ that may declare an interest in being consulted on how to ensure effective protection of the UCH concerned, and this declaration confers the right to participate in the appointment of, and possibly even to be appointed as, the coordinating state.¹⁰⁴ The duty codified in 1982 to “preserve” and “dispose” of UCH for the benefit of mankind as a whole increased remarkably in substance through the Convention and its annex in the sense of “preserve,” while “dispose” is not even mentioned as such. The phrase “for the benefit of mankind as a whole” in 1982 was, and under the Convention is still, a valuable recognition of the universal importance of UCH, both the objects and their sites, beyond national borders and cultures. The LOS Convention conferred this recognition only to UCH in the Area, whereas the new Convention maintains it for the Area and extends it also to UCH in all maritime zones to which the Convention applies, using the similar language “for the benefit of humanity.” In 1982 the competence of the Seabed Authority over UCH was implicitly denied, and so it remains under the Convention.¹⁰⁵ The particular status of state vessels and aircraft is also made clear for the Area: no activities directed at them shall be undertaken or authorized without the consent of the flag state.¹⁰⁶

⁹⁷ Immediate danger, whether arising from human activity or any other cause. *Id.*, Art. 12(3).

⁹⁸ And in this case it shall issue all necessary authorizations therefor, and shall promptly inform the UNESCO director-general of the results of this research, and he or she, in turn, shall make such information available to other states parties. *Id.*, Art. 12(5).

⁹⁹ Unless the consulting states, which include the coordinating state, agree that another state shall implement these measures and/or issue all necessary authorizations. *Id.*, Art. 12(4)(a), (b).

¹⁰⁰ *Id.*, Art. 12(6).

¹⁰¹ LOS Convention, *supra* note 3, Art. 149. This is also why this final part of the provision (Art. 12(6) of the Convention) is specific to the Area, as is Article 149 of the LOS Convention, and is absent from the similar provision on the EEZ and the continental shelf (Art. 10(6)).

¹⁰² Also, the language “particular regard” shall be paid to these preferential rights is nearly identical to that in Article 149 of the LOS Convention.

¹⁰³ “Mainly” because another verifiable link seems to be permitted as a requirement for selection under Article 11(4). The same interpretation seems to apply to Article 9(5) on the EEZ and the continental shelf.

¹⁰⁴ Convention, *supra* note 1, Arts. 11(4), 12(2).

¹⁰⁵ The powers and functions of the International Seabed Authority are to be expressly conferred upon it by the LOS Convention, *supra* note 3, Art. 157(2).

¹⁰⁶ Convention, *supra* note 1, Art. 12(7).

III. CONCLUSION

Time will tell if and to what extent the Convention will inspire future developments in customary international law. In our view, the nature of the effects of treaties on preexisting customary rules of a different content, as in the field of UCH,¹⁰⁷ should not be systematically presented in terms of an abrogation of the customary rule¹⁰⁸ but distinguished by virtue of the significance of the time factor in the interrelationship between treaty and custom.¹⁰⁹

The new Convention has already attained several achievements of unequal importance: first, its quality as the first universal instrument with high standards on the protection of UCH offered to the international community; second, its content as a compromise package of solutions on delicate issues such as the notion of UCH, the status of the law of salvage and the law of finds, and respect for the flag state regarding its state vessels and aircraft in particular; third, its general consistency with the LOS Convention and the balances it expresses; and fourth, its adoption of some important general and final clauses—including the comprehensive and binding system of peaceful settlement of disputes achieved under the LOS Convention;¹¹⁰ a useful alternative to the “federal clause,” which is more acceptable than the latter for being open to any state party and promoting, to the extent practicable, the full application of the Convention;¹¹¹ and the strong position taken through the exclusion of any reservations to either the Convention or its valuable annex.¹¹²

The Convention is a compromise text, a package satisfactory to most states, like the LOS Convention in 1982, which nevertheless turned out to be very successful, without asserting

¹⁰⁷ Though practice does not seem to provide certainty about the existence of a well-rooted general customary regime of protection of UCH, a customary rule whose content would be the obligation *at least* to abstain from any act causing damage to or destruction of the UCH seems reasonable. Article 303(1) of the LOS Convention may be considered declarative of such a preexisting rule or to have contributed to its existence since 1982. In any case, the principle of freedom of the high seas and its main applications (laying submarine cables and pipelines, fishing, and scientific research) should not be considered in itself, and to the extent of the maritime zones where the principle still applies, as necessarily incompatible with the existence of this rule. As for the content of the described rule, and *a fortiori* of the principle of the freedom of the high seas with regard to UCH, they are manifestly different from the high-standard content of the Convention (including its annex).

¹⁰⁸ Treaties are often presented as a source of abrogation of a custom. See, e.g., PAUL REUTER, *INTRODUCTION AU DROIT DES TRAITÉS* 117 n.205 (1985).

¹⁰⁹ For an analysis of our proposal to distinguish these two effects of treaties on custom, see Guido Carducci, *L'Obligation de restitution des biens culturels et des objets d'art en cas de conflit armé: droit coutumier et droit conventionnel avant et après la Convention de La Haye de 1954 (L'importance du facteur temporel dans les rapports entre les traités et la coutume)*, 104 *RGDIP* 289, 292, 309–15 (2000). To summarize the proposal: the effects of a treaty would be the *abrogation* of the customary rule among states parties only if the treaty intervened at a time when custom was conceived of as a tacit agreement (*accord tacite*), which is no longer the case for general customs but may still be the case in the adjudicator's or arbitrator's opinion for “regional” customs. In the other, more recent cases, where the treaty intervenes in the period (1910–1920) since custom has generally been conceived of as the result of practice and *opinio juris*, which is psychological and not simply voluntary, the effect should simply be the *suspension* of the effects of the preexisting customary rule (of a different content) between states parties to the treaty. This suspension effect would also apply in principle to the LOS Convention, and especially to the new Convention and its innovative content in the field of UCH, in relation to any potential preexisting *general*, maybe even *regional* customs on UCH (if in the adjudicator's or arbitrator's view they are not fundamentally an application of the tacit agreement—*accord tacite*—theory), as these customs would have a different content: the principle of freedom of the high seas as applied, *inter alia*, to UCH or, maybe and if its existence were agreed upon, a customary rule *at least* not to damage or destroy UCH (as suggested in note 107 *supra*).

¹¹⁰ Convention, *supra* note 1, Art. 25. Adoption of this article may nevertheless result in nonratification by some states not party to the LOS Convention. The delegation of Turkey made statements in this direction. It is useful to recall that among the different proposals made during the negotiations, Doc. WP 44 (Apr. 4, 2001), submitted by Venezuela, Turkey, and Thailand, suggested a simple one-paragraph Article 25 on peaceful settlement of disputes: no mention was made of the LOS Convention or its Part XV, and the peaceful means envisaged were exclusively those listed in Article 33(1) of the UN Charter.

¹¹¹ Convention, *supra* note 1, Art. 29.

¹¹² With the exception of the alternative to the federal clause (Art. 30), the Convention falls within the scope of Article 19(a) of the Vienna Convention on the Law of Treaties, *supra* note 19.

the fiction of unanimous agreement on nearly all of its provisions. Issues like state vessels and warships are simply incidental and accessory to the Convention and should not deter the international community from reacting positively to it and the high standards it embodies, which are consistent with the 1982 Convention, and from joining it quickly to prevent the further damaging and looting of underwater cultural heritage.

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