Ocean Development and International Law, Volume 25, pp. 391–418
Printed in the UK.

0090-8320/94 $10.00 + .00

Report

The Draft Convention on the Protection of the Underwater Cultural Heritage

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The International Law Association (ILA) established a Committee on Cultural Heritage Law in 1988. Following the appointment of the chair, rapporteur, and first members in 1989, the committee began to prepare a Convention on the Underwater Cultural Heritage. The committee completed its work in November 1993. What follows is a revised report, selected bibliography, and draft convention with article-by-article commentaries.

Report

The committee[1] has prepared a convention that provides basic protection beyond the territorial seas of coastal states for a sensitive and precious heritage that is subject to increasing levels of damage and destruction. A second purpose is to help avoid and resolve jurisdictional issues involving underwater cultural heritage.

We were motivated by a conviction that both supporters and critics of a progressive development of the law share the responsibility for devising the best means of avoiding further spoliation of the common heritage at sea. To do nothing is to fail, individually and collectively, to shoulder this responsibility.

To ensure acceptability of the convention, the committee solicited views and suggestions from many people and institutions.[2] Present and past expressions of opinion by particular states were taken into account primarily as a means of elaborating and amplifying particular points.

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Summary of the Committee's Work

With the committee's assistance, the authors prepared a first report and draft convention that were presented at the ILA's 1990 conference in Queensland, Australia. At the conference, the committee's first working session addressed the following questions:

1. Should the committee draft an international convention on the protection of the underwater cultural heritage? If so, should it also draft model municipal legislation to implement provisions of the convention?
2. Should the committee define the property to be protected? If so, should a definition be limited to "important historic" shipwrecks and related material? What is "important" and "historic"? Should the definition be broader, to cover all aspects of the underwater cultural heritage?
3. Should a legal regime provide for control by coastal states over archaeological resources in a zone of control beyond territorial waters? Should that zone embrace the continental shelf, a 200-mile offshore cultural protection zone, or some other marine area?
4. Should states assume jurisdiction, on a combination of territorial and nationality principles, over underwater cultural heritage within and beyond whatever zone of control is adopted? If so, how should the convention specifically address the issues of jurisdiction?

At its 1990 working session, the committee decided to define further the property to be protected and to establish rules of jurisdiction by coastal states and interested non-coastal states on a combination of territorial and nationality principles. The committee also discussed issues of extraterritorial jurisdiction, criminal sanctions for violations, and provision for taking account of the interests of divers and salvors without acceding to those interests altogether.[3] Participants in the working session unanimously adopted a resolution,[4] which was approved without revision at a plenary session of the ILA Conference.

After several rounds of redrafting by correspondence, the committee met for a second working session at the ILA's 1992 conference in Cairo.[5] This session resulted in technical improvements to the text of the convention and benefited from a broad discussion of law-of-the-sea and criminal law issues, on the basis of suggestions requested from other committees of the ILA. The committee also decided, on behalf of the ILA, to accept the invitation of the United Nations Educational, Scientific and Cultural Organization (UNESCO) to submit the convention to it for adoption. The final plenary session in Cairo adopted the committee's resolution without revision.[6]

The committee's third working session took place in Paris, July 23–24, 1993. At that session, the committee substantially revised portions of the draft, reorganized the articles, provided for further clarification of the format, and requested the chair and rapporteur to prepare a final version and article-by-article commentaries. In carrying out this assignment, the authors elicited a final set of comments by correspondence and completed the draft convention.

The Need for a Convention

The need for the committee's initiative is highly evident throughout the world, especially in the Caribbean, Europe, and the Pacific and Indian oceans. For example, a Dutch East Indiaman wreck in Indonesian archipelagic waters has been the focus of important dis-

cussions between Indonesia and the Netherlands. Within the Turkish territorial sea, all known historic wrecks have been plundered, while in the Indian Ocean salvors are approaching governments to allow them to survey and commercially exploit local waters for historic wrecks. Massively financed and poorly regulated private salvage of historical shipwrecks off the southeast coast of the United States continues unabated. The importance of sites on the continental shelf beyond coastal shorelines is well documented, and cultural property at great depth beyond the shelf, such as the Royal Mail Steamer *Titanic*, is now accessible. Scientists maintain that the best preserved wrecks might be found at great depth since they are likely to be mostly intact and undecayed because of a lack of oxygen in the surrounding environment. An effective legal regime for the protection of these sites might rely on an extended jurisdiction of coastal states, which is a matter of considerable political concern.

The importance of the underwater cultural heritage has been recognized in such instruments as the United Nations Convention on the Law of the Sea (hereinafter the 1982 LOS Convention).[7] Article 303, paragraph 1 of that agreement provides as follows:

> States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

Although not specified in the 1982 Convention, the "duty to protect" the underwater cultural heritage would seem to embrace several activities: maintenance of known sites and monuments, excavation of archaeological sites in accordance with accepted standards, conservation and display of excavated material, and dissemination of information obtained. There is, however, no hard law defining this duty.

The underwater cultural heritage has been the subject of discussion in other forums. These discussions have not led to agreement, sometimes because of larger political issues, as with the Council of Europe's 1985 Draft Convention on the Protection of Underwater Cultural Heritage.[8] The International Maritime Organization's Diplomatic Conference on the Law of Salvage, which produced the 1989 International Convention on Salvage (hereinafter Salvage Convention),[9] considered but decided to exclude provisions for the underwater cultural heritage. Spain argued that historic wrecks were not subject to salvage law, and France proposed that the term *property* should specifically exclude "cultural wrecks." These views prevailed.[10]

The committee's work has involved the complicated jurisdictional issue of how to control marine excavations beyond the territorial sea, as well as excavated material taken from that area and brought onto land. Members of the committee addressed several dimensions of this issue: the extent of state power to control archaeological activity beyond the territorial sea, the extent of state power to determine title to and disposition of marine archaeological material found beyond the territorial sea, the extent of a state's duty to control the disposition of such archaeological material on its territory, and the effect of any emerging international law on archaeological activity within a state's own territory.

Another issue is the extent to which values other than strict scientific standards of archaeology and conservation should be incorporated into a Convention on the Underwater Cultural Heritage. In the United States, for example, the Abandoned Shipwreck Act of 1987[11] provides a set of multi-use guidelines. These guidelines provide explicitly that management of underwater resources of this country shall "(1) maximize the enhancement of cultural resources; (2) foster a partnership among sport divers, fishermen, archaeologists, salvors, and other interests to manage shipwreck resources of the States

and the United States; (3) facilitate access and utilization by recreational interests; (4) recognize the interest of individuals and groups engaged in shipwreck discovery and salvage."[12] Although it became questionable whether the convention should attempt to incorporate *all* of these and possibly other values, at the risk of diluting the chief effort to conserve the cultural heritage, it was imperative to identify and take account of all relevant interests to create a conventional regime that would be effective and yet have some chance of gaining the support of the international community.

An important part of the committee's work, then, involved trying to reconcile or weigh competing values and constituencies while producing a treaty that promotes the central purpose of preserving and enhancing historical and archaeological resources and the integrity of the global cultural heritage. The committee believes that this project will have important implications for the global cultural heritage by beginning a long-needed effort to provide for effective legal means to preserve, protect, and carefully remove underwater materials that may be found beyond territorial waters.

Definition of Protected Property

The underwater cultural heritage generally includes all wrecks, sites, and related objects of historic or archaeological importance. Any regime of protection should be extended to all material from shipwrecks, even if it is scattered at a distance. For example, a sinking ship often loses its momentum gradually between the surface and the seabed, leaving a lengthy trail of deposits as objects float away. In common law terminology, the protected material might include wreck (property lost at sea that may or may not come ashore), derelict (abandoned property at sea), flotsam (property lost at sea but afloat, although that is unlikely in the case of objects of cultural heritage), jetsam (sunken goods thrown overboard to lighten or save a ship), and lagan (buoyed jetsam marked for identification and later recovery). This report will generally use the term *wreck* in a more general sense to refer to all shipwrecks and their contents.

Summary of Municipal or Domestic Law

Coastal states unquestionably have a discretionary right to control archaeological excavations and preserve items of cultural heritage within their territorial seas. Some states have enacted specific legislation applying to the territorial sea—for example, the United Kingdom under the Historic Shipwrecks Act 1973—while others apply their general legislation to the cultural heritage.[13]

Beyond the territorial sea, confusion reigns. Several states—for example, Australia, Ireland, Spain, Norway, the Seychelles, and Cyprus—have legislation extending control over material on their continental shelves. The Australian and Irish legislation is restricted to shipwrecks, while that of Spain has a more general scope. Morocco's legislation controls archaeological excavation within its exclusive economic zone, whereas the Danish law of 1984 and French law of December 1989 apply to the contiguous zone. In accordance with an 1857 treaty, and to secure navigation in waters adjoining its straits, Denmark has also established, by administrative practice, a special "*buoyage zone*" that is coextensive with its 200-mile fishing zone and continental shelf. Within this area, Denmark regulates removal and salvage of wrecks that are deemed dangerous to navigation.

Under no municipal law does a shipowner lose title to a vessel merely because it sinks. If a wreck is hazardous to navigation, the owner may even have an obligation to

remove it or risk being charged for its removal by a maritime authority. Despite the continued identification of an owner with a sunken ship and its contents, some jurisdictions are prepared to interfere with ownership rights after a specified length of time. In Spain, the state becomes legal owner of a wreck after three years if the owner makes no effort to exercise rights to it. Portuguese legislation gives the owner five years to recover an object lost beneath the sea; thereafter, title passes to the state. Other jurisdictions are more generous to the shipowner. For example, Finland provides that nautical remains vest in the state only after 100 years from the date of foundering.

The Abandoned Wreck Law of the Cayman Islands provides that any wreck that has "remained continuously upon the sea bed within the limits of the islands for a period of fifty years and upwards before being brought to shore" belongs to the state.[14] All private claims to the wreck are thereby barred. The Cayman Islands legislation establishes the following presumption concerning wreck brought within the territory:

> All wreck found in the possession of any person within the islands shall be deemed to be abandoned wreck until the contrary is proved to the satisfaction of a Magistrate or the Commissioner of Wreck and any person found in possession of abandoned wreck shall be presumed to have brought it ashore unless he has some satisfactory explanation of the manner in which it came into his possession.[15]

Many jurisdictions have no statutory time limitations. Australia's Historic Shipwrecks Act of 1976 asserts control over diving activities on that country's continental shelf, without regard to the nationality of those involved. In 1993 the Australian government declared that all remains of ships in Australian and related territorial waters or waters above its continental shelf, and at least 75 years old, are historic shipwrecks or historic relics within the meaning of Section 4A of the act.

Australia's Navigation Act of 1912 provides that any person who has found and taken possession of any wreck outside Australian territory and who brings it to Australia must give notice to the receiver of wreck. The commonwealth is entitled to all unclaimed wreck found in Australia, and no person, other than the owner of the wreck, may keep possession of any wreck or fail to deliver on demand to the governmental receiver of wreck. When no owner establishes a claim to any wreck found in or brought into Australia and in the possession of a receiver within a year after it comes into the possession of the receiver, the receiver must sell it, deducting the expenses of sale and salvage, and pay the proceeds into a governmental fund. An Australian court would likely decide that the receiver of wreck is entitled to claim possession and to sell items recovered from wreck in areas outside the jurisdiction established by the Historic Shipwrecks Act of 1976 that are brought to Australia. The corollary is that Australia would not normally claim to control material raised from a wreck outside the range of the Historic Shipwrecks Act of 1976 that remains outside its territory. Similarly, the decision of an English court in *Pierce v. Bemis*, [1986] 1 All E.R. 1011, established that the receiver of wreck does not ordinarily have a right of ownership over items recovered from a wreck outside territorial waters, but if these items are brought within the United Kingdom, they must be reported and handed over to the receiver.

In addition to such municipal legislation, the normal rules of admiralty may be applied. Thus, when the owner of a ship is known, the laws of salvage apply, whether the ship is damaged or not. The term *salvage* generally means the compensation or reward allowed by maritime law to persons by whose voluntary assistance a ship or

wreck, or her cargo, or both, have been saved in whole or in part from marine peril, or by whose assistance such property has been recovered from actual peril or loss. A salvor, voluntarily acting to save a ship from marine peril, if successful, has a right to compensation rather than title. The salvor must abide, however, by the "admiralty's 'diligence' ethic," which requires careful, effective, and expeditious retrieval of abandoned vessels, cargo, and contents. Compensation generally is fixed in accordance with the following considerations: the measure of success obtained, the skill and timeliness of the salvors, the dangers to which the property was exposed and from which the property was rescued, the time and labor expended, the expenses incurred, the losses suffered, the risks run by the salvors, and the value of the property. An admiralty court may withhold or reduce compensation if it appears that the salvors are at fault in rendering the salvage or assistance necessary, or are guilty of theft, fraudulent concealment, or other illegal acts of fraud.

If a ship has been deserted, however, by those who were in charge of it, without hope of recovering it (*sine spe recuperandi*) and without intention of returning to it (*sine animo revertendi*), it is considered in some legal systems to be abandoned property (*res derelictae*), to which the law of finds rather than salvage applies. Under this theory, title to abandoned property vests in the person who first reduces that property to his or her possession or to that of his or her state. The finder or the finder's state acquires title against all the world, except against an owner who demonstrates an intent to acquire the property and exercise possession or firm control of it. The "subsequent finders' rule" provides that they acquire the rights of first finders where the latter has discontinued efforts to save the property or has otherwise *abandoned* the site.

Thus, title to a wreck may depend on whether the original owner has abandoned it. Unless such abandonment has been expressed either by the original owner or someone claiming title through him or her (for example, an insurance company), the legal fact of abandonment may be difficult to prove, although a legal system may make an assumption of abandonment in certain circumstances or vary the burden of proof. Evidence of abandonment may include an express disclaimer of ownership, non-use of the property, or lapse of time. Usually, salvage law has adopted these law-of-finds rules because, in the words of one court, "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths."[16]

Both common law and civil law systems reflect the customary *droit d'amirauté*. Under common law, the notion prevails, (with some dissenting authority) that there are no property rights without control, use, and possession. Thus, for example, an abandoned ship, as *res derelictae* lying in an unfound state and relinquished by an owner, may not have the status of "property" until it is found and reduced to possession by a subsequent finder. Title then rests either in that person or, in some jurisdictions, in the state, if the property is unclaimed by the owner. Under the American rule, the individual finder becomes the owner, whereas under the English rule, the state becomes the owner. A French law of December 1989,[17] as an example of civil law, is similar to the English rule.

International Legal Protection of the Underwater Heritage

Under private international law, the Salvage Convention (and the 1910 Brussels Convention that it replaces) provides rules for salvage of vessels. Although these rules do not apply to "removal of wrecks" and thus to issues of the underwater cultural heritage, the

scope of the Salvage Convention contains language of potential significance to the committee in its consideration of relevant laws of admiralty. Specifically, the Salvage Convention provides that a "[s]alvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever."[18] Under Article 30, a state can enter a reservation to the agreement whereby it will not be applied to inland waters of that state. The agreement's scope otherwise encompasses all maritime waters.

Public international law protecting the underwater cultural heritage is weak. Generally, an influential historical principle has been Grotian freedom of the seas. This principle usually embraces four to six freedoms, depending on the authoritative source, none of which refers to marine archaeology. Even so, it has been argued that the principle embraces marine archaeology. Although the validity of this argument is highly questionable today, it nevertheless continues to constrain efforts to manage underwater resources more wisely.

More effective regimes have been proposed. For example, the Parliamentary Assembly of the Council of Europe endorsed a proposal in 1978 for a Convention on the Underwater Cultural Heritage within which coastal states would take jurisdiction for archaeological excavation over a 200-mile offshore zone of cultural protection. An ad hoc committee was established by the European Council of Ministers to draft such a convention, but it was unable to reach agreement on the precise extent of state jurisdiction in a variety of circumstances.

Within a comprehensive law-of-the-sea framework, the 1958 Geneva Convention on the High Seas[19] does not specifically address issues of cultural property. One negative implication of the 1958 convention, however, is noteworthy. The traditional rule had been that shipwrecked persons and property continued to enjoy the protection of a vessel's flag-state. According to some publicists, however, the post-1958 conventional rule is that, since a wreck does not necessarily qualify as a vessel subject indefinitely to the exclusive jurisdiction of the flag state, the general principle of freedom of the seas, together with the *droit d'amirauté*, may govern the search for and recovery of a wreck.[20]

The 1982 LOS Convention does address issues of cultural property explicitly but in a highly qualified fashion. Whether the pertinent provisions codify state practice is highly questionable because marine archaeology was not a prominent item of the conference that negotiated the convention (UNCLOS III), and the provisions therefore elicited neither strong support nor opposition. Article 303, paragraph 2 of the 1982 LOS Convention extends coastal state jurisdiction over certain activities within the contiguous zone out to 24 nautical miles offshore. The convention does not, however, establish coastal state jurisdiction over archaeological material on the continental shelf or within the exclusive economic zone.

In Part XI of the 1982 LOS Convention, which governs the seabed area beyond national jurisdiction (the "Area"), Article 136 establishes that "[t]he Area and its resources are the common heritage of mankind," but *resources* is a term of art limited to mineral deposits. A proposal for the new International Seabed Authority to administer archaeological activity on the deep seabed was unproductive. Instead, Article 141 states that the "Area" is open to all states "without prejudice to other provisions of" the same part of the convention. One of these provisions is Article 149, which provides that

> [a]ll 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.

This provision is a rather weak distillation of Greek and Turkish proposals to the United Nations Seabed Committee to establish institutional protections of underwater cultural property as the common heritage of humanity. What eventually emerged at UNCLOS III, however, is murky. The puzzlingly conjunctive phrase "objects of an archaeological and historical nature" is vague. Also, there is no indication of specific proprietary interests, nor is it clear which states may claim preferential rights. For example, the "State of origin" of particular cargo may or may not be the flag state of a wrecked ship, and the identity of the "State of cultural origin," as distinguished from the "State of historical or archaeological origin," is unclear. What does the term *country*, as opposed to *state*, mean? Was this distinction intended to avoid the problem of state succession? And which of the "preferential rights" of states are superior when they conflict? Suppose all of the following claim preferential rights: the flag state of the wrecked vessel, the state where the vessel was fitted or which provided a home port, and the state whose government or nationals commissioned the vessel? Which has priority? Another problem with Article 149 is the lack of any expert body, authority, or procedure to ensure that objects are effectively "preserved or disposed of for the benefit of mankind as a whole." Reliance seems to be placed, rather unsatisfactorily, on the goodwill of states.

Finally, it is unclear how Article 149 relates to Article 303. Article 303 is a "General Provision" of the treaty that imposes a duty on states "to protect objects of an archaeological and historical nature found at sea and [to] cooperate for this purpose." As noted earlier, a second paragraph provides more specifically against the removal of objects from the seabed of the contiguous zone 24 nautical miles seaward from a coastal state without the approval of that state. Article 303 thereby permits a coastal state to presume that objects removed without its approval from its contiguous zone have been smuggled. More pertinent to this discussion, concluding paragraphs in Article 303 provide that nothing in the 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," or prejudices "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature." The latter provision should, indeed, encourage the work of the committee. Article 303, unlike Article 149, does not refer to a standard like "for the benefit of mankind" or to the "preferential rights" of states.

Articles 149 and 303 share an important ambiguity: the phrase "objects of an archaeological and historical nature." What is "historical nature" as opposed to "historical significance" or "historical value"? How old are objects of "historical nature," if that strange term has any meaning at all? The negotiating history of UNCLOS III suggests that the term *historical* refers at least to objects older than the collapse of the Byzantine Empire in 1453, except within the Western Hemisphere, where the Spanish Conquest of the late fifteenth to early sixteenth centuries provides a more recent cutoff date.[21] Because this interpretation is apparently inclusive rather than exclusive, it does not specify whether more modern objects are covered. Some have suggested that the term *historical* within the 1982 LOS Convention refers only to pre-modern, that is, centuries-old objects. Such an interpretation might conflict, however, with accepted definitions of historical objects, in other words, with the plain meaning of the words. Far more recent cutoff dates than the fall of Byzantium and the Spanish Conquest define items of historical significance within the laws and practices of cultural exchange, international agreements,

and rules of international law to which Article 303 itself refers. Also, limiting the definition of *historical* to pre-modern material might exclude from protection important wrecks of the Dutch East India Company, even though they are of great historical significance to some countries. An overly limited definition of *historical* would also exclude most early European wrecks in the Pacific and off the coast of Asia.

Even after resolving such problems of interpretation, the question remains whether the provisions are binding. The United States, for example, might say that those provisions are binding. Although the United States is not even a signatory to the underlying treaty, it has argued that most of the provisions of the 1982 LOS Convention, except for international authority over the seabed, codify customary international law. This contention is, however, doubtful. Indeed, although the language of Articles 149 and 303 is relatively open-textured, it provides for a new regime that would seem to contradict the sweeping assertion that those articles represent custom. Even if most of the provisions of the treaty are codifications of customary international law, the U.S. government insists that authority over the seabed is not. Such an interpretation sheds doubt on the binding force of Article 149, which is, after all, part of the larger conventional regime of the seabed.

In addition to Articles 149 and 303, it has been suggested that Part XIII of the 1982 LOS Convention, pertaining to marine scientific research, might govern the finding and salvage of shipwrecks. The ordinary meaning of the phrase "marine scientific research" seems to support the interpretation, but there is nothing in the *travaux préparatoires* of UNCLOS III about this. It is difficult to argue that the drafters of the treaty intended to apply both Articles 149 and 303, on one hand, and the somewhat inconsistent provisions for "marine scientific research," on the other, to the same activity. Nor was archaeological work contemplated within the provisions of the 1958 Convention on the Continental Shelf. Under both 1958 and 1982 LOS conventions, a clear line seems to have been intended, if not explicitly drawn, between research concerning the natural features of the continental shelf itself and marine archaeological activity on it. The same is true with respect to the exclusive economic zone under the 1982 LOS Convention.

In sum, the applicable international law of the sea needs further elaboration to provide in itself a significant measure of protection for the underwater cultural heritage. As the maritime regime stands today, a shipwreck under the high seas, at least one that is embedded on the seabed, is usually considered to be *res derelictae*. The principle of freedom of the seas is said to control, so that the laws of salvage and finds under the *droit d'amirauté*, subject to municipal and international norms and rules of varying force in specific cases, generally apply. Although this extension of the freedom-of-the-seas principle is dubious, it must be taken seriously in the absence of any international law to the contrary, other than the 1982 LOS Convention. There may also be an issue of whether specific property is of a sufficiently historical and archaeological nature to be governed by Articles 149 and 303 of the 1982 LOS Convention. It is difficult to take account of the uncharted course of Articles 149 and 303 of the convention, their ambiguous language, and the sheer impracticality of relying on those provisions to achieve international cooperation and protection. Even so, Articles 149 and 303 should not be ignored. They have at least symbolic importance.

The definitive UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[22] provides a related legal framework. Briefly, the UNESCO convention creates multilateral control of the movement of cultural property while seeking to promote the legitimate exchange of cultural property and international cooperation in preparing national inventories. The

convention's most important features are: a system of export certification; a measure permitting signatories to call on one another to help control the flow of jeopardized property of special significance; a requirement that parties return property within their jurisdiction stolen from museums, monuments, and other institutions; a requirement that, "consistent with national legislation, parties prevent museums and similar institutions from acquiring property illegally exported from other countries"; a requirement that parties impose penalties or other administrative sanctions for stipulated infringements; and provisions for international cooperation in identifying cultural property and developing national inventories. Contraband items are recoverable on demand by the country of origin as long as it pays just compensation to innocent purchasers. The document strikes a compromise between the interests of art-importing and art-exporting countries. The scheme allocates the burden of control between them, imposing primary responsibility on exporting countries while requiring importing countries' cooperation in the recovery and retrieval of illicitly exported property.

Toward a More Effective International Regime

In the United States, the Abandoned Shipwreck Act of 1987, which governs wrecks and related objects on submerged lands or coralline formations of the United States, provides a set of guidelines for managing underwater resources that seek to

(1) Maximize the enhancement of cultural resources;
(2) Foster a partnership among sport divers, fishermen, archaeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;
(3) Facilitate access and utilization by recreational interests;
(4) Recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.[23]

These multi-use guidelines provide one framework for international cooperation, but they do not resolve serious issues of jurisdictional rights and duties of states beyond their territorial waters. Some might object to the special recognition the guidelines give to the interests of salvors and recreational interests.

A responsible regime of control must apply, at a minimum, accepted general principles of international jurisdiction. In the familiar format of Harvard Research on International Law, the five most common principles are:

> first, the territorial principle, determining jurisdiction by reference to the place where the offense is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offense; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offense; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offense.[24]

According to the objective territorial or "effects" principle, jurisdiction may also be established on the basis of effects in a territory of an offense committed outside that terri-

tory. Although this principle is established in some legal systems such as the United States, it might be too controversial and unstable to serve as a feasible basis for a regime of control over archaeological resources.

The territorial principle of jurisdiction is fundamental. Although an expanded exercise of coastal state jurisdiction based on the territorial principle may be controversial, it would seem necessary for a new regime that protects the underwater cultural heritage. Destruction of the cultural heritage is a growing threat that urgently needs fresh, effective legal response. Coastal states may not be the optimal agents of protection, but they constitute the most realistic alternative. The scope and exclusivity of expanded coastal state jurisdiction is, however, somewhat uncertain. For example, what happens if a foreign sovereign claims title to a wreck within the territory of another state, perhaps on the basis of the nationality principle? Consider the Dutch East Indiamen wrecks off Western Australia: *Batavia, Vergulde Draeck, Zeewijk,* and *Zuytdorp.* The last had vanished without a trace: it was not even known to have been lost off Australia. There were survivors and items saved from the first three, but the location of the wrecks had been forgotten over the years. All four were found, however, between 1950 and 1970. Questions of title to the wrecks then arose. The government of the Netherlands, as successor in title to the Dutch East India Company (Vereenigde Oostindische Compagnie (V.O.C.)) maintained that it still had title to wrecked V.O.C. vessels wherever they might lie. As more than 100 vessels had been wrecked over the extended sea routes then followed during this great trading company's long history, a great many more may yet be found. Western Australian legislation had vested title to "historic wrecks" in the Western Australian Museum, whereas the Netherlands claimed title over the V.O.C. vessels. The matter was resolved by an agreement between Australia and the Netherlands concerning old Dutch shipwrecks, whereby the Netherlands transferred "all its right, title and interest in and to wrecked vessels of the V.O.C. lying on or off the coast of the state of Western Australia and in and to any articles thereof to Australia."[25] The agreement does not state that the Netherlands has had title to the wrecks and thus does not constitute an acknowledgment of this claim by the Australian government. Rather, whatever title the Netherlands had, in fact, was transferred to Australia. Sometimes, in cases of jurisdictional conflict, a compromise may be worked out by dividing salvaged property, as was the case in the 1970s following a dispute between the Dutch and Norwegian governments and individual divers concerning the Dutch ship *Akerendam,* which had sunk off the coast of Norway.

An Italian court (*Tribunale di Sciacca*) determined that a statue found in 1955 by an Italian ship beyond the limits of Italian jurisdiction was state property.[26] It is noteworthy that the *Tribunale di Sciacca* applied an Italian version of the *fictio juris,* according to which a ship on the high seas is part of state territory. Thus, the recovery of the statue was supposed to have been carried out "within Italian territory." Because the acquisition of the Italian statue on an Italian ship by Italy had not aroused any reaction at the international level, the validity of such practice under international law seems to have been acceptable. As the Italian legislation (Law 1089/39, art. 49) applies, regardless of the nationality of the property claimant, the Italian court presumably would have reached the same conclusion, even if the claimant had not been Italian.

Under the nationality principle of jurisdiction, a state, whether coastal or non-coastal, may exert jurisdiction over its nationals in relation to wrecks found outside its territory. With regard to marine cultural property, the principle of nationality seems to permit a state to govern or prohibit the conduct of its nationals and ships anywhere at sea, but would not preclude another state from applying its own regulations on a territo-

rial basis. Adoption of the nationality principle would require changes in standard practice for some states. Australia, for example, has generally employed the principle only in matters such as citizenship and personal status (for example, divorce and adoption); it does not generally exercise penal jurisdiction on this basis. The Federal Republic of Germany and the United States, on the other hand, try their own citizens for a crime committed elsewhere.

Asserting control over material excavated outside the territorial limits of a state but later brought within it is a minimum control based on the territorial principle that could be exerted over wrecks on the deep seabed. Effective control might require sites to be excavated in accordance with specified criteria; if the material is not so excavated, it would be confiscated and the person responsible fined. Such a provision would become fully effective only when those states that are major destinations for such material became party to the convention. If a reasonable number of such states did so, it would at least be a start. In some locations, it could be quite effective, particularly where there is no alternative port for supplies.

The discovery and plunder of the Royal Mail Steamer *Titanic* in 1985 is an example of the need for extending an international regime for protecting marine archaeology at great depths, even beyond the continental shelf. A minimum standard of international cooperation will be necessary. The response of the U.S. Congress to the plunder of the *Titanic* is one example of unilateral effort to cooperate, though a rather weak one. The R.M.S. Titanic Maritime Memorial Act of 1986 directed the Administrator of the National Oceanic and Atmospheric Administration (NOAA) to consult with the United Kingdom, France, Canada, and "other interested nations" to develop international guidelines for research, exploration, and, if appropriate, salvage of the *Titanic*.[27] The act further directed the secretary of state to enter into negotiations with the same three governments to develop an international agreement for the designation of the *Titanic* as an international maritime memorial and for sound research, exploration, and, if appropriate, salvage of the ship.

The French did not cooperate. They failed to respond to repeated initiatives by the State Department and, in any event, there was little time to implement the act before a French expedition launched a scavenger hunt in the vessel. The U.S. Senate reacted to the French company's threat to the wreck by passing a bill, S. 1581, that would have prohibited the importation of any object from the *Titanic* for commercial gain. The proposed legislation would also have provided for termination of the embargo whenever the United States became bound by international agreement governing the exploration and salvage of the *Titanic*. The bill, however, was never enacted.

Establishment of a global regulatory body seems unrealistic at this time. The best alternative may be to allocate control of the underwater cultural heritage to states, subject to clear international standards. The Draft Convention on the Underwater Cultural Heritage therefore requires states to exercise jurisdiction on a mixture of territorial and nationality principles. Nationals are required to abide by specified criteria when excavating historic wreck sites; any material from a protected site later brought within the territorial limits of a contracting state, whether by one of its own nationals or not, would also be subject to those criteria. Thus, a contracting state would be encouraged to assume jurisdiction over any object whose excavation, even outside that state's territory and offshore zones of control, was deemed to violate the criteria.

The charter to be annexed to the draft convention was inspired by documents such as the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations[28] and the ICOMOS Charter for the Protection and Manage-

ment of the Archaeological Heritage.[29] Both of the documents stress the nonrenewability of archaeological sites and the view that they should be excavated only to answer specific scientific-historical questions. Both instruments represent accepted professional standards for the preservation of the cultural heritage. The UNESCO recommendation states that

> [a]uthority to carry out excavations should be granted only to institutions represented by qualified archaeologists or to persons offering such unimpeachable scientific, moral and financial guarantees as to ensure that any excavations will be completed in accordance with the terms of the deed of concession and within the period laid down.[30]

Questions remain. What is clear is a growing awareness, expressed already in international and municipal legislation, of the need for governments to cooperate and agree on fundamental rules for protecting the underwater cultural heritage. Only then may we have true freedom of the seas rather than the anarchy that prevails today because of the lack of legal consensus on the underwater cultural heritage. Only then may freedom of the seas truly benefit humanity with respect to this heritage.

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Draft Convention on the Protection of the Underwater Cultural Heritage

Preamble

States party to the present Convention,

Acknowledging the importance of the underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their shared heritage;

Noting growing public interest in the underwater cultural heritage;

Perceiving that growing threats to the underwater cultural heritage include increasing construction activity, advanced technology that enhances identification of and access to wreck, exploitation of marine resources, and commercialization of efforts to recover underwater cultural heritage;

Determining that the underwater cultural heritage may be threatened by irresponsible activity and that therefore cooperation among States, salvors, divers, their organizations, marine archaeologists, museums and other scientific institutions is essential for the protection of the underwater cultural heritage;

Considering that exploration, excavation, and protection of the underwater cultural heritage necessitates the application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialization, all of which indicate a need for uniform governing criteria;

Recognizing that the underwater cultural heritage belongs to the common heritage of humanity, and that therefore responsibility for protecting it rests not only with the State or States most directly concerned with a particular activity affecting the heritage or having an historical or cultural link with it, but with all States and other subjects of international law;

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

Realizing the need to codify and progressively develop the law in conformity with international rules and practice, including provisions in the 1982 United Nations Convention on the Law of the Sea;

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

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

Have agreed as follows:

Commentary

The Preamble to an international agreement is significant. According to the Vienna Convention on the Law of Treaties (Article 31(2)), it may be used as a contextual aid to interpretation. As the last paragraph of the Preamble suggests, the best way of protecting the underwater cultural heritage is to keep it in place unless its removal is necessary for scientific or protective purposes. Thus, all efforts must be made to prevent unscientific excavation and retrieval of heritage. Other threats include industrial and construction activity, exploitation of marine resources and commercialization of efforts to recover underwater cultural heritage. These are matters that should be of concern to all States and other subjects of international law, not just those directly concerned with a particular activity. Threats to underwater cultural heritage also concern "salvors, divers, their organizations, marine archaeologists, museums and other scientific institutions". The public must be educated and informed of these threats in order to "appreciate the importance of the underwater cultural heritage to humanity and the need to preserve it as a component of the history of humanity". The Convention on Protection of the Underwater Cultural Heritage seeks to fulfil these objectives and to clarify and amplify pertinent provisions of the 1982 United Nations Convention on the Law of the Sea.

Article 1: Definitions

For the purposes of this Convention:

1. "Underwater cultural heritage" means all underwater traces of human existence including:
   (a) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural contexts; and
   (b) wreck such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context.
2. Underwater cultural heritage shall be deemed to have been "abandoned":
   (a) whenever technology would make exploration for research or recovery feasible but exploration for research or recovery has not been pursued by the owner of the heritage within 10 years after discovery of the technology and at least 50 years have elapsed since the heritage became submerged underwater; or
   (b) whenever no technology would reasonably permit exploration for research or recovery and at least 50 years have elapsed since the last recorded or other public assertion of interest by the owner in the underwater cultural heritage.
3. "Cultural heritage zone" means an area beyond the territorial sea of the State up to the outer limit of its continental shelf as defined in accordance with relevant rules and principles of international law.
4. "Charter" means the "Charter for the Protection and Management of the Underwater Cultural Heritage" prepared by the International Council for Monuments and Sites (ICOMOS) and annexed to this Convention.

Commentary

1. The definition of "underwater cultural heritage" is specific, unlike, for example, a more philosophical definition in the 1992 European Convention on the Protection of the Archaeological Heritage (Revised), Europ. T. S. No. 143. It is designed to make it easier for administrators and courts to decide if something is covered by the Convention or not. The cargo and other contents of the vessel are specifically stipulated because there have been disputes covering whether these were part of a shipwreck. Also included are "sites, structures, buildings, artifacts, and human remains, together with their archaeological and natural contexts". This is likely to include all aspects of the underwater cultural heritage of significance to the history of humanity. The context in which objects are found is itself specified as part of the underwater cultural heritage. Context is one of the most essential aspects of the archaeological heritage in providing knowledge of life during a particular era.
2. The definition of "abandoned" is intended to stabilize expectations under the Convention by simplifying its scope. The legal concept of abandonment is elusive. Most jurisdictions take the view that there must be both abandonment in fact and the intention to abandon a vessel or its cargo. The latter requirement is particularly difficult, especially when the master and crew of a vessel have actually left it and the owner does nothing within a reasonable period of time to recover it. For example, in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992), a federal appeals court in the United States upheld the 135-year-old subrogated interests of insurance underwriters in a cargo of gold. The SS Central America sank in 1857 off the coast of South Carolina. On board was a shipment of gold from Californian merchants, bankers and express companies to New York banks. Following the loss, the insurance companies paid out under the policies and, under the doctrine of subrogation, became the owners of the gold that was eventually found in 1989. The lower court held that the claimants' failure to recover the gold for 130 years and destruction or loss of documentary evidence of their payments under the policies meant that they had abandoned the gold. The Court of Appeals remanded the action to the lower court with instructions to take account of the interests of the successor insurers. In November 1993 the lower court awarded 90% of the treasure to salvors and 10% to the insurance companies. N.Y. Times, Nov. 19, 1993, at A13.

   Similarly, The Netherlands, as successor in title to all wrecks of vessels that belonged to the Dutch East India Company, claimed gold and silver coins from the wreck of the Akerendam, which was discovered off the coast of Norway in the 1970s. A negotiated settlement between Norway and the Netherlands awarded the latter 10 percent of the coins. Although some scholarly writing has acknowledged the import of Dutch claims to such treasure, the Agreement noted in the Report between Australia and the Netherlands Concerning Old Dutch Shipwrecks 1972, Aus. T.S. No. 18, was careful not to enshrine any such claim of right. In view of the uncertain nature of the legal concept of abandonment and the effect this ambiguity would have on the scope of the Convention, its definition attempts to define abandonment with more precision but at the same time to preserve the reasonable rights of owners.
3. The Charter is intended to provide a set of criteria whereby States may judge

whether activity in respect of the underwater cultural heritage has been, or will be, acceptable. In other words, if material has been excavated or retrieved, States will have a basis for determining whether it has been done in accordance with archaeologically acceptable standards. The Charter has been prepared by the International Committee for the Underwater Cultural Heritage established by the International Council for Monuments and Sites (ICOMOS). It is complementary to the "Charter for the Protection and Management of the Archaeological Heritage" already produced by ICOMOS, but is modified to take account of the special features of underwater cultural heritage.

4. Drafting of the Convention involved much discussion of how the "cultural heritage zone" should be defined. Some argued that its breadth should be left to the State concerned; for example, the zone might be made co-extensive with the contiguous zone, continental shelf, 200-mile exclusive economic zone, a special 200-mile zone, or any combination of these. Others argued that a regime with multiple options of this sort would create too many problems of delimitation where States with opposing or adjacent coastlines have proclaimed or exercise different options. It was eventually agreed that the area should coincide with the continental shelf.

Article 2: Scope of the Convention

1. This Convention applies to underwater cultural heritage which has been lost or abandoned and is submerged underwater for at least 100 years. Any State Party may, however, protect underwater cultural heritage which has been submerged underwater for less than 100 years.
2. This Convention does not apply to any warship, military aircraft, naval auxiliary, or other vessels or aircraft owned or operated by a State and used for the time being only on government non-commercial service, or their contents.

Commentary

1. The Convention does not cover all underwater cultural heritage within the definition of Article 1(4). According to Article 2, the heritage must have been abandoned for at least 100 years beneath the sea. The 100-year qualification can be found in the domestic legislation and practice of many states. Of crucial importance is the date on which this period commences. It could be the date of creation of the object, but this would mean that some antique objects would qualify as soon as they sank. There is no scientific basis for the 100-year rule. Some archaeologists work on material of more recent vintage. The best rationale for the rule is administrative convenience. It is an efficient means for separating out material which is more likely to be important from that which is less likely. The Convention does give States the option of extending its coverage to underwater cultural heritage which is less than 100 years old. Thus, a State could specify in its legislation any particular aspect of the heritage—for example, wrecks—that it wanted covered by a shorter time span.
2. The definition of "abandoned" requires modification with respect to government owned or operated non-commercial maritime vessels or aircraft. The mere passage of time should not be interpreted to establish abandonment of such material. Many states resist any attempt to interfere with the sites of such material. For

example, the first wreck protected under the Australian Historic Shipwrecks Act 1976 was a Japanese submarine sunk in action off Bathurst Island, parts of which a salvor had been planning to raise for scrap. Similarly, the United States has stated that:

> . . . salvors should not presume that sunken U.S. warships have been abandoned by the United States. Permission must be granted from the United States to salvage sunken U.S. warships, and as a matter of policy, the U.S. Government does not grant such permission with respect to ships that contain the remains of deceased servicemen . . . .
>
> In the absence of an express transfer or abandonment of a U.S. warship sunk in the near past (e.g. in the World War II era), it should be presumed that title to such vessels remains in the U.S. Title to vessels sunk in the more distant past (such as during the 17th and 18th centuries) would, of course, still be determined by the more conventional interpretation of abandonment of that period.
>
> Letter from Department of State to Maritime Administration, December 30, 1980, *reprinted in* United States Department of State, 8 Digest of United States Practice in International Law 999, 1004 (1980).

Many other States take a similar view and, in light of the firmness with which this view is held, the Convention exempts warships from its scope. A specific concern is that wrecks of warships may contain the remains of service personnel who died in active combat and are regarded by the flag States as war graves that should not be disturbed.

Article 3: General Principle

States Party shall take all reasonable measures to preserve underwater cultural heritage for the benefit of humankind.

Commentary

This Article encapsulates the principle of Article 149 of the 1982 United Nations Convention on the Law of the Sea. It is cast as a general duty rather than one applying only in a specific maritime area. Moreover, the duty is one of preservation. Thus, no mention is made of disposal of objects, as in Article 149. Necessary disposal of underwater cultural heritage should be done in such a way as to preserve it.

Article 4: Non-Applicability of Salvage Law

Underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage.

Commentary

It should be noted that the law of salvage relates solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For underwater cultural heritage, the danger has passed; either a vessel has sunk or an object has been lost

overboard. Indeed, the heritage may be in greater danger from salvage operations than from being allowed to remain where it is. Even if it lies in an area of turbulence, the remedy is to use the provisions of the Convention and Charter rather than rely on criteria drawn from salvage practices. The major problem is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.

Article 5: Cultural Heritage Zone

1. A State Party to this Convention may establish a cultural heritage zone and notify other States Party of its action. Within this zone, the State Party shall have jurisdiction over activities affecting the underwater cultural heritage.
2. A State Party shall take measures to ensure that activities within its zone affecting the underwater cultural heritage comply at a minimum with the provisions of the Charter.

Commentary

1. The jurisdiction of States over the underwater cultural heritage was briefly discussed at the Third United Nations Law of the Sea Conference (UNCLOS III). In Article 303 of the Convention, a legal fiction was created to give states some control over excavations within but not beyond their contiguous zones. This provision is widely regarded as ineffective and insufficient for protection of the underwater cultural heritage. Moreover, it pays no regard to inconsistencies in the current territorial jurisdiction exercised by States over the underwater cultural heritage. Some States use the contiguous zone as a benchmark (e.g. France); others the continental shelf (e.g. Australia, Ireland, Spain); Denmark uses its 200-mile fishing zone; and yet others use the exclusive economic zone (e.g. Morocco). The Convention allows each State Party to establish a "cultural heritage zone" coextensive with the continental shelf (Article 1). This is compatible with the 1992 European Convention on the Protection of the Archaeological Heritage (Revised).

   There is no obligation on a State to adopt a "cultural heritage zone". If a State wants to limit its control over underwater cultural heritage to a three-mile territorial sea, it can do so and still become party to the Convention.
2. Although the coastal State is considered to be the best agent under international and domestic law for protecting the underwater cultural heritage on the continental shelf, coastal States sometimes do not live up to their obligations. Article 5(2) is designed, therefore, to prevent States from simply declaring a cultural heritage zone and then doing nothing more. The provisions of the Charter are regarded as minimum standards for treatment of the underwater cultural heritage.

Article 6: Internal and Territorial Waters

States Party shall transmit a copy of the Charter to all relevant authorities within their jurisdiction, requiring them to take appropriate measures to apply the Charter, at a minimum, to activity within their internal and territorial waters.

Commentary

The Convention does not attempt to control standards of archaeology in internal waters or the territorial sea. A large number of States apply the same rules to underwater archaeology in these areas as they do to land archaeology. Consequently, any attempt to apply the requirements of the Convention in the territorial sea, for example, would require those States either to change their laws or to separate the underwater aspects of those laws. That would be beyond the stated scope of the Convention. Nevertheless, in an attempt to further the implementation of minimum standards, States Party are encouraged to apply the provisions of the Convention and the criteria of the Charter to internal and territorial waters.

Article 7: Prohibition of the Use of Territory in Support of Activities Violating the Charter

No State Party shall allow its territory or any other areas over which it exercises jurisdiction to be used in support of any activity affecting underwater cultural heritage and inconsistent with the criteria of the Charter. This provision shall apply to any such activity beyond that State's territorial sea but not within a territorial sea or cultural heritage zone of another State Party.

Commentary

The Committee considered a hypothetical excavation by a European group of a wreck outside the "cultural heritage zone" of Malaysia. Obviously, for the salvors, the most convenient places for recreation, refuelling, obtaining stores, and so on, would be Malaysia or perhaps Singapore. Without this provision, even if all the countries of the region were party to the Convention, it might impose no constraints on activities violating Charter criteria.

Article 8: Prohibition of Certain Activities by Nationals and Ships

Each State Party shall undertake to prohibit its nationals and ships of its flag from activities affecting underwater cultural heritage in respect of any area which is not within a cultural heritage zone or territorial sea of another State Party. The prohibition shall not apply to activities affecting the underwater cultural heritage that comply with the Charter.

Commentary

This prohibition is a core of the Convention. Past experience indicates that nationality is a principal jurisdictional basis to enforce the Convention. Nationality of the vessel used for a questionable activity is too uncertain; for example, the vessel may be too small to require registration or registration of the vessel in a flag-of-convenience state might also limit effectiveness. An alternative might be universal jurisdiction, but extension of its scope of activiting related to underwater cultural heritage is apt to be too controversial.

States have been resorting to the nationality principle of jurisdiction more frequently to deal with situations where territorial jurisdiction is ineffective. One relevant example is the Protection of Military Remains Act 1986, under which the United Kingdom protects the site of British vessels and aircraft that sank or crashed on military service, even

if the site be in international waters. It is an offence for British nationals to take any action in respect to such a site without a license.

This prohibition is not absolute. Activities affecting the underwater cultural heritage as defined can be carried out provided they are done in accordance with the provisions of the Charter. Material excavated under these conditions would be allowed entry into States Party.

Article 9: Permits

A State Party to this Convention may provide for the issuance of permits allowing entry into its territory of underwater cultural heritage excavated or retrieved after the effective date of this Convention so long as the State has determined that the excavation and retrieval activities have complied or will comply with the Charter.

Commentary

Search for and possible excavation of underwater cultural heritage is often expensive in terms of both time and money. Those undertaking such activities need an assurance that any material raised will be allowed entry into a State Party without the possibility of seizure. This Article gives a State an optional power to issue permits providing for entry of material. Such a permit could be issued before the work begins, subject to a condition that activity be conducted in accordance with the provisions of the Charter. To ensure this, the permit must make provision for supervision of the work. However, the permit could be issued after the work was done, provided the issuing State has been satisfied that the work was conducted in a manner that complied with the Charter. In other words, the essential point is that what is done must be in accordance with the Charter. When, and if, the permit is issued is a matter for individual States Party.

Article 10: Seizure of Heritage

1. Subject to Article 9, on the request of any Party or on its own initiative, each State Party, in accordance with its constitutional procedures, shall seize any underwater cultural heritage brought within its territory, directly or indirectly, after having been excavated or retrieved in a manner not conforming with the Charter.
2. A State shall seize underwater cultural heritage known to have been excavated or retrieved from a cultural heritage zone or territorial sea of another State Party only after obtaining the consent of that State.

Commentary

1. The Convention will need the cooperation of a large number of States Party to be truly effective. Moreover, membership will need to include "art market" States and other States whose nationals have access to advanced technology. For example, if Spain were a Party and received notice of a vessel containing cargo that had been excavated in non-compliance with the Charter, for example, beyond the cultural heritage zone of Malaysia, it would be required to seize the excavated material if the vessel entered Spanish territorial waters.

   The Convention states that seizure will occur where the heritage has been "brought within its territory, directly or indirectly, after having been excavated

or otherwise retrieved . . . ." The "directly or indirectly" language is an attempt to expand the scope of the Convention. An intervening sale of excavated material can create problems. Suppose that European excavators of material excavated off the Malaysian coast proceed directly from the Far East to the Netherlands and suppose that the Netherlands is not a party to the Convention. There the excavated material is sold by auction. One of the purchasers is French and brings his ceramics home. Under the Convention, if France was a party, it would have an obligation to seize the ceramics. This obligation exists whatever the number of intervening transactions in an object.

It should be noted that if an object has not been "abandoned" according to the definition in Article l(l), it is not covered by the Convention and therefore need not be seized.

2. The purpose of this Article is to make clear that a State can only seize underwater cultural heritage from the cultural heritage zone or territorial sea of another State Party if the latter requests or acquiesces in the seizure. This is to prevent the seizing State from applying more stringent provisions than the State in whose cultural heritage zone the object is found. A State is not prevented, however, from seizing underwater cultural heritage found in the jurisdiction of a non-Party State.

Article 11: Penal Sanctions

1. Each State Party undertakes to impose penal sanctions for importation of underwater cultural heritage which is subject to seizure under Article 10.
2. Each State Party agrees to cooperate with other Parties in the enforcement of these sanctions. Such cooperation, consistent with national procedures, shall include but not be limited to, production and transmission of documents, making witnesses available, service of process and extradition.

Commentary

1. Committee members recognized that municipal penal laws, particularly within federal or other complex systems of authority, vary widely. As a basic obligation, however, the Convention requires States to undertake to impose penal sanctions for what, in effect, are activities affecting the underwater cultural heritage in ways contrary to the provisions of the Charter. This provision is, however, expressed specifically in terms of importation, in order to avoid controversy that might cripple any attempt to extend penal sanctions to other aspects of the regime. The nature of the sanctions is left to each State Party.
2. To be effective, cooperation in enforcement of sanctions must, of course, be consistent with national procedures which are often subject to their own legal regimes established by international agreement. It is anticipated that, over time, those regimes would seek to improve the degree of cooperation mandated here. For example, treaties on extradition might include the offense of importing underwater cultural heritage subject to seizure as an extraditable crime.

Article 12: Notification Requirements and Treatment of Seized Heritage

1. Each State Party undertakes to notify the State or States of origin, if known, of its seizure of underwater cultural heritage under this Convention.

2. Each State Party undertakes to record, protect and take all reasonable measures to conserve underwater cultural heritage seized under this Convention.
3. Each Party undertakes, wherever possible, to keep underwater cultural heritage seized under this Convention on display or otherwise ensure the fullest reasonable access to it for the benefit of the public.

Commentary

1. Article 149 of the 1982 United Nations Convention on the Law of the Sea states that particular regard is to be paid to the preferential rights of the State or country of origin when preserving or disposing of objects of an archaeological or historical nature found in "the Area". These preferential rights will take effect only upon a State's acceptance of the International Seabed Authority, as provided for in the 1982 Convention. While in some cases the State of origin may be easily deduced, in others it would be impossible to determine. For example, an object may be determined to come from a particular ancient state or region which today is occupied by four or five national States.
2. It is recognized that conservation is very expensive and that this provision could require unforeseen expenditure of money by a State. The primary duty is, however, to record seized material. Moreover, it is unlikely that material which is particularly expensive to conserve, such as wood, would often be seized. Persons raising this kind of material would be more likely to do so in accordance with the provisions of the Charter, with the result that it would not be subject to seizure.
3. Because objects are seized for the public benefit, they should be used for educational purposes, as set out in Article 14. What is actually done with the objects would depend on their condition and the needs of conservation. Public access or even access for specialists may have to be limited if objects are fragile. Nevertheless, the words of a federal court in the United States are persuasive:

> A painting has no value except the pleasure it imparts to the person who views it. A work of art entombed beyond every conceivable hope of exhumation would be as valueless as one completely consumed by fire. Thus, if the paintings here involved may not be seen, they may as well not exist. (*Commonwealth v. Barnes Foundation*, 159 A.2d 500, 502 (Pa. 1960)).

The objects recovered from the bottom of the sea, albeit unlawfully, are to be used for both scientific and educational purposes to the greatest extent possible, consistent with what context remains.

Article 13: Collaboration and Information-Sharing

1. Whenever a State has expressed a patrimonial interest in particular underwater cultural heritage to another State Party, the latter shall consider collaborating in the investigation, excavation, documentation, conservation, study and cultural promotion of the heritage.
2. To the extent compatible with the purposes of this Convention, each State Party

undertakes to share information with other States Party concerning underwater cultural heritage, such as but not limited to, discovery of heritage, location of heritage, heritage excavated or retrieved contrary to the Charter or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to heritage.

3. Whenever feasible, each State Party shall use appropriate international databases to disseminate information about underwater cultural heritage excavated or retrieved contrary to the Charter or otherwise in violation of international law.

Commentary

1. The Committee recognized the serious problems that inhere in determining a single "country of origin." Even though it may be impossible to establish a single country of origin when it is evident that seized material has connections with other parts of the world, States should contact other States Party that may have some substantial connection with the material, in order to collaborate in dealing with the material. This may foster international cooperation and harmony as well as higher quality work on the material.
2. Rarely does the underwater cultural heritage beyond the territorial sea concern only a single, still existing State. If a shipwreck, the vessel will often have been making for a port in what is now another State. The site will reveal information about trading routes as well as details of the lives of the crew and passengers, construction of the vessel, and so on. It is essential that this information be distributed as widely as possible among interested parties, not only so that others know of what has been found but also so that their expertise may be brought to bear on interpretation and understanding of the information. It is also essential for the purposes of this Convention that information on illegal excavations be distributed as widely as possible.
3. This paragraph reminds States, to their individual and mutual benefit, of the necessity for rapid dissemination of information and the ability of international databases to achieve this.

Article 14: Education

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

Commentary

"Educational means" includes formal training but also many other activities, for example, promotion of exhibitions that feature recovered underwater cultural heritage. Other educational activities might include production of leaflets, provision of background material to journalists, and sponsorship of essay competitions among students. It is necessary to combat the characterization of looters as adventurous, colorful persons and archaeologists as dull academics, also the notion that archaeologists are trying to keep everything for themselves while looters are endeavoring to bring beautiful things to the world. Looters must be held up for what they are: destroyers of our past.

Article 15: Revision of the Charter

Revisions in the Charter by the International Council for Monuments and Sites shall be deemed to be revisions in the annexed Charter, binding on States Party except for those State Parties that notify their non-acceptance to the Director-General of the United Nations Educational, Scientific and Cultural Organization within six months after the effective date of a revision. UNESCO shall inform the States Party of such revisions prior to the effective date of the revision.

Commentary

The criteria of the Charter should evolve as the discipline of archaeology develops and technology changes, but it would not be desirable to subject any Charter amendment to the procedure for amending the Convention. Consequently, this Article establishes, more efficiently, that revision by ICOMOS of its Charter is deemed to be a revision in the annexed Charter that is binding on States Party, subject to specific objections. Activities affecting the underwater cultural heritage will be judged against the version of the Charter existing at the time a particular activity occurred.

Article 16: Dispute Resolution

1. States, on becoming Parties to this Convention, undertake to establish an internal procedure or procedures for resolving disputes concerning whether an activity resulting in excavation or retrieval of the underwater cultural heritage did or did not comply with the Charter.
2. Any dispute between two or more States Party concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the States Party are unable to agree on the organization of the arbitration, any one of those States Party may refer the dispute to the International Court of Justice, or a special chamber thereof, by a request in conformity with the Statute of the Court.

Commentary

Disputes about whether excavation or retrieval of material was done in accordance with the charter require both domestic and international procedures for their resolution. Article 16(1) does not mandate a court proceeding. Rather, it is left to each State Party to determine how disputes should be resolved in accordance with its own practice.

Article 17: Official Languages

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

Article 18: Ratification or Acceptance

1. This Convention shall be subject to ratification or acceptance by States in accordance with their respective constitutional procedures.
2. The instruments of ratification or acceptance shall be deposited with the

Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 19: Applicability to Territorial Units

1. If a State Party has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time.
2. These declarations are to be notified to the depository and are to state expressly the territorial units to which the Convention extends.

Article 20: Reservations, Understandings and Declarations

1. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall receive and circulate to all States Party the text of reservations, understandings and declarations made by States at the time of ratification or accession.
2. A reservation incompatible with the objects and purposes of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 21: Accessions

1. This Convention shall be open to accession by all States not Members of the United Nations Educational, Scientific and Cultural Organization.
2. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 22: Entry into Force

This Convention shall enter into force three months after the date of the deposit of the tenth instrument of ratification, acceptance or accession, but only with respect to those States which have deposited their respective instruments of ratification, acceptance or accession on or before that date. It shall enter into force with respect to any other State three months after the deposit of its instrument of ratification, acceptance or accession.

Article 23: Denunciations

1. Each State Party to this Convention may denounce the Convention.
2. The denunciation shall be notified by an instrument in writing, deposited with

the Director-General of the United Nations Educational, Scientific and Cultural Organization.

3. The denunciation shall take effect six months after notification.

The foregoing is the authentic text of the Convention duly adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization during its . . . session, which was held in . . . and declared closed on the . . . day of . . . .

IN FAITH WHEREOF we have appended our signatures this . . . day of . . . .

The President of the General Conference

The Director-General

Annex (Charter)
[Draft in progress by ICOMOS.]

Notes

1. The members are Mr. Justice S. D. Agarwala (India), Mr. D. H. Anderson (United Kingdom), Mr. Kaare Bangert (Denmark), Mme. A. Derradji (Algeria), Professor Dr. W. Fiedler (Germany), Avv. M. Frigo (Italy), Ms. M. Haunton (Canada), Professor Shigeru Kozai (Japan), Professor V. Lamm (Hungary), Mâitre Jean Lisbonne (France) (Alternate Member), Dr. Helen Moustaira (Greece) (Alternate Member), Dr. Fernando Muñoz B. (Ecuador), Professor James A. R. Nafziger (United States) (Rapporteur), Dr. P. J. O'Keefe (Australia) (Chair), Dr. L. V. Prott (France), Dr. C. G. Roelofsen (The Netherlands), Dr. Sabine von Schorlemer (Germany), Dr. A. Strati (Greece), Dr. A. Szekely (Mexico), M. S. de Vilmorin (France), and Mr. Hongye Zhao (China).

2. In particular, the authors would like to thank the following persons for their valuable assistance: George Bass, David Bederman, Peter Bernhardt, David Blackman, Michael M. Cohen, Martin Dean, Ricardo J. Elia, Anne G. Giesecke, Christopher Grayson, Graeme Henderson, Carsten Lund, Bernard Oxman, J. Ashley Roach, and Frank Wiswall.

3. International Law Association, *Report of the Sixty-fourth Conference* 223 (1991).

4. "The 64th Conference of the International Law Association, held in Queensland, Australia 19–25 August 1990, TAKING NOTE of the first Report submitted by the Committee on Cultural Heritage Law, and the comments and suggestions made thereon at the working session of the Committee: 1. ENCOURAGES the Committee to continue with its work on the underwater cultural heritage, taking account of those comments and suggestions; 2. ENCOURAGES the Committee to prepare a revised and extended draft Convention on the Underwater Cultural Heritage for submission to the 65th Conference of the International Law Association; and 3. ENDORSES the suggestion that the Committee so proceed in consultation with appropriate other committees of the International Law Association." Id. at 11.

5. International Law Association, *Report of the Sixty-fifth Conference* (forthcoming) (draft on file with authors).

6. "The 65th Conference of the International Law Association held in Cairo, Egypt, April 20–26, 1992: NOTING the second Report submitted by the Committee on Cultural Heritage Law, and the comments and suggestions made at the working session of the Committee; ENCOURAGES the Committee to continue its work on the underwater cultural heritage, taking into account these comments and suggestions, with a view to completing a Draft Convention on the Underwater Cultural Heritage for submission to the 66th Conference, and in the expectation that the Draft Convention will be referred to UNESCO for consideration and eventually to States for adoption; RECOMMENDS that the Committee convene a working session prior to the 66th

Conference to consider the proposed Draft Convention; ENDORSES proposals made for the Committee to consult with other relevant ILA Committees, and with other international organizations such as the United Nations Law of the Sea Office, the International Committee on the Underwater Cultural Heritage of the International Council for Monuments and Sites, and the Comité Maritime International." Id.

7. Opened for signature Dec. 10, 1982, 21 I.L.M. 1261.

8. Final Activity Report of the Ad Hoc Committee of Experts on the Underwater Cultural Heritage, Doc. No. CAHAQ 85(5) (1985). For discussion, see Anastasia Strati, "Deep Seabed Cultural Property and the Common Heritage of Mankind," 40 *Int'l & Comp. L.Q.* 859, 862 (1992).

9. Apr. 28, 1989, IMO Doc. LEG/CONF.7/27 (May 2, 1989), S. Treaty Doc. No. 12, 102d Cong., 1st Sess. (1991) [hereinafter Salvage Convention].

10. Id., arts. 1, 3.

11. Pub. L. No. 100-298, 102 Stat. 432 (1988).

12. Abandoned Shipwreck Act § 5(a), 102 Stat. at 433.

13. For a summary of national legislation, see 1 Patrick J. O'Keefe and Lyndel V. Prott, *Law and the Cultural Heritage* 89 (1984).

14. Abandoned Wreck Law (Revised) §§ 2, 3 (1977), discussed in O'Keefe and Prott, supra note 13, at 192.

15. Abandoned Wreck Law, supra note 14, § 12.

16. Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 P.2d 330, 337 (5th Cir. 1978).

17. Loi no. 89-874 du 1er décembre 1989 relative aux biens culturels maritimes et modifiant la loi du 27 septembre 1941 portant réglementation de fouilles archéologiques, 1989 J. O. 15033.

18. Salvage Convention, supra note 9, art. 1(a).

19. Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

20. See, for example, Note, "Marine Archaeology and International Law: Background and Some Suggestions," 9 *San Diego L. Rev.* 668, 676 (1972).

21. Bernard Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)," 75 *Am. J. Int'l L.* 211, 241 n. 152 (1981).

22. Nov. 15, 1970, 832 U.N.T.S. 231.

23. Abandoned Shipwreck Act § 5(a), 102 Stat. at 433.

24. Harvard Research in International Law, 29 *Am. J. Int'l L.*, Supp. 1, at 435, 445 (1935).

25. 1972 Austl. T.S. No. 18, art. 1.

26. According to an interpretation of the 1939 Law on the Protection of Property of Artistic and Historical Interest, No. 1089/39, art. 49; see also Codice della navigazione [C. Nav.] arts. 510–511 (Italy).

27. Pub. L. No. 99-513, § 5(a), 100 Stat. 2082, 2083 (1986).

28. UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, reprinted in United Nations Educational, Scientific, and Cultural Organization, *Conventions and Recommendations of UNESCO Concerning the Protection of the Cultural Heritage* 101 (1985) [hereinafter UNESCO Recommendation].

29. Reprinted in Ricardo Elia, "ICOMOS Adopts Archaeological Heritage Charter: Text and Commentary," 20 *J. Field Archaeology* 97, 98 (1993).

30. UNESCO Recommendation, supra note 28, art. 19.