

INTERNATIONAL ARTS LAW UPDATE
CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE —
UNESCO GENERAL CONFERENCE

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[69] The 31st General Conference of UNESCO (the Conference) was held in Paris from 15 October to 3 November 2001. Delegates made decisions on a number of matters concerning cultural heritage. The Conference adopted a *Universal Declaration on Cultural Heritage* which has the potential to contribute significantly to the philosophical debate over the nature of that heritage and the relationship to it held by people, communities and States. It also adopted a recommendation that the Director-General proceed to the preparation of an international convention on intangible cultural heritage. These will be discussed in the next contribution to the *Review*. This note will examine one of the most significant decisions made by the 31st Conference — adoption of the *Convention on the Protection of the Underwater Cultural Heritage*. It is UNESCO's fourth international instrument dealing with cultural heritage and the first in this field for 19 years.

The Convention was eight years in the making from the time the Executive Board invited the Director-General of UNESCO to consider the 'feasibility of drafting a new instrument for the protection of the underwater cultural heritage'. The early history of the drafting of the Convention has been reported in this *Review*² which left the story heading for a fourth meeting of governmental experts in March/April 2001.

That meeting was held as scheduled and extended for the period 2–7 July 2001. The reason for this lay basically in an expressed desire that as much as possible of the Convention should be decided by consensus. However, midway through the second week of the March–April meeting, it was obvious that the degree of control the coastal State should have over underwater cultural heritage on its continental shelf and in its [70] exclusive economic zone totally divided delegations. On one side were the self-nominated 'major maritime powers' and on the other the Group of 77 together with such States as Australia, Canada, China, Greece, Ireland, Italy, Japan, New

¹ Consultant, Paris.

² (1999) 4 *Media & Arts Law Review* 253; (2000) 5 *Media & Arts Law Review* 267.

Zealand, Republic of Korea, Portugal and Spain. A vote seemed inevitable. The Chairman left the podium to speak to the Director-General. On return, he indicated that the Director-General would like there to be further efforts to find consensus and proposed extending the meeting for a week at time to be decided. Many States were upset at this but eventually acceded to the Director-General's suggestion, but only on the basis that there would be no further extensions beyond the end of the postponed meeting. Following intensive negotiation both up to and during the period 2–7 July, the draft convention was approved and recommended for adoption to the General Conference of UNESCO early Sunday morning, 8 July, by vote — 49 in favour, four against and eight abstentions.

The recommendation was considered by Commission IV of the General Conference on 29 October 2001. Russia and the United Kingdom with the endorsement of the United States of America proposed a number of amendments but these were overwhelmingly rejected without debate. France withdrew further amendments it had proposed. The Draft Convention was then approved by 94 votes to five with 17 abstentions and recommended to the Plenary session. There it was definitively adopted by 87 votes to four with 15 abstentions. It was signed by the President of the General Conference and the Director-General of UNESCO on 6 November after which it became open to ratification, acceptance, approval or accession in accordance with art 26.

Article 1 of the Convention provides that it applies only to material that has been underwater for more than 100 years. Beyond that time it applies to all traces of human existence 'having a cultural, historical or archaeological character'. Illustrations are given of what is meant by this: for example, 'sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context'. Pipelines, cables and other installations still in use are specifically excluded. There was a proposal to include in the definition 'sites with spiritual associations for indigenous peoples'. Although strongly supported by Australia and Canada, it was questioned by some other States which were disturbed at the possibility that such a site might have no distinguishing physical characteristic. The proposal was withdrawn just before the vote in July 2001. However, through Rule 5 it still survives as a factor to be taken into account in activities directed at underwater cultural heritage.

The Convention is controversial as could be expected from an international instrument that touches on delicate issues of public international law, private law, cultural policy and the conduct of archaeology. The last arises from the Annex attached to the Convention. Entitled 'Rules Concerning Activities Directed at Underwater Cultural Heritage', the Annex is an integral part of the Convention. It is intended to provide guidance for States when issuing authorizations for such activities. As such, it controls the way in which underwater cultural heritage is to be managed and how the persons concerned are to conduct themselves once that work commences. It is the first time that archaeology has been the subject of such rules having the force of international law. There had been discussion of the need for a flexible system allowing amendment of the Rules in the light of changing technological and professional standards. In the event, this was not incorporated and the Annex can only be changed by the procedure laid down in art 31 which is applicable to the Convention as a whole.

The *United Nations Convention on the Law of the Sea* 1982 (UNCLOS) contains two provisions on 'Archaeological and Historical Objects Found at Sea' — arts 149 and 303. These are widely regarded as insufficient for protection of the underwater cultural heritage. This was a major impetus for the creation of a specific international instrument on the subject — a possibility foreseen by art 303(4) itself. The Underwater Convention states that it is to be 'interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea' (art 3). There was much discussion over the wording of this provision. In Commission IV, Russia and the United Kingdom with the endorsement of the United States of America, had proposed deleting the words 'international law, including' but this was defeated without debate. Article 3 is a delicate compromise between those who see UNCLOS as the only international instrument that [71] should guide all developments concerning underwater cultural heritage and those who see it as a significant guide but only one among many relevant rules of international law. Both positions have been accommodated in art 3. UNCLOS is part of international law. The wording allows for future development in the interpretation of UNCLOS and in international law through custom or other international instruments.

The debate in Commission IV began with States making general statements regarding their attitude to the Convention. Many — for example, Argentina, Australia, China, Finland, Ireland, Italy, Japan — specifically stated that they regarded the Convention as in full conformity with UNCLOS. Some — France, Israel, Netherlands, Russia, United States of America — disagreed. Norway, as it had done on previous occasions, reserved its position under art 311 of UNCLOS which applies when another agreement modifies or suspends provisions of UNCLOS.

Those who find a clash between the Convention and UNCLOS usually refer to the former's provisions on the continental shelf and exclusive economic zone. The problem is that UNCLOS simply does not deal with the issue of jurisdiction over underwater cultural heritage in these areas. It certainly was discussed during negotiation of UNCLOS but the most that was done was to give the coastal State a limited jurisdiction in the contiguous zone under art 303(2). But this does not mean that the issue cannot be raised anew in the context of another international instrument when more is known of the issues involved and changes in technology have altered the physical reality.

The relationship between the coastal State and underwater cultural heritage on its continental shelf or in its exclusive economic zone was one of the most difficult issues to negotiate in the entire Convention. The great majority of States considered the coastal State should have the right to control activities directed at underwater cultural heritage in these zones. Others, mainly the major maritime powers, opposed this, seeing it as an extension of power by the coastal State leading to further such claims or, as it is called, 'creeping jurisdiction'. Finally, there emerged two provisions — art 9 dealing with 'Reporting and Notification' and art 10 on 'Protection'.

A crucial provision is art 9(1). Paragraph (a) of that provision requires a State Party to direct that its nationals and ships flying its flag report to it any discovery of underwater cultural heritage or any intention of undertaking activities directed at such heritage in the two zones. This is unexceptional. On the other hand, para (b) incorporates what has been called 'a creative ambiguity' in that on one interpretation it allows the coastal State to require such reports from a foreign national or a foreign flag ship. It represents a compromise that would make the Convention acceptable to

more States. The Russian and British proposed amendments introduced at Commission IV would have removed the ambiguity and made it plain that the coastal State would not have such power. Rejection of the amendment is a clear indication that the majority wished to retain both interpretations within the ambiguity.

Under UNCLOS, the coastal State has sovereign rights to exploit the natural resources of its adjacent continental shelf and no one may undertake activities in relation to them without its express consent (art 77). In its exclusive economic zone a coastal State has sovereign rights to exploit the natural resources although it has to have due regard to the rights and duties of other States (art 56). Most wrecks are associated with marine life whether it be fish, molluscs or micro-organisms. Under existing law as represented by arts 56 and 77, the coastal State could control any work done on a wreck if the affect would be to interfere with such natural resources — as it almost inevitably would. This is recognized in art 10(2) of the Convention, under which [72] the coastal state has the right to prohibit or authorize any activity directed at underwater cultural heritage ‘to prevent interference with its sovereign rights or jurisdiction as provided for by international law including [UNCLOS]’.

In the rare situation where there is no such interference, a complex procedure set out in art 10(3) and following applies. This involves the coastal State, or, if it doesn’t want to act, another State, coordinating consultations with States that have declared an interest based on a verifiable link to the underwater cultural heritage concerned. The Coordinating State may take emergency measures. It is to implement protective measures agreed with the other States and, in conformity with the Rules, issue all authorizations necessary to carry those measures into effect.

Articles 11 and 12 of the Convention deal with reporting and protection of underwater cultural heritage in the ‘Area’ which is defined as in UNCLOS to mean the sea-bed beyond the limits of national jurisdiction. A State Party is to require its nationals and the masters of vessels flying its flag to report to it any discovery of, or activity directed at, such heritage in the Area. That State then notifies the Director-General of UNESCO who is to make the information available to all States Parties. Those with a verifiable link then declare to the Director-General their interest in being consulted on effective protective measures. A co-ordinating state is appointed and a similar

procedure to that under art 10 follows. It will be obvious that the consultation and coordination procedures under arts 10 and 12 will require significant cooperation among states and the development of efficient procedures by UNESCO.

Port state jurisdiction is also used to control unauthorized activities. Under art 15, States Parties are to prohibit the use of their territory in support of any activity directed at underwater cultural heritage which is not in conformity with the Convention. This could be a very effective control mechanism but will only work when all the states in a region become parties.

Articles 14, 17 and 18 require state parties to take various actions making it unattractive for persons to act contrary to the Convention. For example, under art 14 States are required to prevent the entry into their territory, dealing in or possession of, underwater cultural heritage recovered in a way which does not conform to the Convention. Under art 18 States are required to seize such heritage. This can pose practical problems. For example, in 2001, at the request of the Indonesian Government, the Australian authorities seized seven shipping containers packed with Chinese ceramics from the wreck of the *Tek Sing*. In accordance with s 36 of the *Protection of Movable Cultural Heritage Act 1986* a 'Notice of Seizure' containing a description of the objects being seized had to be issued 'as soon as practicable' following physical seizure. The seven containers held 71,939 pieces of porcelain which had to be unpacked, catalogued and repacked — a task taking several months work by experts.³

Article 17 requires the imposition of sanctions for violation of measures a State has taken to implement the Convention. A major problem in dealing with sanctions in an international convention is the discrepancy between the fines and gaol sentences that may be imposed by the various States Parties. The Convention attempts to overcome this by requiring that offenders be deprived of any benefit resulting from their illegal activities.

³ Porcelain that had left Australian before the formal Indonesian request was received was taken to Munich and auctioned on the Internet. Apparently the auction was not a success with about half the lots

Salvage is an ancient custom of the sea whereby a person who saves property in danger receives an award of a percentage of the value of what is saved. It is commonly regarded as inappropriate when applied to underwater cultural heritage as it attracts attention to saving only high value articles and detracts from that which has no commercial value, such as ship's timbers. Some courts in the United States of America have attempted to incorporate archaeological principles into the process for assessing the salvage award but a recent study concludes: 'If the full range of archaeological principles is taken into account, there seems [73] little scope for salvage to operate'.⁴ Moreover, many States, particularly those with a Civil Law background, do not apply salvage to ships that have sunk. Against this background, there were many proposals on how to deal with salvage in the context of the Convention. Eventually a compromise proposal was reached that greatly restricts the application of both salvage law and the law of finds to underwater cultural heritage. They are only to apply if the activity in question is authorized by the competent authorities; is in full conformity with the Convention and anything recovered receives maximum protection.

One aspect of the Convention that cuts directly across the philosophy underlying salvage principles is its emphasis on *in situ* preservation. This is stressed in the Preamble. In art 2(5) and Rule 1 *in situ* preservation must be considered as the first option before any activity is directed at the heritage. Excavation is allowed for the purpose of scientific study or ultimately for protection of the heritage.

In addition to the above, art 2(7) states categorically that underwater cultural heritage 'shall not be commercially exploited'. It leaves open the question of what this means. Some guidance may be obtained from Rule 2 which is also concerned with commercial exploitation. If the purpose of this is trade or speculation or leads to irretrievable dispersal, then it is 'fundamentally incompatible with the protection and proper management of underwater cultural heritage'. Moreover, such heritage is not to be 'traded, sold, bought or bartered as commercial goods'. Commercial exploitation then is connected with exchange. Exploitation through tourism, image reproduction or

not selling and the company responsible failing to cover its costs: T Bawden, 'Salvage Dividend Hopes Sunk' *Adelaide Advertiser*, 1 March 2001.

other means that does not involve exchange of the heritage itself for something else is not affected.

Another major point of contention concerned warships and other government non-commercial vessels. On one point of view, wrecks of these vessels are entitled to sovereign immunity. One proposal was to exclude them from the Convention; another to include them but allow the normal rules of international law to apply. In the end, it was decided that the relative rights of the flag State and the coastal State should depend on what zone the wreck lies in (arts 7, 10 and 12).

Twenty States are required to bring the Convention into force. This will probably take a couple of years. Once in force, it can only operate effectively if there is goodwill and cooperation among States Parties including the willingness to invest both money and facilities. UNESCO needs to consider now what it will be required to do and have the resources in place to do it when the Convention comes into force.⁵

⁴ P Fletcher-Tomenius; P J O'Keefe; and M Williams, 'Salvor in Possession: Friend or Foe to Marine Archaeology?' (2000) 9 *International Journal of Cultural Property* 263, 299.

⁵ A full discussion of the Convention can be found in P J O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (Institute of Art and Law, Leicester, 2002).