

# **International Law for the Protection of the Underwater Cultural Heritage: Can Our Past be Salvaged?**

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The term “underwater cultural heritage” (or UCH for short) refers to all remains of human activities lying on the seabed, on riverbeds, or at the bottom of lakes. It includes shipwrecks and other objects lost at sea, as well as pre-historic sites, sunken towns, and ancient ports that were once on the dry land and were eventually submerged due to climatic or geological changes. UCH forms an integral part of our common archaeological and historical heritage, and can give us invaluable information about cultural and economic contacts, migration and trade patterns, and production and export.

In this paper I will briefly outline the current state of international law for the protection of Underwater Cultural Heritage. I will concentrate on the 2001 UNESCO Convention, which is at present the only international agreement specifically directed at the protection of UCH. However, since this Convention has not yet entered into force (and may not do so for some time), I will also look at other legal instruments that bear on the protection of UCH.

## **UNCLOS**

First, some basic background concerning maritime law in general. The most comprehensive international legal regime dealing with maritime affairs that is currently in force is the Third United Nations Law of the Sea Convention (or UNCLOS for short), which was adopted in 1982 and went into force in 1994. For jurisdictional purposes UNCLOS recognizes five main maritime zones:

- First, we have the internal waters of a country: these include lakes and rivers, as well as archipelagic waters, and are normally treated as an integral part of a State’s territory. A majority of countries have national legislation covering the protection of cultural heritage, and these laws usually apply to both land and underwater sites.
- Secondly, the territorial sea: UNCLOS allows States to proclaim sovereignty over an area extending up to 12 nautical miles from the coastline. In this zone the coastal state has total control on any activity; ships belonging to other States have only the right of innocent passage.

- Third, the contiguous zone: a State may claim a further zone up to a total of 24 miles from the coast in order to enforce its customs, tax, immigration and sanitary laws.
- Fourth, the continental shelf and an Exclusive Economic Zone (EEZ) up to 200 miles from the coast can be claimed to exploit the natural resources of the seabed and the water above.
- And finally, the high seas, also called the Area, where no country has exclusive jurisdiction or sovereign rights.

UNCLOS is primarily concerned with trade, fishing rights, commercial exploitation of natural resources in the seabed, and environmental protection. In fact, questions related to the protection of Underwater Cultural Heritage only entered the negotiations at a late stage. As a result, only two articles of UNCLOS refer directly to UCH.

Article 303 declares that “States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose”, but provides no details. This article also gives coastal states limited rights to protect cultural heritage within the contiguous zone. However, Article 303 also adds that it is “without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature”, effectively leaving the door open to new international agreements such as the 2001 UNESCO Convention.

Article 149 of UNCLOS states that “all objects of an archaeological and historical nature found in the Area [that is, on the seabed underneath the high seas] 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”. So, not only is article 149 limited to the Area, but the provisions for exactly what to do with UCH as well the definitions of what constitute country of origin are both extremely vague and confusing.

So far, UNCLOS has been ratified by 146 nations. It is, however, clearly inadequate to guarantee proper, scientific, long-term protection of Underwater Cultural Heritage at an international level. Moreover, it leaves a dangerous gap in the regulation of UCH situated between the outer limit of the contiguous zone and the beginning of the Area.

For these reasons, even before UNCLOS entered into force, the International Law Association (or ILA), a private organization based in London, started work in 1988 on a draft convention for the protection of UCH. This draft was eventually finalized and adopted in Buenos Aires in 1994 and was forwarded to UNESCO, which was judged the most appropriate organization to examine and adopt it as an international convention.

In fact already in 1993 the Executive Board of UNESCO had asked the Director General to examine the feasibility of an international instrument for the protection

of UCH. The ILA draft was taken into consideration in the report which was submitted by the UNESCO Secretariat to the Executive Board in March 1995. This study highlighted some of the shortcomings of the existing legal regime, and strongly recommended the drafting of a new international normative instrument for the protection of UCH.

To begin with, the report observed that none of the other three UNESCO Conventions concerned with the protection of the world cultural heritage — namely, the 1954 Hague convention on the protection of cultural heritage during armed conflict, the 1970 convention on illicit trade in antiquities, and the 1972 convention on the world cultural and natural heritage — include provisions directed at UCH.

The other major concern expressed in the report is that the technological advances in SCUBA diving since World War II and the ever-increasing interest in underwater exploration for both recreational and commercial purposes pose a real and growing threat to the preservation of cultural and historical resources.

Following the recommendation expressed in this feasibility study, the UNESCO executive board convened a group of governmental experts with the task of drafting a new convention. The negotiations took place in four meetings between June 1998 and July 2001. A total of four separate drafts were drawn, using the ILA draft as a basis. Although much of the spirit of the ILA draft was retained, the final text of the convention also differs in important ways both from the ILA draft and from the earlier UNESCO drafts. This was the result of lengthy, and at times contentious, debates, in a process that was marred by numerous problems such as a high turnover of delegates, who were sometimes not fully informed about the issues involved. Finally, in an unusually extended meeting on July 8, 2001, the governmental experts, unable to reach a full consensus, approved the draft text by vote. The Convention was formally adopted by the 31st General Conference of UNESCO on November 2, 2001, by 87 votes in favor, 4 against (Russia, Norway, Turkey and Venezuela) and 15 abstentions (among which were Brazil, France, Greece, the Netherlands and the UK). The US, although invited to participate in the negotiations, did not have the right to vote as it was not a member of UNESCO at the time (the US rejoined UNESCO in October 2003).

The Convention consists of a main body of 35 articles and an Annex of 36 Rules concerning activities directed at UCH, which were developed by the International Council of Museums and Sites (ICOMOS) and are to be considered as an integral part of the Convention.

In Article 1, UCH is defined as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as: sites, structures, buildings, artefacts and human remains ...; vessels, aircraft ... [and] their cargo, together with their archaeological and natural context; and objects of prehistoric character”. The 100-year time limit automatically excludes more recent materials such as (at least for the near future) relics from the two World Wars or others of particular historical significance like the Titanic.

The main objective of the Convention is the protection and conservation of UCH “for the benefit of humanity” as a whole, with a strong emphasis put on “in situ”

preservation. As has been often observed, underwater sites, in particular shipwrecks, are like time capsules, or as one commentator put it, “snapshots of history at a particular point in time” where all the finds are closely related to each other in a well-defined spatial and chronological context. Moreover, underwater sites are often surprisingly well preserved, especially when lying in the deep seabed where the moist environment protects materials such as wood, while the lack of oxygen prevents the decay of metals. It is only when such stable conditions are disturbed, for instance by excavation, that materials can very quickly deteriorate. A further reason to favor in situ preservation is that, because of the continual advances in technology, we may have better chances in the future to study such sites in more precise but less invasive ways. Therefore, the Convention recommends that only when the safety of a site is seriously threatened — whether by natural causes or by man-made ones, such as the laying of cables, oil drilling or other resource exploitation, or of course looting — should underwater sites be scientifically “excavated”, in the sense that the finds are carefully removed and catalogued, and provisions are made for their long-term storage and conservation. In any case, all activities directed at UCH should “only be undertaken under the direction and control of ... a qualified underwater archaeologist with scientific competence appropriate to the project” (Rule 22). For this purpose, the Convention actively encourages co-operation and the sharing of information and technology among States. Furthermore, it recognizes the public’s right to “enjoy the educational and recreational benefit of responsible, non-intrusive access to in situ cultural heritage” and the importance of public education to raise awareness regarding the value and significance of UCH and the need for protecting it. The same regime of protection applies to all the maritime zones.

One of the key points of the Convention is its declaration – in Article 4 – that the law of salvage and the law of finds will NOT be applicable to Underwater Cultural Heritage. The law of salvage has ancient roots, and its main function is to encourage the rescue of vessels in sea peril and the recovery of goods from shipwrecks on behalf of the owner. Salvors do not obtain ownership rights in the goods recovered, but do obtain a right to generous compensation for their labors. The law of finds, by contrast, applies to property that has been long lost or abandoned, and grants title to the first finder. In either case, the emphasis is on the adjudication of property rights, not on the protection of archaeological context. Indeed, “salvage” activities on an underwater site are not very different from looting an archaeological site on land. Clearly the idea of salvage applied to UCH is completely against the spirit of the Convention and totally inconsistent with its main principle of “in situ” preservation. Therefore, Rule 2 of the Convention states unambiguously that “the commercial exploitation of Underwater Cultural Heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with its protection and proper management. UCH shall not be traded, sold, bought or bartered as commercial goods.”

As I mentioned earlier, in the course of the negotiations a number of disagreements emerged, which the delegates were unable to resolve to everyone’s satisfaction in the final text of the Convention; and these remain the main concerns preventing some of the major maritime nations from joining. One important concern, shared particularly by the US, UK and Russia, involves issues of sovereign immunity for sunken State

vessels and warships as well as the security and freedom of their armed forces to operate in the high seas without interference. The US is also especially worried about jeopardizing the economic interests of its thriving commercial and recreational diving industry. The UK, for its part, objected to the Convention's extension of mandatory protection to *all* shipwrecks over 100 years old, preferring the approach of its own Protection of Wrecks Act, which applies only to wrecks of "historical, archaeological or artistic *importance*".

## US DOMESTIC LEGISLATION ON UCH

The US has not ratified either UNCLOS or the 2001 UNESCO Convention. In addition to sovereign rights in its territorial sea, the US has at various times declared its jurisdiction over the contiguous zone, the continental shelf and the Exclusive Economic Zone, covering therefore an area up to 200 nautical miles from the coastline. The only federal law directed exclusively at UCH is the Abandoned Shipwreck Act of 1987, by which the federal government asserts ownership over certain classes of abandoned shipwrecks considered to be of historic significance (and then transfers title to the States). There are, however, serious limitations in this statute: in particular, it deals only with shipwrecks and not with other types of submerged sites; its application is limited to the territorial sea up to three miles from the coast; and most importantly, it covers only shipwrecks deemed to be "abandoned", but without providing any precise definition of this term. This has created a paradoxical situation in which commercial salvors, who used to prefer to have a shipwreck declared abandoned so that they could get title to it under the law of finds, are now trying to win salvage rights by convincing admiralty courts that even ancient shipwrecks have not really been abandoned and are therefore not covered by Abandoned Shipwreck Act. Unfortunately, some recent court cases, in particular that of the *Brother Jonathan*, which sank in 1865, seem to prove that this strategy may actually work!

The only other important federal law concerned with UCH is the National Marine Sanctuaries Act of 1972. This law authorizes the Secretary of Commerce, through the National Oceanic and Atmospheric Administration (NOAA), to designate discrete marine areas, within 200 nautical miles of the coast, which are deemed to be of national importance for a variety of reasons including the area's "historical, cultural, archaeological, or paleontological significance". There are at present 12 national marine sanctuaries scattered along the coasts of the US. In these zones NOAA has the authority to regulate any activity directed at UCH. There are also three historic preservation statutes that, although primarily intended for the preservation of historical sites on land, can under certain circumstances be applied to the protection of UCH. These are the Antiquities Act of 1906, the National Historic Preservation Act of 1966, and the Archaeological Resources Protection Act of 1979.

The 2001 UNESCO Convention needs to be ratified by at least 20 states to enter into force. So far only three countries have ratified: Panama, Bulgaria and Croatia. This is unfortunate, as this convention is the most comprehensive legal instrument available at present for ensuring the protection of UCH beyond territorial waters. It is therefore imperative to put pressure on governments to ratify the Convention.

In the meantime, states should strengthen their domestic legislation by declaring sovereign rights out to 200 nautical miles, as allowed by UNCLOS, and applying strict rules to the management and protection of UCH within that zone. Indeed, as Sarah Dromgoole has pointed out, the Rules embedded in the UNESCO Convention could serve as a model for national legislation. It is important that major maritime nations such as the US, the UK, and Australia take the lead at the domestic level as well as becoming signatories to the Convention. To its credit, the US was in 1983 the first major art-importing country to ratify the 1970 UNESCO Convention on Illicit trade in antiquities, which now has 100 state parties including France, the UK, Switzerland and Japan. The 2001 Convention could have an impact on Underwater Cultural Heritage similar to the positive impact that the 1970 Convention has had for the protection of the archaeological heritage on land.

To conclude, I believe that it is absolutely necessary to recognize that only through a broad concerted effort and international commitment can the preservation of our rich, yet extremely fragile underwater patrimony be guaranteed for future generations.