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GAPS, ISSUES, AND PROSPECTS: INTERNATIONAL LAW AND THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

LOWELL B. BAUTISTA[†]

ABSTRACT

The protection and preservation of underwater cultural heritage is becoming an increasingly important issue as technologies develop which allow for its exploitation. The UNESCO Convention on the Protection of Underwater Cultural Heritage (“UCH Convention”) is an important step in the international regulation of this resource. This paper examines the theoretical and historical antecedents of the UCH Convention, and outlines the Convention’s most significant provisions. Specifically, this paper examines how the UCH Convention protects underwater cultural heritage in six areas: internal waters, the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, and the Area. This paper then examines the various concerns which arise from an analysis of the Convention, including the Convention’s expansive definition of underwater cultural heritage and associated issues.

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“... even as we speak today, we all know that, in some vulnerable parts of the world, the pillaging and desecration of these cultural properties continue unabated. The major cause of this unspeakable tragedy is the absence of a single, consistent, preventive and punitive regime that deters the mercenaries of our collective underwater cultural heritage.”

- Philippine opening statement, delivered by HE Hector K.Villaroel, Third Meeting of Governmental Experts on the Draft Convention on the Protection of the Underwater Cultural Heritage, 3 July 2000¹

In a historic moment that concluded nearly a decade of negotiations, the UNESCO Convention on the Protection of the Underwater Cultural Heritage² (“UCH Convention”) was adopted by the 31st General Conference³ of UNESCO⁴ on November 2, 2001. The UCH Convention was adopted by vote⁵ with 87 affirmative votes, 4 negative votes⁶ and 15 abstentions.⁷

¹ Third Meeting of Governmental Experts on the Draft Convention on the Protection of the Underwater Cultural Heritage, UNESCO Headquarters in Paris, 3 to 7 July 2000. The quote was cited in Craig Forrest. “A New International Regime for the Protection of Underwater Cultural Heritage” (2002) 51 I. C. L. Q. 512, at 516.

² *The UNESCO Convention of the Protection of the Underwater Cultural Heritage*, Doc. 31 C/24, Paris, 3 Aug 2001; 41 ILM 40 (2002). Hereinafter UCH Convention.

³ The Convention, in the six authoritative languages of the UNESCO, was signed on November 6, 2001 by the Director-General of the UNESCO, Mr. Koichiro Matsuura and the President of the General Conference, Mr. Ahmad Jalali. This is a procedure unique to UNESCO and replaces the signature of the States. The Convention will enter into force three months after the deposit of the 20th instrument of ratification, acceptance, approval or accession (Article 27). Member States of UNESCO may deposit an instrument of ratification, acceptance, approval or accession (Article 27[1]). The right to accede to the Convention is also accorded to certain non-Member States (Article 27[2]).

⁴ United Nations Educational, Scientific and Cultural Organization.

⁵ The Director-General initially established consensus as the preferred means of reaching agreement. See discussion in Guido Carducci. “New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage” (2002) 96 A. J. I. L. 419.

⁶ The Russian Federation, Norway, Turkey and Venezuela. The United States was not a member of the UNESCO when the UCH Convention was adopted and did not have the right to vote. However, as an observer during its drafting and negotiations, the US made its strong opposition clear. The United States (previously a member from November 4, 1946 to December 31, 1984) joined the UNESCO on October 1, 2003. See UNESCO list of member states and associate states members, online: <http://erc.unesco.org/cp/MSList_alpha.asp?lg=E>.

⁷ Brazil, Colombia, Czech Republic, France, Germany, Greece, Iceland, Israel, Guinea-Bissau, the Netherlands, Paraguay, Sweden, Switzerland, United Kingdom, Uruguay.

The UCH Convention is the fourth international instrument dealing with cultural heritage adopted under the aegis of UNESCO⁸, and the first one specifically addressing the protection of underwater cultural heritage (“UCH”)⁹. The UCH Convention is the first universal instrument that deals exclusively with the preservation of UCH in international waters. The UCH Convention builds upon and addresses the gaps of the very limited, vague and contradictory protective regime¹⁰ afforded to UCH within the framework of the United Nations Convention on the Law of the Sea (“LOS Convention”).¹¹

Thus, the UCH Convention stands as *lex specialis* for the protection of UCH, while the LOS Convention remains the authoritative *lex generalis* for the whole of the law of the sea and all issues pertaining to it.¹² The UCH Convention, reflective of the delicate balance of interests embodied in the LOS Convention, as well as the need to codify and progressively develop rules relating to UCH consistent with international law and practice,¹³ states that nothing in the UCH Convention “shall prejudice the rights, jurisdiction and duties of States under international law”, including the LOS Convention. The UCH Convention further states that it shall be “interpreted and applied in the context of and in a manner consistent with international law,” which includes the LOS Convention.¹⁴ Because of the strong link between the UCH Convention and the LOS Convention, a meaningful discussion of the international

⁸ The other three were: The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (294 UNTS 215); the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (10 ILM 289); and the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (1037 UNTS 151). Forrest, *supra* note 1 at 511.

⁹ Hereafter, “UCH.”

¹⁰ See discussion of Tullio Scovazzi. “A Contradictory and Counterproductive Regime” in Roberta Garaballo and Tullio Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden: Martinus Nijhoff Publishers, 2003) 3 – 17.

¹¹ *United Nations Convention for the Law of the Sea*, (opened for signature December 10, 1982), U.N. Doc. A/CONF. 62/122 (1982) (entered into force November 16, 1994), reprinted in 21 I.L.M. 1261. See generally, Churchill, Robin R. & Alan V. Lowe. *The Law of the Sea* (Great Britain: Manchester University Press, 1999).

¹² Jean Allain. “Maritime Wrecks: Where the *Lex Ferenda* of Underwater Cultural Heritage Collides with the *Lex Lata* of the Law of the Sea Convention.” (1998) 38 Va. J. Int’l L. 747.

¹³ See Preamble, UCH Convention.

¹⁴ Article 3, UCH Convention.

legal framework protecting UCH necessitates an analysis of both of these treaties.

The UCH Convention is an important and progressive development in the field of international law. The UCH Convention, like the LOS Convention, is a compromise package of solutions to a complex problem of indisputable global significance.¹⁵ Despite its flaws, the UCH Convention should be regarded as a critical international instrument, providing a wide scope of protection for UCH. The fact that the UCH Convention was adopted was a major success, and if the strong support shown by the states in the UNESCO forum is any indication, it will not be long before the UCH Convention comes into force.¹⁶

In this paper I will examine the international legal framework protecting underwater cultural heritage, paying particular attention to the protective regimes under the UCH Convention and the LOS Convention. I will provide an overview of the theoretical and historical antecedents of the UCH Convention and its relation to the LOS Convention, discuss the salient provisions of the UCH Convention, compare the protective regimes afforded to underwater cultural heritage within the different maritime zones under both the LOS Convention and the UNESCO Convention, and finally, identify the promises of the UNESCO Convention framework as well as issues and gaps that need to be addressed.

¹⁵ Craig Forrest, "An International Perspective on Sunken State Vessels as Underwater Cultural Heritage" (2003) 34 *Ocean Devel. & Int'l L.* 41.

¹⁶ The great majority of developing countries voted in favor of the UCH Convention. The number of industrialized countries which voted in favor was very substantial. This include: Australia, Canada, China, Japan, New Zealand and the Republic of Korea. Among the member states of the European Community, the following also voted in favor: Austria, Belgium, Denmark, Finland, Ireland, Italy, Luxembourg, Portugal and Spain. In order to come into force, the UCH requires at least 20 ratifications (Article 27, UCH Convention). As of 5 December 2004, there are only two states parties to the UCH Convention: Bulgaria and Panama. Status of ratifications, online: <[http://erc.unesco.org/cp/convention.asp?KO=13520 &language=E](http://erc.unesco.org/cp/convention.asp?KO=13520&language=E)>.

I. THE DEVELOPMENT OF AN INTERNATIONAL REGIME TO PRESERVE UNDERWATER CULTURAL HERITAGE

1. The imperative to protect underwater cultural heritage

Until quite recently, for both marine archeologists and lawyers, the legal regime of marine archeology has been largely a neglected topic.¹⁷ In the past, the absence of the technology necessary to explore underwater sites, much less exploit them—especially those lying beyond areas of national jurisdiction—meant the relative absence of jurisdictional problems.¹⁸ Problems associated with the recovery of artifacts from the sea were ignored because such recovery was not seen as economically viable.¹⁹

While the legal regimes have remained largely unchanged, advances in technology have made the recovery of underwater artifacts economically viable on a commercial scale.²⁰ Such recovery has become a lucrative maritime commercial industry.²¹ The development of advanced technologies now enable the recovery of almost any object in the sea, at any depth, anywhere in the globe.²²

¹⁷ L. H. Van Meurs. *Legal Aspects of Marine Archeological Research* (Institute of Marine Law, University of Cape Town, 1985).

¹⁸ Anastasia Strati. *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (The Hague, Netherlands: Kluwer Law International, 1995) at 40.

¹⁹ It is widely accepted that for the recovery of a wreck to be commercially viable, it must be worth more than \$10 million and there are only around 100 – 200 such wrecks in the deep seabed. See UNESCO Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage, Paris 22-24 May 1996; Doc CLT-96/CONF. 605/6 at 12.

²⁰ See Jeffrey T. Scrimo. Comment. “Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks.” (2000) 5 *Ocean & Coast. L. J.* 271.

²¹ For example, the historic British warship, HMS *Sussex*, an 80-gun warship that sank in deep water off Gibraltar in 1694, reputedly carried gold and/or silver coins estimated to be now worth several hundred million, to a billion dollars. See Sarah Dromgoole. “Murky Waters for Government Policy: the Case of a 17th-century British Warship and 10 Tonnes of Gold Coins” (2004) 28 *Marine Policy* 189.

²² The RMS *Titanic* was found in waters 4,000 meters in depth. See Robert Ballard. *The Discovery of the Titanic* (London: Guild Publishing, 1987). See Dromgoole, *supra* note 21, who notes that it is now possible to “locate and recover material from 98% of the ocean floors of the world using modern technology” citing O’Hara E. *Maritime and Fluvial Cultural Heritage*. Report of the Committee on Culture and Education. Parliamentary Assembly of the Council of Europe Doc. 8867 12 October 2000; para. 3.4.3.

It must be emphasized that underwater cultural artifacts are a finite resource. Once they are damaged or destroyed they are irretrievably lost. These artifacts are an integral link to the past, should be regarded as part of humanity's common collective cultural heritage, and should be protected as such.²³ This is the why the protection and preservation of UCH is at the core of the UCH Convention.²⁴ The fact that most UCH lies in areas outside national jurisdiction²⁵ makes the need for an international agreement, protecting UCH wherever it may be, more acute.²⁶

In summary, the underlying basis for the UCH Convention can be understood as a reaction by the international community to three factors. The first is the recognition that recent advances in technology have made UCH increasingly accessible. The second is the increasing awareness that UCH is more than just an economic resource—it is an invaluable cultural, historical and archeological resource. The third factor is the apparent absence of a clear protective regime governing UCH under international law.²⁷

2. Theoretical antecedents of the UCH Convention

It must be noted that even prior to the adoption of the UCH Convention, cultural heritage in general was protected by a wide variety of international instruments.²⁸ In fact, the definition of cultural property in some

²³ Lawrence J. Kahn. "Sunken Treasures: Conflicts Between Historic Preservation Law and the Maritime Law of Finds." (1994) 7 Tul. Env'l L. J. 595.

²⁴ Article 2, UCH Convention; in particular, Article 2(3): "States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of the Convention."

²⁵ See Van Meurs *supra* note 17 at 7, 13. See also Scovazzi, "A Contradictory and Counterproductive Regime" *supra* note 10 at 7.

²⁶ See Gerstenblith, Patty. Symposium Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century. "The Public Interest in the Restitution of Cultural Objects" (2001) 16 Conn. J. Int'l L. 197.

²⁷ See K. Russel Lamotte. "Introductory Note to UNESCO: Convention on the Protection of the Underwater Cultural Heritage" 41 ILM 37 (2002). See also Etienne Clément. "Current Developments at UNESCO Concerning the Protection of the Underwater Cultural Heritage: Presentation Made at the First and the Second National Maritime Museum Conferences on the Protection of Underwater Cultural Heritage (Greenwich, 3 and 4 February 1995) (London, IMO, 25 and 26 January 1996)" (1996) 20 Marine Policy 309.

²⁸ The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Im-

of these instruments was broad enough to include UCH.²⁹ In addition to international agreements, there were a considerable number of regional agreements which addressed the need to protect cultural heritage.³⁰ These regional instruments are by and large European in origin and apply to European territory. It is not surprising that earlier international and regional instruments protecting UCH are also from Europe.³¹

While the UCH Convention traces its own legislative history from these European regional initiatives, the greatest impetus behind the development of the UCH Convention was the LOS Convention itself. The LOS Convention, widely referred to as the “constitution of the oceans,” was the product of a delicate balancing of interests. The final text of the LOS Convention consisted of 320 articles and nine annexes, which covered virtually every topic of importance to coastal and maritime states.³² UCH, however, is covered in only two Articles: 149 and 303.

port, Export and Transfer of Ownership of Cultural Property (1970), the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (1972), the UNESCO Recommendation on International Principles Applicable to Archaeological Excavations (1956), the UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968), the UNESCO Recommendation for the Protection of Movable Cultural Property (1978), UN General Assembly Resolutions on the Return or Restitution of Cultural Property to the Countries of Origin. For a discussion of international and regional instruments protecting cultural heritage, see Strati, *supra* note 18, at 70 -101.

²⁹ For example, see Article 1, UNESCO 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970); also Article 2, UNESCO Recommendation on International Principles Applicable to Archaeological Excavations (1956); among others. Strati, *ibid.* at 71, 73. See also Theresa Papademetriou. “International Aspects of Cultural Property” (1996) 24 Int’l J. Legal Info. 270.

³⁰ Among which are: the European Cultural Convention (1974); the European Convention on the Protection of the Archeological Heritage (1969); the European Convention on Offences relating to Cultural Property (1985); the Convention for the Protection of the Architectural Heritage of Europe (1985); the European Convention on the Protection of the Archeological Heritage (revised) (1992). For a discussion of these Conventions and their relation to the UCH Convention, Strati, *supra* note 18 at 69 – 101.

³¹ For example, the Protocol concerning Mediterranean Specially Protected Areas (1982); Recommendation 848 (1978) of the Parliamentary Assembly of the Council of Europe on the Underwater Cultural Heritage; the Draft European Convention on the Protection of the Underwater Cultural Heritage (1985). *Ibid.*

³² Among the topics covered: breadth of the territorial sea, exclusive economic zone (EEZ), contiguous zones, and continental shelf, freedom of navigation and overflight; the laying of cables and pipelines; rights of transit, innocent and archipelagic sea lanes passage; right of states to conduct marine scientific research; a balancing of rights between fishing states and coastal states concerning management of fish stocks, as well as empowerment of regional fishing compacts; creation of special regimes for the management and protection of marine mammals, anadromous, and highly migratory fish species; apportionment of responsibility between the coastal

These sections, which provide the only substantive international law relating to UCH in international waters, are vague and ambiguous. The sheer breadth and scope of the matters covered in the LOS Convention and the “consensus approach” adopted throughout the negotiations—which spanned almost a decade—meant that UCH was viewed as an issue of relatively minor importance.³³ UCH figured in the debates, but was sacrificed in order for consensus to be reached on other issues. Criticisms of the protective regime afforded to UCH by the LOS Convention, principally its being inadequate or ambiguous, must be understood in this context.

The two LOS Convention articles deploy general principles of international law. First, states have a duty to protect UCH in the different maritime zones. Second, this duty is undertaken for the benefit of humanity. Third, every state is required to cooperate in the fulfillment of these duties. These principles also constitute the foundation of the UCH Convention. The question, therefore, is not one of coverage or mere inclusion in an international legal instrument. The proper question is whether the protection and preservation of UCH under international law is adequate.³⁴ Under the LOS Convention, the international legal framework on the protection of underwater cultural heritage was inadequate. The protection was fragmented, ambiguous, and lacked mechanisms for enforcement.

states and flag states to take measures to protect the marine environment; and establishment of a broad range of dispute settlement options so that universal Participation would be reasonably assured. See generally Myron H Nordquist, ed., *The Third United Nations Conference on the Law: Documents Vols. 1 – V* (Dordrecht: Martinus Nijhoff Publishers, 1985-1988). Also Renate Platzoder, ed. *The Third United Nations Conference on the Law: Documents Vols. 1 – XVII* (Dobbs Ferry, N.Y.: Oceana Publications, 1982 – 1988); United Nations, *Third United Nations Conference on the Law: Official Records, Vols. 1 – XVII* (N.Y.: United Nations, 1975 – 1984).

³³ See generally, Edward D. Brown. *The International Law of the Sea*, 2 vols. (Aldershor: Dartmouth, 1994); Churchill, *supra* note 11; Anand Ram Prakash. *Origin and Development of the Law of the Sea* (The Hague: Nijhoff, 1982).

³⁴ See Lauren W. Blatt. “SOS (Save Our Ship)! Can the UNESCO 1999 Draft Convention on the Treatment of Underwater Cultural Heritage Do Any Better?” (2000) 14 *Emory Int’l L. Rev.* 1581.

3. Historical antecedents of the UCH Convention

The legislative history of the UCH Convention is neither as protracted nor as complex as that of the LOS Convention.³⁵ International recognition of the need to formulate an international instrument affording protection specifically to UCH was first formally embodied in a 1978 Council of Europe Recommendation.³⁶ A Draft European Convention on the Protection of the Underwater Cultural Heritage³⁷ was finalized in 1985 and submitted to the Committee of Ministers for approval, but was not submitted for signature due to the objection of Turkey to the scope of territorial application.

In 1988, the International Law Association (“ILA”)³⁸ formed a Committee on Cultural Heritage Law. The Committee reviewed the protection of UCH in international waters and concluded that a convention was needed to address the gaps in the LOS Convention. The same ILA Committee prepared a Draft Convention on the Protection of the Underwater Cultural Heritage. The ILA adopted the draft in a plenary session in Buenos Aires in 1994 and submitted it to UNESCO for consideration. In 1996 the International Council of Monuments and Sites (ICOMOS)³⁹ adopted the International Charter on the Protection and Management of

³⁵ Roberta Garabello. “The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage” in Garabello & Scovazzi, *supra* note 10 at 89 - 192. See also Patrick J. O’Keefe. “Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention.” (1996) 20 *Marine Policy* 297.

³⁶ See Council of Europe Recommendation 848 (1978) on the Underwater Cultural Heritage (Doc. 4200, Strasbourg) as cited in Sarah Dromgoole. “2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage” (2003) 18 *Int’l J. Mar. & Coast. L.* 59, at 60. This was the first attempt to establish regional principles on the protection of underwater cultural heritage and to address the jurisdictional issue of coastal state jurisdiction over underwater cultural heritage. See discussion of Strati, *supra* note 18 at 85- 87.

³⁷ Draft European Convention on the Protection of the Underwater Cultural Heritage, Doc. CAHAQ (85) 5.

³⁸ The International Law Association, founded in Brussels in 1873, has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies. Its objectives, under its Constitution, include the “study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals for the solution of conflicts of law and for the unification of law, and the furthering of international understanding and goodwill”. Online: <<http://www.ila-hq.org/>>.

³⁹ The ICOMOS, established in 1964, is a non-governmental organization with special observer status at UNESCO, and whose primary function is to advise intergovernmental organizations of the steps necessary to conserve the monuments and sites of the world. The ICOMOS Charter was ratified by the 11th ICOMOS General Assembly, held in Sofia, Bulgaria, from October 5-9, 1996. online: <<http://www.icomos.org/>>.

Underwater Cultural Heritage, which set the standards for underwater archeology. The ICOMOS Charter was included in the ILA Draft as an annex.

In 1993, a feasibility study was conducted by UNESCO to consider the option of adopting a new international convention on UCH.⁴⁰ In the process of preparing the feasibility study, it became apparent that while the ILA Draft was useful, it was inadequate and required substantial revision. In a Meeting of Experts in May 1996⁴¹, the need for a convention was unanimously recognized. However, it was not until 1997, at the 29th session of the UNESCO General Conference, that it was decided that the protection of UCH should be regulated at the international level by an international convention. The Director-General was invited to convene a group of government experts for this purpose.⁴² On the basis of the ILA draft, UNESCO prepared a preliminary draft text in 1998.⁴³

From 1998 to 2001, four open-ended meetings of government experts were held to discuss the draft Convention. The UNESCO Draft was discussed at the first and second meetings of government experts, in June and July 1998⁴⁴ and April 1999⁴⁵. Out of these meetings, a revised draft was produced which embodied the discussion and debates which had taken place during the negotiations, and which formed the basis for the discussions which occurred during the subsequent meetings of government experts, held in July 2000⁴⁶ and March and April 2001.⁴⁷

⁴⁰ Doc. 141 EX/18 Paris, 23 Mar 1993, Resolution 5.5.1 para 20. See also UNESCO Secretariat, “Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage”, presented to the 146th Session of the UNESCO Executive Board, Paris, 23 March 1995, Doc. 146 EX/27, para. 19 on the question of whether UNESCO was the appropriate body to take action on the matter, as cited in Dromgoole, *supra* note 36, footnote 8, at 61.

⁴¹ CLT-96/CONF.605/6 Paris, 22-24 May 1996.

⁴² Doc. 29C/Resolution 21

⁴³ Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage. Doc. CLT-96/CONF.202/5, April 1998.

⁴⁴ The first meeting, UNESCO Headquarters, 29 June to 2 July (Report Doc. CLT-98/CONF.202/7).

⁴⁵ The second meeting, UNESCO Headquarters, 19 to 24 April (Report Doc. CLT-99/CONF.204). During this meeting, general agreement was reached to incorporate in an Annex, as an integral part of the draft convention, the Principles set forth in the 1996 ICOMOS Charter.

⁴⁶ The third meeting, UNESCO Headquarters, 3 to 7 July (Report Doc. CLT-2000/CONF.201/7) to study the revised draft (Doc. CLT-96/CONF.202/5 Rev. 2). Despite much progress, the Convention text was not finalized.

⁴⁷ The first session of the fourth meeting, UNESCO Headquarters, 26 March to 6 April. The Director-General proposed an extension to allow for further consultations regarding certain matters still under discussion.

The UNESCO Director-General made it clear that these would be the last meetings before the text was finalized.⁴⁸ However, failure to reach an agreement necessitated an extension of the session in July 2001⁴⁹, where pressure to produce a finalized text mounted.⁵⁰ Eventually, a draft was agreed upon which was adopted by the General Conference on November 2, 2001.

II. THE UNESCO CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN OUTLINE OF MAIN PROVISIONS

The UCH Convention consists of 35 articles and an Annex with 36 rules. The UCH Convention is a complex document which addresses the most delicate political and legal issues. The grueling negotiations leading up to its drafting resurrected old debates and tensions which had arisen during the Law of the Sea Conferences.⁵¹ In addition, during the drafting of the UCH Convention new divisions were created, indicating opposing values and conflicting positions. An important example of this was the divergent positions on UCH taken by the archeological community and the treasure salvage community.⁵²

A brief overview of the main provisions of the UCH Convention,⁵³ which was created amidst this political turbulence,⁵⁴ follows below. An

⁴⁸Dromgoole, *supra* note 36, footnote 11, at 61 citing Patrick O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (2002) at 30.

⁴⁹ The second session of the fourth meeting, UNESCO Headquarters, 2 to 7 July. The draft text was approved by 49 votes in favour, 4 against and 8 abstentions.

⁵⁰ At this last meeting, the Chairman, Mr. Carsten Lund of Denmark, produced a Single Negotiating Text which was the focus of fierce debates. See Garabello, *supra* note 35.

⁵¹ See Strati, *supra* note 18 at 99, 117 – 121. See also parallel discussion in Deirdre O’Shea, “The Evolution of Maritime Historic Preservation Jurisprudence” (2002) 8 *Widener L. Symp. J.* 417.

⁵² Paul Fletcher-Tomenius and Craig Forrest. “Historic Wreck in International Waters: Conflict or Consensus?” (2000) 24 *Marine Policy* 1.

⁵³ While it is to be expected that this paper will not be able to cover all the substantive provisions of the UCH Convention, an attempt will be made to at least identify them. Furthermore, the cursory discussion in this section will be supplemented with an analysis, nay a modest critique, in the latter part of this paper which will tackle the corresponding issues that these contentions raise.

⁵⁴ Blake, Janet. “The Protection of the Underwater Cultural Heritage” (1996) 45 *I. C. L. Q.* 819.

attempt to define underwater cultural heritage as the term is used in the UCH Convention is included.

1. The UCH Convention – salient provisions

The aim of the UCH Convention is clear: “to ensure and strengthen the protection of underwater cultural heritage”⁵⁵ for the benefit of humanity.⁵⁶ In order to achieve this objective, the UCH Convention imposes upon state parties the duty to cooperate⁵⁷ and to take all necessary and appropriate measures in conformity with the UCH Convention and with international law in order to protect UCH, using the best practicable means at their disposal and in accordance with their capabilities.⁵⁸

The UCH Convention prohibits the commercial exploitation of UCH⁵⁹ and requires that recovered UCH shall be deposited, conserved and managed in a manner which ensures its long-term preservation.⁶⁰ This is in keeping with the an ideology inherent in the Convention that preservation of UCH *in situ* should be the first option considered, to be used before allowing or engaging in any other activities directed at these materials.⁶¹ Towards this end, the UCH Convention encourages responsible, non-intrusive access, to observe or document *in situ* UCH in order to create public awareness, appreciation, and protection of this heritage, except where such access is incompatible with its protection and management.⁶² It also ensures that activities directed at UCH must use non-destructive techniques and survey methods before attempting the recovery of objects.⁶³ The UCH Convention requires that prior to

⁵⁵ Article 2 (1), UCH Convention.

⁵⁶ Article 2 (3), UCH Convention.

⁵⁷ Article 2 (2), UCH Convention.

⁵⁸ Article 2 (4), UCH Convention.

⁵⁹ Article 2 (7), UCH Convention; Rule 2 of the Annex.

⁶⁰ Article 2 (6), UCH Convention.

⁶¹ Article 2 (5), UCH Convention; Rule 1 of the Annex. See discussion in Luigi Migliorino. “In Situ Protection of the Underwater Cultural Heritage International Treaties and National Legislation” (1995) 10 International Journal of Marine and Coastal Law 483. See also Geoffrey Brice. “Salvage and the Underwater Cultural Heritage” (1996) 20 Marine Policy 337.

⁶² Article 2 (10), UCH Convention; Rules 7 and 8 of the Annex.

⁶³ Rule 4 of the Annex.

any activity directed at UCH, a design for the project shall be developed and approved by the competent authorities.⁶⁴

The UCH Convention recognizes the rules of international law and state practice pertaining to sovereign immunities, as well the rights of states with respect to state vessels and aircraft, and does not seek to modify these rules, which include the provisions of the LOS Convention.⁶⁵ In this respect, states parties have a duty to ensure that proper respect is given to all human remains located in maritime waters.⁶⁶ Activities directed at UCH shall avoid the unnecessary disturbance of human remains or venerated sites.⁶⁷ The UCH Convention accords special treatment for warships, other government ships or military aircraft.⁶⁸

The UCH Convention states that any activity relating to UCH, to which the Convention applies, shall not be subject to the law of salvage or the law of finds, unless it is authorized by the competent authorities, is in full conformity with the Convention, and ensures that any recovery of the underwater cultural heritage achieves maximum protection for the UCH.⁶⁹ The UCH Convention also promotes training in underwater archaeology, transfer of technologies, information sharing and the raising of public awareness regarding the value and significance of UCH.⁷⁰

The UCH Convention devotes separate provisions to protective regimes that apply to UCH in each of the following areas: internal waters,

⁶⁴ Rules 9-16 of the Annex. See James A. R. Nafziger. "The Titanic Revisited" (1999) 30 *Journal of Maritime Law and Commerce* 311.

⁶⁵ Article 2 (8), UCH Convention.

⁶⁶ Article 2 (11), UCH Convention.

⁶⁷ Rule 5 of the Annex. See Jason R. Harris. "The Protection of Sunken Warships as Gravesites at Sea" (2001) 7 *Ocean & Coast. L. J.* 75.

⁶⁸ Article 13 in relation to Articles 9, 10, 11, and 12, UCH Convention.

⁶⁹ Article 4, UCH Convention. See Tullio Scovazzi. "The Application of 'Salvage Law and other Rules of Admiralty' to the Underwater Cultural Heritage: Some Relevant Cases" in Garabello & Scovazzi, *supra* note 10 at 19 – 80. Article 4, which excludes any activity relating to UCH from the law of salvage and the law of finds, should be read in relation with Article 2 (7) and Rule 2 of the Annex which forbids the commercial exploitation of UCH. This can also be read in light of Article 2 (5) and Rule 1 of the Annex, which considers *in situ* preservation as the first option for the protection of UCH. Salvors oppose this view and argue that objects underwater are subject to marine peril and eventual destruction, and should be recovered. See William T. Storz. "Formal Report of the Committee on Salvage" Library, The Maritime Law Association of the United States, online: <<http://www.mlaus.org/article.ihtml?id=667&issue=47&folder=0>>.

⁷⁰ Articles 19 – 21, UCH Convention. See Marilyn Phelan & Marion P. Forsyth. "A Comprehensive Regime for the Protection of Underwater Cultural Heritage" in Richman & Forsyth, *supra* note 148 at 119 – 139.

archipelagic waters and the territorial sea;⁷¹ in the contiguous zone;⁷² in the exclusive economic zone (EEZ) and on the continental shelf;⁷³ and in the Area.⁷⁴ These will be discussed in detail below.

2. Defining “underwater cultural heritage”

The entire protective regime of the UCH Convention is based on its definition of the objects to which it affords protection. The UCH Convention defines underwater cultural heritage as:

- (a) ... all traces of human existence having a cultural, historical or archeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as:
 - (i) sites, structures, building, artifacts and human remains, together with their archeological and natural context;
 - (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archeological and natural context; and
 - (iii) objects of prehistoric character.
- (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.
- (c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.⁷⁵

Clearly, the UCH Convention definition is broad in scope. The definition contains an expansive inclusion⁷⁶ and clear exclusions⁷⁷ and imposes two requirements. The first is one of location; the second is one of

⁷¹ Article 7, UCH Convention.

⁷² Article 8, UCH Convention.

⁷³ Articles 9 and 10, UCH Convention.

⁷⁴ Articles 11 and 12, UCH Convention.

⁷⁵ Article 1, UCH Convention.

⁷⁶ Article 1 (a), UCH Convention.

⁷⁷ Article 1 (b)(c), UCH Convention.

time. An object must be found underwater, whether partially or totally; and must have been there for a period of at least 100 years. The phrase “*all traces of human existence having a cultural, historical or archeological character*”⁷⁸ is so broad that it appears, on an ordinary reading, to cover any objects which show signs of human intervention. There also appears to be no significance test, as the wording used was merely one of “character.” This definition is one of the most contentious provisions in the UCH Convention. The debate is real and complex⁷⁹, and the literature is equally divided on this matter.⁸⁰ This issue will be more extensively treated below.

III. THE INTERNATIONAL LEGAL FRAMEWORK ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE

The division of ocean space into the various maritime zones provided for under the LOS Convention requires any meaningful discussion on the international legal framework on the protection of the UCH to account for these divisions. The LOS Convention makes reference to six maritime zones: internal waters,⁸¹ the territorial sea,⁸² the contiguous

⁷⁸ Article 1 (a), UCH Convention. Italics supplied.

⁷⁹ See for example, Craig J. S Forrester.. “Defining Underwater Cultural Heritage” (2002) 3 The Journal of Nautical Archeology 3.

⁸⁰ See for example, Forrester, *supra* note 1 at 523 - 524; but see Dromgoole, *supra* note 36 at 64. See especially, David J. Bederman. “The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal” (1998) 30 J. Mar. L. & Com. 331. See also David J. Bederman. “The UNESCO Convention on Underwater Cultural Heritage: Panacea or Peril for Resource Managers?” [Bederman, “Panacea or Peril”] in Richman & Forsyth, *supra* note 148 at 143- 145. Forrester thinks that the interpretation of this provision is not clear; Dromgoole believes that the definition in the UCH Convention embodies a “significance criterion” while Bederman strongly argues that the “outlandish” definition is so expansive to be interpreted as including “a splintered surfboard or even a soda can.” For an in-depth discussion on the negotiating history of this provision, see Garabello, *supra* note 35 at 100 – 109.

⁸¹ Internal waters are located on the landward side of the baseline of the territorial sea (Article 8, par. 1, LOS Convention). The normal baseline is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State (Article 5, LOS Convention).

⁸² The territorial sea is the area of sea adjacent to a coastal State over which its sovereignty is exercised subject to letting foreign ships pass (rule of innocent passage). Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines (Article 3, LOS Convention).

zone,⁸³ the exclusive economic zone,⁸⁴ the continental shelf,⁸⁵ and the Area.⁸⁶ The LOS Convention carefully outlines the various rights and duties of states in each of these zones. The UCH Convention follows the LOS Convention's division of the ocean into the various maritime zones of jurisdiction. In this section of the paper, I will describe broadly the legal regime of protection within the LOS Convention; and discuss in greater detail the legal regime within the UCH Convention.

1. The protection regime under the LOS Convention

The protective regime afforded to UCH within the framework of the LOS Convention is insufficient in scope, ambiguous in content, and ineffective in its protection. The LOS Convention, the only substantive piece of international legislation relating to UCH in international waters, contains only two provisions on UCH: Articles 149 and 303.⁸⁷

⁸³ The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. The coastal State may exercise the control in the contiguous zone necessary to prevent infringement of its customs, fiscal, immigration or sanitary rules and regulations (Article 33, LOS Convention). According to Article 303, par. 2, of the LOS Convention, the coastal State may presume that the removal of objects of an archaeological and historical nature from the seabed in the zone without its approval would result in an infringement within its territory or territorial sea of its laws and regulations.

⁸⁴ The exclusive economic zone is an area beyond and adjacent to the territorial sea and shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. (Articles 55 and 57, LOS Convention).

⁸⁵ The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Article 76, par. 1, LOS Convention).

⁸⁶ The "Area" means the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (Article 1, par. 1, LOS Convention). The Area and all solid, liquid or gaseous mineral resources *in situ* in the Area or beneath the seabed, including polymetallic nodules, are "common heritage of mankind" (Article 136, LOS Convention). Furthermore, according to Article 149, of the LOS Convention, all objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

The high seas comprise all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State (Article 86, LOS Convention).

⁸⁷ See Moritaka Hayashi. "Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea." (1996) 20 Marine Policy 291.

i) Jurisdiction with regard to archaeological and historical objects found at sea under the LOS Convention

Article 149 of the LOS Convention provides that:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

Article 303 of the LOS Convention states that:

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

These provisions have been the subject of much criticism. The articles are fraught with ambiguity, obscurities and contradictions. The provisions do not define what constitutes objects of an archaeological and historical nature; a suitable definition cannot be found elsewhere in the LOS Convention. The above provisions relate to UCH only in the contiguous zone and in the Area, thus creating a legal vacuum on the status and protection of UCH found in the EEZ and on the continental shelf.

Article 149 does not specify the manner by which objects of an archaeological and historical nature will be preserved and disposed and what mechanisms will be instituted in order to ensure that these remain available for the “benefit of mankind as a whole.” The Article also fails

to designate an appropriate body to implement its provisions.⁸⁸ The Article merely mentions archaeological and historical objects *found* in the Area. Will this regime govern the right to search for such objects and are such activities still carried out for the benefit of mankind? If such activities are indeed carried out for the benefit of mankind, why are the laws of salvage and the other rules of admiralty, which are evidently for private, commercial gain, given pre-eminent status in Article 303(3)? There is likewise a failure to clarify what the LOS Convention means when it speaks of the laws of salvage and admiralty.⁸⁹ These are just some of the many flaws of the LOS Convention provisions on UCH.

In sum, it is clear that the protection regime under the LOS Convention leaves much to be desired, in substance as well as in effectiveness. We needed a better regime. This is what the protection regime under the UCH Convention addresses.

2. The protection regime under the UCH Convention

The UCH Convention is mindful of the gaps and flaws in the LOS Convention, and addresses these issues. In this section I will discuss the protection regime afforded by the UCH Convention to UCH found within the various maritime zones provided for in the LOS Convention.⁹⁰

⁸⁸ Although Article 149 pertains to the Area, the International Seabed Authority (ISA) does not enjoy jurisdictional powers over archaeological and historical objects. The LOS Convention in Article 157 (2) states that the ISA “shall have such incidental powers consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area.” But “activities in the Area” are confined to mineral resource exploration and exploitation according to Article 1 (3) of the LOS Convention. See also Article 133(a) and 147 of the LOS Convention which define resources and other activities in the marine environment, respectively. See Strati, *supra* note 18 at 300 – 306.

⁸⁹ See James A. R. Nafziger. “Historic Salvage Law Revisited” (2000) 31 *Ocean Devel. & Int’l L.* 81. See also Joseph C. Sweeney. “An Overview of Commercial Salvage Principles in the Context of Marine Archaeology.” (1999) 30 *J. Mar. L. & Com.* 185; Ole Varmer. “The Case Against the ‘Salvage’ of the Cultural Heritage.” (1999) 30 *J. Mar. L. & Com.* 279.

⁹⁰ See especially Carducci, *supra* note 5 at 428 - 433. This sections draws heavily from the excellent discussion by Carducci.

i) UCH in Internal Waters, Archipelagic Waters and Territorial Sea

The UCH Convention recognizes the absolute right of a state, in the exercise of its sovereignty, to regulate and authorize activities directed at UCH in their internal waters, archipelagic waters and territorial sea.⁹¹ However, the UCH Convention imposes upon states twin duties: first, to apply the Rules⁹² to activities directed at UCH;⁹³ and second, to inform a state which is a party to the UCH Convention, and in certain instances other states with a verifiable link,⁹⁴ of the discovery of a vessel or aircraft belonging to that country.⁹⁵

These duties preserve the balance between the interests of the coastal states and the flag states that is such an important part of the LOS Convention. This is clearly a compromise provision. The language of the UCH Convention is strongly worded, however; the duty imposed upon the coastal state is unmistakable. The UCH Convention states that the “States Parties *shall* require that the Rules be applied to activities directed at underwater cultural heritage...”⁹⁶ and that “State Parties ... *should* inform the flag State Party to this Convention, and if applicable, other States with a verifiable link.”⁹⁷

These provisions garnered considerable debate during the negotiations of this particular provision.⁹⁸ Reflecting this, the UCH Convention imposes the duties described above “with a view to cooperating on the best methods of protecting State vessels and aircraft”⁹⁹ and does not ap-

⁹¹ Article, 7 (1), UCH Convention.

⁹² Rules Concerning Activities Directed at Underwater Cultural Heritage, attached as an Annex to the UCH Convention.

⁹³ Article 7 (2), UCH Convention.

⁹⁴ The UCH Convention does not explicitly define a “verifiable link”, but illustrates it, *inter alia*, as “a cultural, historical or archeological link” with respect to the identifiable State vessel or aircraft. See, for example, references in Articles 6 (3), 7 (3), 9 (5), 11(4), among others.

⁹⁵ Article 7(3), UCH Convention.

⁹⁶ Article 7 (2), UCH Convention.

⁹⁷ Article 7 (3), UCH Convention.

⁹⁸ Although widely regarded as a compromise, it may reasonably be an obstacle for the ratification of some States. This provision should be read in light of the debate regarding the legal status of sunken warships and its collateral issues of the definition of abandonment as well as flag state jurisdiction. Bederman, “Panacea or Peril” *supra* note 80 at 148, predicts that this provision can potentially be the greatest source of conflict in the entire UCH Convention.

⁹⁹ *Ibid.*

ply to internal waters. This provision also echoes the objective of state parties to cooperate in the protection of UCH.¹⁰⁰

ii) UCH in the Contiguous Zone

The UCH Convention¹⁰¹ not only complements the protective regime provided in the LOS Convention¹⁰² for UCH in the contiguous zone—it expands and improves the protection. First, the UCH Convention extends the protective scope (*ratione materiae*). The UCH Convention gives coastal states the right to regulate and authorize activities directed at UCH within their contiguous zones. Article 303(2) of the LOS Convention merely covers the unauthorized removal of UCH in view of the coastal state's control of traffic in such objects, while the expansive wording of the UCH Convention gives the coastal state the right to regulate and authorize activities beyond the mere removal of UCH. Second, the requirement for the coastal state to apply the Rules to activities directed at UCH in the contiguous zone establishes uniformity.

iii) UCH in the EEZ and on the Continental Shelf

It must be remembered that the LOS Convention does not contain any provision on the protection of UCH in the EEZ or on the continental shelf. The UCH Convention addresses this gap in the law by imposing upon states the responsibility to protect UCH in the EEZ and on the continental shelf.¹⁰³

The UCH Convention imposes upon all state parties two obligations. First, a state party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its EEZ or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to the state party.¹⁰⁴ Second, if the discovery of UCH, or the intention to engage in activities relating to UCH, occurs in the EEZ or

¹⁰⁰ Article 2 (2), UCH Convention.

¹⁰¹ Article 8, UCH Convention.

¹⁰² Article 303 (3), LOS Convention.

¹⁰³ Article 9 (1), UCH Convention. The expansive protective regime for UCH in the EEZ and on the continental shelf is further enhanced by the UCH Convention by the institution of two regimes: the information regime, through the system of reporting and notification under Article 9; and the protection regime, under Article 10.

¹⁰⁴ Article 9 (1) (a), UCH Convention.

continental shelf of another state party, the flag state shall require their national or the master of their flag vessel to report such discovery or activity to them and to the other state party.¹⁰⁵ Alternatively, a state party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other states parties.¹⁰⁶ On depositing its instrument of ratification, acceptance, approval or accession, a state party shall declare the manner in which reports will be transmitted.¹⁰⁷

The UCH Convention aims to establish a global information scheme by imposing upon all state parties the duty to notify the Director-General of UNESCO of all discoveries and activities reported to it.¹⁰⁸ The Director-General of UNESCO is likewise required to promptly notify all state parties of any notifications given to him.¹⁰⁹

The protection regime applicable to UCH in the EEZ and on the continental shelf, gives a state party in whose EEZ or on whose continental shelf UCH is located, the right to prohibit any activity directed at such UCH which interferes with the coastal state's sovereign rights as provided for by international law, including the LOS Convention.¹¹⁰ This right is not found in the LOS Convention. This is an innovative expansion of the rights of the coastal states, although it is circumscribed by the limitation that these activities will only be subject to prohibition if they interfere with a coastal state's "sovereign rights or jurisdiction." Within the framework of the LOS Convention¹¹¹ alone, this clause can be interpreted liberally, to include jurisdiction over marine scientific research, preservation of the marine environment in the EEZ;¹¹² and activities undertaken for the purpose of exploring and exploiting natural resources in the EEZ and on the continental shelf.¹¹³ Of course, the right

¹⁰⁵ Article 9 (1)(b) (i), UCH Convention.

¹⁰⁶ Article 9 (1)(b) (ii), UCH Convention.

¹⁰⁷ Article 9 (2), UCH Convention.

¹⁰⁸ Article 9 (3), UCH Convention.

¹⁰⁹ Article 9 (4), UCH Convention.

¹¹⁰ Article 10 (2), UCH Convention.

¹¹¹ Article 10 (2) of the UCH Convention states that "as provided for by international law including the United Nations Convention on the Law of the Sea." Thus, the range of activities directed at UCH in the EEZ and on the continental shelf is definitely broader and the examples that are listed above are merely illustrative.

¹¹² Article 56 (1) (b), LOS Convention. This includes jurisdiction over the establishment and use of artificial islands, installations and structures.

¹¹³ Articles 56, 77, LOSC Convention.

of the coastal state to authorize any activity directed at UCH located within its EEZ or on its continental shelf must be exercised in conformity with the provisions of the UCH Convention.¹¹⁴

In instances where the discovery of UCH, or activities directed at UCH in the EEZ and on the continental shelf, do not interfere with the sovereign rights of the coastal state, the UCH Convention imposes upon that state party a duty to consult all other states parties who have declared an interest¹¹⁵ on how best to protect the underwater cultural heritage.¹¹⁶ The coastal state coordinates such consultations as a “Coordinating State”, unless it expressly declares that it does not wish to do so.¹¹⁷ In such an instance, the state parties who have declared an interest¹¹⁸ shall appoint a Coordinating State.¹¹⁹ This principle is in harmony with Article 149 of the LOS Convention.¹²⁰

The UCH Convention accords the Coordinating State the right to take all practicable measures, or issue any necessary authorizations,¹²¹ to prevent immediate danger to UCH, whether arising from human activities or any other cause, including looting. This is, of course, without prejudice to the duty of all state parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage.¹²² In taking such measures, the Coordinating State may request assistance from other state parties.¹²³

¹¹⁴ In particular, as specified by the UCH Convention, in conformity with the provisions of Article 10.

¹¹⁵ Under Article 9 (5), UCH Convention; i.e., a declaration based a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned.

¹¹⁶ Article 10 (3) (a), UCH Convention.

¹¹⁷ Article 10 (3) (b), UCH Convention.

¹¹⁸ Under Article 9 (5), UCH Convention.

¹¹⁹ Article 10 (3) (b), UCH Convention.

¹²⁰ The LOS Convention in Article 149, which only applies to the Area, also recognizes this preferential right of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin. This is the reason why no similar provision is included on the protection regime pertaining to the UCH in the EEZ and on the continental shelf.

¹²¹ Article 10 (4), UCH Convention, i.e., “in conformity with this Convention and, if necessary prior to consultations” See also other duties of the Coordinating State in Article 10 (5), UCH Convention.

¹²² Article 10 (4), UCH Convention.

¹²³ Article 10 (4), UCH Convention.

The UCH stresses that the Coordinating State acts on behalf of the state parties as a whole and not in its own interest; any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the LOS Convention.¹²⁴ This reinforces the notion that the preservation of UCH, as a central goal of the UCH Convention, is undertaken for the benefit of humanity.¹²⁵

However, as a testimony to the long-standing tension between coastal state jurisdiction and flag state jurisdiction, and the precarious balances that delegates must always seek in order to achieve a compromise, the protective regime afforded to UCH in the EEZ and on the continental shelf is subject to the limitation that “no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag state and the collaboration of the Coordinating State.”¹²⁶ This creative solution, included apparently to assuage the concerns of flag states over vessels or aircrafts within the EEZ or continental shelf of another state’s jurisdiction, is nevertheless subject to the two main provisions of the protection regime. First, the activities must not interfere with the sovereign rights or jurisdiction of the coastal state; and second, interference is justified in instances of immediate danger to the UCH.¹²⁷

iv) UCH in the Area

The protection regime afforded to UCH in the Area¹²⁸ under the UCH Convention substantially mirrors the provisions pertaining to UCH in the EEZ and on the continental shelf.¹²⁹ The information regime and the protection regime, including the provisions for emergency measures, are identical in form and structure. The principal difference is that the function performed by the coastal state is vested in the Director-General of UNESCO for the information regime, and to an appointed state for the protection regime.

¹²⁴ Article 10 (6), UCH Convention.

¹²⁵ Article 2 (3), UCH Convention.

¹²⁶ Article 10 (7), UCH Convention.

¹²⁷ Article 10 (7) in relation with Article 10 (2) and (4), UCH Convention.

¹²⁸ Articles 11 and 12, UCH Convention.

¹²⁹ Articles 9 and 10, UCH Convention.

The UCH Convention imposes a duty upon state parties to protect underwater cultural heritage in the Area.¹³⁰ This entails a two-tiered duty: First, the state must require its national, or the master of the vessel flying its flag, to report a discovery or an intent directed at UCH in the Area;¹³¹ and second, the state must notify the Director-General of UNESCO and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to it.¹³² The Director-General of UNESCO shall promptly make available to all state parties any information supplied by states parties.¹³³

The protection regime for the Area authorizes the Director-General of UNESCO to invite all state parties which have declared an interest¹³⁴ to consult on how best to protect the UCH, and to appoint a “Coordinating State”, who shall coordinate such consultations.¹³⁵ The International Seabed Authority shall also be invited to participate in these consultations.¹³⁶

The UCH Convention, in instances where there is an immediate danger to UCH in the Area, whether arising from human activity or any other cause including looting, allows *all* state parties to take all practicable measures, if necessary, to prevent damage to the UCH, even prior to consultations.¹³⁷ Similar to the provision pertaining to the EEZ and the continental shelf, the UCH Convention stresses that in coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations,¹³⁸ the Coordinating State acts for the benefit of humanity as a whole, on behalf of all state parties.¹³⁹ However, the UCH Convention accords particular regard to the preferential rights of states to UCH of cultural, historical or archaeological origin.¹⁴⁰ The protection

¹³⁰ Articles 11 (1) UCH Convention. States Parties have a responsibility to protect UCH in the Area in conformity with the UCH Convention and Article 149 of the LOS Convention.

¹³¹ Articles 11 (1) UCH Convention

¹³² Article 11 (2), UCH Convention

¹³³ Article 11 (3), UCH Convention.

¹³⁴ Under Article 11, paragraph 4, UCH Convention.

¹³⁵ Article 12 (2), UCH Convention. See Article 12 (4), (5) and (6) for the other duties and limitations to the functions of a Coordinating State.

¹³⁶ Article 12 (2), UCH Convention.

¹³⁷ Article 12 (3), UCH Convention

¹³⁸ Every action must always be in conformity and limited only to those provided under Article 12, UCH Convention.

¹³⁹ Article 12 (6), UCH Convention.

¹⁴⁰ *Ibid.*

regime of UCH in the Area is in accordance with the regime applicable to the Area under the LOS Convention, which respects flag state jurisdiction. In this regard, the UCH Convention prohibits a state party from undertaking or authorizing activities directed at state vessels and aircraft in the Area without the consent of the flag State.¹⁴¹

IV. THE UCH CONVENTION: PROMISES, ISSUES AND CONCERNS

The UCH Convention has been the subject of both strong praise as well as strong criticism.¹⁴² In this section I will identify the strengths of the UCH Convention, and provide a critique of the UCH Convention, with an analysis of its weaknesses.

1. Strengths and promises

The main achievements of the UCH Convention can be summarized as the adoption of the text itself; and the international recognition of the imperative to preserve and protect underwater cultural heritage.

The UCH Convention is an embodiment of the aspirations of the international community to protect and preserve UCH for the benefit of humanity. It is the first multilateral agreement that specifically addresses this issue. It is a culmination of a decade of arduous negotiations and an attempt to fill in the gaps within the LOS Convention framework.¹⁴³ The UCH Convention is a compromise text, which proceeded from and preserved the delicate balance of conflicting interests crafted during the negotiations for the LOS Convention. The very idea of protecting and preserving UCH was so embroiled in political and legal debates that many were skeptical the UCH Convention would be adopted. For these reasons alone, the UCH Convention must be seen as a success. However, the adoption of the UCH Convention is merely a first step.

¹⁴¹ Article 12 (7), UCH Convention.

¹⁴² See for example David J. Bederman. "The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal" (1998) 30 J. Mar. L. & Com. 331. Also see Jack Fullmer. "The UNESCO Convention on the Protection of Underwater Cultural Heritage: A Shark in the Disguise as an Angelfish", online: <[http:// www.scubanj.org/UNESCO_stand.html](http://www.scubanj.org/UNESCO_stand.html)>.

¹⁴³ Richard T. Robol. "Legal Protection for Underwater Cultural Resources: Can We Do Better?" (1999) 30 J. Mar. L. & Com. 303.

The second success of the UCH Convention is the fact that it has placed the protection and preservation of UCH on the global agenda. The pioneering role played by UNESCO, as well as the efforts of ILA, ICOMOS, and the government experts of the states which participated, created a critical mass that produced the UCH Convention. The wide participation of states and other stakeholders during the drafting of the UCH Convention indicates a growing awareness of the need to preserve this important heritage. This bodes well for the eventual ratification of the UCH Convention.¹⁴⁴

However, the serious issues and concerns raised regarding the UCH Convention are major obstacles to the ratification of the treaty by many states and may delay, if not prevent, the coming into force of the treaty.

2. Issues and concerns

i) The ambiguous and expansive definition of UCH

The UCH Convention defines UCH in Article 1. The definition is broad and vague. The phrase “all traces of human existence having a cultural, historical or archaeological character” is problematic because it fails to provide a standard for exclusion and a standard for inclusion. In its proper and ordinary meaning, this definition may be interpreted to include nearly everything that is found underwater.

Of course, following basic rules of statutory interpretation, one may be guided by the *travaux préparatoire*—the transcripts of the negotiations and debate which transpired in drafting this definition—to ascertain the intent behind this definition. But the pervasive spirit of absolute preservation and protection of UCH that runs through the entire UCH Convention is guidance enough. The strict prohibitive regime of the UCH Convention, which forbids any activities directed at UCH (except

¹⁴⁴ As of December 4, 2004, there are only two (2) states parties to the UCH Convention: Panama (date of deposit of ratification: May 20, 2003); and Bulgaria (date of deposit of ratification: October 6, 2003), online: <http://erc.unesco.org/cp/convention.asp?KO=13520&language=E>. In accordance with Article 27, of the UCH Convention, it shall enter into force three months after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, but solely with respect to the twenty States or territories that have so deposited their instrument. It shall enter into force for each other State or territory three months after the date on which that State or territory has deposited its instrument.

in certain specified exceptions, as discussed above) and bans the commercial exploitation of UCH, actually creates a legal presumption. The UCH Convention presumes as UCH any underwater object which satisfies the above criteria and the 100-year period test. These broad criteria ignore the nature of UCH as a multi-use resource.¹⁴⁵ This obvious archaeological bias overlooks the fact that UCH is also a fishery resource, and often a recreational resource.¹⁴⁶ The practical consequence of this over-inclusive definition may be to deprive other users of the opportunity to maximize these resources.

ii) The elimination of the economic value of UCH

The elimination of the economic value of UCH raises issues with respect to the Convention's practicability; enforceability; and effectiveness. The UCH Convention introduces the principle that the preservation and protection of UCH is incompatible with its commercial exploitation. More than this, the UCH Convention seeks to eliminate UCH from commerce. On the one hand, it is doubtful whether this is the most effective means to achieve the aims of the UCH Convention; on the other hand, it may be naïve to even envision that this can commercial exploitation can be completely avoided.

Underwater cultural heritage is a multi-use resource; it can be important not only archeologically, historically or culturally, but it can also have an economic value.¹⁴⁷ The UCH Convention cannot legislate to eliminate this economic value. On the contrary, the imposition of legislation may invigorate illicit trade, increase the global demand of UCH,

¹⁴⁵ Hance D. Smith and Alastair D. Cooper. "The Management of the Underwater Cultural Heritage" (2003) 4 *Journal of Cultural Heritage* 25. See also discussion in Alastair Couper, "The Principal Issues in Underwater Cultural Heritage." (1996) 20 *Marine Policy* 283.

¹⁴⁶ Fletcher-Tomenius & Forrest, *supra* note 52.

¹⁴⁷ Shipwrecks supply various kinds of economic values. These are: salvage value - as when cargoes of high monetary value are recovered, so returning them to the 'stream of commerce'; archaeological value - as when the careful investigation of a wreck uncovers interesting historical information; recreation value - as for hobbyist divers; and reef value - as when a wreck creates an artificial reef as a habitat for fish that may be of value to recreational anglers. Paul Hallwood. "Some Law and Economics of Historic Shipwrecks" University of Connecticut Working Paper 2003-42, November 2003, online: <<http://www.econ.uconn.edu/working/2003-42.pdf>>. See also Gillian Hutchinson. "Threats to Underwater Cultural Heritage: The Problems of Unprotected Archaeological and Historic Sites, Wrecks and Objects Found at Sea." (1996) 20 *Marine Policy* 287.

and cause the prices of UCH to sky-rocket.¹⁴⁸ Such legislation may prove ruinous and achieve results contrary to those intended. Additionally, this principle overly simplifies the varied causes of the destruction of UCH by laying blame solely on commercial treasure salvagers. The oil and gas industry, the pipe-laying industry, unintentional or accidental human acts, and even nature itself are just a few of the other culprits.¹⁴⁹

An attempt to ban commercial exploitation is simply unbalanced public policy. There is no substantial reason to differentiate between UCH and its terrestrial counterpart.¹⁵⁰ Furthermore, it is neither good science, nor is it cost-effective, to collect multiple artifacts and prohibit their economic utilization. In such cases, it would be best just to keep a representative sample and dispose of the rest.¹⁵¹ This also poses an archival problem of preservation and storage.

iii) The treatment of sunken state vessels and sovereign immunity issues

The UCH Convention maintains an uncertainty over the issues of the abandonment and the sovereign immunity of sunken warships. Article 2(8) of the UCH Convention reflects the complexities of this issue. The negotiating draft initially provided for the exclusion of state vessels in the Convention.¹⁵² This exclusion reflected the view of many maritime nations that states only lose ownership over state-owned vessels by ex-

¹⁴⁸ Neil Brodie. “Export Deregulation and the Illicit Trade in Archeological Material” in Jennifer R. Richman & Marion P. Forsyth. *Legal Perspectives on Cultural Resources* (United States: Altamira Press, 2004) at 85 – 99.

¹⁴⁹ See for example, Komurcu. *Cultural Heritage Endangered by Large Dams and its Protection Under International Law* (2002) 20 *Wis. Int’l L. J.* 233. See also Christopher C. Bryant. “The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks” (2001-2002) 65 *Alb. L. Rev.* 97.

¹⁵⁰ Fletcher-Tomenius & Forrest, *supra* note 52 at 3.

¹⁵¹ *Ibid.* citing G. Stemm. “Protection of our Underwater Cultural Heritage: Thoughts on the Future of Historic Shipwrecks” Proceedings of the Thirty-First Annual Law of the Sea Institute, University of Miami, Florida, March 30, 1998 at 4; and J.A. Roach. “Shipwrecks: Reconciling Salvage and Underwater Archeology” Proceedings of the Thirty-First Annual Law of the Sea Institute, University of Miami, Florida, March 30, 1998 at 9.

¹⁵² The Convention “shall not apply to the remains and contents of any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, at the time of its sinking, only for government non-commercial purposes.” CLT-96/CONF 202/5 Rev 2, Paris, July 1999 cited in Forrest, *supra* note 1, footnote 66 at 525.

press abandonment.¹⁵³ However, since most of these vessels are clearly UCH, this provision was widely criticized. There was a perception that to allow these vessels to be outside of the purview of protection of the UCH Convention would undermine the very aims of the Convention.¹⁵⁴

The qualified inclusion still poses several questions. Among these is the argument that the principle of sovereign immunity of state-owned vessels does not apply to sunken vessels.¹⁵⁵ This is premised on the assertion that sunken vessels cease to be ships and are therefore removed from the exclusive jurisdiction of the flag state.¹⁵⁶ Another contentious issue is one of determining the legal status of a state-owned vessel and its consequent issue of ownership.¹⁵⁷ The reasons for these may be varied: The vessel may so old that it pre-dates the very conception of a 'state'; or the original flag-state no longer exists, either because it has broken up into many states, or coalesced with other states into another state; or the vessel may simply not reveal any historic evidence sufficient to determine ownership.¹⁵⁸

¹⁵³ See David J. Bederman, "Rethinking the Legal Status of Sunken Warships" (2000) 31 *Ocean Devel. & Int'l L.* 97; Jeffrey W. Yeates, "Clearing Up the Confusion: A Strict Standard of Abandonment for Sunken Public Vessels" (1999-2000) 12 *U. S. F. Mar. L. J.* 359.

¹⁵⁴ J. Ashley Roach, "Sunken Warships and Military Aircraft." (1996) 20 *Marine Policy* 351.

¹⁵⁵ See Articles 95 and 96, LOS Convention.

¹⁵⁶ Both the Convention on the High Seas (Art. 8) and the LOS Convention (Art. 29) define warships as a "ship belonging to the armed forces of a State bearing external marks ... under the command of an officer duly commissioned by the government... and manned by a crew." A sunken vessel will definitely not meet any of these criteria. Thus, several commentators argue that when a ship sinks it is no longer entitled to the special preferences and immunities accorded to warships under international law. See especially Jerry E. Walker, "A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations" (1999-2000) 12 *U. F. S. Mar. L. J.* 311 at 355 citing Oppenheim's *International Law: Peace* § 560, at 1165 (Sir Robert Jennings & Sir Arthur Watts, ed., 9th ed. 1996). See also Forrest, *supra* note 1 at 527.

In the US case of *Baltimore, Crisfield & Onancock Line, Inc. v. United States* (140 F.2d 230, 234 (4th Cir. 1944)), the court resolved that the battleship at issue was no longer property of the United States and reasoned that "Sunken vessels lying on the sea floor cannot qualify as 'ships', as they are not used for navigation nor are they capable of being so. The most common characteristic of the definition of 'ships' is their ability to navigate; if they cannot navigate, they are not considered as ships..." (140 F.2d at 234) as cited in Walker, *ibid.* at 352.

¹⁵⁷ See for example, analogous jurisdictional dilemma in John D. Kimball, Case Note, "Jurisdiction: A United States Admiralty Court Can Award and Enforce Salvage Rights in a Shipwreck in International Waters." (*R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 1999 AMC 1330 (4th Cir. 1999)). (1999) 30 *J. Mar. L. & Com.* 691.

¹⁵⁸ See Forrest, *supra* note 1 at 528. See also David J. Bederman, "Maritime Preservation Law: Old Challenges, New Trends" (2002) 8 *Widener L. Symp. J.* 163.

The resulting compromise within the UCH Convention largely reflects and balances this tension between the flag-state and the coastal state in whose maritime zone the vessel may be located. Needless to say, the conflict remains, and a jurisdictional dilemma will still arise, for example if a state-owned vessel happens to be found within the territorial sea of coastal state.¹⁵⁹ The same is true if the state-owned vessel was found in any of the other maritime zones.¹⁶⁰

iv) Other issues

There are other equally-important, critical issues which, due to space limitations, will not be covered extensively in this paper. Some of these issues are: (1) The consistency of the UCH Convention with the LOS Convention;¹⁶¹ (2) the conflict of values between the principal users of UCH (the archeological community, the treasure salvage community and the sport diving community);¹⁶² (3) potential conflicts of the Convention with national legislation;¹⁶³ (4) the application of salvage law,

¹⁵⁹ See especially Clarissa A. Kang. “Charting Through Protection for Historic Shipwrecks Found in U.S. Territorial Waters: *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*” (2000) 19 Va. Env’t L. J. 87. See also Jason R. Harris. “Protecting Sunken Warships as Objects Entitled to Sovereign Immunity” (2002) 33 U. Miami Inter-Am. L. Rev. 101.

¹⁶⁰ See for example, issues of private ownership claims in Stephen Paul Coolbaugh. Comment. “Raiders of the Lost ... Sub? The Potential for Private Claims of Ownership to Military Shipwrecks in International Waters: The Case of Japanese Submarine I-52” (2001) 49 Buff. L. Rev. 931.

¹⁶¹ Bederman, *supra* note 80 at 145-146, opines that despite the harmonizing provision of Article 3, the UCH Convention is still in many respects inconsistent with the LOS Convention. He thinks this is true for Articles 9 through 12 of the UCH Convention on coastal state jurisdiction and activities in the Area, as well as provisions which contradict the preservation of the law of salvage and maritime law in Article 303 of the LOS Convention. He adds that Article 10 (2) of the UCH Convention is an unambiguous amendment to the LOS Convention which could enter in force, as provided for in the UCH Convention, with as little as twenty ratifications. See also concise discussion of these issues in Report of the CMI Working Group. “Consideration of the UNESCO Convention on the Protection of Underwater Cultural Heritage” (2002) CMI Yearbook 154. online: <http://www.comitemaritime.org/year/pdffiles/cons_unesco.pdf>.

¹⁶² See Fletcher-Tomenius & Forrest, *supra* note 52. See also Jeffrey T. Scrimo. “Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks” (2000) 5 Ocean & Coastal L. J. 271; John Alan Cohan. “An Examination of Archeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)” (2004) 27 *Environm’t L. & Pol’y J.* 349.

¹⁶³ See especially James A. R. Nafziger. “The Underlying Constitutionalism of the Law Governing Archeological and Other Cultural Heritage” (1994) 30 *Willamette L. Rev.* 581. For example, the US federal Abandoned Shipwreck Act (ASA) claims federal ownership of abandoned shipwrecks embedded in a state’s submerged land and simultaneously transfers title to

the law of finds and admiralty law;¹⁶⁴ and (5) the issues of sovereign status of state-owned vessels and state succession.¹⁶⁵

V. CONCLUSION

The adoption of the UCH Convention should be regarded as an important achievement and a major step in the progressive development of international law. The UCH Convention implements a comprehensive legal regime for the preservation and protection of UCH, one which

the wrecks to the states for administration, management and regulation. See Sean D. Murphy. "US Concerns Regarding UNESCO Convention on Underwater Heritage" (2002) 96 I. J. I. L. 468. For a discussion of the ASA, see Roberto Iraola. "The Abandoned Shipwreck Act of 1987" (2004) 25 Whittier L. Rev. 787. But see Sherri J. Braunstein. "Shipwrecks Lost and Found at Sea: The Abandoned Shipwreck Act is Still Causing Confusion Rather than Preserving Historic Shipwrecks" (2002) 8 Widener L. Symp. J. 301.

Another example is Australia's domestic legislation on UCH, the Historic Shipwrecks Act, which declares all remains of a ship which are "situated in Australian waters or above the continental shelf of Australia" and at least 75 years old to be "historic shipwrecks" and declares a protected zone around a historic shipwreck or historic relic. (ss 4a, 7). See Constance Johnson.. "For Keeping or for Keeps? An Australian Perspective on Challenges Facing the Development of a Regime for the Protection of Underwater Cultural Heritage" (2000) 1 Melbourne Journal of International Law 19. See also Liza J. Bowman. "Oceans Apart Over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?" (2004) 42 Osgoode Hall L. J. 1.

¹⁶⁴ See excellent discussion of Guido Carducci.. "The Crucial Compromise on Salvage Law and the Law of Finds" in Garabello & Scovazzi, *supra* note 10 at 193 – 206. See also Craig J.S. Forrest. "Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past? (2003) 34 J. Mar. L. & Com. 309; Anne M. Cotrell "The Law of the Sea and International Marine Archeology: Abandoning Admiralty Law to Protect Historic Shipwrecks" (1994) 17 Fordham Int'l L. J. 667. See also John D. Kimball. "Jurisdiction: A United States Admiralty Court Can Award and Enforce Salvage Rights in a Shipwreck in International Waters. R.M.S. Titanic, Inc. v. Haver, 171 F.3D 943, 1999 AMC 1330 (4TH CIR. 1999)" (1999) 30 J. Mar. L. & Com. 691. See also Mark A. Wilder. "Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries" (2000) 67 Defense Counsel Journal 92. See interesting discussion in Justin S. Stern. "Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks" (2000) 68 Fordham L. Rev. 2489. See also Terence P. McQuown. "An Archeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks" (2000) 26 Wm. Mitchell L. Rev. 289.

¹⁶⁵ See Walker, *supra* note 156. For discussion on both property rights and sovereignty issues involved in cultural property disputes, see Evangelos I. Gegas. "International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property" (1997) 13 Ohio St. J. Disp. Res. 129. Please also refer to discussion on the legal status of sunken warships above. See also issues on litigation of disputes in Peter E. Hess "Deep Shipwreck in High Courts" (1999) 17 Del. Law 16; and Nafziger, James A.R. "The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck" (2003) 44 Harv. Int'l L. J. 251.

addresses the gaps and improves the protective regime which existed under the LOS Convention. The UCH Convention succeeded in making the protection and preservation of UCH a global priority. Now all that is left is for these laudable objectives to be realized.

This paper examined the international legal framework on the protection of underwater cultural heritage by paying particular attention to the protective regimes under the UCH Convention and the LOS Convention. I provided some theoretical and historical background to the UCH Convention, and examined its relationship with the LOS Convention. I then proceeded to discuss the salient provisions of the UCH Convention. Then I discussed the protective regimes within the different maritime zones under both the LOS Convention and the UCH Convention. Finally, I engaged in a critique of the UCH Convention, examining its strengths and weaknesses.

Two final points should to be underscored. The first is the importance of international cooperation in the context of protecting UCH. A corollary to this is the need for widespread ratification of the UCH Convention.¹⁶⁶ The UCH Convention will only be effective if it is binding. The basis of all of international law, which is at the heart of the UCH Convention, is the principle of cooperation.¹⁶⁷ The UCH Convention will succeed or fail on this aspect alone. At the national level, and in furtherance of the objectives of the UCH Convention, states must be willing to enact domestic legislation¹⁶⁸ that deter and punish the looting,

¹⁶⁶ Aside from the substantive issues discussed above, there is also the issue of forum. Norway, for example made a formal declaration that it reserves its position that UNESCO is the appropriate forum for the negotiation and adoption of the UCH Convention. General remarks of Mr. Hans Wilhelm Longva, Director General, Department of Legal Affairs, Royal Norwegian Ministry of Foreign Affairs, 19 April 1999 as cited in Forrest, *supra* note 1, footnote 33, at 517.

¹⁶⁷ Article 2 (2), UCH Convention.

¹⁶⁸ Many states with a rich archeological tradition have enacted domestic legislation vesting ownership of antiquities in the national government (for example, the Antiquities Act of 1906 of the United States). This type of legislation creates the presumption that any activity undertaken without the permission of the state is an act of theft. The public policy is the prosecution of theft and the restitution of the object to its original owner. See Gerstenblith, *supra* note 26 at 212. See also Lawrence M. Kaye. "Art Wars: The Repatriation Battle" (1998) 31 N. Y. U. J. Int' L. & Pol. 79.

theft and smuggling¹⁶⁹ of UCH. In the meantime, in recognition of international concern over the continuing loss of UCH on a global scale, and pending the ratification of the Convention, states should endeavor to comply with the spirit and principles of the Convention and implement on a voluntary basis the Rules of the Annex.¹⁷⁰

Finally, in the long-term, the importance of capacity-building, education and training must be addressed,¹⁷¹ and a global awareness campaign must be emphasized.¹⁷² The success of the UCH Convention in achieving its aims of protecting and preserving UCH will depend not only on cooperation among states but on the vigilance and dedication of all interest groups as well.

¹⁶⁹ Two international conventions call upon States parties to respect each others' export restrictions on cultural property, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property [Nov. 17, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971)] and the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects [reprinted in 1 Uniform L. Rev. N.S. 110 (1996); 1 Art Antiquity & Law 79 (1996); 5 Int'l Journal of Cultural Property 155 (1996)] have been promulgated

¹⁷⁰ *Declaration of the UNESCO Kingston Conference on the Convention on the Protection of the Underwater Cultural Heritage in the Caribbean, Latin and North American Regions*. (Kingston, Jamaica, 17 – 20 June 2002), online: <http://portal.unesco.org/culture/en/file_download.php/2748b171af3402ee016e299abee09137Kingston+Declaration.pdf>. The Rules of the Annex emphasize the need to uniformly apply current professional standards in archaeological methods and techniques to any activity directed at Underwater Cultural Heritage.

¹⁷¹ The UNESCO is a leading UN institution in education and capacity-building. In 1999, for example, it established the International Institute for Capacity Building in Africa (IICBA) which provides services to some 20 countries. In 2000, under its auspices, the Dakar Framework for Action, was adopted during the World Education Forum. It includes a pledge from donor countries and institutions that “no country seriously committed to basic education will be thwarted in the achievement of this goal by lack of resources”. Text of the Dakar Framework for Action, online: <http://www.unesco.org/education/efa/ed_for_all/dakfram_eng.shtml>.

¹⁷² See for example, *Memorandum of Understanding Between the Caribbean Community (CARICOM) and the UNESCO*, 5 May 2003, Georgetown, Guyana, online: <http://www.caricom.org/archives/mou-caricom-unesco_03.htm>.