

The elaboration of the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage

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Abstract

The UNESCO Convention on the Protection of the Underwater Cultural Heritage was adopted in 2001. Like many such treaties, its text is the result of a compromise between opposing views. The negotiations leading to this instruments started in the Eighties at the initiative of underwater archaeologists who teamed up with lawyers and with the International Law Association. These pioneers considered that the United Nations Convention on the Law of the Sea (UNCLOS) did not protect adequately the underwater cultural heritage. But many States Parties to the UNCLOS were reluctant to re-open any kind of negotiation that might affect the delicate balance of the UNCLOS. Moreover, the industry of salvage was also extremely reluctant to any new international legislation that may affect their activities, especially in the high seas. The process of preparation of an international legal instrument was suspended several times. It was finally put on tracks thanks to the pugnacity of a few UNESCO staff and ICOMOS members supported by Ministries of a Foreign Affairs of several countries who convinced the UNESCO General Conference to enter the process of elaboration of a Convention. During the negotiation of the text, the views expressed by the delegations of UNESCO Member states were often antagonistic. In the discussions, the ICOMOS Committee on Underwater Cultural Heritage (ICUCH) played a major role, by sensitizing the diplomats to the urgency of adopting a legal instrument at a time when technology had made possible to explore practically all ancient vessels lying on the seabed. The author has participated in some key steps of the elaboration of the Convention and will present some of the legal and ethical positions expressed at the negotiations and that have led to the compromise adopted in 2001.

Key words: UNESCO, UNCLOS, outreach, UCH

Introduction

The protection of the underwater cultural heritage, in particular ancient shipwrecks laying on the seabed under various jurisdictions, is by nature an international issue. It is therefore natural that the United Nations, in particular UNESCO as the specialized agency with the UN mandate for cultural heritage, has looked into the matter and adopted in 2001 the Convention on the Protection of the Underwater Cultural Heritage, one of the seven UNESCO Conventions in the area of culture. It was elaborated as a response from the international community to the removal and destruction of underwater cultural heritage by industrial activities and by the so-called “treasures hunters”. The Convention reflects the growing recognition of the need to ensure the same protection to underwater cultural heritage as that already accorded to land-based heritage. It provides legal protection, enables States Parties to adopt common approaches to preservation and provides effective professional guidelines. The main principles of the convention and its Annex had long been endorsed by professionals in UCH. It is to be remembered that the draft of the Annex was drafted by UCH professionals who started working on it in 1983. The Convention entered into force in January 2009. As of 15 July 2017, 57 countries are States Parties to it, which is an honorable score but does not give it the status of a universal instrument. For instance only two countries in Asia and the Pacific have joined it. But those States which joined it made an important commitment by agreeing on rules applicable by vessels bearing their flag and by their nationals, including also the treasures hunters.

Keys steps towards a Convention

UNESCO has been concerned with the protection of UCH since its early days. Its *Recommendation on International Principles Applicable to Archaeological Excavations*, a non-legally binding text adopted by the General conference in 1956 applies also to underwater archaeology.

The Council of Europe, as early as 1978, began to develop a draft European convention for the protection of the underwater cultural heritage. The draft reached an advanced stage but was never adopted by the Council of Ministers.

The issue was raised again during the negotiations for the United Nations Law of the Sea Convention and resulted, in the closing days of these negotiations, in the adoption of two articles (149 and 303). However these articles are widely felt by cultural experts to be unsatisfactory and incomplete. They are indeed ineffective to protect underwater cultural heritage beyond the contiguous zone, they do not resolve the conflict between ownership claims, salvage claims and cultural heritage interests and they do not give any guidance on how underwater cultural heritage should be treated. They are also sufficiently ambiguous to give rise to alternative interpretations.

In 1990, under the leadership of its Chairperson, Professor Patrick J. O'Keefe¹, the Cultural Heritage Law Committee of the International Law Association undertook to study the international legal protection of the underwater cultural heritage. It produced its first report and a draft text of a convention for the meeting of the International Law Association in Cairo in 1992. One year later, the Director-General of UNESCO was requested by the UNESCO Executive Board to undertake a study into the feasibility of a new international instrument. As the International Law Association

had an advisory status with UNESCO and was well advanced in its work on a draft convention, the Director-General decided to wait until the ILA work was complete before reporting back to the UNESCO Executive Board. In 1994, in Buenos Aires, the Cultural Heritage Law Committee produced its final report and draft convention to the ILA meeting which adopted it and transmitted it to the Director-General of UNESCO.

In parallel to this legal process, a group of influential underwater archaeologists who were members of the International Council of Monuments and Sites (ICOMOS) created the ICOMOS Committee for Underwater Cultural heritage (ICUCH) and advocated within ICOMOs for the development of specific ethical and professional standards for underwater archaeology. They argued that underwater archaeology had particular requirements related to its environment which has led to the development of specific techniques and that underwater conservation is always a pressing and expensive immediate necessity. Their efforts led to the preparation and adoption of the International Charter on the Protection and Management of Underwater Cultural Heritage by ICOMOS General Conference in Sofia in 1996. To be noted that the ICUCH played a major role during the whole negotiation process of the 2001 Convention, in particular through its Chairpersons, Graeme Henderson (Australia) and Robert Grenier (Canada).

With the ILA draft in its hands, as a useful basis for a possible new instrument, the UNESCO Secretariat was ready to start preparing a feasibility study requested by the Executive Board. Within the UNESCO Secretariat in 1994, Dr. Lyndel V. Prott was the Head of the International Section of the Division of Cultural Heritage. She played a major role, as a renowned lawyer and an international civil servant, all over the process of elaboration of the Convention. I had the honor to be the other member of

her two-person team and rejoined later by a then junior colleague, Mr. Ieng Srong. In preparing the feasibility study, the Secretariat looked at the relevant articles of the United Nations Convention on the Law of the Sea and at the International Charter on the Protection and Management of Underwater Cultural Heritage.

In 1995, a large number of artifacts found in the wreck of the Titanic, which was discovered several years before, were exhibited all over the world. This travelling exhibition gave a sort of technology signal that most shipwrecks that could be found on the seabed were technically accessible and that cultural objects could be removed. At the occasion of one such international exhibition in Greenwich (United Kingdom), an expert meeting was organized for legal experts and underwater archaeologists. It included those experts who had worked on the ILA draft and the ICOMOS Charter as well as lawyers familiarized with salvage Law. The discussions anticipated the difficulty of finding a compromise on a draft legally-binding text which could be accepted and implemented universally.

The Director-General submitted the feasibility to the Executive Board in May—June 1995² and recommended that this Board transmits its recommendation to the UNESCO General Conference which has the authority, under UNESCO's constitution, to decide on the elaboration of a Convention. But during the discussion, although a number of delegates emphasized the urgency of the situation, the majority requested more time before launching the preparation of a Convention. They insisted that the jurisdictional aspects of the question should be further studied, namely the compatibility of a possible new convention with the provisions on jurisdiction contained in the United Nations Convention on the Law of the Sea (UNCLOS).

Therefore, instead of transmitting the Director-General's recommendation to the General conference, the Executive Board requested him to urgently convene an expert meeting to discuss this issue and to report to the General Conference just a few months later. But the time was too short between June and October 1995 to convene, before the General Conference, an expert meeting based on a fair geographical balance and representing the various interests involved. The Secretariat therefore wrote to all countries which had expressed an interest in order to receive their comments on the feasibility study. Thirteen replies (Australia, Colombia, France, Germany, Greece, Italy, The Netherlands, Philippines, Spain, Turkey, United Kingdom, United States and the U.N. Division for Ocean Affairs and the Law of the Sea) were received. A majority of them were in favor of a Convention. But divergent opinions were expressed about the content of the norms, for instance on the concept of a specific cultural heritage zone or on specific protected areas. It was also accepted that UNESCO was the appropriate forum and that the norms to be prepared should duly take into account the balance achieved in the UNCLOS Convention.

The 1995 session of the UNESCO General Conference did not launch yet the formal process of elaborating a Convention. Instead, it invited the Director-General:

- *to pursue further discussions with the United Nations in respect of the UNCLOS and with the International Maritime Organization (IMO)*
- *to organize, in consultations with UN and IMO, a meeting of experts representing expertise in archaeology, salvage and jurisdictional regimes*
- *to make the views of the experts known to UNESCO Member States and invite their comments;*

- and to report back to the 29th session of the General Conference (1997)

Therefore UNESCO Secretariat had proposed to the IMO (London) and to the United Nations Division of the Law of the Sea (New York) to nominate some of the above experts in order to ensure consistency with the work already developed within these two organizations. The expert meeting took place in May 1996. It was chaired by Dr. Carsten Lund (Denmark). To be noted that Dr. Lund remained the Chair of all further intergovernmental experts meetings that took place until the adoption of the Convention in 2001. The 1996 meetings was an important one because it agreed that a possible Convention be grounded on the principle incorporated in Article 303 (1) of the UNCLOS Convention which says that: "States have a duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose". The majority agreed that UNESCO was the right venue for such a Convention, although a minority group believe that it should be adopted within the Law of the sea framework at the United Nations in New York.

The General Conference finally gave the green light for a Convention in October 1997 at its 29th session³. It decided that the question should be regulated and that the method adopted should be an international convention. It invited the Director-General to convene meeting, but this time with expert representing their Governments. Four such governmental experts meeting took place from 1998 to 2001. The UNESCO Convention on the Protection of the Underwater Cultural Heritage was finally adopted on 2 November by the Plenary Session of the 31st General Conference with 88 votes in favor, 4 against and 15 abstentions⁴.

Major issues during the negotiation of a Convention

The three main issues at the core of the experts' deliberations were:

- the jurisdiction (including the necessary compliance with the UNCLOS)
- the relation with the Law of salvage or salvage law
- the standards for research in underwater cultural heritage.

Jurisdiction

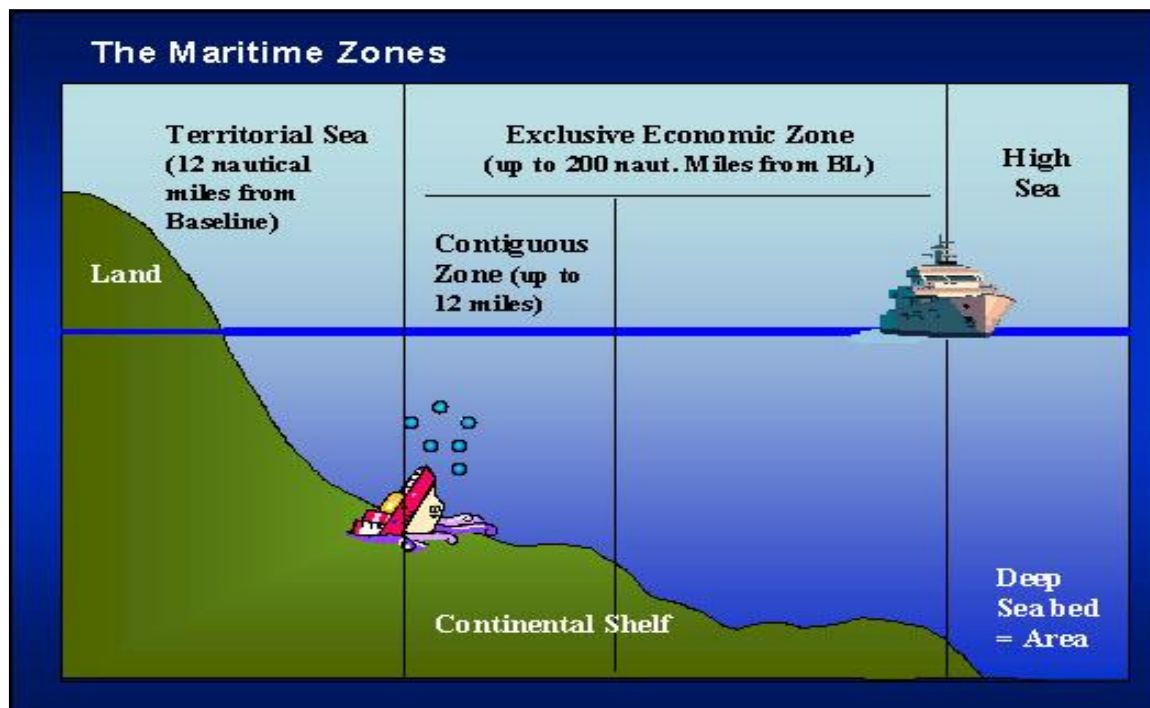


Fig. 1: The maritime zones.

In the territorial sea, the national legislation of the coastal State applies to underwater cultural heritage. Beyond the territorial sea, the coastal State's jurisdiction is generally very limited under national legislations. Often the coastal States have jurisdiction over their own nationals and vessels bearing their flag. But it is often expressed in vague terms and with serious difficulties of implementation without any State cooperation system. Underwater cultural heritage being largely located in the oceans which fall

under the Law of the Sea Convention, its legal regime falls under UNCLOS articles 149 and 303:

Article 149 Archaeological and historical objects.

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 Archaeological and historical objects found at sea

- i. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.*
- ii. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the sea-bed 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.*
- iii. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.*
- iv. 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 articles, according to archaeologists and lawyers concerned with the preservation of the underwater cultural heritage, were considered as

insufficient for an effective protection of the cultural heritage. Indeed, in the Exclusive Economic Zone and on the Continental Shelf, UCH remains practically unprotected. Another serious problem is that the provision in Article 303 stating that 'Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty...' appeared to protect the commercial exploitation of historic shipwrecks, leading to the destruction of archaeological resources without their scientific examination. The relation with salvage law was therefore an issue of very lively discussions, often antagonistic, during the several experts meetings from 1998 to 2001.

Salvage law

Salvage Law or Law of Salvage or Law of Finds is based on practical and economic considerations. The function of salvage is to encourage the recovery of goods at sea that are in danger of being lost. The primary objective of the salvage industry, recognized in salvage law, is the recovery of commercially valuable property from a shipwreck. But in some countries, the salvage industry had extended its activity to commercial exploitation of submerged archaeological sites, often by teams of unqualified persons. Therefore for many years archaeologists had been concerned by the loss of scientific information caused by such unprofessional excavation and by the destruction of artefacts not considered commercially valuable.

The activities of the salvage industry were regulated by the 1989 International Convention on Salvage, adopted under the auspices of the International Maritime organization (IMO). It does not include provisions on the underwater cultural heritage. As the Article 303, iii, of the UNCLOS protects salvage law, most experts considered that the international legal framework in 1998 was an invitation to looting.

Standards for research in UCH

When the first meeting of experts opened in 1996, the International Council of Monuments and Sites (ICOMOS) had just adopted its International Charter on the Protection and Management of Underwater Cultural Heritage at its General Conference in Sofia (see above).

To be noted that the International Law Association had included in several provisions of its draft Convention on UCH that underwater excavations were to be undertaken in accordance with the ICOMOS UCH Charter, which would be an annex to the ILA draft.

Therefore given the importance of the ICOMOS Charter which sets standards for research and conservation of the UCH, the members of the ICOMOS Committee for Underwater Cultural heritage (ICUCH) were associated closely to the elaboration of the text of the UNESCO Convention. They were very influential in the process leading to the adoption of the 2001 Convention.

The way towards a compromise

The process involved a long and patient campaign initiated by underwater archaeologists in Europe, Australia, North America and later in other regions. They needed to convince even their own peers - i.e. the 'land' archaeologists- to team-up with them in order to convince Ministries of Foreign affairs of their respective countries to support the idea of a Convention. Indeed in many countries Ministries of Foreign Affairs were quite hesitant to open negotiations on an issue related to the Law of the Sea, only a few years after the entry into force of the UNCLOS Convention. To be noted that members of the International Law Association (ILA), especially Professor Patrick J. O'Keefe, the Chairperson of the ILA Cultural Heritage Law Committee, played an

important role in the informal lobby in favor of an effective convention. Other influential institutions included ICOMOS, ICUCH, the International Council of Museums (ICOM) and several Maritime museums all over the world.

In 1998, reaching of a compromise to be included in a Convention appeared to be very challenging. At the beginning of the discussions, there was a consensus only on the necessity to avoid creating a new “archaeological zone” in addition to the zones established by UNCLOS. There was also an agreement that a Convention should refer to some kind of guidelines on how to treat UCH.

All the other issues were the object of profound divergences between experts and between the UNESCO Member States. However, gradually, a consensus emerged to obtain protection of UCH wherever it is located beyond the territorial seas, in all maritime zones including international waters, through a State cooperation system.

The salvage Industry was also represented in the experts meetings. Indeed at the request of the UNESCO General Conference, UNESCO Secretariat had asked the International Maritime Organization (IMO) to designate experts to represent the interests of the maritime industry, including the salvage industry. The Tourism diving industry was not invited as such, but several countries’ delegations included experts which expressed the views of this sector. The consistency with the UNCLOS Convention was ensured by representatives of the UN Division of the Law of the Sea (New York) who played a very positive role in this respect. Some “Treasures Hunters”, although not invited officially, showed up at one of the meetings and opposed the adoption of a text, without success. To be noted that “treasures hunters” were more influential among

international TV channels, which, during the years of the negotiations, displayed TV shows glorifying their activities.

The negotiations also had to face language difficulties. For instance, archaeologists and lawyers understood differently the concept of “rules”, the former saw them as rules applicable to professionals and the latter as rules applicable to States. This has rendered the role of the courageous Chairperson, Dr. Carsten Lund (Denmark), an almost impossible task⁵.

The composition of each country’s delegation was also a challenge. Only important delegations could include international lawyers, cultural heritage lawyers, salvage lawyers as well as archaeologists. But most delegations were composed of only one international lawyer, often with little background in archaeology.

The compromise adopted in 2001

Despite the antagonistic positions that continued to be expressed during the whole negotiation process, a compromise was reached in 2001. It included a very advanced State cooperation system containing provisions of legal and professional or ethical nature binding both States parties and UCH professionals. The Convention was structured under a main text and an Annex which is an integral part of the Convention. The main text contains basic principles for the protection of UCH and a detailed State cooperation system. The Annex includes widely recognized practical rules for the treatment and research of UCH which reflects practically the text of the ICOMOS Charter.

The basic principles of the Convention include the obligation to preserve UCH “for the benefit of humanity”, the “in situ” preservation as the first option (not the only one), a commitment for no commercial exploitation and an obligation of training and information sharing. It does not include

the sovereignty rights of States and the issue of the ownership of wrecks which remain regulated by civil law, other domestic law and private international law.

The compromise on the relation with salvage law was one of the most difficult to reach. It is contained in Article 4 of the 2001 Convention which excludes the application of salvage law, except when and if three cumulative conditions are met:

Article 4- Relationship to Law of Salvage or Law of Finds

Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

- (a) is authorized by the competent authorities, and*
- (b) in in full conformity with this Convention, and*
- (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.*

But the Convention was not adopted by consensus. The Culture commission of the General Conference had recommended the Plenary of the UNESCO 31st General Conference to adopt the draft Convention by 94 votes in favor, 5 against and 19 abstentions. The Plenary adopted it with 88 votes in favor, 4 against and 15 abstentions⁶.

Conclusion

Sixteen years later, the Convention is ratified by 57 countries. This relatively low level of ratification can be explained by several factors. Perhaps it still reflects the fact that the Convention may have a few detractors among some of the UNESCO Member States. But most

probably, many countries do not consider the ratification as a priority as they do have the technology nor the human or financial resources to be involved in activities towards the underwater cultural heritage. In these countries, there are also very few archaeologists who have training in underwater archaeology. There is therefore no effective influential group that could persuade their respective authorities to join the Convention or that could campaign among the public on the importance of this heritage for their country and for humanity. But the advancement of technology and the ability of a growing number of countries to own such technology may however have a positive influence on the rate of ratifications in the following years.

Endnotes

¹ Professor Patrick J. O’Keefe has worked for more than 40 years on legal instruments to protect the underwater cultural heritage. He has.

² UNESCO General Conference documents 28C/39 and 28C/39 Add.

³ UNESCO General Conference Document 29C/Resolution 21

⁴ UNESCO General Conference Documents 31C/24 and 31C/Resolution XV, para D

⁵ Lund, C., 2006. The making of the UNESCO Convention 2001.

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⁶ UNESCO General Conference Documents 31 C/24 and 31 C/Resolution XV, para D

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Biography



Etienne Clément, JD 1978, LLM International Law 1980, (University Brussels) had responsibilities in UNESCO 1984-2015. He contributed to the development of international standards for the protection of cultural heritage, including to the elaboration of 2001 Underwater Cultural Heritage Convention. From 1998, he was UNESCO Representative to Cambodia, Deputy Director Field operations (Paris), Deputy Director Regional Bureau (Bangkok) and Director Pacific States. He is author of articles on conventions for cultural heritage and is currently advising governments on these instruments. He lectures at Science Po Lille (France) and is member of ICOMOS International Committee on Legal, Administrative and Financial Issues (ICLAFI).