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THE DEVELOPMENT OF THE INTERNATIONAL LAW CONCERNING THE PROTECTION OF UNDERWATER CULTURAL HERITAGE: REMARKS ON THE OCCASION OF THE ACCESSION OF POLAND TO THE 2001 UNESCO CONVENTION

Abstract: *This article discusses the development of international law concerning the underwater cultural heritage (UCH), with particular emphasis on the 2001 UNESCO Convention on the subject. It attempts to set out the main legal solutions adopted in the 2001 Convention. However, in order to achieve this aim, it traces the genesis of the Convention and identifies the problems which prompted UNESCO to initiate the negotiations that ultimately led to the adoption of the 2001 Convention. Hence, before analysis of the UNESCO treaty it firstly describes the initial phase of the development of law regarding UCH, which was mostly based on the national laws of particular coastal States, as well as in some instances on the laws of salvage. Subsequently, the article turns to the discussion concerning the (in)famous two provisions of the UN Convention on the Law of the Sea (UNCLOS) dealing with archaeological objects, as well as the efforts that were undertaken within the framework of the Council of Europe to adopt a convention on UCH.*

Keywords: 2001 UNESCO Convention, law of the sea, UNCLOS, underwater archaeology, underwater cultural heritage

INTRODUCTION

While 2021 marks the 20th anniversary of the adoption of the UNESCO Convention on the Protection of the Underwater Cultural Heritage[1] (2001 UNESCO Convention),

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[1] Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3.

it is certainly not the only reason substantiating the need for reflection with respect to its provisions and their implementation. Firstly, there has been academic debate as to the relationship of the Convention with the United Nations Convention on the Law of the Sea[2] (UNCLOS) and the added value of the former in connection to the latter. In this context, it is also worth recalling that some states have also questioned the particular legal solutions that were finally adopted in the 2001 UNESCO Convention. This debate still merits academic enquiry. Secondly, as the title of this paper suggests, the Republic of Poland became the 69th state-party to the 2001 UNESCO Convention. Poland deposited its instrument of ratification on 18 May 2021 and, accordingly, in line with its Art. 27 the Convention entered into force for it on 18 August 2021. This step contributes to the wider application of the underwater cultural heritage (UCH) Convention's rules on the international plane as well as signifies the need for Poland to introduce necessary changes in its domestic legal system. Thus it seems warranted, if only for this reason, to discuss this development here. Thirdly, the present volume of the Polish Yearbook of International Law is dedicated to the scientific legacy of Prof. Janusz Symonides. This article should be also regarded as a modest attempt to pay tribute to the life and work of this great scholar and practitioner. The 2001 UNESCO Convention as such was within Professor Symonides' academic interests,[3] as part of his activities in the field of the international law of the sea.[4] It is also a part of the UNESCO system, where he served as the Director (1989-2000) of the then Division of Human Rights, Democracy, Peace and Tolerance.

This article first sets out general considerations with respect to the UCH. Subsequently (Part 2), it discusses the development of international laws and standards with respect to UCH, paying particular attention to the relevant rules in the UNCLOS and efforts within the Council of Europe. Thirdly, the article turns its attention to the development of the 2001 UNESCO Convention itself, addressing its genesis within UNESCO, its main controversial aspects, as well as its principal provisions. The final part presents some brief conclusions.

1. UNDERWATER CULTURAL HERITAGE: AN OVERVIEW OF ITS IMPORTANCE AND THE THREATS THERETO

It was reported that the best record of human (principally terrestrial) civilization may well rest on the seabed, given that according to some estimates some 5% of ships are

[2] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[3] J. Symonides, *Międzynarodowa ochrona podwodnego dziedzictwa kulturowego* [International protection of the underwater cultural heritage], 27(1-2) Stosunki Międzynarodowe 52 (2003); J. Symonides, *Unresolved Issues and Emerging Challenges in the Law of the Sea*, 34 Prawo Morskie 17 (2018), pp. 34 *et seq*.

[4] *See* particularly J. Symonides, *Nowe prawo morza* [New law of the sea], PWN, *Warszawa*: 1986; J. Symonides, *Geographically Disadvantaged States under the 1982 Convention on the Law of the Sea*, RCADI, Vol. 208 (1988-I).

lost every year.[5] However, it is not only the ships and their cargo, but also the remains of old or even ancient towns or settlements, as well other artefacts, that constitute UCH,[6] as all this material carries traces of human existence of a cultural, historical, or archaeological character.[7] Moreover, due to the underwater conditions such material is often well preserved, constituting "time capsules"[8] which enable the present generations to look back into and better understand our past.

Access to such artefacts had been largely restricted, roughly up until the 1940s, by the limited human capacity to engage in underwater activities. This was primarily about lung capacity, which later was enhanced by early aqualungs and then submersibles (as well as such equipment as sonars or, later, underwater cameras and the like). These instruments, combined with better knowledge about depressurization processes, significantly enlarged access to UCH. Consequently, what had been previously thought to have been "lost forever," became gradually within human reach, dependent "only" on the capacity of a given person or entity to secure necessary financial resources and technology (as well as time and perseverance) to engage in the search for underwater treasures.[9] For example, the wreck of the *Titanic* was found in 1985 at a depth of 3,798 meters, and the wreck of the bulk carrier *Derbyshire* in 1994 at a depth of more than 4.000 meters (and in less than four days).[10] It should be remarked that the recovery of some 1800 artefacts from the site of the *Titanic*, with the aid of a submersible, is sometimes considered as a turning point in the development of international legal protection for the UCH and a symbol that the former "physical" protection of the oceanic depth was not longer a bar to accessing UCH.[11]

While on the one hand such better access has brought with itself undeniable advantages, i.e. as it translated into better knowledge about and understanding of our past, it also meant that the UCH has become more vulnerable to other non-scientific activities, in particular due to increased commercial interest and related private explorations. Suffice it to say that, as has been most famously reported, the *Geldermalsen* (which sunk in the South China Seas in 1752) was salvaged in 1985; and the "Nankin treasure"

[5] T. Scovazzi, *Protection of Underwater Cultural Heritage*, in: D. Attard, M. Fitzmaurice, N.A. Martinez Gutiérrez (eds.), *The IMLI Manual on International Maritime Law*, vol. I: *The Law of the Sea*, Oxford University Press, Oxford: 2014, p. 443.

[6] P.J. O'Keefe, *Underwater Cultural Heritage*, in: F. Francioni, A.F. Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford: 2020, p. 295. *See also* S. Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge University Press, Cambridge: 2013, p. 41.

[7] *See* Art. 1(1)(a) of the 2001 UNESCO Convention.

[8] O'Keefe, *supra* note 6, p. 295.

[9] *Ibidem*, pp. 295-296; W. Kowalski, *Konwencja UNESCO o ochronie podwodnego dziedzictwa kulturowego* [UNESCO Convention on the Protection of Underwater Cultural Heritage], in: K. Zalasińska (ed.), *Konwencje UNESCO w dziedzinie kultury. Komentarz* [UNESCO Conventions in the field of culture. A Commentary], Wolters Kluwer, Warszawa: 2014, pp. 312-314.

[10] G. Hutchinson, *Threats to Underwater Cultural Heritage: The Problems of Unprotected Archaeological and Historic Sites, Wrecks and Objects Found at Sea*, 20(4) Marine Policy 287 (1996), pp. 287-288.

[11] Dromgoole, *supra* note 6, p. 32.

was recovered and sold at Christie's auction for £10 million.[12] However, what is often overlooked in commercially-oriented underwater efforts is the cultural importance (and integrity) of the UCH, not necessarily present only in such materials as bullion, gold bars or porcelain. More recently, in 2015 a similar debate occurred in relation to the "holy grail" of shipwrecks – the *San José,* a Spanish treasure ship that sank to the bottom of the Caribbean Sea in 1708.[13]

2. THE DEVELOPMENT OF INTERNATIONAL LAW CONCERNING UNDERWATER CULTURAL HERITAGE

2.1. Early beginnings: the application of national laws and the role of salvage law

Against the backdrop of above-described technological advances enlarging the scope of access to the UCH, before 2001 the relevant international legal framework had been relatively modest. By way of illustration, one may observe at this point that UNCLOS, sometimes referred to as a "Constitution of the Oceans," contains just two provisions on the subject. Moreover, it is not only *international* law that matters when it comes to the UCH. In fact, it was observed by one scholar that "the law of marine archaeology is primarily the law of a particular state regarding the conduct of marine archaeology and the resultant property interests in anything that may be found."[14] By virtue of its sovereignty, a state could relatively freely, subject to its international obligations, regulate access to the UCH present on its (maritime) territory. It would normally be for international *private* law, as applied by national courts, to decide on any claims to title to UCH objects that would be made on the basis of the laws of another state.

This notwithstanding, the question still arises as to the legal status of UCH *beyond national jurisdiction*, as well as, more generally, of the legal rules concerning activities aimed at the UCH therein. Traditionally, it has been accepted – even if those rules were not really designed to deal with UCH – that the rules of admiralty (maritime) law apply, in particular salvage law.[15] However, even these rules have been given

[12] *Ibidem*, pp. 288-299.

[13] J. Daley, *"Holy Grail" of Spanish Treasure Galleons Found Off Colombia*, Smithsonian Magazine, 25 May 2018, available at: https://bit.ly/3jfYYAk (accessed 30 May 2021).

[14] B.H. Oxman, *Marine Archaeology and the International Law of the Sea*, 12(3) Columbia-VLA Journal of Law & the Arts 353 (1987), p. 353.

[15] Salvage law would apply to situations whereby a person (a salvor) voluntarily saves the maritime property from danger and, thus, is entitled to a reward. Clearly, the concept of "saving a maritime property in danger" (as well as the idea of a "reward") is not easily applied to underwater cultural heritage, especially if it has rested on a seabed for a century or more. *See generally* S. Baughen, *Shipping Law* (4th ed.), Routledge, London and New York: 2009, pp. 292-324 (*cf.* in particular pp. 322-323); International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165. With reference to UCH, *see* Dromgoole, *supra* note 6, p. 32; Oxman, *supra* note 14, p. 354; and L. Caflisch, *Submarine Antiquities and the International Law of the Sea*, 13 Netherlands Yearbook of International Law 3 (1982),

various interpretations under common and civil law systems, and one could identify differences especially with regard to the issue whether the finder/salvor of a wreck would be entitled to claims to ownership or rather compensation only (whereby it would be a state that would acquire ownership over the wreck, often after a lapse of certain period of time).[16] In any case, the applicability of the law of salvage has become a contentious issue, not only due to the fact that it was arguably not designed for this purpose but also because it prioritized private (financial) interests over the cultural value and integrity of the UCH.

2.2. International and regional efforts preceding the 2001 UNESCO Convention

As may be inferred from the above, the law (or rather, "laws") that would apply to UCH constituted a patchwork of different national regulations, as well as admiralty/salvage law, only some of which would be relevant in waters within national jurisdiction. Still, the legal puzzle in these waters, complicated as it was, offered better opportunities for the protection of UCH in comparison with the largely unregulated situation in areas beyond national jurisdictions. This deficiency was quickly noted with the advancement (as described above) of technology and *know-how* that made access to underwater archaeological objects significantly easier – including at ever greater depths. It also translated, at least partially, into the possibility to access UCH further from land, which in turn would often mean access in either maritime zones where States enjoy (only) sovereign rights and jurisdiction (as opposed to "full" sovereignty) – the Exclusive Economic Zone (EEZ) and Continental Shelf (CS) – or even zones beyond national jurisdiction, i.e. the High Seas or the Area.[17]

Overall, the problem of preservation and regulation of the UCH has been gradually identified at both the international and regional levels. While a full account of these developments would exceed the constraints of this article, attention will nevertheless be paid to the most significant developments. They include the discussion of relevant rules enshrined in the UNCLOS on the one hand, and developments within the Council of Europe (CoE) and, obviously, the UNESCO on the other. One should underline that many of the relevant processes took place in parallel, mutually influencing each other, especially in the 1980s and 1990s. It is also interesting to observe the juxtaposition between the general law of the sea (i.e. UNCLOS), which addresses UCH in a very general manner, and the regional and specialized instruments which deal with cultural heritage generally, which however for various reasons refer to *underwater* cultural heritage in a limited way.

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p. 5. For a critique, *see e.g.* T. Scovazzi, *Underwater Cultural Heritage*, Max Planck Encyclopedia of Public International Law (online), paras. 4, 15-18.

[16] P.J. O'Keefe, J. Nafziger, *The Draft Convention on the Protection of the Underwater Cultural Heritage*, 25 Ocean Development & International Law 391 (1994), pp. 392-396.

[17] This part of argumentation omits the discussion on the temporal development of the law of the sea and the establishment of respective maritime zones, as well as the powers of states therein. It should be noted, though, that the terminology used here relies on the UNCLOS.

2.2.1. UNCLOS

Underwater cultural heritage was certainly not among the main issues that were subject to negotiations at the Third UN Conference for the Law the Sea (1973-1982). Consequently, out of 320 articles, only two deal with UCH, and they arguably do so in an incomplete and unsatisfactory manner. One of these provisions (Art. 149) was inserted in the earlier work of the Conference and was present already in the 1975 Informal Single Negotiating Text.[18] However, it deals only with objects in the Area (i.e. the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction). The other one (Art. 303) found its way into the Convention much later (1980), when attempts were made to include a provision that would address more pressing needs; that is, the protection of the UCH closer to shore, in the waters of or adjacent to the territorial sea, such as in the case of Mediterranean Sea. This issue proved more controversial, not so much because of the advanced stage of negotiations but due to fears of, most notably, the maritime powers that such a new regulation would amount to yet another instance of what had come to be known as "creeping jurisdiction." Namely, this meant a concern that the delicate compromise concerning the balance of coastal states' rights in their continental shelves and EEZs on the one hand, and the freedoms third states enjoy therein on the other, would be affected if the former group of states would be entitled to expand their sovereign rights and jurisdiction to archaeological objects.[19] Thus, the final shape of Art. 303 of UNCLOS – the result of many compromises – consists of four paragraphs, with each one basically devoted to a different issue, and all of them resorting to "constructive ambiguity" and/or legal fiction. Both of these articles have been subject to considerable analysis and critique.[20] Therefore, for the purposes of this article, they will be only briefly addressed.

Firstly, it shall be observed that articles make reference to the rather odd, especially if interpreted verbatim, phrase "objects of an archaeological *and* historical nature." It is far from clear what the difference would be, if any, between these objects. Secondly, they cover explicitly only the Area (Art. 149), as well as the contiguous zone (Art. 303(2), which creates a presumption that the conditions specified in Art. 33 UNCLOS – identifying functional rights of coastal States in that zone – are to be considered fulfilled). It

[18] Doc. A/CONF.62/WP.8 of 7 May 1975.

[19] B. Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 American Journal of International Law 211 (1981), pp. 239-242; T. Scovazzi, *The Law of the Sea Convention and Underwater Cultural Heritage*, 27 International Journal of Marine and Coastal Law 753 (2012), p. 754.

[20] Oxman, *supra* note 14, pp. 359-365; Caflisch, *supra* note 15, pp. 16-31; O'Keefe, *supra* note 6, pp. 298-300; A. Strati, *Deep Seabed Cultural Property and the Common Heritage of Mankind*, 40 International and Comparative Law Quarterly 859 (1991), pp. 871-892; T. Scovazzi, *The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention*, in: D. Freestone, R. Barnes, D. Ong (eds.), *The Law of the Sea: Progress and Prospects*, Oxford University Press, Oxford: 2006, pp. 121-128. Particularly the latter author presents a very sharp critique of the UNCLOS regime with respect to UCH, e.g. assessing it as 'incomplete', 'counterproductive' and as one that could in fact be interpreted in a way "which undermines the very objective of protecting the underwater cultural heritage" (*infra*, p. 121).

is implied, by way of sovereignty, that a coastal State may regulate the UCH within its territorial sea. The result is that there are no rules that would apply specifically to the remainder of the EEZ and Continental Shelf (i.e. from the outer limit of the contiguous zone – which, if established at all,[21] could extend 24 nautical miles – up to the 200 nautical miles from the baselines, or even more in the case of the continental shelf).

This conclusion needs to be qualified by stating, thirdly, that Art. 303(1) UNCLOS sets a general duty for States, not restricted to any maritime zone, to protect these objects, as well as "a duty to co-operate for that purpose." Important as it is, this obligation is not supported by any procedural or institutional means that would be able to verify its implementation.

The remaining two provisions of Art. 303 are basically non-prejudice clauses, according to which neither the rights of owners, the law of salvage "or other rules of admiralty," nor other agreements and rules of international law dealing with "objects of an archaeological and historical nature" are affected (Art. 303(3)).

Finally, going back to Art. 149 UNCLOS and putting aside the fact it has limited spatial application, one needs to observe that this provision seems, on the one hand, to prioritize community interests in protecting UCH ("for the benefit of mankind as a whole"), while, on the other, it underlines the need for preferential treatment of "State or country" (*sic!*) of origin, or of cultural, or historical and archaeological origin – without specifying what these concepts mean or how to take into account the concepts they embody (which in some situations are certainly conflicting).

Overall, while the UNCLOS does contain some provisions that deal with UCH, they are certainly general, ambiguous, and incomplete. Without a doubt they are rather a result of compromises that were struck at the side lines of the main thrust of negotiations during the III Conference on the Law of the Sea in order to include *any* provisions concerning UCH in the Convention. This unsatisfactory situation was one of the main reasons that prompted UNESCO, some two decades later, to take action.[22]

2.2.2. Council of Europe

Partially in parallel to the III UN Conference on the Law of the Sea, the Council of Europe (CoE) also took an action, on the regional level, with respect to the protection of the UCH. This was also motivated to some extent by the slow progress of the UNCLOS negotiations, as well as the low priority given to the UCH.[23]

As a consequence, in 1977 the CoE Parliamentary Assembly (PACE) instructed its Committee on Culture and Education to take up the matter. The resulting famous

[21] On the establishment of the said zone by Poland and some implications for the UCH, see: K.J. Marciniak, *The Polish Baselines and Contiguous Zone: Remarks from the Perspective of the United Nations Convention on the Law of the Sea*, XXXII Prawo Morskie 49 (2016).

[22] *See* UNESCO, *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, doc. 146 EX/27 of 23 March 1995 that concluded, *inter alia*, that UNCLOS provisions are not adequate and universal regulation of UCH at the international level is lacking (*infra*, para. 41).

[23] J. Blake, *The Protection of the Underwater Cultural Heritage*, 45 International and Comparative Law Quarterly 819 (1996), p. 821.

and influential 1978 Roper Report[24] consisted of a very thorough study of the level of legal protection of the UCH at the international and national levels, as well as of an overview of the interests in and threats to underwater cultural heritage. It also set out minimum legal requirements for the effective protection of UCH, in particular proposing that coastal States could extend their jurisdiction up to 200 nautical miles (a "cultural protection zone"), based on a new European treaty that could be adopted. The resulting document was the 1978 PACE recommendation 848 on UCH[25], with its annexed set of "minimum legal requirements,"[26] on the basis of which CoE Member States were urged to revise their legislation. Importantly, the recommendation also instructed the CoE Council of Ministers to "draw up a European convention on the underwater cultural heritage, open to all member states of the Council of Europe and also to all non-member states bordering on seas in the European area." As it turned out, the recommendation (or, more specifically, its annex) became the only international instrument dealing explicitly with the UCH until the adoption of the 2001 UNESCO Convention.

It is nevertheless important to underline that the Council of Ministers did act on recommendation 848 and initiated the process (in 1979) to elaborate a treaty on the UCH. For that purpose an Ad Hoc Committee of Experts (CAHAQ) was established, which held six plenary meetings between 1980 and 1985. Its work culminated in the adoption of the Draft Convention on the Protection of Underwater Cultural Heritage.[27] The draft Convention was, however, never adopted due to an apparent controversy between Greece and Turkey over its territorial scope of application.[28] At the same time, it should be observed that it finally adopted a similar approach in that regard as the UNCLOS – by then already adopted – and was generally restricted to the contiguous zone. It also did not follow the PACE recommendation 848's stance on excluding salvage law, but also in this respect went along the lines of the solution enshrined in Art. 303(3) UNCLOS.

To complete the overview of the CoE's efforts with regard to the matter under consideration, one should note that in the late 1980s it began work on revising the 1969 Convention on the Protection of the Archaeological Heritage.[29] This work was

[24] PACE, *The Underwater Cultural Heritage: Report of the Committee on Culture and Education* (Rapporteur: John Roper), doc. 4200-E, Strasbourg, 1978. This document is not publicly available and references to it in this article are made on the basis of: Blake, *supra* note 23 and Dromgoole, *supra* note 6, p. 53.

[25] PACE Recommendation 848 (1978), *Underwater cultural heritage*, 4 October 1978.

[26] They specified, *inter alia*, that: (a) there should be no loopholes in the legal protection of UCH; (b) protection should cover all objects that have been beneath the water for more than 100 years; (c) national jurisdiction should be extended to 200 nautical miles, based on an international agreement that would also reflect principles of reciprocity; (d) existing salvage and wreck law should not apply to UCH.

[27] *See* CAHAQ, *Final Activity Report: Draft European Convention on the Protection of the Underwater Cultural Heritage*, doc. CAHAQ (85) of 23 April 1985.

[28] Dromgoole, *supra* note 6, p. 5; Blake, *supra* note 23, pp. 824-827.

[29] Convention on the Protection of the Archaeological Heritage (adopted 6 May 1969, entered into force 20 November 1970), ETS No. 066.

finalized in 1992 with the adoption of the European Convention on the Protection of the Archaeological Heritage (Revised).[30] While this treaty takes a broad approach, not focusing on the UCH, its preamble does make reference to PACE recommendation 848 (1978), and its operative text specifies that for the purposes of this treaty "[t]he archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, *whether situated on land or under water*."[31] The Convention also reflects a new trend in the thinking about the role and protection of archaeological objects in that it prioritizes their protection *in situ*, while excavations should be avoided, and only carried out for scientific purposes.[32]

2.2.3. Non-governmental initiatives: ILA and ICOMOS

Before turning to the 2001 UNESCO Convention, brief mention should be made of two important initiatives which were conducted by expert bodies in their respective fields and which influenced the UNESCO treaty.

The first of these is the action taken on UCH by the International Law Association (ILA) in 1988. The newly established ILA Committee on Cultural Heritage Law undertook to prepare a draft convention on underwater cultural heritage. This work was finalized by the Committee in 1993 and adopted at ILA's 66th Conference in Buenos Aires in 1994[33] (ILA Draft). It was then transmitted to UNESCO for consideration and exerted a significant influence on the final shape and form of the 2001 UNESCO Convention. Overall, one can identify a "legal dialogue" (as well as personal links) between the 1978 Roper Report, the 1985 CoE draft Convention, the ILA Draft and, finally, the 2001 UNESCO Convention.

Suffice it to state at this point that the ILA envisaged the possibility to create (at the discretion of the coastal State) a 200-nautical mile Cultural Heritage Zone,[34] and as well adopted a broad definition of underwater cultural heritage, coupled with a 100-year threshold for it to be submerged under water to enjoy protection (with a possibility

[30] European Convention on the Protection of the Archaeological Heritage (adopted 16 January 1992, entered into force 20 May 1995), ETS No. 143 (Valetta Convention).

[31] *Ibidem*, Art. 1(3) (emphasis added). This statement shall be read in conjunction with Art. 1(2) (iii) which states that it applies to elements of the archaeological heritage "which are located in any area *within the jurisdiction of the Parties*" (emphasis added). Hence, from the perspective of the law of the sea it would could apply to internal waters and territorial sea (and archipelagic waters), as well as to EEZ and continental shelf.

[32] *Ibidem*, Art. 3. *See also* Explanatory Report, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/143 (accessed 30 May 2021), which states, *inter alia,* that "[e]xcavations made solely for the purpose of finding precious metals or objects with a market value should never be allowed" (p. 4).

[33] *See* P.J. O'Keefe, *Protecting the underwater cultural heritage: The International Law Association Draft Convention*, 20 Marine Policy 297 (1996); O'Keefe, Nafziger, *supra* note 16 (the draft Convention, with commentaries, is reproduced in this article). For a critique of the ILA draft, *see* D. Bederman, *Historic Salvage and the Law of the Sea*, 30 The University of Miami Inter-American Law Review 99 (1998), pp. 112 et seq.

[34] ILA Draft, Art. 5.

for States to afford protection in their national law at an earlier stage). It also disapplied the law of salvage to UCH.[35]

A second and related initiative was the one by International Council on Monuments and Sites (ICOMOS), which in 1996 prepared the Charter on the Protection and Management of Underwater Cultural Heritage (the Charter).[36] This work was also inspired by the ILA report and became an integral part of the ILA Draft (although it was prepared two years later). The Charter details basic principles, approaches, and methodologies with respect to UCH, underlining in particular the need to preserve it, to use the least intrusive methods, as well as fully document the investigative process and secure material conservation, including in the long term.

3. THE 2001 UNESCO CONVENTION

3.1. The UNESCO process leading up to the adoption of 2001 UNESCO Convention

As may be inferred from the above recounting of the development of international and regional rules concerning the protection of underwater cultural heritage, the UNESCO work on the subject had at its disposal a significant body of international documents and standards. Moreover, the UNESCO itself previously had adopted three conventions protecting cultural heritage[37] (although they did not mention explicitly UCH),[38] as well as a number of non-binding instruments.[39] However, while its work did not start in a legal vacuum, it also suffered from similar controversies as in the previous attempts to regulate the UCH.

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[35] *Ibidem*, Arts. 1, 2 and 4.

[36] The Charter was ratified by the 11th ICOMOS General Assembly in Sofia, Bulgaria in October 1996, available at: http://icuch.icomos.org/useful-documents/ (accessed 30 May 2021). The Charter is also devised to serve as a supplement to the earlier ICOMOS 1990 Charter for the Protection and Management of Archaeological Heritage.

[37] These are: the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956), 249 UNTS 215; the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972), 823 UNTS 231; and the Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975), 1037 UNTS 151.

[38] One should remark, though, that under the 1972 World Heritage Convention there are world heritage sites (e.g. Bikini Atoll; Red Bay wrecks) and intangible cultural heritage (Hawaii fish trap veneration; maritime rites; some boat building techniques) that are located under water. Nevertheless, even the UNESCO's *Feasibility Study* (*supra* note 22, para. 42) underscored that this Convention is not apt for the protection of UCH generally.

[39] *See* UNESCO General Conference, 9th Session, New Delhi, 1956, *Recommendation on International Principles Applicable to Archaeological Excavations*. While it is considered as the oldest UNESCO document concerning UCH, it only briefly touches directly on underwater archaeology (*infra*, para. 1).

The decision to elaborate a convention under the auspices of UNESCO was taken by the General Conference of UNESCO in 1997,[40] and was preceded by a preparatory process within the organization.[41] The General Conference also requested the Director-General to prepare a first draft of such a treaty, which he did in 1998.[42] On that basis, the group of government experts[43] negotiated over the course of four meetings that stretched out between 1998 and 2001.[44] Despite holding intensive meetings, formal and informal exchanges, as well as efforts exerted by the Chairmen (C. Lund) and individual States, it was not possible to reach consensus on all issues. Therefore, subsequently the draft text of the Convention was voted upon; first by the groups of government experts (49-4-8),[45] then by the IV Commission of the 31st session of the UNESCO General Conference (94-5-19)[46] and, finally, by the General Conference (87-4-15[47]), and thus the Convention was adopted on 6 November 2001.

3.2. Major controversial issues during the negotiations and main solutions adopted in the 2001 UNESCO Convention

While basically all states (including those that voted against) supported the objectives of the new treaty, they could not reach consensus on some of its provisions. It seems useful here to highlight some of the most controversial aspects of the Convention. Certainly most of these issues were not new and had been identified already in the course of the previous international efforts to address the UCH (notably within the framework of UNCLOS and CoE). Still, the examination of these problematic aspects enables

[40] *Preparation of an international instrument for the protection of the underwater cultural heritage*, doc. 29 C/Resolution 21 (1997).

[41] This included, among others, the preparation of the *Feasibility Study* in 1995 (*supra* note 22) and the organization of a meeting of experts (chaired by Carsten Lund) in May 1996 (summary in *Report by the Director-General on Action Taken Concerning the Desirability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage*, 5 August 1997, doc. 29C/22); as well as a round of written comments on experts' conclusions (which were unanimous that a legally binding instrument concerning the protection of the UCH is needed and that UNESCO is an appropriate forum for its adoption) by UNESCO Member States.

[42] Doc. CLT-96/Conf.202/5 (1998). This document is available and commented upon in: S. Dromgoole, N. Gaskell, *Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998*, 14 International Journal of Marine and Coastal Law 171 (1999).

[43] Before the meeting a small group of experts from six States was established (with Poland among them, represented by dr. Z. Kobyliński) to study the first draft.

[44] These meetings are summarized by Symonides (*Międzynarodowa ochrona*), *supra* note 3, pp. 53-57.

[45] *Draft Convention on the Protection of the Underwater Cultural Heritage*, 3 August 2001, doc. 31 C/24.

[46] UNESCO, *Records of the General Conference. Vol. 1: Resolutions*, 31st Session, 15 October – 3 November 2001 (UNESCO, Paris: 2002), p. 156.

[47] States voting against were: Norway, Russia, Turkey and Venezuela; States that abstained: Brazil, Czech Republic, Colombia, France, Germany, Greece, Iceland, Israel, Guinea-Bissau, Netherlands, Paraguay, Sweden, Switzerland, United Kingdom and Uruguay. *See* UNESCO, *Records of the General Conference.* Vol. 2: *Proceedings*, 31st Session, 15 October – 3 November 2001 (UNESCO, Paris: 2002), pp. 561 et seq.

a more comprehensive understanding of the rules finally adopted in Convention. These non-consensual points included:[48]

1) *The relationship of the 2001 UNESCO Convention with UNCLOS*: This is a multifaceted issue. At the most general level, some states viewed the 2001 UNESCO Convention as the implementation of the Art. 303(4) UNCLOS (non-prejudice clause with respect to other agreements concerning UCH), while some others would rather qualify the 2001 UNESCO Convention under Art. 311(3) UNCLOS, i.e. as an agreement *inter partes*, not affecting the rights and duties of parties to the latter treaty that are not parties to the former. Also, some non-UNCLOS[49] parties could not agree to references in the 2001 UNESCO Convention to UNCLOS, including in particular the potential application of its Part XV containing a dispute settlement mechanism.

Indeed, it should be underlined that the 2001 UNESCO Convention contains both general (Art. 3), as well as more specific rules (Arts. 2(8), 8, 10(2) and (6), as well as Art. 11) that seek to ensure that the 2001 UNESCO Convention does not prejudice the rights and obligations enshrined in the UNCLOS, as well as that it should be applied and interpreted in line with the latter treaty. Nevertheless, these controversies have persisted. They are still visible during, e.g., the annual discussions concerning the UN General Assembly resolution "Oceans and the Law of the Sea,"[50] as well as in the individual positions taken by various States.[51]

2) *The balance of rights and duties of coastal and flag States in the EEZ and the Continental Shelf*. While the 2001 UNESCO Convention does not establish a new maritime zone (such as the Cultural Protection Zone, as postulated in the 1994 ILA Draft, and earlier in the 1978 Roper Report), it nevertheless does apply and contain rules concerning the protection of the UCH in the EEZ and the Continental Shelf, as well as other maritime zones established in the UNCLOS, both within and beyond national jurisdiction. This important development has sometimes been assessed negatively

[48] This overview is mostly based on explanations of votes that states made upon the adoption of the Convention (*see ibidem*). *See also* Z. Kobyliński, *Konwencja o ochronie podwodnego dziedzictwa kulturowego* [Convention on the Protection of Underwater Cultural Heritage], 55 Ochrona Zabytków 142 (2002); T. Scovazzi, *Convention on the Protection of Underwater Cultural Heritage*, 32 Environmental Policy and Law 152 (2002); R. Garabello, *The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage*, in: R. Garabello, T. Scovazzi (eds), *The Protection of the Underwater Cultural Heritage*, Martinus Nijhoff, Leiden-Boston: 2004, pp. 89 *et seq*.; G. Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 American Journal of International Law 419 (2002).

[49] Turkey and Venezuela.

[50] *See* the recent UN General Assembly resolution "Oceans and the Law of the Sea", 31 December 2020, A/RES/75/239, paras. 8, 9 and 354. It should be observed at this point that in 2011, during the Polish presidency in the Council of the EU, it was Poland which negotiated, on behalf of the EU and its Member States, the said resolution and these controversies manifested themselves there as well. Prof. J. Symonides formed part of the Polish delegation to these meetings.

[51] For example, for a recent overview of the British non-ratification of the 2001 UNESCO Convention *see* H. Roberts, *The British Ratification of the Underwater Heritage Convention: Problems and Prospects*, 67 International & Comparative Law Quarterly 833 (2018).

from both sides: some coastal states felt that their sovereign rights and jurisdiction are not adequately accounted for in the 2001 UNESCO Convention (e.g. Uruguay, Greece); whereas other states (e.g. Russia, Turkey, Norway, or the USA) took the stance that the new treaty affects the delicate balance of rights and duties established in the UNCLOS and is yet another instance of "creeping jurisdiction" of coastal States, to the detriment of the rights of the flag States and the freedoms they enjoy under the UNCLOS.[52]

3) *Status of warships and other State-owned vessels.* While the legal status of "State vessels" is relatively clear, and in particular that they do enjoy immunity,[53] it is less obvious whether the same legal status is to be accorded to such vessels which have sunk.[54] This issue certainly proved very delicate during the negotiations, and some states (e.g. the UK and USA) took the position that sunken warships (and aircraft) retain their status (regardless of how long they have remained under water). Conversely, some other states argued that a general exclusion of warships from the regime of the Convention would be counterproductive and not in line with its objectives to protect the UCH. This issue proved to be one where consensus during negotiations was not attained, despite many attempts.

Ultimately, the 2001 UNESCO Convention – in contrast to its 1998 draft[55] – does *not* contain a general exclusion of state-owned vessels (and aircraft), while dealing with this issue in separate maritime-zone-specific provisions.[56] Even though the Convention contains a saving-clause that it does not affect immunities accorded to state-owned vessels under international law or states' rights with respect to their vessels,[57] some flag states still consider that their rights *vis-à-vis* those of the coastal state are not adequately protected.[58]

4) *Exclusion of salvage law and ownership issues:* As already highlighted in the introductory part of this article, the application of salvage law to UCH had been controversial well before the beginning of the negotiations leading to the 2001 UNESCO Convention. This is also partially linked to the question of ownership of the sunken vessels (and their cargo). In this respect the 1998 draft of the Convention adopted the

[52] Symonides, *Unresolved issues*, *supra* note 3, pp. 35-36.

[53] *See* Arts. 29-33 and 95-96 of UNCLOS. *See also* ITLOS, *The "ARA Libertad" Case (Argentina v. Ghana)*, *Provisional Measures*, Order, 15 December 2012, ITLOS Rep 2012, p. 332.

[54] *See also,* Institute of International Law, *The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law* (Tallin Session, 2015, Rapporteur: N. Ronzitti).

[55] Dromgoole, Gaskell, *supra* note 42, pp. 183 *et seq*. (draft Art. 2(2)).

[56] *See* Arts. 7(3), 10(7), as well as 9(1)(b) and 9(2) of the 2001 UNESCO Convention.

[57] *Ibidem*, Art. 2(8). Moreover, Art. 3 requires that the 2001 UNESCO Convention shall be interpreted in line with the UNCLOS.

[58] This is particularly the case with respect to: (a) Art. 7(3) concerning internal waters, territorial sea and archipelagic waters, whereby a flag State merely "should be informed" by the coastal State if exercising its sovereignty in the Continental Shelf and EEZ; as well as (b) Art. 10(7), concerning the Continental Shelf and EEZ, whereby the requirement to obtain an agreement of the flag State is qualified by a reference to paras. 2 and 4 of the aforementioned provision.

following solutions: (a) indirect exclusion of the law of salvage[59] (which was certainly a negotiated-down provision in comparison with the outright exclusion proposed in the 1994 ILA Draft); and (b) adoption of a "deemed abandonment" standard with respect to UCH (after the lapse of 25 or 50 years).[60]

Ultimately, the 2001 UNESCO Convention excludes the laws of salvage (Art. 4), although it also contains an exception to this rule (Art. 4, letters a-c), thus diluting the principle. The Convention also bypasses questions of ownership (as well as the controversial "deemed abandonment" standard) and applies to the UCH in general (submerged for at least 100 years).[61] While such an approach proved effective as a negotiating technique, it is less certain whether it provides sufficient legal certainty in terms of its practical implementation. After all, omitting private law issues in the Convention does not make them disappear and they may still come into play, especially when the exception provided in Art. 4 will materialize. Such a situation could, in turn, create tension with respect to other provisions of the Convention that generally prioritize the preservation of the UCH "for the benefit of humanity" and forbid the commercial exploitation of UCH.[62]

5) *The form and content of archaeological standards to be adopted for the purposes of the Convention.* The idea that the Convention should also provide a benchmark for archaeological standards, annexed to the treaty, was not new (in particular, the ILA Draft also consisted of the main treaty and annexed standards). The gist of the content of such standards had also been earlier prepared by the ICOMOS in its 1996 Charter. In the framework of the UNESCO-led negotiations issues arose both as to the form/status of such standards, as well as to their precise content. With regard to the former, it was discussed whether the Convention should refer to such externally-prepared standards (an added value of such a scenario would entail their flexibility and the ease with which they could be updated to reflect new technologies and methods; the downside being that state-parties would, at least partially, have a lesser degree of control over them); or whether the Convention should incorporate them, thus giving them the same legal status as the Convention itself, but at the same time making their amendment much more burdensome.[63]

Finally, the 2001 UNESCO Convention adopted the second approach and incorporated the "Rules concerning activities directed at underwater cultural heritage" (the Rules) as an Annex, constituting an integral part of the Convention (Art. 33). This, in

[59] Art. 12(2) of the 1998 Draft requires the "non-application of any internal law or regulation having the effect of providing for commercial incentives for the excavation and removal of UCH." *See also* Dromgoole, Gaskell, *supra* note 42, p. 188.

[60] Dromgoole, Gaskell, *supra* note 42, p. 195. Art. 1(2) of the 1998 Draft which was closely linked to the scope of application of the draft Convention as a whole.

[61] Art. 1(1)(c) of the 2001 UNESCO Convention.

[62] Art. 2 paras 3 and 7 of the 2001 UNESCO Convention, respectively. *See also* S. Dromgoole, *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 18 International Journal of Marine and Coastal Law 59 (2003), pp. 69-72.

[63] Dromgoole, *supra* note 68, pp. 62-63; O'Keefe, *supra* note 6, pp. 313-315.

turn, meant that the subject-matter of the ICOMOS Charter was also subject to (legal and political) negotiations, which inevitably influenced both the language (making them apt for a treaty – in particular the Rules utilize mandatory "shall" terminology), as well as the content of the Rules that had been previously adopted for the purposes of the Charter.[64] Overall, there are 36 Rules, which are organized into sections following a logical sequence of activities concerning UCH (from "General principles," through to, e.g., "Project design," "Funding," "Project duration," and up to "Reporting").

3.3. Overview of other basic principles of the 2001 UNESCO Convention

It should be stated here at the outset that the 2001 UNESCO Convention, especially when compared with the two UNCLOS provisions concerning UCH, sets out a comprehensive regime for dealing with the underwater cultural heritage. Importantly, it does so with respect to all maritime zones established in the UNCLOS (within and beyond national jurisdiction), without however establishing any new zone (e.g. Cultural Protection Zone). Also, clearly the Convention is an internationally-binding treaty (binding on its state-parties) which again – especially when compared with previous attempts to adopt legally binding rules on the subject – is a success in itself.[65]

Some basic rules and principles of the 2001 UNESCO Convention are enshrined in its Art. 2, which states in particular that: (1) the Convention aims to ensure and strengthen the protection of underwater cultural heritage; (2) state-parties shall cooperate in the protection of UCH; (3) they shall preserve UCH for the benefit of humanity; and (4) they shall also take all appropriate measures in conformity with the Convention and with international law that are necessary to protect UCH (although this is qualified by the clause "in accordance with their capabilities"). Art. 2 further specifies that (5) the preservation *in situ* of UCH shall be considered as the first option before allowing or engaging in any activities directed at this heritage; (6) recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation; as well as (7) that UCH "shall not be commercially exploited." Some of these regulations are further elaborated upon in the Rules.

The Convention defines *what* it is to be protected; namely it contains a definition of UCH.[66] It should be stressed that it only relates to UCH that has been underwater for at least 100 years (hence it will be in some two decades before it will cover, e.g., ships that were sunk during the World War II). It also excludes submarine cables and pipelines, as well as some other installations in use.[67]

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[64] Such as Rule 2 concerning the ban on commercial exploitations of UCH (*see* Dromgoole, *supra* note 68, pp. 62, 66).

[65] Before and during the negotiations of the Convention it was argued that this project would, as a similar effort in the framework of CoE, end in a failure (*see* Dromgoole, *supra* note 68, p. 60).

[66] Art. 1(1)(a) of the 2001 UNESCO Convention states that UCH means "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years."

[67] *Ibidem*, Art. 1(1)(b)-(c).

Attention should also be paid to *what* the UCH is protected *from*. As specified above, the gist of the debates before the adoption of the 2001 UNESCO Convention revolved around the (in)applicability of the laws of salvage; the commercial exploitation of UCH; and the increased threat of looting. This is, indeed, the focus of the Convention, which is evidenced by the fact that it concentrates mostly on "activities directed at"[68] UCH, and less on those that merely "incidentally affect" it[69] (such as, for example, fishing or seabed-mining, not to mention other factors, such as a changing or deteriorating environment[70]).

Finally, the Convention sets out a number of rules with regard to *how* the UCH is to be protected. Some of them are horizontal in character and apply to the protection of UCH in general, notwithstanding the maritime zone it is located in (in particular the basic rule enshrined in Art. 2, discussed above, as well as those contained in the Rules), while some are tailored for specific maritime-zone. Consequently, the Convention provides for regulations in zones where states enjoy sovereignty (internal waters, territorial sea, archipelagic waters),[71] exercise sovereign rights and jurisdiction (the Continental Shelf and EEZ),[72] as well as zones beyond national jurisdiction (the Area).[73] Clearly, the specific rules in these instances vary, taking into account the different jurisdictional basis of the coastal state (if any).

Generally speaking however, the coastal state has the exclusive right to regulate and authorize activities directed at UCH in the first group of maritime zones (as well as to determine the rules to be applied). In the second group of maritime zones, all states shall protect UCH and they need to oblige their nationals or vessels flying their flag to report on any activity directed at, or the discovery of UCH, to the coastal state in question (if the discovery or activity is in its maritime zone, and/or to the other coastal State (if in that state's maritime zone). Moreover, if other states declare their interest in UCH located in other states' EEZ/Continental Shelf,[74] the latter shall act as a "Coordinating State" and consult on how best to protect a particular UCH. Finally, UCH in the Area also needs to be protected, in line with the 2001 UNESCO Convention as well as Art. 149 UNCLOS. To this effect, any discoveries of or activities directed at UCH shall be notified to the Director-General of UNESCO and to the Secretary General of the International Seabed Authority. If need be, the Coordinating State shall also be appointed and shall act "for the benefit of humanity as a whole."[75]

[68] *See e.g.* the 1998 draft utilized a broader terminology, as it spoke of activities "affecting" UCH.

[69] Art. 1(6) and (7) in conjunction with Art. 5, respectively, of the 2001 UNESCO Convention.

[70] O'Keefe, *supra* note 6, pp. 301-302.

[71] Arts. 7 and 8 (the latter provision dealing with the Contiguous Zone where States enjoy specific functional powers; *cf.* Art. 33 UNCLOS).

[72] Arts. 9-10 of the 2001 UNESCO Convention.

[73] *Ibidem*, Arts. 11-12.

[74] *Ibidem*, Art. 9(5). This should be based on a "verifiable link" (especially of a cultural, historical or archaeological character).

[75] Art. 12(2) and (6) of the 2001 UNESCO Convention.

As may be inferred from the above, the 2001 UNESCO Convention uses both *territorial* (maritime zones where states enjoy sovereignty) and *personal* (EEZ/Continental Shelf and the Area – "nationals," "vessels flying their flag" or "masters of the vessels")[76] links through which the provisions of the Convention are to be given effect. On top of these solutions, the 2001 UNESCO Convention obliges state-parties to take measures to control entry into their territory and to deal with the possession of and trade in UCH illicitly exported and/or recovered, in cases where it took place in contravention with the Convention, as well as to prohibit the use of their territory (including ports) to support any activity directed at UCH which is not in conformity with the Convention.[77]

The Convention also requires state-parties to impose sanctions for violations of measures that they have introduced to implement the Convention,[78] as well as to provide for the seizure of UCH in its territory that was recovered in contravention of the Convention.[79]

Among other solutions which the Convention envisages, one should underline that it mandates that states shall cooperate and assist each other in the protection and management of the UCH, as well as takes into account the important role in the protection of UCH played by awareness-raising and the provision of training in underwater archaeology.[80]

In terms of the *institutional and procedural solutions* that the Convention has adopted, it should be noted that it establishes a regular Meeting of State Parties, to be assisted by a Scientific and Technical Advisory Body, as well as a Secretariat of the Convention.[81] The provision concerning the peaceful settlement of disputes proved contentious. While it envisages a relatively traditional procedure of negotiations between parties to a dispute, as well as provides for a mediation, it also utilizes the peaceful settlement of disputes procedure adopted in Part XV UNCLOS (which, *inter alia*, allows for a dispute to be referred to the International Court of Justice, International Tribunal for the Law of the Sea, or arbitration[82]). It does so not only with respect to the state-parties to the UNCLOS and the 2001 UNESCO Convention, but also, potentially, to state-parties to the latter only.[83]

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[76] *Ibidem*, Art. 16. *See also* A. Petrig, M. Stemmler, *Article 16 UNESCO Convention and the Protection of Underwater Cultural Heritage*, 69 International & Comparative Law Quarterly 397 (2020).

[77] Arts. 14 and 15 of the 2001 UNESCO Convention, respectively.

[78] *Ibidem*, Art. 17. Such sanctions should be "adequate in severity to be effective in securing compliance" (*infra*, para. 2).

[79] *Ibidem*, Art. 18.

[80] *Ibidem*, Arts. 19-21.

[81] *Ibidem*, Arts. 23-24.

[82] *Cf.* Art. 287 UNCLOS.

[83] Art. 25 of the 2001 UNESCO Convention. In particular, the joint reading of Art. 25(3) and (4) leaves uncertainty whether the UNCLOS-established mandatory procedures to settle disputes apply also to non-UNCLOS parties (*see* Dromgoole, *supra* note 68, pp. 89-90).

CONCLUSIONS

Clearly, the 2001 UNESCO Convention is a landmark legal instrument concerning UCH. In contrast to all previous treaties and efforts, it managed to establish a comprehensive system for the protection of underwater cultural heritage; one that applies in all maritime zones. Bearing in mind the large number of delicate political issues as well as legal and jurisdictional problems to be negotiated and resolved in order for the Convention to be adopted and ratified, it is not surprising the conclusion of the Conventions came at the cost of compromises, the use of general language, and/or the bypassing of some issues.

Nevertheless, this should not cast a shadow over the fact that the Convention does oblige states, in unequivocal terms, to cooperate for the protection of the UCH, meaning that all activities directed at UCH have to be reported on and that commercially-oriented activities are generally banned, while protection *in situ* is a priority. As rightly remarked by Prof. Symonides, it also seems natural that the Convention rests on the important principle of cooperation between states, and its implementation in good faith by state-parties will ultimately decide whether the Convention achieves its objectives.[84]

Notwithstanding the legal (and symbolic) importance of the adoption of the Convention, one has to note that it is directly binding only with respect to its state-parties. While it is always difficult and sometimes misleading to assess the "success-rate" of any given treaty by the number of states that have become bound by it, it should be nevertheless be noted that the number of state-parties (69, including Poland) falls short of being able to qualify the Convention as a universally-binding treaty. On the other hand, putting aside the issue of the possible indirect effect of the 2001 UNESCO Convention (e.g. on the regulatory solutions of States that for various reasons did not choose to become bound by the Convention[85]), one should underline that the Convention has attracted a number of important – from the perspective of the protection of UCH – coastal and/or flag states (e.g. France, Italy, Mexico, Portugal, Spain). Clearly there are still a number of important non-ratifying states (such as Australia, China, Greece, the Netherlands, Russia, the United Kingdom, and the United States). Moreover, when looked upon from the regional perspective the level of ratification is certainly uneven. For example, most of the states bordering the Mediterranean Sea have joined the Convention, and many of the Latin American and Caribbean States have become bound by it well. Ratification is less prominent in the African and Asia-Pacific region, and in the Baltic Sea area only Estonia, Lithuania and Poland are parties to the 2001 UNESCO Convention.

While the Polish maritime zones are not yet fully explored and researched from the perspective of their UCH, it seems reasonable to assume, both on the basis of the condi-

[84] Symonides, *Międzynarodowa ochrona*, *supra* note 3, p. 61.

[85] This is particularly the case with respect to the Rules that are supported by many non-State parties to the 2001 Convention (such as the UK) – *see* Roberts, *supra* note 51, p. 883.

tions generally conducive to the preservation of underwater archaeology which prevail in the Baltic Sea, as well as hitherto findings and Polish maritime history,[86] that there is important UCH located in the Baltic Sea.[87] This conclusion, coupled with a conviction that the Polish law is generally in line with the 2001 UNESCO Convention, led at least one commentator to predict already some time ago that Poland would accede to the said Convention.[88]

It seems opportune that Poland decided to accede to the 2001 UNESCO Convention. While this act closes a certain chapter, new challenges emerge as – in line with the conclusions above – the effectiveness of the Convention in protecting UCH[89] lies in its proper implementation and the actual measures taken by state-parties (now including Poland). This issue should be subject to a separate scrutiny in the future.

[86] *See also* activities undertaken by the Polish National Maritime Museum in Gdańsk. For example, there are currently 24 wrecks (from the 19th century or older) that are researched by the museum: available at: https://www.nmm.pl/archeologia-podwodna/wraki-badane-przez-nmm (accessed 30 May 2021).

[87] *See* I. Pomian, *Podmorskie dziedzictwo. Inwestycje morskie a ochrona podwodnego dziedzictwa archeologicznego* [Underwater heritage. Maritime investments and the protection of underwater archaeological heritage], 80-81 Cenne, bezcenne/utracone 58 (2014); I. Pomian, *Archeologia morska w Polsce stan obecny i perspektywy* [Underwater archaeology in Poland: current status and perspectives], 2016, available at: https://www.nmm.pl/archeologia-podwodna/badania (accessed 30 May 2021).

[88] Kowalski, *supra* note 9, pp. 321-323.

[89] This refers to the effectiveness among the 2001 UNESCO Convention's state-parties. The "general" effectiveness of the Convention is naturally also dependant on, *inter alia*, the number of states that become bound by it.