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THE ILLICIT TRAFFIC OF CULTURAL OBJECTS  
IN THE MEDITERRANEAN

edited by Ana Filipa Vrdoljak and Francesco Francioni



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**ACADEMY OF EUROPEAN LAW**  
**ROBERT SCHUMAN CENTRE MEDITERRANEAN PROGRAMME**

*The Illicit Traffic of Cultural Objects in the Mediterranean*

**EDITED BY ANA FILIPA VRDOLJAK AND FRANCESCO FRANCONI**

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## **Abstract**

Ongoing high profile litigation in Europe and the United States against museum officials and art dealers reveals that the illicit trade in cultural heritage is flourishing rather than abating. Ironically, the disparity between the failure of states to sign on to and implement certain multilateral agreements, and escalating cultural loss is particularly significant in the Mediterranean region, because of the cultural wealth located in the Mediterranean Sea and the countries which surround it.

This working paper focuses on evolving multilateral efforts and national responses in the Mediterranean region to control the illicit trade in cultural heritage, particularly underwater heritage. It identifies areas of policy and law reform to encourage the uptake and implementation of existing multilateral instruments and the creation of regional initiatives to curb the illicit traffic of cultural objects.

The collected contributions fall into four discernible categories. The first part contains a paper prepared by Francesco Francioni and myself and serves as a backgrounder outlining the current international and European legal protection afforded cultural objects excavated from the earth and seabed.

Part II focuses specifically on the protection of underwater cultural heritage. Jeanne-Marie Panayotopoulos examines the legal regimes established under the UN Convention on the Law of the Sea and the specialist instrument, the UNESCO Convention on the Protection of Underwater Cultural Heritage. Amy Strecker provides detailed analysis of the shortcoming of existing legal protections with reference to the 'Black Swan' case. Tullio Scovazzi rounds off this section by considering national perspectives, with particular reference to the Italian experience.

Part III broadens the scope of potential legal protection to other specialist international law regimes. Valentina Vadi critically examines law applicable to the recovery of shipwrecks under the law of salvage and law of finds, UNCLOS and the Underwater Heritage Convention. Federico Lenzerini details the possibilities of the World Heritage Convention in the control of the illicit traffic of cultural objects. Sana Ouechtati extends these concerns to the area of international trade law through her exploration of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

Part IV, the final part, emphasizes the ever-present difficulties in facilitating the return of illicit removed cultural objects through existing legal instruments. Andrzej Jakubowski provides a private international law perspective by focussing on the 1995 UNIDROIT Convention and EC Directive 93/7. Alessandro Chechi analyses the operation of bilateral agreements, encouraged under the 1970 UNESCO Convention, with particular reference to the existing agreements between the United States and Italy, and Italy and Libya for the return of the 'Venus of Cyrene'. Robert Peters explores the potential of alternative, 'creative' modes of resolving restitution claims including the recent return of the Axum obelisk to Ethiopia.

## **Keywords**

European law - fundamental/human rights - free movement - international agreements - regional policy - trade policy - Mediterranean, law

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# Legal Protection of Cultural Objects in the Mediterranean Region: An Overview

Ana Filipa Vrdoljak<sup>†</sup> and Francesco Francioni<sup>‡</sup>

## Abstract

Recent civil and criminal litigation brought in U.S. and European courts against officials of leading museums and art dealers has revealed that illegal trafficking from the Mediterranean region is far more significant than previously thought. This ongoing litigation also highlights the dire need for reassessment, implementation and coordination of initiatives at the national and supranational levels to control this illegal trade. Most Mediterranean countries are state parties to the 1970 UNESCO Convention and the First Protocol of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Protocol). Significantly, however, in the Mediterranean region this trend is not replicated in respect of the 1995 UNIDROIT and 2001 Underwater Heritage Conventions.

This paper serves as a backgrounder by analysing the development of international law concerning the trade of cultural objects illicitly excavated from the earth or seabed. It is divided into two parts. The first section examines the main international instruments relating to the protection and control of the movement of cultural objects, either directly or indirectly, which are of relevance to the protection of the heritage of the Mediterranean region. The second section examines the potential of European Community (EC) policies and agreements between the European Union (EU) and Mediterranean Partner Countries (MPC) covering cultural cooperation and human rights to curb this illicit trade.

By analysing the positives and negatives of existing international and regional schemes, the paper outlines lessons for the Mediterranean region.

## Keywords

European law - fundamental/human rights - free movement of goods - international agreements - regional policy - trade policy - Mediterranean - cultural goods - international law

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## 1. Introduction

The true scale of the contemporary illicit trade in cultural objects by its nature is not able to be properly quantified. However, there is increasing awareness of the link between this trade and the drug and arms trade, corruption and money laundering.<sup>1</sup> Recent civil and criminal litigation brought in U.S. and European courts against officials of leading museums and art dealers has revealed that illegal trafficking from the Mediterranean region is far more significant than previously thought.<sup>2</sup> This ongoing litigation also highlights the dire need for reassessment, implementation and coordination of initiatives at the national and supranational levels to control this illegal traffic.

Specialist international organisations, like UNESCO, the International Council of Museums (ICOM), Interpol, and the World Customs Organization (WCO) have recognised this problem and made concerted efforts to encourage national and institutional responses and to promote adherence to establish international regimes through conferences, workshops and publications.<sup>3</sup> These efforts target law reform, the role of customs and law enforcement authorities, museum practices, and public education. Likewise, several countries in the region have fostered similar initiatives.

Available publications in this area can be divided into three broad categories. The first includes detailed commentaries of the development and final form of the relevant conventions.<sup>4</sup> The second comprises compilations of summaries or reproductions of national legislative schemes;<sup>5</sup> these texts are largely of historic interest due to online availability of current national laws through the UNESCO website.<sup>6</sup> The third are publications prepared in response to regional or domestic efforts to implement

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<sup>1</sup> N. Brodie, 'An Archaeologist's View of the Trade in Unprovenanced Antiquities', in: B. Hoffman (ed.), *Art and Cultural Heritage: Law, Policy and Practice*, (Cambridge, 2006), p.52 at p.54.

<sup>2</sup> See G. Pastore, 'The looting of archaeological sites in Italy', in: N. Brodie, J. Doole and C. Renfrew (eds), *Trade in Illicit Antiquities: The Destruction of the Archaeological Heritage* (Cambridge, 2001); and P. Watson and C. Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities from Italy's Tomb Raiders to the World's Greatest Museums*, (New York, 2006).

<sup>3</sup> For details of the UNESCO Mediterranean Programme, based at the Cairo Office, see <[http://portal.unesco.org/culture/en/ev.php-URL\\_ID=1515&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=1515&URL_DO=DO_TOPIC&URL_SECTION=201.html)> (viewed on 22 January 2008). ICOM, *Workshop on the protection of the heritage and the fight against illicit traffic in cultural properties in the Arab countries*, Hammamet, Tunisia, 2-4 June 1998, organised by ICOM with the Institut National du Patrimoine de Tunisie, in collaboration with UNESCO and Interpol. (Paris, 1998) (English and Arabic); and Recommendation of the 6th Interpol International Symposium on the Theft of and the Illicit Traffic in Works of Art, Cultural Property and Antiques, Lyon, 21-23 June 2005 at <<http://www.interpol.int/Public/WorkOfArt/Conferences/20050621/recommendations.asp>> (viewed 21 January 2008) (Arabic, English, French and Spanish).

See also memoranda of understanding between the International Criminal Police Organization (INTERPOL) and the International Council of Museums (ICOM) on Countering the Theft of and Trafficking in Cultural Property, 11 April 2000 at <<http://icom.museum/mou-interpol.html>> (viewed on 21 January 2008); and the World Customs Organization (WCO) and the International Council of Museums (ICOM) on Combating the Illicit Traffic in Cultural Property, 25 January 2000, at <<http://icom.museum/mou-wco.html>> (viewed on 21 January 2008).

<sup>4</sup> See P. J. O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, (Leicester, 2000); L. V. Prott, *Commentary on the UNIDROIT Convention*, (Leicester, 1997); P. Askerud and E. Clément, *Preventing the Illicit Traffic in Cultural Property: A Resource Handbook for the Implementation of the 1970 UNESCO Convention*, (Paris, 1997); and J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, (Paris, 1996).

<sup>5</sup> See L. V. Prott and P. J. O'Keefe (eds), *National Legal Control of Illicit Traffic in Cultural Property*, (Paris, 1983).

<sup>6</sup> Cultural Heritage Laws Database, UNESCO Paris, at <<http://www.unesco.org/culture/natlaws/index.php?&lng=en>> (viewed on 21 January 2008). See also the Council of Europe, *Compendium Cultural Policies and Trends in Europe, Country Profiles*, at <<http://www.culturalpolicies.net/web/profiles-news.php>> (viewed on 21 January 2008); and Unimed Cultural Heritage II, The Euromediterranean Cultural Heritage Portal, at <<http://heritage.euromedagency.eu/indexleg2.php>> (viewed on 21 January 2008).

international obligations.<sup>7</sup> Whilst these latter texts aided (or otherwise) efforts to adopt these conventions in Europe or the United States — they are skewed to the concerns of those fora and not those confronting the Mediterranean region. Nonetheless, such existing publications successfully assisted the debate within their respective regions.

Almost four decades have passed since the signing of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) covering public international law aspects of the illicit traffic in cultural objects.<sup>8</sup> It is over a decade since the signing in Rome of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995 UNIDROIT Convention) addressing its private international law implications.<sup>9</sup> The Convention on the Protection of the Underwater Cultural Heritage signed in 2001 (Underwater Heritage Convention) came into force on 2 January 2009.<sup>10</sup> An active campaign to raise public awareness of this trade, and its wider context, in countries where the main markets are located, has been successful. The United States (1983), France (1992), United Kingdom (2002),<sup>11</sup> Japan (2002), Switzerland (2003) and Germany (2007) have ratified or acceded to the 1970 UNESCO Convention. Similarly, most Mediterranean countries are state parties to the 1970 UNESCO Convention and the First Optional Protocol of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Protocol).<sup>12</sup> Significantly, however, in the Mediterranean region this trend is not replicated in respect of the 1995 UNIDROIT and 2001 Underwater Heritage Conventions.

There is a marked incongruity between the failure of states to sign onto and implement these multilateral agreements and escalating cultural loss being experienced in the Mediterranean region. Several countries in this region experienced depredations during successive periods of foreign or belligerent occupation. However, such losses increased sharply following independence with expanding international markets for ‘art’ and antiquities from the region. In recent decades, this trend has increased due to armed conflict, civil unrest, economic hardship and the introduction of new technologies, such as the internet.<sup>13</sup>

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<sup>7</sup> See N. Palmer, Ministerial Advisory Panel Report on Illicit Trade, Department for Culture, Media and Sport, (London, 2000); and P.M. Bator, An Essay on the International Trade in Art (1982) 34 *Stanford Law Review* 275.

<sup>8</sup> 14 November 1970, in force 24 April 1972, 823 UNTS 231; (1971) 10 ILM 289. Official text available in Arabic, English, French and Spanish on the UNESCO website: at <http://portal.unesco.org/culture> (viewed 14 January 2008).

<sup>9</sup> 24 June 1995, in force 1 July 1998, (1995) 34 ILM 1322. Official text available in English and French on the UNIDROIT website: at <http://www.unidroit.org> (viewed 14 January 2008).

<sup>10</sup> 2 November 2001, in force 2 January 2009, UNESCO Doc.31C/Resolution 24; (2002) 41 ILM 37. Official text available in English, French, Spanish and Arabic; and unofficial translation in Portuguese on the UNESCO website: at <http://portal.unesco.org/culture> (viewed 14 January 2008).

<sup>11</sup> The reservation filed by the United Kingdom (Letter LA/Depositary/2002/31) at the time of ratification provided:

(a) the United Kingdom interprets the term “cultural property” as confined to those objects listed in the Annex to Council Regulation (EEC) N° 3911/1992 of 9 December 1992, as amended, on the export of cultural goods and in the Annex to Council Directive 1993 / EEC of 15 March 1993, as amended, on the return of cultural objects unlawfully removed from the territory of a Member State;

(b) As between EC member states, the United Kingdom shall apply the relevant EC legislation to the extent that that legislation covers matters to which the Convention applies; and

(c) The United Kingdom interprets Article 7(b)(ii) to the effect that it may continue to apply its existing rules on limitation to claims made under this Article for the recovery and return of cultural objects.

<sup>12</sup> 14 May 1954, in force 7 August 1956, 249 UNTS 358. Official text available in English, French and Spanish on the UNESCO website: at <http://portal.unesco.org/culture> (viewed 14 January 2008).

<sup>13</sup> See Illicit traffic on internet. Appeal from ICOM, UNESCO and Interpol, ICOM Press Release, Paris, 5 July 2007, at <http://icom.museum/release.common.initiative.html> (viewed on 21 January 2008); Basic Actions concerning Cultural Objects being offered for Sale over the Internet prepared by UNESCO, ICOM and INTERPOL, at <http://portal.unesco.org/culture/fr/files/21559/11836509429MesuresTraficIlliciteEn.pdf/MesuresTraficIlliciteEn.pdf>

This paper serves as a backgrounder by analysing the development of international law concerning the trade of cultural objects illicitly excavated from the earth or seabed. It is divided into two parts. The first section examines the main international instruments relating to the protection and control of the movement of cultural objects, either directly or indirectly, which are of relevance to the protection of the heritage of the Mediterranean region. The second section examines the potential of European Community (EC) policies and agreements between the European Union (EU) and Mediterranean Partner Countries (MPC) covering cultural cooperation and human rights to curb this illicit trade.

When analysing the practices of the countries of the Euro-Mediterranean region, we examine not only countries lining the northern Mediterranean, but all EU member states because of the distribution of competences in the field of culture between the EC and its member states. Countries lining the Mediterranean Sea from the north-eastern corner through to the south, that is, Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority, Syria, Tunisia and Turkey are all considered. These countries are often referred to as Mediterranean Partner Countries (MPCs), in the parlance of the European Commission.

## **2. Multilateral legal instruments for the protection of cultural objects**

The earliest international law measures to protect cultural heritage were directed at shielding pre-eminent examples of human creativity against the excesses of war for the benefit of universal knowledge in the arts and sciences. The same justification was employed by the imperial powers to encourage unfettered international transfer and exchange of cultural 'resources'. With the growing influence of newly independent states in international organisations from the 1920s onwards, the emphasis shifted to a grudging recognition of national interests in cultural heritage. States with significant archaeological sites maintained that national measures to protect their cultural patrimony, like export controls, were largely ineffectual without the cooperation of states where the centres of the international art trade were located. Their campaign for an international regime to aid the enforcement of national laws governing the transfer and export of cultural property was realised in a limited fashion with the 1970 UNESCO Convention.

Increasing involvement of non-state groups in various international and regional fora has led to greater recognition that the interests of non-state groups and states do not necessarily correspond. These groups are usually reliant on states to enforce obligations under existing treaty regimes. These limitations are being gradually recognised and addressed at the international level. For example, the preamble of the 1995 UNIDROIT Convention refers to 'the irreparable damage' to the 'cultural heritage of national, tribal, indigenous or other communities' by illicit trade in cultural objects.

There are a number of multilateral agreements which are directly related to the control the illicit traffic of cultural objects, namely, the 1970 UNESCO Convention; the 1995 UNIDROIT Convention; and during belligerent occupation, the 1954 Hague First Protocol. Other multilateral instruments which cover cultural heritage generally but are relevant in the control of illicit trade and restitution include: the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention),<sup>14</sup> the 2001 Underwater Heritage Convention, and the Convention concerning the Protection of the World Cultural and Natural Heritage (1972 World Heritage Convention).<sup>15</sup> We can

(Contd.) \_\_\_\_\_

(viewed on 18 March 2009), N. Brodie, J. Doole, P. Watson, *Stealing History: The Illicit Trade in Cultural Material*, (Cambridge, 2000); and Brodie, N., M.M. Kersel, C. Luke, and K.W. Tubb (eds). *Archaeology, Cultural Heritage, and the Antiquities Trade*. (Gainesville, 2006).

<sup>14</sup> 14 May 1954, in force 7 August 1956, 249 UNTS 240. Official text available in English, French and Spanish on the UNESCO website: at <http://portal.unesco.org/culture> (viewed 14 January 2008).

<sup>15</sup> 16 November 1972, in force 17 December 1975, 1037 UNTS 151. Official text available in Arabic, English, French, Hebrew, Portuguese and Spanish on the UNESCO website: at <http://portal.unesco.org/culture> (viewed 14 January 2008).

also include in this latter category regional efforts established under the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention).<sup>16</sup>

The following section provides a brief overview of the various current multilateral agreements (not all in force) which directly or indirectly cover the protection of cultural objects.

**A. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property**

The 1970 UNESCO Convention was the result of a concerted push by countries rich in archaeological sites to obtain multilateral cooperation in the effective enforcement of domestic laws designed to regulate the export of cultural objects from their territories. To this end, its preamble states in part:

Considering that the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which is part of UNESCO's mission to promote by recommending to interested states, international conventions to this end,

Considering that the protection of cultural heritage can be effective only if organized both nationally and internationally among states working in co-operation...<sup>17</sup>

Similarly, Article 2 of the Convention recognises that the illicit trade in cultural objects is 'one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property' and that international cooperation is the primary mode of curbing the trade. To this end, it requires states parties to 'oppose such practices ... by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations' (Article 2(2)).

The definition of cultural materials covered by the 1970 UNESCO Convention is broad. Article 1 provides that 'cultural property' is 'designated by each State as being of importance' and can include:

- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest...
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; ...<sup>18</sup>

Furthermore, if the cultural objects were found within the territory of the state party, or they were acquired by archaeological, ethnological or natural science missions with the consent of the competent authorities of the country of origin, or were obtained through freely agreed exchange, or as a gift or purchased legally with the consent of the competent authorities of the country of origin of such

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<sup>16</sup> Convention for the Protection of the Mediterranean Sea Against Pollution, adopted in 1976, entered into force in 1978, 1102 UNTS 44; and replaced by the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 10 June 1995, entered into force 9 July 2004; at <[http://195.97.36.231/dbases/webdocs/BCP/bc95\\_Eng\\_p.pdf](http://195.97.36.231/dbases/webdocs/BCP/bc95_Eng_p.pdf)> (viewed 21 January 2008).

<sup>17</sup> Seventh and eighth preambular recitals, 1970 UNESCO Convention, n.8.

<sup>18</sup> Article 13(d) requires state parties to 'recognise the inalienable right of each state party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported'

property, then it may form the cultural property of the state party (Article 4).

The Convention lays down obligations for state parties both for the protection of their cultural property and the mechanisms for the restitution of illicitly removed objects. These include the establishment of national authorities to: enable the enactment of appropriate legislation, prepare a national inventory, scientific institutions for protection and preservation, supervise archaeological sites to ensure in situ preservation of objects and future excavations, enforce ethical standards for relevant professionals like curators, art dealers etc; promote educational measures, and publicise ‘the threat to the cultural heritage created by theft, clandestine excavations and illicit exports’ (Articles 5 and 10). In addition, it requires creation and enforcement of an export licensing scheme (Article 6). States parties must prevent museums and similar institutions acquiring objects which have been illicitly removed from the country of origin, after the Convention has come into force (Article 7(a)). Further, they must prohibit the import of such objects by these institutions if they appear on the national inventory of a state party (Article 7(b)(i)). State parties are required to impose penalties or administrative sanctions on persons trying to import such objects (Article 8).

There are also obligations on state parties in respect of the restitution of illicitly removed cultural objects. Broadly, there is a requirement that their competent authorities facilitate the earliest possible restitution of such objects to their rightful owner; and their courts and agencies admit recovery actions made on behalf of the rightful owner (Article 10(b) and (c)). However, restitution claims are highly restricted under the Convention. They must be made by the requesting state party through diplomatic channels, just compensation must be paid to the *bona fide* purchaser and they bear all other recover expenses (Article 7(b)(ii)).

During negotiations for the 1970 UNESCO Convention, the U.S. delegation successfully lobbied for the creation of a ‘special’ regime covering archaeological sites. Pursuant to Article 9 when a state party’s cultural heritage is ‘in jeopardy from pillage of archaeological or ethnological materials’ it may seek international cooperation from other states parties which can ‘include[e] the control of exports and imports and international commerce in the specific materials concerned’. Prior to such international action, each state party can take interim steps ‘to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State’. The Implementation of the Convention of Cultural Property Act (19 U.S.C. 2601) transposes this treaty obligation into U.S. domestic law. Pursuant to this law, the U.S. government has established a series of bilateral agreements recognising the export controls of specific states and facilitating the return of objects removed contrary to those laws. As at February 2009, the United States has current bilateral agreements with only two Mediterranean countries: Cyprus<sup>19</sup> and Italy.<sup>20</sup>

The obligations laid down in the 1970 UNESCO Convention are clearly more onerous and extensive in respect of protective and preventative measures states parties must undertake; rather than those related to restitution. Nonetheless, the most significant resistance to ratification of the convention

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<sup>19</sup> Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of Cyprus concerning the imposition of import restrictions on pre-classical and classical archaeological objects and Byzantine period ecclesiastical and ritual ethnological material, dated 6 July 2007, at <<http://exchanges.state.gov/culprop/CyprusExt2007AmendedAgreement.pdf>> (viewed on 15 January 2007).

<sup>20</sup> Extension and Amendment to the Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, dated 19 January 2006, at <<http://exchanges.state.gov/culprop/it06agr.html>>. Paragraph D provides:

Both Governments agree that, in order for United States import restrictions to be most successful in thwarting pillage, the Government of the Republic of Italy shall endeavor to strengthen cooperation among nations within the Mediterranean Region for the protection of the cultural patrimony of the region, recognizing that political boundaries and cultural boundaries do not coincide; and shall seek increased cooperation from other art-importing nations to restrict illicit imports, in the effort to deter further pillage.

came from countries which hosted the international art market centres like London, Paris, New York, Geneva and Frankfurt. However, since the late 1990s there has been a significant turn around in this trend. As of February 2009, all EU Member States are states parties to the 1970 UNESCO Convention except Austria, Ireland, Latvia, Luxembourg and Malta. The European Community is not a state party. In addition, Algeria, Egypt, Israel, Lebanon, Libya, Morocco, Syria, Tunisia and Turkey are states parties to the convention; with Israel and Jordan yet to ratify it.

### **B. 1954 First Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict**

Article 11 of the 1970 UNESCO Convention provides that ‘the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit’. This position reflects the protection afforded to cultural heritage under international humanitarian law (IHL), the specialist legal regime covering armed conflict and belligerent occupation.<sup>21</sup> The 1954 First Hague Protocol is especially relevant in respect of the control of illicit traffic of cultural objects. This legal protection is crucial because of the destruction, loss and removal of cultural objects occasioned by war and belligerent occupation. However, most contemporary armed conflicts are internal, that is, within the territory of a state. It is unclear whether the 1954 Hague Protocol was intended to cover internal armed conflicts.<sup>22</sup>

The 1954 Hague Protocol takes its definition of the cultural property from the 1954 Hague Convention (para.1):

(a) movable ... of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above...

Under the 1954 Hague Protocol, a state party which occupies a territory during armed conflict is required to prevent the export of cultural objects from this territory (para.1). If it fails to do so, it is required to indemnify the subsequent *bona fide* purchaser when the objects are returned (para.4). All state parties are required to take into their custody, automatically on importation or on request of the authorities of the occupied territory, cultural objects imported into their territory from any occupied territory (para.2). They undertake to return cultural property which was illicitly exported or which was deposited into protective custody during the armed conflict, to the competent authorities of the occupied territory on cessation of hostilities (paras.3 and 5). Cultural property cannot be retained as

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<sup>21</sup> See Article 56, Regulations of the Convention (IV) Respecting the Laws and Customs of War on Land, and Annex, 18 October 1907, (1907) 208 Parry's CTS 277; and (1908) 2(supp.) AJIL 90; Article 53, Protocol Additional I to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, 8 June 1977, in force 7 December 1979, 1125 UNTS 3; and Article 16, Protocol Additional II to the Geneva Convention of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflict, 8 June 1977, in force 7 December 1978, 1125 UNTS 609.

<sup>22</sup> The *travaux* noted that: ‘Where property has changed hands on the national territory and has not been exported, the case is one for the national legislation alone’: UNESCO Doc.CL/717, Annex IV, 47. Cf. L. V. Prott, ‘The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954’, in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (Paris, 1996), p.163 at p.170. Compare with Art.19, Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), 14 May 1954, in force 7 August 1956, 249 UNTS 240. Official text available in English, French and Spanish on the UNESCO website: at <<http://portal.unesco.org/culture>> (viewed 14 January 2008); and Ch.5, Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, in force 9 March 2004, (1999) 38 ILM 769.

war reparations (para.3). There is no time limit placed on these obligations.

The interrelationship between these international humanitarian law standards for the control of illicit transfer of cultural property during armed conflict and belligerent occupation and human rights has recently been stressed by the Human Rights Council. It has urged states and intergovernmental and non-governmental organisations to ‘take all necessary measures at the national, regional and international levels to address the issue of protection of cultural rights and property during armed conflicts, paying particularly attention to the situation of occupied territories, and to provide appropriate assistance’ when requested by the relevant country.<sup>23</sup>

As of February 2009, all EU Member States are state parties to the 1954 Hague Protocol except Ireland, Malta and the United Kingdom. The European Community is not a party. In addition, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Syria, Tunisia and Turkey are state parties to the protocol; with Algeria and Palestinian Authority yet to ratify it. While the prohibition against ‘all seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science’ is considered part of customary international humanitarian law and binding on all parties to an armed conflict or occupying powers in cases of belligerent occupation.<sup>24</sup>

### **C. 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects**

The 1970 UNESCO Convention covers public international law obligations and rights between the relevant state parties. However, the illicit trade in cultural objects often involves violation of the rights of non-states entities like private individuals, groups, institutions and so forth. Unless the relevant countries (requesting and holding states) are state parties to the convention and are willing to represent these interests at the diplomatic level, the 1970 UNESCO Convention is ineffective. The 1995 UNIDROIT Convention seeks to fill this lacuna by encouraging uniform application of ‘minimum’ private international law rules in such cases.<sup>25</sup>

The preamble of the 1995 UNIDROIT Convention acknowledges the deleterious impact of the illicit traffic of cultural objects on ‘the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information’.<sup>26</sup> However, the Convention only applies to claims of an ‘international character’ (Article 1). Cultural objects covered by the instrument must be important ‘on religious or secular grounds, [be] of importance for archaeology, prehistory, history, literature, art or science’ (Article 2) and come within a category listed in the Annex to the Convention.<sup>27</sup>

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<sup>23</sup> HRC resolution 6/1 of 27 September 2007 entitled ‘Protection of cultural rights and property in situations of armed conflict’, para.5.

<sup>24</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (3 vols., 2005), vol.1, at 132-136 and vol.2, Part I, at 790-813

<sup>25</sup> Fifth and sixth preambular recitals, 1995 UNIDROIT Convention, n.9.

<sup>26</sup> Fourth preambular recital, 1995 UNIDROIT Convention, n.9.

<sup>27</sup> Annex to the 1995 UNIDROIT Convention, n.9 provides:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

Following intense pressure from the U.S. delegation, the rules laid out in the 1995 UNIDROIT Convention explicitly delineate between the ‘restitution’ of ‘stolen’ cultural objects; and the ‘return’ of ‘illegally exported cultural property’, that is, contrary to the export laws of the requesting Contracting Party (Article 1, and Chapter III and Chapter II respectively). Where an object was unlawfully excavated or unlawfully retained following lawful excavation contrary to the laws of the relevant State it is considered stolen (Article 3(2)).

Any claim for restitution of a ‘stolen’ cultural object must be made within three years of the claimant becoming aware of the current location or possessor but no longer than 50 years from the date of theft (Article 3(3)). Claims made in respect of objects integral to a public monument, archaeological site, public collection or item of communal importance to a tribal or indigenous group shall not be subject to this outer 50 year time limit. However, a Contracting Party may stipulate that such claims must be made within 75 years (or some longer period) (Article 3(5)). In such cases, provision is also made for compensation to be paid to the possessor where they show due diligence when acquiring the object. This is assessed by considering the parties, the purchase price, consultation of registers or agencies monitoring stolen objects, or any other step that a reasonable person would have taken in the circumstances (Article 4).

As noted above, the 1995 UNIDROIT Convention also provides for the ‘return’ of cultural objects removed contrary to the export control laws of the requesting state. It is not enough that the object was removed without the relevant export authorisation by the competent authorities of the state. Instead the following additional criteria must be satisfied: first, the cultural object was legal export for the purposes of an international exhibition but not returned; second, one of the following interests have been significantly impaired, including the physical preservation of the object or its context, the integrity of a complex object, the preservation of scientific or historical information, or the traditional or ritual use by a tribal or indigenous group; or third, it is established that the object is of significant cultural importance to the requesting state (Article 5). These claims for return must be made within three years of the claimant becoming aware of the location of the object or current possessor, with an outer limit of 50 years from the date of export or agreed return in respect of loans (Article 5(5)). The possessor will be entitled to fair and reasonable compensation (or other remedies) provided that he or she did not know or ought not to have reasonably known at the time of acquisition that the object was illegally exported (Article 6). The lack of a valid export certificate is a factor in determining reasonableness (Article 6(2)). In contrast to Chapter II claims, only Contracting Parties, that is, states can make claims under Chapter III and not private individuals.

There has been limited enthusiasm for the ratification of the 1995 UNIDROIT Convention since it was finalised in Rome in 1995. As of February 2009, the only EU Member States which are Contracting Parties are Cyprus, Finland, Greece, Hungary, Italy, Portugal, Romania, Slovakia, Slovenia and Spain,

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- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

with France and the Netherlands having signed but not ratified. The European Community is not a party. None of the Mediterranean partner countries are Contracting Parties. So while there is near universal ratification by northern Mediterranean countries, non-EU Mediterranean states have largely shunned the instrument.

#### **D. 2001 Convention on the Protection of the Underwater Cultural Heritage**

With growing public awareness of the richness of the cultural heritage submerged under its waters and being revealed by authorised and unauthorised salvage, countries lining the Mediterranean Sea and the international community as a whole are becoming cognisant of the need for an effective legal regime. The 2001 Convention on the Protection of the Underwater Cultural Heritage is a specialist instrument developed following the finalisation of the decades-long negotiations for the 1982 U.N. Convention on the Law of the Sea (UNCLOS).<sup>28</sup>

UNCLOS makes reference to underwater heritage but the protection it provides is conflicting and incomplete.<sup>29</sup> State parties have a duty to protect and cooperate in the protection of archaeological or historical objects found 'at sea' (Article 303). To control traffic in such materials, coastal states may presume removal of such an object from the contiguous zone (not more than 24 nautical miles from the baseline of its territorial seas) if contrary to laws and regulations covering its territorial sea. *But* this provision is subject to the rights of identifiable owners, the law of salvage or other admiralty rules, the laws and practices of cultural exchange, or other international laws and agreements covering the protection of cultural property (Articles 303(3) and (4)). Article 149 UNCLOS covers archaeological or historical material found in the seabed, ocean floor and its subsoil beyond the limits of national jurisdiction. Such material will be preserved or disposed of for the benefit of all mankind with preferential treatment being given to the state or country of origin, or of cultural origin, or of historical or archaeological origin. UNCLOS also establishes various oversight and enforcement mechanisms including the International Tribunal for the Law of the Sea based in Hamburg.

States parties to the 2001 Underwater Heritage Convention recognise that underwater cultural heritage is threatened by unauthorised activities and strong action must be undertaken to curb such illicit conduct.<sup>30</sup> Its preamble refers to the need to codify rules relating to the protection and preservation of underwater heritage in conformity with international law and practice, including the 1970 UNESCO Convention, the 1972 WHC Convention and UNCLOS.<sup>31</sup> However, the perceived non-conformity with some of the principles laid down by UNCLOS, and despite a specific provision stating that the Convention shall be interpreted consistently with UNCLOS (Article 3), the convention has had a less than satisfactory take-up rate. Nevertheless, it entered into force on 2 January 2009.<sup>32</sup> As at February

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<sup>28</sup> Convention on the Law of the Sea, 10 December 1982, in force 16 November 1994, 1833 UNTS 3.

<sup>29</sup> See T. Scovazzi, 'The Application of "Salvage Law and Other Rules of Admiralty to the Underwater Cultural Heritage"', in Garabello and Scovazzi (eds), *The Protection of Underwater Cultural Heritage – Before and After the 2001 UNESCO Convention*, (Lieden, 2003), pp.20 and 38. Scovazzi details the impact of the Ballard expeditions in the Mediterranean and the looting of galleons by treasure hunters.

<sup>30</sup> Sixth preambular recital, 2001 Underwater Heritage Convention, n.10. See T. Scovazzi, 'The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage', in: B. Hoffman (ed.), *Art and Cultural Heritage: Law, Policy and Practice*, (Cambridge, 2006), p.285 at p.289; Garabello, 'The Negotiating History of the Provisions of the Convention on the Protection of the Underwater Cultural Heritage', in: Garabello and Scovazzi, (eds), n.30 at p.89; and P. J. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, (Leicester, 2002).

<sup>31</sup> Twelfth preambular recital, 2001 Underwater Heritage Convention, n.10.

<sup>32</sup> The Convention was adopted by the UNESCO General Assembly in 2001 with 87 States in favour, four against (Russian Federation, Norway, Turkey and Venezuela); and 15 abstentions (Brazil, Czech Republic, Colombia, France, Germany, Greece, Iceland, Israel, Guinea-Bissau, Netherlands, Paraguay, Sweden, Switzerland, United Kingdom and Uruguay. Turkey voted against because of disagreement regarding peaceful settlement of disputes (Art.25) and reservations

2009, of the EU Member States only Bulgaria, Portugal, Romania, Slovenia and Spain are state parties to the 2001 Underwater Heritage Convention. The European Community is not party to the convention. Of the Mediterranean partners, only Lebanon, Libyan Arab Jamahiriya and Tunisia are state parties. Montenegro is also a state party to this convention.

Cultural heritage covered by the 2001 Convention encompasses ‘all traces of human existence of a cultural, historical or archaeological character which was partially or completely underwater, periodically or continuously for at least a century’. Including sites, structures, buildings, artefacts and human remains, and their archaeological and natural context; vessels, aircraft, other vehicles, their cargo or other contents, together with their archaeological and natural context; and objects of a prehistoric character. It does not include pipelines or cables or other installations on the seabed (Article 1).

For our present purposes, it is important to briefly note obligations on Coordinating States to prevent looting and other dangers to underwater heritage in the exclusive economic zone and on the continental shelf (Article 10(4)). Such obligations rest on all states parties when objects are located in the seabed, ocean floor and its subsoil beyond the limits of national jurisdiction (Article 12(3)). Obligations extend to seizure and disposition (Article 18), cooperation and information-sharing (Article 19), public education (Article 20), training of persons in maritime archaeology (Article 21), and the establishment of competent authorities to pursue these aims and the compilation and maintaining of an inventory of underwater heritage (Article 22). The convention also has an Annex setting out the ‘Rules concerning activities directed at underwater cultural heritage’. These rules reiterate that all efforts should be directed to preserve the material *in situ* and that it should not be the subject of commercial exploitation (Article 2).

The 2001 Underwater Cultural Heritage Convention encourages state parties to enter into or develop other bilateral, regional or multilateral agreements for the protection and preservation of underwater heritage (Article 6). This reflects the trend already existing in the 1970 UNESCO and the 1995 UNIDROIT Conventions; and instruments in the field of environmental law. Existing cooperation between Baltic countries provides an important example for Mediterranean countries. The 1997 Lübeck Declaration adopted by the third Conference of the Council of the Baltic Sea states (CBSS) included a mandate to establish an action plan for the common heritage of the region.<sup>33</sup> Subsequently, a working group of senior heritage experts, the Baltic Sea Monitoring Group on Heritage Cooperation, was established in April 1998.<sup>34</sup> The group’s work goes beyond underwater heritage, by incorporating building preservation and maintenance in practice; coastal culture and maritime heritage; and sustainable historic towns. The aim of the subgroup on underwater heritage is to study the possibility of a regional agreement to protect underwater cultural heritage in the Baltic Sea, including prohibiting CBSS nationals and ships flying member-state flags interfering with historic wrecks and archaeological structures.

The possibility of a Mediterranean regional agreement for the protection of underwater heritage was proposed during an academic conference held in Siracusa, Italy in 2001. The participants emphasised the need for an agreement which set out the relevant rights and obligations covering the region

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(Art.30) provisions. The French delegation in explaining their abstention noted: ‘la France est en désaccord avec le projet sur deux points précis: le statut des navires d’Etat et les droits de juridiction, dont nous considérons qu’ils sont incompatibles avec les dispositions de la Convention sur le droit de la mer’. Greece cited the failure to include provisions relating to coastal states. See Scovazzi, n.30 at p.285.

<sup>33</sup> See Third Conference of the CBSS Ministers of Culture, Lübeck, 22 September 1997 (known as the Declaration of Lübeck), at <<http://www.cbss.st/documents/cbsspresidencies/6danish/dbaFile3263.html?1=1&print=true>> (viewed on 15 January 2008). The group includes Denmark, Estonia, Finland, Germany, Iceland, Latvia, Lithuania, Norway, Poland, Russia and Sweden.

<sup>34</sup> See generally the website of the Baltic Sea Monitoring Group on Heritage Cooperation, at <<http://www.cbss.st/structure/balticheritage>> (viewed on 15 January 2008).

because ‘the Mediterranean basin is characterised by the traces of ancient civilizations which flourished along its shores and, having developed the first seafaring techniques, established close relationships with each other ... [and] the Mediterranean cultural heritage is unique in that it embodies the common historical and cultural roots of many civilizations’.<sup>35</sup> No such specialist multilateral agreement exists to date.

#### **E. *Barcelona Convention, 1995 Barcelona Protocol and 2007 Madrid Protocol***

Nonetheless, the Barcelona Convention and its Protocols, a multilateral framework initially established in the 1970s to prevent pollution in the Mediterranean region is increasingly encompassing the protection of cultural heritage. These instruments are negotiated within the framework of the Mediterranean Action Plan (MAP), under the auspices of the U.N. Environmental Programme (UNEP) and adopted by the European Community and sixteen Mediterranean countries in 1975 to protect the environment and encourage development in the Mediterranean region. The 1995 Barcelona Convention and Protocol replace the original instruments finalised in the 1970s, to bring the regime into line with principles contained in UNCLOS and the 1992 U.N. Conference on Environment and Development (UNCED).

The potential (and limitations) of the 1995 Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona Protocol), to protect underwater cultural heritage have been noted in detail by other writers.<sup>36</sup> Its preamble stresses ‘the importance of protecting and, as appropriate, improving the state of the Mediterranean natural and cultural heritage, in particular through the establishment of specially protected areas...’. The Protocol requires states parties to prepare a ‘List of Specially Protected Areas of Mediterranean Importance’ (known as SPAMI List) which can include sites of ‘special interest at the scientific, aesthetic, cultural or educational levels’ (Article 8(2)). All states parties to the instrument recognise the importance of these areas and are required to comply with measures applicable to the SPAMI List and must not undertake acts contrary to the purposes of which it was established (Article 8(3)). The criteria for listing indicated that while the protection of cultural heritage is a ‘highly desirable’ factor, it is subordinate to the importance of conservation of natural heritage.<sup>37</sup>

The Protocol on Integrated Coastal Zone Management (‘ICZM’) (Madrid Protocol) adopted on 21 January 2008, not in force, is the first international agreement for the management of coastal areas.<sup>38</sup>

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<sup>35</sup> Extracted in Garabello and Scovazzi, n.29 at p.274.

<sup>36</sup> Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (1995 Barcelona Protocol), adopted 10 June 1995, entered into force 12 December 1999, 2102 UNTS 203; available at <[http://195.97.36.231/dbases/webdocs/BCP/ProtocolSPA9596\\_eng\\_p.pdf](http://195.97.36.231/dbases/webdocs/BCP/ProtocolSPA9596_eng_p.pdf)> (viewed 21 January 2008); and Council Decision 1999/800/EC of 22 October 1999 on concluding the Protocol concerning specially protected areas and biological diversity in the Mediterranean, and on accepting the annexes to that Protocol (Barcelona Convention). It superseded the Protocol concerning Mediterranean Specially Protected Areas (Geneva Protocol), adopted 3 April 1982, into force 23 March 1986. See for example, F. Lafarge, ‘Mediterranean Heritage. The Mediterranean Interest Criteria for Zones and Coasts Protection in the Barcelona Convention Framework’, Sixth Annual Mediterranean Social and Political Research Meeting (2004-05), at <<http://www.eui.eu/RSCAS/RestrictedPapers/conmed2005free/11-200503-Lafarge.pdf>> (viewed 21 January 2008).

<sup>37</sup> See 1995 Barcelona Protocol, n.36, Annex 1: Common Criteria for the Choice of Protected Marine and Coastal Areas that could be included in the SPAMI List, General Principles (a).

<sup>38</sup> Protocol on Integrated Coastal Zone Management (ICZM), adopted 21 January 2008, at <[http://195.97.36.231/acrobatfiles/08IG17\\_Final\\_Act\\_Eng.pdf](http://195.97.36.231/acrobatfiles/08IG17_Final_Act_Eng.pdf)> (viewed 22 January 2008); and 4.2.2009 OJ. L.34/19. Integrated Coastal Zone Management is defined as ‘dynamic process for the sustainable management and use of coastal zones, taking into account at the same time the fragility of coastal ecosystems and landscapes, the diversity of activities and uses, their interactions, the maritime orientation of certain activities and uses and their impact on both the marine and land parts’ (Article 2(f)).

Its preamble states:

Considering that the coastal zones of the Mediterranean Sea are the common natural and cultural heritage of the peoples of the Mediterranean and that they should be preserved and used judiciously for the benefit of present and future generations.

One of the objectives of the ICZM is to ‘facilitate, through the rational planning of activities, the sustainable development of coastal zones by ensuring that the environment and landscapes are taken into account in harmony with economic, social and cultural development’ (Article 5(a)).

Significantly, the Madrid Protocol also makes specific provision for the protection of cultural heritage in coastal zones. States parties (individually or collectively) must take all appropriate measures in conformity with national and international instruments, to ‘preserve and protect the cultural, in particular archaeological and historical heritage of coastal zones, including the underwater cultural heritage’ (Article 13(1)). Also, they must, as a first option, preserve the heritage *in situ* if possible (subpara.2).

However, it is Article 13(3) of the 2008 Madrid Protocol which is of the most relevance for controlling the illicit traffic of underwater heritage in the Mediterranean region. Like the 2001 Underwater Heritage Convention, it requires parties to ensure that underwater cultural heritage removed from coastal zones is ‘conserved and managed in a manner safeguarding their long-term preservation and are not traded, sold, bought or bartered as commercial goods’. When this protocol comes into force, it may have a significant impact on controlling the illicit trade in underwater heritage given the new compliance mechanisms adopted by the states parties to the Barcelona Convention in 2008.<sup>39</sup> The European Council approved the signing of the Madrid Protocol on behalf of the European Community on 4 December 2008.<sup>40</sup> It has also been signed by Algeria, Croatia, France, Greece, Israel, Italy, Malta, Monaco, Montenegro, Morocco, Slovenia, Spain, Syria and Tunisia. As at March 2009, it had not been ratified by any state.

#### ***F. 1972 Convention concerning the Protection of the World Cultural and Natural Heritage***

The rationale for the protection of heritage espoused by the World Heritage Convention is contained in the preamble which states: ‘cultural or natural heritage are interest and therefore need to be preserved as part of the world heritage of mankind as a whole’.<sup>41</sup> Like the 1972 WHC, the 1995 Barcelona Convention,<sup>42</sup> and the 2001 Underwater Heritage Convention also provides that the protection and preservation of such heritage is for the ‘benefit of humanity’.<sup>43</sup> The WHC is the most successful

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<sup>39</sup> For details of the current efforts in the European Parliament towards the adoption of a common maritime policy which also covers underwater cultural heritage, see European Parliament, Committee on Transport and Tourism, ‘Towards a future maritime policy for the Union: a European vision for the oceans and seas’, 15 June 2007, Doc.A6-0235/2007, at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0235+0+DOC+WORD+V0//EN&language=EN>> (viewed 16 January 2008).

<sup>40</sup> Decision 2009/89/EC of 4 December 2008, on the signing, on behalf of the European Community, of the Protocol on Integrated Coastal Zone Management in the Mediterranean to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, [2009] OJ L.34/17.

<sup>41</sup> Sixth preambular recital, WHC, n.15.

<sup>42</sup> First and second preambular recitals, 1995 Barcelona Convention, n.16, provide:

Conscious of the economic, social, health and cultural value of the marine environment of the Mediterranean Sea Area,

Fully aware of the their responsibility to preserve and sustainably develop this common heritage for the benefit and enjoyment of present and future generations...

<sup>43</sup> Article 2(3), 2001 Underwater Heritage Convention, n.10.

multilateral instrument for the protection of cultural heritage, if measured solely in terms of the number of state parties. All EU Member States and Mediterranean Partner States are state parties to the World Heritage Convention. The European Community is not a party nor is the Palestinian Authority.<sup>44</sup>

The 1972 WHC does not apply to movable heritage. However, various aspects of the 1972 WHC make it an instrument which is also capable of facilitating any effort to control the illicit traffic of cultural objects by preserving the sites and monuments where they are located. The convention (with its Operational Guidelines) adopts an expansive interpretation of 'heritage' as covering cultural, natural and mixed heritage.<sup>45</sup> The success of the WHC is underpinned by its implementation structures including the World Heritage Committee, the Secretariat in the form of the World Heritage Centre, the World Heritage Fund, the World Heritage List and the World Heritage in Danger List. Furthermore, the Committee is required to coordinate its activities and information share with other Conventions (including the 1954 Hague Protocol, 1970 UNESCO Convention and 2001 Underwater Heritage Convention), programmes and intergovernmental organizations involved in the protection of cultural and natural heritage.<sup>46</sup>

### **3. Trade, Human Rights and Cultural Heritage: the European Union and Mediterranean Partnership Countries**

Despite its recent prominence in international human rights law and international economic law, the debate over the costs and benefits of globalisation and trade liberalisation to human rights has defined the protection of cultural rights and cultural heritage since the inception of modern international law. From the late nineteenth century, Western European states and the United States insisted on the inclusion of provisions in treaties with non-European states for unfettered access to cultural 'resources'.<sup>47</sup> Although the rights of peoples to preserve and develop their cultural heritage were gradually acknowledged, these rights were usually subordinated to the rights of the international community as defined by the free trade agenda. Today, a succession of international and regional human rights instruments, trade agreements,<sup>48</sup> and development policies, in theory provide some equilibrium.<sup>49</sup> However, the practical reality remains largely the same.

Currently, there is no formal multilateral agreement between the European Union and remaining countries lining the Mediterranean Sea exclusively on the protection of cultural heritage. This is reflective of the evolving competence of the European Community in the field of culture. It was not until the Treaty of Maastricht in 1992 that European Community (and EU Member States) were given competence to 'foster cooperation with third countries and the competent international organisations in

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<sup>44</sup> Nonetheless, the World Heritage Committee has approved funding for a series of programmes to assist the Palestinian Authority to implement the WHC through the World Heritage Fund: for example, 26 COM 6.1; and 26 COM 6.2.

<sup>45</sup> Articles 1 and 2, WHC, n.15; and Paras.45-53, Operational Guidelines for the Implementation of the World Heritage Convention (OGs), Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, 2 February 2005, WHC.05/2.

<sup>46</sup> Article 13(7), WHC, n.15; and OGs, paras.41-43, n.44. See generally F. Francioni (ed), *The 1972 World Heritage Convention: A Commentary*, (Oxford, 2008).

<sup>47</sup> See A. F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, (Cambridge, 2006), pp.104ff.

<sup>48</sup> See generally T. Voon, *Cultural products and the World Trade Organization*, (Cambridge, 2007).

<sup>49</sup> See for example, World Bank Operational Policy 4.11, 'Physical Cultural Resources', January 2006, at <<http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/f7481a92325a3e928525699e006c16d6/61a8fc9168e4c7fe852571b6006cdb54?OpenDocument>> (viewed on 21 January 2008); World Bank, Middle East and North Africa Region, *Cultural Heritage and Development: A Framework for Action in the Middle East and North Africa*, (Washington D.C., 2001); World Bank, Operations Evaluation Department, *Cultural Properties in Policy and Practice: A Review of World Bank Experience* (Washington D.C., 2001).

the sphere of culture' (Article 151(3), EC Treaty).<sup>50</sup> The first European Commission Communication on culture which mapped the future scope of the European Community's action in the cultural field encouraged cooperation with non-member states and international organisations.<sup>51</sup> Shortly thereafter, various bilateral agreements and declarations covering trade and development aid increasingly incorporated provisions covering cultural issues.<sup>52</sup>

The European Union commenced its actions in respect of the Mediterranean region and cultural heritage in 1995 as part of the so-called 'Barcelona Process', instigated by the Declaration on the Euro-Mediterranean Partnership.<sup>53</sup> It was adopted by the foreign ministers of the then E.U. member states and remaining twelve countries lining the Mediterranean Sea. The declaration sought to broaden relations between these countries through the promotion of: shared prosperity through the creation of a free trade area; and peace and stability by fostering common values of human rights and democracy. The process is augmented by a significant package of financial aid known as the MEDA Programme.<sup>54</sup> The Euro-Mediterranean Partnership is a series of bilateral agreements between the European Community and EU Member States and the twelve Mediterranean Partnership Countries, pursuant to Article 310 EC Treaty. A summary of these Euro-Mediterranean Association Agreements (EMAAs) is contained in Annex 2 below.

The third pillar of the Barcelona Process, or Chapter III, specifically focuses on social and cultural cooperation. The Italian EU presidency, which commenced in January 1996, heavily promoted the field of cultural heritage in the Euro-Mediterranean partnership. The Euro-Mediterranean Conference of Cultural Ministers entitled 'Maximising the Potential of Cultural Heritage' held in Bologna in April 1996 (Bologna Conference) agreed that 'the projects for conserving and enhancing the cultural heritage should be based on the following broad guidelines, particularly: ...exchanging experiences in the areas of ...legislation and the protection and movement of cultural assets ...'.<sup>55</sup>

This precipitated the introduction of the Euromed Heritage Programme, the first regional MEDA programme centring on cultural heritage which was launched in 1998 involving EU Member States and Mediterranean Partner Countries.<sup>56</sup> A project funded by this scheme, is a portal providing information detailing best practice in the conservation and management of cultural heritage as well as the inclusion of legislation from Portugal, Spain, Italy, Turkey, Lebanon, Palestinian Authority, Egypt, Tunisia, Algeria and Morocco.<sup>57</sup>

Subsequently, the European Neighbourhood Policy (ENP) was adopted as part of the revamped EU

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<sup>50</sup> Consolidated Text of the Treaty on the European Union and the Treaty establishing the European Community, 2006 OJ C321; at <<http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>> (viewed 21 January 2008).

<sup>51</sup> COM (92) 149, New Prospects for Community Cultural Action.

<sup>52</sup> See generally J. A. McMahon, 'Preserving and Promoting Differences? The External Dimension of Cultural Cooperation', in: R. Craufurd Smith (ed.), *Culture and European Union Law*, (Oxford, 2004), p.327.

<sup>53</sup> Adopted by Euro-Mediterranean Conference of Foreign Ministers in 27-28 November 1995, available at <[http://ec.europa.eu/external\\_relations/euromed/bd.htm](http://ec.europa.eu/external_relations/euromed/bd.htm)> (viewed on 22 January 2008). See generally F. Haruka, 'The Euro-Med Policy: The Implications of the Barcelona Declaration' (1997) 34 CMLR 337.

<sup>54</sup> See P. Holden, 'The European Community's MEDA Aid Programme: A Strategic Instrument of Civilian Power?' (2003) 8 EFARev 347.

<sup>55</sup> Evaluation of Euromed Heritage I, ME8/B7-4100/IB/07/0353, Final Report, Vol.1-Programme Evaluation, July 2004, p.23.

<sup>56</sup> Euromed Heritage is managed by EuropeAid Co-operation Office, EC; and coordinated and monitored by the Regional Management and Support Unit (RMSU) based at the Italian Ministry for Cultural Heritage, Rome. MEDA regulation, see Regulation 1488/96, OJ L.189/1, as amended by Regulation 2698/2000, OJ L.311/1; and Decision 96/706 of 1996, OJ L.325/20).

<sup>57</sup> The Euromediterranean Cultural Heritage Portal available at <<http://heritage.euromedagency.eu/indexleg2.php>> (viewed 15 January 2008).

external affairs regime developed in response to the enlargement process.<sup>58</sup> ENP has replaced existing geographical and thematic programmes like MEDA for the period 2007-2013. ENP countries encompassing the southern Mediterranean include Algeria, Egypt, Israel, Lebanon, Libya, Morocco, Palestinian Authority, Jordan, Syria and Tunisia. Turkey is covered by the pre-accession instrument. The ENP intends to reinforce relations between the EU and these states through a mutual commitment to common values.<sup>59</sup> One mode of attaining this aim is to ‘connect people of the Union and its neighbours, to enhance mutual understanding between each others’ cultures, history, attitudes and values’.<sup>60</sup> The European Commission has advised that initiatives encompassed by the ENP will include greater efforts to promote human rights, further cultural cooperation and enhance mutual understanding.<sup>61</sup> The ENP does not supersede but complements the existing Euro-Mediterranean partnership. Pierluigi Montalbano suggests:

The novelty of the [ENP] consists in the goal to achieve a deep integration with EU neighbours, by moving from simply “negative integration” (i.e. total removal of trade obstacles) towards a process of “positive integration” (the creation of new instruments and institutions able to achieve common objectives). It implies the introduction of specific elements of the European legal framework by means of bilateral negotiations.<sup>62</sup>

Reflecting the ENP’s recognition of the importance of culture for development, Euromed Heritage prepared a ‘Strategy for the development of Euro-Mediterranean Cultural Heritage: Priorities from Mediterranean countries (2007-2013)’<sup>63</sup> The programme adopts a general ‘orientation’ of defining cultural heritage as ‘public wealth’:

Since heritage assets are public and universal wealth, they require public support. The theory of “public wealth” identifies similarities between “cultural wealth and environmental wealth”. This orientation provides the ground for public support of the CH [cultural heritage] domain’.<sup>64</sup>

It adopts the following strategic goals: (1) awareness-raising and education that cultural heritage has to ‘remain closely related to the interest of local population’ with the active participation of civil society;<sup>65</sup> (2) cultural heritage as a means of local development; and (3) good governance in the field of cultural heritage.

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<sup>58</sup> Communication from the Commission to the Council and the European Parliament, ‘Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours’, Brussels, 11.3.2003, COM(2003) 104 final, p.2.

<sup>59</sup> Communication from the Commission, ‘European Neighbourhood Policy: Strategy Paper’, Brussels, 12.5.2004, COM(2004) 373 final, p.3:

The privileged relationship with neighbours will build on mutual commitment to common values principally within the fields of the rule of law, good governance, the respect for human rights, including minority rights, the promotion of good neighbourly relations, and the principles of market economy and sustainable development.

The document then details in various tables the ratification rate of relevant ENP countries of instruments covering human rights, labour rights, and the environment: at pp.32-35.

<sup>60</sup> Ibid.

<sup>61</sup> COM(2003) 104 final, p.12. It noted that in the Mediterranean this work would take place under the auspices of the Euro-Mediterranean Foundation.

<sup>62</sup> P. Montalbano, ‘The ENP: Towards a New EU-MED Partnership?’, in: M. Cremona and G. Meloni (eds), *The European Neighbourhood Policy: A Framework for Modernization*, EUI Working Paper LAW 2007/21, p. 45 at p.51.

<sup>63</sup> Euromed Heritage, ‘Strategy for the development of Euro-Mediterranean Cultural Heritage: Priorities from Mediterranean countries (2007-2013)’, (Luxembourg, 2007), pp.5-6; at <[http://www.euromedheritage.net/en/strategy/strategy2007\\_2013.pdf](http://www.euromedheritage.net/en/strategy/strategy2007_2013.pdf)> (viewed 14 January 2008).

<sup>64</sup> Ibid., p.6.

<sup>65</sup> Ibid.

One of the strategic priority areas is legislative reinforcement and institutional reform. The legislative reinforcement is intended to accompany institutional reforms with the implementation of international instruments being flexibly realised through revision or upgrading existing legislation, or introduction of new national laws. The strategic priority on legislative reinforcement emphasises the ‘integration and coherence with international rules concerning illicit traffic of cultural heritage’.<sup>66</sup> The intended legislative reforms also cover the creation of inventories for movable and immovable cultural heritage, copyright, preservation of private buildings of artistic value, tax concessions, vocational training; comparing EU Member States and MEDA legislation in the areas to provide ‘new inputs’.<sup>67</sup>

The Euro-Mediterranean Association Agreements (EMAAs) cover aspects of political dialogue; respect for human rights and democracy; establishment of transitional process for the creation of a free trade compatible with WTO rules; intellectual property, services, public procurement, competition rules, state aids and monopolies; economic cooperation in various sectors; cooperation in social affairs and migration; and cultural cooperation. Implementation is governed by an Association Council (Ministerial) and Association Committee (senior officials) established under the relevant agreement.

The provisions in EMAAs covering cultural cooperation are limited in the context of the overall agreement and vary from bilateral agreement to bilateral agreement. None directly deal with harmonisation of laws relating to the control of the import, export or return of cultural objects. So, for example, Article 71 of the EMAA between the EC and its member states and Egypt provides:

1. The Parties agree to promote cultural cooperation in fields of mutual interest and in a spirit of respect for each other’s cultures. They shall establish a sustainable cultural dialogue. This cooperation shall promote in particular:
  - conservation and restoration of historic and cultural heritage (such as monuments, sites, artefacts, rare books and manuscripts);
  - exchange of art exhibitions, troupes of performing arts, artists, men of letters, intellectuals and cultural events;
  - translations;
  - training of persons working in the cultural field....
6. Cooperation shall be implemented in particular through:
  - a regular dialogue between the Parties;
  - regular exchange of information and ideas in every sector of cooperation including meetings of officials and experts;
  - transfer of advice, expertise and training;
  - implementation of joint actions such as seminars and workshops;
  - technical, administrative and regulatory assistance;
  - dissemination of information on cooperation initiatives.<sup>68</sup>
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To the extent that the Barcelona Process and the ENP are designed to encourage deeper integration

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<sup>66</sup> Ibid., p.10.

<sup>67</sup> Ibid.

<sup>68</sup> Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States and the Arab Republic of Egypt, 25 June 2001, COM (2001) 184 final.

with membership of the EU, it is arguable that the limited existing EC regulatory and harmonisation action in controlling the illicit traffic of cultural objects should logically be extended to the MPCs. However, the current EC regime would be of limited benefit for these countries. The Directive and Regulation have had little impact in the EU and have been rarely used by its member states to date.<sup>69</sup> See Annex 3 for a summary of claims under the EC Directive.

Efforts to curb the illicit traffic of cultural objects can also draw upon the increasingly explicit connection being made at the multilateral level between human rights and cultural heritage. The preamble of the EMAAs reaffirms that parties' commitment to the principles of the U.N. Charter 'particularly the observance of human rights, democratic principles and political and economic freedoms which form the very basis of this Association'.<sup>70</sup> The clause covering respect for democratic principles and fundamental human rights is considered an 'essential element' of all the agreements by the European Commission.<sup>71</sup> Since the 1990s, the UN Committee on Economic, Social and Cultural Rights, which oversees implementation of the International Covenant on Economic, Social and Cultural Rights, has confirmed that Article 15(1)(a) covering the right to cultural life implies a positive duty on the state party to protect cultural heritage from theft and deliberate destruction.<sup>72</sup> More recently, the Human Rights Council has emphasised the importance of cultural heritage for the effective enjoyment of cultural rights.<sup>73</sup> Resolution 6/11 of 2007 affirms that 'States bear responsibility for intentional destruction or failure to take appropriate measures to prohibit, prevent, stop and punish any such destruction of cultural heritage of great importance for humanity, to the extent provided for by international law'.<sup>74</sup>

Finally, it is interesting to note that the Barcelona Process has moved beyond enforcement of these bilateral trade agreements and has encouraged a process of regional (South-South) integration between the Mediterranean countries. The Arab-Mediterranean Free Trade Agreement (Agadir Agreement) between Egypt, Jordan, Morocco and Tunisia; and bilateral agreements between Turkey and Morocco and Tunisia and between Israel and Jordan are included in these efforts.<sup>75</sup>

#### **4. Conclusion**

The European Community and its Member States acting in unison in controlling the illicit traffic of cultural objects is an advantageous step for all countries in the Mediterranean region. Internally, the European Union must balance a diversity of interests in this field including member states hosting art

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<sup>69</sup> See Council Regulation No.3911/92 on the export of cultural goods to third countries, OJ [1992] L 395/1; and Council Directive 93/7/EEC on the return of unlawfully removed cultural objects, OJ [1993] L74/74; Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001 amending Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State [2001] OJ L 187/43; Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 21 December 2005, 'Second report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State', COM(2005) 675 final; and Report from the Commission to the Council, the European Parliament and the Economic and Social Committee of 25 May 2000 on the implementation of Council Regulation No 3911/92 on the export of cultural goods, and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, COM (2000) 325.

<sup>70</sup> Third preambular recital, EMAA with Egypt, n.69.

<sup>71</sup> Euro-Med Association Agreements, Implementation Guide, Relex F, Brussels, 30 July 2004, p.2.

<sup>72</sup> See UN Docs.E/1991/23, para.79; E/1992/23, paras.310, 312; E/1993/22, para.186; and E/1995/22, para.136.

<sup>73</sup> HRC resolution 6/11 of 28 September 2007 entitled 'Protection of cultural heritage as an important component of the promotion and protection of cultural rights'. The resolution was adopted without a vote. The EC had indicated that it would vote against the resolution if put to a vote.

<sup>74</sup> *Ibid.*, para.5.

<sup>75</sup> Montalbano, n.63, p. 45 at p.48.

markets and promoting the liberalisation of the trade in art objects; and those states rich in archaeological sites and historic monuments who seek cooperation in the protection of their cultural heritage. Countries in the Mediterranean region, including EU member states, are all prone to cultural losses occasioned by the illicit trade in cultural objects. So it is significant that there has been some movement towards increasing cooperation from so-called art market states in Europe; with the United Kingdom, Germany and Switzerland recently ratifying the 1970 UNESCO Convention.

There is a multitude of legal frameworks at the international and regional levels for the protection (and restitution) of cultural objects. In addition, multilateral treaties on environmental protection and human rights are also important in this effort. This existing web of legal instruments contains limitations and gaps in controlling the illicit trade in cultural objects removed from the land and seabed. However, ratification of these instruments and enactment and harmonisation of relevant domestic laws by the EC, its member states and Mediterranean countries is an important step towards cooperation in this field until an appropriate specialist framework is adopted.

**Annex 1: Table of Euro-Mediterranean states parties to relevant cultural heritage conventions**

COUNTRY	1954 Hague 1P	1970 UNESCO	1972 WHC	1995 Unidroit	Barcelona Convention	1995 Barc Prot	2001 Underwater	UNCLOS
European Community					16/03/1983	12/04/2002		1/04/1998
Albania	20/12/1960	13/06/2002	10/07/1989		30/05/1990	26/07/2001		23/06/2003
Algeria		24/06/1974	24/06/1974		16/02/1981			11/06/1996
Austria	25/03/1964		18/12/1992					14/07/1995
Belgium	16/09/1960	15/09/1971	24/07/1996					13/11/1998
Bulgaria	9/10/1958	15/09/1971	7/03/1974				6/10/2003	15/05/1996
Croatia	6/07/1992	6/07/1992	6/07/1992	20/09/2000	8/10/1991	12/04/2002	1/12/2004	15/04/1995
Cyprus	9/09/1964	19/10/1979	14/08/1975	2/03/2004	19/11/1979			12/12/1998
Czech Republic	26/03/1993	26/03/1993	26/03/1993					21/06/1996
Denmark	26/03/2003	26/03/1993	25/07/1979					16/11/2004
Egypt	17/08/1955	5/04/1973	7/02/1974		24/08/1978	11/02/2002		26/08/1983
Estonia	17/01/2005	27/10/1995	27/10/1995					26/08/2003
Finland	16/09/1994	14/06/1999	4/03/1987	14/06/1999				21/06/1996
France	7/06/1957	7/01/1997	27/06/1975	(s)	11/03/1978	16/04/2001		11/04/1996
Germany	11/08/1967	30/11/2007	23/08/1976					14/10/1994
Greece	9/02/1981	5/06/1981	17/07/1981	1/01/2008	3/01/1979			21/07/1995
Hungary	16/08/1956	23/10/1978	15/07/1985	8/05/1998				5/02/2002
Ireland			16/09/1991					21/06/1996
Israel			6/10/1999		3/03/1978			
Italy	9/05/1958	2/10/1978	23/06/1978	11/10/1999	3/02/1979	7/09/1999		13/01/1995
Jordan	2/10/1957		5/05/1975					27/11/1995
Latvia	19/12/2003		10/01/1995					23/12/2004
Lebanon	1/06/1960	25/08/1992	3/02/1983		8/11/1977		8/01/2007	5/01/1995
Libyan Arab Jamahiriya	19/11/1957	9/01/1973	13/10/1978		31/01/1979		23/06/2005	
Luxembourg	29/09/1961		28/09/1983					5/10/2000
Malta			14/11/1978		30/12/1977			20/05/1993
Montenegro	26/04/2007	26/04/2007	3/06/2006		(A)19/11/07	19/11/2007	18/07/2008	23/10/2006

Morocco	30/08/1968	3/02/2003	28/10/1975		15/01/1980			31/05/2007
Netherlands	14/10/1958		26/08/1992	(s)				28/06/1996
Poland	6/08/1956	31/01/1974	29/06/1976					13/11/1998
Portugal	18/02/2005	9/12/1985	30/09/1980	19/07/2002			21/09/2006	3/11/1997
Romania	21/03/1958	6/12/1993	16/05/1990	21/01/1998			21/09/2006	17/12/1996
Slovakia	31/03/1958	31/03/1993	31/03/1993	16/06/2003				8/05/1996
Slovenia	5/11/1992	5/11/1992	5/11/1992	8/04/2004	15/03/1994	8/01/2003	18/09/2008	16/06/1995
Spain	26/06/1992	10/01/1986	4/05/1982	21/05/2002	17/12/1976	23/12/1998	6/06/2005	15/01/1997
Syrian Arab Republic	6/03/1958		13/08/1975		26/12/1978	10/10/2003		
Sweden	22/01/1985	13/01/2003	22/01/1985					25/06/1996
Tunisia	28/01/1981		10/03/1975		30/07/1977	1/06/1998	15/01/2009	24/04/1985
Turkey	15/12/1965	21/04/1981	16/03/1983		6/04/1981	18/09/2002		
United Kingdom		1/08/2002	29/05/1984					25/07/1997

**Annex 2: Summary of current Euro-Mediterranean Association Agreements**

COUNTRY	TITLE OF THE AGREEMENT	SIGNED	STATUS	ARTICLE COVERING CULTURAL FIELD
<a href="#">ALGERIA</a> COM (2002) 157 final	Euro-Mediterranean Association Agreement		In process of ratification	Article 77
<a href="#">EGYPT</a> COM (2001) 184 final	Euro-Mediterranean Association Agreement		In force since 1.06.04	Article 71
<a href="#">ISRAEL</a> OJ L 147	Euro-Mediterranean Association Agreement		In force since 1.06.00	Articles 58, 60 and 61
<a href="#">JORDAN</a> OJ L 129/02	Euro-Mediterranean Association Agreement		In force since 01.05.02	Article 85
<a href="#">LEBANON</a> COM (2002) 170 final Association Agreement (April 2002) <a href="#">Council Decision and Official Text</a>  <a href="#">Council Decision Corrigendum</a>  <a href="#">Final Act</a>  Interim Agreement (September 2002) <a href="#">Official Text</a>	Euro-Mediterranean Association Agreement  Interim Agreement for Early implementation of trade measures			Article 67
<a href="#">MOROCCO</a> OJ L 70/00	Euro-Mediterranean Association Agreement		In force since 1.03.00	Article 74
<a href="#">PALESTINIAN AUTHORITY</a> OJ L 187/97	Interim Association Agreement, awaiting a Euro-Mediterranean association agreement	Signed on 24.02.97	In force since 1.07.97	Article 56, 57 and 59
SYRIA (Final text will be soon published on the web)	Euro-Mediterranean Association Agreement		Council to decide on signature.	

TUNISIA OJ L 97/98	Euro-Mediterranean Association Agreement		Entry into force 1.03.98	Article 74
TURKEY OJ L 35/96	Agreement establishing the definite phase of the customs union		In force since 31.12.95	
OJ 217 <a href="#">[fr]</a>	Agreement establishing an Association between the European Economic Community and Turkey	-		

Source: European Commission, External Affairs, The Euro-Mediterranean Partnership, at [http://ec.europa.eu/external\\_relations/euromed/med\\_ass\\_agreements.htm](http://ec.europa.eu/external_relations/euromed/med_ass_agreements.htm) (viewed 14 January 2008).

**Annex 3: Tables showing returned and instances of administrative cooperation between EU Member States 1993-2003**

**List of returns (all amicable settlements outside the legal return procedure)**

<b>Year</b>	<b>Returning State</b>	<b>Requesting State</b>	<b>Object</b>
1993	Italy	Portugal	6 parts of a XV c. wooden altarpiece
1996	Portugal	Spain	3 XVII c oil paintings by Juan de Landa
1996	Italy	Greece	?
1997	Italy	Portugal	6 oil painting include Delacroix and Miguel Angel Lupi
1999	UK (possessor)	Finland	Collection of old medals. Action for return brought before High Court, London, under Art.5 of the Directive but settled before decision by amicable settlement with bona fide possessor.
2000	Netherlands	Austria	Painting
2001	Portugal	Spain	Painting "Romany" of Frederico Madrazo Kuntz
2003	UK	Netherlands	Manuscripts
2003	UK	Portugal	Archive of XVIII c manuscripts
?	UK	Sweden	Books

**Summary of ongoing requests for return**

<b>Year</b>	<b>Returning State</b>	<b>Requesting State</b>	<b>Object/Result</b>
1999	Portugal	Italy	Religious sculpture by Sao Liborio
1999	Spain	Portugal	?
?	Germany	Italy	Ongoing
2002	Netherlands	Italy	Ongoing (armour)

**List of legal return procedures (Art.5 Directive 93/7/EEC)**

Year	Returning State	Requesting State	Object
2002	Greece	Germany	438 antiquities of Greek origin
2003	Greece	Germany	13 antiquities of Greek origin
<b>2003</b>	<b>France</b>	<b>Belgium</b>	<b>Public archives (33,000 documents)</b>

**List of requests for search (Art.4 Directive 93/7/EEC)**

Year	Returning State	Requesting State	Outcome
?	Italy	UK	Object not on the UK customs territory, on Island of Jersey
1999/2000	Italy	Netherlands	Two items. Resolved outside the ambit of the Directive.
2001	Austria	Germany	Latin military diploma. No result for lack of intervention by the authorities.
2003	Netherlands	UK	Due to an agreement between the parties, the objects were returned to the Netherlands without the need to apply the Directive
2003	Germany	UK	Removal from Germany was not unlawful.
2003	Germany	Austria	Degas painting. No result. The painting is not known in Austria
?	Italy	Germany	Ongoing
?	Portugal	Spain	Ongoing

?	Spain	Germany	Painting of Bernardo Belotto. Without success.
?	Greece	Germany	Two items. Securing of the objects
?	Italy	Netherlands	?

**Notification of discoveries (Art.4 Directive 93/7/EEC)**

<b>Year</b>	<b>Returning State</b>	<b>Requesting State</b>	<b>Outcome</b>
?	France	UK	Lawful export under UK law
?	Italy	UK	Unlawful export, but retrospective licences
?	Italy	Greece	Return under the 1970 UNESCO Convention
?	UK	Denmark	Retrospective licence issued by Danish authorities
?	UK	Spain	Unlawful export, but the Spanish authorities did not sue the return procedure
?	UK	Portugal	Portugal did not have enough information to give a view, so no export licence
?	UK	Portugal	No licence required
?	UK	Portugal	No licence required
?	UK	Portugal	No licence required
?	UK	France	Licence issued retrospectively by French authorities
?	UK	France	Licence issued retrospectively by French authorities

?	UK	Italy	Unlawful export, but the Italian authorities did not use the return procedure
1996 (informal) and 1997(formal)	Netherlands	France	Authorities did not use the return procedure
?	Spain	Italy	Ongoing
1999	Austria	Italy	?
1999	Italy	Austria	Gothic reliefs. No result. Origin could not be determined. Item returned to owner.
2001 (1) 2003 (2)	UK (3)	Portugal	In two cases the Portuguese authorities granted retroactive authorisation and the British authorities issues export licences. In the other case, the article has been sent back to Portugal on a voluntary basis following mediation by the British authorities between the holder and Portuguese authorities.
2002	France	Greece	Prohibition of the sale
2003	UK	France	The French authorities have granted retroactive authorisation and the British authorities have issued an export licence.
2003	Germany	Austria	Objects of Greek origin. No result. Restitution abandoned for lack of conditions.

Source: Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 21 December 2005, 'Second report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State', COM(2005) 675 final, pp.1112; and Report from the Commission to the Council, the European Parliament and the Economic and Social Committee of 25 May 2000 on the implementation of Council Regulation No 3911/92 on the export of cultural goods, and Council Directive 93/7/EEC on

the return of cultural objects unlawfully removed from the territory of a Member State, COM (2000) 325, pp.22-23.

## **The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: Main Controversies**

Jeanne-Marie Panayotopoulos\*

### **Abstract**

The protection of the underwater cultural heritage has been a source of considerable interest in recent years, and the need for the elaboration and adoption of a comprehensive international regime had become urgent. This led to the adoption of the Convention on the Protection of the Underwater Cultural Heritage on 2 November 2001 by the 31<sup>st</sup> General Conference of UNESCO, which entered into force three months after the deposit of the twentieth instrument of ratification, acceptance, approval or accession, on 2 January 2009. As yet, among the 24 States having already adhered to it, nine of them are Mediterranean States. Apart from serious hurdles in setting up the definitions of the general principles to be accepted, three other issues – mainly dealing with the delimitation of State jurisdiction in the various maritime zones – were the bones of contention which led to abstentions and negative votes by major maritime States. A thorough analysis of the negotiations' procedures and the resulting rules of the Convention will point out the (still lasting) controversies and their practical consequences.

### **Keywords**

underwater cultural heritage protection - 2001 UNESCO Convention - jurisdiction *ratione loci* – controversies - technical rules - law of the sea convention - law of salvage law of finds

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## **1. Introduction**

As a real hidden museum, endowed with excellent conservation qualities, the sea hosts an unimaginable quantity of archaeological, historical and cultural objects.<sup>1</sup> Underwater cultural heritage consists of all conserved material traces of humanity, i.e. shipwrecks, vessels, buildings, structures and other manmade objects, as well as human remains, as long as they are underwater. Considering the difficulty in accessing these relics, they still hold a great number of the secrets of mankind's history, even though rapidly progressing systematic archaeological exploration has opened a window on this unknown past. Preserving the archaeological sites discovered as sources of knowledge is a challenge if this window is to remain open.<sup>2</sup> While some underwater archaeological sites disappear naturally every year, the real danger for the heritage remaining on the bottom of the seas results from plundering and destruction through the acts of adventurers and speculators acting for profit and disregarding the scientific interests and the practices of modern archaeology. Inevitably this threat raises the issue of the legal framework applicable to the underwater cultural heritage.

The question of the legal status of the underwater cultural heritage involves a combination of elements, at national and international level. At national level, general or specific legislation, such as property law, admiralty law, tax law, environmental protection laws and conflict of law rules<sup>3</sup> must be taken into account. At international level, the legal framework has been the source of considerable interest in recent years, in particular thanks to the negotiations held at UNESCO in view of the finalization of the Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention). The UNESCO Convention, consisting of 35 articles and 36 rules in Annex<sup>4</sup>, was adopted on 2 November 2001 by the 31<sup>st</sup> General Conference of UNESCO, by a vote of 87 in favour, 4 against and 15 abstentions.<sup>5</sup> The UNESCO Convention stipulates its entry into force three months after the deposit of the twentieth instrument of ratification, acceptance, approval or accession.<sup>6</sup> Thus, on 2 January 2009, after the 20<sup>th</sup> State had adhered to it, the UNESCO Convention entered into force. As yet, among the 24 States having already adhered to it,<sup>7</sup> nine of them are Mediterranean States.<sup>8</sup>

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<sup>1</sup> Caflisch L., *La condition des épaves maritimes en droit international public*, in « Droit et Justice », Mélanges en l'honneur de Nicolas Valticos, Paris, Pedone, 1999, p.71

<sup>2</sup> See the Society for Historical Archaeology (SHA) Statement of Principles on the Revised UNESCO Draft Convention [CLT-96/CONF.202/5 Rev.2], unanimously approved on June 28, 2000, <http://www.sha.org/UNESCOd.htm>.

<sup>3</sup> Strati A., *The protection of the underwater cultural heritage in international legal perspective*, in "Archaeological Heritage: Current Trends in its Legal Protection" - International Conference, Athens, 26-27 November 1992, Institute of Hellenic Constitutional History and Constitutional Law, ed. P. Sakkoulas Bros., Athens, 1995, p. 143.

<sup>4</sup> "Rules concerning activities directed at the underwater cultural heritage".

<sup>5</sup> Abstained : Brazil, Colombia, the Czech Republic, France, Greece, Germany, Guinea-Bissau, Iceland, Israel, the Netherlands, Paraguay, Sweden, Switzerland, the United Kingdom, Uruguay ; Voted against : The Russian Federation, Norway, Turkey and Venezuela. The United States of America expressed itself against the Convention, without however to participate to the vote as it was not member of UNESCO at the time.

<sup>6</sup> According to Article 27 UNESCO Convention.

<sup>7</sup> States parties to the UNESCO Convention: Panama, Bulgaria, Croatia, Spain, Libya, Nigeria, Lithuania, Mexico, Paraguay, Portugal, Ecuador, Ukraine, Lebanon, Saint Lucia, Romania, Cambodia, Cuba, Montenegro, Slovenia, Barbados, Tunisia, Grenada, Slovakia and Albania – All of these States had voted in favour of the UNESCO Convention, except for Paraguay which had abstained.

One of the principal motivations for the elaboration and adoption of a comprehensive international regime for the underwater cultural heritage was the need to act urgently and collectively in order to prevent damages caused to underwater cultural heritage by threats appearing through the rapid development of technology during these last thirty years. Indeed underwater activities today reach wider areas and deeper waters, and at the same time are accessible by a larger (mostly untrained) public. Unfortunately, one cannot help but notice that these quantitative increases appear to be inversely proportionate to the concern of these persons to act for the real protection of underwater cultural heritage and keeping this heritage safe from mere commercial interests.<sup>9</sup>

Looking into the effects of rapid technological development, it could appear as a 'chance' for the underwater cultural heritage protected through the actual underwater archaeological techniques, but at the same time as a 'threat', since this development removes the naturally granted protection of this heritage by the depths and laws of physics. Besides the traditional activities of exploitation of biological and mineral resources, the irregular activities for excavation and recovery of cultural and archaeological goods contrary to archaeological rules further harm the marine environment. Even in cases where the recovery is centred on commercially less valuable underwater heritage and could thus be considered as less harmful, the archaeologists and experts and, by extension, all of us, are deprived of essential facts and information.

UNESCO's initiative resulting in the Convention is also directly linked to the admission, by the Member-States, of a flagrant insufficiency of the existing rules in this field, as negotiated during the Third United Nations Conference on the Law of the Sea (UNCLOS III) and codified in the United Nations Convention on the Law of the Sea (UNCLOS) in 1982. Although the latter can be considered as an innovative conventional system as regards its rich normative construction regulating the law of the sea, it addresses the question of the underwater cultural heritage in international waters merely in a very brief manner, recognizing its specificity and the essential need to protect it (Articles 149 and 303). Both articles contain vague and ambiguous rules, this insufficiency probably being attributable to the fact that the question of underwater cultural heritage protection was relatively insignificant in comparison to major concerns addressed by UNCLOS III, in particular as regards natural resources.<sup>10</sup>

In view of the weaknesses of the international rules already existing in this field, the international community reacted by initiating negotiations for the adoption of an international *ad hoc* instrument aimed at the protection of the underwater cultural heritage and at filling this "legal lacuna".<sup>11</sup> These negotiations, which began in 1994 within the framework of UNESCO, aimed at

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<sup>8</sup> Mediterranean States parties to the UNESCO Convention: Croatia, Spain, Libya, Portugal, Lebanon, Montenegro, Slovenia, Tunisia and Albania.

<sup>9</sup> Carducci G., *La Convenzione UNESCO sul patrimonio culturale subacqueo*, *Rivista di Diritto Internazionale*, 1/2002, p.54.

<sup>10</sup> For a more detailed explanation of the negotiation process of Articles 149 and 303 UNCLOS see: Strati A., "The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea", 1995, pp. 300 et seq. ; Blake J., *The protection of the underwater cultural heritage*, *International and Comparative Law Quarterly*, Vol. 45, 1996, pp. 819-843 ; Forrest C., *A new international regime for the protection of underwater cultural heritage*, *International and Comparative Law Quarterly*, Vol. 51, 2002, pp. 512-513 ; Migliorino L., *In Situ Protection of the Underwater Cultural Heritage under International Treaties and National Legislation*, *The International Journal of Marine and Coastal Law*, vol. 10, 4, 1995, p. 486.

<sup>11</sup> Boesten E., *Archaeological and/or Historical Valuable Shipwrecks in International Waters, Public International Law and What it Offers*, 2002, p. 1 ; Boesten E., *The UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage*, Professional Shipwreck Explorers Association, 1999, proSEA.org, Introduction.

bringing together and building on the various existing projects and thoughts on a codification of the law to be applicable to underwater cultural heritage.

Precursory drafts were prepared in 1977, after a growing frustration of some States with the slow progression of UNCLOS III and the quasi-total omission of the issue of underwater archaeology during the negotiations for an international convention on the law of the sea. These States then appealed to the Parliamentary Assembly of the Council of Europe to establish a report on the protection of underwater cultural heritage at a European level.

In the wake of this report<sup>12</sup>, in 1978, the Parliamentary Assembly of the Council of Europe adopted Recommendation 848 on underwater cultural heritage, drafted by the Committee on Culture, Science and Education. This recommendation strongly urged the member-States to revise, where necessary, their pre-existing laws in order to respect the minimal legal obligations provided in the Annex of this recommendation<sup>13</sup>. It also requested the Committee of Ministers to draft a European convention on the protection of underwater cultural heritage. The project of a European convention on the underwater cultural heritage of the Council of Europe, which emerged in 1985, was never adopted due to Turkey's strong opposition concerning the territorial application.<sup>14</sup>

In 1993, the Director General of UNESCO undertook a new preliminary study on the possibility of adopting a new international convention on the matter<sup>15</sup>. Taking note of the rigorous work done by the Cultural Heritage Law Committee of the International Law Association (ILA) in drafting a Project for a Convention on the underwater cultural heritage, the Director General decided to wait for the ILA to finish its project of convention<sup>16</sup> before presenting his feasibility

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<sup>12</sup> Report of the Committee on culture and education of the Parliamentary Assembly of the Council of Europe on underwater cultural heritage (the so-called "Roper-Report"), Rapporteur: M. Roper ; Rau M., *Kulturgüterschutz im Meer: eine erste Analyse der neuen UNESCO-Konvention*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 61, 2001, p. 838.

<sup>13</sup> The minimal legal obligations provided mainly that all objects situated beneath water and at least 100 years old should be protected, that law of salvage would not be applicable on these objects, but that a fixed financial compensation should be determined for the finders, and that national jurisdiction should extend to a 200 nautical mile limit in order to control activities threatening underwater cultural heritage ("cultural heritage zone") ; Dromgoole S., Gaskell N., *Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998*, The International Journal of Marine and Coastal Law, Vol. 14, N°2, 1999, p.172.

<sup>14</sup> The draft proposed to extend jurisdiction for the removal of cultural objects to the contiguous zone ; Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, in "Unresolved Issues and New Challenges to the Law of the Sea – Time Before and Time After", eds. A. Strati-M. Gavouneli-N. Skourtos, Martinus Nijhoff Publishers, 2006, p. 22 ; Forrest C., A new international regime for the protection of underwater cultural heritage, op. cit., p.514; Rau M., *Kulturgüterschutz im Meer: eine erste Analyse der neuen UNESCO-Konvention*, op. cit. p. 839.

<sup>15</sup> UNESCO Resolution, 26 March 1993.

<sup>16</sup> In 1988, when the ILA established the Cultural Heritage Law Committee in charge to draft a convention project, its first task was to evaluate the pre-existing rules for the protection of underwater cultural heritage in high seas (i.e. "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 UNCLOS). The ILA soon concluded to the necessity of a new convention in order to overcome the apparent difficulties raised by the provisions of the UNCLOS. After a long preparation period, this Committee presented a draft convention on the underwater cultural heritage protection. The drafters of the ILA project deemed Article 303 par. 4 UNCLOS – which stipulates that "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" – a legitimate basis for the establishment of a new convention, and considered that such initiative would allow the States to respect their obligations of Article 303 par. 1 of UNCLOS which states that "States have the duty to protect objects of an

study to the Executive Board of UNESCO.

At the ILA, the final project of the convention was adopted in 1994, during the 66<sup>th</sup> Conference held in Buenos Aires (ILA Draft). The ILA Committee's approach consisted of three specific strategies.<sup>17</sup> First, in order to avoid problems relating to rules of private ownership, the Committee chose to protect underwater cultural heritage which had been submerged for at least 100 years and which had been abandoned by its owners. Secondly, the protection regime was mainly left to the discretion of the coastal states and their jurisdiction was extended to an area of up to 200 nautical miles from the baseline, thus granting the possibility for each coastal state to create at their discretion "cultural heritage zones" in which they would have jurisdiction over activities affecting the underwater relics<sup>18</sup>. Finally, in this project, salvage law, which by Article 303 par. 3 UNCLOS<sup>19</sup> was still applicable for marine archaeology where there is freedom of the high-seas, was declared inapplicable.<sup>20</sup> The ILA Draft also contained, in an Annex, the project for a Charter on the Protection and Management of Underwater Cultural Heritage drafted by the International Council of Monuments and Sites (ICOMOS). This Charter, which was finally ratified by the ICOMOS in 1996, sets a number of benchmark standards for the practice of underwater archaeology.

A number of States considered UNESCO as the most appropriate forum to adopt a multilateral convention on underwater cultural heritage, and though they considered the ILA Draft as a very useful basis, the governmental experts concluded that further elaboration on certain crucial questions was still needed.<sup>21</sup> In 1996, a meeting of governmental experts was organised<sup>22</sup>, which unanimously agreed to proceed with the drafting of a convention under the auspices of UNESCO and in collaboration with the Division for Ocean Affairs and the Law of the Sea (DOALAS) of the United Nations Organisation (UNO) and of the International Maritime Organisation. The experts would use the ILA Draft of 1994 and the Council of Europe draft convention as foundations of their further work.<sup>23</sup> Thus, a more technical and legal approach replaced the highly politically connoted preparatory process of the UNCLOS<sup>24</sup>, without however excluding the presence of political issues from the negotiations. Support by all States for the drafting of a convention on the protection of underwater cultural heritage was far from certain<sup>25</sup>, and the forum

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archaeological and historical nature found at sea and shall co-operate for this purpose".

<sup>17</sup> Forrest C., A new international regime for the protection of underwater cultural heritage, op. cit., p.515.

<sup>18</sup> Article 5 par.1 of the ILA Draft – Similar to the proposal Greece had already formulated during the UNCLOS III negotiations.

<sup>19</sup> Article 303 par.3 reads: "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".

<sup>20</sup> O'Keefe P. J., Nafziger J.A.R., *Report – The Draft Convention on the protection of the Underwater Cultural Heritage*, Ocean Development and International Law, Vol. 25, 1994, p. 406 ; Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, op. cit., p. 37.

<sup>21</sup> According to J. Allain, the ILA Draft "does not take into full account the 'package deal' " established by UNCLOS III and "seems to undermine the interests of certain states as conceived in the Law of the Sea Convention" – Allain J., *Maritime Wrecks: Where the Lex Ferenda of Underwater Cultural Heritage Collides with the Lex Lata of the Law of the Sea Convention*, Virginia Journal of International Law, Vol. 38, 1998, p.748.

<sup>22</sup> Governmental experts meeting, 22-24 May 1996, in Paris.

<sup>23</sup> Rau M., *Kulturgüterschutz im Meer: eine erste Analyse der neuen UNESCO-Konvention*, op. cit. p. 839.

<sup>24</sup> Savadogo L., *La Convention sur la protection du patrimoine culturel subaquatique (2 novembre 2001)*, Revue Générale de Droit International Public, 2003/1, p. 34.

<sup>25</sup> Norway, for example, which expressed the greatest opposition during the second experts meeting, contested the

in which its elaboration would take place as well as the form this text would take still remained blurred.<sup>26</sup> The Director General of UNESCO presented a first draft in 1998.<sup>27</sup> After a second meeting in 1999, the negotiating parties agreed to present the final draft at the 31<sup>st</sup> General Conference of UNESCO in 2001 in order to find equilibrium between the opposed stakes of protection and exploitation.<sup>28</sup> The fundamental principles negotiated were the States' obligations to protect underwater cultural heritage in the various maritime zones and to cooperate for the achievement of this task, this being done for the benefit of mankind.<sup>29</sup>

In the final version of the UNESCO Convention, adopted in 2001, the widely used term "underwater cultural heritage"<sup>30</sup> presents considerable uncertainties, in particular as to whether objects, sites or other entities qualify as "cultural heritage".<sup>31</sup> Article 1 par. 1 a) of the UNESCO

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project as a whole, claiming its preference to see the issue of underwater cultural heritage protection regulated by national laws and by the General Assembly of the UNO, Nafziger J.A.R., *Historic Salvage Law Revisited*, Ocean Development and International Law, Vol. 31, 2000, p. 88.

<sup>26</sup> An initial debate arose concerning the choice of UNESCO as the adequate forum for negotiations and the possibility to enter into conflict with other fora or international instruments, liable to interfere in the UNESCO field of action. The intended convention being a project integrating three different spheres of legal regulation, and though UNESCO's mandate applied only to one of them, i.e. culture, the choice of UNESCO was finally made, Forrest C., A new international regime for the protection of underwater cultural heritage, op. cit., p. 517 ; An opposition between "culturalists" and "maritimists" arose. The culturalists, emphasising on the cultural aspect of underwater cultural heritage, considered the drafting of such a large convention in the framework of UNESCO as a great step forward. The maritimists held that the appropriate authority for the drafting of a convention exclusively dedicated to the discoveries at sea should be the UNO, which had already drafted the UNCLOS, and nor did UNESCO have the expertise, nor the means and funds necessary for such an objective. It was, finally, a battle without winners, as the "culturalists" imposed the UNESCO framework and the "maritimists" gained in imposing the adoption of the legal categories of the UNCLOS, Cassan H., *Le patrimoine culturel subaquatique ou la dialectique de l'objet et du lieu*, in « La Mer et son Droit », Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec, Paris, 2003, p. 128 ; Moreover, the parties at the negotiations considered the legal nature of the final text differently. For some States, it should become an agreement similar to the 1995 Agreement for the Implementation of the Provisions of UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, the final text being thus considered as implementing Articles 149 and 303 UNCLOS of which it would be entirely dependent: Declaration by the representative of Norway M. Kolby at the General Assembly : « [...] The Convention is the legal framework within which all activities related to the oceans must be considered. », Debate on the Convention on the Protection of Underwater Cultural Heritage, Selected Documents, Assemblée générale de l'ONU, Environmental Policy and Law, June 2002, pp. 185 ; Following the strong opposition by States not parties to UNCLOS (as, e.g. Turkey), as well as noting the difficulties which would arise by the adoption of an UNCLOS "implementation agreement" – in the strict sense – by UNESCO, this idea was finally abandoned, Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, Max Planck Yearbook of United Nations Law, Volume 6, 2002, p. 447.

<sup>27</sup> Governmental Experts Meeting, Paris, 29 June-2 July 1998.

<sup>28</sup> Johnson C., *For Keeping or for Keeps? An Australian Perspective on Challenges Facing the Development of a Regime for the Protection of Underwater Cultural Heritage*, Melbourne Journal of International Law, Vol.1, 2000, p. 20.

<sup>29</sup> Boesten E., The UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage, op. cit., Conclusion ; C. FORREST, A new international regime for the protection of underwater cultural heritage, op. cit., p. 514.

<sup>30</sup> On a conceptual, structural and legal analysis of the definition see: Prött, L.V., *The definition of the Archaeological heritage*, in "Archaeological Heritage: Current Trends in its Legal Protection"-International Conference, Athens, 26-27 November 1992, Institute of Hellenic Constitutional History and Constitutional Law, ed. P. Sakkoulas Bros., Athens, 1995, pp. 9-26.

<sup>31</sup> According to C. Forrest, the formulation of "underwater cultural heritage" encompasses necessarily a subjective character - *A new international regime for the protection of underwater cultural heritage*, op. cit., p. 523.

Convention describes the underwater cultural heritage as “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”. Thus, to be included into the UNESCO Convention *ratione materiae*, the objects found must constitute “traces of human existence”.<sup>32</sup> This formula was chosen in opposition to the simple and –rather vague- term “objects”, which had been introduced into Articles 149 and 303 par. 1 UNCLOS<sup>33</sup>. The term “object” had often been criticized in the past, as it implied that Articles 149 and 303 only covered single objects and not archaeological sites as a whole, thereby creating uncertainty as to the protection of the material context around the objects.<sup>34</sup>

The UNESCO Convention was willing to cover cultural heritage sites, i.e. the entire environment surrounding the underwater cultural heritage found, as is apparent from the mention of the “archaeological and natural context” twice in Article 1 par. 1 a). Furthermore, this Article includes a list of cultural heritage<sup>35</sup>, which however, is not meant to be exhaustive.<sup>36</sup> Moreover, the term “traces of human existence” should not be read to imply that the objects for protection must have been created by man, rather they shall be proof or signs of past human presence. This large definition is also confirmed by the inclusion, in Article 1 par. 1 a) of terms such as “human remains” and “natural context” without depriving the underwater heritage from its “cultural” dimension.<sup>37</sup>

Finally, the expression retained in Article 1 does not include sites, which, while not necessarily manmade, have an important spiritual character for certain people, the only reference being the inclusion in Rule 5 of the Annex to the UNESCO Convention of “venerated sites” stipulating that “activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites”.

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<sup>32</sup> This formula had already been introduced into Article 1 par. 1 of the Draft European Convention on the protection of the underwater cultural heritage and in the ILA Draft ; O’Keefe P. J., Nafziger J.A.R., *Report – The Draft Convention on the protection of the Underwater Cultural Heritage*, *op. cit.*, pp. 405-406.

<sup>33</sup> Articles 149 and 303 are headed : “Archaeological and historical objects” and “Archaeological and historical objects found at sea”.

<sup>34</sup> O’Keefe P. J., Nafziger J.A.R., *Report – The Draft Convention on the protection of the Underwater Cultural Heritage*, *op. cit.*, p. 406 ; Rau M., *Kulturgüterschutz im Meer: eine erste Analyse der neuen UNESCO-Konvention*, *op. cit.*, p. 841.

<sup>35</sup> Article 1 par. 1 (a) UNESCO Convention: “such as (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any other part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character”.

<sup>36</sup> The “such as” rather points out the elements most probably found underwater, without defining them though.

<sup>37</sup> Dromgoole S., Gaskell N., *Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998*, *op. cit.* pp.195-196 ; It should therefore not simply be a “natural site”, as some proposals in this direction had been made by some experts and observers at the governmental experts meeting in 1996 ; The proposals made by some delegations to extend the definition so as to include sites and landscapes with great importance for the understanding of our history – such as the Battle of Salamis (480 a. D.) and the Titanic wreck site (Proposition put forward by South Korea, Tunisia and Venezuela, Dromgoole S., Gaskell N., *Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998*, *op. cit.* , p. 196) – or to protect sites with special spiritual character were not kept in the final text (This idea was inspired by the Australian delegation for the Aborigines of Oceania revering underwater sites which where on the surface thousands of years ago. This position is also reinforced by the national laws including natural sites in the protection sphere. E.g., the National Historic Preservation Act of the United States of America of 1966, includes not only wrecks, but also other submerged (cultural) elements such as natural sites revered by the Paleo-Indian civilizations of more than 10 000 years ago.

During negotiations, the delegations could not reach agreement on a more precise definition of the “traces of human existence”<sup>38</sup> and finally agreed to include traces of human existence “having a cultural, historical or archaeological character”, these adjectives being taken from Article 149 and 303 par. 1 UNCLOS.<sup>39</sup>

Concerning the time criterion, national legislation contains various definitions of, and time-limits for, the age which an object must have in order to qualify for archaeological protection. In general, most national laws provide for a period from 100 to 200 years underwater<sup>40</sup>.

The UNCLOS does not mention any minimum age in order for an object to qualify as “archaeological” or “historical” pursuant to Articles 149 and 303 par. 1, in spite of some attempts to that effect during UNCLOS III.<sup>41</sup> Such an age limit appears however in Article 1 par. 2 of the Draft European Convention on the protection of underwater cultural heritage, providing that objects should be at least 100 years old in order to qualify for protection.<sup>42</sup>

The UNESCO Convention does not take up this age-limit but rather states that the objects to be protected must have been “partially or totally under water, periodically or continuously, for at least 100 years” and not only be at least 100 years old or totally immersed for this period. Indeed, this condition is useful in distinguishing the scope of application of heritage legislation from that of salvage law.<sup>43</sup> On the other hand, paradoxically, this definition could exclude from protection cultural objects having sunk only recently, such as ancient statues (more than 100 years old).<sup>44</sup>

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<sup>38</sup> Some delegations considered that the 100-years period was enough for entering the protection scope of the UNESCO Convention (proposal of Argentina, Australia, Poland and South Africa during the fourth governmental experts meeting in March 2001) and other delegations insisted upon giving a more precise content to this expression in order to avoid the inclusion of any object, including waste, having been underwater for more than 100 years (position of Germany, Finland, Greece, the United-Kingdom, Iran, Italy and the Russian Federation).

<sup>39</sup> However, scholars soon criticized the adjectives “archaeological” and “historical” to be confusing, to create an unfounded opposition between what is “historical” and what is “archaeological” and to be a redundant, unnecessary addition, as the same legal regime applies to heritage as well of historical, as of archaeological character ; Rau M., *Kulturgüterschutz im Meer: eine erste Analyse der neuen UNESCO-Konvention*, op. cit., pp. 844-845; Carducci G., *La Convenzione UNESCO sul patrimonio culturale subacqueo*, op. cit., p. 65 ; Carducci G., *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, AJIL, 2/2002, p. 423. The proposal made in 1999 by the United-States of America and the United-Kingdom to introduce a “significance test” for the determination of underwater cultural heritage was rejected by Portugal, Argentina, Greece and Colombia, Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, op.cit., 2006, p. 41.

<sup>40</sup> Strati A., “The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea”, op. cit., pp. 178-179 ; Strati A., *Greece*, in “Legal Protection of the underwater cultural heritage – National and International Perspectives”, ed. S. Dromgoole, The Hague, 1999, pp.69-71; Greece qualifies as its underwater cultural heritage all elements dated until 1453, the objects dating from 1453 to 1830 are entering in this category only if the Archaeological Council recommends in this sense.

<sup>41</sup> Rau M., *Kulturgüterschutz im Meer: eine erste Analyse der neuen UNESCO-Konvention*, op. cit., p. 844

<sup>42</sup> Article 1 par. 2 of the Draft European Convention reads : « Underwater cultural property being at least 100 years old shall enjoy the protection provided by this Convention. However, any contracting State may provide that such property which is less than 100 years old shall enjoy the same protection ».

<sup>43</sup> Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, op. cit., 2006, p. 42.

<sup>44</sup> The major problem appearing when reading this provision is the determination of the 100 years. One can indeed ask whether time should be counted up to the moment of discovery or whether it should be wiser to start counting the 100 years when activities are started on this cultural heritage. Some scholars defend this second view as, first, the aim of the UNESCO Convention is to encourage *in situ* protection, and, secondly, this counting method would allow to include a greater number of objects into the protection scheme ; Forrest C., *A new international regime for*

However, this time-limit can also be interpreted as granting major flexibility, as an object which does not fall into the definition of underwater cultural heritage today, could be included and protected tomorrow, the advantage being that the aimed protection of the UNESCO Convention will not fade away with time, but rather include the objects which will be the historical heritage of future generations.<sup>45</sup>

Further than limiting the scope of application through the definition of the underwater cultural heritage, the UNESCO Convention confines its scope by excluding, in Article 1 par. 1 (b), “Pipelines and cables placed on the seabed” and, in Article 1 par. 1 (c) “installations other than pipelines and cables, placed on the seabed and still in use”.<sup>46</sup>

The negotiating parties met with some difficulties to agree on numerous fields. Some of them however draw major attention and were fervently debated. After serious hurdles in setting up the definitions of the general principles to be unanimously accepted, three other issues, which nourished the debates during (and after) the negotiations for the establishment of the UNESCO Convention, were the bones of contention which led to abstentions and negative votes at the 31<sup>st</sup> UNESCO General Conference.

## 2. The international legal basis for the UNESCO Convention : Articles 149 and 303 of the UNCLOS

As has been mentioned before, during the UNCLOS III, underwater archaeology was not considered an area which merited debate. It is rather when discussing the regimes of the areas beyond national jurisdiction that Greece introduced the idea to regulate the protection of objects with archaeological and historical value which could be accidentally found in these zones.<sup>47</sup> Initially, the debates on the archaeological question remained limited to elements discovered on the seabed beyond the zones under national jurisdiction and this is how Article 149, dealing with archaeological and historical objects found in the Area – i.e. “*the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction*”<sup>48</sup> –, came to into being.<sup>49</sup>

In 1979, in the 2<sup>nd</sup> Committee of UNCLOS III, various proposals supported the inclusion of provisions defining the legal status of the archaeological or historical objects found on the

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*the protection of underwater cultural heritage, op. cit.*, p. 524 ; Fletcher-Tomenius P., Forrest C., *The Protection of the Underwater Cultural Heritage and the Challenge of UNCLOS*, Art Antiquity and Law, Vol. 5, 2/2000, pp. 131-132 ; Rau M., *Kulturgüterschutz im Meer: eine erste Analyse der neuen UNESCO-Konvention, op. cit.*, p. 845.

<sup>45</sup> Boesten E., « Archaeological and/or Historical Valuable Shipwrecks in International Waters, Public International Law and What it Offers », *op. cit.*, pp. 137-138 ; Rau M., *Kulturgüterschutz im Meer: eine erste Analyse der neuen UNESCO-Konvention, op. cit.*, p. 846, note 67 ; Fletcher-Tomenius P., Forrest C., *The Protection of the Underwater Cultural Heritage and the Challenge of UNCLOS, op. cit.*, p.133.

<sup>46</sup> These provisions aim at respecting a set of freedoms for the States parties, laid down in various articles of UNCLOS, such as Articles 51, 58 §1, 79, 87 §1 c) and 112 to 115 ; the major difference between the pipelines and cables, and the “other installations” being that the first are totally excluded of the scope of application of the UNESCO Convention, while the latter seem to possibly be included into it once they will not have been “in use” anymore and underwater for 100 years.

<sup>47</sup> Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *op.cit.*, 2006, p. 28.

<sup>48</sup> Article 1 par. 1(1) UNCLOS.

<sup>49</sup> Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *ibid.*, 2006, p. 28.

continental shelf or on the seabed of the exclusive economic zone (EEZ).<sup>50</sup> When a general protection obligation of these objects, wherever found, was proposed, the debate was brought to UNCLOS III which decided to include article 303 among the general provisions of the Law of the Sea Convention.<sup>51</sup>

#### **A. Article 149 UNCLOS**

The debate concerning archaeological objects found on the seabed of the Area began in 1971, with a first proposal by Greece<sup>52</sup> within the framework of the UN Committee entrusted with the preparation of UNCLOS III – the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction (The Seabed Committee).<sup>53</sup> All proposals put forward the designation of the Seabed Authority as the competent international organ to deal with archaeological treasures and to consider the rights of the States of origin.<sup>54</sup>

While the first substantive sessions of UNCLOS III did not greatly alter the proposal of Sub-Committee I of the Seabed Committee, the text was totally modified during the New York session of 1976, and the role of the Authority disappeared.<sup>55</sup>

Article 149 is a *lex specialis*, concerning the ‘Area’, and linked to the famous concept of “common heritage of mankind” including all mineral solid, liquid or gas resources it contains in situ (Article 136 UNCLOS). It 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*”. Though the direct reference to mankind gives this provision an apparent legitimacy and normative potential, it seems however of very little significance and of low protection capacity at the practical level concerning the goods entering into its scope of application. It thus became a vague and ambiguous provision, without real practical power to ensure protection of the cultural heritage in the Area, as the article does not indicate the responsible organisation, the means, the place, the funding for the preservation, nor does it impose a duty to report accidental discovery, or define the States’ preferential rights it establishes.<sup>56</sup>

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<sup>50</sup> Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *ibid.*, 2006, p. 28.

<sup>51</sup> Strati A., « The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea », *op. cit.*, p. 106.

<sup>52</sup> As Ambassador Rallis points out in the Explanation of vote for Greece on the ratification of the UNESCO Convention, at the 31<sup>st</sup> session of the General Conference, 3 November 2001, in *Records of the General Conference – Proceedings – Vol.2*, Paris, 2001, p. 568 ; and a Turkish counterproposal soon followed ; Strati A., *Deep Seabed Cultural Property and the Common Heritage of Mankind*, *International Comparative Law Quarterly* 40, 1991, pp.874-875 ; Sohn L.B., *The Greek Contribution to the Development of the International Law of the Sea*, *ibid.*, p. 5.

<sup>53</sup> Sohn L.B., *The Greek Contribution to the Development of the International Law of the Sea*, in “Greece and the Law of the Sea”, ed. Th.C. Kariotis, Kluwer Law International, 1997, p. 5.

<sup>54</sup> Rau M., “The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea”, *op. cit.*, p. 398 ; For a detailed explanation of the various Greek and Turkish Proposals, see: Strati A., *Deep Seabed Cultural Property and the Common Heritage of Mankind*, *ibid.*, p.875 et seq.

<sup>55</sup> [http://www.un.org/Depts/los/convention\\_agreements/texts/acte\\_final\\_fr.pdf](http://www.un.org/Depts/los/convention_agreements/texts/acte_final_fr.pdf) ; Strati A., *Deep Seabed Cultural Property and the Common Heritage of Mankind*, *ibid.*, pp.876-877.

<sup>56</sup> Sioussiouras P., *The contiguous zone as a mechanism for protecting the underwater cultural heritage*, in “Unresolved Issues and New Challenges to the Law of the Sea – Time Before and Time After”, ed. A. Strati -M.

## B. Article 303 UNCLOS

The discussions having led to the adoption of Article 303 UNCLOS already started in 1977 with a further proposal of Greece, during the first part of the 8<sup>th</sup> session of UNCLOS III, aimed at filling the regulatory gap between the outer boundary of the territorial sea and the seabed starting at the outer limit of the continental shelf<sup>57</sup>, through the inclusion of a provision dedicated to archaeological objects found on the seabed of the EEZ or the continental shelf.<sup>58</sup> This was followed by a series of new versions of provisions concerning underwater antiquities proposed by Greece, Italy, Malta, Portugal, Tunisia, Yugoslavia and Cape Verde and providing for total “sovereign rights” exercised by the coastal State in the continental shelf concerning objects of a “purely archaeological or historical nature”.<sup>59</sup> Some States however rejected this text, fearing that this formulation could present an alibi for modification of the existing regime and of the rights granted to the coastal state in the continental shelf. After a number of negotiations between the United States of America and Greece – followed by other States<sup>60</sup> –, a compromise agreement resulted in the final version of Article 303.

Article 303 can be divided into two analytical parts. First, Article 303 par.2, also a *lex specialis*, is applicable to underwater cultural heritage situated in a zone extending up to 24 nautical miles which is also called “archaeological zone”. According to paragraph 2, “in order to control traffic in 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”.<sup>61</sup> Though the coastal State is granted some control and protection power of underwater cultural heritage in its contiguous zone, a major debate arose on the significance of this provision for the rights and obligations of the coastal State. On one hand, this provision is considered as a mere “*fictio iuris*”<sup>62</sup>, assimilating the archaeological and historical objects as falling under the customs and fiscal regulation of the coastal State without, however, attributing full legislative jurisdiction

(Contd.) \_\_\_\_\_

Gavouneli -N. Skourtos, Martinus Nijhoff Publishers, 2006, p. 68 ; Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention, ibid.*, 2006, p. 33.

<sup>57</sup> Ambassador Rallis – Explanation of vote for Greece on the adoption of the UNESCO Convention, General Conference of UNESCO, 31<sup>st</sup> session, 3 November 2001, *op. cit.*, p. 568 ; Sohn L.B., *The Greek Contribution to the Development of the International Law of the Sea, op. cit.*, p. 10 ; Sioussiouras P., *The contiguous zone as a mechanism for protecting the underwater cultural heritage, ibid.*, p. 68.

<sup>58</sup> Strati A., « The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea », *op. cit.*, p. 162-163.

<sup>59</sup> Scovazzi T., *Convention on the Protection of Underwater Cultural Heritage, op. cit.*, p.157 ; Sioussiouras P., *The contiguous zone as a mechanism for protecting the underwater cultural heritage, op. cit.*, pp. 68-69.

<sup>60</sup> Sohn L.B., *The Greek Contribution to the Development of the International Law of the Sea, op. cit.*, pp. 12-15.

<sup>61</sup> Article 33 UNCLOS concerning the conditions of establishment of a contiguous zone reads : “1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”

<sup>62</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea, Max Planck Yearbook of United Nations Law, Vol. 6, 2002, p. 399 ; Strati A., Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention, op. cit.*, p. 30.

to this State in relation to the heritage found in this zone.<sup>63</sup> On the other hand, the provision is interpreted as granting the coastal State the exclusive right to regulate the removal of cultural relics and their protection in its contiguous zone, and failure to respect this right would be considered as a violation of the law of the coastal State.<sup>64</sup> A careful reading of Article 303 par. 2 suggests that the second approach should be preferred as it is left to the discretion of the coastal State to appreciate the legality of any removal of underwater cultural heritage.

Secondly, the first paragraph of Article 303 UNCLOS stresses that the “States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose”. This rule is a *lex generalis*, stating in a general way the rules *ratione loci et materiae* for the goods and areas under the 1982 Convention.

Various structural observations can be made about these provisions. First, the general obligation of the States-Parties to protect underwater cultural heritage is *sui generis*. Thus the obligation remains vague and can be interpreted in ways resulting in various solutions concerning the determination of the minimum protection level beyond which a State would break its international commitments. Such a norm of minimal conformity should at least contain an obligation of non-deterioration and of non-destruction of underwater cultural heritage, i.e. an obligation of diligence – or means – in the well-known sense of public international law. Moreover, the articles analysed do not protect underwater cultural heritage located beyond the 24-nautical mile limit, thus abandoning it to flag-State jurisdiction.<sup>65</sup>

Furthermore, these provisions do not define their scope *ratione materiae*, i.e. the objects they deal with, leading to a risk of lack of uniform application, also in view of successive international conventions linked to the topic such as the 1970 UNESCO Convention on the Means of Protecting the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage, the 1989 International Convention on Salvage<sup>66</sup>, and the 1992 revised European Convention on the Protection of the Archaeological Heritage.<sup>67</sup>

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<sup>63</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, *ibid.*, p. 399 ; Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *ibid.*, p. 29.

<sup>64</sup> Strati A., “The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea”, *op. cit.*, p.168.

<sup>65</sup> Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *ibid.*, 2006, p. 34.

<sup>66</sup> The diplomatic Conference on salvage law of the International Maritime Organisation which drafted the International Convention on Salvage adopted in 1989 first considered to include provisions on underwater cultural heritage. However, they were excluded after strong reactions of France and Spain who refused to consider cultural or historical shipwrecks as falling under salvage law.

<sup>67</sup> Be also mentioned the 1995 Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean of UNEP, the 2001 International Maritime Organisation Guidelines for the Identification and Designation of Particularly Sensitive Areas and the 2007 International Convention on Removal of Wrecks of the IMO; Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *op.cit.*, pp. 25-27.

### 3. Law of salvage and Law of finds in a legal instrument deemed to become universal

#### A. Definitions

Before the UNESCO Convention, no satisfactory answers were given to the matter of adequate preservation of underwater cultural heritage during wreck recovery.

According to the law of finds, a person having found a long lost or abandoned shipwreck in navigable waters becomes its owner if these objects never belonged to anyone or if they have been abandoned for a very long period of time<sup>68</sup> (*res nullius*). The U.S. Courts apply the Law of finds in cases concerning old shipwrecks for which it is sure that no owner will claim them according to the rule of *animus revertendi* known in common law systems.<sup>69</sup>

“Salvage” is a twofold term. It may be defined as “*the compensation allowed to persons by whose voluntary assistance, a ship at sea or her cargo, or both have been saved in whole or in part from impending sea peril; or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict or recapture*”.<sup>70</sup> On one hand it expresses the act of assistance at sea, and on the other, it stands for the compensation given for such an act.<sup>71</sup> In particular, salvage law is invoked when a person has voluntarily – i.e. without any contractual pre-existing obligation or other – preserved or contributed to the preservation of a shipwreck, a cargo, or any other object in danger. The marine peril condition is thus fundamental in order to apply the law of salvage. The real aim of this right is to ensure the compensation of the salvors in order to encourage them to voluntarily save lives and property at sea and to return the objects to their owner.<sup>72</sup> Never was the protection of the underwater cultural heritage an objective of the law of salvage.

In UNCLOS, Article 303 par.3 states that “*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*”. Thus, according to this article, certain areas of law – and in particular salvage law – are not put aside by the UNCLOS provisions on underwater cultural heritage protection.

As UNCLOS does not further elaborate or define the significance of “law of salvage or other rules of admiralty”, the question on whether this law should apply to cultural heritage depends on the interpretation made of the expression: “state of marine peril”. A broad definition of the term would allow “salvors” to justify their actions by arguing the existence of a danger of loss of economic value. On the other hand, a narrow definition would exclude the possibility of invoking the law of salvage when marine archaeological objects are at stake. According to the 1989 International Convention on Salvage, the law of salvage is applicable if a ship or objects of some value in navigable waters are in a state of danger, i.e. if

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<sup>68</sup> Sohn L.B., *The Greek Contribution to the Development of the International Law of the Sea*, op. cit., p. 11.

<sup>69</sup> Strati A., “The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea”, *op. cit.*, p. 45.

<sup>70</sup> Forrest C., *A new international regime for the protection of underwater cultural heritage*, ICLQ Vol. 51, 2002, p.534.

<sup>71</sup> Salvage law evolved from Roman law stating that the owner of an object grants compensation to those who voluntarily preserved, protected and improved his property – Strati A., “The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea”, *op. cit.*, p. 43.

<sup>72</sup> Forrest C., *A new international regime for the protection of underwater cultural heritage*, op. cit., p.534.

they are in distress or abandoned and thereby expose other ships or surrounding land to some danger. In this sense, salvage law and the protection of underwater cultural heritage appear to be totally distinguishable. This separation is confirmed by Article 30 par. 1 of the International Convention on Salvage, which gives the States the possibility of expressing a general reserve to the application of the Convention's provisions "when the property involved is maritime cultural property of prehistoric, archaeological or historical interest and is situated on the seabed".<sup>73</sup>

This lack of coordination between the two sets of rules is highly regrettable, as the salvage of a ship or an object of high value, or the recovery of wrecks in line with the law of finds aim at economic and commercial profit without taking the principles of underwater cultural heritage protection into account.<sup>74</sup>

### **B. Underwater cultural heritage put out of reach of the laws of salvage and finds**

Considering the different aims of the laws of salvage and finds on the one hand and the protection of underwater cultural heritage on the other, some voices considered the *ex ante* exclusion of the application of the laws of salvage and finds in the UNESCO Convention as a major breakthrough for the protection of maritime cultural property.<sup>75</sup> Article 4 of the Convention states that "any activity relating to underwater cultural heritage to which the Convention applies shall not be subject to the law of salvage or the law of finds, unless it (a) is authorized by the competent authorities, and (b) is in full conformity with the Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves maximum protection". Though considered as "one of the major achievements" of the Convention<sup>76</sup>, this compromise solution does not reflect the original positions of the majority of negotiating States. Indeed, the ILA Draft had totally excluded the application of the law of salvage to underwater cultural heritage and Greece and Italy had reiterated this position during negotiations at UNESCO level with the majority of delegations agreeing to it<sup>77</sup>. As, however, a "minority of States"<sup>78</sup> had law of salvage provisions in their domestic legal systems, they insisted upon not putting it totally aside in the UNESCO Convention.

According to certain authors, Article 4 should be read together with Article 2 par.7 of the UNESCO Convention, stating that "*underwater cultural heritage shall not be commercially exploited*", and together with the Rules in the Annex to the UNESCO Convention. More precisely, Rule 2 of the Annex states that "*the commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage*" which "*shall not be*

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<sup>73</sup> Strati A., Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention, *op. cit.*, 2006, p. 27.

<sup>74</sup> Strati A., "The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea", *ibid.*, p.45.

<sup>75</sup> Rau M., Kulturgüterschutz im Meer: eine erste Analyse der neuen UNESCO-Konvention, *op. cit.*, p. 866.

<sup>76</sup> Carducci G., *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, *op. cit.*, p. 425 ; Rau M., "The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea", *op.cit.*, pp. 405-406.

<sup>77</sup> Carducci G., *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, *ibid.*, p. 425.

<sup>78</sup> Scovazzi T., *Convention on the Protection of Underwater Cultural Heritage*, *op. cit.*, p. 154.

*traded, sold, bought or bartered as commercial goods*".<sup>79</sup> Thus, Article 4, in combination with Article 2 par.7 and the Rules of the Annex, is formulated in a way to prevent individuals (navigators and divers) – through the laws and interventions of their States – from appropriating cultural heritage objects themselves as they would be barred from exploiting them commercially. The exclusion of the laws of salvage and finds in the Convention is also a way of aiming at preservation *in situ*<sup>80</sup> or at the common exploitation of the heritage by many States together in a common interest.

The exception to the core principle of non-application of the laws of salvage and finds to underwater archaeological objects, in the case of very special circumstances, ensures a protection worthy of underwater archaeology. The conditions in order to qualify for an exception being cumulative, the need for "authorisation by competent authorities", "full conformity with the Convention", and "maximum protection" during recovery should make it hard enough to apply laws of salvage or finds.

In a nutshell, Article 4, as it stands, provides for a satisfactory protection of underwater cultural heritage by the exclusion of laws of salvage and finds, – it however being understood as an obligation *erga omnes partes* of the States members to the Convention.

#### **4. Controversies over jurisdiction *ratione loci***

The geographical scope aimed at by the negotiating parties evolved during the various projects of the convention.

The ILA Draft aimed at only regulating underwater cultural heritage located in international waters, i.e. cultural heritage located beyond territorial seas, leaving internal and territorial waters of the States to their complete jurisdiction as an expression of their sovereign rights.<sup>81</sup> The drafters of this project considered that no new obligations could be imposed on the coastal States regarding the waters under their authority.

However, during negotiations at UNESCO, the tendency to regulate each jurisdictional zone separately prevailed, including a regulation of the waters in which States exercise their sovereign rights. After a short confusion amongst the delegations on whether to include continental waters of the States with no maritime character within the scope of the convention, the negotiating parties finally agreed to include Article 28 into the Convention, which allowed the States to also apply the rules of the Convention to their continental waters. The inclusion of this article is a manifestation of the strong will of the States at the negotiations to create a universally applicable convention, valid for all waters and relevant for all States.

Of course, this choice to cover all areas of the sea did not come without some controversies and some renewal of old debates on certain areas. This resulted in final provisions with vague and barely usable contents.

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<sup>79</sup> Scovazzi T., Convention on the Protection of Underwater Cultural Heritage, *ibid.*, p. 154.

<sup>80</sup> Rau M., "The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea", *op.cit.*, p. 405.

<sup>81</sup> Comments on Articles 5 and 6 of the ILA project on the "cultural heritage zone" and the "internal and territorial waters" in O'Keefe P. J., Nafziger J.A.R., Report – The Draft Convention on the protection of the Underwater Cultural Heritage, Ocean Development and International Law, *op. cit.*, pp. 409-410.

### A. *Contiguous zone and “Archaeological zone”*

As far as the contiguous zone is concerned, certain States took advantage of this new Convention in order to modify and complete the elliptic provisions of the UNCLOS. Thus, due to the limited competences in this area given to the States by the 1982 Convention, the debate of UNCLOS III about the setting up of an additional zone dedicated to underwater cultural heritage resurfaced.

#### 1. *Limited competences in cultural heritage matters*

The rules for the protection of underwater cultural heritage in the contiguous zone are set down in Article 8 of the UNESCO Convention. Similarly to Article 7 concerning internal waters, archipelagic waters and the territorial sea, “*the State parties may regulate and authorise activities directed at underwater cultural heritage*” within their 24-mile zone. And “*in doing so, they shall require that the Rules of the Annex be applied*”. At first sight, this would mean that a comprehensive legislative competence for underwater cultural objects located in the contiguous zone is conferred to the coastal State. However, Article 8 affirms that States parties shall act “*without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303 par.2 of the United Nations Convention on the Law of the Sea*”. This reference to Article 303 par. 2 UNCLOS implies an ambiguous interpretation of Article 8, since, as has been shown, paragraph 2 of Article 303 brings about confusion<sup>82</sup> and can be interpreted in two opposed directions.

These complications originate from the will of some States to avoid having a text which could be understood as extending jurisdictional competence to the coastal State beyond the 12 nautical miles limiting territorial waters. This precaution however seems absurd with regard to the large number of States that had already established an “archaeological zone” of 24 nautical miles.<sup>83</sup>

#### 2. *Debates and claims for an archaeological zone*

During negotiations leading to the UNESCO Convention, the idea in favour of an “archaeological zone” was supported by many delegations.<sup>84</sup> Thus, they interpreted Article 8 as large enough in

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<sup>82</sup> Scovazzi T., *Convention on the Protection of Underwater Cultural Heritage*, op. cit., p.152.

<sup>83</sup> Such as France, Tunisia, China, Cyprus and Algeria ; Prott L., Srong I. (dir.), “Background Materials on the Protection of the Underwater Cultural Heritage”, Vol. 1, Paris, UNESCO, 1999, pp. 1-21; Savadogo L., *La Convention sur la protection du patrimoine culturel subaquatique* (2 novembre 2001), op. cit., p. 51 ; Sioussiouras P., *The contiguous zone as a mechanism for protecting the underwater cultural heritage*, op. cit., p. 70 ; Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, op. cit., 2006, pp. 30-31; for a detailed analysis of the position of Greece for the establishment of a contiguous zone, see Alexopoulos, A.B., *Some Thoughts on the concept of the contiguous zone and its potential application to the Greek seas*, in “Unresolved Issues and New Challenges to the Law of the Sea – Time Before and Time After”, ed. A. Strati-M.Gavouneli-N.Skourtos, Martinus Nijhoff Publishers, 2006, pp. 259-270.

<sup>84</sup> As seen already, some States have interpreted Article 303 UNCLOS placed in parallel with Article 33 UNCLOS, as creating an archaeological zone, in which coastal States can exercise exclusive legislative powers on cultural heritage matters. The ILA Draft convention of 1994 already included a definition of this “cultural heritage zone” in its article 1 par.4 as “an area beyond the territorial sea of the State up to the outer limit of its continental shelf as defined in accordance with relevant rules and principles of international law”. During negotiations at the ILA, the

order not to limit the coastal State's jurisdiction.

Other states however were fervently opposed to the creation of a new zone<sup>85</sup>, considering it as a major threat to the concept of freedom of the high-seas. Negative positions by States such as Germany, Italy, the Republic of Korea, the Netherlands, the United-Kingdom and Tunisia led to the exclusion of the definition provided by article 1 par. 4 of the ILA Draft from the final conventional text. According to these States, the provision of Article 303 par. 2 should be limited to the prevention of customs, fiscal, sanitary or immigration infringement. If a restrictive perception of Article 303 par. 2 is kept, then the powers given to the coastal State through Article 8 UNESCO Convention are of a narrower scope<sup>86</sup>. This position seems confirmed by the fact that, pursuant to Article 8, States can regulate and authorise interventions on cultural heritage in their contiguous zone as long as it is done “*without prejudice to and in addition to articles 9 and 10*”. As these articles refer to underwater cultural heritage located in the EEZ and the continental shelf, they would not be applicable to a 24 nautical miles zone if the coastal States already enjoyed strong jurisdictional power in their contiguous zone.<sup>87</sup>

It may be argued though that Articles 9 and 10 UNESCO Convention are only mentioned in this context in order to fill the gap which could occur if the coastal State concerned would not want or be able to exercise its powers under Article 8 or would not have claimed a contiguous zone. Depending on the coastal State's choice therefore, either the regime for the EEZ and continental shelf would also be applicable to a zone of 24 nautical miles (Articles 9 and 10), or the coastal State would enjoy a comprehensive legislative competence over underwater cultural heritage in a zone up to 24 nautical miles (Article 8).

Another argument explaining the mention of Articles 9 and 10 could be the reference to States having a “verifiable link”, which would in this sense allow these States to also get involved and informed on underwater cultural heritage in the contiguous zone of a coastal State.<sup>88</sup>

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definition issue was strongly debated. Some delegations declared that the determination of the length of the area concerned should be left to the discretion of the State concerned and could include the contiguous zone, the continental shelf and the exclusive economic zone... ; Forrest C., *A new international regime for the protection of underwater cultural heritage*, *op.cit.*, p.542; According to other delegations, leaving the individual choice to every State would create too many complications. Finally, the negotiating parties agreed to make the “cultural heritage zone” coincide with the continental shelf ; O’Keefe P. J., Nafziger J.A.R., *Report – The Draft Convention on the protection of the Underwater Cultural Heritage*, Ocean Development and International Law, *op. cit.*, p. 407 ; In its Article 5 heading “cultural heritage Zone”, the ILA Draft stated that “a State party to this Convention may establish a cultural heritage zone and notify other States party of its action. Within this zone, the State Party shall have jurisdiction over activities affecting the underwater cultural heritage. A State Party shall take measures to ensure that activities within its zone affecting the underwater cultural heritage comply at a minimum with the provisions of the Charter”. A similar formula was used in Article 2 of the 1992 revised version of the European Convention on the Protection of the Archaeological Heritage : “Each Party undertakes to institute, by means appropriate to the State in question, a legal system for the protection of the archaeological heritage, making provision for: (...) the creation of archaeological reserves, even where there are no visible remains on the ground or under water, for the preservation of material evidence to be studied by later generations”

<sup>85</sup> Dromgoole S., Gaskell N., *Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998*, *The International Journal of Marine and Coastal Law*, *op. cit.*, p. 195.

<sup>86</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, *op. cit.*, p. 412.

<sup>87</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, *op. cit.*, p. 413.

<sup>88</sup> Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *op. cit.*, 2006, p. 44 – see below III B. 3.

Notwithstanding these divergent interpretations, which will depend upon the decisions of each coastal State, and though “the system of consultation (...) is not as perfect as it should be”<sup>89</sup>, two positive aspects of Article 8 UNESCO Convention have been noticed in comparison to UNCLOS.<sup>90</sup> Indeed, though Article 303 par. 2 UNCLOS regulates only the removal of marine archaeology, Article 8 regulates all “activities directed at underwater cultural heritage” in general. Furthermore, through the comprehensive Rules in the Annex of the UNESCO Convention, coastal States have a set of uniform rules at their disposal which, according to Article 8, “they shall require that [they] be applied”.<sup>91</sup>

## **B. Exclusive economic zone and Continental shelf**

As far as the EEZ and the continental shelf are concerned, the UNESCO Convention appeared as the dreamt opportunity for some States to fill the legal gap left by the UNCLOS. However, the evolution of negotiations and debates has led to a text that is hardly understandable.

### *1. Legal shortcomings of UNCLOS*

The UNCLOS does not contain any rule on the archaeological and historical objects found in the EEZ and the continental shelf, i.e. the area between the 12 nautical miles-limit (or 24 nautical miles if an archaeological zone has been established) and the beginning of the seabed and ocean floor of the Area. Indeed, there is a gap between the provisions of Article 303 UNCLOS dealing with the contiguous zone with reference to Article 33 UNCLOS, and the content of Article 149 UNCLOS which sets a special regime for the cultural objects found in the Area.<sup>92</sup> The intermediate zones are left without a precise legal framework concerning underwater archaeology.<sup>93</sup> Article 77 par. 1 UNCLOS, according to which the rights of the coastal State on the continental shelf are limited to the exploration and exploitation of the relevant “natural resources”, confirms this. This in itself excludes the expansion of the coastal State’s jurisdiction on cultural heritage matters in the continental shelf or in the EEZ.

However, this legal vacuum has been a great danger as looters and treasure hunters could collect cultural heritage located on the continental shelf, without any State being allowed to stop them, even in the case of direct cultural or historical links of the State with these objects.

During the negotiations at UNESCO, the major debates concerned the coastal States’ role in the protection of cultural heritage located beyond 24 nautical miles.<sup>94</sup> Indeed, the majority of countries at the negotiations were ready to extend the coastal State’s jurisdiction to ensure the

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<sup>89</sup> Second reservation expressed by Ambassador Rallis – Explanation of vote for Greece on the adoption of the UNESCO Convention, General Conference of UNESCO, 31<sup>st</sup> session, 3 November 2001, *op. cit.*, p. 568.

<sup>90</sup> Carducci G., *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, *ibid.*, p. 429.

<sup>91</sup> For a detailed analysis of the importance of the Rules of the Annex see part V below.

<sup>92</sup> Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *op. cit.*, 2006, pp. 31-32.

<sup>93</sup> Strati A., « *The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea* », *op. cit.*, pp. 264-265.

<sup>94</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, *op. cit.*, pp. 413-414.

effective protection of underwater cultural heritage in the EEZ and on the continental shelf.<sup>95</sup> As seen earlier, the ILA Draft of 1994 already followed this approach creating the possibility for the coastal States to establish “cultural heritage zones” (Article 5 par. 1) in which these States would have jurisdiction over activities affecting underwater cultural heritage.<sup>96</sup>

Thus, according to certain States, the extension of the coastal State’s jurisdiction in the new UNESCO instrument would not be in line with the UNCLOS and the equilibrium it had managed to reach between the rights and obligations of the coastal State and those of other States, beyond the territorial water-limit.<sup>97</sup> They pleaded for a mechanism of reporting and notification duties between the States parties where cultural objects in the EEZ and the continental shelf were concerned.

## 2. *Complex and ambiguous solution adopted by the Convention*

The compromise solution adopted in the UNESCO Convention is the result of “a stratification of proposals, counter-proposals, last-minute changes and ‘constructive ambiguities’ ”<sup>98</sup> which renders the provisions hardly readable and offers a weak protection regime in the EEZ and the continental shelf.

The proposed regime is a procedure in three steps, moving away from the idea of extension of the rights of the coastal State and consisting in reporting, consultations and urgent measures<sup>99</sup>. On one hand, Article 9 par. 1 and Article 10 par. 3 and 5 of the UNESCO Convention establish a system of cooperation based on the idea that *all* States parties are responsible to protect underwater cultural heritage in the EEZ and on the continental shelf. This mechanism seems to flesh out the general obligation to cooperate in underwater cultural protection matters, as laid down in Article 2 par. 2 of the UNESCO Convention.<sup>100</sup> On the other hand, in order to somehow satisfy those States arguing for an extension of the coastal State’s jurisdiction in these zones, Article 10 par. 2 and 4 grant the coastal States some limited powers in order to protect marine archaeological objects found in their EEZ and continental shelf.

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<sup>95</sup> Scovazzi T., *Convention on the Protection of Underwater Cultural Heritage*, op. cit., p. 154 ; Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, ibid., p. 414.

<sup>96</sup> As seen in section I. B., this extension had already been put forward by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia during the negotiations for a convention on the law of the sea in 1980. These countries having a strong cultural and maritime past or having inherited such one, they were highly concerned in protecting and exploiting underwater cultural heritage found seaward their coasts, but their efforts failed due to strong pressures of States willing to maintain the freedom of the seas as it stood ; Scovazzi T., *Convention on the Protection of Underwater Cultural Heritage*, op. cit., p. 157.

<sup>97</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, op. cit., p. 414.

<sup>98</sup> Carducci G., *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, op.cit., p. 430 ; Scovazzi T., *Convention on the Protection of Underwater Cultural Heritage*, op. cit., p. 154.

<sup>99</sup> The three-step procedure is found again in Articles 11 and 12 UNESCO Convention concerning underwater cultural heritage found in the Area.

<sup>100</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, op. cit., p. 414.

3. *Reporting system for the States concerned*

Article 9 par. 1 of the UNESCO Convention lays down the reporting system in case of the discovery of or interventions on underwater cultural heritage in the EEZ or on the continental shelf. This complex scheme states that “(a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activity directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it; (b) in the exclusive economic zone or on the continental shelf of another State Party: (i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party; (ii) 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”.

This provision intends to ban secret activities or discoveries. While the first sub-paragraph of Article 9 is based on the active personality and the flag state principles of international jurisdiction<sup>101</sup>, the second sub-paragraph deals with activities or discoveries located in the EEZ or continental shelf of another State Party.

Indeed, under Article 9 par. 1 (b) (i), discoveries of underwater cultural heritage in the EEZ and the continental shelf of another State (the coastal State) and interventions on it shall be notified to the State of the national, the flag State and the coastal State. In this case there is a possibility of a direct report to the coastal state. On the contrary, the second alternative of Article 9 par. 1 (b), does not mention the coastal State. This second alternative was a proposal of the United States of America and it raised debates during negotiations on the interpretation of this provision.<sup>102</sup> The text of this alternative was finally kept as a “constructive ambiguity”<sup>103</sup> allowing only an indirect report to the coastal State by the State of the national or the flag State, the coastal State being informed later, together with all the other State parties concerned. Deriving from the will of some States to remain within the pre-existing international legal framework and more particularly in conformity with UNCLOS, this provision deprives the coastal State of any special interest concerning underwater cultural heritage located in its own EEZ or continental shelf.<sup>104</sup> This attribution of a “coordinating role” to the coastal State in its own continental shelf – rather than stronger autonomous rights without prior consultation on how to best protect the heritage, thus entailing loss of time and inefficiency – was the main reservation of Greece during negotiations and it finally led to Greece’s abstention from voting.<sup>105</sup>

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<sup>101</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, *ibid.*, p. 415.

<sup>102</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, *ibid.*, p. 416.

<sup>103</sup> Savadogo L., *La Convention sur la protection du patrimoine culturel subaquatique* (2 novembre 2001), *op. cit.*, p. 53 ; Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, *ibid.*, p. 415 ; Carducci G., *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, *op.cit.*, p.430.

<sup>104</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, *ibid.*, p. 416.

<sup>105</sup> First reservation expressed by Ambassador Rallis – Explanation of vote for Greece on the adoption of the UNESCO Convention, General Conference of UNESCO, 31<sup>st</sup> session, 3 November 2001, *op. cit.*, p. 568 ; Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *op. cit.*, 2006, p. 46 ; A. Strati rightly points out the awkward hypothesis in which a coastal State, not party to the Convention, would not be notified of a discovery or activities

Article 9 par. 5 of the UNESCO Convention provides an introduction for the consultation regime developed in Article 10 par. 3 and 5 of the Convention. This consultation rule affirms that the coastal State – as the so-called “coordinating State” – shall consult all States Parties which have declared their interest in being consulted on how to ensure the effective protection of the underwater cultural heritage at stake.

According to Article 9 par.5, inspired by the distinctions made by Article 149 UNCLOS, such a declaration shall be based on a “*verifiable link, especially a cultural, historical or archaeological link to the heritage concerned*”.<sup>106</sup> However, the introduction of the qualifying “verifiable link” appears at least problematic, as, first, uncertainty remains as to who is to determine the verifiable link, and, secondly, no strict criteria have been set in order to determine which States possess a verifiable link and which does not<sup>107</sup> and how their hierarchical priority is to be determined.<sup>108</sup>

In case a coastal State does not expressly declare its will to be the coordinating State, the other State parties having declared an interest in being consulted shall appoint a coordinating State (Article 10 par. 3. (b) ).

During consultation on the measures to adopt and the authorizations to be given, according to Article 10 par. 6 of the UNESCO Convention, the coordinating State acts “*on behalf of the States Parties as a whole and not in its own interest*” and “*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 United Nations Convention on the Law of the Sea*”. Thus, no extension of jurisdiction shall be granted to the coastal State which shall rather be regarded as a “guardian” or “agent” of the international community interests.<sup>109</sup>

Finally, Article 10 par. 2 and 4 provide for situations, in which the coastal State may act without prior consultation of the other States involved.

Article 10 par. 2 of the UNESCO Convention gives the coastal State the “*right to prohibit or authorize any activity directed at [underwater cultural] heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea*”. Through this provision seemingly of a “declaratory nature”, the coastal State may, when exercising its rights and obligations in the EEZ and the continental shelf, incidentally protect underwater cultural heritage.<sup>110</sup> The main criteria of the importance of the interference with its sovereign rights or jurisdiction in order to be allowed to intervene are left

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directed at underwater cultural heritage located on its continental shelf.

<sup>106</sup> Article 9 par. 5 UNESCO Convention: “Any State Party may declare to the State Party in whose exclusive economic zone or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned”.

<sup>107</sup> Forrest C., A new international regime for the protection of underwater cultural heritage, op. cit., p. 544.

<sup>108</sup> For a more detailed analysis of the “verifiable link” see below III. C. 2.

<sup>109</sup> Carducci G., New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage, op.cit., p. 431 ; Rau M., The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea, op. cit., p. 418 ; this interpretation goes in line with the wording of Article 10 par.6 which implies an obligation of the coordinating State which is not only owed erga omnes partes, but rather refers to an obligation erga omnes.

<sup>110</sup> Rau M., The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea, ibid., p. 418 ; Savadogo L., La Convention sur la protection du patrimoine culturel subaquatique (2 novembre 2001), op. cit., p. 53.

to the discretion of the coastal State<sup>111</sup>. In this sense, this provision does not ensure a global protection of cultural heritage but rather excludes such protection when other interests, considered of higher (economical, national security) importance, are at stake.

If however, the coastal State was to use this article in a way to protect underwater cultural heritage in the zones, its decision can be questioned by the State of the national or flag State interfering and a forum to solve such a possible controversy should be found.

As regards urgent measures, Article 10 par. 4 of the UNESCO Convention provides that “*the Coordinating State may take all practicable measures (...), if necessary prior to consultations, to prevent any immediate danger to underwater cultural heritage*”. This provision reiterates the role of the coordinating State as seen in Article 10 par. 3 (b), and as a consequence, also in cases of urgency, the coastal State is invited to act “*on behalf of the States Parties as a whole and not in its own interest*” (Article 10 par. 6).

Article 10 par. 7 provides an exception for activities directed at State vessels and aircraft found in the EEZ and the continental shelf. Whereas the coastal State has an information duty to the flag State when State vessels and aircraft are located in archipelagic waters or the territorial sea<sup>112</sup>, the agreement of the flag State and the collaboration of the coordinating State are necessary for activities begun in the EEZ and the continental shelf by the coastal State.<sup>113</sup>

### **C. Underwater cultural heritage in the Area**

#### **1. Reporting obligation and interest to be consulted**

The protection of the underwater cultural heritage in the Area is set out in Articles 11 and 12 of the UNESCO Convention. Similar to the provisions regulating the EEZ and continental shelf, a reporting system is set up, without however giving a pre-eminent role to the coastal state. In this sense, Article 11 par. 1 provides for a reporting obligation to the States of the national or the master of the vessel flying its flag, of any discovery or any intended activity directed at underwater cultural heritage located in the Area.<sup>114</sup> According to Article 11 par. 2 and 3, the reported information ought afterwards to be notified to the UNESCO Director-General and to the Secretary General of the Seabed Authority, who shall promptly pass this information over to all States parties.

According to Article 12 par. 2 of the UNESCO Convention, since no “natural” coordinating State can be determined for the Area, the States parties interested shall choose a “coordinating State” and the Director General shall also invite the Authority to participate in the negotiations.<sup>115</sup>

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<sup>111</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, *ibid.*, p. 418.

<sup>112</sup> Article 7 par. 3 UNESCO Convention.

<sup>113</sup> Carducci G., *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, *op. cit.*, p. 431.

<sup>114</sup> Article 11 par. 1 UNESCO Convention: “States Parties have a responsibility to protect underwater cultural heritage in the Area in conformity with this Convention and Article 149 of the United Nations Convention on the Law of the Sea. Accordingly when a national, or a vessel flying the flag of a State Party, discovers or intends to engage in activities directed at underwater cultural heritage located in the Area, that State Party shall require its national, or the master of the vessel, to report such discovery or activity to it”.

<sup>115</sup> Article 12 par. 2 UNESCO Convention: “The Director-General shall invite all States Parties which have declared

In case of “immediate danger, whether arising from human activity or any other cause”, Article 12 par. 3 states that all States parties can take, if necessary prior to consultations, all practicable measures to prevent this danger. This obligation of any State party is in line with the general duty provided in Article 2 par. 4 to take all appropriate measures to protect underwater cultural heritage. A first interpretation would be that no State would thus be allowed to abstain from taking the appropriate measures in the Area.<sup>116</sup> On the other hand, these provisions can also be read as “entirely optional” possibilities left to the means and discretion of every State.

## 2. *The “verifiable link” of a State to the underwater cultural heritage concerned*

Following Article 11 par. 4<sup>117</sup>, the States parties having declared an interest based on a “verifiable link” to the underwater cultural heritage concerned<sup>118</sup>, can inform the Director-General of their interest in being consulted on how best to protect it. As seen earlier, the requirement of a “verifiable link” appears again in this context, without however having to be accompanied by the qualifications “especially a cultural, historical or archaeological link” found in Article 9 par. 5, probably in order to avoid duplications.<sup>119</sup> In addition, Article 12 par. 6 refers to the preferential rights<sup>120</sup> clearly following the language of Article 149 UNCLOS: “*the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin*”.

Here again, the mention of the “verifiable link” gives rise to various difficulties which can, in turn, be the reason for strong disagreements in the practical use of these provisions.<sup>121</sup> First, indeed, when locating underwater cultural objects in the seabed and before having undertaken a thorough archaeological assessment, their “nationality” or “origin” will not be affirmed with certainty for some time so as to justify a prior claim by some States to be involved. Secondly, once these States will pretend to be somehow linked to these objects, the obvious lack of guidelines for the determination of a “link” with the cultural heritage at stake will result in an

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an interest under Article 11, paragraph 4, to consult on how best to protect the underwater cultural heritage, and to appoint a State Party to coordinate such consultations as the “Coordinating State”. The Director-General shall also invite the International Seabed Authority to participate in such consultations”.

<sup>116</sup> Rau M., *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, op. cit., p. 421.

<sup>117</sup> Article 11 par. 4 UNESCO Convention: “Any State Party may declare to the Director-General its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link to the underwater cultural heritage concerned, particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin”.

<sup>118</sup> The “verifiable link” criterion appears again in Article 18 for the report of seizure of illicitly recovered underwater cultural heritage.

<sup>119</sup> Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, op. cit., 2006, p. 48.

<sup>120</sup> Article 12 par. 6 UNESCO Convention on the coordination of activities for the protection of underwater cultural heritage reads: “In coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations pursuant to this Article, the Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties. Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned”.

<sup>121</sup> The introduction into the UNESCO Convention of this “very vague concept which is open for different interpretations and controversies” was the fourth reservation expressed by Ambassador Rallis explaining Greece’s abstention – Explanation of vote for Greece on the adoption of the UNESCO Convention, General Conference of UNESCO, 31<sup>st</sup> session, 3 November 2001, op. cit., p.568.

uncontrolled situation, with numerous States claiming a connection to it, a series of disagreements over whether to involve them or not in the reporting/cooperation regime<sup>122</sup> and as to the hierarchical priority over the objects found. Furthermore, no mention is made of shared financial responsibilities or of the way non-parties to the Convention with a verifiable link will be included among the interested States and what will then be the solutions if they refuse to submit themselves to the scheme of a coordinating State.<sup>123</sup>

The additional reference of Article 12 par 6 to the “preferential rights” of the States of cultural, historical or archaeological origin does not clarify the nature and scope of these rights, but rather adds “nothing but confusion”.<sup>124</sup>

## **5. Multilateral, bilateral or regional agreements**

The protection of underwater cultural heritage is already regulated in numerous bilateral or regional agreements.<sup>125</sup> Even during negotiations at UNESCO the conclusion of bilateral and regional agreements was considered as an effective means of reaching a high level of protection of marine archaeological finds. It appeared indeed essential to encourage neighbouring States or of the same region, sharing the same experiences and problems as regards underwater heritage protection, to handle it in close cooperation while at the same time respecting the UNCLOS.<sup>126</sup>

During negotiations, many States proposed to include the possibility of entering into future bilateral, regional or multilateral agreements with stricter provisions than the UNESCO Convention, fearing that the UNESCO Convention’s protection scheme would not be sufficient. In this sense, this option was added to the negotiation texts in 1999 and was further extended and completed in subsequent draft versions.

Finally, Article 6 of the UNESCO Convention, devoted to bilateral, regional or other multilevel agreements, opened the way for a “multiple-level” protection of underwater cultural heritage<sup>127</sup>. Three interesting elements were incorporated into Article 6: first, the condition of full conformity with these existing or new or extended agreements with the UNESCO Convention as the universal instrument in this field<sup>128</sup>; secondly, the possibility for adopting stricter rules of protection of the underwater cultural heritage than those set down in the UNESCO Convention<sup>129</sup>; and thirdly, the possibility opened to States with a verifiable link to specific underwater cultural

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<sup>122</sup> Forrest C., A new international regime for the protection of underwater cultural heritage, *op. cit.*, pp. 553-554.

<sup>123</sup> Boesten E., « Archaeological and/or Historical Valuable Shipwrecks in International Waters, Public International Law and What it Offers », *op. cit.*, pp. 168, 171.

<sup>124</sup> Strati A., Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention, *op. cit.*, pp. 47-48.

<sup>125</sup> Examples of Agreements in : Forrest C., A new international regime for the protection of underwater cultural heritage, *op. cit.*, p.552.

<sup>126</sup> Boesten E., The UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage, *op. cit.*, Articles 5,6,7.

<sup>127</sup> Scovazzi T., Convention on the Protection of Underwater Cultural Heritage, *op. cit.*, p.155.

<sup>128</sup> Boesten E., « Archaeological and/or Historical Valuable Shipwrecks in International Waters, Public International Law and What it Offers », *op. cit.*, p. 157 ; this rule implies a hierarchy of norms recalling the general public international law elevation of the *erga omnes* obligations.

<sup>129</sup> The provisions of the UNESCO Convention seem thus to be understood as “minimum standards” in the sense of a more flexible international legal system.

objects to join such agreements.<sup>130</sup>

The rules set down by this article do not offer any original idea in comparison to the normal way of doing in international law, the UNESCO Convention itself being such an example.<sup>131</sup> As such, this provision does not provide the States with any rights or duties they do not already possess as subjects of international law<sup>132</sup> and according to some delegations, a simple reference to Article 311 UNCLOS as a basis for regional agreements<sup>133</sup> or to Article 303 par. 4 would have sufficed.

The inconvenient or rather the flaw of this article is that it gives the impression that the UNESCO Convention as it stands is not sufficient and would need to be completed by regional agreements to fill up its inefficiency. At the same time, this encouraged proliferation of regional and bilateral agreements could lead to a fragmentation of the regime applicable to underwater cultural heritage, the negative consequences of which were precisely the rationale for the preparation of an effective Convention – deemed to become universal – in this context.<sup>134</sup>

According to some authors, the protection granted by the provisions of the UNESCO Convention and its Annex, is to be seen as a “substantial *minimum* threshold”<sup>135</sup> for the protection of underwater cultural heritage in new or extended agreements. In this sense, Article 6 may be used by some States to heighten their neighbours’ awareness of the necessity of establishing an effective protection regime in their area. It would, thus, constitute the starting point of the expansion of effective protection to all areas.<sup>136</sup> Other scholars argue that Article 6 could aim at developing a regime for wreck sites that are in need of protection but do not qualify as underwater cultural heritage protected under the UNESCO Convention<sup>137</sup>.

## 6. The technical Rules of the Annex

As the underwater cultural heritage lies in a very particular environment, its research and protection are subject to special constraints and the main goal of its protection can only be

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<sup>130</sup> Article 6 reads as follows: “1. States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention. 2. The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements. 3. The present Convention shall not alter the rights and obligations of State Parties regarding the protection of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adoption, and, in particular, those that are in conformity with the purpose of this Convention”.

<sup>131</sup> A comparison may be drawn to the international legal framework for the protection of the environment where international treaties are also followed by regional and sub-regional treaties.

<sup>132</sup> Forrest C., A new international regime for the protection of underwater cultural heritage, *op. cit.*, p. 553.

<sup>133</sup> This was proposed by the Russian Federation in the Working Group 1 of the 3<sup>d</sup> governmental experts meeting of July 2000.

<sup>134</sup> Forrest C., A new international regime for the protection of underwater cultural heritage, *op. cit.*, p. 553.

<sup>135</sup> Carducci G., New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage, *op. cit.*, p. 427.

<sup>136</sup> Forrest C., A new international regime for the protection of underwater cultural heritage, *op. cit.*, p. 553.

<sup>137</sup> Boesten E., « Archaeological and/or Historical Valuable Shipwrecks in International Waters, Public International Law and What it Offers », *op. cit.*, p. 158.

achieved with the assistance of a sophisticated and appropriate technical regulatory instrument ruling the possible interferences with it. This consideration led to the elaboration of specific scientific techniques. This is how, simultaneously to the ILA proceeding with the drafting of a convention, ICOMOS drafted a Charter in order to advise the States on the principal measures to be taken for the conservation of the world's underwater sites and monuments.

ICOMOS – a non-governmental organization with special observer status at UNESCO – drew up the project of a Charter as providing benchmark standards on how to handle underwater cultural heritage<sup>138</sup>. The project was approved by the Executive Council of ICOMOS in 1995 and adopted by the ICOMOS General Assembly in 1996 with representatives from more than eighty countries.<sup>139</sup> This International Charter on the Protection and Management of Underwater Cultural Heritage (the Charter), - comparable to the ICOMOS international Charter on the conservation and the restoration of monuments and sites (the Venice Charter) of 1965, and to the ICOMOS international Charter for the protection and management of the archaeological heritage of 1990 -, deals with matters such as the concept of research and its funding, scientific objectives, investigation methods and techniques, researchers' qualifications and competence, preliminary research, cooperation, project documentation, material conservation, site management, security, curation of project archives, and the transmission of information. In many provisions, the ILA Draft referred to this Charter and invited the States to explore underwater cultural heritage according to its rules.

#### **A. *Link between the Annex and the UNESCO Convention***

During the drafting of the UNESCO Convention, the question arose whether to include standards as those in the Charter into the Convention. The ILA Draft mentioned the Charter in its Article 1 par. 4, annexing it to the Convention.<sup>140</sup> When UNESCO was finally chosen as the adequate forum and the preliminary study on the opportunity of establishing an international legal instrument on the protection of the underwater cultural heritage was presented at the UNESCO General Conference in 1995, the Netherlands proposed to directly insert the rules of the ICOMOS Charter into the Convention's core text instead of just referring to the Charter<sup>141</sup> and the United States of America insisted upon the respect, by every State, its nationals and vessels, of the ICOMOS Charter.<sup>142</sup> The draft convention presented in 1999 included a reference to the Charter in Article 24, stressing the fact that, being an Annex, it was an integral part of the convention, and that it could be revised by the ICOMOS. This solution was however rejected, as many delegations considered the attribution of revision competence to a private body as contrary to Article 40 of the 1969 Vienna Convention on the Law of Treaties, which allows only States to propose and

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<sup>138</sup> Forrest C., A new international regime for the protection of underwater cultural heritage, op. cit., p. 545 ; Strati A., Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention, op.cit., 2006, pp.38-39.

<sup>139</sup> Carducci G., New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage, op.cit., p. 423.

<sup>140</sup> O'Keefe P. J., Nafziger J.A.R., Report – The Draft Convention on the protection of the Underwater Cultural Heritage, op. cit., pp. 405-407.

<sup>141</sup> 28<sup>th</sup> session of the UNESCO General Conference, 1995, point 7.6 of the provisional timetable concerning the preliminary study on the opportunity of drafting an international legal instrument for the protection of the underwater cultural heritage, Observations of the States and of the Division on Maritime Affairs and Law of the Sea of the UN Legal affairs Bureau, observations made by the Netherlands.

<sup>142</sup> *Idem*, observations made by the United States of America.

amend international treaties.<sup>143</sup>

Finally, Article 33 of the UNESCO Convention called “The Rules” reads “The Rules annexed to this Convention form an integral part of it and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Rules”.<sup>144</sup> It is to be noted that the name of the Annex changed from « Charter » to « Rules », thus totally deleting the reference to the ICOMOS Charter. This was probably done in order to present a more coherent legal text, to avoid possible misunderstandings due to the reference to a non-governmental organisation in an international Convention and to allow for a unified amendment system.<sup>145</sup>

In addition, Article 28 completed Article 33 by stating that “any State or territory may declare that the Rules shall apply to inland waters not of a maritime character”, giving the States the opportunity to extend the respect of these rules to non-international maritime areas.

Inspired by the technical standards of actual archaeological practice, the ICOMOS Charter encloses the standards for underwater archaeological excavations which seem to be accepted by most of the States.

Further to these technical standards, the Rules of the Annex also contain some general principles, as e.g. the principle of *in situ* preservation or the prohibition of any commercial exploitation of (underwater) cultural heritage – the latter being considered as the most important general principle in general archaeology. In this respect, as seen above, Rule 2 states: “The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.”

## **B. Large acceptance of the scientific standards**

It is notable that at the end of the negotiations for the drafting of a comprehensive international Convention on the protection of the underwater cultural heritage, the Annex was the only subject matter which was approved without reserves by so many States. The adoption of this part of the Convention was welcomed as a great success even by States having proven most skeptical for the main part of the major legal provisions<sup>146</sup> and Norway, one of the most fervent opponents to the Convention, went as far as to express its aim of applying the Rules of the Annex unilaterally.<sup>147</sup>

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<sup>143</sup> Boesten E., « Archaeological and/or Historical Valuable Shipwrecks in International Waters, Public International Law and What it Offers », *op. cit.*, pp. 193-194.

<sup>144</sup> Proposal of article made by Canada during the 4<sup>th</sup> governmental experts meeting in March 2001 : « L’annexe est partie intégrante de la présente Convention et, sauf disposition contraire expresse, toute référence à la présente Convention ou à l’une de ses parties renvoie aussi aux règles figurant à l’annexe [qui s’y rapportent] ».

<sup>145</sup> Fletcher-Tomenius P., Forrest C., *The Protection of the Underwater Cultural Heritage and the Challenge of UNCLOS*, Art Antiquity and Law, Vol. 5, 2/2000, p. 156.

<sup>146</sup> Declaration made by the United States of America: « Many provisions of that agreement, most notably the annexed rules, will be helpful in addressing underwater cultural heritage »; Declaration made by Norway: « The annex to the UNESCO Convention represents a major achievement and has our full support » in *Debate on the Convention on the Protection of Underwater Cultural Heritage*, Selected Documents, Assemblée générale de l’ONU, *Environmental Policy and Law*, juin 2002, pp. 185 ; Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *op.cit.*, 2006, p. 60.

<sup>147</sup> Declaration made by Norway : « We are aiming at unilateral application of the rules set out in the annex and would

Compared to the main text of the Convention which is far from reaching unanimous approval, this unexpected success of the Annex is probably due to the fact that it contains high standard technical instructions originating from the developments of Archaeology and recognised worldwide as reference guidelines.

## **7. Conclusion**

The main goal of establishing an international profile of underwater cultural heritage, intended by the various interest groups appealing for positive rules in the field of underwater cultural heritage protection has been achieved with the UNESCO Convention. The adoption of this Convention can be considered as a major step in the evolution pursuant to the adoption of the UNCLOS and the application of its legal regime, as the UNESCO Convention aims at improving it with additional protective provisions. This goal, however, did not remain without controversies as some included rules still seem unacceptable for numerous States, even thirty years after the negotiations of UNCLOS III.

The wording of the UNESCO Convention in itself may be criticised, since it is the expression of many difficulties from the very beginning of its drafting. Indeed, its starting point was a text drafted by a group of experts from various fields, and in the framework of a non-governmental organization, the ILA. The UNESCO Convention went through a number of unfruitful negotiations and when the text was finally presented at the UNESCO General Conference, it was far from being unanimously accepted by all governmental experts.

Furthermore, the negotiating parties having come short in time, decided to deal with the most important and controversial questions at the very end. As a result, when the General Conference of UNESCO started in October 2001, these major points had not been solved, nor really been debated despite the repeated proposals by some States<sup>148</sup> in order to come to generally agreed compromises. Also, the UNESCO Convention did in no way solve the principal dissents among States and left many flaws, such as the protection mechanism beyond the contiguous zone, the inclusion of state vessels and aircraft into the Convention's regime and the question of commercial use of the underwater cultural heritage.

The two first issues mainly crystallized the opposition of a group of States, the weight of which, as maritime powers and being at the forefront of technological development, shall not be overlooked. Indeed, negotiations and compromise-seeking at any price had a detrimental impact upon the final text. During the adoption of the UNESCO Convention, these States felt it as inevitable to abstain, or even to vote against. Indeed, on one hand, some States considered the provisions as an encroachment on the principle of the freedom of the high-seas, the texts not taking the flag State's rights sufficiently into account and granting excessive rights to the coastal State.<sup>149</sup> On the other hand, a group of States rejected the Convention because the provisions lead to meager rights and obligations for an effective protection of the underwater cultural heritage, in

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encourage other States to consider this as well » in *Debate on the Convention on the Protection of Underwater Cultural Heritage*, Selected Documents, Assemblée générale de l'ONU, *Environmental Policy and Law*, juin 2002, pp. 185.

<sup>148</sup> Such as France, the United-Kingdom, Germany, the Russian Federation and the United States of America as observer State.

<sup>149</sup> Among others, positions of the Russian Federation and Norway in Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, op. cit., 2006, p. 46.

particular concerning the jurisdictional rights of the coastal State beyond its contiguous zone.<sup>150</sup>

Moreover, the Convention, being the result of repeated compromises among various interests and of stratifications of notions and references to other texts (mainly the UNCLOS), does not offer rules easily and effectively applicable by the States. In this sense, it appears that the heavy cooperation, reporting and information mechanisms established by the UNESCO Convention can be applied in a realistic way only by the more wealthy States, and those dedicated to the protection of the underwater cultural heritage.

Some positive aspects of this Convention may be pointed out, such as, for example, the priority given to *in situ* protection and the promotion of public access, information, sensitization and training. Or, as seen above, the *ex ante* exclusion of the law of salvage. Particular mention must also be made to the inclusion in the UNESCO Convention of a comprehensive Annex with scientific standards, which, having even been approved by the most sceptical States, may develop into a most complete text of Standards of reference for the whole international community in matters of “activities directed at the underwater cultural heritage”.

On the other hand, other aspects have been totally eluded, – such as the purely inter-State dispute resolution system in a field in which the principal actors are private entities and especially big companies.

Finally, as every new multilateral agreement in international law, the UNESCO Convention’s rules are only applicable to the States parties to it. Thus, the States with the major modern technological means for exploration and excavation in deep waters rejecting the text’s content as unacceptable, two or more parallel and often contradictory regimes will slowly occur in the regulation of underwater cultural heritage protection at universally. Given that the entry into force of the UNESCO Convention depended upon a low threshold of twenty ratifications, acceptance, approval or accession – 24 States having already adhered to it – this conflicting situation is far from being a mere unfounded hypothesis.

The answer to this may be seen in Article 303 par. 4 UNCLOS and Article 6 of the UNESCO Convention which invite the States to conclude bilateral, regional or multilateral agreements for an effective protection of the underwater cultural heritage. In this sense, it would be advisable for the States to take common decisions at regional level in order to comprise the underwater cultural heritage specificities of their region in new protective instruments, without however necessarily basing them on the provisions of the UNESCO Convention.<sup>151</sup>

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<sup>150</sup> Greece’s abstention was mainly a reaction to the latter position, the provisions being considered as too blurred.

<sup>151</sup> As did the less successful proposal of Italy aiming at establishing a regional convention for the protection of the underwater cultural heritage in the Mediterranean based on the framework of the UNESCO Convention, in Strati A., *Protection of the underwater cultural heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, *op. cit.*, 2006, p. 61.



**Pirates of the Mediterranean?**  
**The Case of the ‘Black Swan’ and its Implications for the Protection of Underwater  
Cultural Heritage in the Mediterranean Region**

Amy Strecker\*

**Abstract**

On 16 May 2007, Odyssey Marine Exploration, a Florida-based commercial salvage company, flew 17 tonnes of gold and silver coins (with an estimated value of \$500 million) along with a number of artefacts from Gibraltar to an undisclosed location in Florida. According to the firm, the hoard was recovered from a sunken vessel located 100 miles west of the coast of Gibraltar. Spain, who doubted whether the wreck was found in international waters and believed the vessel to be a Spanish galleon carrying objects from the American colonies, then filed a claim in a US Florida Middle District Court asserting ownership over the vessel and its artefacts. This case raises a number of important legal and moral issues in relation to the protection of historical vessels in the Mediterranean Sea and beyond. The most glaring in this context is the application of admiralty law to historical/archaeological vessels. Other problems include the *in rem* jurisdiction of US courts over shipwrecks located in European waters; the rights of Mediterranean states to prevent unauthorized salvage and most importantly, the rights *and* obligations of coastal and flag states to protect their cultural and historical heritage.

**Keywords:** historic sunken vessels – unauthorized salvage - admiralty law – rights of coastal states – legal vacuum

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## 1. Sunken Vessels as Underwater Cultural Heritage

Underpinning this paper is the assumption that historical sunken vessels are integral elements making up the cultural heritage of the Mediterranean Sea. While the majority of vessels located in shallow waters have already been plundered, those lying in deeper waters have largely been saved this indignity, because looters have not had the technology to reach them. This situation is changing however, as commercial salvage companies have developed highly sophisticated technology able to reach almost any depths. Historic sunken vessels are particularly valuable archaeological remains in that they are considered as 'time capsules' or closed deposits of a particular moment in history. Furthermore, the marine environment often slows down the natural decaying process and cultural objects are preserved significantly better than their comparables on land. The Mediterranean Sea is unique because it embodies the common historical and cultural roots of many civilizations and periods - from the early civilizations through Classic Antiquity to the Middle Ages through to the more recent Colonial period. Yet despite this cultural richness and the close cultural links that have developed between the peoples of the region, there is currently no regime of legal protection for cultural heritage beyond the territorial waters of the Mediterranean states. Given that the majority of sunken vessels are located on the Continental Shelf in international waters, it is commercial salvors who are most actively involved in recovering and 'exploring' these vessels, and as long as this continues, so the number of historical and cultural 'time capsules' diminishes.

### A. *Odyssey Marine Exploration Inc. v. the Unidentified Shipwrecked Vessel(s)*

On 18 May 2007, Odyssey Marine Exploration, a Florida-based commercial salvage company, announced its discovery of a colonial-era sunken vessel in an undisclosed location somewhere in the Atlantic Ocean.<sup>1</sup> The wreck, which was code-named the 'Black Swan', contained 17 tonnes of gold and silver coins (with an estimated value of \$500 million) as well as a substantial number of artefacts, making it the largest ever discovery of its kind in maritime history. Two days before the announcement of the discovery, the hoard was flown from Gibraltar by private aircraft to Florida. The government of Spain immediately suspected that the vessel had been discovered in Spanish territorial waters near the Straits of Gibraltar and was confident that even if discovered in international waters, the likelihood of the vessel being Spanish was high. This was due to the fact that: a) in March 2007 the Spanish authorities had granted permission for the company to resume explorations in its territorial waters for another sunken vessel – the *HMS Sussex*, a British warship which was the subject of a controversial agreement between the UK government and Odyssey Marine Exploration in 2002;<sup>2</sup> b) Odyssey refused Spain's request for information regarding the identity and location of the vessel;<sup>3</sup> and c) the hoard was similar to that of a Spanish vessel known as *La Nuestra Señora de Las Mercedes*, which sank off the coast of Portugal in 1804 loaded with coinage from the American colonies.<sup>4</sup> The

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<sup>1</sup> The vessel was said to have been located 100 miles west of the strait of Gibraltar in international waters.

<sup>2</sup> The agreement was severely criticized by ICOMOS and other bodies. For a discussion see S. Dromgoole, *Murky Waters for Government Policy: the Case of a 17<sup>th</sup> Century British Warship and 10 Tonnes of Gold Coins*, in *Marine Policy* 28 (2004) p.189-98 and R. Garaballo, *The Sunken Warships in the Mediterranean*, in Tullio Scovazzi (ed.), *La Protezione del Patrimonio Sottomarino nel Mare Mediterraneo*, Milano, 2004.

<sup>3</sup> On 18 May counsel for Spain requested information from Odyssey's counsel as to the source and identity of the large quantities of material recovered and transported. Odyssey refused to supply the information. See *Odyssey Marine Exploration, Inc. v. the Unidentified Shipwreck Vessel or Vessels*, Case No. 8:2007 cv00614, Filing 16, 19 June 2007, at: <http://docs.justia.com/cases/federal/districtcourts/florida/flmdce/8:2007cv00614/197978/13/>. Furthermore, if the coordinates given to the Court are correct (100 miles west of Gibraltar) this would include approaches to Cadiz, which was used by countless Spanish vessels over the centuries.

<sup>4</sup> See 'Who owns what lies beneath?' – *The Guardian*, 20 October 2007; 'Spain forces Treasure Ship into Port in Battle

Spanish Guardia Civil began an investigation into the activities of Odyssey in the weeks leading up to the announcement of the discovery, and on 29 May the Spanish government filed a claim in a US Florida Middle District Court - where Odyssey had filed its arrest against the vessel six weeks earlier<sup>5</sup> – asserting ownership over the vessel and its artefacts.

Odyssey had filed the case under admiralty and maritime law and submitted that the Court had *in personam* jurisdiction over the plaintiff and constructive quasi *in rem* jurisdiction over the defendant unidentified shipwrecked vessel. The company asserted a possessory and ownership claim pursuant to the law of finds, and a salvage award claim pursuant to the law of salvage, along with an injunctive relief to protect the recovery operation. It also asserted a declaratory judgment stating that Odyssey had the authority to explore and recover the vessel without the interference of any salvor, agency, department or government.<sup>6</sup>

On 16 June, Spain filed a motion requesting a more definite statement from Odyssey concerning the location of the vessel, its identity and contents.<sup>7</sup> Counsel for Spain stated:

Despite the extensive examination Odyssey alleges to have conducted, the Complaint provides no information as to the known or believed origin or nationality of the vessel, as to the characteristics of the remains and artefacts Odyssey has located and photographed, or as to the objects from the vessel Odyssey alleges it has documented. Odyssey's cryptic pleadings also fail to disclose even whether the *res* is a military ship or other sovereign property of a foreign nation, with respect to which the Court may have no authority under long-established rules of international and US law.<sup>8</sup>

Spain also put forward that although Odyssey claimed to have seen valuable cargo on the site, it failed to give any information that would enable a potential owner of the cargo to evaluate whether the owner's property was being claimed. Furthermore, Spain argued that Odyssey's pleadings demonstrated that it possessed far more information than it had disclosed. It was argued, for example, that in its April motion to arrest the *res*, Odyssey stated that it and its associates had invested substantial money and effort in locating, surveying, photographing and researching the history of the defendant vessel(s) and Odyssey's general counsel had stated in an affidavit that the vessel was a nineteenth-century wreck. In the same motion, Spain reiterated its non-abandonment of the property and its refusal of salvage for any of the vessels and properties claimed by Odyssey.<sup>9</sup>

On 12 July, upon leaving the port of Gibraltar, the Guardia Civil intercepted one of the company's vessels, Ocean Alert, and steered it to the Spanish Port of Algeciras for inspection.<sup>10</sup> This resulted in

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over Pieces of Eight' – *The Guardian*, 17 October, 2007. 'The New Pirates of the Caribbean' – *Irish Independent*, 3 November 2007.

<sup>5</sup> Odyssey had filed its claim over the vessel and another undisclosed vessel as an admiralty case under Federal Rule of Civil Procedure in the same court in April 2007. It was submitted "The Defendant Shipwreck vessel is lying at a depth of approximately 1100 meters, beyond the territorial waters or contiguous zone of any sovereign nation, approximately 100 miles west of the Straits of Gibraltar. Based upon information and belief no entity or person presently claims ownership interest in the Defendant Shipwrecked Vessel. Evidence at the site indicates that efforts, if any, by any previous owner to salvage the shipwreck and/or its cargo have been long since abandoned." Filing 1, 9 April 2007, at: <http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2007cv00614/197978/13/>.

<sup>6</sup> See *supra* 4.

<sup>7</sup> Filing 16, 19 June 2007, at *supra* 3.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> This was carried out on secret search order issued by a Judge of La Linea de La Concepción (Cádiz). Odyssey argued that the ship was boarded in international waters, but Spain maintained that the ship had entered Spanish territorial waters. This is due to the ongoing dispute between the United Kingdom and Spain over the territorial jurisdiction of the Rock of

Odyssey filing an Amended Complaint on 6 August and claiming damages from Spain for loss of revenue.<sup>11</sup> Odyssey also filed for an extension of time in responding to Spain's motion for a more definite statement and this was granted. In September it was revealed that the coins transported from Gibraltar were Spanish *reales de a ocho* or 'pieces of eight'. It also became apparent that the value of the coins was underplayed at the time of export: In export licence applications made in Gibraltar the company valued the 500,000 coins at \$2.5 (around \$5 per coin), but in a press release issued by Odyssey in June, the coins were said to be worth \$500 or \$1000 per coin, a disparity of some 100 percent.<sup>12</sup>

After a number of further filings and time extensions, on 10 January 2008 the Court granted a Protective Order over the information concerning the unidentified shipwrecked vessel and ordered Odyssey to disclose information to Spain containing the maritime co-ordinates of the 'Black Swan' as well as photographic material of the artifacts and coins and other documents relating to the vessel's identity.<sup>13</sup> The Protective Order authorized Odyssey to resume further operations on the site and required the strictest confidentiality to be upheld by Spain regarding the disclosed information. Odyssey was obliged to comply with this order within fourteen days, that is, before 24 January, and a preliminary pretrial conference was set for 5 March 2008.

In a statement made by Odyssey's then Chairman and CEO, the following was stated:

Odyssey has always practiced a policy of transparency and open communication with all governments interested in our deep ocean archaeological activities. We have invited the Kingdom of Spain to participate in our archaeological projects many times in the past, including the expedition that resulted in the discovery of the Black Swan site. We have made it abundantly clear that in each of the three pending cases, we did not operate in waters claimed by Spain, and that we have abided by all applicable legal requirements as set forth in the Law of the Sea Convention and the Salvage Convention.<sup>14</sup>

Greg Stemm, co-founder and current Director of Odyssey added:

By properly arresting all three of these sites in a U.S. Federal Court, we have shown that we respect the rule of law. The Court has assumed jurisdiction over the sites and Odyssey will work with the Court to protect the historical and archaeological value of the sites. After detailed research, we are now prepared to provide information about the sites to the Judge in each case, and it is the Judge who will decide which information is appropriate for release to any potential claimants.<sup>15</sup>

## **B. Other vessels**

In April 2007, when Odyssey Marine Exploration filed its claim of ownership on the unidentified vessel code named the 'Black Swan', it filed a separate claim on another unidentified shipwreck,

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Gibraltar.

<sup>11</sup> Fling 21, 6 August 2007, at *supra* 3.

<sup>12</sup> 'Spain Forces Treasure Ship into Port in Battle over Fortune in Pieces of Eight' - *The Guardian*, 17 October 2007. However, it looks as if the value of the coins might have been slightly overplayed by Odyssey to boost shares on the stock exchange. See 'Sunken Treasure Overvalued to Lift Shares of Salvage Firm' - *Sunday Times*, 4 November 2007.

<sup>13</sup> See Filing 76 at *supra* 3.

<sup>14</sup> Statement by John Morris, ex-Chairman and CEO of Odyssey Marine Exploration. See 'Deep Sea Divers Opt for Nasdaq Flotation' - *The Guardian*, 16 July 2007.

<sup>15</sup> Statement by Greg Stemm, Director of Odyssey, 'Odyssey Marine Exploration: Files Amended Complaints in Three Admiralty Cases, Spain Added as a Defendant in All Cases' - *Business Wire*, 7 August 2007.

apparently located between Sardinia and Sicily in the Mediterranean Sea,<sup>16</sup> and prior to this, in September 2006, it filed a claim on a 17th century Merchant vessel located near the southwest of England in the Atlantic Ocean.<sup>17</sup> In August 2007, Spain requested that all three cases be transferred to the same Court; in the interests of justice and judicial economy, to avoid duplication or potentially conflicting rulings and because the cases share the same “sensitive and far-reaching questions” such as, *inter alia*: “those concerning the *in rem* jurisdiction of US courts over shipwrecks located in European waters; ii) the sovereign immunities of other nations from *in personam* claims or claims against sovereign property; iii) the rights and immunities of sovereigns to prevent unauthorized salvage and iv) the right of sovereigns to protect their cultural and historical heritage.”<sup>18</sup> Spain had already filed parallel verified claims asserting its sovereign ownership rights in the other two cases and affirmed its refusal of salvage. The request for transferal was granted and all cases were transferred to the same Court. Thus the Protective Order issued on 10 January requiring Odyssey to disclose information to Spain regarding the exact location, identity and nature of the vessel also applied to the two other defendant shipwrecks.

## 2. Issues raised by the Case

Since May 2007, the case of the ‘Black Swan’ has attracted a substantial amount of media attention in the US, Spain and internationally. This is in part due to the captive interest that shipwreck and treasure stories hold for the public, and to the fact that Odyssey Marine Exploration Inc. is a high profile company whose stocks were recently transferred on the NASDAQ exchange.<sup>19</sup> In Spain, however, the reaction to the discovery of the find and the secrecy over the identity of the shipwreck has caused outrage amongst Spanish authorities, the general public and most of all the archaeological community, who see this as just another case of ‘pirates’ or ‘treasure hunters’ in the Mediterranean, attempting to profit from the historical and archaeological heritage of the region.<sup>20</sup> It also reaffirms their belief that salvage law should not be applied to the underwater cultural heritage, and that US courts should not be entitled to jurisdiction over sites located in international waters but on the continental shelf or EEZ of European countries attached to a regional sea. If the application of salvage law to historical vessels is alien to the legal systems of civil law states, then surely it should not be applied to the cultural heritage in the waters adjacent to those states.

This case thus raises a number of important legal and moral issues in relation to the protection of historical vessels in the Mediterranean Sea and beyond. The most glaring in this context is the application of admiralty law to historical/archaeological vessels. Other problems include the *in rem* jurisdiction of US courts over shipwrecks located in European waters; the rights of Mediterranean states to prevent unauthorized salvage and most importantly, the rights *and* obligations of coastal and flag states to protect their cultural and historical heritage. Adopted in 2001, the UNESCO Underwater Cultural Heritage Convention (hereinafter, the 2001 Convention) has just recently received the required number of ratifications to enable its entry into force.<sup>21</sup> However, only 9 of the 24 states that

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<sup>16</sup> Odyssey Marine Exploration, Inc., v. the Unidentified Shipwrecked Vessel. Case No 8:07-CV-00616-JSM-MSS, 9 April 2007.

<sup>17</sup> Odyssey Marine Exploration, Inc., v. the Unidentified Shipwrecked Vessel. Case No. 8:06-CV-16854-T23-TBM, 13 September 2006.

<sup>18</sup> Filing 31, 15 August 2007, at *supra* 3.

<sup>19</sup> Odyssey’s shares soared after the announcement of the Black Swan discover. See ‘Sunken Treasure Overvalued to Lift Shares of Salvage Firm’ – *Sunday Times*, 4 November 2007.

<sup>20</sup> See for example, ‘A la caza del cazatesoros’ – *Diario Vasco*, 6 July 2007 and ‘Cronologia de un Triller de Piratas’ – *El País*, 17 October 2007.

<sup>21</sup> The Convention entered into force on 2 January 2009.

have so far signed or ratified the Convention are Mediterranean states.<sup>22</sup> Meanwhile, the general lack of provision for the cultural heritage in the Mediterranean outside the territorial or contiguous waters of its coastal states still persists. This legal vacuum means that US Courts may continue to apply admiralty law and attain jurisdiction over sites located in the Mediterranean, and unless a practical solution is found, there will simply be nothing left to claim for.<sup>23</sup>

#### **A. Salvage Law and the Underwater Cultural Heritage**

According to Dromgoole, the concept of salvage and the principles on which it is based have ancient origins.<sup>24</sup> A professional salvage industry has developed over the years to provide salvage services to seafarers whose property is in danger, and traditionally the industry concerned itself with vessels that are still afloat but in immediate peril, and also those that have sunk. The traditional salvage industry, however, needs to be distinguished from the treasure salvage industry, which was only added as an element of marine salvage under admiralty law in recent decades. While the former is concerned with recovering the vessel (in peril) to its owner, the latter is concerned with the recovery of valuable cargo of bullion, gold and silver coins, porcelain, pottery and other artefacts, for sale.

In the US Courts, there has been a growing number of cases in the past decades in which salvors have sought to obtain legal rights to their finds under two lines of argument: the law of finds, on the basis that there is either no owner of the wreck or that the wreck has been abandoned; or the law of salvage, by which they are entitled to a generous salvage award for returning the vessel to its owner.<sup>25</sup> The award will depend upon a number of factors, such as the extent to which the vessel is considered to be in danger; the time and labour expended by the salvor in recovering the object; the value of the property saved; the promptitude, skill and energy displayed by the salvor in saving the property, and more recently, US Courts have considered the archaeological duty of care as a factor in granting salvage awards.

With the exception of a few cases, the US Courts have mostly found for the salvors.<sup>26</sup> One such exception is the case of *Juno* and *La Galga*, two Spanish frigates that sank in US waters in 1750 and 1802 respectively. In 2000, Sea hunt Inc., a commercial salvage company, claimed to have discovered the wrecks of both vessels off the coast of Virginia and was granted permission to explore them and to conduct salvage operations. Under the US *Abandoned Shipwreck Act* of 1987, individual US states have title to shipwrecks that are abandoned in their waters, including the recovery of artefacts. Almost

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<sup>22</sup> Croatia, Spain, Libya, Tunisia, Slovenia, Albania, the Lebanon, Montenegro and Portugal

<sup>23</sup> According to A. Strati, the vast majority of sites in shallow waters of the Mediterranean Sea have been plundered. See Strati, in S. Dromgoole (ed.), *The Protection of Underwater Cultural Heritage: National Perspectives in light of the UNESCO Convention 2001*, Leiden, 2006, p.84.

<sup>24</sup> Dromgoole, *Law and the Underwater Cultural Heritage: a Question of Balancing Interests*, in Brodie, N. and Walker Tubb, K., *Illicit Antiquities: The theft of cultural and the extinction of archaeology*, London, 2002, p.119.

<sup>25</sup> Under the law of finds, it must be proven that the vessel has been abandoned. While initially US Courts used to infer abandonment from the inaction of states to recover its vessel(s) and the passing of time, recent customary law favours the principle of 'express abandonment'. Under the law of salvage, there are certain criteria to meet before a salvage claim can be made: there must be a marine peril placing the property at risk of loss, destruction or deterioration; the salvage service must be voluntarily rendered and not be required by an existing contract; and the salvage operation must be successful, in whole or in part.

<sup>26</sup> A much cited extract from judgement was that "The Law acts to afford protection to persons who actually endeavour to return lost or abandoned goods as an incentive to undertake such expensive and risky ventures". *Treasure Salvors Inc v The Unidentified, Wrecked and Abandoned sailing Vessel* (Salvors III) [1981] American Maritime Cases 1857, 1874. The first favourable ruling for the underwater cultural heritage came in 1983 when a judge of the District Court of Maryland granted Maryland's motions to vacate arrests, thus awarding the right of excavation to the state. This ruling was particularly notable for the acknowledgement that the preservation of the cultural heritage constitutes a public interest. *Subaqueous Exploration & Archaeology, Ltd. v The Unidentified, Wrecked and Abandoned Vessels*, 577, F. Supp.598 (D. Md. December 21, 1983).

immediately, Spain claimed that it was the true and *bona fide* owner of both vessels and that its title and ownership in them had never been abandoned or relinquished. Furthermore, it stated its wish that the vessels be treated as maritime graves and that their salvage not be authorized. The Court found that both vessels remained the property of Spain and that Spain had the right to refuse unwanted salvage.<sup>27</sup> The Judge stated the following in respect of the *Juno*:

It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the *Juno* was a Spanish ship and that Spain might make a claim of ownership and decline salvage. Before conducting any salvage operations pursuant to this Court's orders, Sea Hunt received an express communication of refusal of salvage from Spain. Because Sea Hunt had knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on the *Juno*, Sea Hunt cannot be entailed to any salvage award. The Court realizes that this holding places a substantial burden on Sea Hunt, and places on potential salvors the risk of expending significant time and resources in salvaging sunken objects for which they will not receive compensation. However, such is the risk inherent in treasure salvage.<sup>28</sup>

The Spanish legal position regarding sunken state vessels is that, irrespective of their location and the passage of time, title to such vessels can only be lost by an express act of abandonment. This is also the practice of other maritime powers and has become an established rule of international law.<sup>29</sup> Indeed, in the case of *Juno* and *La Galga*, the United States acted as *amicus curiae* to Spain and defended its ownership over the two wrecks:

The United States is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to ensure that its sunken vessels and lost crews are treated as sovereign ships and honoured graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea.<sup>30</sup>

The conclusion reached by the Court of Appeal gives the impression that commercial salvors should have little to do with the sunken shipwrecks of sovereign states:

It bears repeating that matters as sensitive as these implicate important interest of the executive branch. Courts cannot just turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of abandonment, and where the nations involved all agree that the title to the shipwrecks remains with the original owner.<sup>31</sup>

The case of *Juno* and *La Galga* could mark a turning point in the history of admiralty case law in the US and there is likely to be more rulings of a similar vein in the future. This position means that sunken state vessels may be preserved from what Scovazzi calls the 'first-come-first-served' or 'freedom-of-fishing-approach'.

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<sup>27</sup> See Tullio Scovazzi, The application of Salvage Law and Other Rules of Admiralty, in Scovazzi, T. & Garabello, R. (eds.), *The Protection of the Underwater cultural Heritage before and after the 2001 Convention*, Leiden, 2003, pp.55-60.

<sup>28</sup> *Sea Hunt Inc v Unidentified Shipwrecked Vessel or Vessels*, 1999 U.S. Dist. LEXIS 21752, 9 (E.D.Va., June 25, 1999), reproduced at *supra* 42.

<sup>29</sup> Mariano J. Aznar-Gomez, Spain, in Dromgoole, S. (ed.), *The Protection of Underwater Cultural Heritage: National Perspectives in light of the UNESCO Convention 2001*, Leiden, 2006, p.275. For a more in depth discussion see M.J. Aznar-Gomez, Legal Status of Sunken Warships 'Revisited', (2003) 9 *Spanish Yearbook of International Law* 61.

<sup>30</sup> See *supra* 26, p.59.

<sup>31</sup> *Ibid.*

## **B. Non-State Sunken Vessels**

In a case where no owner can be established or when the vessel is simply too old that it belonged to another era or civilization long before the nation state existed, the protection of the underwater cultural heritage becomes significantly more problematic. Under admiralty law, if there is no identifiable owner of the vessel/object and if it is located outside the territorial waters of any state, then the law of finds will be applied and the salvor will gain title of the cultural property. However, many expeditions and/or excavations take place outside the courts. For example, during the preliminary authorised research for the *HMS Sussex*, over 400 square miles of seabed were searched using side-scan sonar and bathymetric surveys.<sup>32</sup> A number of ancient wrecks were found, including a Phoenician trading vessel dating from 2,500 years ago.<sup>33</sup> The unexpected discovery was found at a depth of 3,000ft in the Mediterranean and included hundreds of clay storage jars which the Phoenicians used for shipping wine, olive oil and honey. Experts identified the artefacts as being from the Western Mediterranean Phoenician or Punic Culture dating from between 450 and 250 BC.<sup>34</sup> The Phoenicians dominated trade in the Mediterranean before the Greek and Roman Empires but despite this, little is known about their civilization, and what is known derives only from land excavations and the accounts of their enemies. A professor at the Institute of Nautical Archaeology in Texas expressed her concern about a profit-making company being in charge of such an enterprise, fearing that the need to make money would rush the excavation and thereby compromise it.<sup>35</sup> Odyssey's Director, Greg Stemm, assured her, however, that great care would be taken in mapping and excavating the site according to archaeological standards, and that the objects would be kept together as a collection.<sup>36</sup> The fact that a commercial salvage company might conduct an excavation of such historical importance to Mediterranean culture is worrying. Yet the fact that this company conducted the excavation at all is surprising, since many treasure-hunters would have simply retrieved the objects of value and sold them to the highest bidder. In this case, it seems that the UK supported the excavation, yet should the coastal states of the Mediterranean not also be made aware of such an endeavor? The objects' whereabouts are unknown to the author, but presumably they are located in Florida, where the company is based.<sup>37</sup>

In 1989, the explorer Robert Ballard carried out excavations on a Roman vessel found in the Mediterranean about 60 n.m. from Tunisia and 75 n.m. off Italy. No previous official information about the expedition was given to any of the Mediterranean states.<sup>38</sup> During this expedition, more than 150 artefacts were removed from the seabed, including amphorae, glassware and anchors. Mr. Ballard stated that the objects were protected by the non-profit Sea Research Foundation which would not allow their exploitation. A further four expeditions then took place between 1989 and 1997 to locate shipwrecks and retrieve artefacts from the Mediterranean Continental Shelf beyond the limit of the territorial seas and later expeditions in the Eastern Mediterranean uncovered two Phoenician trading vessels.<sup>39</sup> Artefacts from the expeditions are now on display at the Institute for Exploration in Mystic, Connecticut.<sup>40</sup>

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<sup>32</sup> S. Dromgoole, *Murky Waters for Government Policy: The Case of a 17<sup>th</sup> Century British Warship and 10 Tonnes of Gold Coins*, *Marine Policy*, 28 (2004), p.191.

<sup>33</sup> 'Ship that came from depths of history' – *The Times*, 13 October, 1998.

<sup>34</sup> 'Dreams of Undersea Treasure Excite Tampa-based Explorers' -*Tampa Tribune*, 18 October, 1998.

<sup>35</sup> *Ibid.*

<sup>36</sup> Information concerning the excavation of the vessel can be found on Odyssey's website: <http://www.shipwreck.net>.

<sup>37</sup> *Ibid.*

<sup>38</sup> Scovazzi, *The application of Salvage Law and Other Rules of Admiralty*, in Scovazzi, T. & Garabello, R. (eds.), *The Protection of the Underwater cultural Heritage before and after the 2001 Convention*, p. 76.

<sup>39</sup> Information on the exhibition can be found at: <http://www.mysticaquarium.org/index.cgi/30>

<sup>40</sup> Scovazzi outlines a number of criticisms on the 'archaeological' activities of Ballard. See *supra* 37.

The discovery, recovery and transportation of cultural objects from the Mediterranean to the United States by exploration and salvage companies means that: a) the objects are being taken from the historical and archaeological context with which they are associated; b) the objects are being transported away from their region of origin, thus denying any territorial link between the objects and the people who live in the region; c) they are not subject to archaeological protocols and standards of excavation; and d) they become the property of a far flung private institution.

**C. *'Mare Nostrum'? The in rem jurisdiction of US Courts over cultural objects in Mediterranean waters***

During the negotiations leading to the adoption of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, the Italian delegation declared that 'it cannot accept that any private individual or company can automatically acquire property rights in an object which is part of the Mediterranean cultural heritage and dispose of it as a private owner' [...] "neither can Italy accept that a foreign judge can declare a prohibited area in the Mediterranean where archaeological research cannot be made by the relevant Italian public authorities."<sup>41</sup> This statement by the Italian delegation sums up the problem with regard to jurisdiction over historical vessels in European waters; which can in turn be traced to the divergence between common law and civil law countries on the issue of salvage. In some countries of common law, such as the US and the UK, principles of admiralty law are applied with respect to cultural heritage, and are even considered to be old principles of international law.<sup>42</sup>

In contrast, the application of salvage law to cultural heritage is completely unknown in countries of civil law, who regard it more characteristic of domestic rather than international rules. In civil law salvage mostly denotes traditional salvage and accordingly it is applied to vessels in peril or in need of recovery. When a ship has sunk, however, and a certain amount of time has elapsed, it is no longer subject to salvage law and becomes the property of the state. It is inconceivable that cultural or historical vessels become the property of a private person or entity by law, as in most civil law countries the underwater cultural heritage is out of the stream of commerce. On a purely philosophical level, it is curious that the freedom-of-fishing approach of the high seas should take precedence over the law of states with a direct cultural, historical and geographical link to the Mediterranean. On a practical level, this is of course due to the fact that although the Mediterranean is an enclosed regional sea, the vast majority of its waters are international, and there is no protection for cultural heritage outside the territorial seas of coastal states.

The origins of this problem can be traced to the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) relating to 'archaeological and historical objects'.<sup>43</sup> Article 303(1) holds that 'states have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose', which is not a very strong obligation and the word 'protect' can be interpreted in many ways. Article 303(2) refers to the contiguous or 24-mile zone set forth in Article 33 of the Convention:

In order to control traffic in such [archaeological or historical] objects, the coastal state may, in

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<sup>41</sup> R. Garaballo, The Negotiation History of the Convention on the Protection of the Underwater Cultural Heritage, in Scovazzi, T. & Garaballo, R. (eds.), *The Protection of the Underwater Cultural Heritage before and after the 2001 Convention*, p.125-126.

<sup>42</sup> See Dromgoole, Law and the underwater cultural heritage: a question of balancing interests, Brodie, N. and Walker Tubb, K., *Illicit Antiquities: The theft of cultural and the extinction of archaeology*, London, 2002, p.122.

<sup>43</sup> Article 149 deals with cultural heritage in the Area and is therefore not applicable to the Mediterranean: "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."

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.

Therefore, only removal, not disturbance or destruction, should result in infringement of coastal state laws. In the opinion of Aznar-Gomez, a literal reading of this looks absurd, and must be interpreted as extending coastal state legislation over any activity directed at the underwater cultural heritage.<sup>44</sup> Article 303(3), however, gives over-arching status to salvage law and the law of admiralty:

Nothing in the Article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or law and practices with respect to cultural exchanges.

Therefore, UNCLOS has provisions for the Area (Article 149) and the Contiguous Zone (Article 303), but there is no mention of the underwater cultural heritage located on the Continental Shelf or the EEZ and it gives precedence to the law of salvage. It is for these reasons that Article 303 has been described as 'contradictory' and 'counterproductive' as it leaves a gap in the protection of underwater cultural heritage precisely in the waters it is most likely to be located.

During the negotiations for UNCLOS some countries were prepared to extend the jurisdiction of the coastal state to the underwater cultural heritage found on the continental shelf. An informal proposal was submitted by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia. The proposal was rejected, however, due to the fear of creeping jurisdiction by coastal states. The question of jurisdiction also proved a lengthy and complex question during the negotiations of the 2001 Convention on the Protection of the Underwater Cultural Heritage. Articles 9 and 10 are the main provisions dealing with the Continental Shelf and the EEZ and their main goal was indeed to fill the gap that exists in the current regime. Again, the fear of creeping jurisdiction proved to be a problem here, as well as the fear of violating UNCLOS and the potential for limiting the freedom of the high seas.<sup>45</sup> In the International Law Association (ILA) Draft Convention, states parties were allowed to create a 'cultural heritage zone' extending to their continental shelf (Articles 1 and 5) but this was rejected at the 1996 Meeting of Experts, who felt that the use of a completely new concept not codified by UNCLOS could jeopardize the success of the future Convention.

Eventually, obligations pertaining to the cultural heritage in the Continental Shelf or EEZ relate to reporting, consultation and urgent measures. Article 9 contains obligations with respect to reporting and essentially prohibits secret activities or discoveries. States parties shall require their nationals or vessels flying their flag to report activities or discoveries to them.<sup>46</sup> If the activity or discovery is located on the continental shelf of another state party then:

(i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;

(ii) 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.<sup>47</sup>

The 'state party' mentioned in subparagraph (ii) is ambiguous in that it could be read to mean the coastal state; according to the preparatory works, however, is to be understood as the state to which

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<sup>44</sup> M.J. Aznar-Gomez, Spain, in Dromgoole, *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, p.274.

<sup>45</sup> For a detailed discussion on the negotiation process concerning Articles 9 & 10 see Garabello, *supra* 22, pp. 138-151.

<sup>46</sup> Article 9, para. 1 (a).

<sup>47</sup> Article 9, para. 1 (b).

the national belongs or the state of which the vessel flies the flag.<sup>48</sup> Regarding consultations, the coastal state shall consult all states parties which have declared their interest in being consulted on how to ensure the effective protection of the underwater cultural heritage in question.<sup>49</sup> Article 9(5) provides that any state party may declare its interest in being consulted and that ‘such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned’. The coastal state shall co-ordinate the consultations, unless it does not wish to, in which case the interested states parties shall appoint another coordinating state. The coordinating state will then implement the measures of protection which have been agreed by consulting states and may conduct any preliminary research.<sup>50</sup>

Article 10(2) maintains that “a state party in whose exclusive economic zone or continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by the international law including the United Nations Convention on the Law of the Sea.” Article 10(4) also deals with urgent measures:

Without prejudice to the duty of all States 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, including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties.

This right enabling the coordinating state to adopt urgent measures is perhaps the most important protective measure within the Convention, as it allows for direct intervention without the burden of consultation and other timely procedures.<sup>51</sup> If more Mediterranean states were to ratify the 2001 Convention, Articles 9 and 10 would mean that they might prevent activities carried out by commercial salvors in Mediterranean waters outside the respective territorial jurisdictions.

### **3. The Mediterranean Context: Possible Solutions**

#### **A. Regional Agreement**

During the negotiations leading to the 2001 Convention, there were many differences over aspects of the Convention – most of which related to the normative scheme codified by UNCLOS and the fear of certain states of diverging from it. However, on a more subtle level, some difference in attitude existed between the flag and coastal states in their approach to the Convention. This difference suggests that the coastal states adjacent to an open sea tend to be more cautious of the Convention than coastal states adjacent to a regional sea, particularly if the states share with other coastal states of the same condition an interest in such regional sea.<sup>52</sup> One of the reasons for this assumption is that the legal

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<sup>48</sup> Scovazzi, The Convention on the Protection of the Underwater Cultural Heritage, in Scovazzi, T., *La Protezione del patrimonio culturale sottomarino nel Mare Mediterraneo*, Milano, 2004, p.36.

<sup>49</sup> Article 10, para.3 (a) and Article 9, para.5. As Scovazzi point out, the term ‘costal state’ is actually not mentioned – this reflects the sensitivities of those states that feared the prospect of ‘creeping jurisdiction’.

<sup>50</sup> Article 10, para.5.

<sup>51</sup> Article 10 (para. 6) also states that the coordinated state party must ‘act on behalf the states parties as a whole and not in its own interest’.

<sup>52</sup> A.W. Gonzalez, Some Thoughts on the Different Contexts that Coastal States Face, in Scovazzi, T., *La Protezione del patrimonio culturale sottomarino nel Mare Mediterraneo*, p. 109.

systems of regional coastal states tend to belong to the same tradition. This facilitates a concerted position of such countries as regards the exclusion of the law of salvage and the law of finds. Furthermore, regional coastal states tend to have cooperation agreements between their custom, fiscal or coast guard authorities on other issues. This framework would facilitate and stimulate regional coastal states to collaborate on matters of monitoring, protecting and preventing unauthorized removal of cultural objects. In addition, various environmental and fisheries agreements already bind regional coastal states to mutually monitor the exercise of due diligence as regards activities that may incidentally affect underwater cultural heritage. This is the case, for example, with the regime established under the Barcelona Convention and its Protocols, particularly the protocol on specially protected areas and biological diversity in the Mediterranean.<sup>53</sup> Thus it would seem that all the ingredients are there for an agreement of a regional nature. Article 6 of the 2001 Convention encourages regional agreements and seems to allow for a scenario of *ex ante*, that is, the Convention cannot alter the rights and obligations of States arising from agreements concluded before its adoption and “in particular, those that are in conformity with the purposes of the Convention.”<sup>54</sup> UNCLOS itself does not exclude the possibility. Article 303(4) states:

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.

Although we may not want to rely on UNCLOS for guidance on whether it may or may not be possible to conclude an agreement that might somehow alter its stance with respect to the venerable law of the sea, we must bare in mind that UNCLOS is *lex generalis* whilst an agreement on the underwater cultural heritage is *lex specialis*. In theory, there should not be any conflict between the two in respect of a regional agreement of this nature.

In March 2001, the Siracusa Declaration on the Submarine Cultural Heritage of the Mediterranean Sea was adopted during the international conference entitled “Means for the Protection and Tourist Promotion of the Marine Cultural Heritage in the Mediterranean” and in April 2003 the Italian government began an initiative to negotiate and adopt the regional convention. This is a promising step forward and will hopefully move in the right direction in the near future. As Garabello points out, there is one aspect of the Mediterranean draft convention that might make it more appealing than the UNESCO Convention; in the case of warships or state vessels sunk in foreign territorial seas, the coastal state ‘shall’ (instead of ‘should’) inform the flag state of the discovery of a sunken vessel flying its flag.<sup>55</sup> This was one of the major obstacles for flag states during negotiations and the reason why some decided not to ratify the 2001 Convention.<sup>56</sup>

### **B. The Inclusion of Salvors?**

Another solution would be the inclusion of salvors (not salvage law) within the regulatory system – in order that they would be permitted to conclude agreements with the relevant government authorities. The *HMS Sussex* contract between Odyssey and the British Government is an example of this kind of agreement. Those who champion this proposal would say that salvors will continue to explore and conduct their operations regardless and therefore it is better to regulate their activities and try to include them in the system. Furthermore, many salvage companies, including Odyssey Marine Exploration, have started to employ marine archaeologists for their projects and to apply

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<sup>53</sup> Signed in 1976 as the Convention for the Protection of the Mediterranean Sea against Pollution (revised in 1995 as the Convention on the Protection of the Marine Environment and the Coastal Region of the Mediterranean).

<sup>54</sup> Article 6, para.3.

<sup>55</sup> Garabello, The Sunken Warships in the Mediterranean, in Tullio Scovazzi (ed.), *La Protezione del Patrimonio Sottomarino nel Mare Mediterraneo*, p.197.

<sup>56</sup> Article 6, para.1 of the first draft, presented at the international conference held in Siracusa on 3-5 April 2003.

archaeological standards. As Dromgoole points out, this may simply be to add a veneer of respectability to their activities, or it may be a genuine attempt to adopt archaeological methods.<sup>57</sup> The 2001 Convention excludes the application of salvage law to the underwater cultural heritage, **unless it: a)** is authorised by the competent authorities, b) is in full conformity with the Convention, and c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.<sup>58</sup> However, the Convention prohibits outright the commercial exploitation of the underwater cultural heritage. So it would seem that provided the cultural objects are not exploited, the possibility of concluding an arrangement with a salvage company is left open under the Convention. Another argument in favour of an agreement of this sort is that bullion and coins are not as archaeologically valuable as other cultural objects. They are also plentiful and no museum would display the whole collection, as many representative examples exist elsewhere.

Yet those who argue in favour of the inclusion of salvors within the regime fail to take into account one crucial point: the preservation *in situ* of sunken vessels. The *in situ* preservation of archaeological remains is a principle enshrined in the regime set out by the European Convention on the Protection of the Archaeological Heritage, also known as the Valletta Convention,<sup>59</sup> which includes archaeological heritage situated under water in its scope of application.<sup>60</sup> (The 2001 Convention echoes this principle.) While the majority of land excavations are construction-led and therefore archaeological remains are not always preserved *in-situ*, underwater archaeological remains often lie undisturbed for hundreds of years; they have the added advantage of being better preserved than their counterparts on land; and they are considered time capsules of a moment in history. In respect of the underwater cultural heritage, it is likely that new technologies developed in the future will be better equipped at exploring and preserving archaeological remains lying in deep waters. The only exception to *in-situ* preservation would be a scenario whereby the discovery of a sunken vessel was made during the construction of a pipeline (for example), thus leaving timely excavation as the only option. In this case, would it be appropriate to contract a private salvage company? In response to this question it is worth quoting an extract of a paper presented by the Archaeological Institute of America:

[...] Treasure hunting, or private sector commercial recovery, has never been able to convincingly demonstrate that it can operate in a way that satisfies the archaeological and preservation interests. Commercial recovery frequently results in the destruction of underwater cultural resources as systematic archaeological recording, excavation, and conservation are sacrificed in the interests of expedient recovery of marketable property. Even commercial projects that are regulated by state authorities have an abysmal record in terms of professional standards of performance, preservation, and dissemination of information. The aims, methods, and practices of treasure hunters are fundamentally at odds with those of archaeologists and preservationists.<sup>61</sup>

If we return to the case of the 'Black Swan' presented at the start of this paper; until the details regarding the location, identity and contents of the vessel are disclosed, we will not know if Odyssey have acted in good faith or not. Despite their best attempts to convey archaeological integrity, there are a number of issues which sit uncomfortably with this self-portrayal: the first is that Odyssey lied about the value of the coins exported from Gibraltar, underplaying their value. When back in the US,

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<sup>57</sup> See Dromgoole, Law and the underwater cultural heritage: a question of balancing interests, Brodie, N. and Walker Tubb, K., *Illicit Antiquities: The theft of cultural and the extinction of archaeology*, p.121.

<sup>58</sup> Article 4.

<sup>59</sup> The European convention on the Protection of the archaeological Heritage (Valletta, 1992) replaced the earlier London Convention (1969) and introduced a number of safeguards.

<sup>60</sup> Article 1(3).

<sup>61</sup> The archaeological Institute of America (AIA) Comments on the UNESCO/UN Division on Ocean Affairs and the Law of the sea Draft Convention on the Protection of the Underwater Cultural Heritage reproduced in Scovazzi, *supra* 42, p.78-79.

however, Odyssey announced a sum significantly higher (100%) than what had been quoted to customs. It now seems that the cost was over-valued to lift shares in the company, which it did. Second, it was disclosed in stock exchange documents that three Directors of Odyssey Marine Exploration cashed in millions of dollars of shares within days of announcing their recovery of 17 tons of gold and silver coins from the wreck.<sup>62</sup> Thirdly, in 2005 and 2006, Odyssey suffered net losses of \$14.9m and \$19.1m respectively, but after the discovery of the Black Swan, its stocks were transferred on the NASDAQ. This would indicate that from the very beginning this case has been about financial profit, not archaeology and the preservation of a historical sunken vessel.

## Postscript

Since this paper was written, a number of significant developments have occurred in the case of *Odyssey Marine Exploration v the Unidentified Shipwrecked Vessel*. In the Pretrial Conference that was scheduled for 6 March 2008, the Magistrate Judge dismissed Spain's request for a dismissal of Odyssey's request for a possession and ownership claim, provided that the Order of 10 January requiring Odyssey to disclose all the relevant information was complied with. Problems began to emerge when Spain declared that Odyssey had not in fact disclosed sufficient information necessary to draw a hypothesis regarding the vessel's identity.<sup>63</sup> Odyssey was then given 30 days within which to state the identity of the ship, and if not, to make a good faith belief as to its identity, or at the very least, a working hypothesis.<sup>64</sup> On 17 April 2008 the Court refused Odyssey's request for a Protective Order, on the basis that the Judge found its appeals for secrecy to be 'disingenuous' and utterly 'without merit' given that Odyssey had not guarded the vessels' names with secrecy in the press but only in Court.<sup>65</sup> It was stated that 'Odyssey's actions in releasing the vessels' names in the media contradict its claims that secrecy is necessary due to site security.'<sup>66</sup> The names released were *La Nuestra Señora de Las Mercedes* for the vessel code-named the Black Swan, precisely the hypothesis put forward by Spain, and the *Merchant Royal* for one of the other two vessels transferred to the same Court and for which Spain had also filed a claim. In a Press Conference on 8 May 2008, James Goold (counsel for Spain) declared that 'the mystery is over'.<sup>67</sup> For Spain it is no longer a hypothesis but a certainty that the vessel is that of *La Nuestra Señora de Las Mercedes*. It bases its certainty on three facts: a) the location of the vessel coincides with where the *Mercedes* sunk in 1804;<sup>68</sup> b) the cargo includes *reales de a ocho* minted in Lima in 1803 and bearing the image of Spain's Carlos IV; and c) Odyssey had carried out its research on the ship in the *Archivo de Las Indias* prior to the expedition and knew what it was looking for. Spain affirms that the vessel was in the service of the Kingdom of Spain and is therefore subject to sovereign immunity. Odyssey, for its part, argues that the vessel had been 'assigned to transport mail, private passengers and consignments of merchant goods at the time of sinking.'<sup>69</sup>

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<sup>62</sup> John Morris, Odyssey chief executive and co-founder, sold £ 650,000 of shares four days after the issuing of the May 18 press release, while David Morris, the company secretary and treasurer, earned himself more than £ 343,000 within the following 24 hours. George Becker, then Odyssey's executive vice-president and who has since left the company, also sold shares worth £ 193,000 within 12 days of the announcement. The commission declined to comment this weekend. See 'Sunken Treasure overvalued to Lift Shares of Salvage Firm – *Sunday Times*, 4 November 2007.

<sup>63</sup> See Order <http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2006cv01685/186117/99/>

<sup>64</sup> *Ibid.*

<sup>65</sup> See Order 110 of 17 April 2008: <http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2006cv01685/186117/110/>

<sup>66</sup> *Ibid.*

<sup>67</sup> Cultura tiene la convicción legal y moral de que vencerá a Odyssey – *El País*, 9 May 2008.

<sup>68</sup> Outside Spanish territorial waters off the south coast of Portugal.

<sup>69</sup> See *supra* 64.

Finally, in the most recent decision on 3 June 2009, the Court concluded that the *res* is in fact *La Nuestra Señora de las Mercedes*, and thus declared itself without jurisdiction to adjudicate the claims against Spain's property.<sup>70</sup> Judge Mark Pizzo stated that 'Odyssey set out to find the Mercedes and found it'.<sup>71</sup> Odyssey's amended complaint was dismissed and the warrant of arrest vacated. All claims against the *Mercedes* have been denied, and Odyssey has been ordered to return the vessel and its property to Spain. The decision has been applauded by the Spanish Ministry for Culture, which stated that 'the decision is an extraordinary progress for our country, for our rights and duties to protect our heritage against any illegal interferences or commercial uses. These rights and duties are contemplated in Spanish law on the protection of historical heritage and in the UNESCO Convention on the Protection of the Underwater Cultural Heritage, which came into force in January this year.'<sup>72</sup> It is envisaged that Odyssey will now appeal the decision.

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<sup>70</sup> Odyssey Marine Exploration, Inc. v The Unidentified Shipwrecked Vessel, Doc. 209 at: <http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2007cv00614/197978/209/>.

<sup>71</sup> Ibid, at 7.

<sup>72</sup> 'The Judge of Odyssey Case recognised Spain's Claim Rights Upon Mercedes', *States News Service*, 4 June 2009.



# **The Protection of the Underwater Cultural Heritage: An Italian Perspective**

Tullio Scovazzi \*

## **Abstract**

While the legislation on underwater cultural heritage of some countries, such as Italy, is based on the State ownership of cultural property fortuitously found and on its use for public purposes (exhibition, research), the legislation of other countries, such as the United States, grants priority to the commercial use of such property and attributes the right of ownership to the finder. The 1982 United Nations Convention on the law of the sea takes the latter approach and creates a serious risk of pillage of the cultural heritage on the basis of a first-come-first-served criterion. The UNESCO Convention on the protection of the underwater cultural heritage attempts to remedy such an undesirable situation.

## **Keywords**

Underwater cultural heritage – Mediterranean - admiralty law – 2001 UNESCO Convention

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## 1. The Melqart of Sciacca

In January 1955 a 38 cm high bronze statue accidentally became entangled in nets being dragged by the *Angelina Madre*, a fishing vessel flying the Italian flag. The recovery of the artefact occurred on the Italian continental shelf, at about 20 n.m. from the Italian coast south of the island of Sicily.<sup>1</sup>

At first the statue was not considered to be of importance. Without dissent of any sort, it was taken by one of the sailors, Mr. Santo Vitale, to his home in the city of Sciacca. It was then displayed for some months in a small grocery shop managed by Mr. Calogero Vitale, father of the sailor. It was later sold to a neighbour, Mr. Giovanni Tovagliari, or perhaps (the point has never been clarified) bartered for some flasks of wine.

Mr. Tovagliari was the first to wonder whether the statue might be of historical importance and submitted it for examination to Mr. Stefano Chiappisi, an expert in history. Mr. Chiappisi's research ascertained that the statue was a very rare historical relic of the Phoenician civilisation (9th to 11th century B.C.), representing a deity that was probably Melqart, the god of the sea. It was similar to the only two other examples known to be in existence: the Adad, or Ba-Al, of Minet el Beida, found in Syria and now exposed in the Louvre in Paris; and the Addad of Pelizeus, or Resef, preserved in the museum of Hildesheim, Germany. However, it was perhaps even more precious because of its greater height.

Learning of the fortunate finding, the Superintendent of Antiquities of the Province of Agrigento requested that the Melqart of Sciacca (as the statue came to be called) be handed over to him, as the property of the State. Under the Italian legislation applicable at that time (Law 1 June 1939, No. 1089), all objects belonging to the cultural heritage which are fortuitously found belong to the State. The finder is only entitled to a reward. However, in order to ensure the Melqart for his city's cultural heritage, Mr. Tovagliari donated it to the municipality of Sciacca. The municipality accepted the donation and entrusted the Melqart to a respected clergymen, Mgr. Aurelio Cassar, who jealously cared for the statue in the historical section of the municipality's library, opposing any requests of the Superintendent.

At this point, Mr. Michele Scaglione, the owner of the *Angelina Madre*, intervened in the matter. He maintained that the sphere of application of the Italian legislation on the cultural heritage was limited to the Italian territory and territorial sea (which was, at that time, 6 n.m. in breadth).<sup>2</sup> Relying on what could be considered as a "first-come-first-served" or "freedom-of-fishing" principle, he asked that the Melqart be declared his property, as a *res nullius* having been found by his vessel on the high seas.

The subsequent litigation to determine the ownership of the statue involved, on opposing sides, the State, the municipality of Sciacca, Mr. Scaglione and the heirs of Mr. Tovagliari (the latter maintaining that Mr. Tovagliari, who in the meantime had died, had not donated the Melqart to the municipality but had only entrusted it for safekeeping). The case was settled on 9 January 1963 by an interesting, albeit questionable<sup>3</sup>, decision whereby the Tribunal of Sciacca found that the Melqart belonged to the State.<sup>4</sup>

The Tribunal held that a ship flying the Italian flag is to be considered as a part of Italian territory. The nets of a fishing vessel flying the Italian flag are a part of the vessel itself and, consequently, also a part of the Italian territory. This meant that the Melqart, having been enmeshed in the nets of an Italian fishing vessel, was to be treated as if it had been found in the Italian territory with the consequent application of

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<sup>1</sup> On the statue, see CAMERATA SCOVAZZO, *Presentazione della statuetta bronzea di Reshef (Melqart)*, in LI VIGNI & TUSA (a cura di), *Strumenti per la protezione del patrimonio culturale marino - Aspetti archeologici*, Milano, 2002, p. 1.

<sup>2</sup> By Law 14 August 1974, No. 359 (*Gazzetta Ufficiale della Repubblica Italiana* No. 218 of 21 August 1974) the external limit of the Italian territorial sea was extended to 12 n.m.

<sup>3</sup> For the reasons specified *infra*, para. 3.

<sup>4</sup> The decision can be read in *Il Foro Italiano*, 1963, I, p. 1317.

the Italian legislation which granted to the State the ownership of the cultural heritage fortuitously found.

Taking into consideration the public interest in protecting the cultural heritage<sup>5</sup>, the practical result obtained by the decision can be appreciated. In facing a case for which no precedents were available, the Tribunal avoided the application of a “first-come-first-served” or “freedom-of-fishing” principle which would only have served the private interests of the ship-owner. This objective was achieved through the use of legal imagination based on the innovative theory of “prolongation of prolongation”: the nets of a fishing vessel are the prolongation of the vessel which in its turn is the prolongation of Italian territory.

## 2. The Italian Legislation on Underwater Cultural Heritage

The legal intricacies in which the Melqart of Sciacca was involved can also be seen as a good introduction to the rules applying in Italy in the field of underwater cultural heritage.<sup>6</sup> The regime in force today is found in Legislative Decree 22 January 2004, No. 41, entitled “Code of Cultural Properties and Landscape”.<sup>7</sup> It does not substantially depart, as far as the underwater cultural heritage is concerned, from the previous regimes established by Legislative Decree 29 October 1999, No. 490<sup>8</sup>, and, many years before, by Law 1 June 1939, No. 1089.

Under Art. 2, para. 2, Cult. Code, cultural properties are all the things, either movable or immovable, that present an artistic, historical, archaeological, ethno-anthropological, archival and bibliographical interest, as well as the other things specified by the relevant laws as evidence of civilization. The cultural properties that belong to the State, the regions<sup>9</sup> and the other public territorial entities (provinces or municipalities) form the cultural demesne (Art. 53 Cult. Code).<sup>10</sup>

Research in the field of archaeological and cultural properties in any part of the national territory is reserved to the Ministry for Cultural Properties and Activities<sup>11</sup> or to the public or private subjects who have been authorized by the Ministry (Arts. 88 and 89 Cult. Code).<sup>12</sup> Anyone who fortuitously discovers cultural properties is bound to inform within 24 hours the regional superintendent for cultural and environmental properties or the mayor or the police and to ensure the provisional conservation of the properties leaving them in the conditions and the place where they have been discovered.<sup>13</sup> The removal

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<sup>5</sup> Today the Melqart can be found at the Regional Archaeological Museum of Palermo.

<sup>6</sup> The problems of the underwater cultural heritage have been studied with much interest by Italian authors. Besides the works quoted in other footnotes, see also MIGLIORINO, *Il recupero degli oggetti storici e archeologici sommersi nel diritto internazionale*, Milano, 1984; TREVES, *Stato costiero e archeologia sottomarina*, in *Rivista di Diritto Internazionale*, 1993, p. 698; LEANZA, *Le patrimoine culturel sous-marin de la Méditerranée*, in CATALDI (sous la direction de), *La Méditerranée et le droit à l'aube du 21ème siècle*, Bruxelles, 2002, p. 139; GARABELLO, *La Convenzione UNESCO sulla protezione del patrimonio culturale subacqueo*, Milano, 2004.

<sup>7</sup> Hereinafter: Cult. Code. Text in *Gazz. Uff. suppl.* to No. 45 of 24 February 2004.

<sup>8</sup> *Gazz. Uff. suppl.* to No. 302 of 27 December 1999.

<sup>9</sup> Sicily is the Italian Region which is entitled to exercise the broadest competences in the field of cultural properties. Under Art. 14 of the Statute of the Region (Constitutional Law 26 February 1948, No. 2), Sicily has been granted exclusive legislation in the field of, *inter alia*, conservation of antiquities and artistic properties. Under Regional Law 29 December 2003, No. 21 (*Gazzetta Ufficiale della Regione Siciliana* No. 2 of 9 January 2004) a Superintendency of the Sea was established. The relevant regulations provide, with a certain margin of ambiguity, that the underwater cultural and historical heritage of the Region is composed of “the cultural properties located in the waters adjoining the regional territory”.

<sup>10</sup> Most of them cannot be sold (Art. 54 Cult. Code). Others can be sold following an authorization by the Ministry for Cultural Properties and Activities (Arts. 55 and 56 Cult. Code).

<sup>11</sup> Hereinafter: the Ministry.

<sup>12</sup> Violators are sanctioned by imprisonment not exceeding one year and a fine of between EUR 310 and EUR 3,099 (Art. 175, a, Cult. Code).

<sup>13</sup> Violators are sanctioned by imprisonment not exceeding one year and a fine of between EUR 310 and EUR 3,099 (Art.

and taking into custody of the properties are permitted only where there is no other means of ensuring their security and conservation until the intervention of the public authorities (Art. 90 Cult. Code).<sup>14</sup> The expenses for removal and taking into custody are reimbursed by the Ministry.

All the cultural properties found by anyone by whatever means in the subsoil or on the seabed belong to the State demesne, if immovable, or to the inalienable patrimony of the State, if movable (Art. 91, para. 1, Cult. Code).<sup>15</sup> The finder is entitled to a reward which is paid by the Ministry and cannot exceed one-fourth of the value of the properties found. However, if the properties are found at sea, the finder is entitled to a reward corresponding to one-third of their value (Arts. 510 and 511 of the Navigation Code<sup>16</sup>). The reward may be paid either in money or through the cession of part of the properties found (Art. 92 Cult. Code). A special procedure, set forth by Art. 93 Cult. Code, applies to the determination of the reward.

The State, the regions, the public territorial entities and any other public institutions are bound to ensure the use of cultural properties for the public benefit (Arts. 101 and 102 Cult. Code). Public initiatives for the preservation and promotion of cultural properties may be sponsored through contributions by private subjects (Art. 120 Cult. Code).

A decree adopted on 12 July 1989<sup>17</sup> provides for measures of inter-ministerial coordination in the field of the protection of marine areas of historical, artistic or archaeological interest. In 2002, based on the above mentioned Legislative Decree No. 490 of 1999 and on the 1991 Framework Law on Protected Areas<sup>18</sup>, two submarine parks of archaeological relevance were established along the Italian coast, respectively at Gaiola in the Gulf of Naples<sup>19</sup> and at Baia in the Gulf of Pozzuoli.<sup>20</sup>

### **3. The Activities by Mr. Ballard in the Mediterranean**

However laudable the objectives achieved by the decision on the Melqart might be, the exertion of imagination displayed by the Tribunal of Sciacca can hardly be subscribed to if the general aspects of the matter are considered. On the basis of the principles applied by the Tribunal, if the Melqart had been recovered by the nets (or whatever other machinery) of an American vessel, United States legislation, i.e. the law of finds, would have become applicable and would have operated for the exclusive benefit of the finder.

Yet this is what occurred later to other cultural properties. The facts demonstrate an unexpected connection between the famous wreck of the *Titanic* and the underwater heritage of the ancient Mediterranean civilisations.

On 1 September 1985, an American expedition sponsored by the Woods Hole Oceanographic Institution and led by Mr. Robert Ballard discovered the wreck of the *Titanic* liner at a depth of 12,460 feet (3,798 m) on the ocean floor south-east of Newfoundland, Canada. Mr. Ballard made use of very advanced deepwater technology, namely a research vessel (*Knorr*), an unmanned submersible (*Argo*), loaded with

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175, b, Cult. Code).

<sup>14</sup> Any one who illicitly takes into his possession cultural properties belonging to the State is sanctioned by imprisonment not exceeding three years and a fine of between EUR 31 and EUR 516.50 (Art. 176 Cult. Code).

<sup>15</sup> Art. 826 of the Civil Code (Royal Decree 16 March 1942, No. 262, in *Gazz. Uff.* No. 79 of 4 April 1942) already provides that things of historical, archaeological, paleontological, paleontological and artistic interest, found by anyone in any way in the subsoil, belong to the inalienable patrimony of the State.

<sup>16</sup> Royal Decree 30 March 1942, No. 327 (*Gazz. Uff.* No. 93 of 18 April 1942).

<sup>17</sup> *Gazz. Uff.* No. 175 of 28 July 1989.

<sup>18</sup> Law 6 December 1991, No. 394 (*Gazz. Uff.* suppl. to No. 292 of 13 December 1991).

<sup>19</sup> Decree 7 August 2002 (*Gazz. Uff.* No. 285 of 5 December 2002).

<sup>20</sup> Decree 7 August 2002 (*Gazz. Uff.* No. 288 of 9 December 2002).

video cameras and towed by a long fiber-optic cable and a remotely operated vehicle (*Jason*), attached to *Argo* on a tether and equipped with lights and stereo cameras.

Mr. Ballard has revealed that he personally resisted the temptation to engage in salvage activities in respect of the artefacts of the wreck in order to supply his cellar with a bottle of *Titanic* champagne. He could not consider the wreck as a "pyramid of the deep", since we do know exactly how the ship was built and what was on board:

Maritime collectors around the world would have paid thousands of dollars for a piece of the ship. And artifacts could have been easily recovered with *Alvin's* powerful robot arm designed to collect biological and geological samples in the deep sea. How I would have loved a bottle of *Titanic* champagne for my own wine cellar. But from all our discussions it became clear the *Titanic* has no true archaeological value. Although it is tempting to make the comparison, the *Titanic* is not a pyramid of the deep. We knew exactly how the ship was built and what was on board. Recovering a chamber pot or a wine bottle or a copper cooking pan would really just be pure treasure-hunting. My major funder, the Navy, wasn't interested in using taxpayers' money for this purpose. Nor was I.<sup>21</sup>

A different view, however, was expressed by Mr. Ballard as regards the removal of objects from ancient shipwrecks located elsewhere and as regards his future activities in the Mediterranean:

There are many true unopened "pyramids" in the deep sea. For example, thousands and thousands of ships were lost in the deep basins of the Mediterranean and wait to be discovered, ships of real archaeological worth. Their cargoes merit documentation, recovery, and preservation.<sup>22</sup>

In the summer of 1997, I will lead an expedition to the Mediterranean that will perform the first-ever excavation of a wreck in deep water. To accomplish this we plan to mount a powerful pumping system on the U.S. Navy nuclear-powered *NR-1* submarine that will vacuum away two thousand years of sediment from three ancient Roman wrecks.<sup>23</sup>

As it appears from an article published by Mr. Ballard<sup>24</sup>, the last of his four Mediterranean expeditions (1997), called the Skerki Bank Deep Sea Project, utilised a support ship (*Carolyn Chouest*), a nuclear-powered research submarine of the United States Navy (*NR-1*) and a remotely operated vehicle (*Jason*).<sup>25</sup> Ancient shipwrecks were located in an area on the Mediterranean continental shelf beyond the limit of the territorial seas of the coastal States.<sup>26</sup> No prior official information about the expedition appears to have been given to any of the Mediterranean coastal States.

Mr. Ballard reported removing more than 150 artefacts (amphorae, glassware, anchors) from the seabed. When asked about the concern that his expeditions had raised, Mr. Ballard relied on the principle of freedom of the high seas:

I do not like being wrongly accused. (...) I was well outside the 12-mile limit.<sup>27</sup>

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<sup>21</sup> BALLARD & ARCHBOLD, *The Discovery of the Titanic*, 2nd ed., Toronto, 1998, p. 138. *Alvin* is the name of the manned submersible used by Mr. Ballard in his second expedition to the wreck (1986).

<sup>22</sup> *Ibidem*, p. 138.

<sup>23</sup> *Ibidem*, p. 221.

<sup>24</sup> BALLARD, High-Tech Search for Roman Shipwrecks, in *National Geographic*, No. 4, 1998, p. 32.

<sup>25</sup> The expedition was supported in part by the United States National Geographic Society, the Office of Naval Research and the J.M. Kaplan Fund. On the expeditions and the retrieval of artifacts see also BALLARD & McCONNELL, *Adventures in Ocean Exploration*, Washington, 2001, p. 69.

<sup>26</sup> This area includes the Skerki bank and is located along a navigational route which crossed the Mediterranean in ancient times. Several archaeological discoveries of objects pertaining to the Phoenician, Greek and Roman civilizations have been made there, including the famous "dancing satyr".

<sup>27</sup> *The Times*, 6 August 1997. For a different view see BLACKMAN, *Is Maritime Archaeology on Course?*, in *American*

Mr. Ballard pointed out that the objects removed from the Mediterranean “were protected by the non-profit Sea Research Foundation which would not allow their exploitation”. This implies that the Sea Research Foundation is supposed to be the owner of the objects in question. Mr. Ballard himself complained of the lack of rules to deter the looting of the underwater cultural heritage:

Far from being a plunderer, he said, he was worried about others who would try to loot the ancient ships with no international laws to deter them.<sup>28</sup>

The artefacts removed by Mr. Ballard are now in the United States of America:

The artifacts we bring home from our first deep-sea excavation in 1997, after carefully mapping the wrecks we excavate, will be put on display in the brand new Institute for Exploration in Mystic, Connecticut, due to open in April 1999.<sup>29</sup>

In asserting that he could not be accused of illegalities, Mr. Ballard was right, in so far as the regime applied under the legislation of the United States is considered. In many countries, the notion of salvage (*sauvetage* in French, *salvataggio* in Italian) is only related to the attempts to save a ship or property from imminent marine peril on behalf of its owners. But United States courts apply the notion of “salvage” to ancient sunken ships and to objects removed from such wrecks which, far from being in peril, have been very clearly lost.

For example, the United States Court of Appeals for the 4th Circuit in a decision rendered on 24 March 1999 (*R.M.S. Titanic, Inc. v. Haver*) stated that the law of salvage and finds is a “venerable law of the sea”. It is supposed to be applicable in all the oceans and seas of the world. It is said to have arisen from the custom among “seafaring men” and to have “been preserved from ancient Rhodes (900 B.C.E.), Rome (Justinian's *Corpus Juris Civilis*) (533 C.E.), City of Trani (Italy) (1063), England (the Law of Oleron) (1189), the Hanse Towns or Hanseatic League (1597), and France (1681), all articulating similar principles”.<sup>30</sup> Coming to the practical result of such a display of legal erudition, the law of salvage, which appears to be applicable when the owner of the wreck is known, gives the salvor a lien (or right *in rem*) over the object. The law of finds, which becomes applicable when the owner of the wreck or the removed objects is not known, means that “a person who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession becomes the property's owner”.

The fact remains that the body of “the law of salvage and other rules of admiralty” is today typical of a few common law systems, but is a complete stranger to the legislation of the majority of other countries. For instance, no Italian lawyer (with the laudable exception of a few scholars) would today know what the “law of salvage and finds” is, despite the fact that the cities of Rome and Trani, which are said to have contributed to this body of “venerable law of the sea”, are located somewhere in the Italian territory. Nor

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*Journal of Archaeology*, 2000, p. 596: “(...) I wonder whether it has been realized in the United States how much offense has been caused to their sensibilities by American archaeological operations in deep water in the Mediterranean” (the sensibilities referred to are those of the Mediterranean States).

<sup>28</sup> *Ibidem*. Incidentally, Mr. Ballard's viewpoint may seem in contradiction with the spirit of the recent Agreement between Italy and the United States concerning the imposition of import restrictions on categories of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy (Washington, 19 January 2001; text in *International Legal Materials*, 2001, p. 1031). Under the Agreement, “both Governments agree that, in order for United States import restrictions to be most successful in thwarting pillage, the Government of the Republic of Italy shall endeavor to strengthen cooperation among nations within the Mediterranean Region for the protection of the cultural patrimony of the region, recognizing that political boundaries and cultural boundaries do not coincide; and will seek increased cooperation from other art-importing nations to restrict illicit imports, in the effort to deter further pillage” (Art. II, D).

<sup>29</sup> BALLARD & ARCHBOLD, *The Discovery* cit., p. 221.

<sup>30</sup> *International Legal Materials*, 1999, p. 807.

is it clear how a “venerable” body of rules, that is believed to have developed in times when nobody cared about the underwater cultural heritage, could provide any sensible tool today for dealing with the protection of the heritage in question. Yet, looking at the conclusions reached in their decisions on underwater cultural heritage, it would seem that some American judges are much better than normal human beings: they have access to all the ancient sources from where such a “venerable law of the sea” can be inferred, they know all the mysterious languages in which the relevant rules have been written, they are able to interpret such rules correctly, they seize the intrinsic consistency between one source and the other and, finally, they can explain to the rest of the world why a “first-come-first-served” or “freedom-of-fishing” approach is the best way to deal with the subject of underwater cultural heritage. This is impressive indeed.

But the few people who are not impressed by such a display of legal erudition are inclined to suppose that the lofty and almost theological expressions employed by the American supporters of the law of salvage and the law of finds (such as “return to the mainstream of commerce”, “admiralty's diligence ethic”, “venerable law of the sea”, etc.) are doubtful euphemisms. They disguise a “first-come-first-served” or “freedom-of-fishing” approach based on the destination of underwater cultural heritage for the purpose of private interest or gain of the finders.<sup>31</sup> Private appropriation and commercial sale are the most likely destiny of the artefacts removed from the wrecks. The non-commercial value of such properties and their use for the public benefit have very little relevance.

#### 4. The UNCLOS Invitation to Looting

Sadly enough, Mr. Ballard was twice right. His statements find support not only in American law but also in the regime set forth by the United Nations Convention on the Law of the Sea (Montego Bay, 1982)<sup>32</sup> as regards the underwater cultural heritage. While Art. 303, para. 1, UNCLOS refers to a very general obligation of protection of underwater cultural heritage<sup>33</sup>, para. 3 of the same provision subjects this general obligation to a completely different set of rules:

Nothing in this article affects the rights of identifiable owners, the law of salvage and other rules of admiralty, or laws and practices with respect to cultural exchanges.

Salvage law and other rules of admiralty, which include the law of finds, are given an overarching status by the UNCLOS. If there is a conflict between the objective of protecting the underwater cultural heritage, on the one hand, and the provisions of salvage law and other rules of admiralty on the other, the latter prevail.

Availing himself of the principle of freedom of the sea, any person on board a ship could explore the continental shelf adjacent to any coastal State, bring any archaeological and historical objects to the surface, become their owner under domestic legislation (in most cases, the flag State legislation<sup>34</sup>), carry the objects into certain countries and sell them on the private market. If this were the case, there would be no guarantee that the objects are disposed of for the public benefit rather than for private commercial gain or personal benefit. Nor could a State which has a direct cultural link with the objects prevent the continuous pillage of its historical heritage.

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<sup>31</sup> See, as regards the story of Spanish galleons looted by American treasure hunters or the fate of the artifacts removed from the *Titanic* after the granting of salvage rights to a private corporation (in which Mr. Ballard has no interest at all), SCOVAZZI, *The Application of "Salvage Law and Other Rules of Admiralty to the Underwater Cultural Heritage*, in GARABELLO & SCOVAZZI (eds.), *The Protection of the Underwater Cultural Heritage - Before and After the 2001 UNESCO Convention*, Leiden, 2003, p. 19.

<sup>32</sup> Hereinafter: UNCLOS.

<sup>33</sup> “States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose”.

<sup>34</sup> In this regard, the problems posed by flags of convenience must be taken into consideration.

The danger of a “first-come-first-served” or “freedom of fishing” approach for underwater cultural heritage is far from being merely theoretical. Art. 303, para. 3, UNCLOS, at least in the official English text<sup>35</sup>, can be seen as more conducive to the protection of the looting of underwater cultural heritage than to the protection of the heritage itself. It is not clear how such an unhelpful provision was included in the text of the UNCLOS.<sup>36</sup> During the negotiations some countries, including Italy, were ready to extend, under certain conditions, the jurisdiction of the coastal State to the underwater cultural heritage found on the continental shelf. For instance, an informal proposal submitted in 1980 by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia provided as follows:

The Coastal State may exercise jurisdiction, while respecting the rights of identifiable owners, over any objects of an archaeological and historical nature on or under its continental shelf for the purpose of research, recovery and protection. However, particular regard shall be 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, in case of sale or any other disposal, resulting in the removal of such objects out of the Coastal State.<sup>37</sup>

The rejection of the proposal was probably due to the desire of some major maritime power to avoid any provision that might give the impression of creeping of jurisdiction beyond the territorial sea besides what had already been granted to coastal States through the introduction in the UNCLOS of the new concept of the exclusive economic zone. Rather than laying down a substantive regime to deal with a new concern, such as the protection of the underwater cultural heritage, the UNCLOS seems more inclined to pay tribute to abstractions, like the attachment of some States to the dogma of freedom of the seas. This leads to a regime which not only leaves a legal vacuum open, as regards the underwater cultural heritage located on the continental shelf, but could also imply an actual invitation to the looting of such heritage.

## **5. The Italian Position during the Negotiations for the CPUCH**

During the negotiations for the Convention on the Protection of the Underwater Cultural Heritage<sup>38</sup>, sponsored by UNESCO and signed on 6 November 2001 in Paris, the main concern of the Italian delegation was a practical one: to do whatever possible to avoid that in the future anyone could repeat what Mr. Ballard had already done in the Mediterranean. With or without Art. 303, para. 3, UNCLOS, Italy felt it to be politically unacceptable that countries endowed with a huge underwater cultural heritage were requested not only to tolerate, but also to applaud the removal of properties located on their continental shelf and strictly linked to the events of their own history.<sup>39</sup>

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<sup>35</sup> The French official text of Art. 303, para. 3 (“Le présent article ne porte atteinte ni aux droits des propriétaires identifiables, au droit de récupérer des épaves et aux autres règles du droit maritime, ni aux lois et pratiques en matière d’échanges culturels”), seems less dangerous than the English one. Because of the lack of corresponding concepts, the very words “salvage” and “admiralty” cannot be properly translated into French and are rendered with expressions which have a broader and different meaning.

<sup>36</sup> The UNCLOS may well be a “constitution for the ocean”, as it is often said to be. But it is inevitable that, in such a monumental body of codification of international law, composed of 320 provisions and several annexes, there will be some weak or outdated provisions. Art. 303, para. 3, UNCLOS is not only weak and outdated, but also insufficient and counter-productive.

<sup>37</sup> Informal proposal by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia (U.N. doc. A/CONF.62/C.2/Informal Meeting/43/Rev. 3 of 27 March 1980).

<sup>38</sup> Hereinafter: the CPUCH. On this convention see O’KEEFE, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester, 2002; GARABELLO, *The Negotiating History of the Provisions of the Convention on the Protection of the Underwater Cultural Heritage*, in GARABELLO & SCOVAZZI, *op. cit.*, p. 89.

<sup>39</sup> Ironically enough, Italy, one of the countries affected by Mr. Ballard’s expeditions and the potential application of Art. 303, para. 3, UNCLOS, is a party to the UNCLOS, while the United States of America, the country from which the expeditions were sponsored, is not a party to it.

The negotiations for the CPUCH were seen as an opportunity to build a reasonable defence against the results of the counter-productive regime of the UNCLOS. The basic defensive tools envisaged by the Italian delegation were the elimination of the undesirable effects of the law of salvage and finds, the exclusion of a "first-come-first-served" or "freedom-of-fishing" approach for the heritage found on the continental shelf and the strengthening of regional cooperation.

In April 2000 Italy distributed a document where a number of general remarks on the draft CPUCH were made:

1. As a centre and crossroad of several civilisations, the cultural heritage of Italy is particularly rich. Objects of an archaeological and historical nature are also often found in the Mediterranean waters adjacent to the Italian peninsula. While this heritage spiritually belongs to mankind as a whole, Italy, and the other Mediterranean countries linked with the objects in question, are more directly interested in their preservation. This is the reason why Italy attaches a great importance to the draft Convention on the protection of the underwater cultural heritage which is presently being negotiated within the framework of UNESCO.

2. Two provisions of the 1982 United Nation Convention on the Law of the Sea (UNCLOS) deal with archaeological and historical objects. Under Art. 149, if these objects are found in the seabed beyond the limits of national jurisdiction (the Area), they "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". Under Art. 303, para. 2, in order to control traffic in such objects, the coastal State may presume that their removal from the seabed in the 24-mile contiguous zone without its approval would result in an infringement within its territory or territorial sea of its laws and regulations.

3. A question may be asked in this respect. What rules apply to archaeological and historical objects which are found on the continental shelf, that is, on the seabed located between the 24 miles from the coast and the Area? There is no clear response in the UNCLOS. This legal vacuum greatly affects the protection of cultural heritage.

4. Nevertheless, it is within the spirit of UNCLOS that the cultural heritage must be protected, wherever in the sea it is located. According to Art. 303, para. 1, "States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose". This general obligation binds every Party and applies to all such objects, wherever they are found. Very important for the present negotiation is para. 4 of the same Art. 303: "This article [i.e. Art. 303] is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature". This is an interesting point: the UNCLOS allows for the drafting of more specific treaty regimes which can ensure a better protection of the underwater cultural heritage. In other words, the UNCLOS itself fully encourages the future filling of the gaps that it has left open, which are particularly evident in the case of the cultural heritage found on the continental shelf. This opportunity should not be lost by the States participating in the present UNESCO negotiations. It would be meaningless to simply repeat the provisions of the UNCLOS, including their shortcomings, without adding any improvements.

5. To leave the regime as it is now would lead to an unacceptable consequence: namely, the risk of leaving a great part of the marine cultural heritage without protection. The problems posed by flags of convenience should also be taken into consideration. Availing himself of an abstract application of the principle of freedom of the sea, any person on board any ship or submarine could explore the continental shelf adjacent to another State, bring the archaeological and historical objects to the surface, become their owner under a domestic legislation, import the objects into his national country, and sell them on the private market. Is this a proper use of the cultural heritage? Is there any guarantee that the objects are disposed of for the public benefit rather than for a private commercial gain? Can a coastal State which has a direct cultural link with the objects in question accept such an increasing pillage of its history? In the case of Italy the answer is negative.

6. The establishment of an effective protection regime for objects located on the continental shelf or within the exclusive economic zone cannot be seen as an encroachment on the freedom of the sea; nor is it the creation of another jurisdictional zone. It is difficult to see how clear rules and entitlements on the underwater cultural heritage could affect, for example, navigation in the superjacent waters. While generally committed to the principle of freedom of the sea, Italy believes that the sea is free only for uses which are not injurious to the legitimate interests of any nation and the international community as a whole. The concept of freedom of the sea is today to be understood not in an abstract way, but in the context of the present range of marine activities and in relation to the other potentially conflicting uses and interests. Also the idea that the coastal State can exercise rights on the mineral resources of its continental shelf could have seemed, when it was proposed, an encroachment on the freedom of the high seas. Presumed encroachments on the freedom of the high seas can be easily found also in the recent 1995 Straddling and Highly Migratory Fish Stocks Agreement. They were considered a necessary tool to promote the conservation and sound management of living marine resources and, as such, were found reasonable and acceptable by the great majority of States. Similarly effective solutions need now to be agreed upon also as regards the underwater cultural heritage. Why should there remain a freedom-of-fishing-type regime for objects of an archaeological and historical nature? Do they need less protection than fish? This is the core of our present UNESCO negotiation: a "first come, first served" regime is to be definitely banned.

7. The coastal State is a country directly concerned with the protection of the underwater cultural heritage found on its continental shelf. This is even more evident where the coastal State has a direct and preferential link with the objects in question, being the State of origin, or the State of cultural origin, or the State of historical and archaeological origin. The coastal State should be entitled to be informed of, to regulate and to authorize all activities relating to underwater cultural heritage found on its continental shelf (or in its exclusive economic zone). This is the best way to promote the preservation of the heritage and to ensure the disposal of it for the public benefit. Rights of this kind are neither specifically allowed, nor prohibited by UNCLOS. It is the filling of an UNCLOS gap, as permitted by UNCLOS itself.

8. Of course, States other than the coastal State can also have an interest in archaeological and historical objects. The special position of the States of cultural, historical or archaeological origin could be taken into consideration not only in the Area (as already provided for by Art. 149), but also in the case of objects found on the continental shelf of another State. The merits of the States whose nationals have lawfully and openly made substantial efforts in the research and location of objects could also be taken into account. An obligation of all the States directly concerned to cooperate in, and negotiate the finding of, reasonable solutions should in this respect be envisaged. Italy, bearing the example of the Mediterranean Sea in mind (but the same applies to other regional seas as well), proposed that more stringent rules may be adopted at the regional level under agreements open to the participation of States of cultural, historical and archaeological origin. These agreements are directed at the preservation of a common cultural heritage. Again, all these are consequences arising from the main point: that a "first come, first served" (or a "freedom-of-fishing-type") regime is to be clearly banned. Why - to give a purely hypothetical example - should a citizen of a country which has no link whatsoever with a specific heritage be able to survey with submarines the continental shelf of other States and use remotely -powered vehicles to remove any objects he chooses, without any notice to the States concerned?

9. In the light of what is said above, Italy believes that a sound regime can be negotiated for the protection of the underwater cultural heritage. Aiming at this objective Italy is participating in the present UNESCO negotiations with a constructive spirit. It is ready to examine and discuss any proposals made by other States. It believes that, despite the differences in their positions, all the other States participating in the negotiation substantially agree on the basic assumption that a "freedom-of-fishing-type" regime is not the acceptable solution».

While this is not the proper place to analyze its text<sup>40</sup>, the CPUCH can be considered as a reasonable compromise between two opposing positions, namely the “first-come-first-served” or “freedom-of-fishing” approach of Art. 3, para. 3, UNCLOS, on the one side, and the extension of coastal States’ jurisdiction to the continental shelf, on the other. All the main Italian concerns have substantially been met by the CPUCH, in particular by the regime provided for in Art. 4 (relationship to the law of salvage and law of finds), Arts. 9 and 10 (reporting, notification and protection with regard to the underwater cultural heritage in the exclusive economic zone or on the continental shelf) and Art. 6 (bilateral, regional or other multilateral agreements). Italy was one among the majority of 87 States which voted in favour of the adoption of the CPUCH.

## **6. The Prospects for a Regional Agreement for the Protection of the Mediterranean Underwater Cultural Heritage**

Art. 6 CPUCH<sup>41</sup> paves the way for a multiple-level protection of underwater cultural heritage. This corresponds to what has already happened in the field of the protection of the natural environment where treaties having a world sphere of application often co-exist with treaties concluded at the regional and sub-regional level. The key to co-ordination between treaties applicable at different levels is the criterion of better protection, in the sense that the regional and sub-regional treaties are concluded to ensure better protection than those adopted at a more general level. The possibility of negotiating regional agreements should be carefully considered by the States bordering enclosed or semi-enclosed seas which are characterised by a particular kind of underwater cultural heritage, such as the Mediterranean, the Baltic and the Caribbean.

On 10 March 2001, the participants at an academic conference held in Palermo and Siracusa, Italy, adopted a Declaration on the Submarine Cultural Heritage of the Mediterranean Sea.<sup>42</sup> It stresses that “the Mediterranean basin is characterized by the traces of ancient civilisations which flourished along its shores and, having developed the first seafaring techniques, established close relationships with each other” and that “the Mediterranean cultural heritage is unique in that it embodies the common historical and cultural roots of many civilizations”. The Mediterranean countries were consequently invited to “study the possibility of adopting a regional convention that enhances cooperation in the investigation and protection of the Mediterranean submarine cultural heritage and sets forth the relevant rights and obligations”.

Two years afterwards, the final round table of an International Conference on “Cooperation in the Mediterranean for the Protection of the Underwater Cultural Heritage”, held in Siracusa, on 3-5 April 2003, was devoted to the discussion and definition of feasible proposals in the field of international cooperation for the protection of the underwater cultural heritage in the Mediterranean. At the round table, which was reserved for the government representatives of the countries bordering the Mediterranean, Italy presented a draft Agreement on the Protection of the Underwater Cultural Heritage in the Mediterranean

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<sup>40</sup> For the many merits of the CPUCH as a reasonable compromise, see SCOVAZZI, *A Contradictory and Counterproductive Regime*, in GARABELLO & SCOVAZZI, *op. cit.*, p. 3 (the title refers to the UNCLOS regime).

<sup>41</sup> “1. States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention. 2. The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements”.

<sup>42</sup> Text in CAMARDA & SCOVAZZI (eds.), *The Protection of the Underwater Cultural Heritage - Legal Aspects*, Milano, 2002, p. 448.

Sea.<sup>43</sup> The Mediterranean draft is only a tentative text, remaining subject to all the improvements and modifications resulting from the discussion held in Siracusa and further consideration by the countries concerned.

The provisions of the Mediterranean Draft aim at bringing an added value to the CPUCH.<sup>44</sup> For instance:

- the application of the law of salvage and the law of finds is completely excluded;
- in the case of sunken State vessels and aircraft located in internal waters or territorial sea, a closer cooperation is sought between the coastal State, the flag State of the wreck and other States having a verifiable link with it;
- Specially Protected Areas of Mediterranean Cultural Importance can be established<sup>45</sup>;
- the establishment of an International Museum of Mediterranean Underwater Cultural Heritage is envisaged;
- the organization of periodical training courses is foreseen;
- in order to stress the special responsibility of Mediterranean States, it is provided that only those States which are Parties to the future Mediterranean Agreement, or which agree to co-operate with the Parties in applying the measures established by it, shall have the right to engage in activities relating to the Mediterranean underwater cultural heritage.

However, no further steps towards the negotiation and finalization of an agreement on the Mediterranean underwater cultural heritage have so far been made by Italy or other countries concerned.

## **7. Warships**

No specific provisions of the Italian legislation apply to the wrecks of State vessels and aircraft, including warships. During the negotiations for the CPUCH, Italy did not take any strong positions on the regime for such kind of wrecks, although this issue was much discussed by other States. However, a few cases relating to sunken warships can be found in Italian international practice.

An exchange of notes took place in Rome on 6 November 1952 by Italy and the United Kingdom regarding the salvage of the *HMS Spartan*<sup>46</sup>, a British cruiser that sank during World War II within the Italian territorial sea. The Parties, which did not consider the ship as belonging to the underwater cultural heritage<sup>47</sup>, agreed to share fifty per cent each of the amount received for the sale of scrap material from the wreck (Art. 1). Italy undertook to hand over to the United Kingdom “all documents and correspondence, cyphers, cypher machines, books, safes, steel chests, steel boxes and cash which may be recovered from the wreck” (Art. 4) and to take all necessary steps to deliver to the British naval attaché “the bodies of any British Naval personnel which may be found in the course of the salvage operations” (Art. 5). The instrument includes a provision having a general character:

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<sup>43</sup> Hereinafter: the Mediterranean Draft.

<sup>44</sup> The Mediterranean Draft presupposes that the Parties to the future Mediterranean Agreement are either Parties to the CPUCH or accept the application of its substantive principles.

<sup>45</sup> This provision is based on the Specially Protected Areas of Mediterranean Interest (so-called SPAMIs) established under the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 10 June 1995).

<sup>46</sup> U.N., *Treaty Series*, vol. 158, p. 431.

<sup>47</sup> Even today, the *Spartan* would not qualify as underwater cultural heritage under the definition adopted by the CPUCH (Art. 1, para. 1, a), since it has been under water for less than 100 years.

Her Majesty's Government agree to notify the Italian Government within sixty days of the date of the present Note the names and position (as far as known) of wrecks of British warships at present lying in or adjacent to Italian territorial waters. Whenever the removal of the wrecks of British warships so notified is considered necessary, the Italian Government shall advise Her Majesty's Government before initiating the salvage operations, in case Her Majesty's Government intend to proceed with these operations themselves with the limit and under the conditions which shall be determined by the Italian Maritime authorities in accordance with the circumstances in each particular case» (Art. 6).

On 5 May 2005, an interrogation was addressed by a member of the Chamber of Deputies to the Italian Ministries of Foreign Affairs and Defence on activities promoted by Croatian authorities and directed at the exploration of the wrecks of the Italian warships *Palestro* and *Re d'Italia*<sup>48</sup>. The two ships were lost during the battle of Vis (Lissa in Italian) fought in 1866 by Austria-Hungary and Italy and are today located in Croatian territorial waters.

## 8. The Present Uncertain Situation

Despite its active participation in the negotiations for the CPUCH, the procedure for the ratification is still pending before the Council of Ministers and the relevant bill has not yet been finalised for transmission to the Parliament. The delay may be explained in light of the complex requirements required by the domestic legislation to fulfil the obligations arising from the convention.

In 2004, a 24-mile archaeological contiguous zone was established. Art. 94 of the Cult. Code provides that “archaeological and historical properties found on the seabed of a maritime zone extending up to twelve nautical miles measured from the external limit of the territorial sea are protected pursuant to the Rules Concerning Activities Directed at Underwater Cultural Heritage annexed to the CPUCH”. Doubt remains on how an annex can be applied without Italy being a party to the treaty to which it is annexed and without applying the main provisions of the treaty itself, in particular Art. 8 CPUCH relating to the heritage located in the 24-mile contiguous zone.

Under Law 8 February 2006, No. 61<sup>49</sup>, ecological protection zones may be established beyond the limits of the Italian territorial sea. This law provides that, in such zones, Italy can exercise its jurisdiction also as regards the protection of the archaeological and historical heritage. However, the law is still on paper, as the decrees that are necessary for its implementation have not yet been adopted.

Sadly enough, it appears that the sensible message coming from the CPUCH has not yet been appreciated by a sufficient number of States.<sup>50</sup> In particular, it was very disappointing to see that, by Resolution 59/24 (“Oceans and the Law of the Sea”) adopted on 17 November 2004, the United Nations General Assembly

urges all States to cooperate, directly or through competent international organizations, in taking measures to protect and preserve objects of an archaeological and historical nature found at sea, in conformity with article 303 of the Convention [= the UNCLOS] (para. 7).

Not only is the CPUCH not even mentioned, but also Art. 303 UNCLOS, that is, the provision which includes the invitation to looting (para. 3), is emphasized as a model! Italy, instead of voting against the draft resolution or at least abstaining, cast an affirmative vote with the following explanation:

Italy voted in favour of draft resolution (...) entitled "Oceans and the Law of the Sea", although this year did not sponsor the draft resolution. In this regard, Italy would like to underline its concerns

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<sup>48</sup> Interrogation No. 4-14243.

<sup>49</sup> *Gazz. Uff.* No. 52 of 3 March 2006.

<sup>50</sup> For the time being (February 2009), the CPUCH has been ratified by twenty-two States. It has entered into force on 2 January 2009.

with regard to paragraph 7 of the resolution. First, Italy believes that reference should be made to the United Nations Convention on the Law of the Sea - the Montego Bay Convention - in general, since article 149, in addition to article 303, refers to the protection of the underwater cultural heritage.

Moreover, Italy also believes that mention should have been made of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection of the Underwater Cultural Heritage. The UNESCO Convention was negotiated and adopted to clarify and strengthen the contents of the relevant United Nations Convention on the Law of the Sea provisions and to provide a specific and better regime for the protection of the underwater cultural heritage. The UNESCO Convention deserves to be mentioned in the resolution.»<sup>51</sup>

The United Nations General Assembly took a more balanced approach in Resolution 60/30 on oceans and the law of the sea, adopted on 29 November 2005<sup>52</sup>, where it did not refrain from “mentioning” the CPUCH and it noted

the effort made by the United Nations Educational, Scientific and Cultural Organization with respect to the preservation of underwater cultural heritage, and notes in particular the rules annexed to the 2001 Convention on the Protection of the Underwater Cultural Heritage that address the relationship between salvage law and scientific principles of management, conservation and protection of underwater cultural heritage among parties, their nationals and vessels flying their flag (para. 8).

Some doubts that the “venerable” salvage law is the best way of protecting the underwater cultural heritage seem implied in another paragraph of the resolution, where the General Assembly urges

... all States to cooperate, directly or through competent international bodies, in taking measures to protect and preserve objects of archaeological and historical nature found at sea, in conformity with the Convention [= LOSC], and calls upon States to work together on such diverse challenges and opportunities as the appropriate relationship between salvage law and scientific management and conservation of underwater cultural heritage, increasing technological abilities to discover and reach underwater sites, looting and growing underwater tourism» (para. 7).

The word “looting”, which makes its appearance in the resolution, clearly shows what the most serious danger is. Time will tell whether the CPUCH, which is the appropriate instrument for the fight against looting, is fully appreciated.

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<sup>51</sup> U.N., General Assembly, *Official Records*, doc. A/59/PV.56 of 17 November 2004.

<sup>52</sup> The same approach is repeated in Resolutions 61/222 and 62/215 on “Oceans and Law of the Sea”, adopted by the General Assembly in 2006 and 2007.

# **The Protection of Underwater Cultural Heritage in International Law: Challenges and Perspectives**

**Valentina S. Vadi\***

## **Abstract**

Ancient shipwrecks contribute to our understanding of history, providing a glimpse into different epochs and societies. In recent times, the advancement of technology has made it possible to find, visit and remove artefacts from shipwrecks that have been kept remote in the abyss for centuries. The increasing capability to reach these archaeological treasures has intensified the debate on related ownership and management issues. While private actors have claimed possession rights under the law of salvage and the law of finds and sold the artefacts, the scientific community and the public at large would demand the preservation of cultural heritage. Dealing with the clash of these conflicting interests and philosophies, courts have struggled to settle cultural heritage disputes. Given the international dimension of most of the disputes concerning the recovery of ancient shipwrecks, underwater cultural heritage has become the last frontier of the international legal debate. This study aims at proposing a theoretical framework in order to reconcile private interests with the public interest of cultural heritage protection in international law. It is argued that international law needs to be interpreted and reshaped to better protect underwater cultural heritage. The conservation of underwater cultural heritage would not only stimulate peaceful relations among nations, but would represent a factor for economic, social and cultural development.

## **Keywords:**

underwater cultural heritage – law of the sea- salvage law – law of finds – maritime museums – cultural rights

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## **1. Introduction**

Historians record that when the French battleship *Danton* was hit by a German submarine in the Mediterranean Sea on 18 March 1917, Captain Delage and his officers stood on the bridge and ‘made no attempt to leave the ship as it went down’.<sup>2</sup> The vessel was travelling between Toulon and Corfu and was carrying over 1,000 men when it was attacked by Germany’s U-64 submarine. The *Danton* rested on the floor of the Tyrrhenian Sea for decades until it was accidentally discovered during a survey for a gas pipeline between Algeria and Italy, about 35 km southwest of the island of Sardinia. The Gasdotto Algeria Sardegna Italia (Galsi) consortium, which is building the pipeline, immediately acknowledged the cultural significance of the battleship and decided to re-route the pipeline away from the wreck site. Although the French Admiralty is keen to see the site protected, it is improbable that efforts to recover the shipwreck will be made, because of their prohibitive costs. The *Danton*, which was one of the largest French naval vessels of her era, lies 1,000 meters below the sea level.<sup>3</sup> More probably, the *Danton* will keep lying on the seabed, as the peaceful grave of Captain Delage and part of his crew.

While the case of the *Danton* does not appear to raise complex legal issues, the discovery of other shipwrecks in the Mediterranean Sea has given rise to a series of admiralty claims and subsequent disputes. In recent decades, the advancement of technology has made it possible to find and recover artefacts from shipwrecks that have been kept remote in the abyss for centuries. The increasing capability to reach these archaeological treasures makes the debate on their governance as timely as ever. The research questions of this contribution are: How do States and private actors interact in the salvage of ancient shipwrecks? What is the relevant legal framework? Has the current legal regime reached an optimal balance between the different interests at stake?

The argument will proceed as follows. First, this article defines the multifaceted concept of underwater cultural heritage. Second, it specifically explores some recent cases involving Mediterranean cultural heritage. This focus is due to the fact that the Mediterranean Sea may be defined as a ‘Sea of Human Civilization’<sup>4</sup> and is particularly rich in underwater cultural heritage. These cases are paradigmatic examples of the complex legal issues raised by the discovery of underwater cultural heritage. Third, this article scrutinizes the regime complex which governs underwater cultural heritage at the international level. Fourth, this contribution offers a model for establishing a synergy between different international actors.

## **2. Treasures Beneath the Sea: The Concept of Underwater Cultural Heritage**

Historic sunken vessels constitute the essence of underwater cultural heritage (UCH). The concept of underwater cultural heritage is much broader though, as it can be defined as ‘all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously’<sup>5</sup>, for a certain amount of time. This amount of time is

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<sup>2</sup> J. Amos, ‘Danton Wreck Found in Deep Water’, BBC News, 19 February 2009

<sup>3</sup> A suggestive video allows the public to watch the remains of the ship, its bridge, turrets and cannons. The video is available at the ANSA (Agenzia Nazionale Stampa Associata) website: [https://www.ansa.it/site/notizie/videonews/30secondi/italia/2009-02-21\\_121308781.html](https://www.ansa.it/site/notizie/videonews/30secondi/italia/2009-02-21_121308781.html) (accessed on 24 March 2009).

<sup>4</sup> Mr Papatransopoulos (Greece) proposed to consider the Mediterranean sea as ‘Sea of Human Civilization’ during the negotiations of the Council of Europe. See Parliamentary Assembly, *The Underwater Cultural Heritage*, Report of the Committee on Culture and Education, Doc. 4200-E, Strasbourg, 1978, App. IV, Individual submissions, p. 157.

<sup>5</sup> United Nations Educational, Scientific and Cultural Organization, Convention on the Protection of the Underwater Cultural Heritage, Article 1.1. See below, Section 5.B.

expressly specified by certain international law instruments<sup>6</sup> while it is left undetermined by others.<sup>7</sup>

Underwater cultural heritage needs protection for a number of different reasons. First, cultural heritage has a historical and archaeological value, as it allows discourse and reflection upon the past. While in some rare cases aesthetic beauty alone would justify consideration of certain archaeological remains,<sup>8</sup> in other more frequent cases, it is the narrative connected to the object which makes it unique and fascinating. In this sense, underwater cultural heritage gives us insight not only into trade routes and shipbuilding but also lifestyle, rituals and beliefs that no longer exist.

Second, underwater cultural heritage has an intrinsic importance because of its uniqueness. All underwater landscapes assume a 'phantasmagorical dimension'<sup>9</sup>: they let us enter into the fourth dimension, i.e. the dimension of time. Discovering underwater cultural heritage is like gaining access to the secrets of a civilization in its entirety, at a certain point in time. Not only are ancient shipwrecks very often well preserved due to the low oxygen marine environment, but they neither present alterations, nor stratifications as in the case of land archaeology, where almost everything is altered through time.<sup>10</sup> Thus, underwater cultural heritage well represents a *time capsule* waiting to be unlocked.

Third, cultural heritage may contribute to the formation and preservation of cultural identity and, by fostering people's sense of community, it can hold associative value.<sup>11</sup> In this sense, maritime cultural heritage,<sup>12</sup> which includes the underwater cultural heritage and maritime landscapes, deserves special mention as it may contribute to building a common identity. For instance, archaeological objects found at the bottom of the Mediterranean Sea contribute to building a European identity by fostering the sense of 'unity in diversity'.<sup>13</sup> UCH has a truly cosmopolitan character, often deriving from regional trade in which ships wrecked at a distance from their origin or destination. It was common that vessels built in a certain country transported cargoes from one country to another, under a third country's flag with a cosmopolitan crew. Also, the shipwreck may be located not only in international waters but also in the territorial waters of a given country. While it may be argued that only the special circumstances of the case made the ship sink in a given area, another argument would underline that certain places constitute *maritime cultural landscapes* as they have represented maritime trade routes for centuries. The cosmopolitan character of underwater cultural heritage makes it a worthy object of protection by international and regional law treaties and customs.

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<sup>6</sup> For instance, the UNESCO Convention of the Protection of Underwater Cultural Heritage indicates a period of at least 100 years. UNESCO Convention of the Protection of Underwater Cultural Heritage, Article 1.1.

<sup>7</sup> For instance, the United Nations Convention on the Law of the Sea merely refers to historical and archaeological objects without defining their characteristics or making reference to the time. See below, Section 5.B.

<sup>8</sup> For instance, the famous *Bronzi di Riace* (Italian for 'Riace bronzes'), which were found by a sub in 1972 off the coast of Riace, near Reggio Calabria, are major additions to the surviving examples of Greek sculpture. The Bronzes belong to a transition period from Archaic Greek sculpture to the early Classic style. They are currently housed by the Museo Nazionale della Magna Grecia in Reggio Calabria, Italy.

<sup>9</sup> J.-M. Blas de Roblès, 'The Deep Dive Syndrome' 1 *The UNESCO Courier* (2009).

<sup>10</sup> As an author puts it, 'land sites typically present stratum after stratum of occupation. [...] Frequently artifacts from one period become mixed in with those of another when a site is disturbed making the archaeologist's unraveling of the puzzle more difficult.' See R. F. Marx, 'The Disappearing Underwater Heritage' *Museum* 137 (1983) 9-11, at 9.

<sup>11</sup> For a similar argument, see S. Scafidi, *Who Owns Culture? Appropriation and Authenticity in American Law* (Rutgers University Press: 2005), at 35.

<sup>12</sup> The maritime cultural heritage includes maritime landscapes and undersea objects. This contribution does not deal with the maritime landscapes, but focuses on the undersea cultural heritage of the Mediterranean Sea. On Mediterranean landscapes, see for instance A. Vallega, 'The Coastal Cultural Heritage Facing Coastal Management' (2003) 4 *Journal of Cultural Heritage* 1, 5-24. On maritime landscapes, see C. Westerdahl, 'The Maritime Cultural Landscape' (1992) 21 *International Journal of Nautical Archaeology*, 5-14.

<sup>13</sup> See P. Sticht, *Culture Européenne ou Europe des Cultures?* (L'Harmattan: Paris 2000).

Finally, underwater cultural heritage holds a spiritual dimension, as in many cases these ancient vessels represent a sort of collective burial for the people who lost their life at the time of the shipwreck.<sup>14</sup> While in some cases, the survivors provided a description of the shipwreck, in other circumstances, only the relic may resolve the historical jigsaw, a collective disappearance which happened centuries before. Therefore, discovering a shipwreck is like rediscovering the history connected with it.

### **3. The Maritime Cultural Heritage of the Mediterranean Sea**

As the Mediterranean Sea has been navigated since the most ancient times, its seabed is rich in shipwrecks and archaeological objects.<sup>15</sup> The abundance of archaeological material and the *legal vacuum* which is created by the patchwork of incoherent norms, has determined a trend towards the unsustainable exploitation of these cultural resources. The recent discoveries of a series of shipwrecks by private companies and the subsequent dispersion of the recovered cultural goods have raised a number of legal issues, including issues of management and ownership.

A notorious case is that of the British ship *SS Persia* which was torpedoed by a German U-Boat (*Unterseeboot*) and sunk on December 30, 1915. The attack, under the command of Max Valentiner, broke customary law or the *Cruiser Rules* that required firing a warning shot across the bow in order to allow the passengers of merchant ships to disembark before the combat.<sup>16</sup> The *SS Persia* sank in five to ten minutes killing 343 of the 519 on board.<sup>17</sup> After almost 90 years, a British company found the wreck of the *Persia* which was lying in waters at more than 3,000ft deep. Among the discoveries, there were several unopened bottles of *Veuve Cliquot* champagne, cutlery, pipes and more than 200 rubies and other precious stones which had belonged to the Maharajah Jagatjit Singh.<sup>18</sup>

From a legal perspective, several questions arise. Should the area be declared a war grave? Who owns the found objects? According to the salvage law of the United Kingdom, the salvors are entitled to the possession of the treasure unless the owners reclaim the objects within one year. Wrecks which remain unclaimed become the property of the Crown, and often the finder is allowed to keep items in lieu of a salvage award. To the knowledge of this author, the heirs of the Maharajah have not filed any suit to

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<sup>14</sup> For example, over 1500 perished when the *Titanic* sank. After the wreckage was discovered in 1985 by Dr Robert Ballard, the US Congress enacted legislation directing the Department of State to negotiate an international agreement to designate the wreck as a maritime memorial and to protect it from looting and misguided salvage. See C. R. Bryant, 'The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historic Shipwrecks', 65 Albany Law Review 97, at 100 note 21 (2001-2002). Similarly, after the passenger carrier *M/S Estonia* sank taking more than 800 passengers and crew with it in 1994, Estonia, Finland and Sweden concluded an agreement and designated the wreck as a maritime grave. See M. Jacobsson and J. Klabbbers, 'Rest in Peace? New Developments Concerning the Wreck of the M/S Estonia' (2000) 69 Nordic Journal of International Law 317.

<sup>15</sup> The Mediterranean culture is a *thalassic* culture, where the sea occupies a central role in the economics and imaginary of the involved communities. See F. Lenzerini, 'Illicit Trafficking in Cultural Objects and the Protection of World Cultural Heritage' Paper presented at the Ninth Mediterranean research Meeting, Florence and Montecatini Terme, 12-15 March 2008, organized by the Mediterranean Program of the Robert Schumann Centre for Advanced Studies at the European University Institute, at 5-6.

<sup>16</sup> Because of his unorthodox methods of attack, Max Valentiner was considered a war criminal by the Allies, but was never extradited. R. Compton-Hall, *Submarines at War 1914-1918* (Periscope Publishing: 2004).

<sup>17</sup> Among the victims there was Eleanor Thornton, the model who inspired the iconic flying lady which adorns the bonnet of the Rolls-Royces. See C. Hastings, 'Wings of Desire: The Secret Love Affair that Inspired Rolls-Royce's Flying Lady', *The Telegraph*, 21 April 2008.

<sup>18</sup> G.S. Aujla 'The Saga of Maharaja's Sunken Treasure' *Sunday Tribune India*, May 27, 2001; 'Gems Retrieved in Deepest Salvage Operation', *Sunday Times*, 9 July 2006; I. Almroth-Wright 'The Persia's Fateful Voyage' *BBC News* 20 May 2008.

recover a part of the property.<sup>19</sup>

The destiny of the *Persia* is strikingly similar to that of the *Ancona*, an Italian-American liner, which sank on 6 November 1915 close to the Sardinian coast. From a historical perspective, its recovery sheds light on a dark corner of WWI, as the *Ancona*, which had been making frequent trips between Naples and New York since 1908, was carrying no guns or munitions, and on board were mostly Italian women and children emigrants when it was shelled by U 38, under the command of Valentiner. At the time of the incident, the public was outraged; Afterwards, however, the sinking of civilian passenger liners by German U-boats would become commonplace.<sup>20</sup>

From a legal perspective, problems arise as to the determination of the ownership of the wreck and its artefacts. The wreck is valuable not only for its historical and archaeological significance, but also because it is believed to contain valuable cargo including bars of gold. The wreck has been found and identified by Odyssey, a US salvage company which is specialised in the recovery of ancient shipwrecks and generates revenues *inter alia* through the sale of coins, artefacts and merchandise. In April 2007, Odyssey filed a 'warrant of arrest *in rem*' establishing a maritime lien on the shipwreck of the *Ancona* and becoming substitute custodian of the artefacts recovered.<sup>21</sup> As Spain feared that the shipwreck might belong to its fleet, it filed a notice in this case stating that it did not intend to give up rights to any Spanish property which might be on the site. Subsequently, when the ship was identified as the *Ancona* without any doubt, Spain voluntarily dismissed its claim since the wreck was neither in Spanish waters nor a Spanish vessel.<sup>22</sup> Other Mediterranean states might have an interest in the wreck. However, the exact location of the wreck is unknown. If it is in the high sea, freedom of the sea prevails. Further, the passenger liner was owned by a private (Italian) company, not by a state. Finally, doubts arise as to the qualification of the *Ancona* as underwater cultural heritage, since the ship has been underwater for more than ninety years, but according to the UNESCO Convention, one hundred years are required to classify an artefact as undersea heritage.<sup>23</sup> If the shipwreck lay in territorial waters, the admiralty court's decision might not be enforceable, because it would amount to extraterritorial jurisdiction or to a violation of the *cultural public policy* of the coastal state. As the exact location of the shipwreck is not known, these are mere hypothesis. The risk is that cultural goods are dispersed forever, as happened in the case of the French ship *General Abbattucci*.<sup>24</sup> The shipwreck was located in 1996 by a salvage company, Blue Water Recoveries Ltd., which recovered jewellery and coins and sold the cargo at Christies's on 7 October 1997; since then, some goods have been re-sold through the internet by antique dealers.<sup>25</sup> Only some items of archaeological value have been bought by museums and are now located all around the world.<sup>26</sup>

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<sup>19</sup> Part of the cultural objects is exposed in the Beaulieu Maritime Museum at Bucklers Hard, Hampshire.

<sup>20</sup> For days the *New York Times* published detailed accounts of the event. *New York Times*, 12 November 1915. On the 'submarine question', see 'British Advocate Doubly Armed Ships' *New York Times*, 20 November, 1916; 'Pledge Put to Test in Arabia Sinking- Note From Berlin Shows Submarine Sank Liner Without Investigation' *New York Times*, 8 December 1916.

<sup>21</sup> Case No. 8:07-cv-00616 (M.D. Fla. Filed Apr. 9, 2007).

<sup>22</sup> See Odyssey Marine, Press Release No. 177, 'Odyssey Marine Exploration Announces 2008 Financial Results', March 11, 2009, at 11.

<sup>23</sup> UNESCO Convention, Article 1.

<sup>24</sup> The ship was en route from Marseilles to Civitavecchia, carrying several millions French francs as a gift for Pope Pius IX in 1869, when it collided with a Norwegian barkentine 24 miles off the north Corsican coast.

<sup>25</sup> For instance, E-Bay recently sold gold jewelry and watches of the *General Abbattucci*. See [http://cgi.ebay.it/Abbatucci-Shipwreck-Cargo-Antique-Silver-Pocket-Watch\\_W0QQcmdZViewItemQQitemZ400029661698](http://cgi.ebay.it/Abbatucci-Shipwreck-Cargo-Antique-Silver-Pocket-Watch_W0QQcmdZViewItemQQitemZ400029661698) (visited 26 March 2009).

<sup>26</sup> For instance, the Charleston Shipwreck and Heritage centre, in Cornwall UK, displays a leather cap which was part of the uniform worn by the French soldiers who were on the *Abbatucci*. See <http://www.shipwreckcharlestown.com/pages/artefacts.htm> (visited on 26 March 2009).

#### **4. The Pirate's Dilemma**

The dilemma which underlies many disputes concerning cultural goods is whether these goods should be returned to the original owners who produced them, or whether the actual possessors should be privileged simply because of possession. In many circumstances, dramatic historical events characterize the history of certain cultural objects. For instance, during World War II, Jewish communities all around Europe were persecuted and their properties and even religious objects were stolen.<sup>27</sup> Analogously, albeit in a different manner, underwater cultural heritage often records dramatic events and has an emotive dimension which stretches the imagination. The stories of shipwrecks are often marked by dramatic circumstances and loss of lives.<sup>28</sup> What should be done with the recovered artefacts? Should the finders be keepers and the losers weepers? Would this solution not be simplistic and unfair with regard to the people who perished because of dramatic circumstances? What about the danger of dispersing the memory of these historical events?

The increasing capability to reach undersea archaeological treasures has intensified the debate on related ownership and management issues. While the scientific community and the public at large demand the preservation of cultural heritage, commercial salvors who have been particularly successful in maritime excavation have recovered costs by claiming possession rights under salvage law and selling the artefacts. In the current legal framework, salvage law contemplates monetary rewards and incentives for salvaging shipwrecks.

However, salvage involves dilution and irremediable loss of cultural heritage. Selling archaeological finds may provide monetary rewards in the short run, but in the long run it implies dispersion of cultural heritage.<sup>29</sup> It has been pointed out that 'the archaeologist's work is often like that of a detective. But what would we think of a detective who sells the victim's watch to pay for his investigations?'<sup>30</sup> According to what may be called the *purist view*,<sup>31</sup> commercial salvage operators are contemporary *pirates* and should be excluded from working on historical wreck sites.

Still, unless salvors can recover underwater heritage, it is unlikely that this heritage will ever be brought to light.<sup>32</sup> Not only are most countries short of funding for such works, but at the same time face a lack of expertise, shortage of equipment and lack of historical documents. Even industrialized countries may find it difficult to invest huge monetary resources in rescuing underwater cultural

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<sup>27</sup> The literature is extensive. See, *inter alia*, S. Mann, 'What's A Survivor to Do? An Inquiry into Various Options and Outcomes for Individual Seeking Recovery of Nazi-Looted Art' (2007-2008) *Loyola University Chicago International Law Review* 191; E.A. Maples 'Holocaust Art: It Isn't Always "Finders Keepers, Losers Weepers": A Look at Art Stolen During the Third Reich' (2000-2001) 8 *Tulsa J. Comp. & Int'l L.* 355.

<sup>28</sup> According to historians, the Mediterranean Sea also hides the so-called 'Rommel's Treasure'. After the seizure of silver, jewelry and sacred objects and the establishment of labor camps in Tunisia, where more than 2,500 Tunisian Jews died, the SS attempted to bring the loot to Germany by sea. Being shelled by the Allies, they deposited the treasure in the sea off the island of Corsica, planning to recover it after the end of the war. Ever since, the undiscovered treasure has attracted generations of treasure hunters. See J. Friedmann, 'New Research Taints Image of Desert Fox Rommel', *Der Spiegel- International*, 23 May 2007. A British researcher, Terry Hogdkinson, has recently claimed to have located the treasure in waters less than a nautical mile from the town of Bastia. If the treasure was recovered, issue of ownership would arise. Under French law, the proceeds from the treasure would be split between the state and those who found it. However, in this case, the state would seemingly also try to find any surviving relatives of the original owners. H. Samuel, 'Rommel's Sunken Gold "Found" by British Expert', *Telegraph*, 19 July 2007.

<sup>29</sup> See generally, O. Varmer 'The Case Against the 'Salvage' of the Cultural Heritage' (1999) 30 *Journal of Maritime Law & Commerce* 279.

<sup>30</sup> 'Beneath the Water, Heritage in Search of International Protection' (2009) 1 *UNESCO Courier*.

<sup>31</sup> Professor Scovazzi may be considered one of the *purist* defenders of the preservation of underwater cultural heritage. His work includes R Garabello and T. Scovazzi (eds), *The Protection of the Underwater Cultural Heritage* (Martinus Nijhoff 2001).

<sup>32</sup> F. Booth, 'The Collision of Property Rights and Cultural Heritage; the Salvors' and Insurers' Viewpoints' in B. Hoffman (ed) *Art and Cultural Heritage- Law, Policy and Practice*, 293-299, at 299.

heritage. While certain shipwrecks have been found accidentally and/or have been excavated by maritime archaeologists through public funding, this is rarely the case.

These different positions on the appropriate legal framework to deal with underwater cultural heritage are based on different theoretical assumptions. On the one hand, the mercantilist approach aims to reward the work of salvors. On the other hand, the purist approach is based on the conception of cultural objects as the common heritage of mankind. Dealing with the clash of these conflicting interests and philosophies, courts have struggled to settle cultural heritage disputes. Given the international dimension of most of the disputes, underwater cultural heritage has become the last frontier of the international legal debate.<sup>33</sup>

## 5. The Legal Framework

A *regime complex* protects underwater cultural heritage at the international law level. Paradoxically though, this abundance of legal sources and disciplines has not clarified the important issues of ownership and management of undersea heritage.

### A. The Law of Salvage and the Law of Finds

The law of salvage and the law of finds constitute two bodies of law which have come to govern the recovery of underwater cultural heritage. Those who recover shipwrecks may invoke both the law of salvage and the law of finds in order to get a reward before admiralty courts.<sup>34</sup> If the Court affirms its jurisdiction, it will then focus on the specific facts of the case to verify whether the law of salvage or the law of finds apply. The two laws cannot be simultaneously applied because they serve two different purposes.<sup>35</sup>

Salvage law, which some authors deem to be part of the *jus gentium* or the law of all nations,<sup>36</sup> governs *salvage*, which is the act of rescuing life or property from peril in water.<sup>37</sup> The goal of salvage law is thus to provide an incentive to mariners and ship-owners' solidarity.<sup>38</sup> By way of analogy, admiralty courts have applied the concept of salvage to the recovery of ancient relics. If a private actor rescues an ancient shipwreck, thus being considered a salvor, she is entitled to obtain an award

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<sup>33</sup> J. Nafziger, 'The Present State of Research', in *Le patrimoine culturel de l'humanité- The Cultural Heritage of Mankind* (Académie de droit international de la Haye- Hague Academy of International Law, 2005), at 216.

<sup>34</sup> Admiralty courts are ordinary courts exercising jurisdiction and hearing disputes under the rules and procedures of admiralty law.

<sup>35</sup> See generally *Hener v. United States*, 525 F. Supp. 350. 'Sharp theoretical differences exist between the law of salvage and the law of finds, although which one is applicable to a particular case may present some difficulty. The clear major premise of the law of salvage is that the property that is the object of the salvage act is owned by persons other than the salvor. The purpose and rules of the law of salvage are designed to accord the salvor a right to compensation, not title. [...] The assumption of the law of finds is that the title to the property may have been lost. [...] The primary concern of the law of finds is title to the property'.

<sup>36</sup> E. Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters* (CUP: Cambridge 2002) at 93.

<sup>37</sup> Salvage may have a contractual or factual origin. In the first case, it is the contract that regulates the proceedings and the reward. In the second case, to have a valid claim for reward, the salvor must show that the property saved was imperilled and there was a benefit for the property. The salvor has a maritime lien on the salvaged property and does not need to return the property to the owner until his claim is satisfied. Also the salvor may file a claim *in rem* against the property, in which case the court will take possession of the property unless the owner posts a bond to secure release.

<sup>38</sup> In an old case, the United States Supreme Court well explained the rationale of salvage law stating that 'Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of *quantum meruit* [...] but as reward for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property. Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises [...]' *The Blackwall*, 77 U.S.1 (1869) at 14.

granting her a reward. The reward often consists of a generous percentage of the value of the saved vessel or part of the sale proceedings and auctioning of recovered treasures and artefacts.

This is extremely problematic from a cultural policy perspective, because salvage law, as it has been traditionally shaped, is not apt to deal with *preservation* or even *protection* of underwater cultural heritage in the common interest of mankind.<sup>39</sup> On the one hand, admiralty law provides a powerful incentive to salvors to dedicate time and money to discovering and rescuing ancient shipwrecks. As an author highlights, ‘Fame aside, the potential for overwhelming financial reward is the true engine behind the salvaging of historic shipwrecks.’<sup>40</sup> Salvaging ancient shipwrecks is prohibitively expensive<sup>41</sup> and remains extremely risky from a financial point of view.<sup>42</sup> On the other hand, salvors lack expertise and often damage or destroy historic shipwrecks and artefacts. Further, as selling artefacts constitutes the primary method of capitalizing shipwrecks, commerce of the artefacts implies a loss from an archaeological perspective, because after the sale the artefacts are no longer available for further study.

When no owner exists or can be determined, the party who recovers the property at sea is entitled to the application of the law of finds.<sup>43</sup> Under this ancient doctrine, title to the abandoned property is given to the finder. While under salvage law, the salvor merely possesses the ship, under the law of finds, she is entitled to property, as the law of finds assumes that ‘the property involved was never owned or was abandoned’.<sup>44</sup> Thus, in order for someone to qualify as a finder, she must prove that the original owners abandoned the shipwreck.<sup>45</sup>

### **B. Multilateral Legal Instruments for the Protection of Undersea Heritage**

The 1982 United Nations Convention on the Law of the Sea (UNCLOS),<sup>46</sup> which governs virtually all aspects of the law of the sea,<sup>47</sup> only marginally deals with underwater cultural heritage. Although the UNCLOS recognizes the obligation of States to protect archaeological and historical objects, it includes only two provisions (Article 149 and Article 303) referring specifically to archaeological and

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<sup>39</sup> See, e.g., P. Fletcher Tomenius, P. O’Keefe and M. Williams, ‘Salvor in Possession: Friend or Foe to Marine Archaeology?’ (2000) 9 *International Journal of Cultural Property* 263.

<sup>40</sup> See Bryant, ‘The Archaeological Duty of Care’, *cited*, at 107.

<sup>41</sup> It is estimated that salvage operations cost more than \$30,000 per day. See Bryant, ‘The Archaeological Duty of Care’, *cited*, at 111.

<sup>42</sup> *Ibidem* at 107.

<sup>43</sup> The law of finds has its roots in the common law in cases such as *Pierson v Post*. In *Pierson*, a New York Court denied a hunter’s claimed right to a fox, holding that the mere pursuit of the animal did not grant title to it. Title was given to a second hunter who seized the fox. *Pierson v Post*, 3 Cai. R. 175 (Sup. Ct. N.Y.1805).

<sup>44</sup> *Hener v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981) cited by Mark A. Wilder, *Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries*, *Defense Counsel Journal* 92-105 at 93 (2000).

<sup>45</sup> The determination of the abandonment of the ship varies from a jurisdiction to another. While the British law of finds sets the time limit of a year and a day for filing a claim, the US law does not set a time limit. According to US courts ‘the passage of time does not necessarily mean that the property has been abandoned as long as the owner can show continuous intent to salvage’. Further, ‘under the American rule the finder not the sovereign becomes the owner, if no valid claim is made by the owner’. See T. J. Runyan ‘Shipwreck Legislation and the Preservation of Submerged Artifacts’ (1990) *Case W. Res. J. Int’l L.* 31, 35.

<sup>46</sup> United Nations Convention on the Law of the Sea opened for signature Dec 10, 1982, 1833 UNTS 397 and entered into force Nov 16 2004. As of February 1<sup>st</sup>, 2008 155 States have ratified UNCLOS.

<sup>47</sup> As Prows puts it ‘The 1982 United Nations Convention on the Law of the Sea (UNCLOS) represents the culmination of thousands of years of international relations, conflict, and now nearly universal adherence to an enduring order for ocean space that is the most significant achievement for international law since the UN Charter’. See P. Prows, *Though Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law*, New York University Public Law and Legal Theory Working Paper No 30, 2006, at 1.

historic objects and establishing an obligation to protect them.<sup>48</sup>

Under UNCLOS Article 303, States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.<sup>49</sup> States can establish an archaeological zone within their contiguous zone<sup>50</sup> and thus may consider the removal of any archaeological or historical object from the contiguous zone as an infringement of the Convention.<sup>51</sup> Notwithstanding these provisions, the content of the coastal state's rights is far from clear. In addition, Article 303 also states that UNCLOS does not affect the law of salvage or other admiralty rules.<sup>52</sup>

In parallel, Article 149 states that all objects of an archaeological and historical nature found on the seabed and ocean floor beyond the limits of national jurisdiction (the so-called Area) 'shall be preserved and 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.'

Not only do the two provisions not define what constitutes an archaeological and historical object, but nor do they mention the measures to be taken to protect these. Also, there seems to be an intrinsic ambiguity in the regime established by the Convention. Authors have highlighted that while the *incipit* of Article 139 seems to give preference to an internationalist conception of undersea cultural heritage ('[archaeological objects] shall be preserved and disposed of for the benefit of mankind as a whole') the remaining part of the provision seems to adopt a nationalist view of cultural objects ('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').<sup>53</sup> Thus, the Convention expressly left room for the elaboration of a more detailed protection regime by a specific international instrument.<sup>54</sup>

A more specific instrument for the international protection of underwater cultural heritage is the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (hereinafter CPUCH Convention).<sup>55</sup> The elaboration of the Convention, which has just entered into force on January 2<sup>nd</sup> 2009, reflects the increasing awareness reached within the international community of the importance of protecting underwater cultural heritage.<sup>56</sup> The Convention recommends *in situ* preservation of underwater cultural heritage<sup>57</sup> and provides a rule against its commercialization for trade or speculation,<sup>58</sup> thus embracing the *purist* approach.<sup>59</sup> The idea behind these provisions is to foster

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<sup>48</sup> For a detailed analysis of UNCLOS provisions dedicated to underwater cultural heritage, see for instance, M. Papa Sokal, 'International Law for the Protection of Underwater Cultural Heritage: Can Our Past Be Salvaged?' (2005) 16 Culture Without Context.

<sup>49</sup> UNCLOS, Article 303.1.

<sup>50</sup> The contiguous zone is a band of water extending from the outer edge of the territorial sea to up to 24 nautical miles from the baseline, within which a state can exert limited control for the purpose of preventing or punishing infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.

<sup>51</sup> UNCLOS, Article 303.2.

<sup>52</sup> UNCLOS, Article 303.3.

<sup>53</sup> UNCLOS, Article 139. See D. Curfman, 'Thar Be a Treasure Here: Rights to Ancient Shipwrecks in International Waters- A New Policy Regime' (2008) 86 Washington University Law Review 181-207, at 200.

<sup>54</sup> UNCLOS, Article 303.4.

<sup>55</sup> The Convention on the Protection of Underwater Cultural Heritage was adopted on 2 November 2001 at the thirty-first session of the UNESCO General Conference, 41 ILM 40 (2002). The Convention is entered into force on 2 January 2009.

<sup>56</sup> G. Carducci, 'Introduction to the UNESCO Convention on the Protection of the Underwater Cultural Heritage', in R. Grenier, D. Nutley and I. Cochran (eds.), *Underwater Cultural Heritage at Risk: Managing Natural and Human Impacts* (2006) 20-22.

<sup>57</sup> Convention, Preamble, Article 2(5), and Rule 1 of the Annex

<sup>58</sup> CPUCH, Article 2(7).

<sup>59</sup> For commentary see C. J.S. Forrest, 'Defining Underwater Cultural Heritage' (2001) 31 The Journal of Nautical

tourism development related to archaeological discoveries. Ideally, once the resource has been sold, particularly in a foreign state, it is no longer capable of providing any further economic benefit to the State in which it was found. Consequently, admiralty law i.e., the law of salvage and the law of finds are retained in the Convention but in an attenuated form. Under Article 4, salvage activities relating to underwater cultural heritage may apply only if they are authorized by the competent authorities, in full conformity with the Convention.

Perhaps the most important achievement of the Convention is represented by its Annex. Having a technical nature and having been drafted by archaeologists, the Annex benefited from a rather unanimous support at the time of its adoption and restates the need to preserve underwater cultural heritage *in situ*, but also the possibility of adopting different measures for protecting or diffusing the knowledge of underwater cultural heritage.<sup>60</sup> Also, the Annex reaffirms the idea that cultural objects should not be considered as mere commodities.<sup>61</sup> With regard to the legal status of the Annex, it is not legally binding, as it clearly follows the Convention's status. However, in this context, it is worth recalling the trend in international law to use the idea of *standards* to complement and further the role of rules.<sup>62</sup> While standards are not traditionally mentioned amongst the sources of international law listed by Article 38 of the Statute of the International Court of Justice,<sup>63</sup> they have become more and more influential in shaping state conduct in international relations. As the Annex is widely recognized as embodying professional standard guidelines, it might be replicated in national legislation without the need of ratifying the Convention.

Because of its controversial provisions, the Convention has a mere twenty two parties so far.<sup>64</sup> There are numerous reasons why states are reluctant to ratify the Convention. Perhaps the most influential lies in the Convention's utopian character. The Convention adopts a *purist* or preservationist approach to underwater cultural heritage protection, allowing salvage in a very limited way. However, States lack the financial resources to implement it. In addition, by requiring *in situ* preservation, the Convention seems contradictory as decay and spoilage seem unavoidable. In conclusion, by adopting a pure preservationist approach without conceding much space to private actors' concerns, the Convention does not seem to establish a global consensus on the way to protect underwater cultural

(Contd.)

Archaeology, 3-11; P. J. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (2002); R. Garabello and T. Scovazzi (eds) *The Protection of the Underwater Cultural Heritage Before and After the 2001 UNESCO Convention* (2003); S. Dromgoole, '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2003) 18 *The International Journal of Marine and Coastal Law* 59-108; D. Momtaz, 'La Convention sur la protection culturel subaquatique', in T. Malick Ndiaye and R. Wolfrum (eds.) *Law of the Sea, Environmental Law and Settlement of Disputes- Liber Amicorum Judge Thomas A. Mensa* (2007). For a look at the *travaux préparatoires*, see J. Blake, 'Protection of the Underwater Cultural Heritage' (1996) 45 *ICLQ* 819.

<sup>60</sup> Annex, Rule 1.

<sup>61</sup> Rule 2 of the Annex states 'The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold bought or bartered as *commercial goods*.' [emphasis added]

<sup>62</sup> A *standard* involves an idea of reasonableness, of what is an acceptable conduct under the circumstances, thus functioning as a model against which to evaluate certain behaviours. Standards can evolve in legal tools, eventually giving rise to a sort of global administrative law. See N. Krisch and B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *EJIL*, 1-13.

<sup>63</sup> Article 38 of the Statute of the International Court of Justice states: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply a. international conventions [...]; b. international custom as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.[...]

<sup>64</sup> The List of State Parties is available at <http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha> (last visited on 21 March 2009). Among the Mediterranean countries, only Croatia, Lebanon, Libyan Arab Jamahiriya, Montenegro, Slovenia, Spain and Tunisia have signed the Treaty.

heritage. This is a missed opportunity, as the recent technological developments may determine an increasing looting and dispersion of underwater cultural heritage.

## 6. Ownership and Management of Underwater Cultural Heritage

This section addresses issues of ownership and management of undersea cultural heritage. Ownership and management of cultural objects are often confused in discourse concerning underwater cultural heritage. Instead, it seems appropriate to draw a clear cut distinction between the two. The concept of property is a legal one, which is referred to in a number of international law instruments.<sup>65</sup> The concept of management is an economic one, which refers to the act of taking care, handling, supervising and controlling peculiar objects. While the two notions often overlap – as the owner manages his or her own cultural property- these may diverge – as the owner charges somebody with managing his or her own property.

With regard to the ownership of undersea heritage, its regime varies depending on the site of the recovery. If a shipwreck is found in territorial waters or in the archaeological zone within the contiguous zone of the state,<sup>66</sup> the national law of the state shall apply. In this context, it is worth recalling that the conflict between the disposed owner and the good faith acquirer is regulated differently in the domestic law of various states. For instance, under common law, the owner can claim the object which was stolen from him and acquired by a third party. Instead, civil law requires the protection of the good faith acquirer.<sup>67</sup>

If underwater cultural heritage artefacts are found in the high seas, difficulties arise with regard to the determination of ownership. Article 149 of the UNCLOS states that all objects of an archaeological and historical nature found on the seabed and ocean floor beyond the limits of national jurisdiction (the so-called Area) ‘shall be preserved and disposed of for the benefit of mankind as a whole [...]’. Underwater cultural heritage may be considered as an ‘integral part of the common heritage of humanity’ because of its universal importance.<sup>68</sup> The common heritage of mankind ‘symbolizes the unity of mankind’ and ‘belongs’ to all peoples in the sense that ‘it must be protected and preserved’.<sup>69</sup> However, this formulation does not establish a form of collective property rights or a ‘distinct international cultural heritage’<sup>70</sup> but affirms the objective of protecting underwater cultural heritage.

Article 149 of the UNCLOS also requires ‘particular regard’ to be 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.’ As Dr. Anastasia Strati clarified, this vague formulation indicates that particular attention has

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<sup>65</sup> The right to property is reaffirmed by a series of international law instruments. For instance, the Universal Declaration prohibits arbitrary deprivation of property. See UDHR, Article 17. The right to property is an extremely problematic notion in international law, as ‘it cannot be easily classified as an exclusively civil and political right or as a social right’. See C. Krause, ‘The Right to Property’ in A. Eide, C. Krause & A. Rosas, *Economic, Social and Cultural Rights* (1995), 143-157, at 143. The author highlights that ‘Historically, [the right to property] is associated with civil liberties, but at the same time it has strong economic implications and is therefore often discussed in the context of social rights.’ *Ibidem*. Indeed, such right was not included in the 1966 Covenants, because its exact content was a matter of debate. See T.R.G. Van Banning, *The Human Right to Property* (2002) 5.

<sup>66</sup> Coastal states are allowed to exercise jurisdiction over undersea heritage found within 24 miles from the baseline from which the territorial sea is measured. See Article 303(2) of the UNCLOS.

<sup>67</sup> M. Schneider, ‘The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’ Paper presented at the Ninth Mediterranean research Meeting, Florence and Montecatini Terme, 12-15 March 2008, organized by the Mediterranean Program of the Robert Schumann Centre for Advanced Studies at the European University Institute, at 3.

<sup>68</sup> CPUCH, *preamble*.

<sup>69</sup> Strati, ‘Deep Seabed Cultural Property and the Common Heritage of Mankind’, *cited*, 860.

<sup>70</sup> A. Strati, ‘Deep Seabed Cultural Property and the Common Heritage of Mankind’ (1991) 40 ICLQ 859-894, at 860.

to be paid to the cultural linkages of a given object to the communities which originated it.<sup>71</sup> Cultural heritage is always associated with a given civilization:<sup>72</sup> ‘historically and socially, it is related to a particular human group, whether a whole nation or a minority group within it’.<sup>73</sup> However, Article 149 of the UNCLOS does not clarify which community should be preferred. As mentioned above, underwater cultural heritage is multicultural heritage *par excellence* because of its cosmopolitan character. It may be relevant to the state of origin of the ship, the state of origin of the cargo, the coastal state on whose continental shelf the wreck was found and to other third states. As Strati suggested, perhaps the best approach is to adopt a *case-by-case approach*.<sup>74</sup> In the case of ‘difficult heritage’ i.e. heritage that recalls dramatic events,<sup>75</sup> I submit that the ethnic communities that originated the artefact should re-appropriate it. This is particularly the case with looting of religious goods and other riches in time of war, genocide and so on and so forth. In these specific circumstances, equity *infra legem* requires the interpretation of article 149 of the UNCLOS Convention so as to allow restitution and to right historical wrongs.<sup>76</sup>

It has been pointed out that ‘conventional property concepts do not automatically apply to cultural goods’.<sup>77</sup> This inapplicability of common property rules to cultural expressions would be confirmed by the terminology shift from ‘cultural property’ to ‘cultural heritage’.<sup>78</sup> The concept of cultural heritage reaffirms the double face of cultural goods: on the one hand, they may belong to individual owners; on the other hand, they have historical value and significance for a given people or community. In general terms, if the balance between private interests and the public at large is intrinsic to the same concept of property, this is all the more true with regard to cultural heritage.<sup>79</sup> National legislations have limited the enjoyment of cultural goods in different ways, for instance by limiting the alienability of cultural

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<sup>71</sup> *Ibidem*, at 886. Strati also proposes (at 888) to adopt the ‘effective link’ of nationality envisaged by the International Court of Justice in the *Nottebohm Case*. *Nottebohm Case (Liechtenstein v Guatemala)* second phase Judgement of 6 April 1955) ICJ Rep 1955, 4.

<sup>72</sup> See for instance, the case of the *Venus of Cyrene*. The case was complex because the statue is the Roman copy of a Greek original and was found in Cyrene. When Libya became an Italian colony, Italian troops took the Venus for display in Rome. See A. Chechi, ‘Facilitating the Restitution of Cultural Property through Cooperation- The Case of the 2001 US-Italy Agreement and Its Relevance for Mediterranean Countries’, paper presented at the Ninth Mediterranean research Meeting, Florence & Montecatini Terme, 12-15 March 2008, organized by the Mediterranean Programme of the Robert Schumann Centre for Advanced Studies at the European University Institute, at 17.

<sup>73</sup> Strati, *cited*, 860.

<sup>74</sup> *Ibidem*, 889.

<sup>75</sup> See S. Macdonald, *Difficult Heritage- Negotiating the Nazi Past in Nuremberg and Beyond* (Routledge: Oxon 2009), 1.

<sup>76</sup> On equity in international law, see for instance, F. Francioni, ‘Equity in International Law’ *Max Planck Encyclopedia of Public International Law* (2007).

<sup>77</sup> M. Lindsay, ‘The Recovery of Cultural Artifacts: The Legacy of Our Archaeological Heritage’ (1990) *Case Western J. Int’l Law* 165-182.

<sup>78</sup> As Bauer highlights, ‘The term ‘cultural heritage’ contains an inherent tension. On the one hand, ‘culture’ suggests something dynamic: it represents the different values and practices of different social groups, which continually evolve as they interact with others and their membership changes. On the other hand, ‘heritage’ (and likewise ‘property’) implies something more clearly defined and static: it refers to a specific object or tradition passed on from generation to generation with little to no significant change. The difficulty in resolving these opposing forces –change versus stability–underlies why protecting [...] cultural heritage is so difficult to regulate in law, policy and practice.’ See A. A. Bauer, ‘(Re)Introducing the International Journal of Cultural Property’ (2005) *12 International Journal of Cultural Property*, 6.

<sup>79</sup> As Roman law acknowledged, *dominium est jus utendi et abutendi re sua quatenus juris ratio patitur*, ownership is the right to use and abuse a thing to the extent in which such use and abuse is compatible with the logic of the law. In other words, the owner has the power to use what she owns; but she must use it lawfully. Therefore, a clear distinction needs to be made between the physical power to use the thing and the lawful use of the same. If we accept an absolutist conception of property, interference with the use of property becomes expropriation. However, this absolutist view is a misconception of property, as most constitutional systems and even human rights systems which protect property as a human right, also recognize the intrinsic limits of property and the need of its regulation. On the connection between Roman law and international law, see A. Pillet, *Les Fondateurs du droit international* (1904).

property or prohibiting its removal without the state's consent.<sup>80</sup> The limitation of the right by the law is not so much a limitation on the institution as it is an internal safeguard: what would seem to limit the nature of the right actually confirms it and preserves it by establishing its legitimacy.

The above scrutiny on the limits of cultural property necessarily leads to discourse on its management. Management of cultural goods can be defined as the act of taking care, handling, supervising and controlling these peculiar objects. Distinguishing between ownership and management allows us to overcome the dichotomy between 'cultural internationalism' and 'cultural nationalism' as it allows us to perceive cultural heritage as a multi-faceted concept. Such a concept has both national and international relevance, and 'expresses a metaphysical dimension as well as physical presence'.<sup>81</sup> In other words, leaving aside the identification of the owner, focusing on the management of cultural heritage allows more flexible and dynamic solutions.

Some authors point out that 'preservation and display are the most significant factors to be considered when deciding upon [the] disposition [of cultural heritage]'.<sup>82</sup> With regard to preservation, the Convention for the Protection of Cultural Property in the Event of Armed Conflict states that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind'.<sup>83</sup> Further, authors have stressed the linkage between the conservation of cultural heritage and the protection of cultural rights.<sup>84</sup>

With regard to the display of cultural objects, the UNESCO Constitution affirms that 'the wide diffusion of culture' is 'a sacred duty that all the nations must fulfill'.<sup>85</sup> However, the very linkage between cultural rights, human dignity and cultural heritage requires that adequate consideration be paid to the *moral rights* of the owners. For instance, human remains and religious and cultural objects stolen during operations of ethnic cleansing must return to the relevant cultural communities.<sup>86</sup> The question whether the owners of these objects prefer to keep religious objects secret or bury the remains of their ancestors belongs to the most intimate sphere of human dignity and should be respected. With regard to other kinds of cultural objects, if the owners deem it appropriate, they can temporarily lend their collections to museums or even organize such exhibitions themselves.

At a more preliminary phase, with regard to the discovery and recovery of undersea heritage, public-private partnerships should be carefully envisaged. Since archaeologists do not have funds to discover and excavate sites, archaeological remains may be irremediably lost through illegal excavation and trade or because of natural events. Therefore, incentives to recover artefacts in a legitimate way need to be established. Economists and lawyers might help policy makers to envisage concession-agreement-like contracts between countries and salvors.<sup>87</sup>

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<sup>80</sup> See J. Sax, *Playing Darts with a Rembrandt, Public and Private Rights in Cultural Treasures* (1999).

<sup>81</sup> J. Harris, 'Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Law' (1997) 14 *Arizona J. Int'l & Comp. Law* 225, at 238.

<sup>82</sup> Lindsay, 'The Recovery of Cultural Artifacts: The Legacy of Our Archaeological Heritage', cited, 165.

<sup>83</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, Preamble. 14 May 1945, 249 UNTS 215.

<sup>84</sup> F. Francioni, 'Culture, Heritage and Human Rights: An Introduction', in F. Francioni and M. Scheinin (eds.), *Cultural Human Rights*, (2007) 5; R. Peters, 'Beyond Restitution: An International Public Policy Approach in International Cultural Heritage Law' Paper presented at the Ninth Mediterranean Research Meeting, Florence and Montecatini Terme, 12-15 March 2008, organized by the Mediterranean Program of the Robert Schumann Centre for Advanced Studies at the European University Institute, 15.

<sup>85</sup> Constitution of the United Nations Educational, Scientific and Cultural Organization, 16 November 1945, 4 U.N.T.S. 275.

<sup>86</sup> See A. F. Vrdoljak, *International Law, Museums and Return of Cultural Objects*, (CUP: Cambridge 2006).

<sup>87</sup> See V. Vadi, 'Investing in Culture: Underwater Cultural Heritage and International Investment Law' (*forthcoming* 2009) *Vanderbilt Journal of Transnational Law* 1-52; V. Vadi 'The Challenge of Reconciling Underwater Cultural Heritage and

## **7. The Preservation of Cultural Heritage as a Key Factor Towards Sustainable Development**

Preservation should be the primary objective of any recovery of undersea heritage. As Prott and O'Keefe highlight, 'Heritage creates a perception of something handed down; something to be cared for and cherished. These cultural manifestations have come down to us from the past; they are our legacy from our ancestors. There is today a broad acceptance of a duty to pass them on to our successors, augmented by the creations of the present.'<sup>88</sup> Therefore preservation in the lens of intra and inter-generational equity should be the goal of cultural heritage regulation.

Exhibitions of the recovered underwater cultural heritage may represent a suitable social and economic option for the states and the owners of cultural goods. From a social perspective, museums have cultural and social functions as they are institutions in the service of society and of its development. Not only are museums 'temples of heritage', but they have become important forums for dialogue and critical thinking.<sup>89</sup> From an economic perspective, they may be profitable. Therefore, the sale of cultural objects is not the only available option to recover costs and expenses related to archaeological excavations. The preservation of historic assets has the potential to generate powerful heritage industry, tourism and related business. The management of cultural heritage after its recovery and the exploitation of subsequent revenues may constitute the necessary warranty for obtaining equity financing.<sup>90</sup>

For instance, after recovering 6,000 artefacts from the Titanic wreck, the salvage company went on city tours to display them to the public. The huge success of the *RMS Titanic* exhibitions bears testimony to the potential profitability of a salvage operation without the sale of recovered artefacts. Remarkably, the company decided not to do much future shipwreck salvage work, 'preferring above-water cash-paying customers to chasing high risk dreams of underwater riches'.<sup>91</sup> Other companies that are specialised in shipwreck recoveries have partially adopted a similar policy of exhibiting the recovered artefacts.<sup>92</sup>

States have been willing to finance the creation of maritime museums.<sup>93</sup> Maritime museums pay due consideration to the material frailty of shipwrecks and allow the public to have access to cultural heritage. Indeed, as one author puts it, 'divers are only a small, and relatively wealthy, section of the public' and diver access should not be a priority 'over other forms of public interpretation above the water'.<sup>94</sup> If recovering and displaying the wreck is not possible, attempts to recover its cargo should be done. Museums may ensure better preservation and security schemes, but also allow accessibility to

(Contd.)

Foreign Direct Investment: A Case Study' (2007) *Italian Yearbook of International Law* 143-158.

<sup>88</sup> L. V. Prott and P. J. O'Keefe, "'Cultural Heritage" or "Cultural Property"?' (1992) *International Journal of Cultural Property* 311.

<sup>89</sup> On the importance of critical thinking in the disposal of artifacts, see R. Shannan Peckham (ed) *Rethinking Heritage-Cultures and Politics in Europe* (I.B. Tauris: London 2003).

<sup>90</sup> Project financing can be defined as the financing of long term investment projects based upon a complex financial structure where project debt and equity are used to finance the project, and debt is repaid using the cash-flow generated by operation of the project. See E. Yescombe *Principles of Corporate Finance* (Academic Press: London 2002).

<sup>91</sup> P. Hodson 'How to Invest in Sunken Treasures; Salvage Stocks Offer High Returns, but Big Risks' *National Post*, 31 May 2007.

<sup>92</sup> Odyssey Marine, Press Release No. 177, 'Odyssey Marine Exploration Announces 2008 Financial Results', March 11, 2009.

<sup>93</sup> As an author underlines 'although museums started as individual hobbies with collectors of unique items doing it for personal satisfaction, today they are ... institutions carrying out diverse functions that range from research, collection development, documentation, and inventory, to exhibition and education.' See G. H. Okello Abungu, 'Africa and Its Museums: Changing of Pathways?' in *Art and Cultural Heritage*, cited, 386-393, at 386.

<sup>94</sup> J. Ransley, 'Rigorous Reasoning, Reflexive Research and the Space for Alternative Archaeology' (2007) 36 *International Journal of Nautical Archaeology*, 221, 224.

the old and disabled.

Following the recovery of Viking ships, a nautical museum was established at Roskilde, Denmark. The Viking Ship Museum in Oslo is known worldwide. In Germany, a national maritime museum has been built around the medieval cog found at Bremen, and the museum, situated at Bremerhaven, is now a national archaeological research centre. In the United Kingdom, the Portsmouth Historic Dockyard now includes the relict of the *Mary Rose*, a Tudor warship. In Greenwich, the *Cutty Sark* is conserved in dry dock and attracts millions of tourists every year. Actually, there are more than 800 nautical museums in the world mainly due to private-public partnerships.<sup>95</sup> Although maritime museums are interdisciplinary and attract research from a variety of different fields,<sup>96</sup> they are no longer the exclusive reserve of particularly erudite visitors. The evolution of modern techniques makes maritime museums more and more attractive to the broadest categories of tourists.

Akin to maritime museums on land, in recent years a series of initiatives have been taken to create underwater museums. Underwater museums presuppose the conservation *in situ* of the wrecks and may be a suitable option in areas which present transparent waters and are not particularly deep. For instance, the Egyptian authorities have launched a pilot project for the creation of an underwater museum in the Bay of Alexandria.<sup>97</sup> Caesarea, an ancient port created under the kingdom of Herod, has become a dive trail for divers who can admire an ancient shipwreck from Roman times.<sup>98</sup> Croatia, which is extremely rich in underwater cultural heritage, has adopted the methodology of protecting shipwreck sites with metal cages. This should deter potential looters while allowing divers to enjoy the sites. In Italy, an underwater trail has been created in Ustica, where divers can admire several shipwrecks. In Greece, the *HMHS Britannic* wreck site is set to become a seabed museum.<sup>99</sup>

Both museums and national parks participate in the local life and contribute to local cultural and economic development.<sup>100</sup> Usually, discourse on heritage management focuses on issues of property. The general assumption is that societies and individuals 'have at their disposal both cultural and economic types of capital which are different but convertible into one another'.<sup>101</sup> This paper overcomes this traditional dichotomy, and proposes a re-conceptualization of heritage as *cultural capital* and engine for cultural, social and economic development.<sup>102</sup>

## 8. Conclusions

Shipwrecks are an invaluable source of knowledge and hold a profound historic and cultural value.<sup>103</sup> From a historical perspective, the discovered goods may constitute a 'difficult heritage' because they recall dramatic events of the past and stories of aggression and violence. Still, they offer us the possibility of remembering the dead and unveiling often neglected episodes of the past. From a

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<sup>95</sup> See F. Serafini, *Musei navali e collezioni marittime nel mondo* (2005).

<sup>96</sup> O. Genin, 'Les musées maritimes, gardiens d'un patrimoine mondial', 48 *Museum International* 4 (1996), at 5.

<sup>97</sup> The project is interesting because it includes the creation of an underwater terrace in the centre of the bay: 'There, behind glass windows, [visitors] will be able to admire the many finds dating back to ancient Alexandria'. See 'Underwater Cultural Heritage in Alexandria' at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=38697&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=38697&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited April 1, 2009).

<sup>98</sup> See UNESCO 'Underwater Museums and Dive Sites', [http://portal.unesco.org/culture/es/files/35206/12028970437/Underwater\\_Museums\\_en.pdf/Underwater%2BMuseums%2Ben.pdf](http://portal.unesco.org/culture/es/files/35206/12028970437/Underwater_Museums_en.pdf/Underwater%2BMuseums%2Ben.pdf) (last visited March 18, 2009).

<sup>99</sup> See H. Smith, 'Wreck of the Titanic Sister Ship Finds New Destiny as Tourist Attraction', *Guardian*, October 29, 2008.

<sup>100</sup> Y. Herreman, 'The Role of Museums Today: Tourism and Cultural Heritage', in *Art and Cultural Heritage, cited*, 419-426.

<sup>101</sup> P. Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (1984).

<sup>102</sup> D. Throsby, *Economics and Culture*, (CUP: Cambridge 2001) 45.

<sup>103</sup> See E. Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters* (CUP: Cambridge 2002) 12.

cultural perspective, underwater cultural heritage represents an ‘integral part of the cultural heritage of humanity and a particularly important element in the history of peoples and their relations with each other concerning their common heritage.’<sup>104</sup> Thus, conservation of unique assets provides cultural and societal benefits.

From a legal perspective, underwater cultural heritage involves issues of ownership and management. With regard to the ownership of underwater cultural heritage, the UNESCO Convention on the Protection of Underwater Cultural Heritage does not address this issue. Therefore, the regime established by the UNCLOS, which is deemed to reflect customary international law, still generally applies. In the territorial waters and the contiguous zone of a given state, the principle of territoriality requires the application of the law of the coastal state. Instead, in the high seas the freedom of the sea prevails. UNCLOS provides only general principles for establishing the ownership of the vessel and the objective of preserving archaeological and historical objects for the benefit of mankind. Salvage law and the law of the finds remain applicable. However, the abuse of these maritime concepts may determine a sort of piracy and looting of cultural objects found at sea. The commercialization of cultural goods inevitably implies dilution of the related knowledge and the potentially irreversible dispersion of underwater cultural heritage.

From an economic perspective, the preservation and management of undersea heritage may well represent an engine for growth and sustainable development, catalyzing tourism and related economic activities. Actually, development is seen ‘as less like the construction business and more like education in the broad and comprehensive sense that covers knowledge, institutions and culture’.<sup>105</sup> If development is conceived as ‘the process of widening choices for people to do and to be what they value in life’<sup>106</sup> not only social, political and economic opportunities, but also cultural liberty and access to culture are important. The proposed approach would allocate the management of cultural goods to private actors and the States or, eventually, to joint ventures between them. In this sense, modern *pirates* may become *privateers* or *corsairs*. This sensible approach is based on the assumption that an incentive-based system may be coupled with preservation policy and enhances the synergy between private and public actors in order to preserve underwater cultural heritage and to transmit its knowledge to present and future generations.

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<sup>104</sup> UNESCO Convention, *Preamble*.

<sup>105</sup> World Bank, *The Quality of Growth*, (Washington DC: 2000) at XXIII.

<sup>106</sup> United Nations Development Program, Human Development Report 2004- Cultural Liberty in Today’s Diverse World (New York: UNDP 2004), 6.

# Illicit Trafficking in Cultural Objects and the Protection of the World Cultural Heritage

Federico Lenzerini\*

## Abstract

The World's cultural heritage – consisting in the complex of the most outstanding immovable manifestations of the human genius from an artistic, architectural, historical, aesthetic, ethnological or anthropological point of view – is safeguarded by the 1972 UNESCO World Heritage Convention, which at present counts 186 States parties. Many of the properties protected by this Convention are characterized by a relationship of deep interdependence between their immovable skeleton and the movable objects that are part of their whole complex, as elements contributing to shape the distinctiveness and value of the properties concerned. This is a common feature of most such properties, irrespective of the culture to which they belong. Religious buildings, for example, have in the sacred ceremonial objects contained within their walls an essential element of their very *raison d'être*, the absence of which would deprive them of their meaning for the faithful and would make them a void structure retaining only its exterior value. Similarly, objects included in historical buildings are essential for contextualizing such buildings in their age, improving their value and significance as testimony of the historical period in which they served the daily life of people. When illicit trafficking of such objects occurs, the intrinsic significance of immovable properties is degraded, and their “aggregate” value is reduced, leading to an irreplaceable loss for the whole of humanity. It is therefore essential to adopt all available measures for putting such trafficking to an end, in order to preserve the integrity of a unique common inheritance of humanity.

## Keywords

world heritage convention – impact of illicit traffic – context and integrity of sites – cultural diversity

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## 1. The Protection of World Cultural Heritage: The 1972 World Heritage Convention

In the early 1970s, the rise of the concept of “world heritage” represented a ground-breaking event in the evolution of international law on culture. The shift from the conception of (cultural) “property” to the holistic idea of “heritage” meant much more than a mere terminological adjustment; it epitomized the evolution in the perception of the rationale which makes culture worth safeguarding for the international community, from a sovereignty-related prerogative to the inherited patrimony of the human family, conceived as “the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group”.<sup>1</sup>

This new concept of *heritage* was translated in 1972 into the *Convention concerning the Protection of the World Cultural and Natural Heritage* (WHC),<sup>2</sup> based on the idea that “deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world”<sup>3</sup> and that “parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole”,<sup>4</sup> as such heritage is of importance for all the peoples of the world, “to whatever people it may belong”.<sup>5</sup>

The WHC – which protects both cultural and natural heritage of *outstanding universal value*<sup>6</sup> (although in its applicative practice cultural heritage retains a hugely predominant position)<sup>7</sup> – is based in principle on a twofold structure, entailing a generic model of “national protection”<sup>8</sup> and a much more peculiar scheme of “international protection”,<sup>9</sup> structured as a system of interstate cooperation concretely implemented under the guidance of UNESCO. In reality, while the system of national protection is merely based on the recognition by each State party of “the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage [of outstanding universal value] situated on its territory”,<sup>10</sup> it is the scheme of international protection which actually represents the characterizing and most effective element of the WHC. In very concise terms, such a scheme is characterized by a List – defined by article 11 para. 2 as the *World Heritage List*<sup>11</sup> – which has been established and is constantly kept up to date by an *ad hoc* body, the Intergovernmental Committee for the Protection of the Cultural and

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<sup>1</sup> This definition was later provided by the 1982 *Mexico City Declaration on Cultural Policies*, available at <[http://portal.unesco.org/culture/en/files/12762/11295421661mexico\\_en.pdf/mexico\\_en.pdf](http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf)> (last visited on 8 March 2009).

<sup>2</sup> The full text of the Convention is available at <<http://www.unesco.org>> (last visited on 8 March 2009). For a comprehensive article-by-article analysis of the WHC see F. FRANCONI (ed., with F. LENZERINI), *Commentary to the 1972 World Heritage Convention* (Oxford, Oxford University Press, 2008).

<sup>3</sup> See Preamble, second sentence.

<sup>4</sup> *Ibid.*, sixth sentence.

<sup>5</sup> *Ibid.*, fifth sentence.

<sup>6</sup> See articles 1 and 2, entailing the definition of, respectively, cultural and natural heritage.

<sup>7</sup> As it covers nearly 78 per cent of the heritage protected by the Convention (see *infra*, text corresponding to note 16).

<sup>8</sup> See articles 4-6.

<sup>9</sup> See article 7 ff.

<sup>10</sup> See article 4. Furthermore, according to article 5, States parties “shall endeavor, in so far as possible, and as appropriate for each country”, to take appropriate, effective and active measures to ensure “the protection, conservation and presentation of the cultural and natural heritage situated on [their respective] territor[ies]”.

<sup>11</sup> The World Heritage List, constantly updated, is available at <<http://whc.unesco.org/en/list/>> (last visited on 8 March 2009).

Natural Heritage of Outstanding Universal Value, provided for by article 8 and commonly called “World Heritage Committee” (the Committee). The system of the WHC is also characterized by the existence of another list, i.e. the *List of World Heritage in Danger*, established by article 11 para. 4. The Committee may inscribe any property on such the List – on the condition that it *already appears* on the World Heritage List – when it is threatened by serious and specific dangers and for which, therefore, ‘major operations are necessary’ in order to prevent its loss or serious damages to its integrity.<sup>12</sup>

This double-listing scheme has proved extremely successful, stimulating huge international participation in the system established by the Convention. On the one hand, inscription of a property on the World Heritage List gives the territorial country concerned great international visibility and prestige, and, in addition, allows States parties to access the system of international assistance provided for by the Convention,<sup>13</sup> financed by an *ad hoc* fund – the “World Heritage Fund” – established by article 15.<sup>14</sup> On the other hand, the “shame” that a State has to bear when one of its properties is inscribed on the List of World Heritage in Danger – to the extent that such an inscription is the consequence of carelessness by the government concerned in the preservation of the property in point – usually persuades the parties to the WHC to adopt adequate policies and measures for ensuring proper preservation of the sites included on the World Heritage List. Today, the WHC – with its wide visibility within civil society – is universally considered as the most important international legal instrument on the protection of culture, and is also one of the most ratified international conventions in absolute terms.<sup>15</sup> This huge success is self-evident if one considers that, at the moment of writing, 878 properties are inscribed on the World Heritage List, 679 of which are considered of outstanding universal value for cultural reasons, 174 are protected as natural properties, and 25 as “mixed” sites (that is, of outstanding universal significance for *both* cultural and natural value).<sup>16</sup>

This brilliant depiction of the WHC – however – represents only one side of the coin. In fact, the Convention is also characterized by problems and shortcomings which reverberate negatively on its functioning and effectiveness, reducing its capacity to adequately safeguard the value to which its realization is devoted.<sup>17</sup> First, the text of the WHC is hostage to the historical moment in which it was drafted, when, although the international community was opening its horizons toward the holistic concept of “heritage” – to replace the outdated notion of “property” – it was still anchored to the traditional conception of international law as centred on the idea of State sovereignty. As a consequence, the rationale of the WHC, epitomized in ideological terms by the proclamation in the Preamble of the need to preserve whatever part of the world heritage – irrespective of its geographic

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<sup>12</sup> According to article 11 para. 4, the List of World Heritage in Danger “may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods, and tidal waves”.

<sup>13</sup> See article 19 ff.

<sup>14</sup> The Fund, in reality, covers only a minor portion of the expenses necessary for the implementation of the Convention, which are for their most part covered by funds from the budget of the UNESCO Regular Programme and, in particular, by Extrabudgetary Funds. See F. LENZERINI, “Articles 15-16. World Heritage Fund”, in F. FRANCONI (ed., with F. LENZERINI), *cit.*, p. 269 ff.

<sup>15</sup> At the moment of writing, 186 States were parties to the WHC. See <<http://whc.unesco.org/en/statesparties/>> (last visited on 8 March 2009).

<sup>16</sup> See *supra*, note 11.

<sup>17</sup> On this issue see F. FRANCONI and F. LENZERINI, ‘The Future of the World Heritage Convention: Problems and Prospects’, in *Commentary to the 1972 World Heritage Convention*, *cit.*, p. 401 ff.; see also F. FRANCONI, ‘Thirty Years On: Is the World Heritage Convention Ready for the 21st Century?’, in *XII Italian Yearbook of International Law* (2002) p. 13 ff.

location – in the interest of mankind as a whole,<sup>18</sup> is opposed by its concrete side, completely permeated by an approach granting a nearly unlimited freedom to States parties of deciding whether or not a property situated in their respective territories is to be protected under the Convention. Thus, the seventh sentence of the Preamble clarifies that the “collective assistance” provided by the international community as a whole “in the protection of the cultural and natural heritage of outstanding universal value” is simply “participatory”, in the sense that it will not take “the place of action by the State concerned, [but] will serve as an efficient complement thereto”. Similarly, article 3 makes it clear that “[i]t is for each State Party [...] to identify and delineate the different properties situated on its territory” to be protected by the Convention. Also, article 11 para. 3 affirms that no property may be inscribed on the World Heritage List without “the consent of the State concerned”. Last but not least, article 19 rules that “international assistance for [a] property forming part of the cultural or natural heritage of outstanding universal value” may be provided only on the condition that it is requested by the State party in the territory of which the property concerned is located. It is self-evident how this deference to the principle of State sovereignty greatly impairs the effectiveness of the WHC in pursuing the goal of preserving the integrity of World Heritage in the interest of humanity as a whole.

## **2. The Mediterranean Dimension of World Cultural Heritage**

It would probably be “narrow-minded” to think – as many people actually do in the Western world – that culture actually originated in the Mediterranean area, with the rise of the Egyptian, Greek and Roman civilizations. In fact, when the Egyptian civilization emerged from prehistory and the first “modern” settlement was founded in Troy, in around 3000 B.C.,<sup>19</sup> other civilized communities had already developed in other parts of the world. In China, for example, although the Shang dynasty – which is said to have been founded in 1700 B.C. – is commonly considered as the most ancient post-prehistoric Chinese dynasty, it was actually preceded by the Xia dynasty (existing since the 21<sup>st</sup> Century B.C.), which, having being characterized by a somehow advanced social system, should be considered something more than a “prehistoric” society. Also, the highly sophisticated Mayan calendar had been used from the legendary date of 3113 B.C.<sup>20</sup>

Apart from this, it is nonetheless undeniable that the Mediterranean area represents one of the most important regions of the world in terms of cultural heritage. Exactly 212 of 878 properties inscribed on the World Heritage List,<sup>21</sup> that is to say more than 24 per cent (about one quarter) of the whole World Heritage of humanity (in the context of which only a minimal part is represented by natural heritage),<sup>22</sup> belong to Mediterranean countries. This high percentage testifies to the extraordinary historical and cultural inheritance of the Mediterranean region, which – since the rise of mankind – has constantly represented a crossroads of civilizations and a background of cross-fertilization among a myriad of different cultures, leading the fruits of cultural diversity to proliferate in a multitude of unique and

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<sup>18</sup> See *supra*, text corresponding to note 4.

<sup>19</sup> This is the date commonly referred to for indicating the emergence of the Early Dynastic Egyptian Period, although it is reported that the Egyptians created the first calendar about 1.000 years before (see R. WESTGATE, “Ancient Arab Astronomy”, *Emirates National History Group Bulletin* No. 33, November 1987, p. 10 ff., available at <[http://www.enhg.org/bulletin/b33/33\\_10.htm](http://www.enhg.org/bulletin/b33/33_10.htm)>, last visited on 8 March 2009).

<sup>20</sup> See “Mayan Culture, Ancient Empire, The Mayas from the Ancient Empire”, found at <<http://mexico.udg.mx/historia/precolombinas/ingles/maya/ancient.html>> (accessed on 28 December 2004).

<sup>21</sup> In detail, each Mediterranean country has inscribed the following number of properties on the World Heritage List: Albania, 2; Algeria, 7; Bosnia and Herzegovina, 2; Croatia, 7; Cyprus, 3; Egypt, 7; France, 33 (one of which is a transboundary property joined with Spain); Greece, 17; Israel, 6; Italy, 43; Lebanon, 5; Libyan Arab Jamahiriya, 5; Malta, 3; Montenegro, 2; Morocco, 8; Slovenia, 1; Spain, 40 (one of which is a transboundary property joined with France); Syrian Arab Republic, 5; Tunisia, 8; and Turkey, 9. See *supra*, note 11.

<sup>22</sup> Of the 212 properties inscribed on the World Heritage List belonging to Mediterranean countries, only 11 have been included for natural reasons, while 7 are mixed sites (*ibid.*).

irreplaceable manifestations of human creativity and variety.

In this respect, it may be interesting to refer to a theory developed in 1845 by the German geophilosopher Ernst Knapp, who proposed a tripartite classification of civilisations based on the kind of waters around which their life flourished.<sup>23</sup> The first culture, in chronological-historical order, was the *potamic* one, composed by the river-based civilizations of Assyrians, Babylonians and Egyptians, that lived in the territories between the Tigris and Euphrates and around the Nile. Then the *thalassic* culture, which included the Mediterranean-based Greek, Roman and medieval civilisations, developed. Finally, with the great geographical discoveries beginning in the fifteenth century, the *oceanic* culture arose. On the basis of this classification, in the twentieth century the German philosopher Carl Schmitt used an interesting metaphor,<sup>24</sup> according to which, the ocean, due to its dimensions and its inherent non-tameability and hostility, is the symbol of unregulated conquest and the domain of a lack of identity, piracy and imperial power. The Mediterranean, as a docile sea surrounded by lands, is a crossroads among the different cultures inhabiting its coasts.<sup>25</sup> As a consequence, while the ocean is the archetype of disarray, the fact of being part of the Mediterranean would provide the communities living in that area with a sense of unity. Apart from Schmitt's singular reconstruction, it is not unreasonable to hold that a sort of Mediterranean unity actually exists, based on the common cultural roots of the peoples that throughout history have crossed its waters.<sup>26</sup> This is actually reflected in the ease with which the different cultural models of the communities living in the Mediterranean area have merged with each other, giving rise to a high variety of incomparable manifestations of tangible heritage (many of which are today inscribed on the World Heritage List).<sup>27</sup> These manifestations are the living proof that different cultures may co-exist with each other – and may live together in harmony – even if the communities concerned have developed diverse traditions and beliefs.

Such a cultural unity (*i.e.* the cultural link existing among the several communities developed in the Mediterranean region), the perception of which – unfortunately – is today very weak, should be fostered as a tool for promoting mutual acceptance and understanding among the different Mediterranean communities and help to overcome cultural boundaries and conflicts existing in the area. One of the most formidable ways of pursuing this goal would rest in the valorisation of cultural heritage, in which the common legacy of Mediterranean peoples is highly visible in the different artistic and architectural styles merged with each other in the most outstanding manifestations of such heritage, as well as in their symbolic function. In order to further improve this strategy, it would be essential to consider the component of immovable tangible properties in its symbiosis with the other elements of cultural heritage, particularly intangible heritage and movable cultural objects. With

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<sup>23</sup> See D. ZOLO, “Towards a Dialogue between the Mediterranean Cultures”, available at <<http://www.juragentium.unifi.it/en/surveys/med/tunis/zolo.htm>> (last visited on 8 March 2009), para. 4.

<sup>24</sup> See C. SCHMITT, *Land und Meer. Eine weltgeschichtliche Betrachtung*, Stuttgart, 1954, Italian translation, p. 25. This book is quoted by ZOLO, *cit.*, at note 10.

<sup>25</sup> See ZOLO, *cit.*, para. 4.

<sup>26</sup> This unity actually finds expression in some basic features that even today may be found in all well-defined communities living in the Mediterranean area. For example, although the Muslim “identity” is at present considered as much more representative of the Mediterranean communities living in Arabian regions than their Mediterranean legacy, it is a fact that, for instance, the Arabian countries of the Mediterranean, like Syria, bear tradition (*e.g.*, cuisine, social practices, folk dancing, agricultural techniques, traditional building models) which are much more similar to those of the other non-Arabian Mediterranean States (*e.g.* – in the case of Syria – Turkey, Greece and Former-Yugoslavian countries) than to those developed by non-Mediterranean Arabian countries, such as Saudi Arabia, Iraq and Yemen. See S. TAMARI, “A Mediterranean Identity and the Arab Mashriq”, 2004, available at <<http://www.bitterlemons-international.org/previous.php?opt=1&id=25#100>> (last visited on 8 March 2009).

<sup>27</sup> See, for example, the Spanish site of Alhambra, Generalife and Albayzín, Granada, in the context of which the “residential district of the Albayzín [in particular] is a rich repository of Moorish vernacular architecture, into which the traditional Andalusian architecture blends harmoniously” (see <<http://whc.unesco.org/en/list/314>>, last visited on 8 March 8, 2009); see also the Italian Archaeological Area of Agrigento (at <<http://whc.unesco.org/en/list/831>>, *ibid.*), where the Greek influence on the history of Italy is well evident.

respect to the latter element, in particular, it is well-known how the Mediterranean region is afflicted by the scourge of illicit trafficking in cultural properties. This plague is harmful not only in itself – considering the irreplaceable loss it produces for the common heritage of the region and the cultural identity of the communities living therein – but also for impairing and impoverishing the World Heritage properties in which such movable cultural treasures find their inherent environment (by virtue of which they increase the outstanding universal value of the immovable properties to which they are connected).

### **3. The Importance of Fighting Illicit Trafficking in Cultural Objects for the Realization of the Purposes of the World Heritage Convention**

Proper preservation of world heritage implies that all its components are adequately safeguarded. In this respect, it is to be considered that many properties inscribed on the World Heritage List are characterized by a deep interdependence between their immovable skeleton and the movable objects that are contained therein, as an element contributing to shape the distinctiveness and value of the property concerned. This is a common feature of most properties included in the List, irrespective of the culture to which they belong. Religious buildings, for example – irrespective of the credo they represent –, have in the sacred ceremonial objects contained within their walls an essential element of their very *raison d'être*, the absence of which would deprive them of their meaning for the faithful and would make them a void structure retaining only its exterior value.<sup>28</sup> Similarly, original objects included in historical buildings are essential in order to contextualize the building concerned in its age, greatly improving its value and its significance as testimony to the historical period in which it served the daily life of people. When illicit trafficking of such objects occurs, the intrinsic significance of immovable properties is degraded, and their “aggregate” value is therefore reduced, leading to an irreplaceable loss for the humanity as a whole.

The importance of preventing illicit trafficking of cultural objects from World Heritage sites is implicitly recognized by the *Operational Guidelines for the Implementation of the World Heritage Convention* (which are regularly updated by the World Heritage Committee).<sup>29</sup> First, among the criteria to be used by the Committee in order to evaluate the outstanding universal value of a property proposed for inscription on the World Heritage List, the fact that it is “directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance” is contemplated, although the Committee considers that such a criterion “should preferably be used in conjunction with other criteria”.<sup>30</sup> In this respect, the fact of mentioning “artistic works of outstanding universal significance” clearly refers to particularly significant items of movable cultural heritage, the pillage of which would deprive the immovable property concerned of its outstanding universal value, as such value is actually grounded on the premise that the said property constitutes the site where such movable masterpiece(s) is/are located. Also, in setting up the conditions of integrity that are to be satisfied by a proposed site in order to be considered suitable for inscription on the World Heritage List,<sup>31</sup> the Operational Guidelines require,

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<sup>28</sup> Sometimes, the presence in a building of an especially valuable movable cultural property represents the main reason for which the former is inscribed on the World Heritage List. See, e.g., the Italian property of the Church and Dominican Convent of Santa Maria delle Grazie with “The Last Supper” by Leonardo da Vinci, which was inscribed on the List in 1980 by reason of the fact that “[t]he refectory of the Convent of Santa Maria delle Grazie forms an integral part of this architectural complex, begun in Milan in 1463 and reworked at the end of the 15th century by Bramante. On the north wall is *The Last Supper*, the unrivalled masterpiece painted between 1495 and 1497 by Leonardo da Vinci, whose work was to herald a new era in the history of art” (see <<http://whc.unesco.org/en/list/93>>, last visited on 8 March 2009).

<sup>29</sup> The last version of the Operational Guidelines, updated in January 2008, is available at <<http://whc.unesco.org/archive/opguide08-en.pdf>> (last visited on 8 March 2009).

<sup>30</sup> See para. 77(vi).

<sup>31</sup> See para. 87.

*inter alia*, that the fact of whether the property concerned “includes all elements necessary to express its outstanding universal value” is assessed;<sup>32</sup> it is quite evident that among such elements the movable objects that are part of the site may be included and that, *a fortiori*, in the event that they represent a decisive feature in determining the integrity of the property, the circumstance of them being taken away from such a site would in fact deprive the latter of its integrity.

Recently, the need of avoiding illicit trafficking of movable objects located in properties protected by the WHC has also been stressed by the World Heritage Committee. For example, during its twenty-fourth session (held in Cairns, Australia, from 27 November to 2 December 2000), the Committee addressed the problem of the trafficking of sculptures illegally excavated from Buddhist archaeological remains in the site of Taxila, in Pakistan; in this respect, the Committee, while noting that “[i]llicit excavations did not appear to constitute a major threat to the site”, nevertheless recommended Pakistan to apply to the site “the national programme to prevent illegal excavation and illicit trafficking of artefacts”,<sup>33</sup> also reiterating “its request to the State Party to continue strengthening the protection of unexcavated areas in Taxila from illegal looters”.<sup>34</sup>

Another World Heritage property that in the past suffered intense looting of movable objects is the archaeological site of Angkor, in Cambodia,<sup>35</sup> which, since its inscription on the World Heritage List in 1992, had been contextually inscribed on the List of World Heritage in Danger, due to its bad state of conservation and, as noted, the massive looting it was subjected to. However, following the excellent improvements achieved in the subsequent years with respect to both aspects – thanks to the close cooperation between UNESCO and the Government of Cambodia in taking specific action targeting the most urgent problems affecting the site – Angkor has become a model “for the rehabilitation of other ancient sites in post conflict situations”,<sup>36</sup> and was finally removed from the List of World Heritage in Danger in 2004. The example of Angkor was taken as a pattern to be followed in order to resolve the critical situation of illicit trafficking of cultural heritage from Afghanistan after the war waged by the United States and its allies against the Taliban regime. In particular, in 2002 the Committee, in addition to “urg[ing] the neighbouring countries of Afghanistan to co-operate in strengthening control of their national borders to prevent further illicit traffic of Afghan heritage”,<sup>37</sup> invited “the Director-General to organize actions similar to those undertaken in Angkor (Cambodia) with the International Council of Museums (ICOM) to increase the Afghan national capacity to prevent illicit trafficking of heritage”.<sup>38</sup> In more specific terms, these actions should be carried out in close collaboration with the national government and should entail “effective co-operation with NGOs such as the International Council on Archives (ICA) and the International Council of Museums (ICOM) amongst others”.<sup>39</sup>

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<sup>32</sup> See para. 88.

<sup>33</sup> See Report of the twenty-fourth Session of the World Heritage Committee, Cairns, Australia, 27 November – 2 December 2000, UNESCO Doc. WHC-2000/CONF.204/21 of 16 February 2001, p. 124.

<sup>34</sup> *Ibid.*, p. 125.

<sup>35</sup> On this subject see C. FORREST, “Angkor Wat: The Common Heritage of Humankind? An International Law Perspective”, available at <<http://conferences.arts.usyd.edu.au/viewpaper.php?id=527&print=1&cf=9>> (last visited on 8 March 2009).

<sup>36</sup> See the words of the UNESCO Director-General, Koïchiro Matsuura, in “Angkor: time for development”, UNESCO Press Release No 2003 – 95 of 17 November 2003, available at <[http://portal.unesco.org/en/ev.php-URL\\_ID=17265&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17265&URL_DO=DO_TOPIC&URL_SECTION=201.html)> (last visited on 8 March 2009).

<sup>37</sup> See Decision 26 COM 22, in “Decisions Adopted by the 26th Session of the World Heritage Committee”, Budapest, Hungary, 24 – 29 June 2002, UNESCO Doc. WHC-02/CONF.202/25 of 1 August 2002, p. 53, para. 10.

<sup>38</sup> *Ibid.*, para. 11.

<sup>39</sup> See Doc. WHC-02/CONF.202/25, *cit.*, Annex II, “Recommendations Adopted by the World Heritage Committee concerning the Heritage in Afghanistan”, p. 85, para. 3.7.

#### **4. Improving Coordination between the Relevant International Instruments as a Way to Enhance the Fight against Illicit Trafficking in Cultural Objects from World Heritage Sites**

Another point on which the World Heritage Committee has placed emphasis – in order to strengthen the action aimed at preventing and stopping illicit trafficking of cultural objects from Afghanistan – is the need for the whole international community to cooperate towards achieving such an end. In particular, having noted “the significant constraints faced by the Afghan authorities in controlling illegal plundering and excavations within the country and transport of heritage”, the Committee appealed “urgently to those countries where Afghan heritage material is sold to provide co-operation to prevent further illicit traffic of such property”.<sup>40</sup> In doing this, the Committee recalled a duty that a relevant number of countries in the world are bound to respect pursuant to the international conventions of which they are parties concerning the protection of movable cultural objects. The existence of specific legal obligations with this purpose is certainly conducive to favouring better results in the fight against illicit trafficking of such objects – to the extent that States have ratified the relevant international instruments. Being aware of this, the Committee therefore urged both the Government of Afghanistan and the other States parties to the WHC

to become signatory to the *Convention on the Protection of Cultural Property in the Event of Armed Conflict*, (The Hague, 1954) and its two Protocols, the *UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, the *UNIDROIT Convention* and other international legal instruments protecting cultural and natural heritage.<sup>41</sup>

The reason why the Committee recommended UNESCO members to ratify the cited conventions was based on the fact, as it noted “with regret[,] that of the 172 States Parties to the World Heritage Convention, only 91 [were] signatory to the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property”.<sup>42</sup> This rate dramatically decreases if one considers the 1995 *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* – which to date has been ratified by only 29 countries<sup>43</sup> – while the First Protocol to the 1954 Hague Convention concerning the exportation of cultural properties from occupied territories has today 100 States parties, only one of which (Liechtenstein) has not yet ratified the WHC.<sup>44</sup>

Having taken note of this, an interesting question arises concerning whether and to what extent the global action for the protection of material cultural heritage in general, and of World Heritage properties in particular, may benefit from the “cumulative” implementation of the WHC and the relevant international instruments concerning movable cultural objects. Needless to say that of course the implications described below are suitable of being produced *only* when the States concerned in each specific case have ratified the relevant conventions.

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<sup>40</sup> *Ibid.*, para. 3.6.

<sup>41</sup> See Decision 26 COM 22, *cit.*, para. 9. See also Doc. WHC-02/CONF.202/25, *cit.*, Annex II, para. 3.4 (“[t]he Committee reiterates the appeal made by the General Assembly of States Parties to the World Heritage Convention to all States Parties to become signatories to the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the UNIDROIT Convention to prevent further illicit traffic of Afghan cultural heritage”).

<sup>42</sup> At present, of the 186 States which are parties to the WHC (see *supra*, note 15), 115 have also ratified the 1970 Convention; only the State of Bahamas is party to the latter Convention without having ratified the WHC (see <<http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha>>, last visited on 8 March 2009).

<sup>43</sup> See <<http://www.unidroit.org/english/implement/i-95.pdf>> (last visited on 8 March 2009). All the 29 States parties to the UNIDROIT Convention have also ratified the WHC.

<sup>44</sup> See <<http://portal.unesco.org/la/convention.asp?KO=15391&language=E&order=alpha>> (last visited on 8 March 2009).

In general terms, the principle of “evolutionary” interpretation affirmed by article 31.3(c) of the *Vienna Convention on the Law of Treaties*<sup>45</sup> (corresponding to a rule of customary international law) – according to which, in interpreting a treaty “[t]here shall be taken into account, together with the context [...] any relevant rules of international law applicable in the relations between the parties” – is to be taken into consideration. For the purposes of this paper, the significance of this rule rests on the fact that – as all the relevant instruments are based on the common *raison d’être* of safeguarding cultural heritage in the interest of humanity – it requires that any of such instruments is interpreted and implemented by the State(s) concerned in a way which allows, to the maximum extent possible, the contextual realization of the aims pursued by all the other relevant instruments.

In more specific terms, a significant implication arising from the combined application of the instruments under debate concerns the definitions of cultural property provided for by the First Protocol of the Hague Convention of 1954 and the 1970 Convention, as well as the notion of cultural objects enshrined in the UNIDROIT Convention. According to article 1 of the 1954 Protocol, each party “undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property *as defined in Article 1 of the [Hague] Convention*”;<sup>46</sup> article 1 of the Convention, for its part, provides a list of items which – for the Convention to be applicable – must be “of great importance to the cultural heritage of every people”. To a similar extent, the 1970 Convention applies – pursuant to article 1 – to “property which [...] is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science”, while the UNIDROIT Convention defines as “cultural objects” “those which [...] are of importance for archaeology, prehistory, history, literature, art or science”. With respect to these definitions, it is reasonable to assert that, when a cultural property (or object) belongs *intrinsically* to a World Heritage site, its status of being important (either “great”, pursuant to the 1954 Convention, or “simple”, according to the two other instruments concerned) is to be considered as *presumed*, as the item in point is an essential part of an immovable property which has been qualified by the World Heritage Committee as being of outstanding universal value for humanity as a whole.

Also, it is a fact that a movable cultural property which is part of a World Heritage site is suitable of producing other notable effects with respect to the implementation of the 1970 Convention. First, there should be a presumption that the property in point – when removed from its original location and exported abroad – for the purposes of the relevant articles of the latter Convention (in particular, articles 7,<sup>47</sup> 10<sup>48</sup> and 13<sup>49</sup>) has been *illegally* exported from its country of origin. Second – and

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<sup>45</sup> 1155 UNTS 331.

<sup>46</sup> Emphasis added.

<sup>47</sup> Article 7 of the 1970 Convention reads as follows: “[t]he States Parties to this Convention undertake: (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States; (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party”.

<sup>48</sup> According to article 10, “[t]he States Parties to this Convention undertake: (a) To restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the

consequently – for the purposes of article 13(b)<sup>50</sup> any cultural property taken from a World Heritage site implies a strong duty incumbent on the “competent services” of the recipient State to co-operate for “facilitating the earliest possible restitution” of the property concerned to the State of origin. Last but not least, article 6 of the 1970 Convention – establishing the conditions pursuant to which the export of a cultural object may be authorized – is to be considered as non applicable to a movable cultural object belonging to a World Heritage site, as in principle such an object may not be separated from its natural background (i.e. the said site) without impairing its integrity and, *a fortiori*, its outstanding universal value.

The presumption that a cultural object has been exported illegally from the country of origin – when such an object was part of a World Heritage site – is to be considered as applicable also with respect to the UNIDROIT Convention. This also presupposes a further presumption, relating to the obligation of *restitution* to the country of origin of the object in point. Consistently, it is to be additionally presumed that its removal from its territory of origin *actually* impairs significantly one or more of the interests contemplated by article 5(3).<sup>51</sup> To a similar extent, a claim for restitution related to such an object shall *by definition* not be subjected to any time limitation, pursuant to article 3(4).<sup>52</sup>

Another effect played on the scope of operation of the UNIDROIT Convention by the circumstance of a cultural object to be part of a World Heritage site is that it should be considered as limiting the applicability of article 6. This provision recognizes, at paragraph 1, that

[t]he possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reason compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.

Paragraph 3 continues by stating that, “[i]nstead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State may decide: (a) to retain ownership of the object; or (b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees”. When the object concerned has been taken from a World Heritage site (provided that – as in all the other situations examined up to this point – it constituted a significant component of such a site), the latter provision

(Contd.) \_\_\_\_\_

origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject; (b) to endeavour by educational means to create and develop in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports”.

<sup>49</sup> Article 13 reads as follows: “[t]he States Parties to this Convention also undertake, consistent with the laws of each State: (a) To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property; (b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner; (c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners; (d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported”.

<sup>50</sup> See previous note.

<sup>51</sup> Article 5(3) states as follows: “[t]he court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests: (a) the physical preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State”.

<sup>52</sup> According to article 3(4), “a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor”.

should not be considered as applicable, since the integrity of a property inscribed on the World Heritage List is to be preserved in the general interest, implying that the territorial State may not agree – without violating the WHC – to reduce the value of the property concerned through granting ownership of the said object in favour of the *bona fide* possessor.

A final remark is to be made concerning the opposite situation, that is, the implications which the conventions may have on movable cultural property in the implementation of the WHC. In this respect, one could state that, when an artistic property (or object) is recognized as included within the scope of one of the latter conventions – it being of (great) importance – it should be automatically considered as an artistic work “of outstanding universal significance” pursuant to paragraph 77(vi) of the Operational Guidelines for the implementation of the World Heritage Convention.<sup>53</sup> However, it seems evident that this argument may not be fully supported, since the fact that an item is “of importance”, or even of “great importance” (as in the case of the First Protocol to the 1954 Hague Convention), does not necessarily imply that it is of outstanding universal significance, the existence of which requires that a higher threshold of “importance” is reached.

## 5. Conclusion

As emphasized by the Preamble of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, “illicit import, export and transfer of ownership of cultural property is an obstacle to [...] understanding between nations”.<sup>54</sup> The importance of safeguarding cultural heritage and ensuring its fruition by all is therefore not confined to the need of preserving its visual significance, but is also – and especially – required by its role in promoting tolerance and understanding among peoples as well as in preserving the self-esteem and identity of the communities concerned, sowing the seeds for the promotion of cultural diversity. This role is even more evident when it comes to World Heritage sites, since, as underlined by the World Heritage Committee with specific reference to Afghanistan, “the continued and systematic illegal plundering and looting of cultural [...] heritage properties [...] constitut[es] an irreversible impoverishment of the common heritage of all the people in the world”.<sup>55</sup> In this respect, since a World Heritage property often constitutes a “complex” entity – the outstanding universal value of which is determined by the sum of its components – the prevention of illicit trafficking of cultural objects from these properties represents an essential prerequisite in order to preserve their integrity, corresponding to an essential interest of humanity as a whole.

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<sup>53</sup> See *supra*, text corresponding to note 30.

<sup>54</sup> See seventh sentence. In similar terms, the UNIDROIT Convention emphasizes “the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation” (see Preamble, second sentence).

<sup>55</sup> See Doc. WHC-02/CONF.202/25, *cit.*, Annex II, para. 3.1.



## **New Perspectives Offered by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions on the Protection of Cultural Heritage in the Mediterranean Region**

**Sana Ouechtati\***

### **Abstract**

The adoption of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions on October 2005 brought about many new juridical obligations for States, which are focused on the preservation of cultural expressions, and which can also include cultural heritage. It implies new juridical rules concerning cultural goods formulated in a general way and emphasizes their special character, based on the duality of 'both an economic and a cultural nature'. In this way it focuses on the idea that the rules applicable to cultural goods are different from other ones. This aspect has many consequences for the commercial market of these goods, and particularly in the case of illicit trade. By introducing into general international cultural law an organ for the conciliation of disputes, the Convention also made possible the creation of a jurisprudence for cultural matters, enforcing the special character of cultural goods within WTO law. Indeed, this new legally binding international treaty was seen as a way to carve out trade in cultural goods and services from trade agreements and ensure that disputes are adjudicated by cultural rather than trade experts. However the UNESCO Convention also enforces the rules which entered into force before (the UNESCO Conventions of 1970, 1972, 2001 and 2003) and the regional texts on the protection of cultural heritage, developing the role of States on both the national and international levels of their activities. Furthermore, the general expression of the juridical framework of the Convention make possible new interpretations of the capacities of States to set up different ways of preventing and refraining from illicit traffic, even if some problematic aspects remain. The ratification of the Convention by most Mediterranean States, and its entry into force on 18 March this year, created all this new juridical potential for these States in order to protect their cultural heritage.

### **Keywords**

diversity of cultural expressions – 2005 Convention – cultural goods – juridical potential– ambiguities

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## **Les perspectives ouvertes par la Convention de l'UNESCO sur la protection et la promotion de la diversité des expressions culturelles en matière de protection du patrimoine culturel en Méditerranée**

Témoignage millénaire des échanges entre les populations, le commerce des biens culturels a toujours favorisé la rencontre et la compréhension mutuelle des cultures. Cependant, notamment dans la période récente, il faut déplorer le développement d'un négoce basé sur le vol et le trafic d'œuvres d'art et de biens culturels<sup>1</sup>. En sus d'être considérable, tant du point de vue du volume des biens détournés que de leur valeur, ce trafic illicite a des conséquences irréversibles sur le patrimoine culturel de l'humanité.

Au niveau de la région méditerranéenne, berceau millénaire de plusieurs civilisations<sup>2</sup>, la question apparaît comme particulièrement sensible. Du fait de sa richesse historique, les échanges culturels ont toujours été fructueux. Toutefois, la question du trafic illicite organisé autour du patrimoine culturel y prend des proportions de plus en plus préoccupantes<sup>3</sup>, pour plusieurs facteurs parmi lesquels il faut laisser une place aux nouvelles technologies<sup>4</sup>. Ce trafic qui s'est accentué dans les dernières décennies, tend également à souligner la disparité existant entre les pays du Nord et ceux du Sud. En effet, les pays peu développés sont faiblement outillés à la fois juridiquement et pratiquement pour lutter contre des réseaux illégaux, et en conséquence, directement menacés de perdre des témoignages inestimables de leur héritage historique et culturel<sup>5</sup>. Dans le même temps, la prospérité du marché international de

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<sup>1</sup> Il n'existe pas de définition des biens culturels sur laquelle s'accordent les conventions internationales de l'UNESCO, qui en donnent des appréciations et des régimes juridiques variés.

Toutefois il est possible d'induire de leur usage qu'ils revêtent la caractéristique d'éléments concrets ou d'objets, et que leur caractère culturel leur attribue de surcroît une valeur symbolique.

Ces observations peuvent être déduites de l'approche qu'en font ces deux textes: le Préambule de la Convention de La Haye de 1954 et la Convention de l'UNESCO de 1970. Le premier indique que «Les atteintes portées aux biens culturels, à quelque peuple qu'ils appartiennent, constituent des atteintes au patrimoine culturel de l'humanité entière, étant donné que chaque peuple apporte sa contribution à la culture mondiale». Quant au second, dont la définition des biens culturels a été unifiée avec celle qui figure dans la Convention d'UNIDROIT de 1995, il les définit comme « les biens ou les objets culturels comme des biens qui, à titre religieux ou profane, pour l'archéologie, la préhistoire, l'histoire, la littérature, l'art ou la science » appartiennent à l'une des catégories spécifiquement visées dans ces conventions.

<sup>2</sup> Voir notamment l'ouvrage de F. BRAUDEL, *Grammaire des civilisations*, réédité aux Editions Garnier-Flammarion, Paris, 1993, pp.71-152 et pp. 347-464.

<sup>3</sup> Voir VALLTERRA (M. C.) « La lutte internationale contre le trafic illicite des biens culturels et la Convention UNESCO de 1970 », in NAFZIGER (J.A.R.) SCOVAZZI (T.), (dirs), *Le patrimoine culturel de l'humanité*, Académie de droit international de La Haye, La Haye, Martinus Nijhoff 2008, pp. 559-598, au sujet de l'internationalisation de la question de la résolution du trafic illicite.

L'UNESCO estime que sont touchés par ces phénomènes les musées, les collections publiques et privées, les propriétaires ou détenteurs légitimes, les édifices religieux, les institutions culturelles et les sites archéologiques du monde entier, (in *Mesures juridiques et pratiques contre le trafic illicite des biens culturels*, Manuel, UNESCO, Section des normes internationales, Division du patrimoine culturel, 2006).

Voir la liste des dernières oeuvres d'art volées mise à jour quotidiennement par INTERPOL : <http://www.interpol.int/Public/WorkOfArt/Search/RecentThefts.asple>, de même que le site du Conseil international des musées qui lutte activement contre le trafic illicite <http://icom.museum/trafic.illicite.html>.

<sup>4</sup> A propos de la propagation du trafic illicite qui se développe par Internet : « Un trafiquant sommeille-t-il en tout internaute ? L'UNESCO, INTERPOL et l'ICOM (Conseil international des musées) s'unissent pour lutter contre le trafic illicite de biens culturels via Internet : [http://portal.UNESCO.org/culture/fr/ev.php-URL\\_ID=21559&URL\\_DO=DO\\_PRINTPAGE&URL\\_SECTION=201.html](http://portal.UNESCO.org/culture/fr/ev.php-URL_ID=21559&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html) », *Flash Info n°104-2004 du 05 Juillet 2007*.

<sup>5</sup> Il n'existe pas davantage de définition universelle de la notion de « patrimoine culturel », bien qu'il soit de par son sens proche du terme « bien ». Cependant il semblerait que ce dernier renvoie à la notion de concret tandis que le «patrimoine» renvoie à la conservation et à la transmission de génération en génération.

Le patrimoine culturel de l'humanité a été présenté de manière relativement concise par l'article premier de la Convention de l'UNESCO du 16 novembre 1972 concernant la protection du patrimoine mondial, qui n'a pas apporté de

l'art, dans un contexte d'ouverture généralisée des économies, garantit un financement constant du trafic illicite qui ne cesse de proliférer<sup>6</sup>. Malgré les tentatives de contrecarrer ce processus, en raison de la richesse de son patrimoine la région méditerranéenne conserve la triste caractéristique d'être toujours l'un des centres mondiaux du pillage d'œuvres culturelles.

Pour cette raison, plusieurs instruments juridiques ont été adoptés à cette échelle. Au plan européen, le Conseil de l'Europe a dès 1969 fait adopter la Convention européenne pour la protection du patrimoine archéologique<sup>7</sup>. De même, le patrimoine architectural a trouvé une protection spécifique

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définition mais a proposé un ensemble d'éléments constitutifs de cette notion. Le patrimoine comprend ainsi l'ensemble des monuments (« œuvres architecturales, de sculpture ou de peinture monumentales, éléments ou structures de caractère archéologique, inscriptions, grottes et groupes d'éléments, qui ont une valeur universelle exceptionnelle du point de vue de l'histoire, de l'art ou de la science »), des ensembles (« groupes de constructions isolées ou réunies, qui, en raison de leur architecture, de leur unité, ou de leur intégration dans le paysage, ont une valeur universelle exceptionnelle du point de vue de l'histoire, de l'art ou de la science »), et des sites (« œuvres de l'homme ou œuvres conjuguées de l'homme et de la nature, ainsi que les zones y compris les sites archéologiques qui ont une valeur universelle exceptionnelle du point de vue historique, esthétique, ethnologique ou anthropologique »).

En revanche, ses catégories sont précisément énumérées dans l'article premier de la Convention de l'UNESCO de 1970 concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels et l'annexe à la Convention d'UNIDROIT de 1995 qui énoncent les catégories suivantes :

- «... (a) Collections et spécimens rares de zoologie, de botanique, de minéralogie et d'anatomie; objets présentant un intérêt paléontologique;
- (b) Les biens concernant l'histoire, y compris l'histoire des sciences et des techniques, l'histoire militaire et sociale ainsi que la vie des dirigeants, penseurs, savants et artistes nationaux, et les événements d'importance nationale;
- (c) Le produit des fouilles archéologiques (régulières et clandestines) et des découvertes archéologiques;
- (d) Les éléments provenant du démembrement de monuments artistiques ou historiques et des sites archéologiques;
- (e) Objets d'antiquité ayant plus de cent ans d'âge, tels qu'inscriptions, monnaies et sceaux gravés;
- (f) Le matériel ethnologique;
- (g) Les biens d'intérêt artistique tels que :
  - (i) Tableaux, peintures et dessins faits entièrement à la main sur tout support et en toutes matières (à l'exclusion des dessins industriels et des articles manufacturés à la main);
  - (ii) Productions originales de l'art statuaire et de la sculpture, en toutes matières;
  - (iii) Gravures, estampes et lithographies originales;
  - (iv) Assemblages et montages artistiques originaux, en toutes matières;
  - (h) Manuscrits rares et incunables, livres, documents et publications anciens d'intérêt spécial (historique, artistique, scientifique, littéraire, etc.) isolés ou en collections;
  - (i) Timbres-poste, timbres fiscaux et analogues, isolés ou en collections;
  - (j) Archives, y compris les archives phonographiques, photographiques et cinématographiques;
  - (k) Objets d'ameublement ayant plus de cent ans d'âge et instruments de musique anciens. »

<sup>6</sup> Ce trafic vient donc alimenter les riches collections publiques et privées. Ainsi « du musée de Tervuren en Belgique.. en passant par le Musée du quai Branly à Paris et le Dahlem Museum de Berlin, les pays du Nord possèdent d'innombrables trésors artistiques et objets artisanaux provenant des Etats du Sud.. plus nombreux en Occident que dans les sociétés d'où ils proviennent », commente un conservateur (*in* MÜLLER (B.), « Patrimoines pillés », *Le Monde Diplomatique*, juillet 2007, p. 20 et 21); Egalement, voir « Un trafic particulièrement lucratif » BAQUE (P.), *Le Monde Diplomatique*, janvier 2005, p. 19; du même, *Un nouvel or noir, Pillage des œuvres d'art en Afrique*, Paris, Éd. Paris Méditerranée, 1999.

<sup>7</sup> Convention européenne pour la protection du patrimoine archéologique, (Conseil de l'Europe, 1969 révisée et entrée en vigueur en 1995 afin de *placer la conservation et la mise en valeur du patrimoine archéologique parmi les objectifs des politiques d'urbanisme et d'aménagement*) STE No 66, voir sur le site du Conseil : [http://www.coe.int/T/F/Coopération\\_culturelle/Culture](http://www.coe.int/T/F/Coopération_culturelle/Culture); STE No 143, *idem*. La Convention a en effet été révisée en 1995.

dans la Convention pour la sauvegarde du patrimoine architectural de l'Europe<sup>8</sup>. En ce qui concerne les pays du Sud, la protection du patrimoine culturel a été établie à travers la coopération Nord-Sud et notamment les dispositions de la Déclaration de Barcelone adoptée lors de la Conférence Euro Méditerranéenne en 1995<sup>9</sup>, qui renvoie explicitement à des experts la formulation de « propositions d'actions concrètes portant... sur le patrimoine culturel et artistique » qui caractérise la Méditerranée<sup>10</sup>. Elle a été renforcée par de multiples accords bilatéraux pris entre les Etats de la rive sud et les Etats membres de l'Union européenne<sup>11</sup>.

La situation générée par ce trafic illicite a également alerté la communauté internationale, qui par le biais de l'Organisation des Nations Unies pour l'Education, la Science et la Culture a adopté un certain nombre de textes internationaux visant à empêcher le trafic international illicite des biens culturels et ses dommages sur le patrimoine mondial. Ces instruments ont des objets divers, qui s'étendent des biens culturels en temps de guerre, au patrimoine mondial matériel, ou immatériel, ainsi qu'au domaine subaquatique, tous réglementés par des conventions appropriées et efficaces<sup>12</sup>. L'éventail des mesures adoptées s'étend aussi des mesures préventives aux mesures pénales, visant à sanctionner les auteurs des pratiques irrégulières<sup>13</sup>. Outre les instruments juridiques, l'UNESCO a mis

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<sup>8</sup> *Convention pour la sauvegarde du patrimoine architectural de l'Europe prise par le Conseil de l'Europe le 3 octobre 1985, entrée en vigueur dn 1987 (STE No 121, prise le 3 octobre 1985, entrée en vigueur en 1987) Voir également la Directive 93/7/CEE du Conseil du 15 mars 1993, relative à la restitution de biens culturels ayant quitté illégalement le territoire d'un Etat membre (Journal officiel L074, 27/03/1993 p.74-79); Rapport de la Commission des communautés européennes au Conseil, au Parlement européen et au Comité économique et social sur l'application du règlement (CEE) n° 3911/92 du Conseil concernant l'exportation de biens culturels et de la directive 93/7/CEE du Conseil relative à la restitution de biens culturels ayant quitté illicitement le territoire d'un État membre, Bruxelles, 2000; ainsi que la Convention-cadre du Conseil de l'Europe sur la valeur du patrimoine culturel pour la société, à la page : <http://conventions.coe.int/Treaty/fr/Treaties/Html/199.htm>*

<sup>9</sup> Déclaration finale prise à la suite de la Conférence ministérielle euro-méditerranéenne de Barcelone du 27 et 28 novembre 1995.

<sup>10</sup> « Compte tenu de l'importance que revêt l'amélioration de la compréhension mutuelle par la promotion des échanges culturels et de la connaissance des langues, des fonctionnaires et des experts se réuniront afin de faire des propositions d'actions concrètes portant entre autres, sur le patrimoine culturel et artistique.. » (Déclaration de Barcelone, Point IV : Partenariat dans les domaines social, culturel et humain) 1995. Les négociations en cours aujourd'hui au sujet de l'Union pour la Méditerranée renferment un volet important à cet égard.

<sup>11</sup> Voir la Résolution 1313 (2003) de l'Assemblée parlementaire du Conseil de l'Europe sur la coopération culturelle entre l'Europe et les pays du sud de la Méditerranée <http://assembly.coe.int/Mainf.asp?link=http://assembly.coe.int/documents/AdoptedText/TA03/FRES1313.htm>; la Recommandation 1651 (2004) « Mettre un terme au pillage des biens culturels africains » <http://assembly.coe.int/Documents/AdoptedText/TA04/FREC1651.htm>, avec le rapport du Sénateur français J. LEGENDRE à ce sujet <http://senat.fr/rap/r04-225/r04-22525.html>. Plus récemment, voir à titre d'exemple le Décret n° 2007-1604 du 13 novembre 2007 portant publication de l'accord-cadre de partenariat global entre le Gouvernement de la République française et la Grande Jamahiriya arabe libyenne populaire et socialiste, signé à Tripoli le 25 juillet 2007 <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000158446&dateTexte=>

Voir également le très riche document d'EuromedHeritage : « Stratégie pour le développement du patrimoine culturel euroméditerranéen: les priorités des pays méditerranéens (2007-2013) » <http://www.euromedheritage.net/fr/strategie/index.htm>

<sup>12</sup> L'UNESCO a ainsi successivement adopté avant 2005 la « Convention de La Haye » (Convention pour la protection des biens culturels en cas de conflit armé) en 1954 et ses Protocoles de 1954 et 1999; la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels (1970) et les onze recommandations de l'UNESCO pour la protection du patrimoine culturel; la Convention sur la protection du patrimoine mondial culturel et naturel de 1972 ; la Convention sur la protection du patrimoine culturel subaquatique (2001) ; et enfin la Convention sur la protection du patrimoine culturel immatériel (2003).

<sup>13</sup> MAINETTI (V.) « Des crimes contre le patrimoine culturel? Réflexions à propos de la criminalisation internationale des atteintes aux biens culturels », Actes du Forum de recherche de la Société Européenne de Droit International 2005 sur le droit international: *Problèmes contemporains*, disponible sur le site [www.esil-sedi.eu/english/pdf/Mainetti.PDF](http://www.esil-sedi.eu/english/pdf/Mainetti.PDF); ALDER (C.) & POLK (K.) « Stopping this Awful Business: the Illicit Traffic in Antiquities Examined as a Criminal Market » *Art Antiquity and Law*, Leicester, Institut of Art and Law, Vol. 7, No. 1, March 2002. Voir aussi BRIAT (M.), FREEDBERG (J. A.) (eds). *Legal Aspects of International Trade in Art Les aspects juridiques du commerce international de l'art*, Paris,

en place un Comité intergouvernemental pour la promotion du retour des biens culturels à leur pays d'origine ou leur restitution en cas d'appropriation illégale<sup>14</sup>.

A l'issue de sa mise en œuvre, la protection proposée par ces textes apparaît toutefois incomplète. Ceci a conduit l'UNESCO en 2005 à ajouter une nouvelle pierre à l'édifice juridique, la Convention sur la protection et la promotion de la diversité des expressions culturelles<sup>15</sup>. Apparue dans un contexte de protection des biens et services culturels contre les règles du libre-échange applicables en matière commerciale<sup>16</sup>, elle a permis d'introduire dans la sphère juridique internationale une disposition reconnaissant aux activités, biens et services culturels « une double nature, économique et culturelle, parce qu'ils sont porteurs d'identités, de valeurs et de sens » en soulignant « qu'ils ne doivent donc pas être traités comme ayant exclusivement une valeur commerciale »<sup>17</sup>.

Bien que le titre et le dispositif de la Convention fassent référence à la « diversité culturelle »<sup>18</sup>, concept inédit dans le champ du droit international de la protection du patrimoine, il faut voir là, aux termes du texte, une dénomination qui englobe également le patrimoine culturel sous ses multiples formes. En effet, en faisant adopter une telle Convention, l'objectif de l'UNESCO était de poursuivre sur la lancée de la « Déclaration universelle sur la diversité culturelle » prise en 2001, dont le contenu, -bien que déclaratoire alors que la Convention a une forme contraignante- est déjà explicite quant à la nécessité de protéger le patrimoine culturel<sup>19</sup>. De même, si la Convention reprend à son compte des dispositions développées par les Conventions précédentes, elle introduit également des arguments nouveaux, en élargissant la portée de la préservation de la culture dans la mesure où celle-ci représente « un patrimoine commun de l'humanité qui doit être célébré et préservé au profit de tous ». L'article 4 souligne également ce lien puisque il définit indirectement le patrimoine culturel, à côté des autres termes utilisés dans la Convention, comme l'une des manifestations de la diversité culturelle<sup>20</sup>.

La Convention se donne également plusieurs autres objectifs, outre celui de "protéger et promouvoir la diversité des expressions culturelles" dont elle consacre la nature spécifique, elle déclare également vouloir "stimuler l'interculturalité"<sup>21</sup>. En outre, la Convention déclare que "la diversité culturelle ne

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ICC, 1996 ; CARDUCCI (G.) *La restitution internationale des biens culturels et des objets d'art volés ou illicitement exportés: Droit commun, Directive CEE, Conventions de l'UNESCO et UNIDROIT*, Paris, L.G.D.J, 1997.

<sup>14</sup> Il s'agit d'un organe intergouvernemental de vingt-deux membres. Site web: [http://www.UNESCO.org/culture/legalprotection/committee/html\\_fr/index\\_fr.shtml](http://www.UNESCO.org/culture/legalprotection/committee/html_fr/index_fr.shtml)

<sup>15</sup> Convention sur la protection et la promotion de la diversité des expressions culturelles, adoptée le 20 octobre 2005, entrée en vigueur le 18 mars 2007, unesdoc.UNESCO.org/images/0014/001429/142919f.pdf

<sup>16</sup> Cf. *Infra*.

<sup>17</sup> Préambule point 18. En effet une telle Convention apparaissait de plus en plus nécessaire, voire urgente, car jusque là il n'existait qu'une « exception culturelle », accordée par l'OMC en 1994 au bénéfice du secteur audiovisuel de certains pays d'Europe à l'occasion des négociations de l'Uruguay Round. Cependant cette possibilité, limitée à une durée de dix ans, a expiré en 2004 sans avoir été reconduite.

<sup>18</sup> La diversité culturelle désigne, selon la Convention, « la diversité de la création du contenu culturel, de sa production, et enfin de sa diffusion, et ce quel que soit son support ou sa forme ».

<sup>19</sup> Le point 13 du Plan d'action pour la mise en oeuvre de la Déclaration Universelle de l'UNESCO sur la diversité culturelle, annexé à celle-ci annonce vouloir: « élaborer des politiques et des stratégies de préservation et de mise en valeur du patrimoine culturel et naturel, notamment du patrimoine culturel oral et immatériel, et combattre le trafic illicite de biens et de services culturels ». Toutefois d'après son titre, par rapport à la Déclaration de 2001, il est manifeste que l'objet de la Convention est plus précis.

<sup>20</sup> «La diversité culturelle se manifeste.. dans les formes variées à travers lesquelles le patrimoine culturel de l'humanité est exprimé, enrichi et transmis ». Déjà dans le Préambule figurait l'idée que « la culture prend diverses formes dans le temps et dans l'espace et que cette diversité s'incarne ..dans les expressions culturelles des peuples et des sociétés qui constituent l'humanité » (pt. 7)

<sup>21</sup> Article premier du texte.

peut être protégée et promue que si les droits de l'homme et les libertés fondamentales" le sont<sup>22</sup>. Allant au-delà, la Convention de l'UNESCO sur la protection et la promotion de la diversité des expressions culturelles voit dans la culture « le ressort fondamental du développement.. et de la paix aux plans local, national et international »<sup>23</sup>. Reconnaisant "l'importance du lien entre culture et développement", elle vise également à renforcer et favoriser l'essor des industries culturelles au Sud, en déclarant que le maintien de la diversité culturelle est une "condition essentielle du développement durable"<sup>24</sup>, dont les aspects culturels sont "aussi importants que ses aspects économiques"<sup>25</sup>. Cela devrait être rendu possible grâce, selon les articles 14 à 19, à un traitement préférentiel pour les pays en développement et l'établissement d'un fonds international pour la diversité culturelle, financé par des contributions volontaires publiques ou privées. Par ailleurs, en cas de survenance de différends en matière culturelle, un mécanisme de règlement est prévu<sup>26</sup>.

En assurant ainsi à la culture un écho élargi, la Convention pour la protection et la promotion de la diversité des expressions culturelles entend affermir la prise en compte de cet élément fondamental par les Etats, en les incitant à veiller plus scrupuleusement à l'adoption de politiques nationales adaptées qui permettront sa mise en compte de manière adéquate. Ceci implique directement le contrôle du trafic des biens culturels à leurs frontières, dont l'illicéité pourrait constituer une menace pour les expressions culturelles, que la Convention souhaite également protéger dans les situations où celles-ci seraient "menacées d'extinction ou de graves altérations"<sup>27</sup>.

La Convention est entrée officiellement en vigueur le 18 mars 2007<sup>28</sup>, devenant ainsi juridiquement à la fois applicable et opposable. A la fin de l'année 2007, deux ans après l'adoption du texte, le nombre d'Etats parties était déjà conséquent, un grand nombre d'entre eux étant des Etats de la région méditerranéenne<sup>29</sup>. C'est dire si son impact est attendu sur la scène méditerranéenne, où plusieurs Etats ont déjà ratifié ses dispositions. Elle enrichit en effet le corpus juridique international culturel

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<sup>22</sup> Ajoutant "Nul ne peut invoquer les dispositions de la présente Convention pour porter atteinte aux droits de l'homme et aux libertés fondamentales". Ainsi, conditions essentielles de l'épanouissement de la diversité culturelle, les droits de l'homme ne sauraient trouver en elle par ailleurs le prétexte à leur violation.

<sup>23</sup> Préambule de la Convention, § 3. Le § 6 souligne même "la nécessité d'intégrer la culture en tant qu'élément stratégique .. en tenant également compte de la Déclaration du Millénaire de l'ONU (2000) qui met l'accent sur l'éradication de la pauvreté".

<sup>24</sup> Article 2-6.

<sup>25</sup> Article 2-7.

<sup>26</sup> Article 25 de la Convention.

<sup>27</sup> Et ce dès le Préambule, au point 9.

<sup>28</sup> Art 29 : « La présente Convention entrera en vigueur trois mois après la date de dépôt du trentième instrument de ratification, d'acceptation, d'approbation ou d'adhésion, mais uniquement à l'égard des Etats ou des organisations d'intégration économique régionale qui auront déposé leurs instruments respectifs de ratification, d'acceptation, d'approbation ou d'adhésion à cette date ou antérieurement ». Leurs instruments seront déposés auprès du Directeur général de l'Organisation. Le § 2 souligne que l'adhésion d'une organisation d'intégration économique régionale, comme ce peut être le cas de l'Union Européenne, n'est pas comptabilisée en surplus de celle de ses États membres.

Voir à ce sujet : RUIZ FABRI (H.) « La Convention sur la promotion et la protection de la diversité des expressions culturelles : enjeux de l'entrée en vigueur », publié sur le site : [www.rdv-mondialisation.fr](http://www.rdv-mondialisation.fr)

<sup>29</sup> <http://portal.unesco.org/la/convention.asp?KO=31038&language=F> (Détail des adhésions et ratifications)

Voir SCHORLEMER (von) (S.) "Promoting International North-South Cooperation in the Framework of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: First Steps 2007-2010", Conférence *Diversité culturelle - La richesse de l'Europe. Faire vivre la Convention de l'UNESCO*, Essen, Allemagne, 26-28 avril 2007 ; [http://www.UNESCO.de/fileadmin/medien/Dokumente/Kultur/Fachkonferenz/Abstracts/Schorlemer\\_NEU\\_ESSEN\\_Forum\\_3\\_Eng.pdf](http://www.UNESCO.de/fileadmin/medien/Dokumente/Kultur/Fachkonferenz/Abstracts/Schorlemer_NEU_ESSEN_Forum_3_Eng.pdf); REZK Leila. "Negotiating diversity: The meaning of the Convention for the Arab world", in OBULJEN (N.), SMIERS (J.), *UNESCO's Convention on the Protection and the Promotion of the Diversity of Cultural Expressions: Making it Work*, Culturelink Joint Publications Series, Zagreb, 2006, p. 245; « La tradition juridique française et la diversité culturelle », ROULAND (N.) Rapport pour la Commission Française pour l'UNESCO, 1993

existant (I). Elle renforce également les dispositions qui étaient préalablement en vigueur (II).

## **CHAPITRE I. Les dispositions introduites par la Convention pour la protection et la promotion de la diversité des expressions culturelles**

A côté de la réglementation internationale favorable aux biens culturels matériels et immatériels, qui a été mise en place à travers l'adoption consécutive de plusieurs conventions internationales sous l'égide de l'UNESCO, la Convention de 2005 amène de nouvelles mesures qui portent sur une catégorie spécifique, les expressions culturelles (I). Par ailleurs, elle crée également de manière inédite en droit international de la culture, un organe de règlement des différends (II).

### ***Section I. La prise en compte particulière des expressions culturelles dans le droit international***

Les instruments internationaux relatifs à la préservation du patrimoine culturel répondent à l'idée qu'un système de référents culturels est essentiel pour les peuples dont ils témoignent spécifiquement de l'identité, mais également pour l'humanité toute entière, à qui bénéficie la protection de tout le patrimoine culturel. Ainsi l'arsenal juridique mis en place par l'UNESCO est dense, dans la mesure où les dispositions ayant trait à la préservation du patrimoine culturel s'intéressent à la protection de l'héritage architectural, la faune sous-marine en passant par la protection du patrimoine en temps de guerre.

Les biens culturels qui sont mis en danger par les situations de conflit armés ou les périodes d'occupation, situation où les biens et le patrimoine culturel sont particulièrement exposés au pillage et au trafic illicite sont en effet encadrés par les dispositions protectrices de la Convention de 1954 et particulièrement son Protocole additionnel<sup>30</sup>. La Convention impose en effet en cas de conflit armé le principe de la sauvegarde et du respect des biens culturels, l'interdiction de leur exportation hors d'un territoire occupé et dans l'hypothèse où cette exportation serait survenue, excluant l'idée de les assimiler à des dommages de guerre, l'obligation de restituer ces biens à l'État d'origine<sup>31</sup>.

Dans un contexte plus général mais toujours dans le but de protéger les biens culturels en situation périlleuse, l'UNESCO a fait adopter en 1970 la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels<sup>32</sup>. Pierre angulaire des dispositions internationales adoptées pour lutter contre le trafic illicite,

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<sup>30</sup> Convention pour la protection des biens culturels en cas de conflits armés, UNESCO, adoptée à la Haye le 14 mai 1954 entrée en vigueur le 7 août 1956, et son Protocole additionnel. Voir TOMAN (J.) « La Convention de La Haye - un pas décisif de la communauté internationale », [http://portal0.UNESCO.org/culture/admin/ev.php?URL\\_ID=29573&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201&reload=1146149198#convention](http://portal0.UNESCO.org/culture/admin/ev.php?URL_ID=29573&URL_DO=DO_TOPIC&URL_SECTION=201&reload=1146149198#convention), Museum, Trimestriel, 04 Dec 2005, Editions UNESCO ; HLADIK (J.) « La Convention de la Haye de 1954 : Quelques observations sur sa mise en œuvre au niveau national » [http://portal0.UNESCO.org/culture/admin/ev.php?URL\\_ID=29573&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201&reload=1146149198#la](http://portal0.UNESCO.org/culture/admin/ev.php?URL_ID=29573&URL_DO=DO_TOPIC&URL_SECTION=201&reload=1146149198#la), Museum, Trimestriel, 04 Dec 2005, Editions UNESCO

A propos du Protocole additionnel: Voir Mainetti (V.), « Le Protocole de La Haye de 1954 et les moyens pour empêcher le trafic illicite de biens culturels en cas de conflit armé », *La protection des biens culturels nous concerne tous ! – Actes du Congrès international sur la protection des biens culturels (Berne, 23-25 septembre 2002)*, Office fédéral de la protection de la population, Berne, 2003, pp. 215-222

<sup>31</sup> Au plan régional, cette Convention a été renforcée par l'adoption la même année de la Convention culturelle européenne, qui avait pour objectif de « développer la compréhension mutuelle entre les peuples d'Europe et l'appréciation réciproque de leurs diversités culturelles », ainsi que de sauvegarder la culture européenne et promouvoir les contributions nationales à l'héritage culturel commun de l'Europe (STE No 018)

<sup>32</sup> UNESCO, Paris, 14 novembre 1970. Elle a été complétée par la Charte de Courmayeur de 1992, adoptée par le Bureau des Nations Unies à Vienne et l'UNESCO, qui porte sur le commerce illicite d'objets d'art et d'archéologie appartenant au patrimoine culturel des nations. A ce sujet se référer à FERCHICHI (W.) « La Convention de l'UNESCO concernant la

elle régleme la lutte contre ce trafic illicite, à travers des mesures préventives, de restitution des biens pris ou par le biais de la coopération internationale. En vue de favoriser l'harmonisation des efforts internationaux, elle a été complétée par la Convention UNIDROIT de 1995 sur les biens culturels volés ou exportés illégalement<sup>33</sup>.

Si son champ d'action est plus large que celui de la Convention de 1954 qui l'a précédée, il faut souligner toutefois qu'il se limite au patrimoine culturel mobilier et aux situations particulières auxquelles sont confrontés les biens culturels. Il faudra attendre pour la prise en compte du patrimoine culturel de manière générale la Convention concernant la protection du patrimoine mondial, culturel et naturel du 16 novembre 1972<sup>34</sup>. Dans la même lignée, en 2001, elle a été suivie par la Convention sur la protection du patrimoine culturel subaquatique, qui s'intéresse plus spécifiquement aux espèces maritimes<sup>35</sup>. Au fur et à mesure de la prise de conscience de la communauté internationale de la nécessité de réglementer de nouveaux espaces culturels, un nouveau dispositif juridique était mis en place. Ainsi, en 2003, elles ont été complétées par la Convention pour la sauvegarde du patrimoine culturel immatériel<sup>36</sup>.

Toutefois cette réglementation internationale ne prenait en compte que les manifestations culturelles établies, qu'elles soient de nature immobilière ou mobilière, matérielle ou immatérielle. C'est là qu'apparaît l'intérêt de l'élargissement volontaire de l'objet de la Convention pour la protection et la promotion de la diversité des expressions culturelles, adoptée en 2005, qui se distingue des conventions précédentes en ce qu'elle s'intéresse « non pas tant aux manifestations passées de la créativité culturelle qu'à l'exercice même de cette créativité dans le présent »<sup>37</sup>. Avec cette Convention, une nouvelle étape est donc franchie qui parachève l'arsenal juridique mis en place dans le droit international culturel.

Les expressions culturelles, selon la Convention, sont celles qui « résultent de la créativité des individus, des groupes et des sociétés, et qui ont un contenu culturel »; elles s'incarnent et se transmettent essentiellement dans la production, la diffusion et la distribution d'activités, biens et

(Contd.) \_\_\_\_\_

protection du patrimoine mondial culturel et naturel », in NAFZIGER (J.A.R.) SCOVAZZI (T.), (dirs), *op. cit.*, p. 455-485.

<sup>33</sup> Convention d'UNIDROIT sur le retour international des biens culturels volés ou illicitement exportés (Rome, 1995). Il s'agit d'une convention de droit international privé. Elle s'applique à une série d'objets culturels plus large ainsi qu'à tous les biens illicitement exportés ayant pour l'Etat requérant une « importance culturelle significative ». La Convention UNIDROIT lui permet de pouvoir engager une action contre l'acheteur de l'un de ses biens devant les tribunaux de l'Etat où il se trouve, qui doit le restituer le cas échéant, et ne percevra une indemnité que s'il peut prouver qu'il a accompli toutes les démarches nécessaires pour vérifier que le bien n'était ni volé ni illicitement exporté. Avec cette Convention, le délai de prescription des actions passe également à cinquante ans. Toutefois, cette convention n'est pas rétroactive.

Voir à ce sujet PROTTE (L.V.), *Commentary on the UNIDROIT Convention*, Leicester, Institute of Art and Law, 1997; *Commentaire sur la Convention d'UNIDROIT*, Paris, Editions UNESCO, 2000 ; et de manière plus général sur le travail complémentaire de ces deux organisations : *Mesures juridiques et pratiques contre le trafic illicite des biens culturels*, Publications de l'UNESCO, Section des normes internationales, Division du patrimoine culturel, 2006 ; et « UNESCO et UNIDROIT - Coopération dans la lutte contre le trafic illicite de biens culturels », Conférence pour célébrer le 10e anniversaire de la Convention de l'UNIDROIT sur les biens culturels volés ou illicitement exportés, Rome 1995, Paris, Siège de l'UNESCO, 24 juin 2005, CLT-2005/Conf/803/2

<sup>34</sup> Il a été accompagné sur le plan régional d'une « Recommandation concernant la protection, sur le plan national, du patrimoine culturel et naturel », UNESCO, 1972, qui avait pour objectif de renforcer et promouvoir les politiques de sauvegarde et de mise en valeur du patrimoine européen, affirmait la nécessité d'une solidarité européenne autour de la conservation de ce patrimoine et favorisait une collaboration concrète entre les Parties.

<sup>35</sup> Paris, 2 novembre 2001.

<sup>36</sup> Paris, 17 octobre 2003.

<sup>37</sup> BERNIER (I.), « Un aspect important de la mise en oeuvre de la Convention sur la protection et la promotion de la diversité des expressions culturelles : Le fonds international pour la diversité culturelle », Ministère de la Culture du Québec, avril 2007, <http://www.mcccf.gouv.qc.ca/diversite-culturelle/pdf/fonds-diversite-culturelle.pdf>.

services culturels<sup>38</sup>. La Convention déclare en effet que « la culture prend diverses formes dans le temps et dans l'espace et.. cette diversité s'incarne dans l'originalité et la pluralité des identités ainsi que dans les expressions culturelles des peuples et des sociétés qui constituent l'humanité »<sup>39</sup>. Elle insiste également sur la portée que doit revêtir la diversité culturelle, en affirmant "l'égalité et le respect de toutes les cultures" envers lesquelles il faut ménager une "ouverture", ce qui doit permettre "l'accès équitable à une gamme riche et diversifiée d'expressions culturelles"<sup>40</sup>. Cette disposition en soi montre assez combien la Convention sur la protection et la promotion de la diversité des expressions culturelles souhaite saisir la notion de culture en amont, dans son aspect général, anthropologique ou social, autant qu'en aval, dans la consécration de la diversité de ses expressions potentielles<sup>41</sup>.

Ainsi si la Convention s'intéresse aux biens et services culturels, elle s'intéresse aussi à la diversité des cultures également prises dans leur sens anthropologique. Elle souligne en conséquence « l'importance des savoirs traditionnels en tant que source de richesse immatérielle et matérielle, et en particulier des systèmes de connaissances des peuples autochtones.. ainsi que la nécessité d'assurer leur protection et promotion de façon adéquate »<sup>42</sup>. Cette largeur de vues permet ainsi de prendre en compte plusieurs éléments caractéristiques du patrimoine immatériel, la protection juridique ne nécessitant plus pour s'appliquer l'existence de biens concrets.

## ***Section II. La création en droit international de la culture d'un organe de règlement des différends***

La mise en œuvre de la Convention s'est faite à travers la création de la Conférence des Parties et du Comité intergouvernemental, le secrétariat ayant vocation à être assuré par l'UNESCO. Dès l'entrée en vigueur de la Convention<sup>43</sup>, une Conférence des Parties a ainsi été convoquée, afin d'élire les membres du Comité intergouvernemental<sup>44</sup> ainsi que le prévoit l'article 23. Le Comité intergouvernemental s'est ainsi réuni pour la première fois du 10 au 13 décembre 2007, à Ottawa au Canada<sup>45</sup>.

Toutefois, au plan institutionnel la Convention pour la protection et la promotion de la diversité des expressions culturelles met également en place un mécanisme inédit, un organe pour le règlement des différends en matière culturelle qui pourraient voir le jour. Les modes de règlement suggérés par

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<sup>38</sup> Article 4§ 3, §4 de la Convention.

<sup>39</sup> Voir également à ce sujet la « Recommandation sur la sauvegarde de la culture traditionnelle et populaire », (UNESCO, 1989), qui déclare que « la culture traditionnelle et populaire fait partie du patrimoine universel de l'humanité », et qu'elle est un « puissant moyen de rapprochement des différents peuples et groupes sociaux et d'affirmation de leur identité culturelle ».

<sup>40</sup> Principes 3, 7, 8 cités à l'article 2.

<sup>41</sup> Voir GAGNIER (S) « Le logiciel libre : la déconcentration du droit de propriété peut-elle contribuer au bien commun ? Etude de la Convention sur la diversité culturelle de l'UNESCO », in *Cultures libres, innovations en réseau. Le (logiciel) libre comme phénomène technique et social*, Colloque interdisciplinaire, LabCMO, Montréal, 17-18 septembre 2007

<sup>42</sup> Préambule, pt 8.

C'est en effet « grâce à leur production constante d'activités, biens et services culturels que les cultures s'adaptent aux changements internes et externes de leur environnement et se perpétuent » ajoute I. BERNIER (op. cit.)

<sup>43</sup> Le président qui a été élu à la tête de la Conférence des parties est M. Kader ASMAL, ex-ministre de l'Education nationale d'Afrique du Sud.

<sup>44</sup> Art 22§4 et 23§1. Cette élection doit en principe répondre au principe de représentativité géographique et donc politique, toutefois si l'on considère que les trente premières signatures pourraient bien ne pas offrir le panel le plus représentatif de la communauté internationale, il serait souhaitable d'attendre la réunion de 50 ratifications, conformément à l'article 23§4 ce qui permettrait d'étendre le chiffre des membres du Comité à 24. Voir BERNIER (I.), op. cit.

<sup>45</sup> Voir notamment le document CE/07/1.IGC/3 (Ordre du jour).

l'article 25 comprennent la recherche d'une solution par voie de négociation, le recours d'un commun accord aux bons offices ou à la médiation d'un tiers, et finalement la possibilité pour un Etat Partie de demander la création d'une commission de conciliation<sup>46</sup>. C'est ce dernier cas de figure qui revêt le caractère d'une innovation en droit international de la culture.

La conciliation peut être définie comme une « intervention dans le règlement d'un différend international, d'un organe sans autorité politique propre, jouissant de la confiance des parties en litige, chargé d'examiner tous les aspects du litige et de proposer une solution qui n'est pas obligatoire pour les parties »<sup>47</sup>. Il ressort de ces éléments que la conciliation ne correspond pas nécessairement à un règlement juridique du litige dans la mesure où il est possible de faire appel à des règles de droit mais également à des éléments non juridiques. Par ailleurs, il ne s'agit pas d'un mode de règlement obligatoire, mais il consiste en un mode de règlement pacifique en ce qu'il débouche sur une proposition de règlement du différend que les Parties examinent de bonne foi et demeurent libres d'accepter ou non. En recherchant la solution adéquate pour les Parties, il est rare que l'organe de conciliation s'arrête à un choix unique, il tentera plutôt d'en proposer plusieurs afin de déterminer celui qui recueillera les suffrages. La conciliation n'entraîne donc pas de décisions judiciaires ou arbitrales, c'est-à-dire contraignantes<sup>48</sup>.

Dans la mesure où l'organe de conciliation ne jouit pas a priori d'une autorité propre susceptible d'amener par elle-même un règlement positif du différend pour les Parties, cela implique qu'il soit à même de faire preuve d'une force persuasive « telle qu'il saura les convaincre qu'il s'agit de la solution adéquate à leur différend et les amènera à vouloir le régler sur cette base »<sup>49</sup>. Cela suppose donc que les Parties aient confiance dans la ou les personnes chargées d'assurer cette mission de conciliation. La conciliation permet « avant tout d'aplanir un litige qui pourrait constituer un obstacle au bon fonctionnement de l'organisation », ce qui caractérise l'objet des différends qui sont généralement soulevés dans le cadre des organisations internationales. Elle paraît ainsi particulièrement adaptée au domaine culturel, dans la mesure où elle évite à bon escient l'aggravation

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<sup>46</sup> Article 25 - Règlement des différends

1. En cas de différend entre les Parties à la Convention sur l'interprétation ou l'application de la présente Convention, les Parties recherchent une solution par voie de négociation.

2. Si les Parties concernées ne peuvent parvenir à un accord par voie de négociation, elles peuvent recourir d'un commun accord aux bons offices ou demander la médiation d'un tiers.

3. S'il n'y a pas eu de bons offices ou de médiation ou si le différend n'a pu être réglé par négociation, bons offices ou médiation, une Partie peut avoir recours à la conciliation conformément à la procédure figurant en Annexe à la présente Convention. Les Parties examinent de bonne foi la proposition de résolution du différend rendue par la Commission de conciliation.

4. Chaque Partie peut, au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer qu'elle ne reconnaît pas la procédure de conciliation prévue ci-dessus. Toute Partie ayant fait une telle déclaration, peut, à tout moment, retirer cette déclaration par le biais d'une notification au Directeur général de l'UNESCO.

BERNIER (I.), LATULIPPE (N.), « La Convention internationale sur la protection et la promotion de la diversité des expressions culturelles, la conciliation comme mode de règlement des différends dans le domaine culturel », Ministère de la Culture du Québec, 2006, sur le site <http://www.mcccf.gouv.qc.ca/>; ainsi que COT (J.-P.), *La conciliation internationale*, Pedone, Paris, 1986.

<sup>47</sup> CORNU (G.) Dir, Vocabulaire juridique.

<sup>48</sup> Ce qui a fait regretter à certains auteurs que la Convention ne mette pas en place de juridiction internationale pour le domaine de la culture, à l'image de celle qui existe dans le cadre de l'OMC (P. LEUPRECHT (P.), cité par LAVERTU (Y.) *La culture au seuil du droit international*, table ronde de l'Université de Montréal-Cercle Jean-Monnet de la Culture, juin 2005, <http://www.barreau.qc.ca/journal/vol37/no13/UNESCO.html>

<sup>49</sup> MANGOLDT (H. von) « Arbitration and Conciliation », dans *Judicial Settlement of International Disputes : International Court of Justice Other Courts and Tribunals, Arbitration and Conciliation : An International Symposium*, Max Planck Institute for Comparative Public Law and International Law, Springer Verlag Berlin Heidelberg, New York, 1974, p. 417552, cité par BERNIER (I.) LATULIPPE (N.), *op. cit.*

du différend et assure « le respect des normes sur lesquelles l'organisation est échafaudée »<sup>50</sup>.

Force est en effet de constater que dans la plupart des cas le recours à la conciliation s'avère payant, même si le choix de ce procédé dans la Convention pour la protection et la promotion de la diversité des expressions culturelles a pu être critiqué<sup>51</sup>. De surcroît, ce mécanisme non contraignant présente l'avantage considérable d'amener les Etats à soumettre leurs différends en matière culturelle à un organe spécifiquement prévu par la Convention pour la protection et la promotion de la diversité des expressions culturelles, ce qui permettra à terme d'échafauder une jurisprudence en matière de biens culturels spécifique, se distinguant des règles appliquées au sein de l'OMC et plus largement, fondée sur des considérations proprement culturelles.

Malgré ses avantages, il n'en reste pas moins que la création d'une commission de conciliation n'a pas rallié les suffrages sauf de manière récente dans le droit international<sup>52</sup>. Les cas de recours à cette procédure sont donc rares, sur les treize cas recensés depuis le lendemain de la Première Guerre Mondiale jusqu'au début des années 1960, s'il n'était pas question du domaine culturel, la grande majorité concernaient des Etats européens<sup>53</sup>. Cette procédure paraît donc particulièrement indiquée dans le cas qui nous occupe, le règlement de différends en matière culturelle survenant à l'échelle régionale méditerranéenne.

Même si elle comporte une annexe explicitant la procédure de conciliation, la Convention ne s'étend pas suffisamment sur le rôle qui serait dévolu au Secrétariat par rapport à cette procédure de conciliation, qu'il s'agisse de l'administration du mécanisme en question, de la possibilité ou non de publier le rapport de la commission ou encore du règlement des frais, ce qui est susceptible de faire renoncer les Etats au bien-fondé du recours à cette procédure en matière culturelle<sup>54</sup>.

## **CHAPITRE II. Le raffermissement par la Convention pour la protection et la promotion de la diversité des expressions culturelles des dispositions internationales antérieures**

Par ailleurs, la Convention vient explicitement consacrer et renforcer le dispositif juridique culturel déjà existant au plan international en matière de protection des biens et services et de patrimoine culturel (I). Mais son application reste tributaire de certaines questions problématiques qui demeurent en suspens (II)

### ***Section I. Le développement des mesures et politiques culturelles***

La Convention soutient vivement la réalisation de politiques et la prise de mesures culturelles de la part des Etats, dans la mesure où celles-ci revêtent une importance fondamentale pour consacrer la protection et la promotion des expressions culturelles. Ainsi l'article 5 dispose que les Parties « réaffirment conformément à la Charte des Nations Unies, aux principes de droit

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<sup>50</sup> MALINVERNI (G.), *Le règlement des différends dans les organisations internationales économiques*, A.

W. Sijthoff – Leiden, Institut universitaire des Hautes Études Internationales, Genève, 1974, cité par BERNIER (I.) LATULIPPE (N.), *op. cit.*

<sup>51</sup> Voir *supra*.

<sup>52</sup> Citons par exemple la Convention des Nations Unies sur la diversité biologique (1992), qui y fait référence.

<sup>53</sup> BERNIER (I.) LATULIPPE (N.), *op. cit.*, qui précisent également qu'un cas impliquait un Etat européen et un Etat africain.

<sup>54</sup> Voir à ce sujet : « La mise en oeuvre et le suivi de la Convention de l'UNESCO sur la protection et la promotion de la diversité des expressions culturelles Perspectives d'action » I. BERNIER avec la collaboration de H. RUIZ FABRI, Ministère de la Culture et des Communications du Québec, 2006 consultable sur le site : [www.mcc.gouv.qc.ca](http://www.mcc.gouv.qc.ca).

international et aux instruments universellement reconnus en matière de droits de l'homme, leur droit souverain de formuler et de mettre en œuvre leurs politiques culturelles et d'adopter des mesures pour protéger et promouvoir la diversité des expressions culturelles »<sup>55</sup>. Cette disposition n'est pas inconnue à travers le corpus des instruments juridiques qui l'ont précédée, mais l'utilisation de termes généraux permet d'interpréter de manière étendue les dispositions favorables de la Convention, bien que son objet porte sur les expressions culturelles et de l'appliquer à d'autres catégories juridiques non prévues expressément par le texte, à savoir le patrimoine culturel. Mais il est manifeste que l'affirmation de la nécessité de mettre en place ces politiques devient plus marquée, puisqu'elles représentent l'essence des droits et obligations des Etats afin d'atteindre les objectifs de la présente Convention<sup>56</sup>.

Selon la Convention, les Etats peuvent de ce fait "conserver, adopter et mettre en œuvre les politiques et mesures qu'ils jugent appropriées", et ce en vue de contribuer à la promotion et à la préservation de la diversité culturelle, en vertu d'un droit souverain qui leur est reconnu<sup>57</sup>. Selon la Convention, une première modalité d'action est de recourir à l'aide directe, tels que des aides financières publiques, ou par le biais de partenariats qui sont évoqués à l'article 15, beaucoup de pays développant déjà des politiques culturelles<sup>58</sup>. Les mesures qu'un Etat peut adopter peuvent aussi consister en des incitations indirectes, destinées tant aux organismes à but non lucratif, qu'aux institutions publiques, ou privées, ou aux artistes et les autres professionnels de la culture. Le but de ces instruments divers doit être de "fournir aux industries culturelles nationales indépendantes et aux activités du secteur informel un accès véritable aux moyens de production, de diffusion et de distribution"<sup>59</sup>.

Ces dispositions protectrices sont particulièrement bienvenues dans le contexte actuel de libéralisation des échanges<sup>60</sup>. En effet en fonction du pays, de son histoire, de son patrimoine culturel et de ses politiques législatives, les biens culturels peuvent être protégés en partie ou dans leur ensemble selon des normes plus ou moins strictes. Cette diversité des protections nationales a tout naturellement pour conséquence un manque d'homogénéité au plan international dans le traitement juridique réservé aux biens culturels. En la matière les pays développés sont mieux lotis dans la mesure où la grande majorité d'entre eux ont d'ores et déjà mis en place un ensemble élaboré de politiques et mesures culturelles répondant à leurs besoins<sup>61</sup>. En ce qui concerne les pays en développement, leurs politiques et mesures culturelles, lorsqu'elles existent, sont moins élaborées et souvent difficiles à mettre en

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<sup>55</sup> Il reprend ainsi partiellement « le droit souverain des Etats de conserver, adopter et mettre en œuvre les politiques et mesures qu'ils jugent appropriées pour la protection et la promotion de la diversité des expressions culturelles sur leur territoire »

<sup>56</sup> Article 1-h, de la Convention

<sup>57</sup> Avec une insistance particulière, puisque le terme ("souverain") est mentionné en tout à cinq reprises dans le texte, démontrant bien par là l'importance que souhaite reconnaître la Convention aux Etats, nonobstant les règles du libre-échange. Toutefois ce droit est encadré par plusieurs obligations, au nombre desquelles on peut citer le respect des droits de l'homme, l'égalité de toutes les cultures, la solidarité internationale, la promotion des aspects économiques et culturels du développement

<sup>58</sup> TOGGENBURG (G. N.), "The Debate on European Values and the Case of Cultural Diversity", 1 *European Diversity and Autonomy Papers - EDAP* (2004), 10, at [www.eurac.edu/edap](http://www.eurac.edu/edap); FERRI (D.), "EU Participation in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks", 1 *European Diversity and Autonomy Papers - EDAP*, 3/2005 sur le site [www.eurac.edu/edap](http://www.eurac.edu/edap).

<sup>59</sup> Articles 5 à 8 du texte : « Leurs objectifs peuvent être aussi plus largement d'"offrir des opportunités aux activités, biens et services culturels nationaux de trouver leur place parmi l'ensemble des activités", ainsi que de "promouvoir la diversité des médias »

<sup>60</sup> «Les parties réaffirment (...) leur droit souverain de formuler et mettre en oeuvre leurs politiques culturelles et d'adopter les mesures pour protéger et promouvoir la diversité des expressions culturelles, ainsi que pour renforcer la coopération internationale afin d'atteindre les objectifs de la présente Convention».

<sup>61</sup> Ainsi, en 2001 le Conseil de l'Europe, en coopération avec ERICarts, a entrepris une recherche transversale sous le titre *Politique culturelle et diversité culturelle*, dans le but d'analyser l'état de la diversité culturelle ainsi que sa place dans les politiques nationales, dans certains pays de l'Europe de l'Ouest, puis dans des pays de l'Europe de l'Est.

oeuvre faute de moyens financiers<sup>62</sup>. Cependant, les conventions internationales une fois ratifiées parviennent à apporter une certaine uniformité, au moins partielle, dans les systèmes juridiques de leurs États parties.

Dans la même lignée, la Convention entend favoriser encore davantage la coopération internationale. Elle invite ainsi à « une collaboration appropriée » entre les États développés et les États sous-développés, qui doivent se donner les moyens de mettre au diapason leurs politiques culturelles. Elle précise aussi que les États doivent s'employer à « renforcer leur coopération bilatérale, régionale et internationale », soulignant un aspect qui ne manque pas de retenir notre attention dans le cadre de cette étude, l'importance des échanges qui seront effectués dans la zone méditerranéenne. Il est à noter que les dispositions de l'accord d'association euroméditerranéen de Barcelone prévoient une entraide sur le volet culturel et économique<sup>63</sup> ; la Convention vient donc opportunément préciser aux États les moyens qui sont à leur disposition à l'échelon méditerranéen. Cette coopération internationale vise donc plusieurs objectifs, faciliter le dialogue entre les Parties signataires à propos des politiques culturelles, et renforcer les capacités stratégiques notamment dans le cadre du secteur et des institutions publiques, ainsi que développer le partage des meilleures pratiques<sup>64</sup>.

Un autre cas de figure est envisagé par la Convention: la coopération internationale dans les situations de menace grave contre les expressions culturelles<sup>65</sup>. Selon l'article 8, lorsque dans certaines situations « spéciales » où les expressions culturelles, sur un territoire, sont soumises à un risque « d'extinction, à une grave menace, ou nécessitent une sauvegarde urgente » l'État concerné peut prendre toutes mesures qu'il juge utiles et notamment requérir l'assistance des autres États. Cette hypothèse est suggérée notamment en faveur des pays en voie de développement parfois confrontés à des situations difficiles, comme les conflits armés non internationaux.

Le Comité intergouvernemental établi par la Convention<sup>66</sup> assurera le suivi de ces politiques à travers le partage de l'information, comme le souligne l'article 9 qui déclare que « les Parties fournissent tous les quatre ans, dans leurs rapports à l'UNESCO, l'information appropriée sur les mesures prises en vue de protéger et promouvoir la diversité des expressions culturelles sur leur territoire et au niveau international ». Ainsi, dans la mise en œuvre de la Convention la collecte, l'échange et l'analyse d'informations sont une étape essentielle<sup>67</sup>. Cette information permanente a un rôle stratégique puisque son objectif est de servir de support à l'action notamment sur le plan de la concertation internationale.

Par ailleurs, la Convention prévoit de créer un Fonds international pour la diversité culturelle, qui représentera une garantie indépendante pour le financement des projets à caractère culturel étatiques, à

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<sup>62</sup> En Afrique, c'est l'Observatoire des politiques culturelles en Afrique créé au Mozambique en 2002 avec le soutien de l'Union Africaine et de l'UNESCO, qui a comme objectif prioritaire de suivre l'évolution de la culture et des politiques culturelles dans la région.

Dans le monde islamique, suite à l'adoption de la Déclaration islamique sur la diversité culturelle en 2004, l'ISESCO a décidé d'introduire la diversité culturelle dans son prochain plan d'action triennal 2007-2009. Voir « Enjeux et méthodes d'observation et d'évaluation de la diversité culturelle dans le monde »

<sup>63</sup> Voir *supra*.

<sup>64</sup> Pt 6 du Préambule, mais également articles 2, 12, 17 de la Convention.

<sup>65</sup> Art 8, 17

<sup>66</sup> Art 23

<sup>67</sup> Aux termes de l'article 19 « l'UNESCO s'engage à faciliter, grâce aux mécanismes existants au sein du Secrétariat, l'analyse et la diffusion de toutes les informations, statistiques et meilleures pratiques en la matière, à constituer et maintenir à jour une banque de données concernant les différents secteurs et organismes gouvernementaux, privés et à but lucratif, oeuvrant dans le domaine des expressions culturelles et enfin à accorder une attention particulière au renforcement des capacités et de l'expertise des Parties qui formulent des demandes d'assistance en matière de collecte de données »

condition que soient réunies les conditions de sa mise en œuvre<sup>68</sup>. Certains auteurs doutent de son efficacité, au motif que "le fonds de coopération mis en place dépend des contributions volontaires de chaque pays, qui sont déjà sollicités de toute part."<sup>69</sup>

En outre, la mise en œuvre de la Convention pour la protection et la promotion de la diversité des expressions culturelles bénéficie du soutien de la société civile à qui l'article 11 du texte reconnaît un « rôle fondamental ... pour la protection et la promotion de la diversité des expressions culturelles »<sup>70</sup>.

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<sup>68</sup> Article 18 - Fonds international pour la diversité culturelle

1. Il est créé un « Fonds international pour la diversité culturelle »,
2. Le Fonds est constitué en fonds-en-dépôt conformément au Règlement financier de l'UNESCO.
3. Les ressources du Fonds sont constituées par :
  - (a) les contributions volontaires des Parties ;
  - (b) les fonds alloués à cette fin par la Conférence générale de l'UNESCO ;
  - (c) les versements, dons ou legs que pourront faire d'autres États, des organisations et programmes du système des Nations Unies, d'autres organisations régionales ou internationales, et des organismes publics ou privés ou des personnes privées ;
  - (d) tout intérêt dû sur les ressources du Fonds ;
  - (e) le produit des collectes et les recettes des manifestations organisées au profit du Fonds ;
  - (f) toutes autres ressources autorisées par le règlement du Fonds.
4. L'utilisation des ressources du Fonds est décidée par le Comité intergouvernemental sur la base des orientations de la Conférence des Parties.
5. Le Comité intergouvernemental peut accepter des contributions et autres formes d'assistance à des fins générales ou spécifiques se rapportant à des projets déterminés, pourvu que ces projets soient approuvés par le Comité intergouvernemental.
6. Les contributions au Fonds ne peuvent être assorties d'aucune condition politique, économique ou autre qui soit incompatible avec les objectifs de la présente Convention.
7. Les Parties s'emploient à verser des contributions volontaires sur une base régulière pour la mise en oeuvre de la présente Convention.

Voir de manière très complète, BERNIER (I.) « Un aspect important de la mise en oeuvre de la Convention sur la protection et la promotion de la diversité des expressions culturelles : Le Fonds international pour la diversité culturelle », Ministère de la Culture du Québec, avril 2007, <http://www.mcccf.gouv.qc.ca/diversite-culturelle/pdf/fonds-diversite-culturelle.pdf>.

En ce qui concerne le fonds pour la diversité culturelle « il en va de la crédibilité des pays riches vis-à-vis des pays en développement qui ont tous apporté leur soutien politique à la convention.. ainsi, La France, l'Italie et l'Allemagne ont déjà annoncé leur intention de contribuer financièrement », précise Indrasen Vencatachellum, directeur de la division des expressions culturelles et des industries créatives de l'UNESCO, cité par VULSER (N.) *Le Monde* édition du 21 juin 2007

<sup>69</sup> H. RUIZ-FABRI, citée par VULSER (N.) « L'UNESCO adopte le texte sur la diversité culturelle », *Le Monde* édition du 19 octobre 2005.

<sup>70</sup> Avant l'adoption déjà la société civile s'activait au sein du Réseau International pour la Diversité Culturelle (RIDC), qui rassemble des artistes, associations et professionnels de la culture de 23 pays, mais également le Comité international de liaison des Coalitions pour la diversité culturelle, qui regroupe en son sein 31 coalitions dans autant de pays. Leurs travaux sur la diversité culturelle sont rassemblés à l'adresse:

[http://portal.UNESCO.org/culture/fr/ev.php-URL\\_ID=21630&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.UNESCO.org/culture/fr/ev.php-URL_ID=21630&URL_DO=DO_TOPIC&URL_SECTION=201.html) Pour ce qui suit l'entrée en vigueur voir : GUEVREMONT (V.) « La mise en œuvre et le suivi de la Convention pour la protection et la promotion de la diversité des expressions culturelles : le défi d'une action concertée de la société civile », Ministère de la Culture du Québec, novembre 2007, <http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/societe-civile.pdf> ; ainsi que BERNARD (de) François « La Convention sur la diversité culturelle reste à mettre en oeuvre ! 4 tâches prioritaires pour la société civile », Conférence Diversité culturelle, la richesse de l'Europe - Faire vivre la Convention de l'UNESCO, Essen, Allemagne, 26-28 avril 2007, [http://www.UNESCO.de/fileadmin/medien/Dokumente/Kultur/Fachkonferenz/Abstracts/Bernard\\_paperEssen2.pdf](http://www.UNESCO.de/fileadmin/medien/Dokumente/Kultur/Fachkonferenz/Abstracts/Bernard_paperEssen2.pdf) Voir également « La société civile et la Convention sur la protection et la promotion de la diversité des expressions culturelles » ANHEIER (H. K.), Document

Le rôle de la société civile aux termes de la Convention tient premièrement dans son activité d'obtenir des informations pertinentes au sujet de la Convention par les gouvernements, ce qui implique de leur part une disposition à délivrer les informations qui sont les leurs. Ceci appelle à une connaissance appropriée des mécanismes de la Convention de la part de ces coalitions, dans la mesure où celles-ci veilleraient à l'application de l'article 9 sur le partage de l'information et la transparence. De même, en conformité avec l'article 10 qui mentionne expressément l'éducation et la sensibilisation du public, l'organisation de leur part de campagnes de sensibilisation serait souhaitable. Le constat tiré de l'observation pratique démontre toutefois que les coalitions nationales soutenant la diversité culturelle sont majoritairement constituées dans les pays développés, ce qui affaiblit la position des pays sous-développés pourtant le plus sensiblement touchés par l'uniformisation culturelle générée par la mondialisation. Cette situation rend donc nécessaire une mobilisation de type transnational<sup>71</sup>. En outre, il faut relever que dans la plupart des cas ces coalitions se composent de professionnels de la culture, ce qui tend à exclure la société civile au sens large, et à limiter l'impact de la Convention au sein de la société civile, qui est peu impliquée dans les activités de circulation de l'information relatives à la mise en œuvre de la Convention ou dans le soutien à celle-ci.

## **Section II. L'ambiguïté de l'autorité juridique des règles de la Convention**

Depuis la réunion des ratifications nécessaires et l'entrée en vigueur de la Convention l'infrastructure institutionnelle a été constituée : ainsi le Fonds pour la diversité culturelle a été mis en place, de même que le Comité et ils sont actuellement à pied d'œuvre. Tout ceci consacre une efficacité aussi vive que possible à la fois pour les principes défendus par elle et pour ceux qu'elle reprend des autres instruments juridiques.

Il n'en demeure pas moins, en tout état de cause, que les avancées réalisées par la Convention pour la protection et la promotion de la diversité des expressions culturelles sont tributaires d'éléments que la Convention a omis de préciser<sup>72</sup>. Ils se résument essentiellement dans les difficultés inhérentes à l'application de celle-ci. En effet, la primauté juridique de la Convention relève des dispositions pour le moins ambiguës de l'article 20, particulièrement décrié quant à sa deuxième partie par la doctrine ainsi que la société civile<sup>73</sup>. Le premier paragraphe souligne que les Parties doivent se soumettre de

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d'information réalisé en 2005 à la demande du Secrétariat de l'UNESCO, présenté lors de la première session du Comité intergouvernemental pour la protection et la promotion de la diversité des expressions culturelles, 10-13 décembre 2007 (Document CE/07/1.IGC/INF.6)

Il est à noter que la Convention ne définit pas le concept de société civile mais il est généralement convenu que celle-ci inclut les individus, les associations, les organisations bénévoles, « tout ce qu'on appelle les corps intermédiaires - intermédiaires entre l'État et l'individu - dans la mesure où ils n'émanent pas de l'État » (BERNIER (I.) *op.cit.*)

<sup>71</sup> BERNIER (I.) *op.cit.* « La société civile pourrait s'appuyer à cet égard sur l'article 12-(c) qui prescrit que les Parties s'emploient à renforcer la coopération bilatérale, régionale et internationale afin de créer les conditions propices à la promotion de la diversité des expressions culturelles, en vue notamment de -renforcer les partenariats avec la société civile, les organisations non gouvernementales et le secteur privé, et entre ces entités, pour favoriser et promouvoir le diversité des expressions culturelles »

<sup>72</sup> Au moment de son adoption et pour faciliter celle-ci (voir *infra*). Durant les négociations, l'une des attentes les plus importantes touchait en effet à la capacité d'impact de la Convention par rapport aux dispositions de l'OMC et son pouvoir d'infléchir en faveur des biens culturels les redoutables règles de libre-échange (Voir *supra*). Cette disposition a fait l'objet de l'article 19 de l'avant projet de Convention, portant sur les relations de la Convention avec d'autres instruments juridiques, qui était proposé en deux versions. Voir le Rapport préliminaire du Directeur Général et l'Avant-Projet de Convention (Partie IV "Relations avec les autres instruments"): [http://europa.eu.int/comm/avpolicy/extern/cl\\_3726\\_fr.pdf](http://europa.eu.int/comm/avpolicy/extern/cl_3726_fr.pdf)

<sup>73</sup> BERNIER (I.) « Le lien entre une future convention internationale sur la diversité culturelle et les autres accords internationaux », Etude réalisée pour le Canada-Québec, juin 2003, in « Projet d'instrument juridique international sur la diversité culturelle - Recueil documentaire » (Juillet 2003)

Il s'agit du RIDC, relayé par la nouvelle Fédération internationale des coalitions pour la diversité culturelle (FICDC), née

bonne foi aux dispositions de la Convention, et qu'elles doivent les prendre en compte dans leur interprétation et dans leur application des obligations découlant d'autres traités. Il affirme également que la Convention n'est pas subordonnée aux autres traités<sup>74</sup>. Toutefois le deuxième paragraphe ajoute que « rien dans la présente Convention ne peut être interprété comme modifiant les droits et obligations des Parties au titre d'autres traités auxquels elles sont parties »<sup>75</sup>. Il instaure ainsi explicitement une confusion quant à l'application de la Convention, ne permettant pas de répondre à la question de savoir laquelle des deux règles est censée prévaloir sur l'autre.

Le débat resterait presque purement théorique si l'on perdait de vue la raison d'exister de cette Convention, qui a été amenée par le souhait d'offrir un cadre protecteur généré par le risque de déperdition des industries culturelles des pays en voie de développement et destiné à lutter contre l'hégémonie culturelle américaine développée par le libre-échange. Cette situation ambiguë posée par l'article 20 s'explique par le fait que la Convention est en réalité le résultat d'un compromis entre deux positions radicalement antagonistes, l'une défendant l'idée d'un droit international prévoyant un traitement spécifique pour les biens culturels, l'autre dénonçant un texte favorable au protectionnisme alors que les règles du libre échange seraient en la matière applicables. Entre ces deux extrêmes, se situaient également des autres Etats préoccupés par l'idée d'une reconnaissance normative et internationale de la « diversité culturelle » qui aurait pu être comprise dans un sens susceptible de mettre à mal la cohésion nationale. L'opposition américaine constante à ce projet, dès le début<sup>76</sup>,

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du congrès de Séville les 18 et 19 septembre 2007 réunissant les délégués de 37 coalitions nationales pour la diversité culturelle, en vue de constituer un nouveau regroupement voué à défendre le droit des pays de concevoir et d'appliquer des politiques culturelles.

<sup>74</sup> Article 20 §1 (Relations avec les autres instruments : soutien mutuel, complémentarité et non-subordination)

«Les Parties reconnaissent qu'elles doivent remplir de bonne foi leurs obligations en vertu de la présente Convention et de tous les autres traités auxquels elles sont parties. Ainsi, sans subordonner cette Convention aux autres traités : (a) elles encouragent le soutien mutuel entre cette Convention et les autres traités auxquels elles sont parties ; et (b) lorsqu'elles interprètent et appliquent les autres traités auxquels elles sont parties ou lorsqu'elles souscrivent à d'autres obligations internationales, les Parties prennent en compte les dispositions pertinentes de la présente Convention ».

La variante A de l'article 19 de l'Avant-projet de Convention, reprise dans le § 1 de l'article 20 de la Convention, se divisait en deux volets, dont le premier déclarait " Rien, dans la présente Convention, ne peut être interprété comme portant atteinte aux droits et obligations des États parties au titre de tout instrument international existant relatif aux droits de propriété intellectuelle auxquels ils sont parties". Ainsi, la Convention n'a pas d'effet rétroactif, et en ce qui concerne son application immédiate, elle souhaite éviter tout "conflit de compétence" positif en matière de réglementation juridique ayant trait à des droits de propriété intellectuelle, dans le cas où un Etat serait préalablement membre d'un autre traité qui lui confère des obligations en matière de propriété intellectuelle, la Convention offrant ainsi une complémentarité opportune.

Selon le deuxième volet, "les dispositions de la présente Convention ne modifient en rien les droits et obligations découlant pour un État partie d'un accord international existant, sauf si l'exercice de ces droits ou le respect de ces obligations causait de sérieux dommages à la diversité des expressions culturelles ou constituait pour elle une sérieuse menace". Cette disposition définit les rapports entre la Convention et les autres instruments juridiques en posant un principe de subsidiarité de la Convention, celle-ci excluant sa propre application dans le cas où un Etat aurait contracté d'autres obligations en matière culturelle et intellectuelle (comme y fait référence l'article premier). Toutefois, il existe une exception invocable en cas de "sérieux dommages ou menace" pour la diversité culturelle. Selon cette disposition la Convention n'a donc pas la prétention de régir toute la matière culturelle existant en droit international, mais souhaite simplement se poser en gardienne de la survie de la diversité culturelle. Son apport serait ainsi tout de même limité.

<sup>75</sup> La version B de l'Avant-projet a ainsi été retenue quasiment à l'identique dans le texte final. Elle disposait en effet que « Rien, dans la présente Convention, ne modifie les droits et obligations des Etats parties au titre d'autres instruments internationaux existants ».

<sup>76</sup> L'hostilité déclarée des Etats-Unis à l'égard de ce projet puise ses raisons dans la prise en compte en 1993 de l'« exception culturelle » par l'OMC au bénéfice du secteur audiovisuel de certains pays européens lors de la phase finale du cycle de l'Uruguay Round. L'Union Européenne, qui agissait sous l'impulsion de la France, chantre de la question culturelle, s'était opposée aux Etats-Unis dans la défense de la culture et avait eu gain de cause. Or lors de la signature de l'accord ALENA l'année suivante, sur la même question, la diplomatie américaine avait également échoué face au Canada.

faisant craindre la réitération d'un « Kyoto culturel », avait conduit certains experts à s'interroger sur l'opportunité d'une Convention d'où seraient absents des pays représentatifs. De même, faire adopter un texte audacieux comme a pu l'être le Statut de Rome de la Cour Pénale Internationale aurait pu compromettre son impact, dans la mesure où celui-ci aurait été amoindri du fait de l'adoption par la suite de certaines déclarations unilatérales, ou de traités bilatéraux<sup>77</sup>.

Ce paragraphe a donc été vigoureusement critiqué par les plus farouches défenseurs de la Convention, qui craignent qu'il n'aboutisse à instaurer une inégalité de fait entre les pays, entérinée par le volet juridique entre les Etats parties<sup>78</sup>. En effet, un Etat déjà membre de l'Organisation Mondiale du Commerce, qui préconise le libre-échange des biens et services, ne pourrait ainsi se prévaloir des dispositions protectrices de la Convention de l'UNESCO pour préserver d'une manière directe ses industries culturelles, et indirectement son patrimoine culturel. Or la possibilité de prendre ou non des engagements en matière culturelle est directement tributaire de la puissance des industries culturelles de l'Etat, qui cela est notoire, sont souvent faibles dans les pays du Sud<sup>79</sup>. Ceci s'explique par la faiblesse des aides publiques à la culture, et dans un parallèle douloureux, la nécessité vitale où ils se trouvent de contracter des engagements commerciaux afin de développer leur économie dans le cadre de la libéralisation des échanges et l'abolition des frontières marchandes. Une situation pareille ne pourrait donc manquer d'aboutir à une discrimination entre des Etats entre ceux dont l'industrie économique est assez forte pour préserver leur secteur culturel de l'impact du libre-échange, et ceux dont l'industrie culturelle ne pourrait résister à l'obligation de libéraliser tous les secteurs, qui figure dans les clauses du traité de l'OMC.

(Contd.) \_\_\_\_\_

Dans le cadre de l'adoption de cette Convention, l'UNESCO a ainsi été accusée de sortir des limites du mandat qui est le sien. A l'occasion des discussions ouvertes dès l'ouverture de la Conférence de Paris qui a suivi le Conseil exécutif<sup>76</sup>, les Etats-Unis ont invoqué les questions de procédure interne et notamment le défaut de paiement des cotisations par les Etats défaillants, puis par la suite, la question de la légitimité du mandat de la Commission européenne pour représenter valablement les 25 Etats membres, puis ont déposé, au dernier jour des discussions, une déclaration formelle contestant la légitimité même du projet de Convention, ainsi que le processus de consensus par lequel elle a été négociée.

En matière de vote leur opposition s'affirma systématiquement, qu'il s'agisse d'une suggestion canadienne d'adopter tel quel l'avant-projet de Convention qui a pourtant recueilli l'avis favorable d'une majorité des Etats, ou de la présentation du texte définitif du 3 au 21 octobre 2005 durant la 33<sup>e</sup> session de la Conférence Générale de l'UNESCO: si le rapport du texte a été adopté, en commission le 17 octobre, à une majorité de 151 voix, grâce au ralliement de plusieurs pays qui émettaient jusque là des réserves, celui-ci s'est heurté à l'opposition des Etats-Unis et d'Israël, et l'abstention de l'Australie ainsi que l'île de Karibati.

<sup>77</sup> Afin de contrecarrer du moins partiellement la ratification de la Convention et son impact futur, le département d'Etat à Washington, avec le lobby des grands groupes de l'audiovisuel américain (la Motion Picture Association) a exercé des pressions sur plusieurs pays aux industries culturelles peu développées en vue de parvenir à la conclusion d'accords bilatéraux ajoutant une clause de libre circulation des biens culturels à un grand nombre de traités commerciaux. Ainsi "des accords de libre-échange sont déjà conclus avec le Chili, Singapour, l'Australie, le Salvador, le Guatemala, le Honduras, le Nicaragua, le Costa Rica et avec un premier pays membre de la Francophonie, le Maroc. Des négociations sont en cours avec le Botswana, le Lesotho, la Namibie, le Swaziland et l'Afrique du Sud et d'autres sont annoncées avec, notamment, les pays du Pacte andin", (in L. BEAUDOUIN, "Marchandisation et diversité culturelle", *Le Devoir*, 16 mars 2004, sur internet: [http://www.wens.uqac.ca/jmt-sociologue/www/html/toc/387\\_335\\_CH/articles\\_de\\_presse/Le\\_devoir\\_2004\\_03\\_16\\_Beaudoin/Beaudoin\\_L\\_2004\\_03\\_16.pdf](http://www.wens.uqac.ca/jmt-sociologue/www/html/toc/387_335_CH/articles_de_presse/Le_devoir_2004_03_16_Beaudoin/Beaudoin_L_2004_03_16.pdf)). De même il est possible de consulter l'article de I. BERNIER « Les accords de libre-échange conclus récemment par les États-Unis en tant qu'exemple de leur nouvelle stratégie relativement au secteur audiovisuel » (*Chronique sur la diversité culturelle*, publication du Ministère des Affaires Etrangères canadien, édition d'avril-juin 2004; [http://www.mcc.gouv.qc.ca/international/diversite-culturelle/pdf/conf\\_seoul\\_fra\\_2004.pdf](http://www.mcc.gouv.qc.ca/international/diversite-culturelle/pdf/conf_seoul_fra_2004.pdf)) GAGNE (G.), COTE (R.), DEBLOCK (C.) « Les récents accords de libre-échange conclus par les Etats-Unis : une menace à la diversité culturelle », Rapport soumis à l'Agence intergouvernementale de la Francophonie, CEIM, Montréal, juin 2004

<sup>78</sup> Voir les propositions d'amendements proposés par les sites web des diverses coalitions nationales pour la diversité culturelle ( par exemple <http://www.coalitionfrancaise.org/index.htm>)

<sup>79</sup> ALMEIDA, d'(F.), ALLEMAN (M. L.) , « Les industries culturelles des pays du Sud : enjeux du projet de Convention internationale sur la diversité culturelle », Rapport d'étude établi pour le compte de l'Agence Intergouvernementale de la Francophonie et du Haut Conseil de la Francophonie, Août 2004

C'est le recours à cet impératif et ses conséquences désastreuses que les tenants de la diversité culturelle souhaitent encore aujourd'hui empêcher<sup>80</sup>. Pourtant, argumentent-ils, il ne semblait pas nécessaire que « l'instrument [cède] devant l'OMC; mais dans la mesure où la possibilité de conflits ne peut pas être éliminée, [il aurait fallu] chercher à établir des ponts susceptibles de faciliter leur règlement dans une perspective acceptable d'un point de vue culturel »<sup>81</sup>. Il n'est toutefois pas imaginable aujourd'hui de songer à reprendre le texte de la Convention en vue de l'amender à nouveau, ce qui l'exposerait avec une quasi certitude à de nouvelles modifications américaines, ou lui ferait courir le risque de voir certains pays favorables à la Convention basculer du côté de la thèse adverse. La question de l'autorité ou la primauté juridique de la Convention<sup>82</sup>, et celle de savoir si la logique culturelle prévaut sur la logique marchande demeurant ainsi irrésolues, certains auteurs déplorent assister « malheureusement à un développement schizophrénique du droit international »<sup>83</sup>. Toutefois, « l'existence même de tels conflits entre accords répondant à des préoccupations distinctes s'inscrit dans une problématique plus large qu'est celle de la gouvernance internationale, problématique qui préoccupe un nombre croissant d'observateurs du système commercial international depuis quelques années ». La solution à cette problématique pourrait bien être trouvée entre les mains du juge de la Cour Internationale de Justice, en tout état de cause, l'arbitrage de la Cour habilitée à apprécier la compatibilité des normes internationales, pouvant être sollicité à cette occasion.

Ainsi, si cette disposition ne donne pas de réponse catégorique, elle permet du moins d'ébranler le

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<sup>80</sup> Le professeur BERNIER tente toutefois une interprétation sur la base de la Convention de Vienne sur le droit des traités « L'article 30 de la Convention de Vienne sur le droit des traités, qui codifie essentiellement à cet égard le droit international coutumier, envisage la question sous l'angle de l'application de traités successifs portant sur une même matière. Deux situations distinctes sont considérées dans un tel contexte. La première est celle où il y a identité complète des parties aux traités en cause. A moins que le traité antérieur ait pris fin ou que son application ait été suspendue, le traité antérieur alors « ne s'applique que dans la mesure où ses dispositions sont compatibles avec celles du traité postérieur ». La seconde situation est celle où les parties à un traité antérieur ne sont pas toutes parties au traité postérieur. S'agissant d'abord des relations entre les Etats parties aux deux traités, la règle applicable est celle énoncée précédemment lorsqu'il y a identité des Parties. Pour ce qui est ensuite des relations entre un Etat partie aux deux traités et un Etat partie à l'un de ces traités seulement, « le traité auquel les deux Etats sont parties régit leurs droits et obligations réciproques ». Ces dispositions concernant le cas où les parties à un traité antérieur ne sont pas toutes parties au traité postérieur s'appliquent toutefois, sans préjudice de toute question de responsabilité qui peut naître pour un Etat de la conclusion ou de l'application d'un traité dont les dispositions sont incompatibles avec les obligations qui lui incombent à l'égard d'un autre Etat en vertu d'un autre traité. La règle de base alors est que l'Etat en question demeure responsable de l'exécution de chacun des deux traités et qu'à défaut de donner suite aux engagements pris dans le cadre de ces derniers, il peut voir sa responsabilité internationale mise en cause auprès des instances appropriées par la ou les victimes d'un tel manquement ». *in* BERNIER (I.) « Le lien entre une future convention internationale sur la diversité culturelle et les autres accords internationaux », *op. cit.*

<sup>81</sup> BERNIER (I.) et RUIZ FABRI (H.) "Évaluation de la faisabilité juridique d'un instrument international sur la diversité culturelle" de 2002 (commandité par le Groupe de travail franco-québécois sur la diversité culturelle) réalisé par H. RUIZ FABRI et I. BERNIER, [http://www.mcc.gouv.qc.ca/international/diversite-culturelle/pdf/106145\\_faisabilite.pdf](http://www.mcc.gouv.qc.ca/international/diversite-culturelle/pdf/106145_faisabilite.pdf)

<sup>82</sup> Sur cette question voir "La mise en œuvre de la Convention sur la protection et la promotion de la diversité des expressions culturelles", (Pr. BERNIER en collab. avec Mme RUIZ FABRI), *Chronique sur la Diversité Culturelle*, site web du Ministère canadien des Affaires Etrangères, nov. 2005 <http://www.mcc.gouv.qc.ca/international/diversite-culturelle/pdf/chronique-05-11.pdf>

<sup>83</sup> P. LEUPRECHT, qui ajoute « il y avait jusque là tout le droit de l'OMC. Il y aura le droit de l'UNESCO avec la Convention sur la diversité »; cité par LAVERTU (Y.) La culture au seuil du droit international, *table ronde de l'Université de Montréal-Cercle Jean-Monnet de la Culture*, juin 2005, <http://www.barreau.qc.ca/journal/vol37/no13/UNESCO.html>; RIDING (A.) "Entr'acte: Next lone U.S. dissent: Cultural diversity pact", *The New York Times*, (<http://www.iht.com/articles/2005/10/12/news/entracte.php>)

Toutefois d'autres estiment qu'« en tant qu'instrument de la diversité culturelle, la Convention devrait aussi jouer un rôle comparable à celui des conventions de l'Organisation mondiale de la propriété intellectuelle (OMPI), des accords de l'Organisation mondiale du commerce (OMC), de l'Organisation mondiale de la santé (OMS) ainsi que des accords multilatéraux en matière d'environnement, et être tout aussi contraignante au regard du droit ». Rapport d'étape du groupe de travail de l'Assemblée Nationale et du Bundestag sur la diversité culturelle en Europe, 14 février 2007, sur le site de l'Assemblée Nationale française.

monopole de l'OMC jusque là établi en matière culturelle. Ce dispositif permettrait alors de remettre en cause la prédominance du droit du commerce, du libre-échange débridé, sur tous les autres droits (notamment sociaux, environnementaux et culturels), qui fait de l'OMC « le fer de lance de la mondialisation libérale »<sup>84</sup>. Si d'autres difficultés et non des moindres, tiennent à la situation du marché<sup>85</sup>, cependant, il est assez rassurant de constater que l'UNESCO n'entend pas se départir de son rôle de « moteur » en matière de préservation du patrimoine culturel. En effet dans la mesure où elle invite les Etats, avec insistance, à la tenir informée sur leur activité, elle manifeste son engagement à persévérer dans la voie de la construction d'un arsenal juridique aussi performant que possible pour lutter contre le trafic illicite des produits culturels<sup>86</sup>.

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<sup>84</sup> CASSEN (B.), *op. cit.* Egalement, se référer à NEIL (G.) « Assessing the effectiveness of UNESCO's new Convention on cultural diversity », *Global Media and Communication 2006 Volume 2*, pp. 257–262, disponible en consultation sur le site <http://gmc.sagepub.com>

<sup>85</sup> Voir *supra*.

<sup>86</sup> GAGNE (M.) « La Convention de l'UNESCO sur la diversité culturelle : un outil à multiples facettes », Planet Agora, Paris, France, 2006.



# **Return of Illicitly Trafficked Cultural Objects Pursuant to Private International Law: Current Developments**

**Andrzej Jakubowski\***

## **Abstract**

This paper deals with the return of illicitly trafficked cultural objects pursuant to private international law. It discusses current developments of international practice and legal doctrine in respect of the law applicable to the movable cultural heritage. The paper analyzes two major spheres of private international law which are crucial for the effectiveness of claims for the return of cultural objects. First, it is argued that the traditional *lex situs* is being reconsidered in favour of a more specific rule based on the *lex originis* theory. It refers to legal doctrine, international instruments (primarily EC Directive 93/7 and the 1995 UNIDROIT Convention) and domestic legislation. In particular, it discusses the new Belgian codification of private international law, which for the first time has explicitly endorsed the *lex originis* rule in respect of claims for cultural objects. Second, it deals with the question of the applicability of foreign public law by national courts. It distinguishes between claims based on public law such as export restrictions and claims based on private law such as patrimony laws. It quotes legal doctrine in the field as well as the case law related to the recognition and enforcement of foreign public law on the cultural heritage. The aim of this analysis is to discuss whether a new legal regime of cultural objects on the grounds of private international law is being created and to indicate major obstacles and expectations for the future.

## **Keywords**

private international law - cultural objects - illicit traffic

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## 1. Introduction

In 1990, the Hague Academy of International Law published an essay by Lyndell V. Prott on problems of private international law for the protection of the cultural heritage.<sup>1</sup> Prott pinpointed and analyzed from a comparative perspective the major obstacles to the successful claims for the return of illicitly trafficked cultural objects brought to domestic courts. She claimed that the complexity of rules of private international law and their variety often nullified state or individual efforts to protect the cultural heritage from illicit trade. In order to overcome these difficulties she proposed two solutions. The first assumed that there would be exceptions to the general rules of private international law in respect of legal relationships which involve the cultural heritage. Thus, the universal consensus on the necessity of its legal protection and preservation would influence the operation of private international law. The second would be to recognize a new category of law – cultural heritage law, which would develop its own conflict rules. Prott opted for the second solution as more efficient and satisfactory in terms of protecting the cultural heritage. She expected that this new field of law would have a profound impact on private international law, in particular with regard to five sets of issues: 1) application of foreign mandatory rules of law, 2) recognition and enforcement of foreign public laws, 3) reconsideration of the *lex rei sitae* rule towards *lex originis*, 4) unification or harmonization of national rules as to the protection of the *bona fide* purchaser, 5) recognition of cultural heritage as a category *sui generis* at the initial stage of classification.

The question of the reintegration of national cultural heritage is especially relevant for the countries of the Mediterranean Region seriously affected by the illicit traffic of cultural objects. Recent widely commented criminal investigations against art-dealers in Switzerland, the United Kingdom, Italy and the United States have demonstrated that the systematic plundering and smuggling of illicit cultural items is still a ‘regular’ way of art collecting. Therefore, the effectiveness of legal measures of claims for the return of illicitly traded cultural objects constitutes one of the major considerations of state cultural policies in the Region.

Apparently, the international legal framework for the protection of the cultural heritage seems much more developed today than it was 20 years ago.<sup>2</sup> Claims for the return of stolen, illicitly exported and traded cultural objects can be based on a much broader list of international treaties and other legal mechanisms than in the time of the publication of Prott’s essay. Furthermore, an increasing number of disputes for the return of illicitly removed cultural objects is being settled in non-curial proceedings such as alternative dispute resolution or private-public agreements. In addition, the regulation of illicit trade in cultural objects has become more efficient as a result of international collaboration and more frequent application of domestic criminal laws to convict persons involved in the illegal art market and to return cultural objects to the countries from which they were removed.

However, despite the increasing variety of international legal instruments governing the return of stolen or illicitly removed cultural objects, many claims continue to be brought and determined according to general rules of private international law. These, in the vast majority of jurisdictions, do not provide for any special status to the movable cultural heritage. Consequently, one may argue that the protection of the integrity of a national cultural

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<sup>1</sup> Lyndell V. Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage', *Recueil des Cours de A. D. I. H.*, 217/V (1989) at 214 et seq.

<sup>2</sup> For broader analysis see: Guido Carducci, 'Growing Complexity of International Art Law: Conflicts of Law, Mandatory Rules, UNSC Resolutions and EU Regulations', in Barbara T. Hoffman (ed.), *Art and Cultural Heritage. Law, Policy and Practice* (Cambridge, 2006), 68-86.

heritage, in practice, is basically limited to a state territory. Thus, almost 20 years after the publication of Prott's essay, many of her observations are still very timely.

The length of this article does not allow for a dialogue with all the questions and arguments discussed by Prott. It presents recent international developments and controversies with regard to the claims for the return of illicitly trafficked cultural objects brought by states to national courts. Accordingly, it deals with two of Prott's postulates: the reconsideration of *lex situs* with respect to the transfer of cultural objects and the enforceability of foreign public law on the cultural heritage by domestic courts. The choice of these problems has been conditioned by the current developments in domestic legislation, international practice and doctrine of private international law. The aim of this analysis is to discuss whether a new legal regime of cultural objects is emerging on the grounds of private international law and to indicate major obstacles and expectations for the future.

## 2. Legal nature of the claims for the return of illicitly trafficked cultural objects

Cultural objects as movable elements of the cultural heritage are protected under domestic and international regulations. The concept of such protection is based on the presumption that certain cultural values<sup>3</sup> embodied in cultural objects should be preserved and delivered entirely to the next generations.<sup>4</sup> Consequently, the protection of the movable cultural heritage should provide for the preservation of material forms of cultural objects in their original and historical contexts where public access as well as scientific research should be facilitated.<sup>5</sup>

Domestic policies and approaches with respect to the protection of national cultural heritage may differ from one legal system to another, but basically they safeguard the general public interest identified with a number of different public and private rights - sometimes very contradictory. Many states have enacted special legal regimes designed for this purpose: systems of classification which provide for inalienability or restricted transfer and sometimes indefeasible and imprescriptible title to certain cultural objects; export controls; rules for the activities of dealers in cultural objects. Moreover, items owned by a state, local and religious communities, public museums, galleries, archives, etc. may constitute a part of the *public domain*, and as a principle are inalienable and exempt from judicial and administrative seizure. In addition, many states introduced the so-called "umbrella statutes" which classify all antiquities and archaeological monuments as state property and banned them from exportation,<sup>6</sup> which sometimes is not justified by any cultural reasons.<sup>7</sup>

Consequently, claims for the return of the illicitly trafficked cultural objects brought by states can be of a different legal nature.<sup>8</sup> Basically, they can be based on private or public law.

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<sup>3</sup> Such values can be defined very broadly, see: Marie Cornu, *Le Droit Culturel Des Biens. L'Intérêt Culturel Juridiquement Protégé* (Bruxelles, 1996) at 45-56, 121-25, 30-37.

<sup>4</sup> John H. Merryman, 'The Public Interest in Cultural Property', *California Law Review*, 77/3 (1989), 339 et seq.

<sup>5</sup> Frank G. Fechner, 'The Fundamental Aims of Cultural Property Law', *International Journal of Cultural Property* 7/2 (1998), 382 et seq.

<sup>6</sup> Astrid Müller-Katzenburg, 'Possession and Ownership of Stolen or Otherwise Lost Works of Art', *Art Antiquity and Law*, 5/2 (2000) at 110.

<sup>7</sup> Compare: John H. Merryman, 'A Licit International Trade in Cultural Objects', *International Journal of Cultural Property* 4/1 (1995) at 19.

<sup>8</sup> For the detailed classification of claims for the return of cultural objects see: Wojciech W. Kowalski, 'General Observations: Claims for Works of Art and Their Legal Nature', in The International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of Cultural Property Disputes. Papers Emanating from the Seventh PCA International Law Seminar May 23, 2003* (The Hague, 2004) at 31 et seq.

Claims based on private law primarily concern the question of title to cultural objects as claims of the owner against possessor (in bad or good faith) for the recovery of the object in question. Their private nature also means that they could be brought not only by states or other public entities, but also by private persons acting *iure gestions*. Claims based on public law can be brought in principle only by states or other public bodies and are related to the exercise of governmental power (*iure imperii*), for instance, provisions of foreign criminal (penal) sanctions for illicit exportation of a cultural object. This distinction is fundamental since the question of the recognition and enforcement of foreign public law by domestic courts constitutes one of the most controversial issues of private international law.<sup>9</sup>

### **3. Reconsideration of *lex situs* rule with respect to cultural objects**

#### **A. General observations**

A determination of the law governing proprietary rights is a major question for the private title based claims for the return of cultural objects. In the vast majority of contemporary legal systems, a judge would apply *lex rei sitae* – the law of the place where the property is situated. As regards movables, this general conflict rule can, however, be interpreted differently, especially in respect of the acquisition and transfer of title. In some jurisdictions, the applicable law is determined on the basis of *lex loci actus* - the law of the place where a relevant transaction was concluded or the place of the last valid transaction.<sup>10</sup> In others, the law of the state where the property during the time of litigation is situated (*lex situs*) may be applied.<sup>11</sup> Moreover, legal systems may require different conditions for the valid transfer of title to movables.<sup>12</sup> Therefore, a decision on qualifying the matter as one of contract or one of title might be very difficult.

Generally speaking, the *lex situs rule* would also govern the proprietary rights to cultural objects.<sup>13</sup> However, its unconditional application can deprive these objects from the protection which would be granted under a legal system other than that determined by the *lex situs* rule.<sup>14</sup> The question of modifying the traditional conflict rules for the purposes of protecting the cultural heritage has been the subject of many international debates. These led to the reconsideration of the general *lex situs* rule and introduced some solutions, at least on the grounds of legal doctrine.

#### **B. International efforts to modify the *lex situs* rule for the purposes of protecting the cultural heritage**

The enforcement of domestic rules governing cultural heritage protection has constituted a central issue in international efforts aimed at preventing the illicit cross-border transfer of movable cultural

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<sup>9</sup> Read more: Matthias Weller, 'Some Observations on the Application of Foreign Public Law by Domestic Courts from a Comparative Perspective', *Art Antiquity and Law*, XII/3 (2007) at 279 et seq.

<sup>10</sup> Khalil A. Sfeir, *Droit International Privé Comparé* (1; Beyrouth 2005) at 683 et seq.

<sup>11</sup> Ibid.

<sup>12</sup> There might be applied several different requirements: existence of legal cause or valid contract (for instance, France, Poland or Switzerland); previous stipulation of an abstract real contract (Germany); deliver of property etc.

<sup>13</sup> Kurt Siehr, 'Globalization and National Culture: Recent Trends toward a Liberal Exchange of Cultural Objects', *Vanderbilt Journal of Transnational Law*, 38/4 (2005) at 1067 et seq., Pierre Lalive D'epinay, 'Une Avencée Du Droit International: La Convention De Rome d'Unidroit Sur Le Biens Culturels Voles Ou Illicitement Exportés', *Uniform Law Review*, 1 (1996) at 43 et seq., Sabine Schmeinck, *Internationalprivatrechtliche Aspekte Des Kulturgüterschutzes* (Berlin, 1994) at 74.

<sup>14</sup> Christian Ambuster, 'La Revendication De Biens Culturels Du Point De Vue Du Droit International Privé', *Revue critique de droit international privé*, 93/3-4 (2004) at 731-43, Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage', (at 263 et seq.)

heritage. At the universal level, the principle of reciprocal recognition of domestic rules on the protection of the cultural heritage was introduced for the first time by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>15</sup> This international instrument arguably provides for the application of foreign law to the protection of the cultural heritage on the basis of reciprocal common understanding and the principle of international co-operation.<sup>16</sup> In international practice states are however very reluctant to introduce such a principle to their internal legal systems. Moreover, the concept of an unconditional enforcement of foreign regimes on export controls has been widely criticized as an unjustified limitation to the international circulation of cultural objects.<sup>17</sup>

To solve these difficulties, the Institute de Droit International moved to take an initiative on the matter.<sup>18</sup> In the Basel Resolution (“The International Sale of Works from the Angle of the Protection of the Cultural Heritage”),<sup>19</sup> it proposed a new conflict rule – the law of country of origin (*lex originis*). Article 2 of the Resolution provides that “transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country”.

Arguably, the solution applied by the Institute was not ideal. First of all, the question of a proper method for determining the country of origin was not very clear. Furthermore, one could not exclude that better and/or more efficient protection of a given cultural object might not always be provided under *lex originis*. Nevertheless, this non binding document contributed to the intergovernmental discussion on the status of cultural property in private international law and influenced the preparation of the 1995 UNIDROIT Convention on stolen and illegally exported cultural objects and Council Directive 93/7/ECC on the return of cultural objects unlawfully removed from the territory of a Member State.<sup>20</sup>

Directive 93/7/EEC introduced the obligation of all Member States<sup>21</sup> to return cultural objects removed from one Member State to another in violation of domestic rules on cultural heritage. It applies to the items classified as “national treasures” (before or after the unlawful removal) and which fall into one of the categories listed in the Annex to Directive 93/7/EEC. It does not settle the issues of ownership, which accordingly with Article 12 of the Directive shall be governed after the return of the cultural objects by the law of the requesting Member State. Some authors argue that this provision seems to favor the *lex origins* rule.<sup>22</sup> In general, Directive

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<sup>15</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, (Done at Paris 14 November 1970, entry into force 24 April 1972), Official Text: [Http://Portal.Unesco.Org/En/Ev.Php@Url\\_Id=13039&Url\\_Do=Do\\_Topic&Url\\_Section=201.Html](http://Portal.Unesco.Org/En/Ev.Php@Url_Id=13039&Url_Do=Do_Topic&Url_Section=201.Html); Article 13(d) obliges the parties to this Convention "to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported".

<sup>16</sup> See Preamble, Article 2.1 and Article 13 of the 1970 UNESCO Convention; read more: Víctor Fuentes Camacho, *El Tráfico Ilícito Internacional De Bienes Culturales* (Madrid, 1993) at 391 et seq.

<sup>17</sup> See in particular: John H. Merryman, 'Cultural Property Internationalism', *International Journal of Cultural Property*, 12/1 (2005) at 11 et seq., idem., 'The Nation and the Object', *International Journal of Cultural Property*, 3/1 (1994) at 64 et seq.

<sup>18</sup> Kurt Siehr, 'International Art Trade and Law', *Recueil des Cours A. D. I. H.*, 243 (1993) at 74 et seq, Erik Jayme, 'Protection of Cultural Property and Conflicts of Laws: The Basel Resolution of the Institute of International Law', *International Journal of Cultural Property*, 6/2 (1997) at 342-45.

<sup>19</sup> Institute of International Law, 'The International Sale of Works from the Angle of the Protection of the Cultural Heritage', *Yearbook*, 64/II (1992) at 403.

<sup>20</sup> Read more : Guido Carducci, *La Restitution Internationale Des Biens Culturels Et Des Objets D'art : Droit Commun, Directive CEE, Conventions De l'Unesco Et d'Unidroit* (Paris, 1997) at 179 et seq.

<sup>21</sup> And all three Member States of the European Economic Area: Iceland, Liechtenstein and Norway.

<sup>22</sup> Erik Jayme, 'Globalization in Art Law: Clash of Interests and International Tendencies', *Vanderbilt Journal of*

93/7/EEC does not deal directly with the question of applicable law, but it provides for the physical return of the cultural objects to the state from which they were unlawfully removed. After the return the domestic law on cultural heritage is applied.

Potentially, Directive 93/7/EEC should have a significant impact on international practice in relation to claims for the return of illicitly traded cultural objects. However, according to the *Second Report on the Application of Council Directive 93/7/EEC on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State* (2005), the provisions of Directive 93/7/EEC were applied only to a very small number of cases and, furthermore, there is no reported case decided under any national legislation implementing this directive.<sup>23</sup> This is due to the reluctance of states to strictly collaborate on this matter. In fact, some Member States (Greece, Spain, France and the Netherlands) generally prefer to use other legal methods to recover cultural objects because the conditions for bringing return proceedings are considered too restrictive.<sup>24</sup>

The 1995 UNIDROIT Convention presents a slightly different approach to the reconsideration of general rules of private international law for the purposes of protecting the cultural heritage. This international instrument deals with two situations: the restitution of stolen cultural objects (Chapter II, Articles 3, 4), which can be claimed by the owners, and the return of illegally exported or removed cultural objects (Chapter III, Articles 5-8), which can be claimed only by Contracting States Parties to the Convention. The first embodies all stolen and unlawfully excavated objects (Article 3.1 and 3.2). The second refers to objects exported or removed from the territory of the requesting state in violation of the domestic rules on the protection of the cultural heritage. In respect of stolen cultural objects the Convention clearly provides for the enforcement of so-called foreign patrimony laws which vest an ownership title to certain cultural objects – unlawfully excavated and traded items.<sup>25</sup> As regards illegally exported cultural objects, the 1995 UNIDROIT Convention provides for the physical return of the objects to the requesting State, only if this proves that removal of the object in question from its territory “significantly” impairs certain cultural interests (Article 5). On this matter, the 1995 UNIDROIT Convention does not provide an automatic application of all foreign rules on the cultural heritage, since states did not agree to accept a general principle of applicability *a priori* of foreign public laws.<sup>26</sup>

The practical application of the 1995 UNIDROIT Convention and its impact on the international regulation of the claims for the return of illegally trafficked objects is difficult to measure. By the end of 2008, only 29 states had acceded to the Convention, none of which is a market state.<sup>27</sup> Furthermore, no case has been decided under its provisions.

### **C. Art. 90 of the Belgian code of private international law**

All of the above-mentioned efforts to modify the *lex situs* for the purposes of protecting the cultural heritage have not resulted in the construction of a new global regime of conflict rules governing the status of cultural objects. States (in particular market states) are still very reluctant to include the

(Contd.) \_\_\_\_\_  
*Transnational Law*, 38/4 (2005) at 937.

<sup>23</sup> 'Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee - Second Report on the Application of Council Directive 93/7/EEC on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State', (Brussels: COM(2005) 675 final, 21 December 2005).

<sup>24</sup> Ibid.

<sup>25</sup> Lyndell V. Prott, *Commentary on the Unidroit Convention on Stolen and Illegally Exported Cultural Objects 1995* (London, 1997) at 32-34.

<sup>26</sup> See: 'Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects. Act and Proceedings', (Rome, 7 to 24 June 1995) at 99.

<sup>27</sup> Source: '<http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>', accessed March 2009.

principle of *lex originis* in their national statutes on conflicts of law, and consequently, in the majority of jurisdictions courts will apply *lex situs* as the basic rule to disputes concerning the ownership of cultural property. However, it seems that this whole discussion process on the reconsideration of the *lex situs* rule may have an indirect impact on the legislative initiatives at domestic level. The example of the new Belgian codification of private international law arguably confirms this tendency.

The Belgian law of 16 July 2004 holding the code of private international law<sup>28</sup> (hereinafter: Belgium Code pil) provides for special provisions in respect of claims for the return of illegally removed cultural objects. Article 90 §1 of the Belgian Code pil states that “if an item, which a State considers as being included in its cultural heritage, has left the territory of that State in a way, which is considered to be illegitimate at the time of the exportation by the law of that State, the revindication by the State is governed by the law of that State, as it is applicable at that time, or at the choice of the latter, by the law of the State on the territory of which the item is located at the time of revindication.” This provision clearly endorses *lex originis*<sup>29</sup> - the law of the state from which the objects were displaced or illegally exported. However, the claimant state may also choose other law which is applicable at that time if it is more convenient.<sup>30</sup> The application of this rule depends on the fulfillment of two conditions. First, the rule applies only to the listed objects (officially considered as being included in the Claimant State’s cultural heritage). Second, exportation itself must be illegitimate at the time of exportation – no retroactive regulations of the claimant state will be applied.<sup>31</sup>

As regards the situation of a good faith possessor of cultural objects subjected to revindication, the Belgian Code pil provides for its protection. According to Article 90 § 2 of the Belgian Code pil, if the law of origin of the object does not grant any protection to such a possessor, he may invoke the protection that is attributed to him by the law of the State in the territory in which the item is located at the time of revindication (*lex situs*).

Claims for the return of illicitly trafficked objects brought under the Belgian Code pil, can also be based on the provisions of the law applicable to stolen goods – Article 92. This states that “the revindication of a stolen good is governed, at the choice of the original owner, by the law of the State on the territory of which the good was located upon its disappearance or by the law of the State on the territory of which the good is located at the time of revindication.” Consequently, domestic laws which vest ownership to certain cultural objects (primarily antiquities) can be enforced.

The provisions on the return of illicitly trafficked cultural objects were included in the draft project on a new code of private international<sup>32</sup> law and from the very beginning caused a number of controversies among Belgian museums’ authorities and private art collectors.<sup>33</sup> As a result, after a debate in the Belgian Senate, a time-bar was introduced.<sup>34</sup> Article 127 §7 of the Belgian Code pil states that Article 90 only applies from 1 October 2004 onwards. This excluded all potential claims

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<sup>28</sup> 'Code of 16 July Holding the Code of Private International Law (Loi Du 16 Juillet 2004 Portant Le Code De Droit International Privé)', in *Moniteur Belge* (ed.), (27 July 2004), 57344, english translation: *Yearbook of Private International Law*, VI (2004), 319, see: Jean-Yves Carlier, 'Le Code Belge De Droit International Privé, *Revue Critique De Droit International Privé*', *Revue critique de droit international privé*, 94/1 (2005) at 11 et seq.

<sup>29</sup> See: Siehr, 'Globalization and National Culture: Recent Trends toward a Liberal Exchange of Cultural Objects', (at 1088-89).

<sup>30</sup> Johan Erauw, 'Reforming the Lex Situs Principle: Recent Developments in Belgium', Paper presented during the Conference *LOCATION, LOCATION, LOCATION. The role of the lex situs principle in modern claims for the return of cultural objects* (Institute of Art and Law, London, 2007), unpublished.

<sup>31</sup> Ibid.

<sup>32</sup> Johan Erauw, 'Brief Description of the Draft Belgian Code of Private International Law', *Yearbook of Private International Law*, IV (2002) at 158.

<sup>33</sup> Erauw, 'Reforming the Lex Situs Principle: Recent Developments in Belgium'.

<sup>34</sup> Ibid.

from States who might already have fulfilled the condition of Article 90 prior to October 2004.<sup>35</sup>

The solutions introduced by the Belgian legislator are clearly an important step towards the creation of new conflict rules designed for the purpose of protecting the cultural heritage. It seems that some arguments formulated by Prott have been fulfilled. One may expect that such an approach will be taken in the future by other market states. This would definitely make the state claims for the return of illicitly trafficked cultural objects more successful.<sup>36</sup>

#### **4. Enforcement of public foreign law on the protection of the cultural heritage**

##### **A. Exception of foreign public law**

For long it has been accepted that on the grounds of private international law, domestic courts do not apply foreign public laws based on the principle of equality between sovereign states. According to this, domestic courts have no jurisdiction to enforce penal, revenue, constitutional or other public law of a foreign state. However, the concept of public law is not the same and may differ from one legal system to another. This is more controversial as regards labour and consumer regulations or administrative law, for instance, domestic export regulations. In the doctrine of private international law, some authors argue that a judge deciding on a given situation should also apply provisions of the foreign public law if they belong to the applicable legal system. In their application, he should take into consideration their nature and purpose.<sup>37</sup> Moreover, they cannot contradict the public order of forum.

A favourable approach towards the doctrine of the application of foreign public law in domestic courts was taken by the Institut de Droit International during its sessions in Wiesbaden (1975) and Oslo (1977). In Wiesbaden the Institute adopted the resolution on “The Application of Foreign Public Law”,<sup>38</sup> which clearly provides that the public law character attributed to a provision of foreign law does not prevent *a priori* the application of such a provision, “subject however to the fundamental reservation of public policy”. The same principle shall apply to the preliminary question as to “whenever a provision of foreign law constitutes the condition for applying some other rule of law or whenever it appears necessary to take the former provision into consideration.” Then, the Resolution explains that “the so-called principle of the inapplicability *a priori* of foreign public law, like that of its absolute territoriality, a principle invoked, if not actually applied, in judicial decisions and legal writings of certain countries.” And, inapplicability of foreign public law is based on different considerations which do not have an absolute character.<sup>39</sup> According to this, domestic courts should not exclude the application of foreign public law *a priori*, but look at its potential consequences. However, the Resolution reserves the question of “claims made by a foreign authority or a foreign public body and based on provisions of its public law”. Arguably, the Resolution postulates for a distinction between claims based on public law brought by foreign states or other public entities and other claims based for instance on private title, such as claims for the recovery of stolen cultural

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<sup>35</sup> Ibid.

<sup>36</sup> Further analysis see: John M. Milo and Vincent Sagaert, 'Private Property Rights in Cultural Objects: Balancing Preservation of Cultural Objects and Certainty of Trade in Belgian and Dutch Law', in Bert Demarsin et al. (eds.), *Art & Law* (Bruges, 2008), at 482. Derek Fincham, 'How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property', *Columbia Journal of Law and the Arts*, (2009 Spring), forthcoming, accessible on <http://papers.ssrn.com>.

<sup>37</sup> Hans W. Badee, 'Operation of Foreign Public Law', *International Encyclopedia of Comparative Law* (12, 1991) at 31 et seq.

<sup>38</sup> 'Application of Foreign Public Law [Http://www.Idi-Iil.Org/Idie/Resolutionse/1975\\_Wies\\_04\\_En.Pdf](http://www.idi-il.org/Idie/Resolutionse/1975_Wies_04_En.Pdf)', accessed March 2009.

<sup>39</sup> See Articles II-IV of the 1975 Resolution.

objects.<sup>40</sup>

During the 1977 session in Oslo, the Institut de Droit International returned to the question of claims based on public law.<sup>41</sup> In the Resolution “Public Law Claims Instituted by a Foreign Authority or a Foreign Public Body”, it stated that public law claims “should, in principle, be considered inadmissible in so far as, from the viewpoint of the State of the forum, the subject-matter of such claims is related to the exercise of Governmental power.” However, they should be admissible “if, from the viewpoint of the State of the forum and taking account of the right of the defendant to equitable treatment in his relations with the authority or body in question, this is justified by reason of the subject-matter of the claim, the needs of international cooperation or the interests of the States concerned.”

In light of the resolutions of the Institut de Droit International, it seems that the distinction between claims based on public and private law should be clear and the traditional principle of inapplicability *a priori* of foreign public law is challenged. However, in international practice the principles proposed by the Institut are not unanimously accepted. In particular, there is a substantial difference between common and civil law systems in respect of the enforcement of foreign public law. It seems that most civil law jurisdictions follow the above described principles and would apply provisions of foreign public law designated by the applicable conflict rule,<sup>42</sup> provided that it does not contract the public policy of forum. Conversely, common law jurisdictions are more traditional in position by excluding the application of foreign public law. This is especially true in respect of the United Kingdom, where the legal doctrine and practice clearly state that English courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or founded on an act of state.<sup>43</sup> In respect of the application of foreign cultural heritage law, English courts used to follow the practice developed in the famous case of illegally traded Maori reliefs from New Zealand (1982)<sup>44</sup> and treat export regulations of foreign public law, non-enforceable by English jurisdiction. However, there are some important developments in this matter.

### **B. *Iran v. Barakat (2007)***

The case concerns the claim of the Islamic Republic of Iran for the recovery of the possession of the antiquities which were allegedly taken illicitly from its territory, namely the Jiroft area around 2001, and which are considered by Iranian law as a part of the national cultural heritage.<sup>45</sup> The Barakat Galleries in London, who possessed the objects, claimed that it acquired good title to the antiquities under the law of the countries where it purchased the objects, namely France, Germany and Switzerland. Moreover, it did not accept that the objects came from the region of Jiroft. In March 2007, in the first instance, the High Court of Justice in London dealt with two preliminary questions: 1) if Iran had acquired either title to or a right of immediate possession of the antiquities; 2) if Iranian law was applicable to the acquisition/transfer of title to the antiquities. In the first question, having examined the domestic Iranian legislation, the High Court gave a negative answer. As regards the

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<sup>40</sup> Matthias Weller, 'Some Observations on the Application of Foreign Public Law by Domestic Courts from a Comparative Perspective', at 281-83.

<sup>41</sup> 'Public Law Claims Instituted by a Foreign Authority or a Foreign Public Body [Http://Www.Idi-il.Org/Idie/Resolutionse/1977\\_Oslo\\_01\\_En.Pdf](http://www.idi-il.org/Idie/Resolutionse/1977_Oslo_01_En.Pdf)', accessed March 2009.

<sup>42</sup> Compare: Weller, 'Some Observations on the Application of Foreign Public Law by Domestic Courts from a Comparative Perspective', at 283-295.

<sup>43</sup> See: Albert V. Dicey, John H. Morris, and Lawrence A. Collins, *Dicey, Morris and Collins on the Conflict of Laws* (14th edn., 1; London, 2006), no. 5R-019 - 5R-054, at 100-121.

<sup>44</sup> 'Attorney General of New Zealand v. Ortiz', (A.C. 1: C.A., 1984).

<sup>45</sup> 'Government of the Islamic Republic of Iran v. the Barakat Galleries Ltd', (E.W.H.C. 705 (Q.B.), 2007).

second, the court held that Iran was claiming the enforcement of its penal laws and that these as other public laws “may not be enforced directly or indirectly in the English Court.”<sup>46</sup> Consequently, the court’s answer to the second question was also negative and the claim was dismissed.

In December 2007, the Court of Appeal took a completely different approach.<sup>47</sup> Two preliminary issues were raised: 1) whether under the provisions of Iranian law Iran has obtained a title to the antiquities; 2) if Iran has obtained such a title, whether the court should recognize and/or enforce that title. In both questions the court judged in favor of Iran. It held that Iran has good title to the antiquities in question and classified the Iranian claim as a patrimony one, “not a claim to enforce a public law or to assert sovereign rights”.<sup>48</sup> The court made a clear distinction between the export restrictions and assessment of ownership. In doing this, it referred to the US precedent *United States of America v. Frederick Schulz*,<sup>49</sup> in which the Court of Appeals of the Second Circuit held in penal proceedings that the Egyptian law was an ownership law although some provisions were not explicit.

Consequently, the Court of Appeal expressed its opinion concerning the general question of the enforcement of foreign public laws on the protection of cultural heritage. It held that “there are positive reasons of policy” why claims brought by states to recover cultural objects based on public law should not be excluded *a priori* by the general principle of non-enforceability of foreign public laws in English courts. The court emphasized that “it is certainly contrary to public policy for such claims to be shut out”.<sup>50</sup> It invoked the provisions of the 1970 UNESCO Convention, the 1995 UNIDROIT Convention, Directive 93/7/EEC and other legal devices,<sup>51</sup> in particular with regard to the principle of international co-operation for the protection of the cultural heritage. The court explained that though “none of these instruments directly affects the outcome of this appeal”, they all “illustrate the international acceptance of the desirability of protection of the national heritage. A refusal to recognize the title of a foreign State, conferred by its law, to antiquities unless they had come into the possession of such State, would in most cases render it impossible for this country to recognize any claim by such a State to recover antiquities unlawfully exported to this country”.<sup>52</sup>

The judgment in *Iran v. the Barakat* arguably constitutes a breakthrough in English art law. One may expect that English courts will better recognize the validity of title to cultural objects under foreign patrimony laws, even if they are not explicit. It also seems that this decision paves the way for claims by states to enforce foreign public laws on the protection of cultural heritage. As the United Kingdom is home to the biggest art market in Europe, this new approach may have a tremendous impact on the international trade in cultural objects, in particular, portable antiquities.

## **5. Export controls v. patrimony laws**

It is clear that there is no agreement on common principles of the enforcement of foreign public law, in particular with regard to export restrictions. Moreover, art dealers and museum officials from market countries claim that giving effect to all export controls may lead to the reduction of the international movement of cultural objects only to the trade in contemporary art and museum exchange. It is postulated that states should limit protection to their ‘real’ national treasures and should

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<sup>46</sup> Ibid. at para. 81.

<sup>47</sup> 'Islamic Republic of Iran v. the Barakat Galleries Ltd.', (1374 E.W.C.A. (Civil Division) 2007). See also: Lawrance Collins (ed.) *Dicey, Morris and Collins on the Conflict of Laws*, (second supplement to the 14<sup>th</sup> edn.; London, 2008) no.5-040, at 9-10.

<sup>48</sup> Ibid. at para. 149.

<sup>49</sup> 'United States v. Friderick Schultz', (333 F.3d 393: 2d Cir, 2003).

<sup>50</sup> 'Islamic Republic of Iran v. the Barakat Galleries Ltd.', (December 2007) at para. 154.

<sup>51</sup> Ibid. at para. 155-62.

<sup>52</sup> Ibid. at para. 163.

not limit the international exchange in other cultural objects.<sup>53</sup>

Conversely, it has become evident that the claims for the return of illicitly trafficked cultural objects can be more effective if based on private title. It has been possible to observe some new liberal trends in the recognition of foreign patrimony law. This is due to few international criminal proceedings in the US courts, in which art dealers involved in trafficking in illegal cultural objects were sentenced and the items returned to state-owners. This tendency stems from two famous judgments: *United States v. Hollinshead*<sup>54</sup> and *United States v. McClain et al.*<sup>55</sup> involving the cross-border transfer of pre-Columbian artifacts. In both decisions, courts recognized the ownership rights of Guatemala and Mexico respectively, whose laws defined such objects as state property, and since they had been excavated, exported and commercialized unlawfully, they were also “stolen” under US legislation.<sup>56</sup> These judgments shocked the American art and antiquities world. Many authors argued that the so-called foreign blanket statements of state ownership could not be applied in the United States, as it was contrary to the principle of non-enforcement of foreign public law.<sup>57</sup> Moreover, the argument has also been raised that dealers in cultural objects might not know the foreign laws, especially since they tend to change very often. However, the US courts continued this liberal tendency in the following years.<sup>58</sup>

The judgements in the two famous cases *United States of America v. Frederick Schulz*, and *Iran v. Barakat* confirms this new tendency. Today, in many proceedings and negotiations of a private nature between the US public administration, US museum officials and source states (primarily Italy and Greece) the recognition of proprietary rights of foreign states to the illegally excavated and exported antiquities is not questioned. Obviously this causes vivid controversies among museum authorities and art dealers. Moreover, it may also affect domestic legislation - states may more eagerly enact patrimony laws rather than export or excavation regulations. This would lead to a criminalisation of any transfer of certain cultural objects, in particular antiquities, and one can argue that such policies could encourage the development of illegal traffic. It results that a certain compromise is needed since not all objects can be acquired by states. Therefore, the reconsideration of export restrictions is perhaps expected. Apparently, there have been some trends towards a liberalization of granting export licenses in recent years. These were caused by several judicial decisions which acknowledged the rights of owners to be fairly compensated in the case where an export permit is denied.<sup>59</sup> It seems that nowadays, states authorities have become more careful in balancing the public interest of retaining valuable cultural objects in the national territory with justified rights of private owners. It cannot be

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<sup>53</sup> Merryman, 'Cultural Property Internationalism', (11 et seq.), Katherine J. Hurst, 'The Empty(Ing) Museum: Why a 2001 Agreement between the United States and Italy Is Ineffective in Balancing the Interests of the Source Nation with the Benefits of Museum Display', *Art Antiquity and Law*, XI/1 (2006) at 55 et seq.

<sup>54</sup> 'United States v. Hollinshead', (495 F.2d 1154 9th Cir., 1974).

<sup>55</sup> 'United States v. McClain Et Al.', (545 F. 2d 988 5th Cir., 1977).

<sup>56</sup> See: Jennifer Anglim Kreder, 'The Choice between Civil and Criminal Remedies in Stolen Art Litigation', *Vanderbilt Journal of Transnational Law*, 38/4 (2006) at 1207-12.

<sup>57</sup> Merryman, 'Cultural Property Internationalism', (11 et seq.), Jordana Hughes, 'The Trend toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes', *George Washington International Law Review*, 33 (2000) at 131 et seq.

<sup>58</sup> See: Kavita Sharma, 'From the Mayan Machaquila Stele to Egyptian Pharaoh Amenhotep's Head: United States Court's Enforcement of Foreign National Patrimony Laws after United States V. Schultz', *Hastings Law Journal*, 56/4 (2005) at 749 et seq. Mark J. Petr, 'Trading Places: Illicit Antiquities, Foreign Cultural Patrimony Laws, and the U.S. National Stolen Property Act after United States v. Schultz', *Hastings International and Comparative Law Review*, 28/3 (2005) at 503 et seq.

<sup>59</sup> See in particular: 'Agent Judiciaire Du Tresor C. Walter', *A.J.D.A.* (Cour de Cassation., 1ere chambre civile, 1996), 459, 6 (1997) Timothy P. Ramier, Pp. 337-42, 'Agent Judiciaire Du Trésor V. Walter; Fait Du Prince and a King's Ransom', *International Journal of Cultural Property*, 6/2 (1997), 337-42, 'Beyeler v. Italy', (No 33202/96: E.C.H.R., 2000), <http://www.echr.coe.int>, Ignaz Seidl-Hohenveldern, 'Case Note. State Preemption of Foreign-Owned Painting and International Law', *International Journal of Cultural Property*, 10/1 (2001), 70-78.

excluded that such reasonable changes in national policies will contribute to a more fruitful dialogue between market and source countries in the sphere of regulation of the cross-border transfer of cultural objects.

## **6. Conclusions**

To sum up, one may claim that none of the postulates and expectations proposed by Prott has been fully realized in international practice. Although the concept of cultural heritage protection as a separate category of law is today widely accepted, it has arguably little impact on private international law. Furthermore, the thesis that a special regime for the movable cultural heritage would emerge on the grounds of private international law is very questionable. Broadly speaking, domestic rules on the transfer and protection of the cultural heritage are still barely enforceable in foreign tribunals. It is clear that states are reluctant to implement and execute existing international instruments in the field of cultural heritage protection. The consensus between market and source countries on the objectives of cultural heritage regulation will arguably not be reached in the near future. However, it seems that it was worth re-examining Prott's theses in light of the current developments of international practice and legal doctrine of private international law in respect of claims for illicitly trafficked cultural objects. It appears that there are some signals of new changes in this field of international law. Accordingly, the following conclusions can be drawn.

First, as a result of the international initiatives, a new conflict rule has been constructed - *lex originis* in respect of the transfer of title to cultural objects. Though this rule has not directly affected the cross-border movement of cultural objects, its principles have influenced some domestic legislation. In 2004, Belgium was the first jurisdiction to introduce the *lex originis* rule in respect of the recovery of illegally removed cultural objects in its recent codification of international private law. Arguably, this solution of the Belgian legislator opens a new chapter in the theory of private international law. However, it is impossible at this stage to evaluate its effectiveness in judicial practice.

Second, the recognition and application of foreign law on the protection of the movable cultural heritage constitutes a fundamental question for the regulation of the cross-border circulation of cultural objects in private international law. With regard to this, one has to differentiate claims by states based on public law and claims based on private law, in particular, the so-called patrimony laws which vest the ownership of certain cultural objects to a state. It seems that in international practice, foreign patrimony laws are more likely enforced by domestic courts than mere export restrictions. Such a trend, however, may lead to the criminalisation of any transfer of certain cultural objects and in the long-term may encourage the development of illegal traffic. Consequently, it seems that a more balanced approach - based on closer international co-operation is needed.

## **Facilitating the Restitution of Cultural Objects through Cooperation: The Case of the 2001 US-Italy Agreement and its Relevance for Mediterranean Countries**

**Alessandro Chechi\***

### **Abstract**

The problem of illicit trafficking in cultural property in the Mediterranean region is a vivid one. Recent lawsuits brought by Mediterranean art-rich countries against importing States, museums and art dealers around the world demonstrate the gravity of the problem. In this sense, neither national restrictive legislation nor multilateral treaties have proved to be adequate. Nevertheless, a number of States demonstrate to have taken seriously the need to curb the illicit movement of cultural property and to facilitate restitution. In effect, alternative methods to solving the clash of conflicting interests, policies and laws in a non-adversarial manner have been developed. This is the case of the bilateral treaties concluded by several source and market nations, of which the agreement entered into by the United States and Italy in 2001 constitutes an interesting example. This paper analyses the legal basis and effectiveness of this bilateral treaty, as well as the perspective of the United States, the primary sale site of the world, on the problem of the illicit trade on stolen or illegally exported cultural objects. This paper also intends to discuss whether the 2001 agreement may reduce the incentive for pillage and become an adequate model to foster cooperation among source and market nations. In particular, it discusses the relevant case-law to question whether bilateral treaties may serve to prevent disputes between States, individuals, art trade professionals and cultural institutions, and facilitate the restitution of cultural property.

### **Keywords**

bilateral agreements - cultural heritage - illicit trade - international cooperation – Italy - United States – restitution - UNESCO

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## 1. Introduction

The United States has entered into bilateral treaties with a number of States in order to balance the interests of art-rich countries with the benefits of museum preservation and display. Among these treaties is the agreement with Italy.<sup>1</sup> This agreement, which is among the broadest signed by the United States, aims principally to strengthen the partnership between the two countries in the fight against illicit trafficking in cultural objects and to foster their cultural dialogue.

This paper opens with a brief description of the nature and causes of the illicit trade in cultural materials and of the regime currently governing cultural heritage, devoting particular attention to the UNESCO Convention of 1970<sup>2</sup> (Sections 2 and 3). It then comments on the United States' approach to the problem of trade in stolen or illicitly removed artworks by describing the relevant US legislation and discussing the effectiveness of the US-Italy Agreement (Section 4). The paper then moves to describe the pro-active approach adopted by the Italian Government (Section 5) before offering a conclusion in Section 6. It intends to answer the question of whether the US-Italy Agreement and the deals that Italy has concluded with some of the most prominent US museums can constitute adequate models not only for fostering cooperation between source and market nations in the fight against illicit trade in cultural materials,<sup>3</sup> but also to avoid thorny restitution claims between States, individuals, art trade professionals, and cultural institutions.

## 2. The Illicit Trade

The problem of the illicit trafficking of stolen or illegally excavated cultural property is a vivid one. The looting of the National Museum of Baghdad in April 2003 and the consequent disappearance of many irreplaceable antiquities is a recent and powerful example. Recent figures indicate that all but 10,000 items have been returned to Iraq, but the mass media offers evidence that many cultural objects have found their way into the international art market.<sup>4</sup> Besides this well known example, it also is worth remembering that every year over 10,000 works of art are reported stolen around the world.<sup>5</sup> The US Federal Bureau of Investigation estimates that the market in stolen art is worth around \$5 billion.<sup>6</sup> Also impressive is the evidence revealing that in Peru 50 per cent of all known archaeological sites have been looted, whereas in Belize the figure is 73 per cent, and in South-West Niger almost 90 per cent.<sup>7</sup>

Mediterranean countries have not been spared from robbery or looting either. As a matter of fact, the

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<sup>1</sup> Agreement between the Government of the United States of America and the Government of the Republic of Italy concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, 19 January 2001, available at: <http://culturalheritage.state.gov/it01agr.html> (last visited on 11 March 2009).

<sup>2</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property, 17 November 1970, 823 UNTS 231.

<sup>3</sup> Professor Merryman, in his seminal article "Two Ways of Thinking about Cultural Property" (AJIL, 1986, p. 831 ff.), has properly depicted the tension dominating the debate with respect to moveable cultural property and dividing "source" nations (also called "art-rich" or "exporting" nations) and "market" nations (also called "importing" nations). According to the "nationalist" standpoint of source countries, cultural property belongs to a nation because it is an integral part of that nation's identity and history. Market countries, instead, underpin the "internationalist" approach, which emphasises mankind's common interest in cultural heritage and considers that works of art should be free to circulate notwithstanding their place of origin, property rights, and matters of jurisdiction.

<sup>4</sup> Crawford, "Looted Iraqi Artifacts 'Found in London'", *BBC News*, 7 November 2003.

<sup>5</sup> Ferentinou, "The Euphronios Vase Case – Could It Be an Example for Pergamon?", *Turkish Daily News*, 1 March 2006.

<sup>6</sup> Ibid.

<sup>7</sup> Brinkman, "Reflexions on the Causes of Illicit Traffic in Cultural Property and some Potential Cures", in Hoffman (ed.), *Art and Cultural Heritage*, 2006, p. 64 ff.

cultural heritage of Italy, Greece, Turkey, Egypt and of other countries bordering the Mediterranean Sea has been destroyed, looted, stolen, and vandalized throughout the centuries for the sake of European emperors and by antiquities thieves. In Italy, for instance, 100,000 Apulian graves have been destroyed, whereas it is estimated that tens of thousands of objects have disappeared from museums, castles, private collections and churches in the last 20 years.<sup>8</sup> The situation in Turkey is no better. Between 1993 and 1995 there were over 17,500 official police investigations into stolen antiquities. In Cyprus, archaeological sites and churches are being raided at an alarming rate. Churches have also been robbed in Bulgaria, where 5,000 icons disappeared in 1992 alone.<sup>9</sup> Greece has been equally bedevilled by antiquities thieves. It comes as no surprise, then, that an Athens news agency report states that there is hardly an area that has not been pillaged by thieves.<sup>10</sup>

Needless to say, these figures have attracted the world's attention to the widespread problem of trafficking in stolen cultural objects and to the importance of States' action – and cooperation – in safeguarding archaeological sites against mercenary excavation and theft. In addition, such evidence emphasises the need for museums to be actively involved in protection efforts, above all by re-examining their acquisition practices.

### 3. The Law and Illicit Trade

#### A. *National and International Efforts to Protect Cultural Heritage*

In response to the threats posed by illicit activities, source countries around the world have attempted to preserve the integrity of their cultural heritage through the enforcement of specific legislation. Although laws vary between countries, they tend to take two forms. First, there are laws which provide that ownership of certain categories of cultural objects or of cultural objects of a certain importance is vested *ipso iure* in the State. They are aimed at equating the removal of cultural objects to theft. Second, there are regulations prohibiting or restricting the export of cultural materials. The problem is that both types of laws do not have extraterritorial effect. This means that market nations are not obliged to enforce the export prohibitions of the countries of origin – though they are willing to return pieces that source nations consider stolen because they have been exported in contravention of domestic ownership statutes. Therefore, it is not surprising that despite the adoption of specific domestic measures illicit trading continues to thrive.

However, the problem of illicit trafficking must also be related to the inadequacy of domestic legislation. On the one hand, the patrimony statutes with which governments take the national cultural heritage into State ownership present the problem that they do not have retrospective effect. Thus, the materials removed from a State before the passing of a statute cannot be claimed as stolen. As the majority of material traded illicitly is removed illegally, and therefore secretly, it is very difficult to prove that it was removed after the enactment of a patrimony statute. On the other hand, export bans are often impossible to enforce because of their excessive breadth and stringency. No government can police every archaeological site in its country, nor can it monitor every border crossing to enforce export controls. Furthermore, cultural property laws often place daunting legal obstacles to the claims for the recovery of stolen or illegally exported works of art. For instance, disputants might have to meet defences such as those posed by limitation period bans<sup>11</sup> and by the domestic statutes that forbid museums to release artworks or that grant immunity from seizure to items on loan.

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<sup>8</sup> ICOM, *One Hundred Missing Objects. Looting in Europe*, 2000, pp. 30-31.

<sup>9</sup> Brodie, Doole, and Watson, *Stealing History: The Illicit Trade in Cultural Material*, 2000, p. 20 ff.

<sup>10</sup> Venizelos, "Speaking with Greece's Minister of Culture. Taking on the Black Market in Antiquities", *Archaeology*, 19 March 2002.

<sup>11</sup> All legal systems subject the starting of proceedings to certain time limits, after which no action is possible, and which may start from the time of the theft or from the discovery of the whereabouts and of the identity of the holder.

These problems are compounded by the lack of effective and enforceable international norms. The existing legal regime regarding moveable cultural heritage is dominated by two international instruments developed on the initiative of the United Nations Educational, Scientific and Cultural Organization (UNESCO). These are the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property*<sup>12</sup> and the *UNIDROIT Convention on Stolen or Illegal Export of Cultural Property* of 1995.<sup>13</sup> These multilateral treaties have been introduced by the international community to foster the enforcement of national ownership laws and of export regulations. These conventions are, in fact, based on the assumption that the chronic and widespread looting of cultural sites and illicit trade are the main causes of the impoverishment of the cultural heritage of source countries and that they should be prevented and suppressed through a concerted multilateral effort.

On the whole, however, these instruments are far from effective. The 1970 UNESCO Convention provides broad and ambiguous provisions and makes no reference to limitation periods. Detractors have stressed the limits of the restitution procedure, which applies only to cultural objects inventoried by museums or similar institutions, and which does not cover objects taken from unknown archaeological sites or stolen from private collections.<sup>14</sup> Another shortcoming is that it is a diplomatic rather than a legal instrument, so that requests for action have to proceed at the inter-governmental level. The 1995 UNIDROIT Convention sets uniform rules for the restitution of stolen cultural objects and for the return of illegally exported artefacts.<sup>15</sup> Article 3(1), in particular, contains an outright obligation to return any stolen cultural object, even if recovered in those systems of law which protect the good faith possessor. Moreover, it establishes that the *bona fide* purchaser will receive compensation following the return of a claimed artefact only if he or she has used the required diligence in acquiring the object.<sup>16</sup> For these reasons, the 1995 UNIDROIT Convention represents an advancement of paramount importance towards the harmonisation of national laws. However, due to its broader scope and stricter requirements, it has had limited success. Only 29 States have ratified it, most of which are source nations.<sup>17</sup>

## **B. International Cooperation under the 1970 UNESCO Convention**

As previously noted, the 1970 UNESCO Convention is the first multilateral treaty aimed at protecting cultural heritage by limiting the movement of works that had been illegally exported or stolen.<sup>18</sup> The main criticisms concerning this convention have already been described in the preceding section. What is worth mentioning here is that it mainly operates by imposing duties on States Parties. States Parties undertake to recognize offences which have been committed outside their territories and to take action to offset the damage resulting from such offences.<sup>19</sup> Moreover, the UNESCO Convention obliges Contracting States to set up specific administrative procedures and services for the protection of cultural objects,<sup>20</sup> to control exports through the introduction of a certification system,<sup>21</sup> to impose

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<sup>12</sup> See *supra* note 2.

<sup>13</sup> 24 June 1995, 34 ILM 1322.

<sup>14</sup> See Article 7(b)(i).

<sup>15</sup> Articles 3 and 5 respectively.

<sup>16</sup> Articles 4(4) and 6(2).

<sup>17</sup> Up-dated list is available at: <http://www.unidroit.org/english/implement/i-95.pdf> (last visited on 11 March 2009).

<sup>18</sup> The 1970 UNESCO Convention is heading towards universal participation: to date, it has been ratified by 116 States (up-dated list is available at: <http://erc.unesco.org/cp/convention.asp?KO=13039&language=E> (last visited on 11 March 2009)).

<sup>19</sup> Article 3 establishes that “*the import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit*”.

<sup>20</sup> Article 5.

penalties,<sup>22</sup> and to control the activities of art trade professionals.<sup>23</sup> However, in line with the current development of international law, the UNESCO Convention does not contain any general duty to secure the return of illegally removed antiquities. This is demonstrated by the narrow scope of application of Article 7(b)(i). As previously emphasised, it circumscribes the duty of return to cultural objects stolen from a limited range of sources, that is, “*from a museum or a religious or secular public monument or similar institution*” and “*provided that such property is documented as appertaining to the inventory of that institution*”. What is more, the obligation to return is conditional on the payment by the requesting State of “*just compensation*” to the innocent buyer or to any person who has valid title to the object.

In addition, under Article 7(a), Contracting States undertake to adopt the necessary measures to discourage domestic museums from acquiring cultural materials illegally exported after the Convention has entered into force in the States involved. In fact, the 1970 UNESCO Convention is not retroactive. Article 7(a) is reinforced by Article 9, which envisages enhanced cooperation in the event of a State Party’s cultural patrimony being in immediate danger of “*pillage of archaeological or ethnological material*”. States Parties are therefore obliged to collaborate with other State Parties in cases of major crises jeopardising their national heritage.<sup>24</sup>

#### **4. The United States’ Implementation of the 1970 UNESCO Convention**

##### **A. The Convention on Cultural Property Implementation Act**

The 1970 UNESCO Convention is not self-executing. Therefore, it requires States Parties to adopt appropriate legislative measures to fulfil its obligations. Contracting States have approached the execution of the Convention in a variety of ways. Many States have passed specific legislation. This is the case of the United States. Other States have not enacted any particular law for this purpose, ostensibly believing that the existing domestic legislation already fulfils their obligations under the Convention. This is the case of the United Kingdom.

The United States ratified the UNESCO Convention in 1972, but only in 1983 was the implementing legislation passed. This is the *Convention on Cultural Property Implementation Act (CPIA)*,<sup>25</sup> which allows the US to impose import restrictions on stolen and illegally exported archaeological or ethnological materials when so requested by another party to the UNESCO Convention. The CPIA, however, constitutes a limited ratification of the Convention, more precisely it only covers Articles 7 and 9.

As far as Article 7(a) is concerned, the CPIA circumscribes the duty to prevent the acquisition of illegally exported cultural property only to institutions whose acquisition policy is subject to national control under existing domestic law.<sup>26</sup> Article 7(b)(i) is reproduced in the CPIA. Thus, only the importations into the United States of stolen cultural objects that have been documented as part of the inventory of a museum or other public institution are prohibited. Designated materials may enter the United States only with documentation certifying that the exportation of such objects was not in violation of the laws of the country of origin, or verifiable documentation that the cultural materials left the exporting country prior to the effective date of the restriction. Undocumented objects are

(Contd.) \_\_\_\_\_

<sup>21</sup> Article 6.

<sup>22</sup> Article 8.

<sup>23</sup> Article 10(a).

<sup>24</sup> O’Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, 2000, p. 71 ff.

<sup>25</sup> 19 U.S.C. §§2601-2613.

<sup>26</sup> O’Keefe, *supra* note 24, p. 58.

subject to seizure and forfeiture.<sup>27</sup> In relation to this, it is important to note that prior to the enactment of the CPIA the US had never authorized the seizure and repatriation of cultural property merely because the exportation from another country violated that country's laws. The only statute that covered the handling of stolen property was the *National Stolen Property Act* of 1948 (NSPA). Under certain conditions, this federal criminal statute empowered the US to seize and return to the rightful owner cultural goods known to be stolen at the time of import.<sup>28</sup>

The implementation of Article 7(b)(ii) UNESCO Convention, which commands the payment of “*just compensation*” to the “*innocent purchaser*”, constituted a substantial problem for the United States. Such a provision contrasted with the common law principle *nemo dat quod non habet*, according to which the mere fact that a person acquires a stolen object in good faith does not extinguish the title of the true owner, and does not give the purchaser either a valid title, or the right to receive compensation. The US clarified this issue with an “understanding” accompanying the ratification of the Convention, according to which the United States is prepared to return stolen cultural materials under Article 7(b)(ii) without paying compensation “*except to the extent required by the Constitution of the United States, for those States Parties that agree to do the same for the US institutions*”.<sup>29</sup>

As for Article 9, it should be made clear that the CPIA does not allow the United States to automatically enforce foreign export laws.<sup>30</sup> In other words, the art-rich countries that are party to the UNESCO Convention do not obtain blanket import restrictions covering all their cultural objects by simply claiming that their cultural patrimony is endangered by pillage. Import restrictions are imposed only with respect to State Parties with whom the US has signed bilateral agreements (also referred to as memorandums of understanding) concerning designated materials, and only if the requesting State can show that its cultural heritage is in danger.<sup>31</sup> Restrictions also apply to such designated materials even if they are imported from a country other than that of origin.

Many commentators have criticized the CPIA on various grounds, most notably because it does not implement some key provisions of the 1970 UNESCO Convention, such as Article 6.<sup>32</sup> This is due to the fact that the CPIA focuses on the import aspect of the Convention and does not contain export restrictions. Moreover, it has been pointed out that the United States' interpretation of the UNESCO Convention has reduced the latter to an “agreement to agree”. In other words, the Convention is understood merely as an instrument to encourage States Parties to cooperate and conclude agreements with the United States. The effect of the agreements concluded in accordance with the CPIA is, however, important, as border control agents are now empowered to confiscate cultural materials whose importation violates the export restrictions of other States Parties.<sup>33</sup> The question that arises, however, is whether the United States' implementing legislation is compatible with the object and purpose of the Convention. Thus far, apart from Mexico, no other Parties to the Convention have lodged objections. Presumably this is due to the fact that, even though the CPIA is to some extent inadequate, it nonetheless represents a substantial commitment of the United States to halt the flow of

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<sup>27</sup> 19 U.S.C. §§2606, 2607, and 2609.

<sup>28</sup> See *US v. Schultz* (2003, US App. LEXIS 12834.) and the cases leading up to it (*US v. Hollinshead*, *US v. McClain*, *Government of Peru v. Johnson*, *US v. Pre-Columbian Artifacts*, and *US v. An Antique Platter of Gold*). Such case-law confirms that the antiquities that are stolen in a foreign country are considered stolen after their importation into the US, thereby recognizing that, regardless of whether the source State has possession, or even knowledge, of the object prior to its theft and illicit exportation, a valid property interest is created by the applicable national patrimony law that satisfies the NSPA's definition of “stolen”, in line with the so-called “McClain doctrine”.

<sup>29</sup> O'Keefe, *supra* note 24, p. 107.

<sup>30</sup> Hoffman, “International Art Transactions and the Resolution of Art and Cultural Property Disputes: A United States Perspective”, in Hoffman (ed.), *Art and Cultural Heritage*, 2006, p. 159 ff.

<sup>31</sup> 19 U.S.C. §2602.

<sup>32</sup> See *supra* note 21 and related text.

<sup>33</sup> O'Keefe, *supra* note 24, p. 110.

illegally removed antiquities.<sup>34</sup>

### ***B. Bilateral Agreements under the CPIA***

The Cultural Property Advisory Committee (CPAC) is responsible for reviewing the requests for import bans in accordance with Article 9 of the 1970 UNESCO Convention. In particular, the CPAC must establish: “(A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party; (B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony; (C) that (i) the application of the import restrictions [...] would be of substantial benefit in deterring a serious situation of pillage [...]; and (D) that the application of the import restrictions [...] is consistent with the general interest of the international community [...]”. The CPAC then recommends action regarding the request for import bans to the US Department of State, which, if appropriate, may enter into a bilateral agreement with the requesting State.<sup>35</sup>

Bilateral agreements last for a maximum of five years, are renewable indefinitely as long as the conditions requested by the CPIA are fulfilled, and apply only to designated cultural materials. The first agreement was signed in 1987 when the CPIA was invoked to bar imports of pre-Hispanic objects from the *Cara Sucia* region of El Salvador. Bilateral agreements were then reached with, among others, Bolivia, Peru, Guatemala, Mali, Cambodia, Cyprus, and China.<sup>36</sup> Most importantly, these agreements have led to a considerable decline in the illicit export of cultural objects.<sup>37</sup>

### ***C. The Agreement between the United States and Italy***

In September 1999 the Italian Government submitted a request to the United States under the CPIA to enact import restrictions on a range of antiquities. The request was submitted as a consequence of alarming reports documenting that the archaeological heritage of Italy was being pillaged to meet the international demand for archaeological and ethnological artefacts.<sup>38</sup> As a consequence, in 2001 the United States and Italy signed an agreement concerning the imposition of import restrictions to materials representing the pre-Classical, Classical, and Imperial Roman periods of Italian cultural heritage, ranging in date from approximately the ninth century B.C. to approximately the fourth century A.D.<sup>39</sup> Such material can enter the United States only if accompanied by an export permit issued by the Italian Government, or by verifiable documentation demonstrating that the exportation occurred prior to 19 January 2001.<sup>40</sup> In exchange, the Italian Government commits itself to increasing scientific research and protection for archaeological sites, to imposing stricter punishment for looters, to developing tax incentives to support legitimate excavations, and to strengthening cooperation with States of the Mediterranean region and with other art-importing countries.<sup>41</sup> Significantly, Article II(E) of the Agreement establishes that “*Italy permits the interchange of archaeological materials for cultural, exhibition, educational and scientific purposes*” through “*agreements for long-term loans of objects of archaeological or artistic interest [...] for research and education, agreed upon, on a case*

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<sup>34</sup> *Ibid.*, p. 26.

<sup>35</sup> 19 U.S.C. §2602.

<sup>36</sup> Up-date list of current and expired import restrictions is available at: <http://culturalheritage.state.gov/chart.html> (last visited on 11 March 2008).

<sup>37</sup> Brinkman, *The Causes of Illicit Traffic in Cultural Property*, 2002.

<sup>38</sup> Hurst, “The Empty(ing) Museum”, *Art, Antiquity and Law*, 2006, p. 55 ff.

<sup>39</sup> See *supra* note 1.

<sup>40</sup> Article I.

<sup>41</sup> See Article II(B)(C) and (D) respectively.

*by case basis, by American and Italian museums [...]*".

#### **D. An Appraisal**

The CPIA and the US-Italy Agreement constitute positive signs. They can be seen as the contribution of the United States to the international campaign to curb the illicit trafficking in antiquities. They also indicate that inter-State cooperation to combat looting can work and may help, if not in preventing the looting and smuggling, at least to ensure the return of designated antiquities to the States of origin.

In particular, the US-Italy Agreement offers concrete incentives for both sides. First, it offers the opportunity to engage in a partnership to help protect the Italian cultural heritage and to repatriate cultural materials, and to fight the looting and the illegal market for smuggled and stolen cultural objects. Second, it promises to enrich American cultural life through research, educational programs and loans.<sup>42</sup> Third, it might generate information and public interest in the gravity of the problem of archaeological looting not just in Italy but also the entire world. Fourth, the agreement might encourage US museums to change their acquisition policies and to trade only in documented objects. Fifth, as the appearance in the United States of stolen or illegally exported artefacts in some cases has strained its relations with the countries of origin, the conclusion of bilateral agreements represents an important diplomatic tool for the US with a view to maintaining good relations and to rendering assistance to friendly countries.<sup>43</sup> Finally, the 2001 Agreement may serve as a model to stimulate art-rich countries to take action towards improving the protection and management of their cultural heritage. The provisions on long-term loans might, in fact, enable source nations to transform their cultural heritage into an economic resource, which, in turn, could contribute not only to promoting knowledge of local cultures and developing cultural tourism, but also to financing national services concerning protection and conservation. However, these legal instruments are not without defects.

The 2001 Agreement has been criticized because: (i) loans are limited to a one-year loan period;<sup>44</sup> (ii) the US and Italian Governments have not committed themselves to financing the high costs of exhibits; (iii) it has no provision granting immunity from seizure to the Italian antiquities already in American museums which, therefore, cannot be loaned to Italy;<sup>45</sup> and (iv) it does not provide any norm pertaining to the settlement of disputes concerning its application and interpretation. It is unfortunate that these criticisms were not taken into account in 2006, when the US and Italian Governments agreed to extend the Agreement until 19 January 2011. The only significant amendment concerned Article II(C). It now contains more detailed obligations for the Italian Government, which is required to "[...] *continue its efforts to: 1. ensure the prompt prosecution of looters; 2. stop the illicit use of metal detectors in archaeological areas; 3. enhance training for the Carabinieri Special Unit for the Protection of Artistic Patrimony; and 4. create and pursue innovative and effective ways to detect and stop the looting of archaeological sites*".

The CPIA has been criticized because of its narrow perspective. Due to the conditions required by it, only a small number of source countries have been deemed eligible for entering into bilateral agreements, which, in turn, normally covers a limited range of cultural assets.<sup>46</sup> Going further, it is worth noticing that the CPIA empowers the CPAC to determine when a particular cultural patrimony

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<sup>42</sup> Hurst, *supra* note 38.

<sup>43</sup> See Senate Report No. 97-564 on Implementing Legislation for the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Cultural Property, available at: <http://culturalheritage.state.gov/97-564.html> (last visited on 11 March 2009).

<sup>44</sup> See Guidelines, Loans of Archaeological Material Under the 2001 US-Italy Memorandum of Understanding.

<sup>45</sup> Hurst, *supra* note 38, p. 74 ff.

<sup>46</sup> Sometimes the category of material restricted is quite specific, as in the case of the Bolivian ceremonial textiles, sometimes it is quite broad, as in the case of the – expired – Canadian agreement.

is in jeopardy and, thus, if import restrictions can be imposed in favour of the foreign country which has requested assistance under the CPIA. One can only hope that the assessment of the actual state of danger is conducted objectively and not with a view to reflecting the general US support for the international trade of art. Moreover, any State seeking emergency restrictions under the CPIA faces considerable obstacles. For instance, while a State like Canada may have the resources to quickly provide the necessary information in support of the request for import bans, many developing States lack the personnel and the facilities to do so in emergency situations.<sup>47</sup>

## 5. The Italian Approach: Fostering Cooperation to Curb Illicit Activities and to Prompt Repatriation

### A. Promoting “Cultural Diplomacy”

As emphasised above, the – renewed – Agreement between the United States and Italy represents – despite its flaws – an important step towards strengthening the partnership between the two countries in the fight against illicit trafficking in cultural objects and towards fostering their cultural dialogue. It can also be considered as the manifestation of the United States’ activism in fighting the plague that affects many source countries around the world. In this respect, Dr. Finn, Acting Assistant Secretary of State for Educational and Cultural Affairs who signed the 2001 Agreement on behalf of the United States, affirmed that “[t]he bilateral accord represents one way of expressing our respect for the gravity of the problem of archaeological looting, which [...] continues to cause destruction and loss at many national monuments [...]. Italy is one of the world’s cultural treasures, and it behoves us all to safeguard it”.<sup>48</sup>

The agreement under consideration, however, must be seen from the Italian perspective as well. Italy is certainly a world power in terms of cultural heritage, thanks to its 5 million catalogued artworks, 100,000 churches, 20,000 historic towns, 45,000 castles and gardens, 2,000 archaeological sites, and 3,500 museums.<sup>49</sup> Moreover, 41 Italian sites are inscribed in the UNESCO World Heritage List. Italy has also demonstrated itself to be one of the most active source nations by promptly ratifying all the relevant conventions concerning movable and immovable cultural heritage. In spite of this, a relaxed *laissez-faire* approach prevailed in Italy from the 1950s to the 1990s. During this period, tomb robbers, traffickers, and unscrupulous dealers worked in relative tranquillity, causing the widespread looting of known and clandestine archaeological sites and the dispersion of countless works of art. At the same time, authorities ignored such trafficking in the belief that cultural objects were better off in foreign museums. The latter, in turn, were not rigorous in checking the provenance of art.

Today, in contrast, the national heritage is perceived as a fundamental resource that needs to be protected and treasured. Consequently, clandestine looting and illicit trade are perceived as crimes that ought to be curbed and prevented through a more pro-active policy. This is the reason why the Italian Government has cooperated with the United States with a view to concluding the above agreement.<sup>50</sup> Such an initiative is based on the awareness that existing settlement mechanisms present significant limits and that, consequently, new methods have to be used to reconcile in a non-adversarial manner the conflicting interests, policies and laws. In this respect, Italy is currently pursuing a campaign to stem the plunder of archaeological sites and to obtain the restitution of cultural materials that combines law, diplomacy, professional ethics, and moral persuasion bolstered by a news media

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<sup>47</sup> O’Keefe, *supra* note 24, p. 112.

<sup>48</sup> See: <http://culturalheritage.state.gov/itfact.html> (last visited on 11 March 2009).

<sup>49</sup> Proietti (ed.), *L’eccellenza del restauro italiano nel mondo*, Roma 2005, p. 1.

<sup>50</sup> In 2006 Italy entered into bilateral agreements also with Switzerland and China. The treaties are available at: [www.riobeniculturali.it/index.php?it/129/furti-scavi-illeciti-importazione-ed-esportazione-illegale](http://www.riobeniculturali.it/index.php?it/129/furti-scavi-illeciti-importazione-ed-esportazione-illegale) (last visited on 11 March 2009).

campaign. In particular, Italy's strategy aims to: (i) invite counterparts (either States or museums) to give consideration to requests of restitution of cultural objects on the basis of ethical and extra-judicial principles rather than through the enforcement of international and national norms; (ii) emphasise the importance of the underlying principles and objectives of existing international conventions; (iii) punish thieves, tomb robbers, and reckless art professionals; (vi) advocate the idea that in the global art market the acquisition of cultural property that has been either stolen, illegally confiscated, illegally exported from the country of origin or otherwise wrongfully expropriated, should not be legitimized.

The structure and objectives of the US-Italy Agreement clearly reflect this new commitment against illicit activities. Such a firm strategy is also mirrored in the agreements concluded between 2006 and 2007 by the Italian Government and the Boston Museum of Fine Arts, the New York Metropolitan Museum of Art, the J. Paul Getty Museum, and Princeton University Art Museum. The agreement concluded on 25 September 2007 by the Italian Ministry of Culture and the Getty Museum is particularly important because it constitutes the culmination of long and contentious negotiations. Thus, it is not surprising that the Italian Minister of Culture celebrated the deal emphasising that it marks the opening of a new era of cultural cooperation as part of the international effort to thwart the illicit trade in antiquities and to force cultural institutions to turn over works with a nefarious past. He also paid tribute to the mediation strategy pursued by Italy, which he defined as the leader of "*cultural diplomacy*".<sup>51</sup> He pointed out that, thanks to this intransigence, illegal digging activity has fallen sharply in Italy,<sup>52</sup> and that the bilateral accords concluded with the US museums will make life more difficult for unethical art dealers.<sup>53</sup> All in all, these recent inter-institutional agreements can be seen as out-of-court settlements with which Italy and the museums concerned have: (i) transferred the legal title of and returned a number of items in relation to which the Italian negotiators presented evidence of their illicit provenance; (ii) established a continuing program of cultural cooperation involving reciprocal loans of works of art of great significance; (iii) agreed to share information about (potential) future acquisitions of Italian antiquities, and to cooperate in the areas of scholarship, conservation and archaeological investigation. In sum, these accords constitute two-way deals that help to foster cooperation and not simply restitution. The museums that return stolen works, in fact, receive on loan for several years, antiquities that are equally important, so that their showcases do not go empty.

However, one could argue that the four US museums were disposed (if not forced) to negotiate not as a consequence of the effectiveness of Italian pressure but because of the evidence emerging in the criminal trial currently pending before the Tribunale di Roma against Marion True, the Getty's former antiquities curator, who is facing charges of conspiring to traffick in looted art. Much of the evidence in the case relates to a 1995 raid on the warehousing facility of Giacomo Medici<sup>54</sup> in the Geneva Freeport, in which investigators seized smuggled ancient artworks and some 4,000 to 5,000 Polaroids and negatives of looted archaeological objects that allowed them to be traced to the premises of various museums, including the Getty, Metropolitan, Boston, and Princeton museums. Notably, through the photographic and documentary evidence seized in Geneva, Italian authorities are currently negotiating with other foreign museums that are reported to have acquired antiquities through the same intricate web of relationships between tomb robbers and dealers in Italy and abroad. These museums are the Leiden-based National Museum of Antiquities, the New Carlsberg Glyptotek in Copenhagen,

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<sup>51</sup> "Rutelli Speaks", *Time*, 2 October 2007. Francesco Rutelli, the Italian Minister of Culture, used a page of *The Wall Street Journal* to present his side of why the Getty talks stalled in 2006. In addition, Italian officials have generously shared information with journalists that several US museums first learned that Italy was targeting pieces in their collections because they got calls from American reporters.

<sup>52</sup> According to statistics from the Carabinieri Cultural Heritage Protection Office the recovery of archaeological artefacts from clandestine digs has declined 90% since the signing of the 2001 Agreement. See at: <http://www.savingantiquities.org/i-safe-mouitalyinfo.php#effective> (last visited on 11 March 2009).

<sup>53</sup> Israeli, "The Museum World's Italian Sheriff", *Time Magazine*, 5 October 2007.

<sup>54</sup> Giacomo Medici was an antiquities dealer who was arrested in 1997 and found guilty of dealing in stolen goods in 2004. Medici was sentenced to 10 years in jail and fined 10 million euro, but remains free pending his appeal.

the Cleveland Museum of Art, the Toledo Museum of Art, the Minneapolis Institute of Arts, the Miho Museum in Shiga, the Antikensammlung in Munich, the Barbara and Lawrence Fleishman collection, the Maurice Tempelman collection, dealer Fritz Bürki, Galerie Nefer, and Atlantis Antiquities.<sup>55</sup>

The same strong strategy has been endorsed by other art-rich nations, including States from the Mediterranean region. It is not possible, within the limited space of this essay, to provide a complete account of the bilateral agreements and examples of voluntary restitution offered by the practice. However, it is worth mentioning the agreements concluded in 1995 and 2006 between the Getty Museum and Turkey and Greece respectively,<sup>56</sup> and the out-of-court settlements that followed the disputes between Greece and the Ward Gallery in New York,<sup>57</sup> and Turkey and the Metropolitan Museum of Art.<sup>58</sup> Unfortunately, there are also examples of museums rebuffing restitution claims. This is the case of the Boston Museum of Fine Arts, which refuses to release the upper half of the “Weary Herakles” to Turkey, where the claimed item was excavated and where the lower half is on display. The museum argues that there is no evidence showing that the statue was illicitly removed from Turkey.<sup>59</sup> Similarly, the St. Louis Museum of Art opposes Egyptian requests concerning the repatriation of a rare 3,200-year-old burial mask, allegedly stolen in the 1980s. The museum contends that it was acquired legally and that there is no evidence that it was stolen.<sup>60</sup>

### **B. The Role of Domestic Courts in the Repatriation of Cultural Property**

As part of the same strategy, Italy has made its own acts of restitution. These have favoured not only the countries that had their own treasures looted by Italians, as in the case of the restitution of the Axum obelisk to Ethiopia, which was taken in 1937 on the orders of Fascist dictator Benito Mussolini and repatriated in 2005, but also the countries of origin of stolen assets that have been recovered in Italy, as proved by the restitution of antiquities to Pakistan and Iran. Notably, at the press briefing celebrating the restitution to Iran, the Italian Minister of Culture seized the occasion to point out that both claiming the restitution of and returning stolen or smuggled cultural property amount to moral and scientific duties and, moreover, that the coherence and integrity of Italian policy *vis-à-vis* clandestine excavation and illicit trafficking will bring about radical changes in the art trade.<sup>61</sup> In relation to this, it is worth considering the ongoing legal battle regarding the “Venus of Cyrene”, as it reveals that Italian courts seem prepared to endorse the cultural policy pursued by the Italian Government.

In short, this case concerns a headless marble sculpture of the goddess Venus which was found by Italian troops in 1913 in the Ancient Greek settlement of Cyrene. Libyan authorities first requested the restitution of the statue in 1989. Negotiations followed, culminating in a Joint Declaration (1998) and an *ad hoc* agreement (2000). On 1 August 2002 the Italian Ministry of Cultural Heritage passed a decree to implement such accords. The decree acknowledged that Italy no longer had any interest in owning the statue and authorized its removal from the State patrimony. Shortly afterwards, the Italian non-governmental organisation Italia Nostra filed a lawsuit against the Italian Ministry of Culture for the annulment of the ministerial decree and to impede the restitution of the statue on the grounds that it

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<sup>55</sup> The same evidence has convinced well-known collectors to return valuable artefacts, even without the formal request of the Italian authorities. This is the case of the recent restitutions by Shelby White, a prominent US art collector, and Jerome Eisenberg of the Royal Athena Galleries.

<sup>56</sup> Brodie, Doole, and Watson, *supra* note 9, p. 54.

<sup>57</sup> *Ibid.*, p. 32.

<sup>58</sup> The Republic of Turkey v. The Metropolitan Museum of Art (1993) 14 IFAR (the Lydian Hoard case).

<sup>59</sup> Brodie, Doole, and Watson, *supra* note 9, p. 31.

<sup>60</sup> Kaufman, “‘This mask is ours’ says St Louis Art Museum”, *Art Newspaper*, No. 170, 5 June 2006.

<sup>61</sup> See *supra* note 51.

is inalienable because it is part of the patrimony of the State.

The *Tribunale Amministrativo Regionale (TAR) del Lazio*, in its decision of 28 February 2007, upheld the ministerial decree and the legitimacy of the act of restitution.<sup>62</sup> It is not possible, within the limited space of this essay, to embark on a thorough analysis of the judgment. Rather, it suffices to focus on the main conclusions of the Tribunal. This allows us to realise that, although the verdict is laudable, some of its premises are flawed. First, the TAR stressed that the statue does not belong to the Italian cultural heritage because the area where it was found was not under Italian sovereignty in 1913 (i.e. the period relevant to the facts of the case). This holding, however, is inaccurate because the Kingdom of Italy established its sovereignty over Cyrenaica on 18 October 1912 with the Treaty of Ouchy concluded with the Ottoman Turks and not, as assumed by the Tribunal, with the Treaty of Lausanne of 1923. Second, the TAR stated that the duty to return the Venus derives primarily from the bilateral agreements concluded by Italy and Libya in 1998 and 2000. Notably, the Tribunal held that these agreements were binding and that they reiterated international obligations already incumbent upon the Italian State. In particular, the TAR referred to the rules embodied in the Regulations annexed to the Hague Conventions Respecting the Laws and Customs of War on Land of 1899 and 1907 (respectively Articles 56 and 46),<sup>63</sup> to the peace treaties concluded after the First World War, and to the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 1978 (Article 15).<sup>64</sup> In the Tribunal's view, these rules justified the legitimacy of the ministerial decree of 2002 and precluded the application of the burdensome domestic norms regulating the circulation of cultural objects and the prescription of ownership title. These findings are also misconceived. The agreements of 1998 and 2000, far from being binding treaties, are mere "minute agreements" articulating the political and diplomatic commitments undertaken by the two States in order to disentangle the issues that were not settled after the end of the Italian colonization in 1943. Further, the reference to the Hague Conventions and to the Vienna Convention raises some doubts. On the one hand, as the Venus was found under Italian colonial rule (and not looted during military occupation), it is not possible to invoke the provisions of the Hague Conventions given that there was not a condition of *occupatio*. On the other hand, the reference to the Vienna Convention seems redundant because it is silent on the issue of State succession to movable cultural objects.

In spite of this, the Tribunal did not err in ruling that Italy is obliged to return the Venus. The decision is certainly consistent with the practice that has progressively developed over the past 200 years indicating that States are obliged to return cultural materials taken wrongfully in times of war, colonial occupation, or as a result of other relations of violence. The verdict is also in line with the commitment to "*strengthen cooperation among nations within the Mediterranean Region*" that the Italian Government has accepted with the above mentioned US-Italy Agreement.<sup>65</sup> However, it may be questioned what the real objectives of the TAR were. In particular, it may be questioned whether the decision to exclude the application of the relevant provisions of domestic law and, in turn, to justify the act of restitution on the basis of international agreements and international law principles was deliberately tailored – even at the cost of rendering a perplexing ruling – to strengthen the emerging general consensus regarding the prevention of dispersion and destruction of cultural heritage, and to contribute to the success of the campaign pursued by the Italian Government. In this respect it is

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<sup>62</sup> *Associazione Nazionale Italia Nostra Onlus c. Ministero per i Beni e le Attività Culturali*, decision No. 3518 of 28 February 2007, reproduced in Guida al diritto-II Sole 24 ore, No. 21, p. 91 ff. The plaintiff appealed the judgment before the Consiglio di Stato.

<sup>63</sup> Regulations annexed to *Hague Convention (II) with respect to the Laws and Customs of War on Land* (Article 56), 29 July 1899 (entered into force 4 September 1900), AJIL, 1907, p. 66; and Regulations annexed to *Hague Convention (IV) respecting the Laws and Customs of War on Land* (Article 46), 18 October 1907 (entered into force 26 January 1910), AJIL, 1908, p. 165..

<sup>64</sup> 8 April 1983, 22 ILM 306.

<sup>65</sup> Article II(D).

interesting to note that with the decision under consideration the TAR rebutted the claimant's contention that Libya does not constitute the proper cultural context for the Venus by emphasising the historical links between the ancient Roman Empire and the Libyan territory, and that restitution would lead to the relocation of the Venus in its original context. Crucially, the Tribunal pointed out that the restitution of the statue, rather than leading to the impoverishment of the national heritage, would permit the Italian Government to set an important precedent in strengthening the campaign pursued internationally for the recovery of unlawfully-removed art objects.

## **6. Conclusion**

A new global approach to the problem of cultural heritage protection is materializing. Today the archetypal interest in the protection of cultural objects from illicit activities is combined with a growing cooperation that is aimed at ensuring the proper allocation of works of art on the basis of educational, historic, scientific, and cultural needs. This new approach is based on the assumption that illicit trade cannot be tolerated any further because of the loss, destruction and desecration that it causes.

This paper has focused on the agreements of cooperation concluded between the Italian Government and the United States and with some prominent US museums. It has served to discuss the motivations and perspectives of the United States and the multifaceted strategy undertaken by the Italian Government. Accordingly, it has demonstrated that the fight to recover stolen or looted cultural objects is not in vain and that a pattern of restitution has been established despite the shortcomings of the existing domestic and international legal instruments. Finally, this paper has proposed considering the Italian strategy as an authoritative precedent which might facilitate the conclusion of more such arrangements between source and market nations, on the one hand, and between art-rich countries and museums, on the other.

However, although the Italian Minister of Culture may be right in affirming that the Italian strategy is bringing about an epochal change, it is yet to be seen whether such a strategy will convince museums and collectors to change their acquisition policies when substantial proof is not available. After all, the success of the Italian mediation campaign largely derives from the substantial evidence of the illicit provenance of the contested items. In fact, it seems fair to say that ultimately, the looting and illicit trafficking in cultural materials will only stop when collectors, museums and dealers refuse to buy unprovenanced objects. No matter what protective measures are put in place, whether draconian or liberal, they will be circumvented if a demand is created by a purchaser with few scruples. Thus, it remains to be seen whether the example set by the US museums with which Italy concluded the discussed agreements of cooperation will be followed. Will the Louvre, the British Museum, and the Pergamon begin to reconsider the legitimacy as well as the ethics of their acquisition policies? Will they respond with transparency to the requests of source nations? Will they put aside the obstinacy with which they rely on their property rights?

Therefore, although a restitution pattern is somehow developing, the above considerations indicate that the solution to the problem of illicit trade does not only reside in the cooperation among States and museums. Rather, protection of sites, churches and museums, documentation, codes of ethics, education and awareness-raising, investigation by special squads, and the application of ordinary domestic procedures and criminal laws to punish thieves, traffickers, and art trade professionals, are all important. The cooperative approach described above constitutes an important development in overcoming the inadequacies of the existing legal framework. But such an approach cannot but complement national criminal laws, civil regulations, and international treaties. Arguably, it could also permit national officials, art dealers, museums administrators, lawyers, and academic alike to engage in a constructive dialogue in order to contribute to the reform of certain detrimental day-to-day practices of the actors in the art trade and of the existing legal framework, and to facilitate the prevention and settlement of art disputes.

## **Postscript**

With decision of 23 June 2008, the *Consiglio di Stato* (i.e. the Italian supreme administrative tribunal) rejected the appeal of Italia Nostra.<sup>66</sup> As a result, the Venus returned to Cyrene in August 2008. The Court upheld the judgment of the lower court by dismissing the arguments that the statue had been discovered on territory subject to Italian sovereignty and, accordingly, that the statue was part of the inalienable patrimony of the State. The *Consiglio di Stato* went on to affirm that the obligation imposing the restitution of the Venus derived from well-established principles of customary international law that were part of Italian law by virtue of Article 10 of the Constitution.<sup>67</sup> Therefore, the obligation in point had to be observed irrespective of the ratification by Italy and Libya of the 1983 Vienna Convention, and of the materialization of the condition of military occupation to trigger the coming into play of the law of armed conflicts. In particular, the Court ruled that this autonomous customary principle mandating the restitution of cultural objects was a corollary of the interplay between two principles of general international law, namely the principle prohibiting the use of force and the principle of the self-determination of peoples. The Supreme Court highlighted the link between these principles and the objective of cultural heritage protection by explaining that the right to self-determination has come to include the right to protect both the cultural identity and the material cultural heritage linked either to the territory of a sovereign State or to peoples subject to a foreign government. Consequently, the restitution of artworks is dictated by the safeguarding of such cultural ties whenever these have been jeopardized or wiped out by acts of war or the use of force during colonial domination.

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<sup>66</sup> Associazione nazionale Italia Nostra Onlus c. Ministero per i Beni e le Attività Culturali et al., decision No. 3154, 23 June 2008.

<sup>67</sup> This norm provides for the automatic incorporation of customary international law into the Italian legal system.

# **Beyond Restitution: An Interest-oriented Approach to International Cultural Heritage Law**

**Robert Peters\***

## **Abstract**

This article focuses on two recent instances of restitution of cultural objects in the Mediterranean: the return of the Axum obelisk to Ethiopia by Italy in 2005 and the return of more than sixty artifacts from US museums to Italy in 2007. On the basis of these cases, the article describes bilateral agreements among states as well as between private actors and states, and discusses the problem of unequal bargaining power in restitution disputes. It then proposes an interest-oriented approach which attempts to strike a balance between the interests of the various stakeholders in restitution disputes without neglecting the preservation of and access to cultural objects. This approach may facilitate alternatives which could overcome current obstacles in restitution disputes, enhance the protection and preservation of cultural heritage, and prevent its loss and dispersion.

## **Keywords**

restitution disputes - alternative approach - bilateral agreements - preservation and access - bargaining power

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## 1. Introduction

National export regulations are generally considered the main tool for controlling the illicit trade in cultural objects, as confirmed by international conventions such as the 1970 UNESCO Convention<sup>1</sup> and the 1995 UNIDROIT Convention.<sup>2</sup> However, especially in culture-rich areas such as the Mediterranean, the illicit trade in cultural objects continues at a steady pace. Claims for restitution and return, like national export regulations, have traditionally been based on the assumption that what has been found within a state's national borders inevitably belongs to its national heritage. Despite the fact that modern state borders were mainly drawn in the 19<sup>th</sup> century and do not often correspond to the boundaries of the ancient civilizations that produced cultural objects, the territorial assumption gives rise to notions such as 'national cultural heritage' and 'national cultural patrimony'. These notions, in turn, lead to a strong sense of entitlement and an unwillingness to compromise in cultural property disputes and undermine the spirit of cooperation on both sides.<sup>3</sup> Although international law is thus still mainly driven by the interests of states and their 'national cultural patrimony', other stakeholders, including indigenous and ethnic minority groups, scientific communities and individuals have succeeded in claiming restitution in recent decades. Broader concepts such as 'common heritage of mankind' and 'common concern' have evolved in international law, even defining the international community as a stakeholder in international cultural heritage law. Despite the intensity of the interests of these various stakeholders and the highly emotional character of the restitution debate, little analysis has been undertaken based on these new concepts in search of alternative approaches to restitution. It is thus time to reconsider the idea of restitution in international law and to develop an approach that goes beyond the simple return of cultural objects by one state to another.

This article intends to serve two main purposes: First, it discusses two of the most recent and significant restitution disputes. The return of the Axum obelisk to Ethiopia on the one hand, and the bilateral agreements between the Italian government and four major US museums, concluding a year-long process of investigation and negotiation, on the other, are about to set new standards in terms of diplomatic negotiation and bilateral agreements in restitution disputes. Italy has taken a major position in the Mediterranean as a requesting and a requested state with possible wider effects for other states in the region. Second, the article proposes an interest-oriented approach to restitution in international cultural heritage law. It proposes the introduction of an approach that attempts to balance the interests of the various stakeholders in the field, while looking at the physical integrity of the cultural object in question, including considerations pertaining to preservation, public as well as scientific access, and spatial integrity. The need for this approach is demonstrated by the following considerations: *One*: The conceptual shift in international law from cultural 'property' towards cultural 'heritage' that has taken place over the past thirty years<sup>4</sup> necessitates a corresponding shift in restitution disputes beyond title and ownership to a common interest in cultural heritage. However, this shift has not yet happened because states and their national property interests are still the main concern in restitution. *Two*: Bilateral agreements among states and agreements between private actors and states are both contractual in nature. Contracts, however, have the major shortcoming that their terms depend in part

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<sup>1</sup> UNESCO-Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970 (Entry into force 24 April 1972), available at: [http://www.unesco.org/culture/laws/1970/html\\_eng/page1.shtml](http://www.unesco.org/culture/laws/1970/html_eng/page1.shtml).

<sup>2</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, available at: <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>.

<sup>3</sup> See for example the *Declaration on the Importance and Value of Universal Museums*, signed in December 2002, in which leading U.S. and European Museums, including the British Museum, the Louvre, the Hermitage and the Metropolitan Museum reject the return of claimed artifacts that have long been in their possession; presented to the British Museum for publication, available at: <http://www.thebritishmuseum.ac.uk/newsroom/current2003/universalmuseums.html>.

<sup>4</sup> See, for example, Francesco Francioni., "A Dynamic Evolution of Concept and Scope: from Cultural Property to Cultural Heritage", in: *Standard-setting in UNESCO*, ed. by Abdulqawi A. Yusuf, 2007, Vol. 1, p. 221.

on bargaining power, since legal aspects are often explicitly excluded in these bilateral agreements. Bargaining power, however, as will be shown later in this article, is often quite unequal, particularly for bilateral agreements between states and private actors. Consequently, unequal bargaining power not only affects the final outcome of negotiations but also inhibits the development and application of a consistent legal framework in restitution disputes. This is where the third consideration comes in. *Three*: As property and contract mainly fail to solve restitution disputes adequately in a sustainable, cooperative manner, neglect the general interest in cultural heritage, and fail to provide a consistent framework in international cultural heritage law, alternatives are much in need. Although international law will never be able to wholly prevent illicit trade in cultural objects, the growing recognition of concepts such as ‘cultural heritage of mankind’ and ‘common concern’ promote the idea of a general interest in the protection and preservation of cultural heritage. The interest-oriented approach proposed in this article may facilitate mutual agreements and cooperation in restitution disputes, enhance the protection and preservation of cultural heritage, and prevent its loss and dispersion.

## 2. Bilateral Agreements in Restitution Disputes

In accordance with the 1970 UNESCO Convention and the subsequent endeavors of UNESCO and its Intergovernmental Committee on Return and Restitution<sup>5</sup> to assist state parties in protecting cultural heritage and settling restitution disputes, several bilateral agreements that include provisions for returning cultural objects have been concluded in recent years. However, restitution disputes are increasingly resolved not merely on the legal basis of international conventions such as the 1970 UNESCO or the 1995 UNIDROIT Convention but on bilateral diplomatic negotiations. Whereas bilateral agreements among states (*inter-state* agreements) are a traditional tool in international negotiations and *intra-state* regulations were introduced in the early 90s to settle restitution disputes within a state, bilateral agreements between states and private actors such as museums and other art-holding institutions are quite a recent phenomenon. The latter is gaining particular international importance as states are no longer the exclusive stakeholders in cultural heritage matters.

### A. Bilateral Agreements: *intra-and inter-State Provisions*

Provisions for the return of cultural objects may arise from agreements that have been concluded as a consequence of legal succession regulated by a peace treaty<sup>6</sup> or from bilateral agreements between a former colonial power and a former colonized country in the process of decolonization.<sup>7</sup> Generally, such agreements fall into two categories: *intra-state* restitution agreements address cultural objects that have been moved within the colonized territory, whereas *inter-state* ones address objects that have been moved to the territory of the former colonial power. An example of an *intra-state* regulation concerning restitution is the U.S. Protection and Repatriation Act of 1990 (NAGPRA).<sup>8</sup> Similar

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<sup>5</sup> UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, set up in 1978 by the General Conference (Resolution 20 C4/7.6/5); see for further information: UNESCO Information Kit on Restitution, available at: <http://unesdoc.unesco.org/images/0013/001394/139407eb.pdf>.

<sup>6</sup> Examples of peace treaties including provisions on the return of cultural property: Treaty of Peace between Austro-Hungary and Italy, Vienna, 3 October 1866; Treaty of Versailles, 28 June 1919; Treaty of Saint-Germain, 10 September 1919; Treaty of Peace with Italy, Paris, 10 February 1947; Agreement on Succession Issues between the Five Successor States of the Former State of Yugoslavia, Annex A and D, 29 June 2001, available at: [http://untreaty.un.org/unts/144078\\_158780/6/7/13812.pdf](http://untreaty.un.org/unts/144078_158780/6/7/13812.pdf).

<sup>7</sup> For example: Bilateral agreements between: France/ Laos (1950), France/ Algeria (1968), Belgium/ Zaire (1977), Netherlands/ and Indonesia (1977).

<sup>8</sup> Native American Graves Protection and Repatriation Act (NAGPRA), Public Law 101-601, Nov 16, 1990 prescribes the process of returning Native American Indian human remains found on federal land to culturally affiliated tribes; available at: <http://www.nps.gov/history/nagpra/MANDATES/25USC3001etseq.htm>.

national regulations have been enacted by states with large indigenous populations such as Australia, New Zealand, and Canada. Whereas these *intra*-state agreements provide regulations for numerous cases of returning cultural objects, *inter*-state agreements do not provide such general provisions but apply only to the particular object or group of objects specified in the treaty or agreement. Although *intra*-state regulations might add valuable contributions to *inter*-state restitution disputes, this article focuses on international and not national disputes and therefore does not cover *intra*-state provisions but *inter*-state ones. The first of the two cases described in this article is such an *inter*-state agreement.

### 1. *The Return of the Obelisk of Axum*

The return of the Obelisk of Axum from Italy to Ethiopia was called for in the Treaty of Peace with Italy signed in 1947,<sup>9</sup> in which Italy renounced sovereignty over its former colonies, Libya, Eritrea, and Italian Somaliland, recognizing their sovereignty and independence and promising the return of all works of art, religious objects, archives, and objects of historical value belonging to Ethiopia or its nationals removed after 3 October 1935.<sup>10</sup> In accordance with Article 37 of the Treaty of Peace, Italy promised to “restore” the obelisk within eighteen months, vowed to do so within six months in a bilateral treaty of 1956, and renewed its promise again in a joint statement in 1997.<sup>11</sup> Despite several requests by the Ethiopian government over these decades, the obelisk remained in Rome until April 2005.

The 152 ton, 23.5 meter stone funeral stele, dating back to 100-300 BC, was looted by occupying Italian troops and shipped to Rome to celebrate Mussolini's fifteenth year of power. The obelisk had been discovered by the troops, broken in five fragments as a result of an earthquake centuries earlier. It was brought to Rome to the *Piazza di Porta Capena* in 1937 and erected in front of what was once the Ministry for Italian Africa where it stood as a reminder of former Italian colonial ambitions and as a symbol of Mussolini's annexation policy in the 1930s and 40s. Since 1951 the building has served as headquarters of the United Nations Food and Agriculture Organization (FAO).

A number of arguments were advanced against returning the stele, including the political instability of Ethiopia and the resulting uncertainty about the country's ability to preserve the obelisk, the logistical challenges of safely returning it, and the high cost of transport. Instead, Italy suggested extending the international territory of the FAO in order to include the Obelisk as a gift of Ethiopia to the organization. Since the costs of returning of the obelisk had been estimated at six million Euro, Italy also offered to invest this amount in social projects in Ethiopia. The Ethiopians, however, refused both proposals and in turn pointed to the highly damaging air pollution in Rome and the outstanding importance of the obelisk to their national heritage. The monolith is one of the most important surviving artifacts of a pre-Christian site in Northern Ethiopia in the Tigray region close to the Eritrean border. Axum, founded around 100 BC, was the capital of the Kingdom of Axum that flourished as a major trading centre from the fifth century BC to the 10th century AD. At its height, Axum was the heart of a kingdom that extended across the areas of modern Ethiopia, Eritrea, Sudan, Somalia, and Yemen; the Kingdom of Axum was then the most powerful state between the Eastern Roman Empire and Persia. Even long after its political decline in the 10th century AD, Ethiopian emperors continued to be crowned in Axum. Today, the ancient site of Axum, with its monolithic obelisks, giant stelae, royal tombs, and ruins of ancient castles, is inscribed in the World Heritage List under the 1972

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<sup>9</sup> Treaty of Peace with Italy, Paris, 10 February 1947, entry into force: 15 September 1947, available at: [http://www.istrianet.org/istria/history/1800-present/ww2/1947\\_treaty-index.htm](http://www.istrianet.org/istria/history/1800-present/ww2/1947_treaty-index.htm).

<sup>10</sup> Apart from the return of the Obelisk of Axum in 2005, Italy also returned on the grounds of the 1947 Peace Treaty and following negotiations the throne of Emperor Menelek II to Ethiopia in 1982.

<sup>11</sup> Tullio Scovazzi, “The return of the Axum Obelisk – the recent story of the Axum Obelisk”, abstract provided in the framework of the Athens International Conference on the “Return of Cultural Property to its Country of Origin”, March 17-18, 2008, available at: [http://www.unesco.org/culture/laws/pdf/abstract\\_scovazzi.pdf](http://www.unesco.org/culture/laws/pdf/abstract_scovazzi.pdf).

UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.<sup>12</sup> In 2002 lightning struck the obelisk in Rome, which had no lightning rod attached, and broke off several feet of granite, undercutting the argument that the Italians could take better care of the artifact and strengthening the Ethiopian position. After a renewed promise in 1997 to enhance bilateral relations on the basis of the 1947 Peace Treaty, Italy and Ethiopia defined procedures for the return in a joint statement. Following the signing of this document, Ethiopia formed a national committee for the return of the obelisk. This committee, working with the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), carried out research and technical analyses to prepare the segmentation and transportation of the obelisk to Ethiopia.

The obelisk was dismantled into three segments in November 2003 and remained in a warehouse near Rome's Airport until April 2005. In the meantime, in 2004, the Italian government agreed in a bilateral memorandum to finance the transportation of the obelisk to Ethiopia, the preparatory studies and archaeological conservation undertaken by UNESCO (phase 1), as well as the reinstallation of the obelisk *in situ* (phase 2). The total budget for activities implemented by UNESCO was estimated at \$ 4.78 million,<sup>13</sup> of which \$ 2.83 million was funded by Italy.<sup>14</sup> Both state parties requested UNESCO's cooperation in returning the obelisk and agreed by virtue of the 1972 Cultural Heritage Convention that UNESCO experts should oversee the reinstallation. Therefore, UNESCO signed in June 2007 a contract with the Italian construction company *Lattanzi S.r.l.* to carry out the reinstallation, including the construction of a foundation for the obelisk and a temporary steel tower for lifting the three separate segments and positioning them. In a final step (phase 3) the obelisk should be cleaned and restored, and the steel support structure dismantled and removed.

The return of the obelisk encountered a series of obstacles: access through the nearby Eritrean port of Massawa – which was how the obelisk left Ethiopia in 1937 – was impossible due to the strained relations between Eritrea and Ethiopia. Therefore, a Russian Antonov was needed to carry the heaviest object ever to be transported by air. The runway at Axum Airport had to be upgraded and extended because it was too short for a cargo plane of this size, and streets and bridges had to be renovated to bear the load. Upon the arrival of the third segment in Axum in April 2005, archaeologists announced the discovery of a large network of underground tombs beneath the site where the obelisk was to be erected, so that it was put in storage in January 2006. Investigators later discovered the original footings for the obelisk, making it possible to re-erect the monument in its original location. Others, however, suggested that it would be fare better in a museum.<sup>15</sup> The continued delay was not only expensive but also seemed to demonstrate a lack of political will on the Ethiopian side. A petition was drafted to the Ethiopian Minister of Culture and Tourism, stating: “We, Ethiopians, groups and concerned individuals, are signing this petition to express our frustration over the delays in re-erecting our returned Axum Obelisk. If the Axum Obelisk could stand in Rome, it cannot be allowed to lie on the ground in Axum. [...] We also request the re-erection of all the fallen obelisks of Axum, to restore the city to its former greatness”.<sup>16</sup>

The reinstallation works at Axum started in October 2007, two years after its arrival. On 31 July 2008, the third and last segment of the obelisk was mounted, and on 5 September 2008 the inauguration

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<sup>12</sup> World Heritage List, Aksum, Ethiopia, date of inscription: 1980, Ref. 15; available at: <http://whc.unesco.org/en/list/15>.

<sup>13</sup> See Press Kit to the Axum Obelisk Reinstallation Project, Fact Sheet UNESCO Culture Sector by World Heritage Centre, May 2008, available at: <http://whc.unesco.org/uploads/news/documents/news-436-2.doc>.

<sup>14</sup> See: UNESCO World Heritage Center Press Release, “UNESCO launches the re-erection project of the Axum Obelisk”, 19 June 2007, available at: <http://whc.unesco.org/en/news/350/>.

<sup>15</sup> Angela M.H. Schuster, “Axum Obelisk To Go Home”, 27 May 1998, available at: <http://www.archaeology.org/online/news/axum.html>.

<sup>16</sup> The ‘Reerect Axum Obelisks Petition’ to the Ethiopian Ministry of Culture and Tourism was created by Members of Axum Alumni Association and written by Beyene Haile, Kokeb Tarekegn, Richard Punkhurst, Andrew Lawrence, available at: <http://www.petitiononline.com/Axum2000/petition.html>.

ceremony for the Axum Obelisk took place.<sup>17</sup>

## 2. *Other Examples of bilateral inter-State Agreements*

Several other bilateral agreements regarding the return of objects removed from their place of origin to a former colonial power have been negotiated, such as the agreement between France and Laos (1950) concerning Laotian objects of art; an agreement between France and Algeria (1968), which led to the return of some 300 paintings; and a 1977 arrangement between the Netherlands and Indonesia for the return of Buddhist and Hindu statues. Belgium returned to Zaire, now the Democratic Republic of the Congo, 114 ethnographic works in 1970 and several thousand additional cultural items in 1977 on the basis of an agreement between the Royal Museum of Central Africa, Tervuren, and the National Museum of Kinshasa. However, the Belgian Royal Museum has since opposed any further restitution because a large number of the returned objects were stolen amid political turmoil in Congo; these objects are now said to have reappeared on the international commercial antiquity market.<sup>18</sup> Although this agreement is remarkable in formal terms as it was concluded directly between the museums without governmental involvement, it failed in practical terms. This and other shortcomings of restitution will be addressed in detail later in this article as evidence of the need for a focus on preservation of and access to cultural objects, rather than on possession, ownership and legal title.

### ***B. Bilateral Agreements between States and Private Actors: the Agreements between Italy and four U.S. museums***

Bilateral agreements between states and private actors regarding the return of cultural objects are quite a recent phenomenon. This trend, as will be shown in what follows, can be seen in line with the emergence of other stakeholders besides states that act on the international level on their own behalf.

Italy has recently signed a number of remarkable agreements with four U.S. museums. Others might follow. In 2006 and 2007 agreements were settled between the Italian Ministry of Cultural Assets and Activities and the Boston Museum of Fine Arts; the New York Metropolitan Museum of Art; the J. Paul Getty Museum in Los Angeles; and the Princeton University Art Museum.<sup>19</sup> These agreements constitute out-of-court settlements that transfer legal title and return several cultural objects requested by Italy.<sup>20</sup> They were reached following Italian investigations into illicitly exported cultural objects, especially a raid on the warehousing facility of Giacomo Medici in the Geneva Freeport in 1995 that revealed trafficking patterns between Italian tomb robbers (*tombaroli*) and dealers in Italy and abroad, mainly in Switzerland, the United Kingdom and the United States - most of whom, including the U.S. museums, have said that they purchased the objects unaware of their illicit origins. The Italian investigators seized looted antiquities and uncovered more than 4,000 photographs and negatives of archaeological objects, partially arranged into albums almost like prospectuses for potential purchasers. Many photographs showed ancient vases and pots still encrusted with dirt, in some cases photographed in the open countryside, surrounded by weeds. Others showed fragments of ancient artifacts wrapped in local newspapers to prove their Italian provenance, and still others depicted

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<sup>17</sup> See: UNESCO World Heritage Center Press Release, "Inauguration Ceremony for the Axum Obelisk", 5 September 2008, available at: <http://whc.unesco.org/en/news/458>; "Mission Accomplished: Aksum Obelisk successfully reinstalled", August 1, 2008, available at: <http://whc.unesco.org/en/news/456>; and "Second block of Aksum Obelisk successfully reinstalled", 28 July 2008, available at: <http://whc.unesco.org/en/news/455>.

<sup>18</sup> For many other instances of return, see: Jeanette Greenfield, *The Return of Cultural Treasure* (2007) p. 371.

<sup>19</sup> The agreement between the New York Metropolitan Museum of Art and the Republic of Italy, concluded February 21, 2006, reprinted in: *International Journal of Cultural Property* (2006) 13, p. 427-434. The other agreements have not yet been published to the best of my knowledge.

<sup>20</sup> The term of the agreements is forty years, renewable by agreement between the parties.

recently discovered tombs, their crude openings sealed with makeshift covers.<sup>21</sup>

These photographs allowed the Italian authorities to identify items on exhibition in several museums. Most identified items were on display at the J. Paul Getty Museum in Los Angeles. Thus, in January 2006, Italy formally claimed from the Getty the return of fifty-two antiquities, alleging that they had been illegally excavated and exported before being purchased by U.S. museums during the 1980s and early 1990s. This was not the first time that Italy questioned the legitimacy of the purchase of artifacts: the dispute over a 2,500 year-old Euphronios *krater*, a vessel for mixing water and wine, began shortly after the Metropolitan Museum purchased it for \$1 million in 1972. However, unlike former claims, these were supported by the compelling evidence of seized photographs. With criminal proceedings initiated against Marion True, the Getty's former antiquities curator, and Robert Emanuel Hecht, a Swiss art merchant,<sup>22</sup> the Getty Museum offered in November 2006 the return of twenty-six of the disputed objects.<sup>23</sup> Following several breakdowns in negotiations, the parties came to a compromise and concluded an agreement in September 2007 obliging the Getty Museum to return forty objects. In the meantime, Italy also negotiated with the other U.S. museums mentioned above; however the negotiations with the Getty were particularly disputatious. Although the Getty had brought up the question of joint ownership for some objects, this suggestion has not been incorporated in the current agreements.<sup>24</sup> The final agreement between the Italian government and the J. Paul Getty Museum could only be concluded without reference to the so-called 'Victory Youth' (*Athleta di Fano*); further discussions on this item have been deferred until the conclusion of ongoing legal proceedings.<sup>25</sup> This bronze statue, dating back to the 4<sup>th</sup> century BC, was acquired by the Getty in 1977 after it was found in the Adriatic Sea in 1964. The contentious points are whether the statue was found in Italian or international waters and whether the museum acquired the athlete in good faith.

Apart from the bilateral agreement with the Getty, the Italian government signed similar agreements with the Boston Museum of Fine Arts, the Metropolitan, and the Princeton University Art Museum. Following these four U.S.-Italian agreements, Italian authorities are now negotiating with other museums that have presumably acquired antiquities of uncertified origin, including the National Museum of Antiquities in Leiden, the Netherlands; the Cleveland Museum of Art and the Toledo Museum of Art, both in Ohio; the New Carlsberg Glyptotek in Copenhagen; the Minneapolis Institute of Art; the Miho Museum in Shiga, Japan; and the Antikensammlung in Munich. Current negotiations regarding the return of cultural objects might be concluded by similar bilateral agreements as with the four U.S. museums.

After the return of the antiquities, a special exhibition was set up at the Italian presidential palace in Rome's *Palazzo del Quirinale* in December 2007.<sup>26</sup> Both demonstrating the government's success and granting immediate public access to the returned objects, the exhibition included sixty-nine of the most prized sculptures and vases purchased by the four U.S. museums. The exhibit was titled

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<sup>21</sup> See for example: Helena Smith, "It's art squad vs. tomb raiders as Greece reclaims its pillaged past", in: *The Guardian*, 21 July 2006, available at: <http://www.guardian.co.uk/world/2006/jul/21/parthenon.arttheft>; Hugh Eakin, "Director of Getty is unrattled by claims of Italy and Greece to Antiquities", in: *New York Times*, 15 May 2006, available at: <http://travel.nytimes.com/2006/05/15/arts/design/15bran.html?fta=y>.

<sup>22</sup> Both are charged with conspiracy to traffic in looted artifacts, currently pending before the Tribunale di Roma.

<sup>23</sup> "The Getty's side", *Los Angeles Times*, 28 November 2006, p. 21.

<sup>24</sup> "The Getty's side", *Los Angeles Times*, 28 November 2006, p. 21.

<sup>25</sup> As a result of the agreement with the Getty Museum, Italy followed through with their promise to drop the civil charges against Marion True. Her criminal trial, however, continues. See: Livia Borghese, "Italy exhibits its recovered masterpieces", *Los Angeles Times*, 18 December 2007; available at: <http://www.latimes.com/news/nationworld/world/la-fg-getty18dec18,0,7195492.story?coll=la-home-center>.

<sup>26</sup> "*Nostoi: Capolavori ritrovati*" – (English: "*Nostoi: Recovered Masterpieces*"), Roma, Palazzo del Quirinale, Galleria di Alessandro VII, Exposition from 21 December, 2007 until 30 March 2008, and afterwards at the Palazzo Poli a Fontana di Trevi; Catalogue of the Exhibition published by: Segretario generale della presidenza della Repubblica Italiana.

“*Nostoi*,” meaning “homecoming”, alluding to a lost epic poem recounting the return of heroes from the Trojan War. Italy has not announced where the objects will definitely go, but many are expected to return to regional museums near where they are believed to have been illegally excavated.<sup>27</sup> The exhibit also features five of eight pieces returned to Greece in 2007 by the Royal Athena Galleries in New York. The Greek government lent the objects to thank Italy for its help in pressing separate Greek claims to objects said to be looted.<sup>28</sup> Some objects on exhibition are the result of other recoveries, like the fragment of an ivory head from the first century B.C. that was seized in 2003 from the collection of a London antique dealer. As Greece and Italy have agreed to work together in their attempt to retrieve illegally exported artifacts from abroad, the *Nostoi* exhibition was temporarily transferred to the new Acropolis Museum in Athens on 26 September 2008 after having been on display in Rome.<sup>29</sup> The Acropolis Museum is still without major exhibits as it is still waiting for the arrival of the Parthenon (Elgin) Marbles, which were removed in 1801 and placed in the British Museum in London. The fate of the *Nostoi* exhibition has yet to be decided.

Exhibiting the returned objects is part of a media campaign that has played an important role throughout the US – Italian negotiations. Francesco Rutelli, the former Italian Minister of Culture, as well as Michael Brand, the Getty’s director, conducted a war of words in interviews and statements in Italian and U.S. newspapers.<sup>30</sup> Minister Rutelli, for example, dedicated a one-page statement in *The Wall Street Journal* to present his version of why the talks with Getty stalled for almost eight months in 2006.<sup>31</sup> At the opening of the exhibit in Rome, Rutelli stated at a press briefing, “Excavated from the bowels of the earth, [...] deprived of their identity, and reduced to mere objects of beauty, without a soul, [these pieces] conclude their odyssey here today.”<sup>32</sup>

The intense effort by Italy to negotiate the return of antiquities is also reflected in the exhibition placards, one of which reads “Attic black-figure amphora with Heracles fighting Geryon, circa 540 B.C., formerly J. Paul Getty Museum.” Nevertheless, the inclusion of statements from each of the four U.S. museums in the introduction to the exhibition catalogue suggests no ill will. Thus, Philippe de Montebello, the Met’s director wrote, “An exhibition such as this serves to remind us all that we share a common heritage and a reverence for artistic achievement that cannot but unite, rather than divide, us in the future.” The Getty Museum’s director, Michael Brand, said “While the Getty Villa will greatly miss the carefully tended objects returning to Italy, the Getty can celebrate the long-term loans offered by Italy as part of the accord.” Indeed, the agreements between the Italian government and the US museums include several long-term loans, mainly for periods of four years, to the museums “on an agreed, continuing and rotating basis selected from archaeological artifacts, or objects of equivalent

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<sup>27</sup> See: Livia Borghese, “Italy exhibits its recovered masterpieces”, *Los Angeles Times*, 18 December 2007; available at: <http://www.latimes.com/news/nationworld/world/la-fg-getty18dec18,0,7195492.story?coll=la-home-center>.

<sup>28</sup> See: Elisabetta Povoledo, “After Legal Odyssey, Homecoming Show for Looted Antiquities”, *New York Times*, 18 December 2007; available at: [http://www.nytimes.com/2007/12/18/arts/design/18trea.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/12/18/arts/design/18trea.html?_r=1&oref=slogin).

<sup>29</sup> *Nostoi* Exhibition at the New Acropolis Museum, 18 September, 2008; further information available at: <http://www.elginism.com/20080918/1340/>.

<sup>30</sup> See for example: Christopher Knight, “The grandstand erected by Italy – Why is its culture minister trying to rough up the Getty? Politics for the home crowd”, in: *Los Angeles Times*, 25 July 2007, available at: <http://articles.latimes.com/2007/jul/25/entertainment/et-getty25>; “Rutelli contro il Paul Getty Museum – Non possono esporre opera rubate”, in: *La Repubblica*, 23 November 2006, available at: [http://www.repubblica.it/2006/11/sezioni/spettacoli\\_e\\_cultura/getty-museum-polemiche/parla-rutelli/parla-rutelli.html](http://www.repubblica.it/2006/11/sezioni/spettacoli_e_cultura/getty-museum-polemiche/parla-rutelli/parla-rutelli.html); Lee Rosenbaum, “Italy’s Rutelli Threatens Getty with Sanctions”, in: *Artsjournal*, 11 July 2007, available at: [http://www.artsjournal.com/culturegrl/2007/07/italys\\_rutelli\\_threatens\\_getty.html](http://www.artsjournal.com/culturegrl/2007/07/italys_rutelli_threatens_getty.html).

<sup>31</sup> Francesco Rutelli, “Italy vs. Getty”, in: *The Wall Street Journal*, 17 January 2007, available at: <http://online.wsj.com/article/SB116900785965978585-search.html?KEYWORDS=Rutelli&COLLECTION=wsjie/6month>.

<sup>32</sup> See: Elisabetta Povoledo, “After Legal Odyssey, Homecoming Show for Looted Antiquities”, *New York Times*, 18 December 2007; available at: [http://www.nytimes.com/2007/12/18/arts/design/18trea.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/12/18/arts/design/18trea.html?_r=1&oref=slogin).

beauty and artistic/historical significance”. That these loans are not treated independently of the transfer of the requested objects can clearly be seen since the ministry has agreed that the transfer shall take place in the context of these “Long-Term Cultural Cooperation Agreements” to ensure the optimum utilization of the Italian cultural heritage, and as part of the policy of the ministry to recover Italian archaeological assets. The agreements also establish that the items on loan shall be exhibited with the legend: “Lent by the Republic of Italy.” Furthermore, both parties agreed to provisions on study and restoration that allow archaeological items originating from authorized excavations, undertaken at the initiative and at the expense of the respective museum, to leave Italy for the time necessary for study and restoration. Afterwards the items shall be returned to Italy and then shall eventually be loaned to the museum for exhibition “for a period of four years, or for the maximum period permitted by Italian law at the time the loan begins”.

These bilateral agreements avoid using the legally-charged terms ‘restitution’, ‘return’ and ‘claim’ employing instead more neutral words such as ‘transfer’ and ‘request’. These agreements also prevent Italy from taking any further legal action, since the museums reject any accusation that they had knowledge of the alleged illegal provenance in Italian territory of the assets. Furthermore, the decision to ‘transfer’ the requested items does not constitute any acknowledgment on the part of the museum of any type of civil, administrative or criminal liability for the original acquisition or holding of the items. The Italian government explicitly waives its right to pursue or support any legal action against the museums whether under Italian, US, or another jurisdiction. Despite the existence of evidence at least persuasive enough to support a compromise, Italy did not take legal action but pursued an out-of-court settlement based entirely on diplomatic negotiations.

These bilateral agreements are revolutionary for three reasons: First, the bilateral agreements are not between states but between private actors and a state. Second, the existence of reliable evidence of the illicit origin of the objects under dispute allowed Italy to open a criminal case and to make a plausible threat of civil action. This threat was bolstered by an international media campaign, especially in the case of the Getty Museum, drawing the attention of the world’s press. The third point concerns an aspect often neglected in current appraisals in the field of cultural heritage law that surely affects policy considerations: the relevance of the international public reputation of museums that have been asked to return cultural objects. In the US - Italian agreements some of the world’s most famous museums were involved; the Getty’s reputation in particular was highly threatened during the dispute. Thus, these negotiations and final agreements can be described as a mix of legal threats and moral suasion bolstered by a news media campaign. Without question, the Italian strategy succeeded and certainly will revolutionize current procedures in restitution disputes as Greece follows the same pattern of negotiations but, of course, not only in the Mediterranean.

The US-Italian agreements can be seen as part of an international success story in cultural restitution disputes based on resolute negotiation on the one hand and cooperation in the final accords on the other. Nevertheless, they are also open to criticism. One structural problem is that they do not provide general procedures for the return or restitution of cultural objects, but apply only to those items specified in the particular agreement. Another, more general problem is the unequal bargaining power of the parties involved, as this is most influential on the final outcome of bilateral negotiations. If equal bargaining power is uncertain in the case of bilateral negotiations among states, it is even less assured in the case of negotiations between private actors and a state government. This, however, does not mean that the private actor is necessarily inferior. This is especially the case in which the claimed object is held by a leading art institution, such as the US museums mentioned above. If Italy had not been one of the world’s art-richest and at the same time most economically developed countries but a country without the facilities to offer “objects of equivalent beauty and artistic/historical significance” to loan in return, the agreements would most likely have been different or not have been reached at all. This can be seen in the Axum case, where Italy delayed for sixty years before returning the obelisk to its place of origin, although it was bound by the 1947 Peace Treaty. Because of Italy’s position, the US museums could not simply refuse its requests without risking countermeasures like the suspension of future exchange processes, as already announced by Italian authorities – a threat no art institution

can ignore if the negotiation partner holds a significant proportion of the entire world heritage of Etruscan, Roman, Greek and Renaissance art. Where no such material sources are present, diplomatic or legal pressure cannot be used at all or at least not as effectively as done by the Italian authorities.

If bilateral agreements were to be widely employed in restitution disputes another difficulty would arise: it is not clear whether bilateral agreements would contribute to or detract from efforts to reach a consistent framework in international cultural heritage law. On the one hand, it can be argued that these agreements combat illicit trade and encourage the return of cultural objects to the rightful owner. On the other hand, reliance on individualized diplomatic negotiations seems likely to lead to further fragmentation within this field of law. While international cultural heritage law at present is by no means uniform, common standards in restitution disputes are in fact needed not only to reduce the risk of unequal bargaining power but also to provide legal and diplomatic certainty on both sides of restitution disputes. This is where the interest-oriented approach proposed by this article steps in. Defining general principles may allow restitution disputes to become more transparent and more focused on cooperation and preservation than on the simple return of objects.

### **3. The Elements of the Interest-oriented Approach**

The purpose of the interest-oriented approach is to shift the restitution debate from being exclusively focused on possession, title, and location of the cultural object in question towards a perspective that attempts to encompass the interests of the various stakeholders in the field without losing the primary aim: the preservation, the access and the spatial integrity of cultural heritage. Therefore, this article attempts to present general considerations in order to facilitate and accelerate claims for restitution and return when legitimate and appropriate, but also to refuse it in those scenarios in which restitution would harm these general objectives. Certain cases are quite straightforward; in others, however, alternative solutions, as for example designated in the provisions on loan and exchange programmes in the US–Italian agreements, might lead to a win-win situation instead of a zero-sum situation in restitution disputes. Returning cultural objects aims to ‘right historical wrongs’ but mostly fails to take a broader perspective since it is mainly focused on property rights and the object’s location. This broader perspective might be reached, as this article argues, by defining overriding general principles.

#### **A. Preservation**

The center of gravity of the suggested approach is the cultural object itself. If a cultural object is partially damaged or completely destroyed it cannot be exhibited, studied, or enjoyed.<sup>33</sup> Therefore, it must be considered whether restitution should be granted if the claimant is not able to prove that its facilities actually guarantee the preservation and safekeeping of the object to be returned. Particularly in cases in which the object in question represents a significant piece of the ‘cultural heritage of mankind,’ the ability to preserve the object might be identified as an overall requirement for restitution. However, this argument is no longer an exclusive one for the Western museum community as museums in so-called ‘source states’ continue to become better equipped and organized also due to better cooperation between museums.

Nevertheless, in specific instances, this argument has been used as a justification for not granting restitution.<sup>34</sup> The Royal Museum in Tervuren, Belgium, as mentioned above, opposes restitution following its experience of returning ethnographic works in to the custody of the Kinshasa Museum in 1976, only to see a large number of them stolen amidst subsequent political turmoil in Congo. Such

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<sup>33</sup> John H. Merryman, "The Public Interest in Cultural Property," *California Law Review* 77, no. 2 (1989): p. 355.

<sup>34</sup> Robert Hallman, "Museums and Cultural Property: A Retreat from the Internationalist Approach," *International Journal of Cultural Property* 12 (2005): p. 215.

disappointing results convinced the museum that wholesale return of objects collected during the colonial era is not a viable option.<sup>35</sup> However, if restitution is denied on the grounds of safekeeping, the holding institution has to show that the artifact in question is best served by keeping it where it is, even if this is far away from the object's place of origin.<sup>36</sup> It is also clear that the highest Western standard of preservation cannot be required but rather a more modest standard that, nevertheless, corresponds with modern preservation techniques. However, preservation is not always that unambiguous, especially in cases of ritual objects and sacred materials that originally required destruction after their ceremonial use or were intended to be seen only by a restricted group of people at particular times or exposed only in a specific place.<sup>37</sup> Likewise, this also relates to claims involving human remains that have been exposed on scientific grounds or based on a specific scarcity value. In such cases, it could be said that concerning archeological items the consideration of preservation is superior, whereas in cases of ritual items of a culture that is still alive and practiced, the particular interest of the ceremonial usage, namely the destruction of the object, might override the common interest in its preservation. Significant cultural importance or a tight link to a particular ethnic group might also conflict with the universal interest of preservation.<sup>38</sup> However, regarding intended destruction, in most cases this does not constitute a serious conflict as most possessors or potential claimants do not intend to destroy their cultural property.<sup>39</sup>

### ***B. Public Access and Civil Society***

Apart from preservation, public access is one of the objectives this paper aims to argue for. Public access should only be guaranteed to the extent that it does not substantially harm the cultural object; thus, regulating public access has always been part of general preservation and safekeeping considerations. Guaranteeing public access is, therefore, one of the main stakes at risk in restitution disputes as claimed objects are often currently on public display in museums and tend, generally, to be less accessible after their return. Returning cultural artifacts to their places of origin, as for example carvings and reliefs to a remote temple or church from which they were taken, would enhance their integrated character and aesthetic value, but it would make them much less accessible to scholars and the general public. Therefore, it could be argued either that seeing an artifact in or near the site for which it was created prevails, and therefore return should be favored, or that a display enabling the beholder to compare the exhibited item with artifacts from the same historical background or other times and cultures prevails and restitution should not be preferred.<sup>40</sup> If the second scenario, regarding public access, outweighs the first, museums are good at providing this environment. Whenever the return of a certain cultural object would put an end to public access and no other values such as preservation or any contrary ritual usage interfere, the retention of the object in question might be considered on the basis of balancing the interests involved.

### ***C. Spatial Integrity and the Reassembling of Dispersed Cultural Material***

In addition to preservation and accessibility, the integrity of an object or its function in its original site is a considerable aspect of restitution disputes. Apart from the example of the return of the Axum Obelisk to its original site and historical context and the US – Italian agreements, one of the ongoing

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<sup>35</sup> Guido Gryseels, "Assuming Our Responsibilities in the Present," *ICOM News* 1 (2004): p. 8.; available also at: [http://icom.museum/pdf/E\\_news2004/p8\\_2004-1.pdf](http://icom.museum/pdf/E_news2004/p8_2004-1.pdf).

<sup>36</sup> Janna Thompson, "Cultural Property, Restitution and Value," p. 260.

<sup>37</sup> John H. Merryman, "The Public Interest in Cultural Property," p. 356.

<sup>38</sup> Martin P. Wyss, "Rückgabeansprüche Für Illegal Ausgeführte Kulturgüter," p. 205.

<sup>39</sup> Janna Thompson, "Cultural Property, Restitution and Value," p. 260.

<sup>40</sup> *Ibid.*: p. 261.

standard cases in this field illustrates well the complexity of dispersed cultural material. In the case of the Parthenon (Elgin) Marbles in the British Museum,<sup>41</sup> Greek authorities have been demanding three sets of sculptures (the metopes, the frieze, and the pediments) since 1986, but the British Museum has refused to return them, and successive British governments have been unwilling to pass necessary legislation. To support its request, Athens has even expressly built the new Acropolis Museum, completed in late 2008, in order to house the Parthenon sculptures jointly with a view of the Parthenon.<sup>42</sup> Considering the question of integrity, it has to be mentioned that other fragments, which are not yet claimed by Greece, are in the Louvre in Paris; two heads from a metope in the British Museum are in Copenhagen; and further fragments of a frieze are in Palermo and the Vatican, the Kunsthistorisches Museum Vienna, the Antikensammlung Munich, and Strasbourg University. This shows that the matter of restitution is not a single one but might involve several claims. Whereas in some cases, location seems to make no difference at all to the cultural value of a certain object, other cultural objects highly depend on their spatial integrity – that is proximity to the place of origin. Restitution might be favored in cases in which a former cultural unity can be re-established, whereas restitution might be denied in cases in which the unity of a unique collection, that as such already represents cultural heritage, might be taken apart.

#### **D. Access for Scientific Research**

While in the case of public access it could be argued that it is best assured in the great museums of New York, London or Paris and by internationally touring exhibitions, the access to cultural heritage for scientists and researcher is, however, mainly independent from these considerations. For the scientific community and their research it is utterly irrelevant to whom the title of ownership is assigned, or where the property is located as long as access to and exchange of information about the object is guaranteed. In particular, new methods of access such as through online publication and online provisions of museum catalogues foster data exchange within the scientific community as, for example, has been done with Nazi-looted art in recent years.<sup>43</sup> Nevertheless, scientific research still involves direct access to the cultural object itself. Although the great Western museums often have the financial and technical facilities to provide access, large parts of their collections are kept in storage and access, even for scientific research, is often not guaranteed.

#### **E. Excursus: Objects with Uncertain Provenance – Orphaned Objects**

Many antiquities are sold without a certificate of provenance, which means that illegally and legally obtained material becomes mixed on the international art and antiquity market. However, for museums, for example, an antiquity without provenance is a potential risk. Many archaeologists today take the pragmatic point of view that an artifact with no provenance is probably looted.<sup>44</sup> Therefore, stolen or illicitly exported items are like orphans without verifiable provenance. If the place of origin of the looted cultural object can be traced, restitution might be claimed. However, the item often remains an orphan: looters often destroy or disguise evidence of objects' background. Even if restitution were granted, it will never be possible to put looted objects back into their original context. They can be returned to their assumed place of origin, but, as objects without provenance, they are

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<sup>41</sup> Kate Fitz Gibbon, "The Elgin Marbles – a Summary," in *Who Owns the Past? Cultural Policy, Cultural Property, and the Law*, ed. Kate Fitz Gibbon (2005), pp. 109.

<sup>42</sup> See with further details: <http://www.parthenonuk.com/DynaLink/ID/206/newsdetail.php>; and outdated but informative; <http://www.greece.org/parthenon/marbles>.

<sup>43</sup> The Central Registry of Information on Looted Cultural Property 1933-45, available at: <http://www.lootedart.com/>.

<sup>44</sup> Neil Brodie, "An Archaeologist's View of the Trade in Unprovenanced Antiquities," in *Art and Cultural Heritage*, ed. Barbara Hoffmann (Cambridge: 2006), p. 53.

usually as meaningless there as they would be in any foreign country.<sup>45</sup> In these cases, the restitution request can either not be made at all on legal grounds, or if made, the claim mostly cannot adequately be proven by the potential claimant. Therefore, in the case of orphaned objects, higher values, as proposed by this interest-oriented approach, might overrule current restitution practices.

Further, it is questionable whether such material should be ignored in the international scientific community – neither studied nor exhibited – in an effort to limit further pillage, or if these objects should, nevertheless, be subject to sale, exhibition and research. On the one hand, simply keeping these objects and displaying them within collections would not be a stimulus to reduce illicit trade. On the other hand, however, the exclusion of these items from the licit international art market and exhibition practices does not make sense either. Looted artifacts are perhaps not as useful as artifacts recovered by scientifically guided and monitored excavations. However, these items are still objects of cultural heritage and thus valuable as such,<sup>46</sup> even if they can only be displayed as ‘art objects’ and little or no scientific data is provided about the history, function, or significance of the object. Aesthetically speaking, these objects are left to speak for themselves without revealing their past. Nevertheless, these items should not be neglected but should be displayed, visibly labeled with their ‘non-identity’ and their tragic past of being subject to illicit trade. Furthermore, these objects could serve the international exchange of cultural material; while restitution to the rightful owner is mostly not possible, loans and shared ownership are considerable alternatives.

#### 4. Conclusion and Final Remarks

The decision to retain a cultural object or to suspend its return interferes inevitably with the property rights of the claimant who purports to be the rightful owner. As restitution is based on title and ownership, proposing alternatives to simple return means considering the general limits of property rights, which in principle also include the right to destroy works of art or to deny public access to them.<sup>47</sup> Whereas limiting property rights is generally not a common principle within international law, it is common in the field of international cultural heritage law. For example, national export regulations concerning ‘inalienable cultural property’ or ‘cultural patrimony’ require authorization to transfer such property abroad. Export regulations have been introduced in many states since the early 1960s, especially in order to ensure the interests of newly founded states in keeping and preserving their national cultural heritage, which was increasingly threatened by illicit trade and clandestine excavations. The 1970 UNESCO and the 1995 UNIDROIT Conventions are designed to give international effect to these national export restrictions. It might be reasonable and coherent to extend such restrictions of property rights in order to deny restitution under circumstances in which the preservation of the object claimed cannot be entirely secured or reasonable public and scientific access cannot be guaranteed.

As early as 1983, Nafziger postulated, “the claimant state must ensure that the recovered property will be protected by conservation, safety and security measures that meet international standards, and that the object will be adequately displayed and, normally, accessible to the public”.<sup>48</sup> In a similar manner, Siehr claims that retention of a claimed cultural object should be considered “until adequate physical preservation of the object is guaranteed in the requesting state of origin”.<sup>49</sup> Merryman, moreover,

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<sup>45</sup> Clemency Chase Coggins, "A Proposal for Museum Acquisition Policies in the Future," in: *International Journal of Cultural Property* 7, no.2 (1998) p. 434.

<sup>46</sup> Neil Brodie, "An Archaeologist's View of the Trade in Unprovenanced Antiquities," p. 59.

<sup>47</sup> See with interesting remarks and case studies to this problem: Joseph Sax, *Playing Darts with a Rembrandt, Public and Private Rights in Cultural Treasures* (1999).

<sup>48</sup> James A. R. Nafziger, "The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property," *New York University Journal for International Law and Politics* 15 (1983): p. 808.

<sup>49</sup> Siehr, "Öffentliches Recht Und Internationales Privatrecht Beim Grenzüberschreitenden Kulturgüterschutz," p. 103.

introduces the trilogy of “preservation, truth, and access” and argues “that these constitute a set of higher “public welfare values” that transcend national interests and boundaries”.<sup>50</sup> As Merryman argues, the 1970 UNESCO Convention is largely about retention of cultural property and although it speaks about protection, it only intends protection against removal – not the protection of the cultural object as such.<sup>51</sup>

Although these object-oriented considerations have been already proposed - and indeed are obviously relevant in a field concerning unique and irreplaceable cultural material – this article aims to add at least four contributions to the debate: (1) to demonstrate the necessity of an interest-oriented approach, since property and contract have mainly failed to provide mutually satisfying outcomes in restitution disputes; (2) to emphasize the rising significance of non-state stakeholders and the resulting shift away from state interests; (3) to show the link between the use of existing export regulations as limitations on property rights as well as concepts like ‘common heritage of mankind’ and ‘common concern’ in international cultural heritage law; and (4) to reflect on alternatives that might improve on the simple return of cultural objects, such as long-term loan programmes, exchange of material, rental agreements for payment, joint ownership, transfer of title only, and cooperation in exhibition and museum management between the requesting and the requested party.

The two cases of restitution discussed in this article can definitely be described as groundbreaking: the US-Italian agreements in particular may set innovative standards by combining the claim for restitution with co-operational exchange. Both cases are certainly steps in the right direction. However, as discussed, both cases also illustrate the problems associated with unequal bargaining power: Ethiopia, on one end of the spectrum, waiting for Italy to abide by the 1947 Peace Treaty, and Italy, on the other end, using its diplomatic strength as one of the major Mediterranean art-source countries, as well as the media, and criminal investigations in order to advance negotiations for the return of cultural artifacts to Italy. This article proposes an alternative approach by going beyond current restitution practices that are often exclusively based on property and contract and that therefore mainly fail to provide a general framework for other disputes. This paper demonstrates that current restitution practices are often inadequate and regressive, since they focus exclusively on the legal title and the location of the object in question. The interest-oriented approach proposed in this article may remedy current shortcomings in restitution disputes, facilitate mutual agreements and cooperation, enhance the protection and preservation of cultural heritage, and prevent its loss and dispersion.

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<sup>50</sup> John Henry Merryman, "The Retention of Cultural Property," *University of California, Davis Law Review*, no. 21 (1988): p.504.

<sup>51</sup> *Ibid.*: p. 506.