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THE 2001 UNESCO CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: IMPLEMENTATION AND EFFECTIVENESS

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ABSTRACT

FACULTY OF HUMANITIES

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THE 2001 UNESCO CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: IMPLEMENTATION AND EFFECTIVENESS

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The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage entered into force in 2009. Little is known of how, or even if, it is being implemented. This study examines the implementation of the Convention in its States Parties and investigates the reasons behind the observed levels of implementation.

Through an investigation of the presence or absence of certain indicators in the national legislation of States Parties to the Convention, it is apparent that there is a low level of compliance with the 2001 Convention. Further, the Convention has so far had a very limited legal effect. From this examination of legal effectiveness, conclusions about the interpretation of certain ambiguous provisions of the Convention are also possible. In particular, there are a small number of indications that the ambiguities in Articles 9 and 10 of the Convention are being interpreted in favour of the coastal State, suggesting an increasing territorialisation of the EEZ.

Interviews of relevant actors were conducted in five case study States. This allowed an examination of the other effects of the Convention and causes of the lack of implementation to be suggested. It is concluded that it is largely factors relating to the States themselves, most notably issues with capacity, that are causing this lack of effect. Finally, suggestions are made which could improve the effectiveness of the Convention and increase the protection of underwater cultural heritage around the world.

Contents

Table of Cases

Canada

United States of America

Table of Domestic Legislation

Year	Type and Number or Date	Original Title	English Title	Translation Source
Albania				
2003	Law 9048	Per Trashegimine Kulturore	For the cultural heritage	UNESCO
2014	Decision 321	Për Sigurinë Në Det, Plazhe, Në Ujërat E Brendshme Në Thellësi Të Territorit Dhe Gjatë Ushtrimit Të Sporteve Ujore	For security on the sea, beaches, inland waters in the depths of the territory and during the exercise of water sports	
Antigua and Barbuda				
1984	Law 11	National Parks Act		
2006	Law 1	The Antigua and Barbuda Merchant Shipping Act		
Argentina				
2003	Ley 25.743	Protección del Patrimonio Arqueológico y Paleontológico	Law on the Protection of the Archaeological and Palaeontological Heritage	UNESCO
2004	Decreto 1022	Reglamentacion de la Ley No. 25.743	Regulation of the Law No. 25.743	IFAR
Argentina				
1976	Law 190	Historic Shipwrecks Act		
Barbados				
1933	Law	Barbados Museum and Historical Society Act		

1978	Law 3	Marine Boundaries and Jurisdiction Act		
2006	Bill	Preservation of Antiquities and Relics Bill		
2011	Bill	Preservation of Antiquities and Relics Bill		
Belgium				
1999	Loi	Loi du 22 avril 1999 concernant la zone économique exclusive de la Belgique en mer du Nord	Act of 22 April 1999 concerning the exclusive economic zone of Belgium in the North Sea	DOALOS, LOS Bulletin No. 44
2008	Ordonnantie [Brussels-Capital Region] 3401	Ordonnantie houdende instemming met het Verdrag ter bescherming van het cultureel erfgoed onder water, goedgekeurd op 2 november 2001 en gedaan te Parijs op 6 november 2001	Ordinance approving the Convention on the Protection of Underwater Cultural Heritage, adopted on 2 November 2001, and made in Paris on November 6, 2001	
2010	Decreet [Government of Flanders] 2688	Decreet houdende instemming met het verdrag ter bescherming van het cultureel erfgoed onder water, aangenomen in Parijs op 2 november 2001	Decree approving the Convention on the Protection of the Underwater Cultural Heritage, adopted in Paris on November 2, 2001	
2012	Décret [French Community] 1840	Décret portant assentiment à la Convention sur la protection du	Decree approving the Convention on the Protection of Underwater Cultural	

		patrimoine culturel subaquatique, adoptée le 2 novembre 2011 et faite à Paris le 6 novembre 2001	Heritage, adopted on 2 November 2001, and made in Paris on 6 November 2001	
2012	Dekret [German-speaking Community] 1104	Dekret zur Zustimmung zu dem Übereinkommen zum Schutz des Kulturerbes unter Wasser, geschehen zu Paris am 2. November 2001	Decree approving the Convention on the Protection of Underwater Cultural Heritage, adopted on 2 November 2001	
2012	Décret [Wallonia] 1467	Décret portant assentiment à la Convention sur la protection du patrimoine culture subaquatique, adoptée le 2 novembre 2001 et faite à Paris le 6 novembre 2001	Decree approving the Convention on the Protection of Underwater Cultural Heritage, adopted on 2 November 2001, and made in Paris on 6 November 2001	
2012	Constitution	La Constitution Belge	The Belgian Constitution	www.constituteproject.org
2012	Bill 24 October 2012	Projet de loi portant assentiment à la Convention sur la protection du patrimoine culturel subaquatique, adoptée à Paris le 2 novembre 2001 (Sénat de Belgique, Doc 5 - 1822/1)	Bill approving the Convention on the Protection of Underwater Cultural Heritage, adopted in Paris on 2 November 2001 (Belgian Senate, Doc 5 - 1822/1)	
2013	Loi	Loi portant assentiment à la Convention sur la protection du patrimoine culturel	Law approving the Convention on the Protection of Underwater Cultural	

		subaquatique, adoptée à Paris le 2 novembre 2001	Heritage, adopted in Paris on 2 November 2001	
2014	Bill 24 February 2014	Projet de Loi relatif à la protection du patrimoine culturel subaquatique (Chambre des Représentants de Belgique, Doc 53 3397/001)	Bill relative to the Protection of the Underwater Cultural Heritage (House of Representatives of Belgium, Doc 53 3397/001)	
2014	Loi 4 April 2014	Loi relative à la protection du patrimoine culturel subaquatique	Law relative to the Protection of the Underwater Cultural Heritage	
2014	Arrêté royal	Arrêté royal relatif à la protection du patrimoine culturel subaquatique	Royal decree relative to the Protection of the Underwater Cultural Heritage	
Benin				
1976	Décret 92	Décret n° 76-92 du 02 avril 1976, portant extension des eaux territoriales de la République populaire du Bénin à 200 milles marins	Decree No. 76-92 of 02 April 1976, extending the territorial waters of the People's Republic of Benin to 200 nautical miles	DOALOS/OLA
2007	Loi 20	Loi n° 2007-20 portant protection du patrimoine culturel et du patrimoine naturel à caractère culturel en République du Bénin	Law No. 2007-20 on the protection of cultural heritage and natural heritage of a cultural character in the Republic of Benin	
Bosnia and Herzegovina				
2001	Law [Federation of	Zakon O Zaštiti Dobara Koja Su Odlukama	Law on the Protection of Properties	Commission to Preserve National

	Bosnia and Herzegovina]	Komisije Za Zaštitu Nacionalnih Spomenika Proglašena Kao Nacionalni Spomenik Bosne I Hercegovine	Designated as National Monuments of Bosnia and Herzegovina by Decision of the Commission to Preserve National Monuments	Monuments, www.kons.gov.ba
Bulgaria				
2009	Law	Закон за културното наследство	Cultural Heritage Act	UNESCO
Cape Verde				
1992	Law 60/IV/92			
China				
1989	Regulation	Underwater Cultural Relics Regulation		
Croatia				
1991	Law	Zakon o preuzimanju saveznih zakona u oblastima pomorske i unutarnje plovidbe koji se u Republici Hrvatskoj primjenjuju kao republièki zakoni	Act Proclaiming that Federal Laws in the areas of maritime and internal navigation in the Republic of Croatia apply as republic laws	
1994	Code	Pomorski Zakonik	Maritime Code	DOALOS/OLA
1999	Law	Zakon O Zaštiti I Očuvanju Kulturnih Dobara	Act on the Protection and Preservation of Cultural Objects	UNESCO
2003	Decision	Odluku O Proširenju Jurisdikcije Republike Hrvatske Na Jadranskom Moru	Decision on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea	DOALOS/OLA

2003	Law	Zakon O Izmjenama I Dopunama Zakona O Zaštiti I Očuvanju Kulturnih Dobara	Act on Amendments to the Act on the Protection and Preservation of Cultural Objects	UNESCO
2004	Code	Pomorski Zakonik	Maritime Code	Petra Zdravkovic
2005	Ordinance	Pravilnik o arheološkim istraživanjima	Ordinance on Archaeological Research	
2007	Bill	Prijedlog Zakona O Obalnoj Straži Republike Hrvatske	Draft Law on the Coastguard of the Republic of Croatia	
2007	Law	Zakon o Obalnoj Straži Republike Hrvatske	Law on the Coastguard of the Republic of Croatia	
2009	Ordinance	Pravilnik O Suradnji Obalne Straže S Tijelima Nadležnima Za Zaštitu Kulturnih Dobara Na Moru, Morskom Dnu I Podmorju	Ordinance on the cooperation of the Coastguard and competent authorities in Protection of Cultural Property on the sea, seabed and subsea	Petra Zdravkovic
2010	Ordinance	Pravilnik o arheoloŠkim istraŽivanjima	Ordinance on Archaeological Research	Petra Zdravkovic
2013	Law	Zakona O Izmjenama I Dopunama Pomorskog Zakonika	Law on Amendments to the Maritime Code	
2013	Bill	Nacrt Prijedloga Zakona O Izmjenama I Dopunama Pomorskog Zakonika, S Konačnim Prijedlogom Zakona	Draft Proposal of the Law on Amendments to the Maritime Code, with the final bill	
Cuba				

2013	Ley 115	Ley de la Navegación Marítima, Fluvial y Lacustre	Law of Maritime, Fluvial and Lacustrine Navigation	
2013	Decreto 317	Regalmento de la Ley de la Navegacion Maritima, Fluvial y Lacustre	Regulations of the Law of Maritime, Fluvial and Lacustrine Navigation	
Dominican Republic				
1999	Decree 289			
2007	Law 66			
Ecuador				
1970	Decree 256-CLP		Civil Code as amended by Decree No. 256-CLP of 27 February 1970	DOALOS/OLA
1993	Decreto Ejecutivo 374	Reglamento para la explotación y rescate de naves naufragadas en el mar territorial ecuatoriano	Regulation for the Exploration and Rescue of ships wrecked in the territorial sea of Ecuador	
2004	Ley	Codificación de la Ley de Patrimonio Cultural	Law of Cultural Patrimony Codification	UNESCO
2008	Decreto 1208	Reglamento de Actividades Dirigidas al Patrimonio Cultural Subacuático	Regulations of Activities Directed at Underwater Cultural Heritage	
France				
1961	Décret 1547	Décret fixant le régime des épaves maritimes	Decree establishing the regime of maritime wrecks	
1989	Loi 874	Loi n°89-874 du 1er décembre 1989 relative aux biens culturels	Law No. 89-874 of 01 December 1989 relative to the maritime	DOALOS/OLA

		maritimes et modifiant la loi du 27 septembre 1941 portant réglementation de fouilles archéologiques	cultural property and modifying the law of 27 September 1941 regulating archaeological excavations	
2004	Code	Code du Patrimoine	Heritage Code	
2004	Ordonnance 178	Ordonnance n° 2004-178 du 20 février 2004 relative à la partie législative du code du patrimoine	Ordinance No. 2004-178 of 20 February 2004 on the legislative part of the heritage code	
2012	Décret 1148	Décret n° 2012-1148 du 12 octobre 2012 portant création d'une zone économique exclusive au large des côtes du territoire de la République en Méditerranée	Decree No. 2012-1148 of 12 October 2012 Establishing an Economic Zone off the Coast of the Territory of the Republic in the Mediterranean Sea	DOALOS, LOS Bulletin No. 81
2012	Bill	Projet de Loi autorisant la ratification de la convention sur la protection du patrimoine culturel subaquatique (Assemblée Nationale No. 90)	Bill authorising the ratification of the Convention on the Protection of the Underwater Cultural Heritage (National Assembly No. 90)	
Grenada				
1978	Law 20	Marine Boundaries Act		
1989	Law 25	Grenada Territorial Sea and Maritime Boundaries Act		
Guyana				

1972	Law 7	National Trust Act		
1977	Law 10	Maritime Boundaries Act		
2010	Law 18	Maritime Zones Act		
Hungary				
2001	Law 64	2001. évi LXIV. törvény a kulturális örökség védelméről	Act LXIV on the protection of cultural heritage	UNESCO
Iran				
1993	Law		Law of Marine Areas of the Islamic Republic of Iran in the Persian Gulf and Oman Sea	DOALOS/OLA
Ireland				
1987	Law 17	National Monuments Act		
Italy				
1939	Legge 1089	Tutela delle cose d'interesse artistico e storico	Protection of items of artistic and historical interest	
1942	Regio Decreto 262	Codice civile	Civil Code	
1942	Regio Decreto 327	Codice della navigazione	Navigation Code	
1989	Decreto Ministeriale [Ministero della Marina Mercantile]	Disposizioni per la tutela delle aree marine di interesse storico, artistico o archeologico	Provisions for the protection of marine areas of historical, artistic or archaeological interest	

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2001	Legge 78	Tutela del patrimonio storico artistico della Prima guerra mondiale	Protection of the historical and artistic heritage of the First World War	
2003	Legge Regionale [Regione Sicilia] 21	Legge Finanziaria 2004	Finance Law 2004	
2004	Decreto Legislativo 42	Codice dei beni culturali e del paesaggio	Cultural Heritage and Landscape Code	UNESCO
2006	Legge 61	Istituzione di zone di protezione ecologica oltre il limite esterno del mare territoriale	Establishment of an ecological protection zone beyond the outer limit of the territorial sea	DOALOS/OLA
2009	Legge 157	Ratifica ed esecuzione della Convenzione sulla protezione del patrimonio culturale subacqueo, con Allegato, adottata a Parigi il 2 novembre 2001, e norme di adeguamento dell'ordinamento interno	Ratification and implementation of the Convention on the Protection of Underwater Cultural Heritage, with Annex, adopted in Paris November 2, 2001, and for the adaptation of internal rules	Paolo Croce
2009	Bill C.2411	Disegno di Legge 'Ratifica ed esecuzione della Convenzione sulla protezione del patrimonio culturale subacqueo, con Allegato, adottata a	Bill 'Ratification and implementation of the Convention on the Protection of Underwater Cultural Heritage, with Annex, adopted in Paris	

		Parigi il 2 novembre 2001, e norme di adeguamento dell'ordinamento interno'	November 2, 2001, and for the adaptation of internal rules'	
2009	Proposta di legge 2302	Istituzione della Soprintendenza del mare e delle acque interne e organizzazione del settore del patrimonio storico-culturale sommerso nell'ambito del Ministero per i beni e le attività culturali	Establishment of the Superintendency of the Sea and Inland Waters and organization of the sector of the submerged cultural and historical heritage under the Ministry for Cultural Heritage and Activities	
2011	Decreto del Presidente della Repubblica 209	Regolamento recante istituzione di Zone di protezione ecologica del Mediterraneo nord-occidentale, del Mar Ligure e del Mar Tirreno	Regulations establishing ecological protection zone in the north-west Mediterranean, the Ligurian Sea and the Tyrrhenian Sea	DOALOS/OLA
2012	Ordinanza [Ministero Delle Infrastrutture e dei Trasporti, Capitaneria de Porto, La Spezia] 241	Rinvenimento di un relitto di epoca romana	Discovery of a wreck from the Roman era	
2013	Proposta di legge 470	Organizzazione del settore dell'archeologia subacquea nell'ambito del Ministero per i beni e le attività culturali e istituzione dell'Istituto	Organization of the sector of underwater archeology in the Ministry of Cultural Heritage and Activities and establishment of	

		centrale per l'archeologia subacquea	the Central Institute for Underwater Archeology	
2014	Ordinanza [Ministero Delle Infrastrutture e dei Trasporti, Capitaneria de Porto, La Spezia] 148	Relitto di epoca romana	Wreck of the Roman era	
2016	Decreto 208	Riorganizzazione del Ministero dei beni e delle attivita' culturali e del turismo ai sensi dell'articolo 1, comma 327, della legge 28 dicembre 2015	Reorganization of the Ministry of Cultural Heritage and Activities and Tourism pursuant to Article 1, paragraph 327 of the Law of 28 December 2015	
2016	Ordinanza [Ministero Delle Infrastrutture e dei Trasporti, Ufficio Circondariale Marittimo di Santa Margherita Ligure] 187	Interdizione Area per Rinvenimento Sito di Interesse Archeologico	Interdiction of an Area due to the discovery of a site of archaeological interest	
Jamaica				
1985	Law 8	Jamaica National Heritage Trust Act		
1991	Law 33	Exclusive Economic Zone Act		

Lebanon				
1933	Decree 166		Regulations governing Antiquities	IFAR
2008	Law 37		Cultural Property	Official Translation
Lithuania				
1994	Law I - 733	Nekilnojamojo kultūros paveldo apsaugos įstatymas	Law on the Protection of Immovable Cultural Heritage	Official Translation
1996	Law I-1179	Kilnojamųjų kultūros vertybių apsaugos įstatymas	Law on the Protection of Movable Cultural Property	Official Translation
2011	Reglamento ĮV-538	Archeologinio Paveldo Tvarkyba	Archaeological Heritage Management	
Mauritius				
2005	Law 2	Maritime Zones Act		
Mexico				
1917	Constitution	Constitución Política de los Estados Unidos Mexicanos	Political Constitution of the United Mexican States	www.constituteproject.org
1972	Ley	Ley Federal Sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos	Federal Law on Archaeological, Artistic and Historic Monuments and Zones	UNESCO
1986	Ley	Ley Federal del Mar	Federal Act relating to the Sea	DOALOS/OLA
1994	Ley	Ley de Navegación	Law of Navigation	
2006	Ley	Ley de Navegación y Comercio Marítimos,	Law of Navigation and Maritime Commerce	
2013	Bill	Proyecto de Decreto que adiciona diversas	Bill by which various provisions are added to	

		disposiciones a la Ley Federal sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos, en materia de bienes culturales subacuáticos	the Federal Law on Archaeological, Artistic and Historic Monuments and Zones, relating to Underwater Cultural Heritage	
2014	Decreto	Decreto por el que se adiciona un artículo 28 TER a la Ley Federal Sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos, en Materia de Patrimonio Cultural Subacuático	Decree by which an article 28 TER is added to the Federal Law on Archaeological, Artistic and Historic Monuments and Zones, relating to Underwater Cultural Heritage	Rodrigo Ortiz
Montenegro				
2010	Law		Protection of Cultural Property Act	UNESCO
Morocco				
1980	Law 1		Act No. 1-81 of 18 December 1980, Promulgated by Dahir No. 1-81-179 of 8 April 1981, establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan coasts	DOALOS/OLA
1980	Dahir 1-80-341		Dahir No. 1-80-341 of 17 Safar 1401 (25 December 1980) promulgating Law No. 22-80 concerning the conservation of historic monuments and sites, inscriptions, art objects	UNESCO

			and antiquities	
Namibia				
2004	Law 27	National Heritage Act		
Nigeria				
2007	Law	Merchant Shipping Act		
Norway				
1972	Royal Decree		Royal Decree of 8 December 1972 relating to Exploration and Exploitation of Petroleum in the Seabed and Substrata of the Norwegian Continental Shelf	
Panama				
1972	Constitution	La Constitución Política de la República de Panamá	Constitution of Panama	www.constituteproject.org
1982	Law 14	Por la cual se dictan medidas sobre custodia, conservación y administración del Patrimonio Histórico de la Nación	Measures on the Custody, Preservation and Administration of the Historic Heritage of Panama	IFAR
1996	Law 38	Por la Cual se Aprueba la Convencion de las Naciones Unidas Sobre el Derecho del Mar, Hecha en Montego Bay, el 10 de Diciembre de 1982	For the Adoption of the United Nations Convention on the Law of the Sea, done at Montego Bay on December 10, 1982	
2003	Law	Que modifica artículos	To Amend Articles in	IFAR

	58	de la Ley 14 de 1982, sobre custodia, conservación y administración del Patrimonio Histórico de la Nación, y dicta otras disposiciones	Law 14 of 1982, on the Custody, Preservation and Administration of the Historic Heritage of Panama and Issue other Provisions	
2008	Law 55	Del Comercio Marítimo	Maritime Commerce	
2012	Bill 416	Proyecto de Ley 416, General de Cultura	Bill 416, General Culture	
2012	Note 330	Nota No. 330-2012-AL, 4 de junio de 2012, Ricardo Martinelli Berrocal, Presidente de la Republica	Note No. 330-2012-AL, 4 June 2012, Ricardo Martinelli Berroca, President of the Republic	
Portugal				
1993	Decreto-Lei 289	De 21 de Agosto	Of 21 August	
1997	Decreto-Lei 117	De 14 de Maio	Of 14 May	
1997	Decreto-Lei 164	De 27 de Junho, 'Património Cultural Subaquático'	Of 27 June, 'Underwater Cultural Heritage'	Joana Valdez-Tullett
1999	Decreto-Lei 270	De 15 de Julho	Of 15 July	Carmen Tania Obied
1999	Bill 228/VII	Estabelece as bases da política e do regime de protecção e valorização do património cultural	Establishing the political basis and the system of protection and promotion of cultural heritage	
2000	Bill 39/VIII	Estabelece as bases da política e do regime de protecção e valorização	Establishing the political basis and the system of protection	

		do património cultural	and promotion of cultural heritage	
2001	Lei 107	De 8 de Setembro, Lei de Bases do Património Cultural	Of 08 September, Fundamental Law of the Cultural Heritage	Direção Geral do Património Cultural
2006	Lei 34	De 28 de Julho, Zonas Marítimas sob Soberania ou Jurisdição Nacional	Of 28 July, Maritime Zones under National Sovereignty or Jurisdiction	
2007	Decreto-Lei 96	Of 29 de Março	Of 29 March	
2012	Aviso 6	(Diário da República, 26 de março de 2012)		
2014	Dectreto-Lei 164	De 4 de novembro	Of 4 November	Carmen Tania Obied
Romania				
1986	Decree 142		Decree No. 142 of 25 April 1986 of the Council of State concerning the establishment of the Exclusive Economic Zone of the Socialist Republic of Romania in the Black Sea	DOALOS/OLA
1991	Constitution	Constitutia Romaniei	Constitution of Romania	Chamber of Deputies, www.cdep.ro
2000	Ordinance 43	Ordonanţa Guvernului privind protecţia patrimoniului arheologic şi declararea unor situri arheologice ca zone de interes national	Ordinance on the protection of the archaeological heritage and declaring certain archaeological sites as national interest areas	European University Institute

2000	Law 182	Lege privind protejarea patrimoniului cultural naþional mobil	Law regarding the protection of the movable national heritage	UNESCO
2007	Law 99	Lege privind acceptarea Conventiei asupra protectiei patrimoniului cultural subacvatic, adoptata la Paris la 2 noiembrie 2001	Law accepting the Convention on the Protection of the Underwater Cultural Heritage, adopted in Paris on November 2, 2001	
Saint Kitts and Nevis				
1987	Law 5	National Conservation and Environment Protection Act		
2002	Law 24	Merchant Shipping Act		
Saint Lucia				
1975	Law 16	The Saint Lucia National Trust Act		
Saint Vincent and the Grenadines				
2004	Law	Shipping Act		
2014	Law 18	Shipping (Amendment) Act		
Slovakia				
2002	Law 49		Law on the Protection of Historical Monuments and Sites	UNESCO
Slovenia				
1993	Memorandum 07 April 1993	Memorandum o Piranskem zalivu	Memorandum on the Bay of Piran	

1999	Law	Zakon o varstvu kulturne dediščine (ZVKD)	Cultural Heritage Protection Act	UNESCO
2001	Code	Pomorski Zakonik	Maritime Code	DOALOS, LOS Bulletin No. 60
2003	Law 19 December 2003	Zakon o Dopolnitvah Pomorskega Zakonika (PZ-B)	Act Amending the Maritime Code	DOALOS, LOS Bulletin No. 60
2003	Ordinance 5033	O razglasitvi struge reke Ljubljanice ter njenega pritoka Ljubije, vključno z bregovi, in območja stare struge Ljubljanice, za kulturni spomenik državnega pomena	Proclaiming the riverbed of the Ljubljanica River and its tributary Ljubija, including the banks and the area of the old riverbed of the Ljubljanica River, as a cultural monument of national importance	
2005	Bill 29 August 2005	Predlog Zakona O Razglasitvi Zaščitne Ekološke Cone In Epikontinentalnem Pasu Republike Slovenije	The draft Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act	
2006	Decree 5 January 2006	Uredba o določitvi območja ribolovnega morja Republike Slovenije	Decree on the Determination of the Fisheries Areas of the Republic of Slovenia	
2006	Law	Zakon O Razglasitvi Zaščitne Ekološke Cone In Epikontinentalnem Pasu Republike Slovenije (ZRZECEP)		DOALOS, LOS Bulletin No. 60
2007	Bill 29 October	Predlog Zakona O Varstvu Kulturne Dediščine	Draft Cultural Heritage Protection Act	

	2007			
2008	Law	Zakon o varstvu kulturne dediščine (ZVKD-1)	Cultural Heritage Protection Act	UNESCO
2012	Law	Zakon O Spremembah In Dopolnitvah Zakona O Varstvu Kulturne Dediščine (ZVKD-1B)	Law on Amendments and Supplements to the Law on Cultural Heritage Protection	
2013	Regulation	Pravilnik o arheoloških raziskavah	Regulations on archaeological research	
2013	Law	Zakon o spremembah in dopolnitvah Zakona o varstvu kulturne dediščine (ZVKD-1C)	Law on Amendments and Supplements to the Law on Cultural Heritage Protection	
2014	Regulation	Pravilnik o iskanju arheoloških ostalin in uporabi tehničnih sredstev za te namene	Regulations on finding archaeological remains and the use of technical means for this purpose	
Spain				
1889	Real Decreto	Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil	Royal Decree of 24 July 1889 publishing the Civil Code	WIPO, www.wipo.int
1978	Constitution	Constitución Española	Spanish Constitution	Congreso de los Diputados, www.congreso.es
1962	Law 60	Ley 60/1962, de 24 de diciembre, por la que se regulan los auxilios, salvamentos, remolques, hallazgos y extracciones marítimos	Law 60/1962 of 24 December, which regulates assistance, salvage, towing, discoveries and maritime extractions	
1984	Bill 26 March 1984	Proyecto de Ley del Patrimonio Histórico Español	Spanish Historical Heritage Bill	

1985	Law 16	Ley 16/1985, de 25 de junio, del Patrimonio Histórico Español	Law 16/1985 of 26 June, on the Spanish Historical Heritage	UNESCO, IFAR
2014	Law 14	Ley 14/2014, de 24 de julio, de Navegación Marítima	Law 14/2014, of 24 July, of Maritime Navigation	Rodrigo Ortiz
Togo				
1977	Ordinance 24	Ordonnance n° 77-24 portant délimitation des eaux territoriales et création d'une zone maritime économique protégée	Ordinance No. 77/24 delimiting the Territorial Waters and creating a protected Economic Maritime Zone	DOALOS/OLA
Trinidad and Tobago				
1986	Law 24	Archipelagic Waters and Exclusive Economic Zone Act		
1991	Law 11	National Trust Act		
1994	Law 13	Protection of Wrecks Act		
Tunisia				
1989	Law 21	Loi n° 89-21 du 22 février 1989 relative aux épaves maritimes	Law No. 89/21 of 22 February 1989, of maritime wrecks	
1994	Law 35	Loi n° 94-35 du 24 février 1994 relative au code du patrimoine archéologique, historique et des arts traditionnels	Law No. 94/35 of 24 February 1994 on the archaeological and historic heritage and traditional arts code	
Ukraine				
2000	Law	Закон України Про охорону культурної	Law on Protection of Cultural Heritage	UNESCO

		спадщини		
2004	Law	Закон України Про охорону археологічної спадщини	Law on Protection of Archaeological Heritage	UNESCO
United Kingdom				
1973	Law	Protection of Wrecks Act		
1986	Law	Protection of Military Remains Act		
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List of Abbreviations

AIA	Archaeological Institute of America
AIS	Automatic identification system
BOEM	Bureau of Ocean Energy Management
CAVV	*Commissie van Advies inzake Volkenrechtelijke Vraagstukken* [Advisory Committee on Issues of Public International Law]
CCS	Convention on the Continental Shelf
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMI	*Comité Maritime International* [International Maritime Committee]
CoE	Council of Europe
CoP	Conference of Parties
DOALOS	The Division for Ocean Affairs and the Law of the Sea
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization of the United Nations
GDP	Gross Domestic Product
GPS	Global Positioning System
HFF	Honor Frost Foundation
ICOM	International Council of Museums
IFAR	International Foundation for Art Research
IGESPAR	*Instituto de Gestão do Património Arquitectónico e Arqueológico* [Institute of Management of Architectural and Archaeological Heritage]
ILA	International Law Association
IMO	International Maritime Organization
INAH	*Instituto Nacional de Antropología e Historia* [National Institute of Anthropology and History]

IOC	Intergovernmental Oceanographic Commission
IPA	*Instituto Português de Arqueologia* [Portuguese Institute of Archaeology]
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
JNAPC	Joint Nautical Archaeology Policy Committee
M	Nautical mile
MiBACT	*Ministero dei beni e delle attività culturali e del turismo* [Ministry of Cultural Heritage, Activities and Tourism]
MoD	Ministry of Defence
MSR	Marine scientific research
SCUBA	Self-Contained Underwater Breathing Apparatus
SIR	System of implementation review
SNT	Single Negotiating Text
UCH	Underwater Cultural Heritage
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS I	The first United Nations Conference on the Law of the Sea
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	Vienna Convention on the Law of Treaties
ZERP	*Zaštićeni Ekološko-Ribolovni Pojas* [Ecological and Fisheries Protection Zone]
ZPE	*Zona di Protezione Ecologica* [Ecological Protection Zone]
ZVKD	*Zakon o varstvu kulturne dediščine* [Cultural Heritage Protection Act]

Introduction

On 02 November 2001 the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Protection of the Underwater Cultural Heritage.[1] This was hailed as a major step forward by the underwater archaeology community, as it was an acknowledgement on the international stage of the importance of underwater cultural heritage (UCH), and an attempt to solve some of the many problems that UCH, and underwater archaeology as a discipline, faces. The Convention came into force on 02 January 2009 after it received its 20th ratification or acceptance.

The Convention requires implementation by its States Parties, through legislative, administrative and other means. However, the pre-existing law relating to UCH is contained in an array of international and national legislation, a context into which the Convention and its implementing laws have to fit. Further, societal, economic and political factors will affect the desire and ability to implement the Convention. It has now been almost ten years since the Convention came into force but little is known of how, or even whether, the Convention is being implemented, and whether it is solving the problems it was created to address. Can the Convention be said to be effective? This study will determine whether and how the Convention is being implemented, what the legal implications are of this implementation, what factors are leading to the current level of implementation, and how this level could be improved.

The 2001 Convention is a treaty. The term treaty refers to all written binding instruments concluded between States. The 1969 Vienna Convention on the Law of Treaties defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[2] 'Convention' also can be used generically to apply to all treaties, but is usually used more specifically to mean multilateral treaties, open to ratification by all

[1] UNESCO Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 41 ILM 40 (2001 Convention).

[2] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, 8 ILM 679 (VCLT) art 2(1)(a).

(or a large number of) States, and negotiated to solve a global issue.[3] These are usually negotiated through an international organisation or an organ of an international organisation, such as the United Nations (UN) or UNESCO. These terms refer to only the instrument itself, so when wanting to refer to the wider commitments, institutions and expectations that surround the text of a treaty, the term 'regime' may be used.[4] For the 2001 Convention, the regime also encompasses, *inter alia*, the Meeting of States Parties, the main decision making body of the 2001 Convention, and its resolutions; the Operational Guidelines of the Convention; and its Scientific and Technical Advisory Body (STAB).

The term 'cluster' can be used to denote the collection of initiatives and regimes that target a particular international objective.[5] The cluster that targets the protection of UCH is made up primarily of the regimes of the 2001 Convention and the United Nations Convention on the Law of the Sea of 1982,[6] and while being relatively less complex than some other clusters relating to marine governance, it still potentially retains all the problems that such a cluster entails, including a lack of consistency and competing obligations. In the two introductory chapters of this study, the cluster relating to UCH will be outlined. Firstly, the threats facing UCH, which the cluster attempts to solve, will be discussed. Secondly the UNCLOS regime will be outlined to show the legal context that the 2001 Convention entered into, and the gaps it was intended to plug. Following this, the 2001 Convention itself will be briefly described. Finally, the issues that such a study on the implementation and effectiveness of the Convention can hope to address will be set out, before exploring these in more detail in the later chapters.

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[3] United Nations, 'Definition of Key Terms Used in the UN Treaty Collection' (*United Nations Treaty Collection*, 2015) <www.treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml> accessed 28 June 2015.

[4] David G Victor, Kal Raustiala and Eugene B Skolnikoff, 'Introduction and Overview' in David G Victor, Kal Raustiala and Eugene B Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (The MIT Press 1998) 8.

[5].Joseph FC DiMento and Alexis Jaclyn Hickman, *Environmental Governance of the Great Seas: Law and Effect* (Edward Elgar Publishing Limited 2012) 8.

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

Chapter 1 - An International Problem

1.1 The Threat to Underwater Cultural Heritage

> For it is probable that a greater number of monuments of the skill and industry of man will, in the course of ages, be collected together in the bed of the ocean than will be seen at one time on the surface of the continents.[7]

Until the 19th century boats and ships were the largest and most complex machines produced by society.[8] They provide invaluable evidence to archaeologists about past societies, technology and the lives of the countless millions of people throughout human history who have, for one reason or another, ventured out to sea. As archaeological assemblages they are often unrivalled, as all their component artefacts will have a close contemporaneity and none of the artefacts will have been purposefully selected for deposition, except in a few rare cases. Their preservation often exceeds that of terrestrial archaeological sites, due, especially in deep waters, to a lack of human and natural interference.

Since the late 1990s a series of discoveries has suggested that the deep water archaeological resource is both more common and better preserved than once thought.[9] These new and seemingly unending finds in deep waters lure us into the belief that these resources will always be unlimited. In fact, the shipwreck resource is finite and non-renewable. Of course, ships still sink, but 'the total number of Phoenician warships, Medieval Cogs, ancient Chinese trading vessels, or Polynesian voyaging catamarans preserved beneath the sea is finite.'[10]

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[7] Charles Lyell, *Principles of Geology, Being an Attempt to Explain the Former Changes of the Earth's Surface, by Reference to Causes Now in Operation. Vol. II* (2nd edn, John Murray 1833) 265.

[8] Keith Muckelroy, *Maritime Archaeology* (Cambridge University Press 1978) 3.

[9] Jonathan Adams, 'Alchemy or Science? Compromising Archaeology in the Deep Sea' (2007) 2 Journal of Maritime Archaeology 48, 49.

[10] Donald H Keith and Toni L Carrell, 'Going, Going, Gone: Underwater Cultural Resources in Decline' in Teresita Majewski and David Gaimster (eds), *International Handbook of Historical Archaeology* (Springer 2009) 109.

It is therefore essential that the remaining resource is either expended in a manner in which the most information can be scientifically extracted from it, or preserved until a time when such an intervention is possible and desirable. One of the most visible problems facing underwater cultural heritage,[11] and one which expends the resource without achieving this fundamental aim, is treasure hunting.[12] Treasure hunting is the exploitation of the archaeological resource driven by a profit motive; detracting from the shared heritage for the benefit of the individual.[13]

Treasure hunting is fundamentally antithetical to archaeology in its aims, methods and ethics.[14] Despite some treasure hunters claiming to be practicing archaeology, archaeology is not just a set of methods, nor is it necessarily improved by more advanced technology; its epistemology, ontology and ethics are as fundamental as the

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[11] But certainly not the only threat facing UCH. Others include development works, tourism, fishing, other resource extraction and even climate change. See: Bill Jeffery, '"Activities Incidentally Affecting Underwater Cultural Heritage" in the 2001 UNESCO Convention' in Lyndel V Prott (ed), *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Institute of Art and Law 2006); Virginia Dellino-Musgrave, Sanjeev Gupta and Mark Russell, 'Marine Aggregates and Archaeology: A Golden Harvest?' (2009) 11 Conservation and Management of Archaeological Sites 29; Amanda M Evans, Antony Firth and Mark Staniforth, 'Old and New Threats to Submerged Cultural Landscapes: Fishing, Farming and Energy Development' (2009) 11 Conservation and Management of Archaeological Sites 43; Joe Flatman, 'Conserving Marine Cultural Heritage: Threats, Risks and Future Priorities' (2009) 11 Conservation and Management of Archaeological Sites 5; Joe Flatman, 'What the Walrus and the Carpenter Did Not Talk About: Maritime Archaeology and the Near Future of Energy' in Marcy Rockman and Joe Flatman (eds), *Archaeology in Society: Its Relevance in the Modern World* (Springer 2012); Elena Perez-Alvaro, 'Unconsidered Threats to Underwater Cultural Heritage: Laying Submarine Cables' (2013) 14 Rosetta 54.

[12] Tatiana Villegas Zamora, 'The Impact of Commercial Exploitation on the Preservation of Underwater Cultural Heritage' (2008) 60 Museum International 18; David Parham and Michael Williams, 'An Outline of the Nature of the Threat to Underwater Cultural Heritage in International Waters' in RA Yorke (ed), *Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK: Proceedings of the JNAPC 21st Anniversary Seminar, Burlington House, November 2010* (Nautical Archaeology Society 2011).

[13] Jerome Lynn Hall, 'The Black Rhino' (2007) 2 Journal of Maritime Archaeology 93.

[14] Wilburn A Cockrell, 'Why Dr. Bass Couldn't Convince Mr. Gumbel: The Trouble with Treasure Revisited, Again' in Lawrence E Babits and Hans Van Tilberg (eds), *Maritime Archaeology: A Reader of Substantive and Theoretical Contributions* (Plenum Press 1998).

practical techniques employed.[15] Central to this is the lack of a financial incentive. This incentive in treasure hunting governs both the philosophical and managerial objectives,[16] and leads to the curtailing of the painstaking and time-consuming techniques needed for archaeological excavation, analysis and conservation of a site and anything removed from it.[17] Financially valuable items will be prioritised for recovery at the expense of less valuable material such as ships timbers and the context that is essential to archaeology. Collections of recovered material are often irrevocably dispersed to pay for recovery operations and shareholder dividends. Such dispersal prevents the ongoing study of a collection as theories, methods and epistemologies develop and denies any future independent verification of results.[18]

Treasure hunting has been increasingly threatening previously undisturbed heritage. With the advent of the self-contained underwater breathing apparatus (SCUBA) wreck sites around the Mediterranean coasts were destroyed in the 1950s and 1960s, and a similar technological leap has taken place over the last two decades, opening up the deep sea to exploitation, and potentially leading to the Mediterranean experience being 'repeated on a global scale.'[19] In addition treasure hunters now target less developed nations which have little experience of maritime archaeology and incomplete or non-existent protective legislation.[20]

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[15] Adams (n 9) 51; Jerome Lynn Hall, 'The Fig and The Spade: Countering the Deceptions of Treasure Hunters' (2007) [15 August] AIA Archaeology Watch 1, 4; Thijs J Maarleveld, 'Ethics, Underwater Cultural Heritage, and International Law' in Alexis Catsambis, Ben Ford and Donny L Hamilton (eds), *The Oxford Handbook of Maritime Archaeology* (Oxford University Press 2011).

[16] Hall (n 15) 3.

[17] George L Miller, 'The Second Destruction of the Geldermalsen' (1992) 26 Historical Archaeology 124.

[18] Kieran Hosty, 'A Matter of Ethics: Shipwrecks, Salvage, Archaeology and Museums' (1995) 19 Bulletin of the Australian Institute for Maritime Archaeology 33; DK Abbass, 'A Marine Archaeologist Looks at Treasure Salvage' (1999) 30 Journal of Maritime Law and Commerce 261, 262; Jane Waldbaum, 'Basement Archaeology' (2003) [Sep/Oct] Archaeology 6.

[19] Adams (n 9) 49. The technological jump consists of improvements in three types of technology, equipment used for locating wrecks, equipment used for interfering with wrecks, and GPS.

[20] Jeffrey Lee Adams, 'New Directions in International Heritage Management Research' (Doctoral Thesis, University of Minnesota 2010) ch 4; Thijs J Maarleveld, 'African Waters: A Treasure Trove for

The situation for UCH is rather unique. The mere existence of supposedly respectable treasure hunters shows that heritage underwater is currently being treated in a very different way from terrestrial heritage. Most people would not expect profit motives to drive interventions on terrestrial heritage,[21] and many States have cultural heritage legislation that reflects this.

This situation has been allowed to develop because the law has permitted it. The law relating to underwater archaeology, and deep-sea archaeology in particular, is insufficient for a variety of reasons, not least that it has largely developed due to concerns other than archaeology. Jurisdictional issues also cause problems for those wanting to regulate interventions. The treasure hunter's argument that posits that because their actions are legal that they are a legitimate use of the heritage falls at the slightest scrutiny. Merely because something is legal does not make it ethical,[22] and because something has been done for centuries does not mean it should continue. The legal framework that has allowed this situation to develop will now be outlined.

1.2 A Legal Vacuum

1.2.1 The Legal Context

With regard to the protection of UCH certain aspects of the international legal environment were, and still are, extremely deficient, and 'for some of its aspects… it can even be considered not only insufficient, but also counterproductive and corresponding to an invitation to the looting of the heritage in question.'[23] Very little of any of the

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International Entrepreneurs in the Antiquities Market' in Anne Mayor, Vincent Négri and Eric Huysecom (eds), *African Memory in Danger – Mémoire africaine en péril* (Africa Magna Verlag 2015).

[21] Hall highlights this double standard: 'But what if, instead of a shipwreck, these wanton thrill seekers were to plunder the "primary cultural deposit" (also known as "the target" or "the motherlode") within a Mycenaean tomb, an Arawak ceremonial court, or a Civil War prisoner camp? Would those popular periodicals condone and promote the digging and divvying up of artefacts among private investors in these instances? *Of course not*' Hall (n 15) 2.

[22] ibid 5.

[23] Tullio Scovazzi, 'Underwater Cultural Heritage' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Online, Oxford University Press 2009). These particular aspects will be discussed later.

previous relevant international and national law has developed with archaeological or heritage considerations in mind.[24] There are two main legal facets that render the law regarding UCH particularly complex: the limits a State has over jurisdiction and the potential competing claims in UCH.[25] The ability to enforce laws is a final, more practical, complicating issue.

1.2.1.1 Jurisdiction

Effective protection of UCH relies on States having the jurisdiction to be able to regulate the behaviour of actors and enforce relevant regulations, and this jurisdiction varies depending on where the UCH is located, who is interfering with it, and also due to its nature and provenance. This creates a complex jurisdictional framework in which States have to act. The current foundation of this is set out in UNCLOS, which outlines a number of maritime zones and the jurisdiction available to States within them.

Generally, jurisdiction means the right of an authority to apply its law.[26] This can include the right to make laws (which is known as legislative or prescriptive jurisdiction), the right of courts to enforce laws (judicial or adjudicative jurisdiction), or the powers of physical interference of the executive (known as enforcement jurisdiction).[27] States may claim whatever jurisdiction they like in their national laws, but whether this jurisdiction is recognized by other States depends on its basis in international law.[28] Under international law there are a number of bases, or

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[24] Much of this law relates specifically to shipwrecks, as these are often both archaeologically and economically valuable, are subject to the most competing interests, and to the attention of treasure-hunters. UCH however, encompasses much more than shipwrecks, and can include submerged landscapes, port and harbour works, or any other material remains relating to humanity's past lost under the sea.

[25] Anthony Clark Arend, 'Archaeological and Historical Objects: The International Legal Implications of UNCLOS III' (1982) 22 Virginia Journal of International Law 777, 780.

[26] Lyndel V. Prott and PJ O'Keefe, *Law and the Cultural Heritage: Volume 1, Discovery and Excavation* (Professional Books Limited 1984) 82.

[27] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 109.

[28] Prott and O'Keefe (n 26) 83.

'manifestations' of jurisdiction,[29] two of which are particularly relevant to this discussion: the principle of territoriality and the principle of nationality.

The territorial principle provides that a State has jurisdiction within its own borders. This is based on sovereignty, the right of a State to govern itself without any interference from outside sources or bodies. Many UCH laws are based on the notion of territoriality, such as the UK's Protection of Wrecks Act 1973, which applies 'to any site in United Kingdom waters.'[30]

The principle of nationality gives States jurisdiction over their nationals whether they are within their territory or not. However, it is important to note that depending on where the national is, some types of jurisdiction may be unavailable to the home State. For instance, if a State's national commits a crime in another State's territory, the first State's legislation may still apply, and its courts may have jurisdiction to hear the case, but it may not have enforcement jurisdiction as its police are not able to enter the other State's territory to make an arrest, at least without the consent of the other State. Deriving from the nationality principle is flag State jurisdiction, where vessels are subject to the laws of their State of registration or 'flag' State.[31] Persons and vessels subject to nationality and flag State jurisdiction may still also be subject to the territorial jurisdiction of other States, depending on where they are.[32] For instance if a vessel is within another State's territorial waters, it will be subject to the laws of that other State in addition to the laws of its flag State.

The nationality principle is also used in UCH protection, but less often than the territorial principle.[33] Contrast the territorial focus of the UK's Protection of Wrecks Act, with the jurisdictional framework set out in its Protection of Military Remains Act 1986,

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[29] Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers 2007).

[30] Protection of Wrecks Act 1973, s 1(1).

[31] Prott and O'Keefe (n 26) 91; Bernard H Oxman, 'Marine Archaeology and the International Law of the Sea' (1988) 12 Columbia-VLA Journal of Law & the Arts 353, 357; Djamchad Momtaz, 'The High Seas' in RJ Dupuy and D Vignes (eds), *A Handbook on the New Law of the Sea* (Martinus Nijhoff Publishers 1991).

[32] Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 357.

[33] Prott and O'Keefe (n 26) 84.

which uses the territorial principle, the nationality principle, and flag State jurisdiction to regulate certain activities towards wrecks. The Protection of Military Remains Act applies:

> (a) if the acts or omissions which constitute the offence are committed in the United Kingdom, in United Kingdom waters or on board a British-controlled ship; or
>
> (b) in a case where those acts or omissions are committed in international waters but not on board a British controlled ship, if that person is—
>
> > (i) a British citizen, a British Dependent Territories citizen or a British Overseas citizen; or
> >
> > (ii) a person who under the British Nationality Act 1981 is a British subject; or
> >
> > (iii) a British protected person (within the meaning of that Act); or
> >
> > (iv) a company registered under the Companies Act 2006.[34]

To ensure the effective protection of UCH a range of mechanisms that use different types of jurisdiction may be needed.

1.2.1.2 Enforcement

Particular problems with enforcement also exist. Even when States have the jurisdiction to regulate interactions with UCH, the enforcement of the relevant laws will be difficult as the activities could be taking place very far from the concerned State, and possibly in a clandestine manner. While it can be difficult for a State to enforce even its terrestrial heritage laws to effectively protect that heritage, trying to ensure the protection of heritage far out to sea will be more difficult still.[35] Some maritime powers believe that it is untenable to control waters beyond about 20 miles from their coasts.[36] This can be because detecting vessels engaged in illicit activities is difficult, especially if only

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[34] Protection of Military Remains Act 1986, as amended, s 3(1).

[35] Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (Martinus Nijhoff Publishers 1995) 20, 222.

[36] ibid 346.

surveys are being performed, however, for large scale excavations of sites detection is likely to be easier for those States with such capabilities.[37] Flags of convenience can also be used to circumvent flag State controls. More imaginative and less direct ways of controlling illicit removal of archaeological objects may therefore often be more appropriate than attempting to monitor the activities of all vessels in a State's jurisdictional waters.[38]

1.2.1.3 Interests in Underwater Cultural Heritage

The situation is also complicated by various different interests in UCH and the various bodies of law that may apply to it.[39] As Strati points out, 'the role of the law of the sea should not be overestimated', as it is only directly relevant to the question of jurisdiction, and not to other areas of law such as ownership.[40] Interests in UCH may be held by the coastal State in whose water the UCH is located, the flag State if the UCH is a wreck, the flag State of the vessel intervening with the UCH, a State of origin of the UCH, private individuals and even the wider international community.[41] Ownership rights may also exist in UCH, and these can be held by a previous owner,[42] abandoned and

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[37] ibid 347. Although this has been made easier by the automatic identification system (AIS) used for tracking ships.

[38] This problem is not limited to heritage protection. Other areas of regulated activity, such as fishing, face similar enforcement issues. See: David Freestone, 'The Final Frontier: The Law of the Sea Convention and Areas beyond National Jurisdiction' in HN Scheiber and MS Kwon (eds), *Securing the Ocean for the Next Generation: Papers from the Law Institute of Ocean Science and Technology Conference, held in Seoul, Korea, May 2012* (2012).

[39] Sarah Dromgoole, 'Law and the Underwater Cultural Heritage: A Question of Balancing Interests' in N Brodie and K Walker Tubb (eds), *Illicit Antiquities: The theft of culture and the extinction of archaeology* (Routledge 2002).

[40] Strati (n 35) 2.

[41] ibid 19–20.

[42] Identifying the previous owner of UCH can be very difficult and this difficulty increases the older the heritage is. In addition, if ownership of one aspect of an assemblage can be proven, such as the ship itself, there will be other aspects that are not as easily traceable, such as the personal possessions of the crew. Thijs J Maarleveld, '"Proper and Appropriate" "Property and Appropriation"' in Lyndel V. Prott, Ruth

awarded to a discoverer through the law of finds, or subject to some form of expropriation such as through the law of salvage by an *in specie* award, or by a State whose waters it is located in. Most of these rights converge and overlap, and most have little to do with the archaeological character of heritage. The law of salvage and the principle of sovereign immunity also are complex issues at the international level, and have been particularly relevant to UCH in the past few decades, leading to some significant cases of destruction of UCH.[43] Generally, these competing interests, especially the question of ownership, are not dealt with by international treaties as the international community has been unwilling to address these issues, and they will therefore usually be based on national legislation.[44] UNCLOS is of little relevance to these interests. Other regimes that are relevant to UCH regulated at an international level include those that relate to the commercial value of the heritage, including salvage, its hazardousness to navigation, and its environmental impacts.[45]

These factors combine to create an incredibly complex situation, and led to the statement in 1996 that UCH is 'the last major issue of a global nature which needs to be resolved in the Law of the Sea.'[46] The remainder of this chapter will finish setting the legal context by outlining the jurisdiction provided for by UNCLOS and the relevance of that treaty to UCH. This is important as the 2001 Convention uses the jurisdictional framework of UNCLOS, but attempts to develop and improve the manner in which it treats UCH.

Redmond-Cooper and Stephen Urice (eds), *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* (Institute of Art and Law 2013) 70.

[43] Tullio Scovazzi, 'The Application of "Salvage Law and Other Rules of Admiralty" to the Underwater Cultural Heritage: Some Relevant Cases' in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff Publishers 2003).

[44] Strati (n 35) 3.

[45] Miguel García García-Revillo and Miguel J Agudo Zamora, 'Underwater Cultural Heritage and Submerged Objects: Conceptual Problems, Regulatory Difficulties - The Case of Spain' (2010) 14 Spanish Yearbook of International Law 1, 15.

[46] Alastair Couper, 'The Principal Issues in Underwater Cultural Heritage' (1996) 20 Marine Policy 283, 285.

1.2.2 The UNCLOS Regime

The jurisdictional regime of UNCLOS is fundamental to the question of the protection of heritage at sea. The law of the sea, codified in UNCLOS, 'supplies the jurisdictional framework pursuant to which States may, individually and cooperatively, develop a substantive law of marine archaeology.'[47] It also lays out some rights and obligations that States have which are relevant to UCH.

[47] Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 355.

1.2.2.1 The Maritime Zones

UNCLOS sets out eight maritime zones, six maritime water spaces and two underwater areas, which partition the ocean into 'tidy stripes of jurisdiction' (Figure 1).[48] Some of these had been elaborated prior to UNCLOS in the four Geneva Conventions concluded in 1958.[49] These zones contain different jurisdiction, rights and obligations for States, ranging from full sovereignty over territorial waters to only jurisdiction over their own flagged vessels on the high seas.

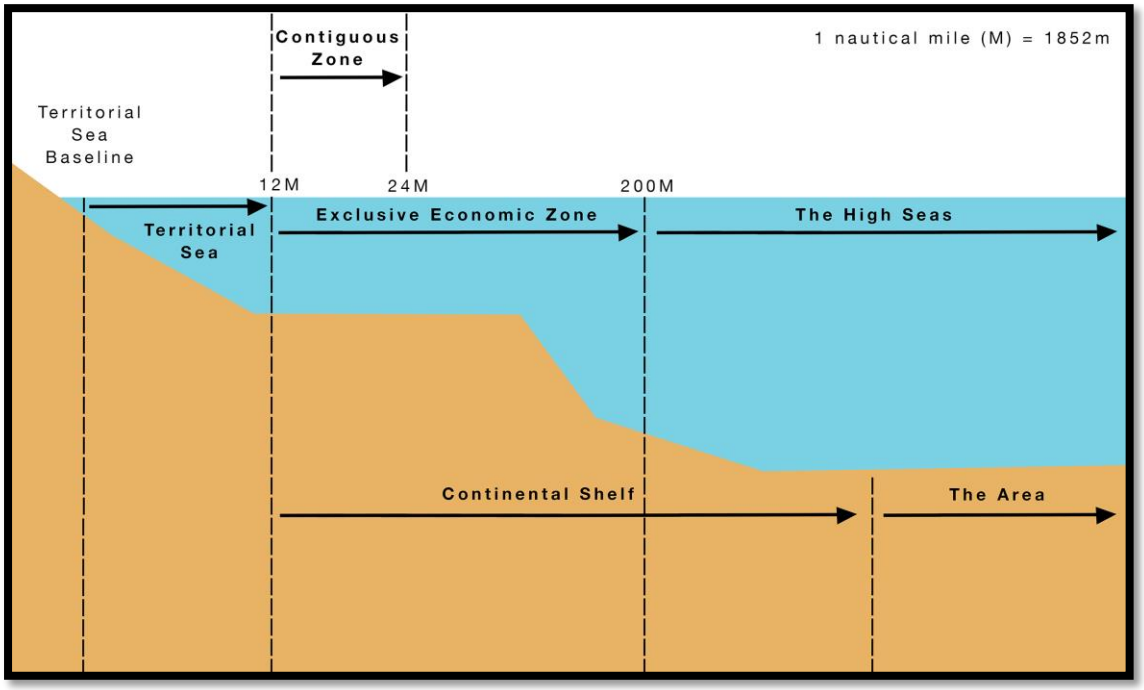

Figure 1.Maritime zones and rights under UNCLOS.[50]

[48] Gavouneli (n 29) 3.

[49] Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311 (CCS); Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285; Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11; Convention on the Territorial Sea and Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205.

[50] For a more detailed version see: Philip Symonds, Mark Alcock and Colin French, 'Setting Australia's Limits' (2009) 93 AusGeo News 1, 2.

1.2.2.1.1 Territorial and Archipelagic Waters

The area known as the territorial sea is a belt of sea extending along the coast of a State. It was set by UNCLOS as covering an area up to 12 nautical miles (M), measured from baselines which usually use the tidal low-water line along the coast.[51] Within the territorial sea a State has full sovereignty, including over its bed and subsoil and the airspace above it.[52] This sovereignty is limited by the right of innocent passage, where foreign vessels have the right to navigate through territorial waters for particular purposes.[53] Passage is not innocent if it includes research or survey activities.[54]

Archipelagic States, which are constituted wholly by one or more archipelagos, may draw baselines around the outermost points of their outermost islands, from which the territorial waters are measured.[55] Within these baselines, in a zone known as archipelagic waters, the State also has sovereignty.[56]

1.2.2.1.2 Internal Waters

A State's internal waters are all waters on the landward side of the baselines of the territorial sea. These include all inland waters such as rivers, lakes and canals, as well as bays and ports. A State enjoys full sovereignty in these waters.[57]

1.2.2.1.3 The High Seas

All parts of the sea not included in the territorial sea, internal waters, archipelagic waters, or in an exclusive economic zone (section 1.2.2.1.6), can be termed the high seas.[58] These waters are not subject to any State sovereignty and the only jurisdiction

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[51] UNCLOS arts 3, 5. Straight baselines may be drawn over indented coasts, river mouths and bays: ibid arts 7, 9, 10.

[52] ibid art 2.

[53] ibid arts 17-9.

[54] ibid art 19(j).

[55] ibid arts 46-8.

[56] ibid art 49.

[57] Strati (n 35) 113.

[58] UNCLOS art 86.

applicable to the high seas is that of the flag State.[59] States have freedom of the high seas, which, for both coastal and land-locked States, comprises, *inter alia*: freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations permitted under international law; freedom of fishing; and freedom of scientific research.[60]

The freedoms listed are not exhaustive, and so the high seas can be used for any purpose not expressly prohibited by international law.[61] These freedoms are thought to include activities related to the search for, and recovery of, submarine wrecks, although this is not mentioned specifically.[62] Search and recovery of archaeological objects could also arguably be included therefore. These freedoms have to be exercised with due regard to the interests of other States.[63]

1.2.2.1.4 The Contiguous Zone

From the edge of the territorial sea, to a distance of 24 M a State may claim a contiguous zone. In this 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.[64]

This zone was developed to allow States to protect against smuggling and disease,[65] and provides the coastal State with enforcement jurisdiction for certain offences committed

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[59] ibid art 92(1).

[60] ibid art 87(1).

[61] Strati (n 35) 215.

[62] Lucius Caflisch, 'Submarine Antiquities and the International Law of the Sea' (1982) 13 Netherlands Yearbook of International Law 3, 25.

[63] UNCLOS art 87(2). This means the interests of others States in their exercise of freedoms must not be ignored, a State attempting to completely exclude other States from practicing maritime archaeology on the high seas could be challenged under this provision.

[64] ibid art 33(1).

in their territory. The powers specified are preventative and punative. States do not, based solely on UNCLOS, have legislative jurisdiction in this zone.

1.2.2.1.5 The Continental Shelf

The continental shelf of a coastal State is:

> …the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[66]

The legal status of the superjacent waters are unaffected by the rights of a coastal State in its continental shelf.[67] These rights include the sovereign rights[68] for exploring the continental shelf and exploiting its (living and non-living) natural resources.[69] States also have sovereign rights in other economic activities related to the economic exploitation and exploration of the zone including the right to authorize and regulate drilling on the continental shelf for all purposes,[70] rights over artificial islands, installations and structures,[71] rights over marine scientific research (MSR),[72] and rights

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[65] Strati (n 35) 159.

[66] UNCLOS art 76(1).

[67] ibid art 78(1).

[68] Despite their name, these are not based on any notion of sovereignty, but rather are rights of exclusive use for a specific functional purpose: Sophia Kopela, 'The "territorialisation" of the Exclusive Economic Zone: Implications for Maritime Jurisdiction', *Paper presented at the 20th Anniversary Conference of the International Boundaries Research Unit on the State of Sovereignty, Durham University, United Kingdom, 1 – 3 April 2009* (2009) 1.

[69] UNCLOS art 77(1).

[70] ibid art 81.

[71] ibid art 80.

[72] ibid art 246.

over the deployment and use of any type of scientific research installations or equipment.[73]

1.2.2.1.6 The Exclusive Economic Zone

States may declare an EEZ between the limits of their territorial seas and points not exceeding 200 M from their baselines.[74] The coastal State has some sovereign rights, and some jurisdiction in the EEZ. It has sovereign rights:

> …for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[75]

It has jurisdiction with regard to:

> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the protection and preservation of the marine environment.[76]

This is a newer zone, first appearing in the 1982 UNCLOS regime, and is *sui generis*, as it stems from neither coastal State sovereignty nor the freedom of the high seas.[77] Whilst the continental shelf is essentially linked to notions of territory, the EEZ is not.[78] This is

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[73] ibid art 258.

[74] ibid art 57.

[75] ibid art 56(1)(a).

[76] ibid art 56(1)(b). It also has the exclusive right to construct, and authorize and regulate the construction, operation and use of artificial islands and certain installations and structures, and has jurisdiction over them: ibid art 60.

[77] ibid art 55; Strati (n 35) 264; Robert Beckman and Tara Davenport, 'The EEZ Regime: Reflections after 30 Years' in Harry N Scheiber and Moon Sang Kwon (eds), *LOSI Conference Papers 'Securing the Ocean for the Next Generation' Papers from the Law of the Sea Institute, UC Berkeley-Korea Institute of Ocean Science and Technology Conference, held in Seoul, Korea, May 2012* (UC Berkeley School of Law 2012) 6.

[78] Moira L McConnell, 'Observations on the Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: A Comparative View' (2011) 25 Ocean Yearbook 221, 237.

highlighted by the fact that an EEZ has to be claimed, while the continental shelf exists *ipso facto.*

Since the EEZ is a *sui generis* zone it has no residual rights, so neither the coastal State nor a flag State has any jurisdiction except that which is set out in the relevant provisions of UNCLOS.[79] For the coastal State these are the provisions of the EEZ, for the flag State, they are the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other freedoms of the high seas, provided they are exercised with due regard of the interests of other States.[80] Where conflicts arise there is no presumption in favour of either the coastal or flag State.[81]

Some States have claimed areas equivalent to EEZs but with only some of the rights available to them. These include Slovenia, France (in the Mediterranean) and Italy which claim Ecological Protection Zones, utilising only the specific features of an EEZ related to the protection of the marine environment.[82]

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[79] Beckman and Davenport (n 77) 9. Beyond the 200 M limit (and so still potentially on a State's continental shelf), the residual rights are those of the high seas, within territorial waters, they are those of the coastal State due to its sovereignty.

[80] UNCLOS art 58; Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 370.

[81] Strati (n 35) 269. Significantly, Article 59 provides: 'In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.' UNCLOS art 59.

[82] Budislav Vukas, 'State Practice in the Aftermath of the UN Convention on the Law of the Sea: The Exclusive Economic Zone and the Mediterranean Sea' in Anastasia Strati, Maria Gavouneli and Nikolaos Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Martinus Nijhoff Publishers 2006); Angela Del Vecchio Capotosti, 'In Maiore Stat Minus: A Note on the EEZ and the Zones of Ecological Protection in the Mediterranean Sea' (2008) 39 Ocean Development & International Law 287; Kopela (n 68) 2.

1.2.2.1.7 The Area

The Area is the seabed, the ocean floor, and their subsoil that is beyond the limits of national jurisdiction.[83] The Area and its resources (which consist of all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules) are the common heritage of mankind and activities in the Area must be carried out for the benefit of mankind as a whole.[84] No sovereignty or sovereign rights are applicable in the Area and no State or person can appropriate any of it.[85] The International Seabed Authority (ISA) governs certain aspects of the Area's regime.

1.2.2.2 UNCLOS and UCH

In the various jurisdictional zones, a State's ability to regulate interventions on UCH varies, from having practically unlimited jurisdiction in its territorial waters to only being able to regulate its own nationals and vessels in the high seas. Some jurisdiction in the EEZ and continental shelf may be used to indirectly regulate activities that affect UCH. UNCLOS also sets out duties and rights that States have towards UCH in two specific articles. The relevant provisions relating specifically to UCH, and others which are more indirectly relevant, will now be discussed in more detail.

1.2.2.2.1 Articles 149 and 303

UNCLOS's two Articles that specifically relate to the protection of cultural heritage, Articles 149 and 303, appear in Parts XI (The Area) and XVI (General Provisions) of UNCLOS respectively. These provide duties relating to objects of an archaeological and historical nature,[86] in the Area, in the contiguous zone and at sea in general.

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[83] UNCLOS art 1(1).

[84] ibid arts 133, 136, 140.

[85] ibid art 137.

[86] The term 'objects of an archaeological and historical nature' is not defined in UNCLOS, but the *travaux preparatoires* suggest that it includes wrecks and related objects with an archaeological *or* historical nature, although some commentators argue that they should be archaeological *and* historical. During negotiations the term 'historical' was added to the phrase by of the delegation of Tunisia, who feared that Byzantine heritage may not be covered by the term 'archaeological', but a much broader definition applying to more recent heritage than Byzantine heritage is now commonly accepted. Determining whether an object is archaeological, historical or both remains a subjective decision. Further confusion is

In the Area:

> 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.[87]

Although this article purports to protect some UCH beyond national jurisdiction, and its inclusion in UNCLOS was an achievement and a step forward, Article 149 has suffered much criticism. In particular this is due to its lack of a reporting duty; the use of the term 'preserved or disposed of'; the failure to define the scope and content of preferential rights, who is entitled to those rights and the order of priority among them; and the lack of any expert or administrative body.[88] It also leaves the implementation of its collective duty to the action of individual States, which Caflisch says, 'constitutes the

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added by the use of the slightly different term 'archaeological and historical objects' in the title of Article 149. See: Bernard H Oxman, 'The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)' (1981) 75 American Journal of International Law 211, 241 at n 152; Caflisch (n 62) 8–10; Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 364; MC Giorgi, 'Underwater Archaeological and Historical Objects' in RJ Dupuy and D Vignes (eds), *A Handbook on the New Law of the Sea* (Martinus Nijhoff Publishers 1991) 565; Moritaka Hayashi, 'Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea' (1996) 20 Marine Policy 291; Jean Allain, 'Maritime Wrecks: Where the Lex Ferenda of Underwater Cultural Heritage Collides With the Lex Lata of the Law of the Sea Convention' (1998) 38 Virginia Journal of International Law 747, 753.

[87] UNCLOS art 149. For a detailed discussion of the provision, see: Strati (n 35) 295–315.

[88] Caflisch (n 62) 29–30; Prott and O'Keefe (n 26) 98; Giorgi (n 86) 567; Strati (n 35) 300; Hayashi (n 86) 293; Tullio Scovazzi, 'A Contradictory and Counterproductive Regime' in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff Publishers 2003) 6; Vincent P Cogliati-Bantz and Craig JS Forrest, 'Consistent: The Convention on the Protection of the Underwater Cultural Heritage and the United Nations Convention on the Law of the Sea' (2013) 2 Cambridge Journal of International and Comparative Law 536, 538–9.

worst possible solution'.[89] The weight of academic opinion is that the provision is of little practical value, and represents a failure.[90]

For the other maritime zones Article 303 provides:

> (1) States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
>
> (2) In order to control traffic in such objects, the coastal State may, in applying article 33 [the contiguous zone], 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 [customs, fiscal, immigration or sanitary laws and regulations].
>
> (3) 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.
>
> (4) This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.[91]

Article 303 has also been described as counterproductive, with the potential to undermine the protection of heritage.[92] 303(1) puts general duties on States to protect heritage and to cooperate for this purpose, and although broad, it does put reasonably

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[89] Caflisch (n 62) 29.

[90] Arend (n 25) 800–1; Caflisch (n 62) 31; Markus Rau, 'The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea' (2002) 6 Max Planck Yearbook of United Nations Law 387, 398. Oxman argues that 'Article 149 belongs to a thriving species of text that codifies rather than resolves an underlying policy dispute… The text is essentially hortatory. This may be all to the good, given the absence in article 149 of the kind of craftsmanship normally found in legal texts purporting to deal with complex issues of title to property.' Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 361.

[91] UNCLOS art 303.

[92] Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 4.

clear obligations on States.[93] As the provision is located in the 'General Provisions' section of the Convention, it is likely that it is intended to apply to all maritime zones.[94] Some commentators have suggested that this would include a reporting duty,[95] however it is hard to agree with this optimistic interpretation, as the provision is too vague to include such normative content.[96]

Article 303(2) relates to the contiguous zone and is very problematic. It creates a legal fiction (or possibly a presumption)[97] where removal of heritage can be taken to contravene laws that have little to do with heritage.[98] It is limited to the removal of objects which is also insufficient, as it does not cover in situ destruction, and cannot be used to prevent removal.[99] It is usually suggested that this jurisdiction only extends to enforcement matters.[100] However, through the general duty in Article 303(1), and the fiction used in 303(2), States may have legislative jurisdiction over objects of an archaeological and historical nature found in the contiguous zone.[101] This appears to have been confirmed by State practice in the intervening years.[102]

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[93] ibid. Oxman notes that: 'it is noteworthy that only with respect to protection of the environment does the Convention introduce a comparably categorical duty applicable everywhere at sea', however Article 303 contains no equivalent of the more precise duties related to the protection of the marine environment. Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 362–3; Cogliati-Bantz and Forrest (n 88) 540.

[94] Dromgoole, 'Law and the Underwater Cultural Heritage: A Question of Balancing Interests' (n 39) 125.

[95] For example: 'This provision implies that any operation aimed at damaging such objects wherever they lie is illegal and that States Parties have a duty to notify the proposed removal operations and the intended subsequent acts of preservation and disposal, as well as to embark in good faith upon negotiations on relevant projects.' Giorgi (n 86) 565.

[96] Caflisch (n 62) 20.

[97] Trpimir M Šošić, 'The 24-Mile Archaeological Zone: Abandoned or Confirmed?' in Rüdiger Wolfrum, Maja Seršić and Trpimir M Šošić (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill Nijhoff 2016) 309 at n 12.

[98] Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 5.

[99] ibid 6.

[100] For example, Rau (n 90) 399.

[101] Caflisch (n 62) 20; Strati (n 35) 329.

In the other zones jurisdiction over maritime archaeology or rights over UCH are not attributed by UNCLOS. Of particular note is the absence of the continental shelf and the EEZ from the provisions relating to objects of an archaeological and historical nature, which creates an 'unprovided for margin'.[103] Heritage protection in these zones was possibly excluded as an oversight, or because it was not thought necessary when UNCLOS was concluded.[104] A member of the US delegation during the UNCLOS negotiations stated:

> …the vast seaward reaches of the economic zone and continental shelf were really not relevant to the problem. The main issue was the policing of the area immediately beyond the territorial sea.[105]

Some States had argued for jurisdiction over this area for archaeological objects but other States were set against it and a resulting compromise gave (some) jurisdiction over the contiguous zone, but not the rest of the continental shelf.[106] The advance of technology over the ensuing years has shown this position to be very myopic, and has meant that UNCLOS has quickly looked dated in its treatment of cultural heritage, its lack of provision for the EEZ and continental shelf being described as a 'legal vacuum'[107] and a 'jurisdictional lacuna'.[108]

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[102] Mariano J Aznar, 'The Contiguous Zone as an Archaeological Maritime Zone' (2014) 29 The International Journal of Marine and Coastal Law 1; Šošić, 'The 24-Mile Archaeological Zone: Abandoned or Confirmed?' (n 97).

[103] James AR Nafziger, 'The Titanic Revisited' (1999) 30 Journal of Maritime Law and Commerce 311, 320. See also: Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 7; C Forrest, *International Law and the Protection of Cultural Heritage* (Routledge 2010) 325–6.

[104] Patrick J O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (2nd edn, Institute of Art and Law 2014) 13.

[105] Oxman, 'The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)' (n 86) 240.

[106] Hayashi (n 86) 294–5.

[107] Patrick J O'Keefe, 'Negotiating the Future of the Underwater Cultural Heritage' in N Brodie and K Walker Tubb (eds), *Illicit Antiquities: The theft of culture and the extinction of archaeology* (Routledge 2002) 138; Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 7; Tullio Scovazzi, 'The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention' in David Freestone,

Article 303(3) provides that the laws of salvage and other rules of admiralty are not affected by the provisions of Article 303. This means that salvage law or other admiralty laws will take precedence over the need to protect an archaeological object where such a conflict occurs.[109] This has been described as an invitation to looting.[110]

Finally, Article 303(4) foresees the possibility of the conclusion of another treaty on the subject and contains within it the chance to save the regime.[111] Indeed calls for a new instrument on this matter were made as soon as UNCLOS was concluded.[112]

The heritage provisions in UNCLOS are therefore very deficient, [113] and create an unclear, impractical and possibly counterproductive regime, especially regarding the EEZ and continental shelf. Some other rights and jurisdiction given to States in these zones may however, also be used to protect UCH.

1.2.2.2.2 Other Provisions

The coastal State does have jurisdiction and some rights in its EEZ and on its continental shelf which may be of relevance to heritage, but these are limited and under normal interpretations cannot be directly applied to heritage. Oxman summarises the situation:

> The Convention does not establish coastal-state jurisdiction as such over marine archaeology, wrecks or cultural artifacts in the exclusive economic zone or on the

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Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press 2006) 124; Tullio Scovazzi, 'The 2001 Convention on the Protection of the Underwater Cultural Hertiage' in Barbara T Hoffman (ed), *Art and Cultural Heritage: Law, Policy, and Pratice* (Cambridge University Press 2006) 291.

[108] UK UNESCO 2001 Convention Review Group, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: An Impact Review for the United Kingdom* (2014) 35.

[109] Strati (n 35) 331; Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 8. However it has also been pointed out that Article 149 does not seem to respect these rights in the Area, and it is unclear which provision would take precedence in these cases: Dromgoole, 'Law and the Underwater Cultural Heritage: A Question of Balancing Interests' (n 39) 126.

[110] Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 8.

[111] Prott and O'Keefe (n 26) 103–4.

[112] Caflisch (n 62) 32.

[113] Prott and O'Keefe (n 26) 101.

continental shelf. Nevertheless, the manner in which marine archaeology is conducted might involve activities, such as drilling, that are subject to coastal-state jurisdiction.[114]

Firstly, the jurisdiction and sovereign rights a coastal State has over resources in an EEZ or on the continental shelf do not extend to cultural heritage. These have to be natural resources and so do not include wrecks or other cultural material.[115] This jurisdiction can however be used to apply a duty to those that have been given permission to explore the continental shelf for such resources, for instance for hydrocarbons, to report any discoveries of heritage.[116]

Similarly, the jurisdiction over marine scientific research,[117] a phrase which is not defined in UNCLOS, is not normally thought to extend to archaeological research.[118] It is

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[114] Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 365.

[115] 'United Nations Conference on the Law of the Sea, Volume VI, Fourth Committee (Continental Shelf): Summary Records of Meetings' (1958) UN Doc. A/CONF.13/42, 51. See also: International Law Commission, 'Articles Concerning the Law of the Sea with Commentaries' (1956) II Yearbook of the International Law Commission 265, 298; Caflisch (n 62) 14; Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 355–6; Strati (n 35) 250–1; Hayashi (n 86) 294. This position was affirmed in the US courts in the case of *Abandoned Shipwreck vs Atocha (treasure salvors)* where it was held that the US had no jurisdiction (under the CCS 1958) over wrecks and their cargoes on its continental shelf. See: *Treasure Salvors, Inc v The Unidentified Wrecked and Abandoned Sailing Vessel believed to be Nuestra Senora de Atocha*, 408 F. Supp. 907 (1976); *Treasure Salvors, Inc v The Unidentified Wrecked and Abandoned Sailing Vessel believed to be Nuestra Senora de Atocha*, 569 F. Supp. 330 (1978); Scovazzi, 'The Application of "Salvage Law and Other Rules of Admiralty" to the Underwater Cultural Heritage: Some Relevant Cases' (n 43) 38–42.

[116] This method has been used by various States. The most often cited legislation in this regard is s 44 of Norway's Royal Decree of 8 December 1972 relating to Exploration and Exploitation of Petroleum in the Seabed and Substrata of the Norwegian Continental Shelf.

[117] Annick de Marffy, 'Marine Scientific Research' in RJ Dupuy and D Vignes (eds), *A Handbook on the New Law of the Sea* (Martinus Nijhoff Publishers 1991).

[118] Caflisch (n 62) 23; Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 356–7; Giorgi (n 86) 571–2; Strati (n 35) 42; United Nations Division for Ocean Affairs and the Law of the Sea, *Marine Scientific Research: A Revised Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations 2010).

more commonly seen as research *of* the marine environment rather than just research *in* the marine environment. Calls have been made to develop this position so that it can apply to archaeology.[119]

Suggestions have also been made that the provisions relating to drilling, the close relationship of living or non-living natural resources to wrecks, and the use of installations for exploiting heritage could be means of indirectly regulating UCH interventions, but these means are all limited, specific and also problematic.[120] Arguably a coastal State could also regulate the commercial activities directed at archaeological and historic objects in its EEZ on the basis that it has a right to regulate economic activities.[121]

If not affected by the measures States may take regarding the above provisions, and subject to Article 303, marine archaeology, and interference with heritage more generally, can be exercised as a freedom of the high seas. However, only freedoms related to navigation, overflight and of the laying of submarine cables and pipelines are preserved in the EEZ.[122] So in an EEZ there is no specific attribution of rights to either a coastal or flag State regarding maritime archaeology.[123] As Giorgi says:

> This fact implies that any State may search for and remove archaeological and historical objects in an exclusive economic zone if no other State intends to undertake the same operations.[124]

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[119] Katherine L Croff, 'The Underwater Cultural Heritage and Marine Scientific Research in the Exclusive Economic Zone' (2009) 43 Marine Technology Society Journal 93; Sarah Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage' (2010) 25 The International Journal of Marine and Coastal Law 33.

[120] Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage' (n 119) 39.

[121] Beckman and Davenport (n 77) 35.

[122] UNCLOS art 58(1); Giorgi (n 86) 571. But see: Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 368–9.

[123] Strati (n 35) 329.

[124] Giorgi (n 86) 571.

Where conflicts arise relating to rights and jurisdiction over maritime archaeology in an EEZ, the conflict will be resolved on the basis of equity and in the light of all the relevant circumstances.[125] Beyond the EEZ (but still potentially on a continental shelf), or in cases where no EEZ has been declared, actions relating to maritime archaeology remain a freedom of the high seas, but may still be subject to Articles 303 and 149.

Some limited means exist in UNCLOS for States to protect heritage, but the regime is 'incoherent and incomplete.'[126] Arguing that UNCLOS should be interpreted in a way it was not meant to be, because one aspect of its regime is lacking however, as in the case of MSR for instance, would not be permitted.[127] So according to UNCLOS, interpreted in line with its preparatory work, States do not have adequate jurisdiction for the protection of UCH, as cultural heritage is not a natural resource, and marine scientific research does not include archaeology. Ultimately, however, it is up to the States Parties of UNCLOS to interpret the treaty, and State practice since its creation may point to different interpretations than those established in the *travaux préparatoires* and academic literature.

1.3 Conclusion

Oxman, in 1988, said of UNCLOS:

> It remains to be seen whether the result will encourage marine archaeology and treat all peoples as the common cultural descendants of ancient civilizations, drinking from a single well of human wisdom and achievement, or will reveal modern states still to be little more than prehistoric tribes, hiding their wealth and squabbling over title to icons and watering holes.[128]

Unfortunately, the latter scenario seems to have played out, with the problem of treasure hunting intensifying, and UNCLOS offering little to combat it. There are various

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[125] UNCLOS art 59.

[126] Strati (n 35) 285 at n 69, 311. But see: Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 369.

[127] Strati (n 35) 285 at n 69.

[128] Oxman, 'Marine Archaeology and the International Law of the Sea' (n 31) 372.

means to protect UCH in UNCLOS, but these have not been consistently used.[129] Any balance that was contained in UNCLOS has since been upset by changes in technology. In addition:

> ...attitudes have changed and there is now more concern with integrated management of sea areas, sustainable development, inter-generational equity, and the curtailment of destructive methods in the development of sea resources and the environment.[130]

Similar problems in UNCLOS relating to fisheries management were able to be addressed by various later agreements. To paraphrase the Italian delegation at the negotiations of the 2001 Convention, does UCH deserve less protection than fish?[131] For various reasons, people began quickly to answer this question in the negative,[132] and the effort to create a new international instrument for the protection of UCH accelerated very soon after UNCLOS was concluded. Just because treasure hunting was legal, did not mean it had to stay that way.[133]

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[129] It appears the USA has used these methods to their greatest extent. See: Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press 2013) 270, 275; Ole Varmer, *Underwater Cultural Heritage Law Study* (Bureau of Ocean Energy Management 2014).

[130] Couper (n 46) 285.

[131] Remarks Presented by the Government of Italy (July 2000). Reprinted in: Roberta Garabello and Tullio Scovazzi, *The Protection of Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention.* (Martinus Nijhoff Publishers 2003) 239–41 at 240.

[132] Guido Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' in Guido Camarda and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Legal Aspects* (Giuffre Editore 2002) 144–9; Graeme Henderson, 'The Reasons for the Convention's Drafting: A Museum-Based Maritime Archaeologist's Perspective' in Graeme Henderson and Andrew Viduka (eds), *Towards Ratification: Papers from the 2013 AIMA Conference Workshop* (Australian Institute for Maritime Archaeology 2014); Patrick O'Keefe, 'The Reasons for the Convention's Drafting' in Graeme Henderson and Andrew Viduka (eds), *Towards Ratification: Papers from the 2013 AIMA Conference Workshop* (Australasian Institute for Maritime Archaeology 2014).

[133] Adams (n 9) 50.

Chapter 2 - An International Solution?

Cultural heritage protection has increasingly been moving away from falling within the exclusive domain of domestic jurisdiction, and has been progressively encompassed by international law.[134] Due to the international nature of the problems facing UCH, it seems obvious now that an international solution was needed. The road towards this agreement was difficult however, and there were a number of attempts to create an international agreement with UCH at its heart before the negotiations at UNESCO were successful.[135] This chapter will outline the process of the formation of the 2001 Convention, give a brief background to it and then discuss the outstanding issues it faces. These issues principally relate to its ambiguities, its relationship to UNCLOS and other treaties, and a lack of knowledge about its implementation. They require consideration as they raise questions which may be answered by a study of the Convention's implementation, the main focus of this research.

2.1 The Formation of the 2001 Convention

At UNESCO the elaboration of a standard setting instrument goes through three phases: determining whether an instrument should be elaborated; elaboration, negotiation and formulation; and finally adoption and authentication of the text.[136]

2.1.1 Desirability

In 1993 UNESCO began to consider creating a treaty on UCH.[137] At the 141st session of UNESCO's Executive Board, the Director-General of UNESCO was invited to consider the

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[134] Francesco Francioni, 'The Role of International Law in the Protection of Cultural Heritage' in Guido Camarda and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Legal Aspects* (Giuffre Editore 2002).

[135] For a concise summary of these efforts see: Janet Blake, 'The Protection of the Underwater Cultural Heritage' (1996) 45 International and Comparative Law Quarterly 819.

[136] Abdulqawi A Yusuf, 'UNESCO Practices and Procedures for the Elaboration of Standard-Setting Instruments' in Abdulqawi A Yusuf (ed), *Standard Setting in UNESCO: Volume 1, Normative Action in Education, Science and Culture* (UNESCO / Martinus Nijhoff Publishers 2007) 38.

feasibility of drafting a new instrument for the protection of the UCH.[138] The resulting study stated:

> …much of the underwater cultural heritage which remains unexplored is on the outer reaches of the continental shelf or deep sea-bed and therefore currently escapes national control. This is illustrated by the controversial lifting of objects from the wreck of the 'Titanic' in 1985.[139]

Due to this lack of control beyond territorial waters, it was recommended that an international convention was needed to address this situation.[140] The decision to proceed was adopted by UNESCO's 29th General Conference in 1997.[141]

2.1.2 Elaboration, Negotiation and Formulation

2.1.2.1 Texts

A number of draft texts are prepared by the Secretariat before the formal intergovernmental process for the negotiation of a draft instrument commences.[142] A draft convention produced by the International Law Association (ILA) in 1994 known as the Buenos Aires Draft Convention of the Protection of the Underwater Cultural

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[137] Etienne Clement, 'Current Developments at UNESCO Concerning the Protection of the Underwater Cultural Heritage' (1996) 20 Marine Policy 309; Patrick J O'Keefe, 'Protection of the Underwater Cultural Heritage: Developments at UNESCO' (1996) 25 International Journal of Nautical Archaeology 169.

[138] 'Decisions Adopted by the Executive Board at its 141st Session (Paris, 10-28 May 1993)' (1993) UNESCO Doc. 141 EX/Decisions, decision 5.5.1.15.

[139] 'Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage' (1995) UNESCO Doc. 146 EX/27, para 10.

[140] ibid para 40. UNESCO is an apt forum for this as it is confined in its action to matters not falling within its Member States' domestic jurisdiction: Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO) (adopted 16 November 1945, entered into force 4 November 1946) 4 UNTS 275 art 1(3); Nico Schrijver, 'UNESCO's Role in the Development and Application of International Law: An Assessment' in Abdulqawi A Yusuf (ed), *Standard Setting in UNESCO: Volume 1, Normative Action in Education, Science and Culture* (UNESCO / Martinus Nijhoff Publishers 2007) 366.

[141] 'Resolution 21 adopted by the General Conference at its 29th session' (1997) UNESCO Doc. 29 C/Resolution 21.

[142] Yusuf (n 136) 40.

Heritage (ILA Draft),[143] was used as the basis for these, but it went through three further iterations before negotiations began in earnest, the first in 1998 (the UNESCO/DOALOS Draft), the second in 1999 (second UNESCO draft), and finally the Single Negotiating Text (SNT) in 2001.[144]

2.1.2.2 Negotiations

The negotiations for the 2001 Convention commenced in 1998, and the fourth and final meeting was held in 2001. These have been described at length in a number of publications,[145] but no formal records were kept.

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[143] Reprinted in Garabello and Scovazzi (n 131) 230–6. See also: International Law Association (ed), 'Final Report of the Cultural Heritage Law Committee of the International Law Association', *Report of the Sixty-Sixth Conference* (International Law Association 1994); Patrick J O'Keefe and James AR Nafziger, 'The Draft Convention on the Protection of the Underwater Cultural Heritage' (1994) 25 Ocean Development & International Law 391; Patrick J O'Keefe, 'Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention' (1996) 20 Marine Policy 297; Patrick J O'Keefe, 'The Buenos Aires Draft Convention of the Protection of the Underwater Cultural Heritage Prepared by the International Law Association: Its Relevance Seven Years On' in Guido Camarda and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Legal Aspects* (Giuffre Editore 2002).

[144] 'Draft Convention on the Protection of Underwater Cultural Heritage' (1998) UNESCO Doc. CLT-96/CONF.202/5; 'Draft Convention on the Protection of Underwater Cultural Heritage' (1999) UNESCO Doc. CLT-96/CONF.202/5 Rev.2; 'Fourth Meeting of Governmental Experts on the Draft Convention on the Protection of the Underwater Cultural Heritage, Paris, UNESCO Headquarters, 26 March-6 April 2001: Consolidated Working Paper' (2001) UNESCO Doc. CLT-2001/CONF.203/INF.3. See also: 'Draft Convention on the Protection of Underwater Cultural Heritage: A Commentary prepared for UNESCO by Dr Anastasia Strati' (1999) UNESCO Doc. CLT-99/WS/8 (UNESCO Doc. CLT-99/WS/8); Sarah Dromgoole and Nicholas Gaskell, 'Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998' (1999) 14 The International Journal of Marine and Coastal Law 171; Paul Fletcher-Tomenius and Michael Williams, 'The Draft UNESCO/DOALOS Convention on the Protection of Underwater Cultural Heritage and Conflict with the European Convention on Human Rights' (1999) 28 International Journal of Nautical Archaeology 145.

[145] For the most detailed account see: Roberta Garabello, 'The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage' in R Garabello and T Scovazzi (eds), *The Protection of Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff Publishers 2003). See also: O'Keefe, 'Negotiating the Future of the Underwater Cultural Heritage' (n 107); Ariel W Gonzalez, 'Negotiating the Convention on Underwater Cultural Heritage: Myths and Reality' in Guido

Negotiations could have been expected to be difficult with such different approaches to heritage, admiralty law, and views on jurisdiction, and this indeed proved to be the case. A number of contentious issues arose, including the Convention's compatibility with UNCLOS, its treatment of State vessels, and its impact on the law of salvage. These will all be discussed in greater detail later in this chapter (section 2.3).

2.1.3 Adoption and Authentication

After adoption, the 2001 Convention did not need to be opened to signature, as UNESCO has a separate procedure for the elaboration of Conventions.[146]

2.2 The 2001 Convention

The result of the negotiations is a complex jurisdictional framework that includes a number of constructive ambiguities.[147] The whole regime has been described at length elsewhere, most extensively in works by Dromgoole,[148] and O'Keefe.[149] It will therefore not be covered in detail here, but certain important aspects will be outlined.[150]

Camarda and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Legal Aspects* (Giuffre Editore 2002); Carsten Lund, 'The Making of the 2001 UNESCO Convention' in Lyndel V Prott (ed), *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Institute of Art and Law 2006).

[146] 'Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution' reprinted in: UNESCO, *Basic Texts* (UNESCO 2014) 111–6.; VCLT 1969 art 10; Yusuf (n 136) 45–6.

[147] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) p.277.

[148] ibid.

[149] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104).

[150] For other discussions of the Convention see: Guido Carducci, 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage' (2002) 96 The American Journal of International Law 419; Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132); Craig Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage', *International and Comparative Law Quarterly*, vol 51 (2002); Rau (n 90); Tullio Scovazzi, 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' in Guido Camarda and Tullio Scovazzi (eds), *The*

The 2001 Convention sets standards, considered as archaeological best-practice, to be applied to all activities directed at UCH.[151] These are contained in the Convention's Annex, and have to be applied to interventions on UCH no matter what maritime zone the UCH is located in. Enforcement mechanisms are contained in Articles 14-18, and include the imposition of sanctions and the seizure of UCH recovered contrary to the Convention. Generative provisions relating to public awareness and State capacity are located in Articles 19-22. These are also vital as law can only be so effective on its own.[152] For controlling behaviour towards UCH, education of the public and interested parties may have more of a long term effect than a well drafted law.

The *ratione loci* jurisdictional framework is contained in Articles 7-12, and has been described as the core of the Convention.[153] Of particular note of course is the jurisdiction used in the EEZ and on the continental shelf,[154] as well as in the regime for

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Protection of the Underwater Cultural Heritage: Legal Aspects (Giuffre Editore 2002); Sarah Dromgoole, '2001 UNESCO Convention on the Protection of Underwater Cultural Heritage' (2003) 18 The International Journal of Marine and Coastal Law 50; Patrick J O'Keefe, 'Protection and International Collaboration: The Legal Framework of the UNESCO Convention 2001' in Lyndel V Prott (ed), *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Institute of Art and Law 2006); Scovazzi, 'The 2001 Convention on the Protection of the Underwater Cultural Hertiage' (n 107); Thijs J Maarleveld, 'The 2001 UNESCO-Convention on the Protection of the Underwater Cultural Heritage: Origin and Consequences' in M Hahn-Pedersen (ed), *Havets Kulturarv* (Fiskerimuseet 2007); Thijs J Maarleveld, 'How and Why Will Underwater Cultural Heritage Benefit from the 2001 Convention?' (2008) 60 Museum International 50; Amanda M Evans, Matthew A Russell and Margaret E Leshikar-Denton, 'Local Resources, Global Heritage: An Introduction to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2010) 5 Journal of Maritime Archaeology 79; Ulrike Guérin and Barbara Egger, 'Guaranteeing the Protection of Submerged Archaeological Sites Regardless of Their Location: The UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001)' (2010) 5 Journal of Maritime Archaeology 97.

[151] Robert Grenier, 'The Annex: Archaeology and the UNESCO Convention 2001' in Lyndel V Prott (ed), *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Institute of Art and Law 2006).

[152] Prott and O'Keefe (n 26) 14.

[153] Rau (n 90) 409.

[154] UNESCO 2001 Convention arts 9 and 10.

the Area.[155] This system is both the major reason why the Convention was drafted, and is also often described as the main benefit that the Convention can provide ratifying States.[156] It is the only aspect of the Convention that States could not legislate or provide for unilaterally. It is separated into two parts, the first dealing with reporting and notification,[157] and the second with the protection regime.[158]

In order to function the regime relies on four 'pillars' of jurisdiction: cooperation and collaboration (coordinated jurisdiction), flag State and nationality jurisdiction, port State jurisdiction and coastal State (territorial) jurisdiction.[159]

A large part of the jurisdictional regime stems from the duty to cooperate.[160] Article 303(1) of UNCLOS had the primary aim of excluding unilateral action,[161] the regime in Articles 9-12 of the 2001 Convention puts the duty of Article 303(1) into practice, in particular through the use of consultations and the implementation of agreed protection measures.

Flag State and nationality jurisdiction are found in Articles 9(1), 10(4), 11(1) and 12(3), and aim to control the behaviour of vessels and persons outside the State's territory.

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[155] Ibid arts 11 and 12.

[156] Ulrike Guérin, 'What Benefits Can States Derive from Ratifying the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001)?' (*UNESCO*) <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/how-to-ratify/> accessed 5 June 2015; Guérin and Egger (n 150) 99; Ulrike Guerin, 'Objectives, Benefits to States Parties, and Implementation of the UNESCO Convention on Underwater Cultural Heritage (2001)' in RA Yorke (ed), *Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK: Proceedings of the JNAPC 21st Anniversary Seminar, Burlington House, November 2010* (Nautical Archaeology Society 2011) 31.

[157] UNESCO 2001 Convention arts 9 and 11.

[158] ibid arts 10 and 12; Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (n 150) 543.

[159] Rau (n 90) p.434.

[160] Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (n 150) pp.542-3.

[161] Rau (n 90) p.436.

This type of jurisdiction is used in other ocean based international agreements.[162] Article 16 uses nationality and flag State jurisdiction also, and complements the regime in Articles 9-12, with more of a focus on prevention.[163]

Territorial and port State jurisdiction are found Article 15, which compels States to take measures to prohibit the use of their territory, including their maritime ports, in support of any activity directed at underwater cultural heritage which is not in conformity with the Convention. Similar use of this mechanism was suggested for inclusion in UNCLOS but was ultimately omitted.[164]

Finally, coastal State jurisdiction is also found in articles relating to the areas subject to national sovereignty and the contiguous zone,[165] and also arguably some ambiguous aspects of the provisions relating to the EEZ and continental shelf.

The 2001 Convention provides a comprehensive system for the protection of UCH in all maritime zones. In an attempt to satisfy all parties, and reach a consensus during negotiations however, the final product produced is complex, ambiguous and controversial. This has caused a slow rate of adoption as some major States do not support the regime, and may also cause problems for implementation. The ambiguities and problems causing these issues will now be examined, before moving on to their implications for the treaty's implementation.

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[162] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered into force 24 April 2003) 2221 UNTS 91; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (Straddling Fish Stocks Agreement). See: Robin F Warner, *Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework* (Martinus Nijhoff Publishers 2009) 99–155.

[163] Rau (n 90) 423.

[164] ibid 422. A similar provision is however present in Straddling Fish Stocks Agreement: Straddling Fish Stocks Agreement art 23(3).

[165] UNESCO 2001 Convention arts 7 and 8.

2.3 Rate of Adoption

The 2001 Convention currently has 58 States Parties (Table 1, Figure 2).[166]

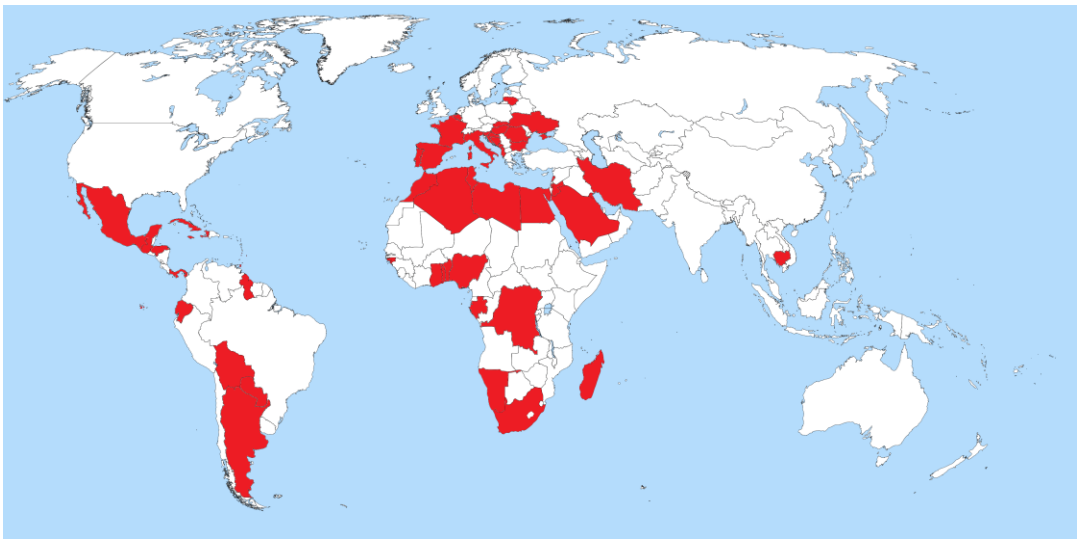

Figure 2 States Parties to the 2001 Convention in March 2018. States Parties are shown in red.

Table 1. Chronological list of States Parties to the 2001 Convention

[166] As of 12 March 2018.

States Parties and their dates of ratification or acceptance

Panama	20/05/2003	**Italy**	08/01/2010
Bulgaria	06/10/2003	**Gabon**	01/02/2010
Croatia	01/12/2004	**Argentina**	19/07/2010
Spain	06/06/2005	**Honduras**	23/07/2010
Libya	23/06/2005	**Trinidad and Tobago**	27/07/2010
Nigeria	21/10/2005	**Democratic Republic of the Congo**	28/09/2010
Lithuania	12/06/2006	**Saint Vincent and the Grenadines**	08/11/2010
Mexico	05/07/2006	**Namibia**	09/03/2011
Paraguay	07/09/2006	**Morocco**	20/06/2011
Portugal	21/09/2006	**Benin**	04/08/2011
Ecuador	01/12/2006	**Jamaica**	09/08/2011
Ukraine	27/12/2006	**Palestine**	08/12/2011
Lebanon	08/01/2007	**France**	07/02/2013
Saint Lucia	01/02/2007	**Antigua and Barbuda**	25/04/2013
Romania	31/07/2007	**Togo**	07/06/2013
Cambodia	24/11/2007	**Belgium**	05/08/2013
Cuba	26/05/2008	**Bahrain**	07/03/2014
Montenegro	18/07/2008	**Hungary**	19/03/2014
Slovenia	18/09/2008	**Guyana**	28/04/2014
Barbados	02/10/2008	**Madagascar**	19/01/2015
Grenada	15/01/2009	**Algeria**	26/02/2015
Tunisia	15/01/2009	**South Africa**	12/05/2015
Slovakia	11/03/2009	**Guatemala**	03/11/2015
Albania	19/03/2009	**Saudi Arabia**	13/11/2015
Bosnia and Herzegovina	22/04/2009	**Ghana**	20/01/2016
Iran (Islamic Republic of)	16/06/2009	**Guinea-Bissau**	07/03/2016
Haiti	09/11/2009	**Bolivia**	24/02/2017
Jordan	02/12/2009	**Kuwait**	30/05/2017
Saint Kitts and Nevis	03/12/2009	**Egypt**	30/08/2017

The 2001 Convention's rate of adoption does not compare well with some of UNESCO's other cultural Conventions. The Convention for the Safeguarding of the Intangible Cultural Heritage was concluded in 2003,[167] and by 2008 had 100 States Parties, and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions concluded in 2005,[168] and had 100 States Parties by 2009. More comparable perhaps is the UNESCO 1970 Convention,[169] which entered into force in 1972 after requiring only 3 ratifications, but it did not acquire 50 ratifications until 1983, and took until 2003 to gain 100. The 2001 Convention however, confronts controversial issues that those other Conventions do not, particularly jurisdictional issues, and it covers a type of heritage that is often overlooked or unseen in favour of more visible, terrestrial heritage. Powerful, influential States also still stand against it. Perhaps the 2001 Convention's slow rate of ratifications is to be expected, but it also weakens the regime.

2.3.1 The Positions of the Major Maritime States

During negotiations, the Director-General of UNESCO established consensus as an objective,[170] however, despite numerous compromises, ultimately this could not be achieved and the Convention was adopted by vote. The final meeting of governmental experts adopted the text with 49 votes in favour of the final text, 4 votes against, and 8 abstentions.[171] The reasons for the abstentions and negative votes were certain issues

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[167] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 1 (UNESCO 2003 Convention).

[168] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311.

[169] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231, 10 ILM 289 (UNESCO 1970 Convention), art 21.

[170] Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 140.

[171] 'General Conference, 31st Session, Paris 2001: Item 8.4 of the Provisional Agenda, Draft Convention on the Protection of the Underwater Cultural Heritage' (2001) UNESCO Doc. 31 C/24 para 10. The Convention was adopted on 2 November by the Plenary Session of the 31st General Conference with 88 votes in favour, 4 against and 15 abstentions: UNESCO, *Records of the General Conference, 31st Session, Paris, 15 October to 3 November 2001: Volume 1, Resolutions* (UNESCO 2002) 156.

that were also contentious in negotiations, with the major maritime States forming most of the abstainers.[172] The main reasons were the jurisdictional question and the 2001 Convention's compatibility with UNCLOS, and also the treatment of State vessels that some would argue are subject to sovereign immunity.[173] The treatment of salvage law was not given as a reason for not supporting the text by any State, but has since proved contentious amongst certain commentators. These issues will be discussed in turn as they highlight the ambiguous provisions of the Convention, provisions for which uncertainty remains over how they are being interpreted by the States Parties. This uncertainty can be resolved by investigating the Convention's implementation.

2.3.2 Compatibility with UNCLOS

Compatibility with UNCLOS was perhaps the primary reason some States could not support the final text of the 2001 Convention.[174] This was mainly due to the jurisdictional framework for the EEZ and continental shelf. A small number of (usually

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[172] For a more detailed discussion of these reasons and why they may need to be reconsidered see: Sarah Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (2013) 38 Marine Policy 116.

[173] The UK also felt that there was a problem with not having a significance criteria in the definition of UCH. Statements by the United Kingdom delegation on Vote during Commission IV on Culture (29 October 2001, 31st Session of the General Conference, UNESCO). Reprinted in Garabello and Scovazzi (n 131) 251–2. This reservation may be based on a misunderstanding, as under the 2001 Convention not all UCH needs resources to be expended on it to be protected, just that the Rules are applied if activities are directed towards it: UK UNESCO 2001 Convention Review Group (n 108) 9–10. See also: Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 172) 122; UK UNESCO 2001 Convention Review Group (n 108) 55–70.

[174] Sean D Murphy, 'Contemporary Practice of the United States Relating to International Law' (2002) 96 American Journal of International Law 461, 468–70; UNESCO, *Records of the General Conference, 31st Session, Paris, 2001: Volume 2, Proceedings* (UNESCO 2003) 559–60; Robert C Blumberg, 'International Protection of Underwater Cultural Heritage' (*U.S. Department of State Archive*, 2005) <http://2001-2009.state.gov/g/oes/rls/rm/51256.htm> accessed 29 December 2014; Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 172).

American) scholars share this view.[175] Their views rest on both the status of UNCLOS, and certain provisions of the 2001 Convention, which they believe are incompatible with UNCLOS and are evidence of a phenomenon known as creeping jurisdiction.

2.3.2.1 Creeping Jurisdiction

Creeping jurisdiction is the notion that, as experience has shown, jurisdiction granted for one purpose is likely to expand *ratione materiae*.[176] It can be shaped through States acting unilaterally, or by the international community in developing new international law.[177] Scovazzi calls the fear of creeping jurisdiction *horror jurisdictionis*.[178] It tends to afflict States that advocate the freedom of the high seas over expanding coastal State jurisdiction.

> The history of the modern international law of the sea can perhaps be best understood by perceiving it as a continual conflict between two opposing, yet complementary, fundamental principles – territorial sovereignty and the freedom of the high seas.[179]

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[175] David J Bederman, 'The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal' (1999) 30 Journal of Maritime Law and Commerce 331; Christopher R Bryant, 'The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historic Shipwrecks' (2001) 65 Albany Law Review 97; J Ashley Roach and Robert W Smith, *Excessive Maritime Claims* (3rd edn, Martinus Nijhoff Publishers 2012).

[176] This means that the subject matter covered by the jurisdiction is likely to expand. Jurisdiction could also expand *ratione loci* or *ratione personae*. ED Brown, 'Maritime Zones: A Survey of Claims' in Robin Churchill, KR Simmonds and Jane Welch (eds), *New Directions in the Law of the Sea: Collected Papers, Volume III* (The British Institute of International and Comparative Law 1973) 172; Erik Franckx, 'The 200-Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage - Some Law of the Sea Considerations from Professor Louis Sohn's Former LL.M. Student' (2007) 39 George Washington International Law Review 467, 471.

[177] Franckx (n 176) 471.

[178] Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 6.

[179] Brown (n 176) 157.

The boundary between these principles has proved to be fluid, and is generally set by the most powerful maritime States in accordance with their national interests.[180] However, following the Second World War a large number of smaller coastal States have gained independence, have voting rights at the UN, and have been willing to revisit legal doctrine in line with their own interests.[181]

In the third United Nations Conference on the Law of the Sea the archaeological issue was ensnared within this conflict between States promoting the expansion of coastal State jurisdiction, and those arguing for the continued freedom of the high seas. A small number of States wanted to give the coastal State jurisdiction over activities relating to archaeological objects on the continental shelf, or assign sovereign rights over them. There were proposals put forward to such an effect from States such as Italy, Greece, Portugal and Tunisia, which were revised and reduced in scope due to the insistence of some maritime States, and finally abandoned in favour of the compromise relating to the contiguous zone in Article 303(2).[182] This broadening of the contiguous zone is itself an example of creeping jurisdiction,[183] although one that took place by agreement of the international community.

The USA and the UK were two of the most prominent opponents of applying the continental shelf or EEZ regime to UCH during the development of UNCLOS. Prott and O'Keefe note the hypocrisy of these States' positions, as both had unilaterally extended

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[180] ibid; Mohammed Bennouna, 'The Multidimensional Character of the New Law of the Sea' in RJ Dupuy and D Vignes (eds), *A Handbook on the New Law of the Sea* (Martinus Nijhoff Publishers 1991) 7.

[181] Brown (n 176) 159.

[182] Arend (n 25) 793–7; Caflisch (n 62) 16–19; Oxman, 'The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)' (n 86) 240; Giorgi (n 86) 569–70; Hayashi (n 86) 294–5; Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 8; Beckman and Davenport (n 77) 34–5. For the development of this proposal see: 'Informal proposal by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia, "Article 77: Add new paragraph 5"' (1979) UN Doc. A/CONF.62/C.2, Informal Meeting/43, Rev. 1; 'Informal proposal by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia, "Article 77: Add new paragraph 5"' (1980) UN Doc. A/CONF.62/C.2, Informal Meeting/43, Rev. 2; 'Informal proposal by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia, "Article 77: Add new paragraph 5"' (1980) UN Doc. A/CONF.62/C.2, Informal Meeting/43, Rev. 3.

[183] Allain (n 86) 757.

their jurisdiction before.[184] They also lament the fact that the USA demanded compromises in certain provisions, most notably to the cultural heritage zone arguments of certain States, but then refused to become party to the treaty,[185] altering the regime to its own ends and weakening the protection of the UCH without then supporting the resulting regime.

2.3.2.2 The Influence of Creeping Jurisdiction on the 2001 Convention

Along similar lines to the negotiations at UNCLOS there developed a group of States at the negotiations of the 2001 Convention, originally known as the 'major maritime powers' but then latterly as the 'like-minded States', which included France, Germany, Japan, Netherlands, Norway, Russia, UK and USA, that did not want to see coastal States gain control over UCH on their continental shelves.[186] Creeping jurisdiction was again cited.[187]

These States saw UNCLOS as having a constitution like status, and therefore believed that its 'delicate balance' must not be disturbed. Resolutions in the UN General Assembly during negotiations emphasized that the treaty under negotiation had to be in conformity with UNCLOS.[188]

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[184] Prott and O'Keefe (n 26) 100. The examples cited are the USA unilaterally extending its jurisdiction over its continental shelf in 1945 after around 200 years of stability in the law of the sea and the UK declaring a 200 mile zone around the Falkland Islands in 1982. The UK example, however, occurred in the context of armed conflict and was not a permanent jurisdictional claim under the law of the sea.

[185] ibid 104–5.

[186] This group also included Italy until Bob Ballard removed some objects from Skerki Bank and took them to the US, with the perception of some actors in Italy being that this was done without sufficient collaboration with Italy, or without the necessary authorisations: O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104) 18. See also: Anna Marguerite McCann and John Peter Oleson, *Deep-Water Shipwrecks off Skerki Bank: the 1997 Survey* (Journal of Roman Archaeology 2004).

[187] Norway questioned whether UNESCO was as the correct forum for discussion, and would have rather have seen the creation of an implementing agreement for UNCLOS at the UN. Lund (n 145) 16.

[188] 'Resolution Adopted by the General Assembly 53/32: Oceans and the law of the sea' (1998) UN Doc. A/RES/53/32; 'Resolution Adopted by the General Assembly 54/31: Oceans and the law of the sea' (1999)

The majority of other States, including the Group of 77,[189] and others such as Australia, Greece and Italy, did not share these fears however, and saw UNCLOS as more fluid and in need of improvement. For example the Government of Italy submitted remarks in 2000 which included the statement that:

> It would be meaningless to simply repeat the provisions of the UNCLOS, including their shortcomings, without adding any improvements.[190]

Two diametrically opposing views were thus present in the negotiations, firstly that it would be meaningless just to restate UNCLOS, and secondly that no extension of jurisdiction was permitted.[191] The result was a complex and ambiguous compromise, now contained largely in Articles 9 and 10 of the Convention, which uses the nationality principle and flag State jurisdiction for reporting, the creation of the concept of a coordinating State, consultations and cooperation in deciding and implementing protection measures, and the possibility of urgent emergency measures before such consultations.[192] As Scovazzi has stated:

> The essence of the regime is the three-step procedure (reporting, consultations, urgent measures) it sets forth.[193]

The coordinating State is key, as no new powers are given to the 'coastal State', a term that is not mentioned at all in the Convention.[194] Similarly any attempt to redefine the

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UN Doc. A/RES/54/31; 'Resolution Adopted by the General Assembly 55/7: Oceans and the law of the sea' (2000) UN Doc. A/RES/55/7.

[189] A coalition of developing nations that jointly negotiate at the UN and its agencies.

[190] Remarks Presented by the Government of Italy (July 2000). Reprinted in: Garabello and Scovazzi (n 131) 239–41 at 240. Greece in particular, as in the UNCLOS negotiations and in line with some of the draft conventions that followed, including the ILA draft, argued for coastal State jurisdiction over a cultural heritage zone extending past the contiguous zone.

[191] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 276.

[192] O'Keefe, 'Negotiating the Future of the Underwater Cultural Heritage' (n 107) 144; Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 11–2.

[193] Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 12.

[194] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 282–3.

zones of UNCLOS was also avoided and the definitions in UNCLOS are implicitly referred to through the use of its terms. The term jurisdiction itself is also avoided as much as possible.[195] Numerous constructive ambiguities are present in the text, which allowed negotiations to progress and finally a text to be adopted.

2.3.2.3 The Status of UNCLOS

UNCLOS is often thought of as being constitutional in nature.[196] The high number of ratifications of UNCLOS lends it authority, [197] and some of its provisions, such as its jurisdictional framework, were the result of years of long negotiation, enormous effort, and create fundamental norms, and so could be said to have some heightened authority. However, there is no such hierarchy in international law. The general treaty interpretation rules of *lex specialis* and *lex posterior* would usually suggest that the provisions of a later, or more specific, treaty that addresses the same issue will take precedence over an older, more general one between parties to both treaties.[198] So while UNCLOS still serves as the *lex generalis* for the whole of the law of the sea, the 2001 Convention is a *lex specialis* for the protection of UCH, used to develop the

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[195] Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 186–7.

[196] It is often described as 'the constitution for the oceans': Tommy TB Koh, '"A Constitution for the Oceans" Remarks by Tommy T.B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea' (*DOALOS*, 1982) <www.un.org/depts/los/convention_agreements/convention_overview_convention.htm> accessed 9 November 2015; Keun-Gwan Lee, 'An Inquiry into the Compatibility of the UNESCO Convention 2001 with UNCLOS 1982' in Lyndel V Prott (ed), *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Institute of Art and Law 2006) 22–3.

[197] 168 States at 12 March 2018. 'Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements' (*DOALOS*, 2017) <www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 12 March 2018.

[198] Lee (n 196) 22.

provisions of UNCLOS.[199] In addition, articles which were last minute compromises between few States, such as Article 303 between seven States on one side and the USA on the other, with a resulting illogical and counterproductive outcome, cannot be afforded the same level of authority.[200] Some sections of UNCLOS are therefore arguably more susceptible to *lex posterior* and *lex specialis* than others.

There is also no legal reason that the regime of UNCLOS cannot be amended or developed.[201] Firstly, no treaty should be permanent and unamendable. Secondly, UNCLOS itself contains provisions for its modification and amendment.[202] Indeed, it has already arguably been amended.[203] Finally, Article 303(4) provides for a future more specific treaty on UCH.[204]

More specifically, Article 311(3) of UNCLOS provides that States Parties may conclude agreements modifying or suspending the operation of provisions of UNCLOS, so long as they do not affect the application of the basic principles embodied therein, i.e. its jurisdictional regime. However, Article 311(5) provides that this does not affect international agreements expressly permitted or preserved by other articles of UNCLOS,

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[199] Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 142; Lowell B Bautista, 'Gaps, Issues, and Prospects: International Law and the Protection of Underwater Cultural Heritage' (2005) 14 Dalhousie Journal of Legal Studies 57, 59; Cogliati-Bantz and Forrest (n 88) 550.

[200] Lee (n 196) 24.

[201] ibid 23.

[202] UNCLOS arts 311-316.

[203] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3, 33 ILM 1309 (Agreement relating to the implementation of Part XI); Straddling Fish Stocks Agreement.

[204] Arend (n 25) 803; Hayashi (n 86) 292; Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 143; Rau (n 90) 427–8; Tullio Scovazzi, 'Convention on the Protection of Underwater Cultural Heritage' (2002) 32 Environmental Policy and Law 152, 154.

which due to Article 303(4), includes agreements on underwater cultural heritage.[205] So it would seem that the 2001 Convention is legally able to depart from UNCLOS.[206] However, the question then becomes whether such a departure is politically wise, as if the difference is significant, it could lead to a rejection of the new regime by a number of States.[207]

A final problem noted with the new Convention having to adhere to UNCLOS is that there is no universally accepted interpretation of UNCLOS.[208] For instance while the normal definition of marine scientific research does not include underwater or maritime archaeology,[209] if States began interpreting it by focusing on the nature of the activity rather than the purpose of the activity the concept could develop to include underwater archaeology.[210] This would cause much of the problems of compatibility to be moot, and would bolster the legitimacy of the regulatory mechanisms of the 2001 Convention.[211]

2.3.2.4 The 2001 Convention

Turning to the 2001 Convention itself, Article 3 provides that:

> Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the

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[205] Myron H Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol V (Martinus Nijhoff Publishers 1989) 243; Rau (n 90) 425–8; Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 372.

[206] However, Article 311(4) provides that States Parties intending to conclude an agreement modifying or suspending the operation of provisions of UNCLOS shall notify the other States Parties through the depositary of UNCLOS of their intention to conclude the agreement and of the modification or suspension for which it provides. This does not seem to have been done for the 2001 Convention. Most commentators seem to gloss over this however.

[207] Rau (n 90) 430–1.

[208] O'Keefe, 'Negotiating the Future of the Underwater Cultural Heritage' (n 107) 142.

[209] Giorgi (n 86) 571–2.

[210] Lee (n 196) 25.

[211] Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage' (n 119) 61.

> Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.[212]

This would seem to suggest that where a conflict arises, the 2001 Convention has to be interpreted in line with UNCLOS. However, the phrase 'international law, including' would suggest that there is other international law outwith UNCLOS (i.e. customary law) which also guides the interpretation of the 2001 Convention. This adds controversy and did not allay the fears of the major maritime powers.[213] The Straddling Fish Stocks Agreement contains a similar consistency clause, but it only has to be in line with UNCLOS, and not wider international law.[214] However, except possibly in the contiguous, or 'archaeological' zone, there does not seem to be enough State practice yet to suggest that there is a customary law relating to control over UCH beyond territorial waters.[215]

The 2001 Convention preserves the maritime zones set out in UNCLOS, and possibly beneficially in this regard, does not add any new ones such as a cultural heritage zone. It uses flag State jurisdiction and the nationality (active personality) principle for the most part, but ambiguities exist in the jurisdiction used for the reporting system in another States EEZ or on their continental shelf.[216] Of fundamental importance is who requires the reporting, the flag State or the coastal State, as only the former would be in line with UNCLOS.[217] Some States attempted to clarify these ambiguities in negotiations but were not successful.[218]

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[212] UNESCO 2001 Convention art 3. This type of article is known as a 'consistency clause', a 'principle of harmonization' or a 'systemic integration': Cogliati-Bantz and Forrest (n 88) 549.

[213] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 280.

[214] Straddling Fish Stocks Agreement art 4.

[215] Aznar, 'The Contiguous Zone as an Archaeological Maritime Zone' (n 102).

[216] 2001 Convention art 9(1)(b); Cogliati-Bantz and Forrest (n 88) 557–8; Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 298.

[217] Rau (n 90) 415. However, the *Commissie van Advies inzake Volkenrechtelijke Vraagstukken* (CAVV, the Advisory Committee on Issues of Public International Law of the Netherlands), suggest that both interpretations could be in line with UNCLOS, as both can be seen as upholding the duty to protect and

Urgent measures and preliminary research are available to a coordinating State that are less easy to explain with nationality or flag State jurisdiction.[219] The right of the coordinating State to take urgent measures is the 'cornerstone' of the regime.[220] Two problems are that these measures remain undefined and take place before consultations.[221] Crucially though, they are available to the coordinating State which may usually be, but is not necessarily, the coastal State, and this means that there is no extension of the coastal States rights from UNCLOS.[222] Also crucially:

> …the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest. Any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea.[223]

In these cases the coordinating State is acting as the 'organ' of the international community for the purpose of effectively dealing with emergency situations.[224] It can only be where consultations have not yet taken place, and so is subordinate to these consultations. Measures taken should also be based on nationality or flag State jurisdiction.[225]

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cooperate as laid down in Article 303(1) of UNCLOS. See: Advisory Committee on Issues of Public International Law (CAVV), 'Advisory Report on the UNESCO Convention on the Protection of the Underwater Cultural Heritage (Translation)' (2011) Advisory Report 21 6.

[218] 'General Conference, 31st Session, Commission IV: Item 8.4 of the Agenda, Draft Resolution submitted by Russian Federation and United Kingdom' (2001) UNESCO Doc. 31 C/COM.IV/DR.5 (UNESCO Doc. 31 C/COM.IV/DR.5); Garabello (n 145) 145; O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104) 64.

[219] UNESCO 2001 Convention art 10(4), (5)(c).

[220] Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 13.

[221] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 300.

[222] Cogliati-Bantz and Forrest (n 88) 559–60.

[223] UNESCO 2001 Convention art 10(6). See also: Rau (n 90) 417–8.

[224] ibid 444.

[225] Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (n 150) 544.

These arguments have meant that the weight of academic opinion seems to be that the 2001 Convention is consistent with UNCLOS (or inconsistent in a legitimate manner).[226] In the end though, the regime remains unclear and difficult to understand. More important than academic opinion are the views of States, and what interpretations their actions and implementation will follow.

2.3.3 State Vessels and the Rights of the Flag State

Some States also felt that they could not support the 2001 Convention due to the way it treated State vessels, especially warships, and the impact this would have on both sovereign immunity and property rights in these wrecks.[227] For instance the UK stated:

> The discussions about warships and State vessels and aircraft used for non-commercial service have proved contentious. There have been exhaustive attempts to reach consensus between the competing claims or the Sovereign Immunity enjoyed by Flag States on the one hand and jurisdictional claims of

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[226] For example Rau (n 90); Lee (n 196); A Strati, '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 Anastasia Strati, Maria Gavouneli and Nikos Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Martinus Nijhoff Publishers 2006); Ya-juan Zhao, 'The Relationships among the Three Multilateral Regimes Concerning the Underwater Cultural Heritage' in James AR Nafziger and T Scovazzi (eds), *Le patrimoine culturel de l'humanité / The Cultural Heritage of Mankind* (Nijhoff 2008); Cogliati-Bantz and Forrest (n 88).

[227] This aspect of international law has been addressed at length in the literature. See: J Ashley Roach, 'Sunken Warships and Military Aircraft' (1996) 20 Marine Policy 351; David J Bederman, 'Rethinking the Legal Status of Sunken Warships' (2000) 31 Ocean Development & International Law 97; Jason R Harris, 'Protecting Sunken Warships As Objects Entitled To Sovereign Immunity' (2002) 33 Inter-American Law Review 101; Mariano J Aznar-Gomez, 'Legal Status of Sunken Warships "Revisited"' (2003) 9 Spanish Yearbook of International Law 61; Craig Forrest, 'An International Perspective on Sunken State Vessels as Underwater Cultural Heritage' (2003) 34 Ocean Development & International Law 41; Valentina S Vadi, 'International Law and the Uncertain Fate of Military Sunken Vessels' (2009) 19 Italian Yearbook of International Law 253; Valentina S Vadi, 'War, Memory, and Culture: The Uncertain Legal Status of Historic Sunken Warships Under International Law' (2013) 37 Tulane Maritime Law Journal 333. For the application of sovereign immunity to cultural heritage in general see: Riccardo Pavoni, 'Sovereign Immunity and the Enforcement of International Cultural Property Law' in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press 2013).

> Coastal States on the other. Unfortunately the differences have not been resolved. The United Kingdom considers that the current text erodes the fundamental principles of customary international law, codified in UNCLOS, of Sovereign Immunity which is retained by a State's warships and vessels and aircraft used for non-commercial service until expressly abandoned by that State. The text purports to alter the fine balance between equal, but conflicting rights of Coastal and Flag States, carefully negotiated in UNCLOS, in a way that is unacceptable to the United Kingdom.[228]

2.3.3.1 Sovereign Immunity and Title to Sunken State Vessels

Sovereign immunity means that States are immune from legal proceedings in another State. It stems from the principle *par in parem non habet imperium* which means that one sovereign State does not have authority over another. According to both customary and conventional law, warships and other government ships operated for non-commercial purposes enjoy sovereign immunity. Subject to some limited exceptions, these vessels are only subject to the jurisdiction of the flag State. For instance Article 32 of UNCLOS provides that, with some exceptions, nothing in UNCLOS affects the immunities of warships in the territorial waters of another State, and Articles 95 and 96 provide that on the high seas, warships and ships owned or operated by a State and used only on government non-commercial service have complete immunity from the jurisdiction of any State other than the flag State. Many other treaties therefore provide a separate regime for these types of ships,[229] indeed this is also seen in Article 13 of the

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[228] Statements by the United Kingdom delegation on Vote during Commission IV on Culture (29 October 2001, 31st Session of the General Conference, UNESCO). Reprinted in Garabello and Scovazzi (n 131) 251–2 at 251.

[229] See for instance the International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184 (MARPOL), art 3(1); International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 193 (Salvage Convention 1989), art 4; Nairobi International Convention on the Removal of Wrecks (adopted 18 May 2007, entered into force 10 April 2015) 46 ILM 697 (Nairobi Convention), art 4.

2001 Convention.[230] This provision is not contentious, the difficulties arise when considering the application of sovereign immunity to wrecks.

The question hinges on whether a sunken ship is still a ship, or whether a warship is still a warship, and hence whether the wreck retains the sovereign immunity that the ship held.[231] UNCLOS does not deal with sunken vessels, except in Articles 149 and 303 when they are considered historical or archaeological. It does however define warships,[232] and it is clear that this definition cannot apply to wrecks, as the warship has to be manned by a crew and under the command of an officer. Nevertheless, some States believe that a customary rule of international law exists whereby sunken warships and government vessels retain their sovereign immunity.[233] State practice is by no means consistent or widespread enough for this to be a customary law, despite the views of certain States. Problems arise where a coastal State seeks to regulate or authorise interventions on such a wreck, or to determine its ultimate destination, but where other flag States believe they have exclusive jurisdiction over the wreck in question.

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[230] 'Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.'

[231] Strati (n 35) 220 n 28-29.

[232] UNCLOS art 29: 'For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.'

[233] Natalino Ronzitti, 'The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law' (2012) 74 Annuaire de l'Institut de droit international 131, 145–51.

As an illustration, the recent case of the *Nuestra Senora de las Mercedes* (*Mercedes*) is illuminating.[234] In 2007 Odyssey Marine Exploration, Inc. (Odyssey), an American treasure hunting company, recovered some of the cargo of what was eventually confirmed to be the wreck of the *Mercedes*, a Spanish Navy warship that was sunk in 1804, and exported its cargo to the USA via Gibraltar in order to claim ownership over it under the law of finds, or a salvage award.[235] Odyssey filed an *in rem* action against the vessel, but the US court eventually held that, being a Spanish warship, it was protected by sovereign immunity, and so the court lacked subject matter jurisdiction.[236] The District Judge stated:

> The ineffable truth of this case is that the *Mercedes* is a naval vessel of Spain and that the wreck of this naval vessel, the vessel's cargo, and any human remains are the natural and legal patrimony of Spain and are entitled in good conscience and in law to lay undisturbed in perpetuity absent the consent of Spain and despite any man's aspiration to the contrary.[237]

The action was dismissed and Odyssey was ordered to return the cargo (which included approximately 594,000 valuable coins and other artefacts) to Spain.

Whether or not a sunken warship loses immunity when it sinks, the ownership by the flag State of the vessel is unaffected, as ownership is a separate but often conflated issue. In the *Mercedes* case it was stated:

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[234] Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel, 675 F. Supp. 2d 1126 (2009); Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel, 657 F.3d 1159 (2011). See also: Vadi, 'International Law and the Uncertain Fate of Military Sunken Vessels' (n 227); Miguel García García-Revillo and Miguel J Agudo Zamora, 'Underwater Cultural Heritage and Submerged Objects: Conceptual Problems, Regulatory Difficulties. The Case Of Spain' (2010) 14 Spanish Yearbook of International Law 1; Jie Huang, 'Odyssey's Treasure Ship: Salvor, Owner, or Sovereign Immunity' (2013) 44 Ocean Development & International Law 170.

[235] García-Revillo and Agudo Zamora (n 234) pp.29-30.

[236] Huang (n 234).

[237] Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel and et al., 675 F. Supp. 2d 1126 (2009), 1129.

> We do not hold the recovered *res* is ultimately Spanish property. Rather, we merely hold the sovereign immunity owed the shipwreck of the *Mercedes* also applies to any cargo the *Mercedes* was carrying when it sank.[238]

Ownership may also mean that the consent of the flag State is required before any interference on their wrecks can be undertaken.[239] The State practice on this matter is more consistent, with property rights over a wreck often being respected even in the territorial waters of another State.[240]

2.3.3.2 The 2001 Convention

In the negotiations for the 2001 Convention the question of sovereign immunity applying to wrecks was largely avoided, although it still proved a point of contention. Instead of sovereign immunity of wrecks being regulated, a separate regime was developed for 'State vessels and aircraft'[241] which require the consent or agreement of flag States in some maritime zones before interventions can be authorised. The ILA draft and the UNESCO/DOALOS draft did not apply to such vessels, but keeping this position would have undermined the Convention as such a large proportion of heritage would have been excluded.

The difficult topic of ownership was also sidestepped by the 2001 Convention. Very few cultural conventions tackle the issue of ownership, and the issue is usually left up to national legislation.[242] Again, the ILA draft and the UNESCO/DOALOS draft applied to only abandoned heritage, however, this limitation was also removed. Retaining it would

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[238] Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel and et al., 657 F.3d 1159 (2011), 1182 n 16.

[239] Strati (n 35) 222.

[240] Aznar-Gomez (n 227).

[241] UNESCO 2001 Convention art 1(8): '"State vessels and aircraft" means warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.'

[242] Strati (n 35) 92.

have been extremely difficult in negotiations that were already challenging, due to the range of national approaches towards abandonment. [243]

The 2001 Convention provides that in internal waters the coastal State has the exclusive right to regulate all UCH, in its territorial waters it should inform the flag State of the discovery of a State vessel, in the EEZ and on the continental shelf the flag State's agreement is needed before activities towards a State vessel are conducted, and in the Area the flag State's consent is needed before undertaking or authorising such activities.[244] The problem with this in the view of some major maritime States is that Article 7(3) relating to State vessels in the territorial waters of a coastal State uses the conditional 'should', and so there is not a compulsory duty on the coastal State. In addition the provisions relating to the EEZ and continental shelf are subject to Articles 10(2) and (4) where States may take measures to protect the UCH in case of immediate danger or prevent interference with their sovereign rights and jurisdiction. Agreement therefore is not needed in all cases, and this may be more prejudicial to flag State interests that the notification system in territorial waters.[245]

Article 2(8) confuses matters further. It provides a consistency clause that states:

> Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.

This affirms the principle of sovereign immunity even though arguably the only other provision that does so relates to vessels in the Area, whereas those relating to the territorial sea, EEZ and continental shelf do the opposite, in a regime that avoids use of

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[243] Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 153; Dromgoole, 'Law and the Underwater Cultural Heritage: A Question of Balancing Interests' (n 39) 128.

[244] UNESCO 2001 Convention arts 7, 10(7), 12(7).

[245] Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 172) 119; Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 163.

the phrase 'sovereign immunity'.[246] It also purports to be consistent with State practice and international law where this law is deeply uncertain.[247] It seems instead, like Article 13, that it was not meant to apply to wrecks, but rather to vessels in service, and was inserted by the Group of 77 to alleviate the concerns of some maritime States by providing another constructive ambiguity.[248]

The regime created by the 2001 Convention sidesteps the issue of sovereign immunity and property rights applying to wrecks, instead distributing the jurisdiction necessary in order to protect these wrecks (i.e. the right to regulate and authorise activities directed at them) where they are classed as UCH.[249] Many States however remain unhappy with it, again due to the apparent extension of coastal State jurisdiction over novel subject matter.

2.3.4 Salvage and Finds

The law of salvage and the law of finds are areas of private admiralty law that are to some extent excluded from applying to UCH by the 2001 Convention. The relevant provisions of the 2001 Convention proved contentious between States at negotiations, and amongst commentators subsequently.

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[246] Ronzitti (n 233) 159.

[247] Greece said of it at the time: 'Article 2(8) of the Draft reserves not only the rules of international law, but also "State practice pertaining to sovereign immunities". Apart from the poor drafting of this paragraph, it is questionable whether there is consistency in State practice with respect to the legal status of sunken vessels and aircraft.' Statements by the Greek delegation on Vote during Commission IV on Culture (29 October 2001, 31st Session of the General Conference, UNESCO). Reprinted in Garabello and Scovazzi (n 131) 246–8 at 248. A commentator has more pithily stated: 'Given that the question of the abandonment and sovereign immunity of sunken warships is uncertain, this general principle simply maintains the uncertainty status quo.' Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (n 150) 528.

[248] M Natalino Ronzitti, 'The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law' (*Institut de Droit International*, 2015) 24 n 6 <www.idi-iil.org/app/uploads/2017/06/2015_Tallinn_09_en-1.pdf> accessed 22 January 2018.

[249] ibid 62.

2.3.4.1 Salvage

The law of salvage has a complex relationship to heritage.[250] It is made up of private laws which developed in common law systems, and has been codified into international law by two treaties.[251] Salvage means the compensation allowed to persons by whose voluntary or contractual assistance a ship at sea, its cargo, or both have been saved in whole or in part from impending peril. The word can also mean the act of salvage itself and is often used indiscriminately for both concepts.[252] The Salvage Convention 1989 defines a salvage operation as 'any act or activity undertaken to assist a vessel or any

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[250] For its application to UCH see in particular: Patrick J O'Keefe, 'Maritime Archaeology and Salvage Laws: Some Comments Following Robinson v. The Western Australian Museum' (1978) 7 International Journal of Nautical Archaeology and Underwater Exploration 3; Anne M Cottrell, 'The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks' (1993) 17 Fordham International Law Journal 667; Joseph C. Sweeney, 'An Overview of Commercial Salvage Principles in the Context of Marine Archaeology' (1999) 30 Journal of Maritime Law and Commerce 185; Ole Varmer, 'The Case Against the "Salvage" of the Cultural Heritage' (1999) 30 Journal of Maritime Law and Commerce 279; P Fletcher-Tomenius, PJ O'Keefe and M Williams, 'Salvor in Possession: Friend or Foe to Marine Archaeology' (2000) 9 International Journal of Cultural Property 263; Craig Forrest, 'Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?' (2003) 34 Journal of Maritime Law and Commerce 309; James AR Nafziger, 'The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck' (2003) 44 Harvard International Law Journal 251; Scovazzi, 'The Application of "Salvage Law and Other Rules of Admiralty" to the Underwater Cultural Heritage: Some Relevant Cases' (n 43); Craig Forrest, 'Historic Wreck Salvage: An International Perspective' (2009) 33 Tulane Maritime Law Journal 347; Kevin Doran, 'Adrift on the High Seas: The Application of Maritime Salvage Law to Historic Shipwrecks in International Waters' (2012) 18 Southwestern Journal of International Law 647.

[251] Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea (adopted 23 September 1910, entered into force 1 March 1913) 4 UKTS 43; Salvage Convention 1989; Michael Kerr, 'The International Convention On Salvage 1989: How It Came to Be' (1990) 39 International and Comparative Law Quarterly 530; Mariano Aznar, 'Book Review: Eke Boesten, Archaeological and/or Historic Valuable Shipwrecks in International Waters: Public International Law and What It Offers, 2002' (2004) 15 European Journal of International Law 603, 604.

[252] Thomas E Lohrey, 'Sunken Vessels, Their Cargoes, and the Casual Salvor' (1965) [July/August] JAG Journal 25, 25; Strati (n 35) 43.

other property in danger in navigable waters or in any other waters whatsoever'.[253] Salvage does not necessarily vest ownership in the salvor, usually providing at first only a possessory right. The salvor can then bring an action *in personam* against the owner, or if they are not known, *in rem* against the property itself, and be awarded a maritime lien for their services.[254] The law of salvage is incompatible with the preservation and protection of UCH as it necessitates recovery, disperses assemblages, and introduces a profit motive which encourages the use of cheaper and quicker methods to recover only economically valuable aspects of wrecks.[255]

The law of salvage is contained in many national laws. It is also argued by US courts that they apply the customary international law of salvage (*ius gentium*),[256] which exists independently of national laws. In practice however US courts and scholars rarely look beyond their borders when considering salvage law.[257] While some form of salvage law may indeed be *ius gentium*,[258] the content of the law is far from certain, as other nations' laws all vary to certain extents. A particular divide is seen between civil and common law States where the very nature of salvage differs, as in civil law States there are several analogous but independent regimes.[259]

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[253] Salvage Convention 1989 art 1(a).

[254] Strati (n 35) 45; Forrest, 'Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?' (n 250) 328.

[255] RJ Elia, 'The Ethics of Collaboration: Archaeologists and the Whydah Project' (1992) 26 Historical Archaeology 105; Varmer (n 250).

[256] Doran (n 250) 648.

[257] For a full discussion on this matter see: Forrest, 'Historic Wreck Salvage: An International Perspective' (n 250).

[258] Although this is debatable, particularly in relation to historic wrecks. See: Nafziger, 'The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck' (n 250) 261.

[259] In some civil law jurisdictions there is a distinction between salvage (*sauvetage, salvataggio*), relating to the assistance of a ship in peril, and the recovery of sunken vessels (*récuperation, ricupero*). In fact there are three separate regimes in Italian and Spanish law, and two in French. Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 161–2. This can be highlighted by comparing the French and English texts of UNCLOS. While Article 303(3) of the English text refers to the 'law of salvage or other rules of admiralty',

For most civil law States salvage does not pose a problem to UCH, as the time in which a vessel is capable of being (legally) salvaged is limited.[260] In some common law states however, courts have developed the concept so that it applies to wreck as well.[261] Marine peril is a necessary condition for a salvage award to be granted and is usually taken to mean any natural or human force that puts a vessel in danger.[262] Common law courts generally hold that sunken vessels are still in marine peril. To paraphrase a line quoted in the *Treasure Salvors* case 'marine peril' is not diminished or extinguished by the fact that property was actually lost.[263] From an archaeological perspective however, it could be said that it is actually the salvage operations themselves that are the danger, disturbing the delicate equilibrium a site may have achieved with its surrounding environment. [264]

The salvage regime of the US typifies the common law stance, and has developed in an insular manner.[265] Even if the US interpretation of salvage law is not *ius gentium*, the US

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the French text says '*au droit de récupérer des épaves et aux autres règles du droit maritime*'. Similarly Article 4 of the 2001 Convention refers in English to 'the law of salvage or law of finds' and in French to '*au droit de l'assistance ni au droit des trésors*'.

[260] O'Keefe, 'Negotiating the Future of the Underwater Cultural Heritage' (n 107) 150.

[261] Scovazzi, 'A Contradictory and Counterproductive Regime' (n 88) 9.

[262] Joseph C. Sweeney (n 250) 190.

[263] Thompson v. One Anchor and Two Chains, 221 F. 770 (1915), 773 '[t]he "marine peril" consisted in the fact that the anchors and chains were actually lost. If they had been resting on a reef, where they could be seen, they would undoubtedly have been in "peril" of being lost, and the "marine peril" certainly was not diminished or extinguished by the fact that they were actually lost.' As quoted in Treasure Salvors, Inc v The Unidentified Wrecked and Abandoned Sailing Vessel believed to be Nuestra Senora de Atocha, 569 F. Supp. 330 (1978), 337.

[264] Dromgoole, 'Law and the Underwater Cultural Heritage: A Question of Balancing Interests' (n 39) p.119. As Varmer states: 'This conflict between historic preservation laws and the maritime law of salvage continues to divide people who actually share a common interest in the protection of historic shipwrecks. At the center of this conflict is a difference in preference between preserving historic shipwrecks on the sites where they are discovered and the belief that shipwrecks are in "marine peril" and need to be salvaged to be protected.' Varmer (n 250) 279.

[265] Forrest, 'Historic Wreck Salvage: An International Perspective' (n 250) 348.

courts have acted as if it is. US companies have exploited this peculiar stance to impact on cultural heritage within and beyond US jurisdiction. This is a problem as US companies, nationals and vessels are the most active salvors in international waters and have perhaps the greatest technological capacity to exploit UCH located in deep waters.[266] They have had no qualms over salvaging heritage with cultural meaning to other states,[267] and salvage rights have been upheld by US courts for wrecks outside their jurisdiction.[268] This means that the vagaries of the law of one nation have created problems on the international stage.[269]

Some common law States have not followed the US example and have interpreted marine peril narrowly in historic wreck cases, for example Canadian courts have held that a wreck was not in marine peril merely by being embedded in the seabed.[270] They also noted, remarkably, that in some cases it is the actions of the salvors that cause

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[266] ibid 349.

[267] ibid 350.

[268] A particularly famous case involved the *Atocha* which was located on the US continental shelf. The court held that it had jurisdiction *in rem* as artefacts from the vessel had been brought before it, and that possession of part of the wreck was enough to constitute possession of the whole of it: *Treasure Salvors, Inc v The Unidentified Wrecked and Abandoned Sailing Vessel believed to be Nuestra Senora de Atocha*, 408 F. Supp. 907 (1976); *Treasure Salvors, Inc v The Unidentified Wrecked and Abandoned Sailing Vessel believed to be Nuestra Senora de Atocha*, 569 F. Supp. 330 (1978); Doran (n 250) p.652. This is a constructive *in rem* jurisdiction and it means that US courts can declare salvage awards for wrecks in international waters, but that these are only enforceable against those under US jurisdiction, not against foreign states, vessels or nationals. See also: *Moyer v. Wrecked and Abandoned Vessel, known as Andrea Doria,* 836 F.Supp. 1099, 1994 AMC 1021(1993); John Reeder (ed), *Brice on Maritime Law of Salvage* (5th edn, Sweet & Maxwell 2011) 278, 318.

[269] Although this position has been acknowledged and defended by some commentators, see: Jonathan Joseph Beren Segarra, 'Above Us the Waves: Defending the Expansive Jurisdictional Reach of American Admiralty Courts in Determining the Recovery Rights to Ancient or Historic Wrecks' (2012) 43 Journal of Maritime Law & Commerce 349.

[270] *Her Majesty the Queen in Right of Ontario v. Mar-Dive Corp.* [1997] AMC 1000 (1997); Steven R Yormak, 'Canadian Treasure: Law and Lore' (1999) 30 Journal of Maritime Law and Commerce 229; Forrest, 'Historic Wreck Salvage: An International Perspective' (n 250) 364.

marine peril.[271] Many other common law states simply do not apply the salvage regime to heritage, but rather apply their cultural heritage regimes.[272] Dromgoole, based on a comparative study, has stated that there seems to be a consensus that salvage law is inappropriate for cultural heritage.[273] It is a shame that US courts and salvage companies are not following suit, but rather applying their own particularly harmful interpretation of the law of salvage and calling it *ius gentium.*

2.3.4.2 Finds

Some jurisdictions, where property is deemed as abandoned or has never been owned (*res derelictae*), vest ownership in the discoverer who reduces the property to their effective possession.[274] This is often known as the law of finds, or the 'American rule', and has a different origin to the law of salvage.[275]

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[271] *Her Majesty the Queen in Right of Ontario v. Mar-Dive Corp.* [1997] AMC 1000 (1997) 1062-3. Some cases in the US have come to the same conclusion, see: Klein v Unidentified, Wrecked and Abandoned Sailing Vessel 568 F.Supp. 1562 (1983). However, it seems that the majority view is still that sunken historic vessels are still in (continuous) marine peril due to ongoing natural processes: Segarra (n 269) 378.

[272] Forrest, 'Historic Wreck Salvage: An International Perspective' (n 250) 365.

[273] Sarah Dromgoole, *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (2nd edn, Martinus Nijhoff Publishers 2006) xxxi. See also: James AR Nafziger, 'Historic Salvage Law Revisited' (2000) 31 Ocean Development & International Law 81, 83 n 18.

[274] Strati (n 35) 45; Joseph C. Sweeney (n 250) 197. What constitutes abandonment will of course depend on the jurisdiction, although it can be difficult to prove when no express act has been made. US courts have held that in the case of an 'ancient and longlost shipwreck, a court may infer an abandonment' *Columbus-America Discovery Group v Atlantic Mutual Insurance Company*, 974 F.2d 450 (1992) 464-5. What exactly constitutes possession seems to be advancing in line with technology: Columbus-America Discovery Group v the Unidentified, Wrecked and Abandoned Sailing Vessel, S.S. Central America, 1989 AMC 1955 (1989) 1958; Drew FT Horrell, 'Telepossession in Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery' (1991) 3 Pace Yearbook of International Law 309; Justin S Stern, 'Smart Salvage: Extending Traditional Maritime Law To Include Intellectual Property Rights in Historic Shipwrecks' (2000) 68 Fordham Law Review 2489.

[275] It is called the American rule as in the US ownership of abandoned wreck traditionally vested in the finder. This was altered in 1987 however by the Abandoned Shipwreck Act, which vests title in the state where abandoned wreck is discovered in state waters. The American position is now more in line with

The law of finds in itself is not prejudicial to heritage. However, problems may arise where the ownership rights it vests in the discoverer are not limited by some means that ensures protection. US courts have also applied the law of finds to wrecks beyond US territory, the landmark case in this regard being that of the *Atocha*.[276]

2.3.4.3 The 2001 Convention

When developing an international regime, national laws on the subject will often be considered. States' positions during negotiation will often reflect these national laws, as they are generally more favourable to a regime that requires less drastic alteration of their national legislation in implementation.[277] The question of salvage was particularly subject to this, and a divide was seen between civil and common law States that have different traditional approaches to cultural heritage, admiralty law and property law in general.[278] The result of the negotiations has been called a 'crucial compromise' on a number of occasions.[279] The compromise is that Article 4 of the Convention does not completely prohibit the law of salvage or finds from being applied to UCH, but provides

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the other common law approach, where abandoned wreck vests in the state. This is known as sovereign prerogative, or the 'English rule'. Where abandoned wreck is found beyond US territorial waters however, and brought in front of a US admiralty court, the law of finds can still be applied. Abandoned Shipwrecks Act 1987; Strati (n 35) 126; Anne G Giesecke, 'The Abandoned Shipwreck Act Through the Eyes of Its Drafter' (1999) 30 Journal of Maritime Law and Commerce 167.

[276] Treasure Salvors, Inc v The Unidentified Wrecked and Abandoned Sailing Vessel believed to be Nuestra Senora de Atocha, 569 F. Supp. 330 (1978).

[277] Dromgoole, 'Law and the Underwater Cultural Heritage: A Question of Balancing Interests' (n 39) 121.

[278] Garabello (n 145) 123.

[279] Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 159; Guido Carducci, 'The Crucial Compromise on Salvage Law and the Law of Finds' in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff Publishers 2003); Guido Carducci, 'The UNESCO Convention 2001: A Crucial Compromise on Salvage Law and the Law of Finds' in Lyndel V Prott (ed), *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Institute of Art and Law 2006).

three conditions which first have to be met.[280] It also does not define salvage or deal with its legal effects.[281] It has been noted however, that the negotiations lacked rigour and consequently the result is again an ambiguous regime.[282] The problem is that Article 4 does allow salvage or the law of finds to be applied to UCH in some limited circumstances, however, this conflicts with Article 2(7) that provides that UCH shall not be commercially exploited.[283] It is therefore unclear then whether salvage is actually excluded or not. It is not explicitly excluded by the Convention, but the conditions set out in Article 4 (and presumably Article 2(7))[284] will detract from the usual content of the law of salvage as to leave little left of the original concept.[285] The law of finds is less inherently deleterious to UCH, as it does not necessitate recovery and does not introduce a financial incentive beyond ownership of the wreck or its cargo, and so would not so obviously contravene Article 2(7).

The problem with this aspect of the Convention is again its ambiguity, it is not a problem in itself that salvage and finds are excluded from applying to UCH. No States cited the salvage provisions as reasons behind their votes in negotiations, nor for their non-ratification. However, certain interest groups and commentators have decried its

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[280] UNESCO 2001 Convention art 4: 'Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.'

[281] Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 163.

[282] Forrest, 'Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?' (n 250) 309–10.

[283] ibid 346. A similar compromise was also developed for the provisions relating to commercial exploitation, that dilutes the clarity of the original rule: UNESCO 2001 Convention, Rule 2.

[284] 'Underwater cultural heritage shall not be commercially exploited.'

[285] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104) 50.

effect on the institution of salvage itself.[286] The Comité Maritime International (CMI) stated:

> The CMI objects strongly to the UCH Convention to the extent it is intended to abrogate the law of salvage or finds. The CMI is firmly of the view that the law of salvage and the law of finds are not incompatible with the protection of underwater heritage. The CMI strongly encourages an interpretation of Article 4 which permits application of the law of salvage in appropriate circumstances and which would actually enhance the protection of cultural heritage.[287]

Using incompatibility with the law of salvage for an argument against the Convention is unsound if the institution of salvage is based on national laws; the importance of UCH and the goal of protecting it on an international level through a public international law instrument overrides this concern.[288] There is also arguably no conflict between the 2001 Convention and Article 303(3) of UNCLOS as Article 303(4) foresaw the creation of the 2001 Convention, and provided that Article 303(3) should not prejudice it. Similarly the French text of UNCLOS, which is equally authoritative as the English,

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[286] Geoffrey Brice, 'Salvage and the Underwater Cultural Heritage' (1996) 20 Marine Policy 337; David J Bederman, 'Maritime Preservation Law: Old Challenges, New Trends' (2002) 8 Widener Law Symposium Journal 163; William R Dorsey, 'Historic Salvors, Marine Archaeologists, and the UNESCO Draft Convention on Underwater Cultural Heritage' (*Houston Marine Insurance Seminar*, 2000) <www.houstonmarineseminar.com> accessed 21 October 2013. See also the discussion in: Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 206–8. This opposition may be largely due to an unawareness of the principles of heritage protection and archaeology, however, in some cases it may be for other reasons. One of the staunchest proponents of this stance, and a leading critic of the 2001 Convention, was David J. Bederman, an American legal authority on admiralty law who served as counsel in many of the landmark cases of the salvage of heritage, and who also coincidentally served on the board of directors of Odyssey Marine Exploration Inc. from 2006, and as its chairman from 2010 until his death in 2011. See: Robert M Jarvis, 'In Memoriam: Dr. David J. Bederman (1961-2011)' (2012) 43 Journal of Maritime Law & Commerce 37.

[287] 'Consideration of the UNESCO Convention on the Protection of Underwater Cultural Heritage: Report of the CMI Working Group' [2002] CMI Yearbook 154, 156.

[288] Lee (n 196) p.26.

mentions '*au droit de récupérer des épaves et aux autres règles du droit maritime*', which translates as something other than the common law notion of salvage.[289]

However a conflict may arise between States that have ratified the 2001 Convention and those that have ratified the Salvage Convention of 1989.[290] The 1989 Convention provides that unless a reservation is made at the time of ratification, that Convention will apply to maritime cultural property of prehistoric, archaeological or historic interest situated on the sea-bed.[291] This is uncertain however for two reasons. Firstly, due the definition of 'vessels', the Salvage Convention only applies to any ship or craft, or any structure capable of navigation, which UCH generally will not be.[292] The second reason is due to its private law nature. An expert from the IMO stated in 1996 that 'because of the private- law non-mandatory nature of the [1989] Convention, the right to exclude the application of salvage law exists even without express reservation'.[293] However, whilst the Salvage Convention does cover areas of private law, it is still an international treaty, and so still puts international obligations on its States Parties.[294]

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[289] Forrest, 'Historic Wreck Salvage: An International Perspective' (n 250) 377. The Arabic, Chinese, English, French, Russian and Spanish texts of UNCLOS are equally authentic: UNCLOS art 320.

[290] 'A Provisional Report by the Comité Maritime International to IMO' [2004] CMI Yearbook 437, 438.

[291] Salvage Convention 1989 art 30(1)(d).

[292] Salvage Convention 1989 art 1(b).

[293] 'Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage, UNESCO Headquarters (Paris, 22-24 May 1996)' (1996) UNESCO Doc. CLT-96/CONF.605/6, 12. This position has been questioned as if this was the case, why would a reservation be necessary? Dromgoole and Gaskell (n 144) 189. This seems to again have been answered by an expert from the IMO: 'At the time of drafting of the Salvage Convention, some States required, for constitutional reasons, a provision expressly allowing for reservation in respect of historic shipwrecks. So far, eleven of the twenty-five States Parties have made this reservation. The majority of States also declared that any State, whether or not it made a reservation, would be entitled not to apply the Salvage Convention to historic wrecks' 'Report of the Meeting of Governmental Experts on the Draft Convention for the Protection of the Underwater Cultural Heritage UNESCO Headquarters, Paris, France (29 June - 2 July 1998)' (1998) UNESCO Doc. CLT-98/CONF.202/7, 14.

[294] Forrest, 'Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?' (n 250) 347. Most of the provisions of the Salvage Convention 1989 relate to private law, but some

States that have joined the 1989 Convention without entering a reservation and then also joined the 2001 Convention may therefore still be obliged to apply the law of salvage in some cases. This will not be an issue where both parties in the conflict are States Parties to the 2001 Convention and so a high rate of ratification of the 2001 Convention may alleviate the problem. States that did not enter a reservation when ratifying the 1989 Convention may also wish to denounce it and then re-ratify with a reservation.[295]

2.3.5 Constructive Ambiguities

It has been remarked that through the necessity of a vote, the drawbacks of adoption by consensus, which include a vagueness of terms and weakness of content, may have been to some extent avoided by the 2001 Convention,[296] however this is not entirely accurate, as there is much ambiguity left in the final product. At the end of negotiations the delegation from the Netherlands stated:

> …the expert meeting in Paris last July choose for a so-called 'constructive ambiguity' approach. It was supposed to be desirable and constructive that this determined ambiguity could give States parties the opportunity to interpret elements of the text on a manner that would be the most suitable for them. However, this is clearly in contradiction of a primary objective of treaties, like the realization of uniformity of law. Besides that, an approach like this harms the common striving for apparent treaty provisions. Considering that the expert meeting chose for this kind of approach to avoid conflicts during the negotiations as much as possible, it is foreseeable that conflicts still will occur at the moment of actual application of the Convention.[297]

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provisions are public in nature, although these may be seen as declaratory of pre-existing rights or hortatory in nature: Reeder (n 268) 22–3.

[295] Dromgoole and Gaskell (n 144) 190 n 60.

[296] Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) p.141.

[297] Remarks of the Netherlands Prior to Vote during Debates in Commission IV on Culture (29 October 2001, 31st Session of the General Conference, UNESCO). Reprinted in Garabello and Scovazzi (n 131) 244–5.

There are three main ambiguities in the text of the 2001 Convention, relating to jurisdiction, State vessels, and salvage law. A proposal by Russia and the UK to remove the ambiguities in the first two of these issues was rejected in the negotiations.[298] The views of the major maritime States, a minority of UNESCO members, necessitated these compromises. Prott and O'Keefe's remarks about the UNCLOS negotiations (section 2.3.2.1) are applicable here too: it is a shame that the major maritime States influenced the regime to such an extent, causing compromises on jurisdictional issues and salvage amongst others, and then did not support the final text anyway.[299] The result retains all the ambiguity and relative weakness of a text adopted by consensus but still without the support of the major treasure hunting nations.

It is currently unknown how States have chosen to interpret these ambiguities, and how they have been transposed into national law. Investigating the implementation of the 2001 Convention can reveal this, and possibly pave the way to more ratifications, should the misgivings of the major maritime powers prove to be unfounded.

2.4 Implementation

The 2001 Convention requires implementation in national law. International law and domestic law (also known as municipal, national and internal law) are concerned with different entities; international law with States and other international legal persons, and domestic law with natural or other national legal persons.[300] Thus they can be said to be distinct legal orders which operate on different planes.[301] Once an international treaty enters into force for a State under international law therefore, it does not necessarily automatically enter into force in that State's domestic law. This is especially true for treaties that confer rights or obligations on non-international legal persons,

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[298] It sought to make the duty in Article 7(3) compulsory, remove the phrase 'international law, including' from Article 3, and remove any ambiguity in the reporting system in Article 9(1)(b). UNESCO Doc. 31 C/COM.IV/DR.5.

[299] Prott and O'Keefe (n 26) 104–5.

[300] Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007) 178.

[301] Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 Recueil des Cours 1, 71–2.

which can usually only be given effect through domestic legislation. The process of giving an international treaty domestic effect is variously described as 'incorporation', 'transformation', 'adoption' or 'reception'.[302]

Some treaties are self-executing and for these, in some States, there may be no need for further legislative measures in order for the treaty to be justiciable in national courts. At the most basic level self-executing treaties can be defined as treaties that may be enforced in the courts without additional legislation.[303]

While parts of the 2001 Convention may be self-executing, the Rules in the Annex in particular may have this status, most of the substantive content of the Convention is not. This is evidenced by its wording. For example Article 17(1):

> Each State Party shall impose sanctions for violations of measures it has taken to implement this Convention.

And Article 16:

> States Parties shall take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with this Convention.

In these cases, even if the exact text of the Convention is brought into domestic law, the duty remains on the State Party (now expressed in national law as well as international) and so no duties are yet placed on individuals. The language is consistent throughout the Convention. It is clear that the intention of the parties that negotiated the Convention was that further measures should be taken by States Parties to implement the Convention, beyond just adopting the text into national law. In all States therefore,

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[302] Malanczuk (n 27) 64.

[303] Carlos Manuel Vazquez, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 The American Journal of International Law 695. Further than this, self-executing treaties are difficult to precisely outline and their exact characteristics will alter depending on the State in question. Some relevant factors affecting whether a treaty is self-executing are the intentions of the parties to the treaty, its specificity, whether it confers rights on individuals, and whether it would establish a norm in an area otherwise reserved to the legislature.

further implementing legislation would be needed for the Convention's obligations to be justiciable in national courts.

Very few States give domestic legal effect to all their international obligations, but this does not automatically mean that they are not complying with these obligations. This very much depends on the nature of the duties, as they could be to other States (and so have no need of domestic effect), or they could be capable of being completed through administrative, rather than legal, processes.

To illustrate this a number of the Conventions obligations can be used, such as the reporting mechanism in Article 9. Article 9(3) states that a State Party shall notify the Director-General of discoveries or activities reported to it by its nationals and flagged vessels. There is no need for this duty to be made enforceable in national law, as the duty is international in nature, and can be performed by the State at an international level. Article 9(1)(b), however, places a duty on the State Party to control the behaviour of its nationals through the use of the nationality principle. This will require legislative action. Furthermore, it provides a choice between two possible processes, so just adopting their text is not sufficient when one or the other must be enforced. Finally the duty in Article 14 regarding the measures to be taken to prevent the entry into a State Party's territory, the dealing in, or the possession of underwater cultural heritage could conceivably be fulfilled through administrative measures, such as orders to customs agencies through the State's executive, and so would not require any further input from the legislature.

So in all States, we would expect to find further specific legislative implementation of *some* of the 2001 Convention's duties. There will usually need to be legislative authority for depriving individuals of private property, relevant to the imposition of sanctions in Article 17 and the seizure of UCH in Article 18. We would also expect to see it where duties are placed on individuals, such as the reporting procedures in Articles 9 and 11, and the general duty of nationals not to engage in any activity directed at UCH in a manner not in conformity with the Convention in Article 16.

2.4.1 Current Knowledge

The current knowledge of the implementation of the Convention so far is inadequate. As the Secretariat to the Convention stated in a report on ratifications and implementation of the Convention for the fifth Meeting of States Parties in 2015:

> Monitoring tools are limited, as the Convention has no planned monitoring mechanism. The Secretariat therefore does not possess accurate global information, which would allow evaluating fully the implementation of the Convention.[304]

The 2001 Convention is almost unique in this regard. Most international regimes have systems for implementation review (SIRs), which are 'rules and procedures by which the parties to international agreements (as well as interest groups, administrative bodies, and the like) exchange data, share information on implementation, monitor activities, assess the adequacy of existing commitments and handle problems of poor implementation'.[305] These may be undertaken by a range of actors, but usually a treaty's secretariat will be involved in some of them.

One of the most basic systems seen in other treaties is the requirement for States Parties to periodically report on the implementation of the treaty in their jurisdiction. Such systems are certainly not perfect,[306] but they do have advantages.[307] The 2001

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[304] 'Convention on the Protection of the Underwater Cultural Heritage, Meeting Of States Parties Fifth Session, 28-29 April 2015: Item 5 of the Provisional Agenda, Proposal for Strategies to Enhance Ratifications and Implementation of the 2001 Convention' (2015) UNESCO Doc. UCH/15/5.MSP/5 (UNESCO Doc. UCH/15/5.MSP/5), 7 n 3.

[305] Victor, Raustiala and Skolnikoff, 'Introduction and Overview' (n 4) 16.

[306] Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 University of Richmond Law Review 1555, 1574–5.

[307] Reporting can provide a basic (if often flawed) level of knowledge about implementation, can increase transparency between States, and can also engage States by making sure at least one official in each State is thinking about implementation, with a resultant slight increase in capacity. As explained by the 2001 Convention Secretariat: 'The role of the reports is not merely to bring about monitoring of Member States' fulfilment of their international obligations. It is also a means of promoting respect for international standards and of informing the Organization.' UNESCO Doc. 164 EX/23 (UNESCO Doc. 164 EX/23), 4.

Convention however, somewhat inexplicably, has no such provision.[308] A lack of such a basic system as periodic reporting is strange for such a recent Convention, and is also strange for a UNESCO Convention. Indeed, all of UNESCO's other cultural Conventions have a provision for periodic reporting (Table 2).

Table 2. Periodic reporting obligations in UNESCO's cultural Conventions.

Convention	Year	Article	Obligation Text
Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention)	1954	26(2)	Furthermore, at least once every four years, they shall forward to the Director-General a report giving whatever information they think suitable concerning any measures being taken, prepared or contemplated by their respective administrations in fulfilment of the present Convention and of the Regulations for its execution.
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property	1970	16	The States Parties to this Convention shall in their periodic reports submitted to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of this Convention, together with details of the experience acquired in this field.
Convention concerning the Protection of the World Cultural and Natural Heritage	1972	29(1)	The States Parties to this Convention shall, in the reports which they submit to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of this Convention, together with details of the experience acquired in this field.
Second Protocol to the Hague Convention of	1999	37(2)	The Parties shall submit to the Committee, every four years, a report on the implementation of this Protocol.

[308] In the most detailed record of negotiations the issue is not raised at all: Garabello (n 145). It is the view of the author that time constraints in the negotiation meetings may have caused this.

1954 for the Protection of Cultural Property in the Event of Armed Conflict			
Convention on the Protection of the Underwater Cultural Heritage	2001		None
Convention for the Safeguarding of the Intangible Cultural Heritage	2003	29	The States Parties shall submit to the Committee, observing the forms and periodicity to be defined by the Committee, reports on the legislative, regulatory and other measures taken for the implementation of this Convention.
Convention on the Protection and Promotion of the Diversity of Cultural Expressions	2005	9(a)	(Parties shall) provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level;

This means that little is known about how the 2001 Convention is being implemented; there is no central repository of all relevant known implementing measures and no study has publicised or examined those that have been promulgated. The Secretariat does however 'collect information through regional meetings, in which national reports are made available, as well as through direct feedback from States Parties, and partners, such as NGOs, its expert network and universities'.[309] From these improvised mechanisms the Secretariat has felt able to state:

> The Convention's regulations have only in some States been reflected in the national laws and overall not been sufficiently enforced. Some States Parties have passed comprehensive legislation implementing the provisions of the Convention. However this is not the case in many States. Some have even no laws on heritage at all.[310]

[309] UNESCO Doc. UCH/15/5.MSP/5, 7 n 3.

[310] ibid 7.

So the current status of knowledge of the Convention's implementation is poor, but it is thought that there has been relatively little implementation of the Convention's obligations into national laws. The lack of implementing measures, and a lack of enforcement of the few that exist, would suggest that the Convention is having little effect on its foundational problems.

In its own modest way, this study will act as one of the first informal SIRs, but hopefully more formal procedures along these lines can be introduced by the Meeting of States Parties in time.

2.5 This Study

Having outlined the genesis of the 2001 Convention, the problems it was created to solve, and its place within international law, we can now turn to what questions the rest of this study will attempt to answer.

2.5.1 Implementation and Compliance

The current status of implementation of the 2001 Convention is unknown. All studies of the Convention so far have looked at the wording of the Convention, the negotiating procedure behind it, and its place in the wider field of international law.[311] Where they consider implementation, they do so only as far as discussing how it *should* be implemented. This of course is through no fault of the scholars. In the formation stages of a regime and its immediate aftermath, the formal norms and rules of the regime are all that can be known.[312] Nine years after the Convention has come into force however, a study into how it is being implemented and whether it is effective becomes possible and necessary.

Determining whether States are implementing the 2001 Convention, and whether they are in compliance with it, is the central focus of this research. For the good of the

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[311] For example Dromgoole, *Underwater Cultural Heritage and International Law* (n 129); PJ O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (1st edn, Institute of Art and Law 2002); O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104).

[312] Arild Underdal, 'One Question, Two Answers' in Edward L Miles and others (eds), *Environmental Regime Effectiveness: Confronting Theory with Evidence* (The MIT Press 2002) 6.

regime, and the UCH itself, it is vital to know how much implementation is taking place, what form it is taking, and whether it is enough to fulfil, or comply with, the Convention's obligations.

2.5.2 Legal Concerns

The legal qualms that certain major maritime States have about the Convention can be addressed by looking at how States have implemented the Convention. The jurisdictional question is particularly important as it is essential to know whether States are using only nationality and flag State jurisdiction in their EEZs and continental shelves in line with UNCLOS, or whether they are extending coastal State jurisdiction because of the 2001 Convention.[313]

Some States, reluctant to ratify at first due to these issues may be persuaded that their fears were unfounded, depending on how the Convention is being implemented. Conversely, States may be discouraged due to the way the Convention is interpreted, if it is interpreted in a manner not in conformity with UNCLOS, and consequently will remain outwith the regime.

2.5.3 Exploring the Implementation Gap

Some particular problems with implementation of the 2001 Convention can be foreseen. In particular, problems may be caused by the complexity of the jurisdictional framework and the numerous ambiguities in the Convention.[314] While the ambiguities were intended to encourage more States to ratify, the regime would be compromised if various States Parties interpret these provisions in their national laws in widely different ways.[315]

Other international instruments, in particular the Straddling Fish Stocks Agreement, use similar jurisdictional mechanisms to try and solve problems of resource exploitation

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[313] This may develop the UNCLOS regime itself. Article 31(3) of the VCLT that provides that when interpreting a treaty account must be taken of '…any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'

[314] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 303.

[315] Forrest, 'Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?' (n 250) 346.

that take place far from the coast and beyond the limits of sovereignty. As has been stated for other such uses of the sea:

> Complexities prevalent in governance of the seas include proliferation of organizations and laws, miscommunications, policy gaps, capacity deficiencies, competition for funding, waning political will, global uncertainty, and poor public education – to name a few.[316]

Due to these issues, such instruments have had problems with implementation and enforcement, and all these issues could also be said to potentially apply to the 2001 Convention, UNCLOS and UCH more generally. Some commentators refer to the problems of an 'implementation gap' which is an inadequate implementation of existing agreements.[317] This gap could be caused by any or all the issues listed above.

Finding out whether there is an implementation gap with the 2001 Convention will be the main focus of this research, but if there is one, discovering what problems are causing it, and suggesting means to alleviate them will be a secondary, but no less important, objective.

2.6 Conclusion

Now that the myriad issues surrounding the Convention have been set out, and the issues to be tackled in this study introduced, attention will turn to the methods available which can be used to address these issues.

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[316] DiMento and Hickman (n 5) 8.

[317] Elisa Morgera, 'Competence or Confidence? The Appropriate Forum to Address Multi-Purpose High Seas Protected Areas' (2007) 16 Review of European Community and International Environmental Law 1, 9. This can be contrasted with issues caused by a 'governance gap', where issues remain inadequately regulated.

Chapter 3 – Methodology

Broadly, this research could be said to address the effectiveness of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. This chapter will set out the methodology which will be used to meet this objective.

Very few studies have looked at the effectiveness of international cultural heritage regimes.[318] The legal output of UNESCO has certainly had an effect on the development of international law and this has been documented to some extent.[319] Its effects on domestic legal systems and wider society are more often ignored.[320] Where such studies exist, they suggest that implementation of the provisions of cultural treaties is sporadic, information on the matter is difficult to come by, and national approaches to the same provisions vary greatly.[321] To develop a sound methodology therefore, inspiration has to be taken from other subject areas. The effectiveness of international regimes is

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[318] The World Heritage Convention has received the most attention in this regard, primarily as it covers natural heritage as well as cultural. For example Edith Brown Weiss and Harold K Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accords* (The MIT Press 1998); Jim Thorsell, 'World Heritage Convention: Effectiveness 1992-2002 and Lessons for Governance'; Karin Baakman, 'Testing Times: The Effectiveness of Five International Biodiversity-Related Conventions' (Tilburg University 2011).

[319] Pierre-Marie Dupuy, 'The Impact of Legal Instruments Adopted by UNESCO on General International Law' in Abdulqawi A Yusuf (ed), *Standard Setting in UNESCO: Volume 1, Normative Action in Education, Science and Culture* (UNESCO / Martinus Nijhoff Publishers 2007); Schrijver (n 140).

[320] Georges Abi-Saab, 'General Conclusions' in Abdulqawi A Yusuf (ed), *Standard Setting in UNESCO: Volume 1, Normative Action in Education, Science and Culture* (UNESCO / Martinus Nijhoff Publishers 2007) 396.

[321] For the UNESCO 1970 Convention for instance see: Patrick J O'Keefe, *Commentary on the 1970 UNESCO Convention* (2nd edn, Institute of Art and Law 2007) 99; Lyndel V Prott, *Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 Years after Its Adoption* (2nd edn, UNESCO 2012); Kurt Siehr, 'Model Laws for Implementing International Conventions: The Implementation of the 1970 UNESCO Convention on Cultural Property' in Michael Joachim Bonell, Marie-Louise Holle and Peter Arnt Nielsen (eds), *Liber Amicorum Ole Lando* (DJØF Publishing 2012). It has been suggested that the achievements of the UNESCO 1970 Convention lie principally in changing attitudes, and that its mechanisms are very rarely used: Prott 3.

commonly studied when the regimes relate to human rights, arms control, trade, and the environment. Of these four, cultural heritage regimes have the most in common with those that focus on the environment, based as they are around the protection of a common resource which demands collective action to be effective. Indeed they could both be said to be focussed on heritage protection, cultural and natural. They both also often seek to regulate the action of not just States, but a wide range of actors such as individuals, companies and organisations. A relevant body of work in both international law and political science (more specifically international relations), has developed around environmental regimes.[322] In the absence of any preceding literature relating to international cultural heritage law therefore, useful research questions, and a methodology capable of answering those questions, may be acquired from the literature relating to international environmental law. These questions will focus on two facets of effectiveness, legal effectiveness, which addresses the levels of implementation and compliance of the Convention, and political effectiveness, which addresses the Convention's other effects. Through exploring these questions the effectiveness of the Convention can be determined. The study can then attempt to explain the levels of effectiveness and suggest strategies that could be employed to improve the effectiveness of the 2001 Convention.

3.1.1 Definitions

As always it is first necessary to define some terms. The implementation, enforcement and effectiveness of, and compliance with, international agreements and regimes may all be investigated. It is a relatively common mistake to treat these terms as synonymous and interchangeable.[323] This is due to there being little consensus as to

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[322] Brown Weiss and Jacobson (n 318); David G Victor, Kal Raustiala and Eugene B Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (The MIT Press 1998); Oran R Young, *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioural Mechanisms* (The MIT Press 1999); Edward L Miles and others, *Environmental Regime Effectiveness: Confronting Theory with Evidence* (The MIT Press 2002).

[323] Brown Weiss (n 306) 1562.

their meaning and the concepts often overlapping.[324] It is thus very important to be clear on what is meant by them in this study.

Firstly, implementation refers to the actions taken to give effect to the obligations of an agreement. It is the process by which 'intent gets translated into action'.[325] The United Nations Environment Programme (UNEP) defines it as, *inter alia*, 'all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations under a multilateral environmental agreement and its amendments if any'.[326] This definition can obviously be applied easily to multilateral cultural agreements also. A stricter definition would limit the term to measures that States take to make international agreements effective in their national law.[327] Such national implementation can take three forms: legislative, administrative and judicial.[328] All three of these may be termed 'hard' or 'legal' implementation. Implementation does not include actions of non-State actors,[329] but does perform a 'delegated normativity' function, influencing the behaviour of non-State actors.[330] It could also be called the 'domestic output' of a regime.

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[324] Rosalind Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (Royal Institute of International Affairs and Earthscan Publications Ltd 2002) 16.

[325] Martin Rein and Francine F Rabinovitz, 'Implementation: A Theoretical Perspective' in Walter Dean Burnham and Martha Wagner Weinberg (eds), *American Politics and Public Policy* (The MIT Press 1978) 308; Victor, Raustiala and Skolnikoff, 'Introduction and Overview' (n 4) 1; Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010) 205.

[326] UNEP, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (United Nations Environment Programme 2006) 59.

[327] Harold K Jacobson and Edith Brown Weiss, 'A Framework for Analysis' in Edith Brown Weiss and Harold K Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (The MIT Press 1998) 4.

[328] Catherine Redgwell, 'National Implementation' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 925.

[329] ibid 924.

[330] ibid 929.

Compliance is the degree to which an actor's behaviour conforms to a specific rule.[331] There are two levels to this definition, it could refer to a State's compliance with the treaty, or it could refer to a non-State actor's compliance with a State's implementation measures. UNEP uses the former level and declares that compliance means 'the fulfilment by the contracting parties of their obligations under a multilateral… agreement'.[332] These obligations would obviously include those requiring implementation measures by the State to transform them into national law, called substantive obligations, but can also include procedural obligations, such as attending meetings or providing reports.[333] It could go beyond these specific obligations and refer also to adherence to preambulatory clauses and initial articles that often contain the 'spirit' of the treaty.[334] The term compliance in this study will use UNEP's definition and will refer only to the actions of States, and not non-State actors, to specific obligations.

Enforcement refers to the actions taken once compliance violations occur. These actions can include formal dispute settlement procedures set out in a treaty, and also sanctions, penalties and other coercive measures.[335] Again this can take place on a State or sub-State level.

The term effectiveness is possibly the most commonly misunderstood. This is because in the relevant literature a number of different concepts of effectiveness can be

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[331] Ronald B Mitchell, 'Compliance Theory: An Overview' in James Cameron, Jacob Werksman and Peter Roderick (eds), *Improving Compliance with International Environmental Law* (Earthscan 1996) 5; Abram Chayes, Antonia Handler Chayes and Ronald B Mitchell, 'Managing Compliance: A Comparative Perspective' in Edith Brown Weiss and Harold K Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (The MIT Press 1998); Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' (2000) 32 Case Western Reserve Journal of International Law 387, 391; Jana von Stein, 'International Law: Understanding Compliance and Enforcement' in Robert A Denemark (ed), *The International Studies Encyclopedia* (Wiley-Blackwell 2010).

[332] UNEP (n 326) 59.

[333] Jacobson and Brown Weiss, 'A Framework for Analysis' (n 327) 4.

[334] ibid.

[335] Brown Weiss (n 306) 1564.

determined.[336] Three are relevant here: legal effectiveness, political effectiveness and problem solving effectiveness.[337]

Legal effectiveness is a measure of the degree to which a treaty's obligations are met, its rules complied with, and relevant programs initiated.[338] It could therefore be broadly equated with compliance by a State.[339]

Political effectiveness measures whether the Convention is causing changes in the behaviour of actors, the interests of actors, or the performance of institutions which aid the achievement of the Convention's objectives.[340] This can also be termed the 'outcome' of the regime.[341] Again this could refer to either State or non-State actor behaviour, and can include behaviour that leads to compliance by States, such as introducing implementing measures.

The final concept of effectiveness is known as the 'problem-solving approach',[342] and can also be called the 'impact' of the regime.[343] It is a measure of the extent to which the regime has eliminated or alleviated the problems it was created to solve.

3.2 Levels of Analysis

The creation of an international regime has four distinct levels of effect that it is possible to causally link, where each stage serves as a starting point for analysing the

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[336] Oran R Young and Marc A Levy, 'The Effectiveness of International Environmental Regimes' in Oran R Young (ed), *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioural Mechanisms* (The MIT Press 1999) 3–6; DiMento and Hickman (n 5) 28. Conclusions about a regime's effectiveness can be very different depending on what type of effectiveness is measured, and the method used to measure it, see: Sofia Frantzi, 'What Determines the Institutional Performance of Environmental Regimes? A Case Study of the Mediterranean Action Plan' (2008) 32 Marine Policy 618, 619.

[337] Bodansky (n 325) 253.

[338] Young and Levy (n 336) 4.

[339] Bodansky (n 325) 253–5.

[340] Victor, Raustiala and Skolnikoff, 'Introduction and Overview' (n 4) 6; Young and Levy (n 336) 5–6.

[341] Underdal (n 312) p.6.

[342] Young and Levy (n 336) 4.

[343] Underdal (n 312) 6.

succeeding stage (Table 3). These stages for the 2001 Convention constitute international output (referring to the formation of the norms, principles and rules of the regime), domestic output (the implementation of the regime by States), outcome (the change in the behaviour of the target actors) and impact (the effect on the UCH itself). Regime formation *should* lead to compliance through implementation, which is both a change in State behaviour in itself and should also lead to changes in sub-State actor behaviour, and these in turn should lead to fewer negative impacts on UCH.

Table 3. Objects of assessment[344]

Object	**International Output**	**Domestic Output**	**Outcome**	**Impact**
Result	Regime formation	Changes in domestic law and policy (Implementation)	Changes in behaviour	Effect on UCH
Type of effectiveness	N/A	Legal	Political	Problem solving

Studying the impacts of a regime would strike directly at the question of whether the regime is actually protecting UCH, but the concepts become more difficult to measure and causally link. The problem-solving approach for instance would be the ideal standard, as of course 'choosing to judge the effectiveness of a treaty by any other measurement would be judging the treaty according to a standard that the parties did not set for the treaty and would be an unfair evaluation'.[345] However, at present, this is unobtainable for a study such as this, as the state of the problem needs to be accurately known and monitored, the previous causal stages of the regime (its implementation measures and its effects on actors' behaviour) must be well understood, and a causation problem exists, as it would be difficult to ascribe any change in the condition of UCH to the functioning of the Convention.

[344] ibid 7.

[345] W Bradnee Chambers, 'Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties' (2004) 16 Georgetown International Environmental Law Review 501, 522.

The legal effectiveness of a regime is the most straightforward concept to measure, but it also tells you the least. For instance widespread compliance with an agreement's obligations by States does not mean that the agreement is achieving its aims.[346] This is because 'compliance is an artefact of the standard embodied in a commitment. Standards can be too weak, too strong, inefficient, or completely ill conceived'.[347] So whilst being evidence of compliance, proper implementation of the Convention's duties is only a means to the end of further political and problem solving effectiveness, it is not an end in itself.[348] Thus it should usually only serve as a first stage of analysis.

Looking only at compliance also does not tell you why States comply or do not comply, and therefore whether the regime is influencing this. Thus, considering political effectiveness is also important. Some States could not alter their actions at all and still comply with an agreement (known as coincidental compliance), and some States may try to comply, but fail due to problems with capacity or other factors (good faith non-compliance).[349] Therefore the regime's influence must be observed in its implementation measures before compliance can be said to be a change of behaviour by a State. Even at this low level, precise measurement can be unattainable and so personal judgements have to be taken.[350] However, proving causation is often much easier at this stage than later stages, especially when studying legislative implementation measures as these often use a treaty's wording, or reference it, demonstrating the treaty's influence.

The problems of methodology increase as the focus on the type of effectiveness gets closer to determining the actual effect of the regime on the problem that prompted its creation. One of the major issues is the knowledge of the regime and its effects; the implementation of the regime needs to be understood before effects on behaviour can

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[346] Brown Weiss (n 306) 1565.

[347] Victor, Raustiala and Skolnikoff, 'Introduction and Overview' (n 4) 7.

[348] ibid.

[349] Ronald B Mitchell, 'Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 895.

[350] Jacobson and Brown Weiss, 'A Framework for Analysis' (n 327) 4–5.

be determined, and the regime's effects on behaviour must be well understood before it can be determined whether these are having an effect on the foundational problems.

Due to the lack of knowledge of the Convention's implementation, and a possible lack of compliance, this study will have to aim initially at the legal effectiveness of the Convention, looking at States' compliance through the implementing measures they have introduced. The higher levels of effectiveness are crucially important, but these cannot be known until a regime's implementation and compliance are understood.[351] In addition, implementation is a crucial factor causing the other types of effectiveness, and so does still deserve to be studied in its own right.[352]

Determining the legal effectiveness of the Convention requires consideration of two stages: implementation and compliance. These relate to two successive questions:

1. Is there any legislation in the State Parties which may implement the substantive obligations of the Convention?
2. Do these implementation measures meet the obligations set out in the Convention?

We can also examine the implementation measures at this stage to determine how States are interpreting the 2001 Convention, in particular relating to the Convention's ambiguous provisions on jurisdiction.

After answering these, once this basic level of information is established, three further questions can then be asked that relate to the political effectiveness of the Convention:

3. Are the implementation measures the result of the Convention?
4. What other effects is the Convention causing?
5. What has caused the observed levels of implementation and compliance?

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[351] ibid 6.

[352] 'Implementation is not the only factor that affects behaviour, but we expect that it is one of the most important. International environmental agreements are typically regulatory in nature – they aim to constrain not just governments but a wide range of actors, including firms, individuals, and agencies whose behaviour does not change simply because governments adopt international commitments. Thus implementation is central.' Victor, Raustiala and Skolnikoff, 'Introduction and Overview' (n 4) 2.

The first of these again can be determined by analysing the text, and also the preparatory work, of the implementing legislation. To answer the other two additional sources of data are needed. This data is provided by qualitative interviews of relevant actors in five of the Convention's States Parties. These will be set out as case studies which will allow a detailed exploration of these complex questions.

Finally, the results from both the legal and political effectiveness sections can be used to determine what types of strategies could be used to improve the levels of the Convention's effectives.

3.3 Data sources

3.3.1 National Legislation

As has been stated (section 2.4) the substantive obligations of the Convention will require implementation measures to be transformed into national law and this could be seen in administrative, legislative or judicial form.[353] Studying legislation has the advantage over the other two means of implementation in that it is usually more transparent, as laws and regulations are almost always public documents.[354] In addition the legal principles are usually more clearly apparent and the regime's influence is also normally visible in the language they use.[355] Legislation also has the advantage of immediacy. While harmonising laws may take time, having observable results from judicial implementation will probably take even longer (and rely on legislation being in place beforehand anyway), whilst the generative aspects of the regime such as increasing capacity and public awareness will only be visible on a longer timescale still. Just focussing on legislative implementation is necessary in this first instance for these practical considerations, despite it giving an incomplete picture of the status of implementation of the 2001 Convention. However it will still serve to give an indication

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[353] Many of the Convention's substantive duties may be implemented using 'soft' or non-legislative means. These include the duties to raise public awareness or cooperate in the provision of training in underwater archaeology.

[354] Mitchell, 'Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law' (n 349) 896. Although court judgements often are too.

[355] ibid; Redgwell (n 328) 929.

of the possible status of the wider administrative and judicial implementation, and will also be interesting in itself in order to answer particular legal questions.

3.3.2 Qualitative interviews

A number of State case studies will help explore the other effects of the 2001 Convention and begin to explain the reasons behind the observed levels of both legal and political effectiveness. The situation in these States was investigated through a qualitative methodology. Qualitative interviews were chosen as the research method as the relevant data was not available in any other form.[356]

Data collection took place in June 2016 and consisted of nineteen semi-structured interviews of twenty archaeologists, government officials and legal academics in the five States Parties.[357] The interview participants were purposively chosen as they were either directly involved in the implementation of the Convention, or worked within the legal, institutional and cultural frameworks that could be expected to affect the implementation of the Convention. Conclusions were arrived at through evidential argument,[358] with the evidence being the opinions of actors with authority. The data therefore consists of the participants' experiences and perceptions of the Convention and its effects, the contextual frameworks present in the States, and possible ways to improve the situation.

3.3.2.1 Study Area

From the results of the legal effectiveness analysis five States were chosen which displayed different levels of implementation and influence of the Convention, as this allowed comparisons to be made that elucidate the reasons behind these differences. These five States are also all located around a semi-enclosed sea,[359] the Adriatic,

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[356] Jennifer Mason, *Qualitative Researching* (2nd edn, SAGE Publications 2002) 66.

[357] University of Southampton Ethics Number 20049. This was funded by a grant from the Honor Frost Foundation.

[358] Mason (n 356) 176.

[359] A semi-enclosed sea is a sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States. UNCLOS provides that States bordering a semi-enclosed sea should

allowing a comprehensive examination of the effects of the 2001 Convention on a particular body of water (Figure 3).

Figure 3. The study area.

Two of these countries, Italy and Croatia, have long histories of maritime archaeology. For some of its relatively recent history Croatia was one of the socialist republics of Yugoslavia. In the other States, Slovenia and Montenegro, which were also socialist republics of Yugoslavia, as well as Albania, maritime archaeology is relatively nascent, and could be perceived, at first glance, as less developed than in Italy and Croatia. All five of these States have ratified the 2001 Convention, most recently Italy in 2010. Croatia was one of the Convention's early adopters in 2004.

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cooperate with each other in the exercise of their rights and in the performance of their duties under UNCLOS. Thus it could be expected that more coordination in the management of the sea is seen as compared to other non-enclosed seas. UNSCLOS arts 122-123. See also: Mitja Grbec, *Extension of Coastal State Jurisdiction in Enclosed and Semi-Enclosed Seas: A Mediterranean and Adriatic Perspective* (Routledge 2014) 9–15.

3.3.2.2 Analysis

The interviews were transcribed from audio recordings. Attribute coding took place first with each interview being given a designation.[360] Other basic descriptive information was also recorded such as the country and institution the participant worked in, and the location and date of the interview (Table 4).

Table 4. Attribute coding of the interviews.

Designation	**State**	**Profession**	**Institution**	**Location of Interview**	**Date**	**Number of Participants**
A1	Albania	Archaeologist	Albanian Center for Marine Research	Skype	11/11/16	1
C1	Croatia	Archaeologist	University of Zadar; ex Ministry of Culture and CCI	Zadar	23/06/16	1
C2	Croatia	Archaeologist	ICUA	Zadar	27/06/16	1
C3	Croatia	Lawyer	University of Zagreb	Zagreb	27/06/16	1
C4	Croatia	Archaeologists	CCI	Zagreb	28/06/16	2
C5	Croatia	Archaeologist	Dubrovnik Museums; ex Ministry of Culture	Dubrovnik	01/07/16	1
I1	Italy	Archaeologist	MiBACT	Rome	08/06/16	1
I2	Italy	Lawyer	University of Milano-Bicocca	Milan	09/06/16	1
I3	Italy	Archaeologist	University of Sassari	Olbia	13/06/16	1
I4	Italy	Archaeologist	Ca' Foscari University of Venice	Venice	14/06/16	1
I5	Italy	Archaeologist	*Soprintendenza Archeologia della Liguria*	Genoa	15/06/16	1
I6	Italy	Archaeologist	Naples Eastern University	Naples	16/06/16	1
I7	Italy	Archaeologist	*Istituto Superiore per la Conservazione ed il Restauro*	Rome	16/06/16	1
I8	Italy	Archaeologist	*Soprintendenza del Mare*, Sicily	Skype	03/08/16	1
M1	Montenegro	Archaeologist	Directorate for Cultural Heritage	Podgorica	29/06/16	1
M2	Montenegro	Archaeologist	Centre for Conservation and Archaeology	Risan	30/06/16	1

[360] Matthew B Miles, A Michael Huberman and Johnny Saldana, *Qualitative Data Analysis: A Methods Sourcebook* (3rd edn, SAGE Publications, Inc 2014) 79.

S1	Slovenia	Archaeologist	Institute for the Protection of Cultural Heritage	Ljubljana	21/06/16	1
S2	Slovenia	Lawyer	University of Ljubljana; Maritime Law Association of Slovenia	Koper	22/06/16	1
S3	Slovenia	Archaeologist	University of Primorska; ex Directorate for Cultural Heritage	Skype	07/07/16	1

First cycle coding is used to initially summarise segments of data.[361] Since the study sought to investigate three broad questions, the effects of the Convention, barriers to its implementation, and methods of improving implementation, the transcripts of the interviews were descriptively coded into these basic topics: effects, obstacles and solutions (Table 5).[362] The effect category was then subcoded using evaluation coding into positive effects, negative effects, qualified effects or no effects.[363] Finally, following categories identified in the literature,[364] the barriers to implementation were provisionally coded into factors related to the individual countries, the agreement (i.e. the 2001 Convention), the international environment, and the characteristics of the activity (activities such as maritime archaeology, UCH management and the threats to UCH). All of these codes were created deductively, i.e. they came from questions that were identified, and used categories from literature already identified, prior to the commencement of the research.

In the second cycle coding the data was pattern coded into a smaller number of themes and categories.[365] Two categories contained too much data and needed to be split into smaller, more manageable, analytic units. These large categories were the effects of the Convention, mostly the positive and qualified effects, which were further coded into

[361] ibid 73.

[362] ibid 74.

[363] ibid 76.

[364] Jacobson and Brown Weiss, 'A Framework for Analysis' (n 327) 6–8.

[365] Miles, Huberman and Saldana (n 360) 86–9.

types of effect such as legislation and enforcement, and the Obstacles to Implementation category, most specifically the factors involving the individual country.

Codes related to the types of effects were created inductively, they emerged as the research progressed, and focussed on smaller, more precise categories of the data. These included effects such as legislation, enforcement and the authority, and perception, of underwater archaeology.

Part way through the data collection process, it became clear that it was the factors related to the country, particularly to do with State capacity relating to maritime archaeology and heritage protection, that the participants discussed the most when asked about problems with implementation. This suggests that this is either the main reason that the Convention is not seeing much implementation, or it is the type of factor that is most immediate for the participants, the one they know about and experience most. Either way, it is the most significant type of factor identified in this study. This factor included the whole context of the archaeological and heritage management systems. Therefore a framework for analysis was sought that provided theoretical constructs which contained more meaningful units of analysis for the data.[366] The factors related to the individual country were sub-coded using the terms 'actors', 'strategy', 'cognitive-informational framework condition', 'political-institutional framework condition', 'economic-technological framework condition' and 'situative context'. These terms will all be explained further in Chapter 8.

Table 5 List of codes

First Cycle	**Category: Effects**
	Positive
	Negative
	Qualified Effect
	No Effect
	Unknown
	Category: Obstacles to Implementation
	Factors involving the individual country
	Factors involving the international environment
	Factors involving the characteristics of the agreement
	Factors involving the characteristics of the activity

[366] Martin Jänicke, 'The Political System's Capacity for Environmental Policy' in Martin Jänicke and Helmut Weidner (eds), *National Environmental Policies: A Comparative Study of Capacity Building* (Springer 1997).

	Unknown
	Category: Solutions
Second Cycle	**Category: Types of Effects**
	Legislative
	Enforcement
	Institutional
	Practice of underwater archaeology
	Authority of underwater archaeology
	Awareness of underwater archaeology
	Cooperation
	Category: Capacity
	C: Actors
	C: Strategy
	C: Cognitive-informational framework condition
	C: Political-institutional framework condition
	C: Economic-technological framework condition
	C: Situative Context

Due to the small number of cases, and the limited sample size, the data is laid out in a case oriented, rather than variable oriented, approach.[367] Each country is considered as a whole, with background, the other political effects of the Convention, and obstacles to implementation all considered within the case study format. Some cross case analysis is undertaken following these stages of analysis, but any findings will largely be particular to the cases and ill-suited to generalisability.

3.4 Structure of the Study

3.4.1 Legal Effectiveness

3.4.1.1 Chapter 4 – Legal Effectiveness

The current relevant legislation in each State Party will be collected, and implementing provisions will be looked for. The focus will be on legislation that has been promulgated or amended since 2001 as this will show how many States have brought in measures that may have been intended to implement the substantive obligations of the Convention. Older legislation will also be considered however, as some States may have coincidentally implemented the Convention through older laws. In studying implementation only a certain number of obligations will be investigated.

[367] Miles, Huberman and Saldana (n 360) 102.

To assess the legal effectiveness of the substantive obligations of the 2001 Convention the implementation measures will need to be measured against a comparator. The implementation measures can be termed the indicator or the object.[368] The comparator can be compliance (measured against the regime's legal standards), regime goals or counterfactuals. The advantage of using compliance is that the comparator is easy to identify, as it can be determined by merely reading the Convention text.[369] So this study will use a specific element of the output (i.e. national legislation) as the indicator and compliance as the comparator. The possible disadvantage with this method however, is that it may not tell us much about regime influence, beyond the text of the laws.[370] However, merely identifying which States are in compliance and which are violators could still be useful in attempting to improve compliance.[371]

A number of indicators will be used in this study, corresponding to the separate substantive obligations looked for in the implementing legislation. Pre-existing compliance will also be looked for in States that have not introduced any new implementation legislation. This should not be an issue for some of the Convention's obligations, especially the ones relating to reporting and authorisation beyond national jurisdiction, as prior to the Convention States had no framework for exercising jurisdiction in these areas.

It is at this point where many legal studies of domestic implementation end, scrutinising only whether implementation measures are in place, and whether they conform to the

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[368] Underdal (n 312) 5; Mitchell, 'Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law' (n 349) 897. The indicator in this case is the domestic output, but could be the outcome or the impact for the other types of effectiveness.

[369] Mitchell, 'Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law' (n 349) 897.

[370] ibid 897–8.

[371] Kal Raustiala and David G Victor, 'Conclusions' in David G Victor, Kal Raustiala and Eugene B Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (International Institute for Applied Systems Analysis 1998) 662; Mitchell, 'Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law' (n 349) 899.

treaty obligations.[372] These would provide interesting results in themselves and it is an essential step as knowledge of the Convention's implementation is currently so poor. However, it is the aim of this study to go further than this and determine whether the Convention is politically effective and why.

For the next step we can attempt to determine whether the Convention has prompted compliance (if any), or whether compliance was coincidental, either through pre-existing legislation or new legislation that was not influenced by the Convention.[373] This can be done at a basic level by studying the language of the legislation to see whether it conforms at all to the wording of the Convention. References to the Convention can also be sought in the legislation text, preceding bills, and any *travaux préparatoires* for the legislation. This will be done throughout the legal effectiveness chapter.

3.4.1.2 Chapter 5 – Legal Implications

Finally, before moving on to political effectiveness, some legal implications of the witnessed implementation can be considered. In particular these relate to the ambiguities contained in Articles 9 and 10 of the 2001 Convention, and how these are being interpreted by the Convention's States Parties. This will determine whether the 2001 Convention is being interpreted in line with UNCLOS or whether the misgivings of some major maritime States were well founded.

3.4.2 Political Effectiveness

3.4.2.1 Chapter 6 – Political Effectiveness

Effects outwith the concept of legal effectiveness or compliance, but which still 'move the system in the right direction', are also signs of effectiveness.[374] These other effects, which could include changes in the behaviour of relevant actors, changes in the interests of actors, or changes in the policies and performance of institutions, come

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[372] Brown Weiss (n 306) 1562; Mitchell, 'Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law' (n 349) 894.

[373] Mitchell, 'Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law' (n 349) 895.

[374] Young and Levy (n 336) 5–6.

under the scope of political effectiveness. It is essential for a study of the 2001 Convention to investigate this as looking just at the legal effects provides only a partial analysis. In addition, the Convention is not intended to solve only a single problem, the Convention is much more wide ranging, and sets its sights on improving both UCH management and even underwater and maritime archaeology itself. Relevant effects therefore could be widespread and varied, certainly going far beyond merely legal effects. The data collected in the interviews will be set out in case studies to explore these other effects.

3.4.2.2 Chapter 7 – Obstacles to Implementation

There are a number of schools of thought about what causes States to comply with international agreements, and separate positions are often taken by scholars of international law and political science.[375] These can involve States making rational choices as to whether complying is in their interests, termed the 'instrumentalist optic', or complying because the norms in a regime have persuasive value in and of themselves, the 'normative optic'.[376] In reality compliance is probably conditioned by both these to varying degrees, and rather than a dichotomy the situation is more of a spectrum.

These explain why States want to comply, but even if the intent is there, other factors may hamper implementation.[377] These can be categorised into four groups: factors involving the individual country, the international environment, the characteristics of

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[375] Robert O Keohane, 'International Relations and International Law: Two Optics' (1997) 38 Harvard International Law Journal 487.

[376] ibid.

[377] Harold K Jacobson and Edith Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' in Edith Brown Weiss and Harold K Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (The MIT Press 1998) 520–35; Victor, Raustiala and Skolnikoff, 'Introduction and Overview' (n 4) 8–15; Redgwell (n 328) 943–5.

the accord and the characteristics of the activity.[378] The views of the interview participants can be used to begin to determine what types of factors are acting as obstacles to implementation.

3.4.2.3 Chapter 8 – Capacity

It is suspected that one of the most important issues for the 2001 Convention will be a factor involving the individual countries: a lack of capacity.[379] In particular, the effectiveness of laws are dependent on their proper administration, and this is largely dependent on resources: the money, manpower, means and knowledge to enact, publicise and enforce laws.[380] Where the protection of UCH is concerned, there could be a lack of such resources leading to low implementation levels of the 2001 Convention. The capacity of the case study States will be explored with reference to a conceptual framework of capacity set out in the literature relating to environmental governance.[381]

3.4.3 Improving the Effectiveness

3.4.3.1 Chapter 9 – Next Steps

Following the conclusions related to legal and behaviour effectiveness, and the obstacles to implementation, particularly capacity, some strategies for improving the effectiveness of the Convention will be suggested. These will be strategies that seek to build capacities of individual States and improve the knowledge of the situation. This approach follows what is known as the managerial school of compliance, first espoused

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[378] Jacobson and Brown Weiss, 'A Framework for Analysis' (n 327) 6–8; Victor, Raustiala and Skolnikoff, 'Introduction and Overview' (n 4) 8–15; Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 520–35; David Vogel and Timothy Kessler, 'How Compliance Happens and Doesn't Happen Domestically' in Edith Brown Weiss and Harold K Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (The MIT Press 1998).

[379] Mitchell, 'Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law' (n 349) 909.

[380] Prott and O'Keefe (n 26) 142–3.

[381] Jänicke (n 366).

by Chayes and Chayes in the early 1990s,[382] which suggests that non-compliance is largely inadvertent, resulting from a lack of State capacity, resource constraints, or ambiguous treaty provisions. Thus, in order to manage non-compliance and help States comply, compliance levels should be monitored and transparent, the capacities of States should be raised, and agreements should be made less ambiguous.[383]

3.5 Concerns

A number of concerns need to be raised at this stage.

3.5.1 National Legislation

Firstly, it may prove difficult to locate all laws that may be relevant to implementation of the Convention. There are a number of databases that may be used, including one provided by UNESCO,[384] and one by the International Foundation for Art Research (IFAR).[385] The Division for Ocean Affairs and the Law of the Sea (DOALOS) of the UN publishes the Law of the Sea Bulletins that contain copies of legislation relevant to the law of the sea.[386] However, these sources are often incomplete, especially concerning legislation dealing with the often overlooked subject of UCH. Individual States can also publish laws in official gazettes, online or often link to them through Ministry of Culture

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[382] Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47 International Organization 175; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995).

[383] Chayes, Chayes and Mitchell (n 331). This approach can be contrasted with the enforcement theory of compliance, founded on the belief that non-compliance is usually a choice and that cooperation is strategic. In these cases coercive measures would be of more use than positive incentives. See: George Downs, David M Rocke and Peter N Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50 International Organization 379; George W Downs, 'Enforcement and the Evolution of Cooperation' (1998) 19 Michigan Journal of International Law 319.

[384] UNESCO, 'UNESCO Database of National Cultural Heritage Laws' <www.unesco.org/culture/natlaws/index.php?&lng=en> accessed 8 May 2015.

[385] International Foundation for Art Research, 'Art Law & Cultural Property' <www.ifar.org/art_law.php> accessed 12 July 2015.

[386] DOALOS, 'The Law of the Sea Bulletins' (2013) <www.un.org/depts/los/doalos_publications/los_bult.htm> accessed 21 August 2015.

websites. Despite these resources, and attempts to contact relevant officials and departments in individual States, it is likely that some relevant legislation has not been found by the author. It is also likely that some new legislation has been added since the time of analysis. The large (and ever increasing) number of States Parties to the Convention makes this difficult to monitor. To the best of the author's knowledge however, the national legislation analysis is complete up to October 2016.

There is also a difficulty caused by the language of these laws. Most often of course they are not published in English. Sometimes official translations are available. The UNESCO database and the IFAR database both often also provide unofficial translations. In some cases, translations were undertaken by colleagues of the author. This is a significant obstacle, and of course will influence the quality of the analysis when translations are unofficial.

In addition, the author has studied Scots law and therefore cannot claim to be any sort of authority on the law of any of the States Parties of the 2001 Convention. The analysis must therefore remain relatively cursory, assessing clear indicators against compliance and gleaning this data, rather than providing what would more often be expected of doctrinal research,[387] which must, of course, be left to those more expert.

Another concern is that this study, despite it being over 16 years since the 2001 Convention was adopted, is taking place too early. According to the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (which was adopted in 1973 and entered into force in 1975),[388] by 1992 just 13% of its parties had legislation that was believed generally to meet the requirements for implementation of CITES, and currently the figure is 48.3%.[389] As seen with CITES therefore, the legislative implementation process may take a very long time, so a study on how the 2001 Convention is being implemented may not have much material to

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[387] That is, a detailed analysis of the law relevant to UCH in each jurisdiction.

[388] Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES).

[389] Rosalind Reeve, 'Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime' (2006) 82 International Affairs 881, 893; CITES, 'National Laws for Implementing the Convention' <http://cites.org/legislation> accessed 30 June 2015.

work with at this stage. It is nevertheless important to find out whether this is indeed the case, to start to outline any obstacles encountered with implementation, and to make the process more transparent so that it may accelerate in the near future.

Finally there is an endogeneity problem to consider in this research.[390] States are free to choose whether or not to commit to treaties, and this creates a selection effect, as treaties may possibly only be joined by States that are ready and willing to comply with them.[391] Therefore the behaviour of States Parties will differ both from their prior behaviour and from that of non-States Parties, and may not be caused at all by the treaty itself. This is aptly demonstrated by States like the USA and the UK choosing not to ratify the 2001 Convention, and therefore choosing not to change their behaviour to anything they would not have done anyway. Some particular instances may go against this trend, for instance France has ratified the Convention when it was initially opposed to it. In addition, it can be argued that since the jurisdiction to protect UCH beyond territorial waters was not present before the 2001 Convention, if this facet is implemented, such behaviour is always due to the 2001 Convention. A way to properly address the endogeneity problem is:

> For scholars using qualitative methods, the chief implication is that it is important to consider not only the extent of compliant behaviour both after and well before signature but also what drives the decision to sign (or not sign) and determines the extent of compliant behaviour. [392]

An attempt to do this was made in the data collection phase, as participants were always asked why they thought that their State Party wanted to join the Convention.

As an aside, the Convention may also have had an effect on the behaviour of States that have not joined it for various reasons. The examples of the Bahamas and Mozambique freezing salvage projects and citing the Convention as the reason spring immediately to

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[390] Downs, Rocke and Barsoom (n 383).

[391] Ronald B Mitchell, 'International Environmental Agreements: A Survey of Their Features, Formation, and Effects' (2003) 28 Annual Review of Environment and Resources 429, 452–3.

[392] Jana von Stein, 'Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance' (2005) 99 American Political Science Review 611, 620.

mind,[393] as well as some other legislative changes in States such as Cyprus that remain outside the regime for jurisdictional reasons. To investigate effects such as these would be too great a task, and so the study must focus on the Convention's States Parties, and only look at five States in any great detail, for this reason.

3.5.2 Qualitative Interviews

There are also some concerns with the nature of the data obtained in the qualitative interviews. Firstly, the sample size is relatively limited, and there is a danger that the participants interviewed are non-representative. It may be that only the most visible participants were contacted, i.e. participants that had a presence on the internet through the websites of their institutions, or through their academic publications. The study was also limited by language, only participants with a degree of proficiency in English were interviewed, and this was none of the participants' first language. However, measures were taken to try to correct this shortcoming, for instance each participant was asked if they knew anyone else that might be useful to talk to. The small sample size was also to some extent unavoidable, as it was due to both the availability, and even existence, of relevant actors in the target countries and also the time and resources available to the author. Due to these drawbacks conclusions will therefore be accordingly restricted, and proving causal relationships will not be possible. However, this analysis will nevertheless give the first indication of the possible root of the problem, in the opinions of relevant actors, and opens up the possibility of a more rigorous study to explore these conclusions further in the future.

There is also the danger that some researcher effects may be present,[394] as participants may have tailored their answers to what they thought the researcher wanted to hear, or that they thought of the researcher as an outsider and did not divulge information that would be embarrassing to them or their institution. This was guarded against by

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[393] Peter B Campbell and Rodrigo Pacheco-Ruiz, 'Treasure Hunting Is the World's Worst Investment' (*Bloomberg View*, 2014) <http://www.bloombergview.com/articles/2014-05-07/treasure-hunting-is-the-world-s-worst-investment> accessed 5 July 2014.

[394] Miles, Huberman and Saldana (n 360) 296.

ensuring the anonymity of the participants. In addition, all participants,[395] were very critical about the systems they worked in and appeared happy that someone was taking an interest in their work and the systems of heritage management in their States, and were very forthcoming with relevant information. Personal bias of the researcher may also be a problem. The author could have been looking to confirm the results of the legal effectiveness portion of this study. However, exploring the other effects of the Convention guarded against this, and precautions were taken, such as asking short, open ended questions, and letting the respondents answer fully before giving any opinions on their answers.[396]

Other techniques were used in the data analysis stage to provide a further degree of confidence in the results. These were the use of counterfactuals (a reconstruction of the flow of events as it would have unfolded in the absence of some key factor),[397] and triangulation or corroboration with other sources, particularly academic and grey literature.[398] In addition, analysis was undertaken within the conceptual frameworks that have been verified in other situations which lend them more credibility.[399]

3.6 Conclusion

This Chapter has set out a robust methodology, taken largely from studies of international environmental agreements, which will be applied to a novel subject area, an international cultural heritage agreement. This methodology will primarily improve the knowledge of the implementation and effectiveness of the 2001 Convention, a subject about which little was previously known. The study will suggest that it is probably a lack of capacity of the individual States that is obstructing implementation, and so strategies will be suggested which reflect these conclusions, and so which have more promise of improving the effectiveness of the Convention than strategies that are not evidence based. Improving knowledge and suggesting actions to increase the

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[395] Except possibly I1.

[396] Miles, Huberman and Saldana (n 360) 298.

[397] Young and Levy (n 374) 18–9.

[398] Miles, Huberman and Saldana (n 360) 299.

[399] Particularly: Brown Weiss and Jacobson (n 318); Jänicke (n 366).

effectiveness of the Convention are vital steps towards both laying a foundation for further research, and also ensuring that the UCH is offered greater protection.

Chapter 4 – Legal Effectiveness

This chapter will determine the level of compliance of the States Parties with the 2001 Convention. To do this a small number of indicators will be chosen whose presence or absence in national law will show whether, generally, the Convention is being implemented. Any implementation found will then be compared to the Convention standard to determine whether a State is in compliance with a particular indicator. This will provide a broad overview of the rate of implementation, and an idea of whether this implementation is sufficient to ensure compliance.

The chapter is divided into three sections. Firstly, indicators will be chosen and briefly discussed. Secondly, the national legislation in the States Parties able to implement the Convention will be outlined. In particular this section will look at the material and jurisdictional scope of the laws to determine whether they are capable of implementing the Convention, as well as noting whether they show evidence of having been influenced by the Convention. Finally, measures in these laws that evidence the indicators will be noted, and analysed for their levels of compliance.

4.1 Indicators

In order to assess the level of implementation in each State Party, and the compliance with the Convention, a number of indicators will be chosen. The choice of these indicators is important. All of the indicators will come from the treaty itself, rather than its wider regime. The indicators will be drawn from those obligations that require legislative implementation.

Many treaties define implementation responsibilities in considerable detail, setting out very specific obligations,[400] however the 2001 Convention does not. Many of its duties are too vague to be of use in this study, particularly those which provide a common, but differentiated responsibility.[401] The duty regarding activities incidentally affecting UCH

[400] Bodansky (n 325) 211–2.

[401] Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 153–4; Redgwell (n 328) 941.

is a good example of this.[402] Each State Party has the same duty, but can fulfil it to different degrees, depending on what means it has at its disposal.[403] It is a common obligation which provides differential obligations with respect to implementation and so should lead to different standards in national laws, depending on context, making it difficult to assess compliance without a thorough understanding of the capacity of each State. In addition, the main objective of the Convention was to ensure that all activities directed at UCH be subject to the Rules. The duty relating to activities incidentally affecting UCH, whilst extremely important, stands alone, outside the rest of the Convention's framework.

There are also some duties that States are more likely to be coincidentally compliant with than others. These include the duty in Article 7(2) requiring States Parties ensure that the Rules be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea. Whilst existing legislation may not quite meet the standards in the Rules, most States will have an authorisation system for such activities within their territorial waters into which the Rules can be embedded without new legislation. Similarly, the duty relating to the control of entry into the territory, dealing and possession of UCH is likely to be at least partially fulfilled by legislation relating to export and trade of cultural heritage that should be pre-existing in most States. Whilst these have usually developed to control the trade in heritage of a terrestrial origin, and are governed by a number of earlier international conventions,[404] they can often be applied to UCH without any legislative amendments. In addition these controls on trade in the 2001 Convention are only relevant when the core protection procedures set up by the Convention have failed, their primary protection potential lies in deterrence for contravening other parts of the Convention.

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[402] UNESCO 2001 Convention art 5: 'Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.'

[403] The phrase 'prevent or mitigate' is also unhelpfully vague.

[404] For example UNESCO 1970 Convention; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 1 July 1998) 34 ILM 1322.

It is also unnecessary to study indicators that are already understood. Professors Aznar and Šošić have studied State practice involving the contiguous (or archaeological) zone which shows that States are using legislative, as well as enforcement, jurisdiction in relation to protection of UCH in this zone.[405] There would be little use in restating their work.

Focusing on duties for which legislation is not likely to already be in place leads us to the duties that relate to the problems the Convention was created to solve. These are those relating to protection of UCH in the EEZ, on the continental shelf, and in the Area. These duties require legislative implementation as they seek to regulate the behaviour of non-State actors, using the nationality principle, flag State jurisdiction, or jurisdiction stemming from particular maritime zones. Whilst States may have attempted to protect UCH in these areas before, the system set out by the Convention is so specific and detailed that it will require new legislation. There is some ambiguity in these duties, especially with regard to the constructive ambiguities in Article 9, and the competencies of the coastal State in Article 10. Whilst ambiguous however, any implementation of them is worthy of analysis, as it will help to begin to answer questions as to how the Convention is being interpreted, as well as what effects it is having with regards to State practice on the jurisdictional issues that have attracted such controversy. The similarly ambiguous duties relating to State vessels and aircraft and the law of salvage will provide the other indicators.

The relevant provisions expected in national law can be divided into four groups depending on their purpose. These are:

- Provisions that create a reporting system,
- Provisions that create an authorisation system,
- Provisions relating to State vessels and aircraft,
- Provisions that exclude UCH from salvage law and the law of finds.

[405] Aznar, 'The Contiguous Zone as an Archaeological Maritime Zone' (n 102); Šošić, 'The 24-Mile Archaeological Zone: Abandoned or Confirmed?' (n 97).

Changes in relevant laws will be summarised to set out the potential number of implementation measures that have been introduced. The laws that apply beyond territorial waters and beyond the contiguous zone will be highlighted, as will laws that apply to the same range of material as envisioned by the Convention. Where there is evidence of the Convention's influence, this will be noted. Older legislation, not intended to implement the Convention, but potentially coincidentally compliant, will also be examined. These will then be analysed against the indicators to see whether they are in compliance with the Convention, and how the Convention is being interpreted.

4.2 National Legislation

The legislation in the States Parties that may be used to implement the 2001 Convention will now be discussed, before comparing any indicators that are found with the standards of the Convention to determine compliance levels. In order to comply with the Convention the relevant laws will have to appropriately apply both *ratione materiae* and either *ratione loci* or *ratione personae*, i.e. to the correct subject matter, and to either the correct location or to the correct people through territorial or nationality jurisdiction. Source selection is therefore the object of this section. It sets out all legislation that can possibly contain the indicators identified in the last section, then screens them for relevance based on material scope, jurisdictional scope, and possible Convention influence.

It is clear that the issue of jurisdiction, whilst already at the heart of the Convention, will be fundamental in implementation and compliance. It can be seen as a sort of primary underlying indicator: without some form of application to areas beyond State sovereignty (either by the nationality principle, flag State jurisdiction, or jurisdiction relating to the maritime zones themselves), national laws will not be in compliance with some of the indicators. State practice seems to confirm that express provisions are needed to apply national laws beyond the State's territory.[406] This factor can be used to limit the legal instruments worthy of analysis for compliance. National laws that do not apply beyond territorial waters in some way, whilst they may implement some duties of the Convention, will not be able to implement the reporting or authorisation systems

[406] McConnell (n 78) 242.

envisaged by the 2001 Convention for the EEZ or continental shelf, and so will not be considered compliant, nor analysed further.

Similarly, a State Party must have a definition of heritage that has the same scope of application *ratione materiae* as the definition of UCH in the Convention,[407] that is to say that it includes at least the same amount of material within its purview.[408] Legal definitions for heritage protection contain two parts, first is the definitional criterion, setting out the subject matter capable of being protected, and the second is the selection criterion which limits the definition by reference to a value.[409]

The definitional criterion for UCH is 'all traces of human existence'.[410] Traces could mean anything from artefacts to soil discolourations from past presences of wood, although the former are most likely to be focused on by those working with the Convention.[411]

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[407] UNESCO 2001 Convention art 1(1)(a): '"Underwater cultural heritage" means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i)sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii)vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character. (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage. (c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.'

[408] There is no geographical limit to this definition of UCH. If the traces of human existence meet the two selection criteria, they are UCH no matter where they are located. However, obviously the applicable protection regime will differ according to the location of UCH.

[409] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 67. As explained by Thomas '…the definitional criterion defines the kind of thing which that particular regime is intended to protect, while the selection criterion sets a kind of threshold, which any given example of that kind of thing must pass in order to be accorded protection' Roger M Thomas, 'Heritage Protection Criteria: An Analysis' [2006] Journal of Planning & Environment Law 956, 960.

[410] UNESCO 2001 Convention art 1(1)(a). Paragraphs (b) and (c) then explicitly exclude pipelines and cables and other installations placed on the seabed that are still in use from the definitional criterion. Paragraph (a) also lists some examples of UCH, although the definition is not limited to these illustrations.

[411] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 311) 41.

There are two selection criteria, a character one, and a temporal one.[412] The character criterion states that the traces have to have 'a cultural, historical or archaeological character'.[413] It is uncertain whether the phrase clarifies the definition as all traces of human existence arguably have a cultural or historical character (especially when they are over 100 years old),[414] and the term 'archaeological character' is meaningless.[415] The situation would be different if 'importance', 'significance', 'value' or 'interest' had been used instead of 'character' but as it is, the phrase does not illuminate the definition at all. The Convention therefore takes a maximalist, or blanket approach to the definition of UCH, rather than a minimalist or selective one.[416]

The temporal criterion states that traces have to 'have been partially or totally under water, periodically or continuously, for at least 100 years'.[417] So UCH has to have been

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[412] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 90–4.

[413] This was proposed by the UK who felt that a significance criteria was needed in the definition, and it was apparently mistakenly left in the final text. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104) 34–5.

[414] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 311) 43.

[415] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104) 12, 34.

[416] The definition in the Convention is a minimum definition, and could be extended by States Parties. For instance the temporal selection criteria could be shortened or the definitional criteria widened to include landscapes with cultural meaning or paleoecological remains containing no direct human evidence. It would also be advantageous for a State to provide for the discretionary inclusion of important, but more recent heritage. Strati (n 35) 117.

[417] The 100 years limit is arbitrary and has no basis in archaeology. Its purpose is merely to exclude recent material for practical reasons. These reasons particularly relate to the distinction between heritage legislation and salvage law, which it is important to clearly separate. See: ibid; O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 311) 41. This limit is also found in some national regimes, and the early legislation of Finland, Norway and Sweden was particularly influential during the formation of the 2001 Convention. Shorter limits of 75 and 50 years are also relatively common. It can also be seen in a number of previous international instruments, eg, UNESCO 1970 Convention art 1; European Convention on Offences relating to Cultural Property (adopted 23 June 1985) CETS No. 119, Appendix 2; Recommendation 848 on the Underwater Cultural Heritage (adopted on 4 October 1978 by the Assembly of the Council of Europe (18th Sitting));

underwater, but the submergence does not have to be continuous or total, and so includes traces located in intertidal zones for instance.

There are always a variety of different definitions in national laws, and these can make the negotiation and operation of an international treaty problematic.[418] The different definitions States use for cultural heritage that may be relevant to the 2001 Convention can be divided into a number of categories. National laws could use the Convention text, could incorporate the Convention's definition by reference, or could not be related to the 2001 Convention at all. Distinction can also be made between underwater specific definitions and general definitions that include both terrestrial and underwater heritage. Some States use the term 'cultural heritage', others 'cultural property' which was the previous common term in international law.[419] While this may be problematic in some cases, due to the legal 'baggage' associated with terms such as property,[420] for our purposes, the term to be defined matters less than the content of the definition. As long as the same material envisioned by the Convention is encompassed by the definition of these terms, it matters little what the actual terms are.

There are a number of different types of laws that may contain provisions relevant to the indicators. These include laws that are aimed at regulating the environment, property, planning, parks, tax, criminal behaviour, import and export, human remains and mineral exploitation.[421] To seek and analyse all of these is too large a task, and it

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'Committee of Experts on the Underwater Cultural Heritage (CAHAQ), Fifth meeting (Strasbourg, 19-23 March 1984): Draft Convention on the Protection of the Underwater Cultural Heritage' (1984) CoE Doc. CAHAQ (84) 4 Addendum I (CoE Doc. CAHAQ (84) 4 Addendum I), art 1(2).

[418] Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 150.

[419] Janet Blake, 'On Defining the Cultural Heritage' (2000) 49 International and Comparative Law Quarterly 61, 65; Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage' in Abdulqawi A Yusuf (ed), *Standard Setting in UNESCO: Volume 1, Normative Action in Education, Science and Culture* (UNESCO / Martinus Nijhoff Publishers 2007). States also often have distinct definitions for movable, immovable and archaeological heritage.

[420] Lyndel V. Prott and Patrick J O'Keefe, '"Cultural Heritage" or "Cultural Property"?' (2007) 1 International Journal of Cultural Property 307; Blake, 'On Defining the Cultural Heritage' (n 419) 65.

[421] Prott and O'Keefe (n 26) 108.

would be impossible to understand all the relationships and conflicts. Only five types of law will therefore be focussed on: specific UCH laws, general cultural heritage laws, admiralty laws, maritime delimitation laws and other laws that do not fit so easily into the above categories, but which are obviously influenced by the Convention. The relevant laws in each State Party will be listed, and analysed to see whether they have the potential to be in compliance with the Convention by applying to the necessary range of material, and with the right types of jurisdiction.

Finally, it is also possible to determine whether changes seen in legislation were caused by the 2001 Convention. There are a number of ways of telling whether a change in law has been induced by the treaty, or whether it has been coincidental. These include specific references to the Convention in legislation or in the preparatory work in advance of the legislation, and the use of the Convention's text in legislation. There is also the possibility of measures unique to the Convention appearing in legislation but which do not use the Convention's text, although there have been no examples of this in the States Parties to date. Where encountered, the Convention's influence will be highlighted.

4.2.1 Underwater Cultural Heritage Specific Laws

Two types of relevant heritage laws can be distinguished,[422] the first of these are underwater cultural heritage specific. These laws are meant to protect cultural heritage located in an aquatic environment. They are relatively uncommon in the States Parties,[423] often only apply only to shipwrecks, and sometimes do not offer a blanket protection. Within the States Parties there are only six such laws (Table 6). A benefit of this type of law is that they are easy to recognise and clear in their aims.[424]

Table 6. Underwater cultural heritage laws of the States Parties.

State	Law	Year

[422] Strati (n 35) 119.

[423] Although Prott and O'Keefe concluded in the 1980's that there seemed to have been no discernible preference for either general heritage laws or specific UCH laws: Prott and O'Keefe (n 26) 112.

[424] ibid 114.

Belgium	Loi du 4 avril 2014 relative à la protection du patrimoine culturel subaquatique	2014
France	Loi 89-874 relative Aux Biens Culturels Maritimes et Modifiant La Loi Du 27 Septembre 1941 Portant Réglementation de Fouilles Archéologiques, 1989	1989
Italy	Legge 157/2009 ratifica ed esecuzione della Convenzione sulla protezione del patrimonio culturale subacqueo, con Allegato, adottata a Parigi il 2 novembre 2001, e norme di adeguamento dell'ordinamento interno	2009
Portugal	Decreto-Lei 164/97 'Património Cultural Subaquático'	1997
Trinidad and Tobago	Protection of Wrecks Act	1994
Tunisia	Loi No. 89/21 relative aux epaves maritimes	1989

4.2.1.1 Convention Influence

Only two of these date from after the formation of the 2001 Convention, and so only these two can contain implementation measures caused by the Convention. These are from Italy and Belgium, and indeed both were intended to implement the Convention.[425]

[425] Italy's 2009 law is called *Legge per la ratifica ed esecuzione della Convenzione sulla protezione del patrimonio culturale subacqueo* (Law for the ratification and implementation of the Convention on the Protection of the Underwater Cultural Heritage) and so it is obvious that the Convention has caused this. Belgium's implementation law is not explicitly called as such, but it is obviously caused by the Convention and implements a significant part of it also. This is evidenced by the Convention being referenced throughout the Act, and the *Projet de Loi* preceding the Act also makes the situation clear, stating 'the present bill is designed to implement the Convention.' Loi du 4 avril 2014 relative à la protection du patrimoine culturel subaquatique (Loi du 4 avril 2014) ss 2(4), 8(1), 8(3) & 16; Projet de Loi relatif à la protection du patrimoine culturel subaquatique 2014, 5. In addition the use of the Convention's text in the definition of *découvertes*, and other provisions which obviously implement the Convention's duties, such as the reporting duty in Belgium's EEZ and the prohibition of ships flying the Belgian flag being used for interventions contrary to the Convention, also point to this conclusion, Loi du 4 avril 2014 ss 2(1), 5(1), 16.

4.2.1.2 Geographical Scope

Both Italy and Belgium's laws apply on their continental shelves or in their EEZs.[426] Of the older laws Tunisia's applies to abandoned objects,[427] including objects of an archaeological or historical character, that are recovered from the seabed in the territorial sea or contiguous zone, or found floating in the exclusive economic zone or recovered from it and brought to the territorial sea, internal waters or land.[428] The other three older laws only apply in the State's territory and in the case of France, in its contiguous zone also.

4.2.1.3 Material Scope

Belgium's law uses the text of the Convention to set its material scope. It starts with the concept of *découvertes* and uses an almost verbatim version of the definition of UCH found in the Convention.[429] A temporal criterion is brought in for discoveries in the EEZ

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[426] Jurisdiction over UCH and archaeology in Belgium is reasonably complex. See: Michiel Deweirdt, 'Maritime Archaeological Heritage Legislation in Flanders/Belgium' in M Pieters and others (eds), *Colloquium: To sea or not to sea - 2nd international colloquium on maritime and fluvial archaeology in the southern North Sea area, Brugge (Belgium), 21-23 September 2006: book of abstracts* (Vlaams Instituut voor de Zee 2006) 59; Ine Demerre and Inge Zeebroek, 'Management of the Underwater Cultural Heritage in Belgium' in Martijn Manders, Rob Oosting and Will Brouwers (eds), *MACHU Final Report Nr. 3* (Educom Publishers BV 2009); Sénat de Belgique, 'Question Écrite N° 5-5529 de Bert Anciaux (Sp.a) Au Vice-Premier Ministre et Ministre de l'Économie, Des Consommateurs et de La Mer Du Nord' (2012) <www.senate.be/www/?MIval=/Vragen/SVPrintNLFR&LEG=5&NR=5529&LANG=fr> accessed 12 March 2014; Marnix Pieters, 'The Processes and Strategies Employed in Belgium' in Graeme Henderson and Andrew Viduka (eds), *Towards Ratification: Papers from the 2013 AIMA Conference Workshop* (Australian Institute for Maritime Archaeology 2014) 31; Ameels Vera, *Discovering the Archaeologists of Flanders 2012-2014* (Flanders Heritage Agency 2014) 17.

[427] '*tous les objets sans maitrise'.*

[428] Loi No. 89/21 relative aux epaves maritimes 1989 s 1.

[429] Loi du 4 avril 2014 s 2(1): 'discoveries: any discovery of traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, such as: a) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; b) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; c) objects of prehistoric character; which the person who discovers them has good reasons to believe that it is underwater cultural heritage,

and on the continental shelf, which have to have been submerged for at least 100 years, but in the territorial sea there is no temporal criterion.[430] In the territorial sea Belgium therefore goes beyond what is required by the Convention, and in the EEZ and continental shelf it meets the standard.[431]

In Italian law the Convention's definition of UCH is referenced in *Legge* 157/2009,[432] which applies beyond territorial waters.[433] The definition is curtailed somewhat by the use of the phrase 'objects attributable to the underwater cultural heritage',[434] so some hypothetical traces which are not objects would be considered UCH by both the Convention and therefore *Legge* 157/2009, but would nevertheless not be subject to the procedures laid out by *Legge* 157/2009. While this may be a practical issue for the moment, as vessels exploring deep waters may be unlikely to be able to identify or exploit 'traces' rather than objects, it does technically fall short of the Convention's

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not yet registered in accordance with Article 7.' The law does not apply to pipelines and cables and other installations placed on the seabed that are still in use, nor does it apply to some newer wrecks that fall under the Nairobi Convention are also excluded from the regime. Loi du 4 avril 2014 s 4.

[430] ibid s 3.

[431] The reason for the two different arrangements in the maritime zones is that it was felt that Belgium had the authority to go beyond the Convention in the territorial sea (due to its sovereignty), but had to be in accordance with the Convention in the EEZ and on the continental shelf and so adhere more strictly to its wording. See: Projet de Loi relatif à la protection du patrimoine culturel subaquatique 2014, 8.

[432] Legge 157/2009 Ratifica ed esecuzione della Convenzione sulla protezione del patrimonio culturale subacqueo, con Allegato, adottata a Parigi il 2 novembre 2001, e norme di adeguamento dell'ordinamento interno (Legge 157/2009) s 5(1) '…whoever finds objects attributable to the underwater cultural heritage within the meaning of Article 1 of the Convention'.

[433] For Italy's territorial waters and inland waters, and the contiguous zone, terms from *Decreto Legislativo* 42/2004 are relevant. Firstly, in the area coterminous with a contiguous zone, s 94 provides that 'archaeological and historical objects' found there are subject to the rules in the Convention's Annex. Again, '*oggetti*' is not as broad a term as 'traces of human existence', but the use of this term is due to Article 303 of UNCLOS. Within territorial limits the relevant definition uses a significance (artistic, historical, archaeological or ethno-anthropological interest), temporal, and ownership selection criteria, and therefore does not meet the Convention's standard. Decreto Legislativo 42/2004, ss 2(1), 10(1), (5), 134. Having three separate definitions for three different maritime zones is also overly complex.

[434] Legge 157/2009 ss 5(1), (3), 6(1), 7, 10(1)-(2).

standard and does not envisage the development of technology which may allow the discovery and research of more ephemeral traces.

In Portugal's UCH specific law from 1997 the definition of UCH has a significance criterion and only applies in territorial and inland waters.[435]

Some of these laws only protect shipwrecks. This is the case in Trinidad and Tobago's Protection of Wrecks Act of 1994.[436] Whilst wrecks may be the most sought-after UCH, and therefore most in need of protection from treasure hunters, UCH should encompass far more and national definitions should not be limited to wreck.

Finally the official French text of the Convention uses the phrase '*toutes les traces d'existence humaine*' to translate 'all traces of human existence', but France uses the term *vestiges,* as well as '*les gisements, épaves, ou généralement tout bien'* in its definition of *biens culturels maritimes.*[437] This should be enough to be compliant.

4.2.2 General Cultural Heritage Laws

The second relevant type of laws relate to cultural heritage in general. Often these apply to cultural heritage located underwater as well as terrestrial and other heritage. Legal systems that use such laws can be called unified systems, as opposed to the dual

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[435] Decreto-Lei 164/97 s 1. Portugal is in the strange position of having a general heritage law that applies to more UCH than its specific UCH one, which can be explained by the UCH law predating both the general heritage law and the 2001 Convention by 4 years: Lei 107/2001 de 8 de Setembro Estabelece as bases da política e do regime de protecção e valorização do património cultural (Lei 107/2001)(section 4.2.2.2). The 1997 law was still a major step forward at the time, as it repealed a 1993 law that allowed the commercial exploitation of UCH: Decreto-Lei 289/93; Paulo Monteiro, 'My Quest Against Treasure Hunting' (1998) <www.abc.se/~pa/publ/monteiro.htm> accessed 10 March 2016.

[436] Protection of Wrecks Act, 1994.

[437] Ordonnance 2004-178, s L532-1. This definition dates from 1989 and was codified in 2004: Loi 89-874; Ordonnance 2004-178. Interestingly although 'traces of human existence' is not part of the definition, it is found elsewhere in the Code du Patrimoine, in the definition of archaeological heritage, due most likely to the influence of the 1992 Valletta Convention which also forms part of French law. Ordonnance 2004-178, s L510-1; European Convention on the Protection of the Archaeological Heritage (Revised) (adopted 16 January 1992, entered into force 25 May 1995) CETS No.143 (Valletta Convention), art 1(2).

systems with both UCH specific and terrestrial legislation.[438] Most States Parties have some form of general cultural heritage law, and this method provides advantages of simplicity and clarity over including protection provisions in a range of other unrelated types of laws.[439] It also has the advantage over a dual system of requiring less parliamentary time and resources to administer, which is beneficial for developing States in particular, and also States with little coastline.[440] Many Caribbean States however, have laws that set up national trusts and historical societies that can protect cultural heritage, but the acts themselves do not provide for this protection in the same manner as cultural heritage laws seen elsewhere. The difference is that these laws set up a body that has duties relating to cultural heritage, but place no obligations on the wider population, except in a few cases relating to monuments that the body designates.[441] Thus they are administrative laws rather than cultural heritage laws. None of these have been altered since 2001 (Table 7).

Table 7. Caribbean cultural heritage authority laws

State	Law	Year
Antigua and Barbuda	National Parks Act	1984
Barbados	Barbados Museum and Historical Society Act	1933
Guyana	National Trust Act	1972
Jamaica	Jamaica National Heritage Trust Act	1985
Saint Lucia	The Saint Lucia National Trust Act	1975
Trinidad and Tobago	National Trust Act	1991

For the most part general cultural heritage laws do not explicitly implement the Convention, but they do usually have relevant provisions. The majority of these laws

[438] Prott and O'Keefe (n 26) 113.

[439] ibid 111.

[440] ibid 114.

[441] For example Jamaica National Heritage Trust Act 1985, s 17.

either expressly apply to heritage in territorial waters, or can be interpreted in this way.[442] The practice amongst States seems to be that express extensions to national law are needed before they apply beyond territorial waters.[443] If there is no express provision, the applicability of national laws is less certain.[444] Read independently therefore, they do not extend to the Exclusive Economic Zone and continental shelf, with a small number of exceptions. Similarly, a definition of heritage using the Convention's text is very rare in this type of law, although some broader definitions of heritage in some laws may encompass all UCH. These laws are too numerous to analyse together, so they will be divided into those that have been adopted or amended since the State ratified the 2001 Convention, those that have been adopted or amended since 2001, and those that predate the Convention.

4.2.2.1 Changes since Ratification

A number of States have altered or introduced cultural heritage laws since they ratified the 2001 Convention in ways that impact on areas of law covered by the 2001 Convention (Table 8).

Table 8. Cultural heritage laws that have been promulgated or amended since ratification of the 2001 Convention. Regional laws in the federal and quasi-federal States of Belgium and Spain have been excluded.

State	Year	Law	Relevant Amendments
Bulgaria	2009	Cultural Heritage Act	2011
Lebanon	2008	Law 37 regarding Cultural Property	
Mexico	1972	Federal Law on Archaeological, Artistic and Historic Monuments and Zones	2014
Montenegro	2010	Protection of Cultural Property Act	

[442] Strati (n 35) 119.

[443] McConnell (n 78) 242.

[444] ibid 247.

Panama	1982	Law No. 14 'Measures on the Custody, Preservation and Administration of the Historic Heritage of Panama'	2003
Slovenia	2008	Cultural Heritage Protection Act	2012 (ZVKD-1B), 2013 (ZVKD-1C)
Ukraine	2000	Law on Protection of Cultural Heritage	2002, 2004, 2007
	2004	Law on Protection of Archaeological Heritage	2010, 2011, 2012

Mexico added a provision concerning UCH to its general heritage law in 2014 that includes a geographical criterion in its definition: its traces of human existence have to be located in the marine area of the United Mexican States for the preservation and research provisions to apply.[445] This area is defined as including the EEZ and continental shelf as well as Mexico's territorial, internal waters and contiguous zone.[446] None of the other heritage laws that have been altered since ratification use anything other than sovereignty as a basis for jurisdiction.

The Convention text appears in the addition to Mexico's law, however, the temporal selection criterion is excluded from the heritage definition.[447] It also excludes foreign State vessels and aircraft subject to sovereign immunity. Thus it exceeds the compliance criteria temporally, but foreign vessels should still be UCH, and it is therefore deficient in this regard.

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[445] Federal Law on Archaeological, Artistic and Historic Monuments and Zones 1972, as amended, s 28 ter; Decreto por el que se adiciona un artículo 28 TER a la Ley Federal Sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos, en Materia de Patrimonio Cultural Subacuático, 2014

[446] Federal Act Relating to the Sea 1986, s 3.

[447] Federal Law on Archaeological, Artistic and Historic Monuments and Zones, 1972, as amended, s 28 ter.

This reform was clearly influenced by the 2001 Convention, as evidenced by the use of the Convention's text in its UCH definition, and also by references to the 2001 Convention in the bill, however, the original intention of the amendment was not realised, leaving the implementation somewhat deficient.[448]

The text of the Convention is not found in any of these other laws, however, in some cases the concept of underwater heritage has been added to a general definition of heritage where this was not the case before. For instance Slovenia's definitions of archaeological finds and archaeological remains now includes evidence of human activity which have been underwater for 100 years.[449] Previously Slovenia's general definition of heritage did not specifically apply to UCH.[450] The definitional criteria, along with the temporal,[451] and informational,[452] selection criteria in Slovenia should be

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[448] The original draft of this provision attempted to create a new class of heritage named UCH, however, it was decided that (as set out in the Mexico's Constitution Article 73(25)) Congress only had the power to legislate on archaeological, artistic, and historic monuments, the conservation of which is in the national interest, and so could not create a new concept of protected heritage (UCH) broader than that set out in the Constitution. The definition of UCH therefore had to be fitted within the existing scheme, and so the term UCH is not actually mentioned, rather certain provisions relating to archaeological and historical monuments and zones apply to the underwater traces. See: Proyecto de Decreto que adiciona diversas disposiciones a la Ley Federal sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos, en materia de bienes culturales subacuáticos, 2013, Dictamen de las Comisiones Unidas de Cultura y de Estudios Legislativos, 11 February 2014.

[449] Slovenia, Cultural Heritage Protection Act 2008, s 3(1)(a)-(b).

[450] Slovenia, Cultural Heritage Protection Act 1999, s 2. But heritage located underwater was mentioned later in the act relating to the ownership and reporting of discovered heritage: s 58.

[451] Slovenia uses the 100 year criterion for items that have been underground or underwater that long, and 50 years for military material. Cultural Heritage Protection Act, 2008, s 3. The 50 year military material criterion is in an attempt to protect the archaeology of the two world wars of the 20th century: Trpimir M Šošić, 'Konvencija UNESCO-a o Zaštiti Podvodne Kulturne Baštine i Jurisdikcija Država u Jadranskome Moru' (2010) 49 Poredbeno Pomorsko Pravo 101, 131.

[452] A criterion that limits the definition based on the information that the material can provide, which often either includes material that helps our knowledge of the past, or material whose only source of information is archaeological. The use of this criterion has been criticised as in many cases archaeology may not be the main source of scientific information about material which is worth protecting nonetheless. Prott and O'Keefe (n 26) 170.

enough to meet the Convention's requirements, and the 100 year limit may demonstrate the Convention's influence.[453] A similar development has taken place in other States.[454]

Table 9. Cultural heritage laws that have been promulgated or amended since the creation of the 2001 Convention.

State	Year	Law	Relevant Amendments
Albania	2003	Law No. 9048 for the cultural heritage	
Argentina	2003	Law on the Protection of the Archaeological and Palaeontological Heritage	2004 (implementing decree)
Benin	2007	Loi 2007-20 portant protection du patrimoine culturel et du patrimoine naturel à caractère culturel en République du Bénin	
Bosnia and Herzegovina (Federation of)	2001	Law on the Protection of Properties Designated as National Monuments of Bosnia and Herzegovina by Decision of the Commission to Preserve National Monuments	
Croatia	1999	Act on the Protection and Preservation of Cultural Objects	2003

[453] This is uncertain however as the act, while it largely applies to the same extent of material as the 2001 Convention, does not reference the Convention or use any of its terminology except the 100 year limit. When drafting the law in 2007, the primary reason stated for its need was the lack of clarity and deficiencies of the previous Act of 1999: Predlog Zakona O Varstvu Kulturne Dediščine, 2007, First Reading.

[454] See for instance Lebanon's Law 37 regarding Cultural Property 2008, s 2, which updates Decree 166 from 1933 by, *inter alia*, adding some UCH to the definition of cultural properties, and Panama's Law 58 of 2003 which adds underwater archaeological research to Law 14 of 1982.

France	2004	Code du patrimoine	Various
Hungary	2001	Act LXIV on the protection of cultural heritage	
Italy	2004	Codice dei beni culturali e del paesaggio	
Lithuania	1994	Law on Protection of Immovable Cultural Heritage	2004
	1996	Law on Protection of Movable Cultural Property	2004, 2008
Morocco	1980	Dahir No. 1-80-341 promulgating Law No. 22-80 concerning the conservation of historic monuments and sites, inscriptions, art objects and antiquities	2006
Namibia	2004	National Heritage Act	
Portugal	2001	Lei 107/2001 de 8 de Setembro Estabelece as bases da política e do regime de protecção e valorização do património cultural	
Romania	2000	Law 43 on the protection of the archaeological heritage	2001, 2006
	2000	Law No. 182 regarding the protection of the movable national heritage	2003, 2004, 2006
Saint Kitts and Nevis	1987	National Conservation and Environment Protection Act	2001
Slovakia	2002	Act 49 on the Protection of Historical Monuments	

4.2.2.2 Changes since 2001

A number of States Parties altered their general heritage laws before they ratified the 2001 Convention, but after the Convention came into existence, so it may have still influenced their legislation (Table 9).

The Convention's influence is only apparent in Italy's Cultural Heritage and Landscape Code, in which it is referenced.[455] It is perhaps to be expected then, that very few of these heritage laws are applicable beyond territorial waters. In Portugal's 2001 law however, archaeological heritage may be found on the continental shelf.[456] The translation of 'traces' in the Portuguese version of the Convention text published in Portugal's *Diário da República*,[457] is v*estígios,* and this is also found in the definitional criterion of Portugal's archaeological heritage definition.[458] There is also an information based selection criterion.[459] The Convention's definition is also included by reference as

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[455] This provides that archaeological and historical objects found on the seabed from 12 to 24 M are protected under the Rules in the Convention's Annex, Decreto Legislativo 42/2004, s 94.

[456] Lei 107/2001, s 74(2). Nowhere in the two bills preceding the law is there any discussion of its application to the continental shelf, or of UNESCO's work on creating the 2001 Convention, although other Conventions such as Valletta 1992 and the UNESCO 1970 Convention are referenced: Proposta de Lei 228/VII; Proposta de Lei 39/VIII. In addition the Portuguese Institute of Archaeology (IPA) had duties which included to develop policy measures and ensure compliance with the State's obligations in maritime areas including the continental shelf and the EEZ: Decreto-Lei 117/1997, s 2. This body was replaced in 2007 by IGESPAR, which had jurisdiction only throughout the national territory: Decreto-Lei 96/2007, s 2(1).

[457] Aviso 6/2012.

[458] Lei 107/2001, s 74.

[459] Lei 107/2001, s 74(1). The information criterion found in Portugal's definition of archaeological heritage is a good example of this type of criterion as it contains both possible forms: material that helps our knowledge of the past, or material whose only source of information is archaeological. The definition states: 'The archaeological and paleontological heritage shall incorporate all the vestiges, assets and other traces of the evolution of the planet, life and human beings: a) whose preservation and study permit us to draw the history of life and humankind and their relationship with the environment; b) whose main source of information is constituted by excavations, prospecting, discoveries or other research methods oriented to the human being and its surrounding environment.'

the definition of cultural heritage also includes any assets that are deemed as such by virtue of international conventions binding on the Portuguese State.[460]

None of these other laws use the Convention's definition of UCH. However, some use definitions that may be in compliance with, and even influenced by, the Convention.

Romania used the term 'traces' in their definition of archaeological heritage and archaeological objects that slightly predates the 2001 Convention.[461] However, this only applies in Romania's territory and it is Romania's movable heritage law that applies on state-owned areas,[462] which include the natural resources of the EEZ and the continental shelf.[463]

Some other States use similar words which, while possibly not being influenced at all by the Convention, would still comply with it. For instance the official Spanish text of the Convention uses *todos los rastros de existencia humana,* but *vestigios* is a more common term in some of the Spanish speaking jurisdictions.[464]

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[460] Lei 107/2001, s 2(5).

[461] Law 43 on the protection of the archaeological heritage, 2000, as amended, s 2(1)(b). The Romanian term for this is *urmele* which is also used to translate 'traces' in Romania's law promulgating the text of the Convention: Lege No. 99 privind acceptarea Conventiei asupra protectiei patrimoniului cultural subacvatic, adoptata la Paris la 2 noiembrie 2001, 2007.

[462] Law 182 of 2000, as amended 2006, s 45(1). Both Romania's movable heritage and archaeological heritage laws were promulgated in 2000. They have received some amendments since then, but the provisions relating to State ownership of heritage located on the natural resources on the continental shelf were present in 2000, prior to the 2001 Convention.

[463] Constitution of Romania, 1991, as amended 2003, art 136(3). This may be an example of a State using its sovereign rights to protect UCH interlinked with these resources, a use of sovereign rights which is advocated by many scholars, eg, Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 267. The other heritage laws that apply on the continental shelf do not make this distinction between the natural resources of the continental shelf and the continental shelf itself.

[464] Argentina, Law on the Protection of the Archaeological and Palaeontological Heritage 2003, s 2; Cuba, Regalmento de la Ley de la Nevegacion Maritima, Fluvial y Lacustre, 2013, s 212. Examples of similar complying language that does not actually use 'traces' could be 'all detectable signs of human life', 'any evidence of human activity', and possibly 'remains'. See for instance: Bulgaria, Cultural Heritage Act, 2009, as amended 2011, s 146(1); Hungary, Act LXIV on the protection of cultural heritage, 2001, s 7(18);

Some States still however, despite having the chance to alter their laws since 2001, use terms that cannot be construed as inclusive of all the material in the 2001 Convention's definitional criteria. The term objects is very common,[465] and of course is seen in UNCLOS, but the term suggests that the heritage must be movable.[466] Both Tunisia and Benin uses the French term *biens*[467] which can be translated as 'property' or 'goods' and could not be construed to mean the same as traces.[468]

Similarly, while some informational,[469] and temporal,[470] criteria could meet the Convention's standards, many States, despite updating their laws since the genesis of

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Lebanon, Law 37 regarding Cultural Property, 2008, s 2; Namibia, National Heritage Act, 2004, s 1; Slovenia, Cultural Heritage Protection Act, 2008, s 3.

[465] Albania, Law No. 9048 for the cultural heritage 2003, s 4; Lithuania, Law on Protection of Immovable Cultural Heritage 1994, as amended 2004, s 3, and 'Archeologinio Paveldo Tvarkyba' 2011, s 10; Saint Kitts and Nevis, National Conservation and Environment Protection Act, 1987, s 51; Slovakia, Act 49 on the Protection of Historical Monuments 2002, s 2(5), Ukraine, Law On Protection of Archaeological Heritage 2004, as amended, s 1.

[466] Strati (n 35) 182.

[467] This forms part of the phrase *biens archeologiques maritimes*, in their almost identical sections of their laws relating to *des decouvertes maritimes*. Much of the cultural heritage legislation in Francophone areas of Africa is based on French law from the mid-20th century. Prott and O'Keefe (n 26) 67.

[468] Tunisia, Loi 94-35 relative au code du patrimoine archéologique, historique et des arts traditionnels, 1994, s 74; Benin, Loi 2007-20 portant protection du patrimoine culturel et du patrimoine naturel à caractère culturel en République du Bénin 2007, s 2.

[469] This is a relatively common criterion in States that have updated their laws since 2001. Argentina, Law on the Protection of the Archaeological and Palaeontological Heritage, 2003, s 2; Bulgaria, Cultural Heritage Act, 2009, as amended 2011, s 146(1); Hungary, Act LXIV on the protection of cultural heritage, 2001, s 7(18); Lithuania, Law on Protection of Immovable Cultural Heritage, 1994, as amended 2004, s 3, and 'Archeologinio Paveldo Tvarkyba', 2011, s 10; Panama, Constitution of Panama, 1972, as amended, s 85; Slovakia, Act 49 on the Protection of Historical Monuments 2002, s 2(5); Slovenia, Cultural Heritage Protection Act, 2008, s 3. Romania also arguably uses this criterion in its definitions of archaeological heritage and archaeological objects, as there seems to be no selection criteria, except that the objects and heritage are archaeological: Law 43 on the protection of the archaeological heritage, 2000, as amended, s 2(1)(b). Again, this criterion can be seen in the Valletta Convention, which is what many of these definitions will have been influenced by: Valletta Convention, 1992, s 1(2).

the Convention, persist with a significance criterion.[471] The problem with significance criteria is that they imply that there is material of the right substance and age that do not have the necessary value or interest to be UCH. This is a subjective decision, one that can absorb lots of time and resources to arrive at,[472] and is incompatible with the blanket protection envisaged by the 2001 Convention.

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[470] In some cases this is 100 years from the material's creation (rather than from when it was submerged), which means this would comply with the 2001 Convention as it would include more than the Convention envisages: Albania, Law No. 9048 for the cultural heritage, 2003, s 4; Argentina, Implementing Order 1022/2004 of Act No. 25.743, 2004, Annex 1, Section 2. Namibia is the only State where a temporal criterion is the only selection criterion: National Heritage Act 2004, s 1. Two States have definitions that include a fixed temporal criterion. In Hungary archaeological heritage dates to before 1711 and in Slovakia an 'archaeological find' dates to before 1918, or before 1946 if it is of a military nature: Act LXIV on the protection of cultural heritage, 2001, s 7(18); Act 49 on the Protection of Historical Monuments, 2002, s 2(5). Slovakia may be in compliance for the time being, but having a fixed limit is impracticable, inflexible and will need to be updated to be in compliance with the 2001 Convention past 2018.

[471] Benin, Loi 2007-20 portant protection du patrimoine culturel et du patrimoine naturel à caractère culturel en République du Bénin, 2007, s 2; Lebanon, Law 37 regarding Cultural Property, 2008, s 2; Lithuania, Law on Protection of Immovable Cultural Heritage, 1994, as amended 2004, s 3, and Law on Protection of Movable Cultural Property, 1996, as amended 2004, 2008, s 2; Montenegro, Protection of Cultural Property Act, 2010, s 2(1); Morocco, Dahir No. 1-80-341 promulgating Law No. 22-80 concerning the conservation of historic monuments and sites, inscriptions, art objects and antiquities, 1980, as amended 2006, ss 1-2; Ukraine, Law On Protection of Archaeological Heritage, 2004, as amended, s 1.

[472] G Henderson, 'Significance Assessment or Blanket Protection?' (2001) 30 International Journal of Nautical Archaeology 3. The problem of this significance criterion in France which uses the term 'interest', (Ordonnance 2004-178, s L532-1) can be demonstrated by an unreported first instance judgment from 1994 that designated the warship *François Kléber* as a *bien culturel maritime*, but not the cargo ship *Saracen*, despite them both being sunk in the same manner during WWI. This was due to the fact that the cargo ship was not thought able to improve knowledge of shipbuilding or technology. This highlights that there is an uncertain cut off point for UCH in France, and which will probably be decided by whether the property in question has informational value. This may have changed now as interest could be read in light of the 2001 Convention so that all *biens culturels maritimes* that have been submerged for 100 years are of interest. Gwenaëlle Le Gurun, 'France' in Sarah Dromgoole (ed), *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (Kluwer Law International Ltd 1999) 47–8; Gwenaëlle Le Gurun, 'France' in Sarah Dromgoole (ed), *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (Martinus Nijhoff Publishers 2006) 66.

Merely protecting wreck is also not sufficient to comply with the 2001 Convention, however, this is rarely seen in general heritage laws. It is seen in Namibia however, as along with its general archaeological places and objects, Namibia's National Heritage Act also has provisions for historic shipwrecks.[473]

4.2.2.3 Older Heritage Laws

Only two older heritage laws are relevant for analysis for coincidental compliance. Spain's definition of archaeological heritage, which dates to 1985, applies on its continental shelf,[474] and Morocco's heritage law of 1980 applies in its exclusive fishing zone, which later became a full EEZ.[475]

4.2.3 Archaeological Regulations

A number of States Parties have archaeological regulations that set standards for archaeological research and usually include provisions, for example, relating to the qualifications of archaeologists and strategies for dissemination of results. Due to this they may go some way to implementing the Rules in the Convention's Annex. They are harder to locate than cultural heritage laws however, as they are secondary rather than primary legislation, and are less commonly found translated into English. Consequently there is some doubt as to whether all relevant archaeological regulations have been

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[473] National Heritage Act 2004, s 57(1): 'The remains of all ships that have been situated on the coast or in the territorial waters or the contiguous zone of Namibia for 35 years or more are historic shipwrecks for the purposes of this section. (2) All articles that have been situated on the coast or in the territorial waters or the contiguous zone of Namibia for 35 years or more and that were associated with ships are historic shipwreck objects for the purposes of this section.' See also Saint Kitts and Nevis National Conservation and Environment Protection Act 1987, s 51.

[474] Ley 16/1985, s 40(1). The text of the bill (originally introduced in 1984), offers no explanation of this decision: Proyecto de Ley del Patrimonio Histórico Español, 1984, Boletin Oficial de las Cortes Generales, Senado, 15 de Abril de 1985, Enmiendas, 90; Proyecto de Ley del Patrimonio Histórico Español, 1984, Boletin Oficial de las Cortes Generales, Congreso de los Diputados, 27 de Mayo de 1985, Enmiendas del Senado, 122.

[475] Dahir No. 1-80-341 promulgating Law No. 22-80 concerning the conservation of historic monuments and sites, inscriptions, art objects and antiquities 1980, s 46.

identified. Nevertheless, there have been some noteworthy alterations in archaeological regulations since the 2001 Convention was negotiated (Table 10).

Ecuador's *Decreto* 1208 is perhaps the most interesting of these regulations as it was intended to implement the Convention.[476] It deals only with activities directed at UCH, uses the text of the Convention for its definition of UCH,[477] and specifically prohibits commercial exploitation of UCH, an obligation which will usually have been implemented using more indirect means.[478]

Table 10. Archaeological Regulations promulgated or amended since 2001.

State	Year	Regulation
Croatia	2005, 2010	Ordinance on Archaeological Research
Ecuador	2008	Decreto 1208 'Reglamento de Actividades Dirigidas al Patrimonio Cultural Subacuático'
Lithuania	2011	'Archeologinio Paveldo Tvarkyba'
Portugal	2014	Dectreto-Lei 164/2014
Slovenia	2013	Pravilnik o arheoloških raziskavah
	2014	Regulations on finding archaeological remains and the use of technical means for this purpose

The regulations of Portugal and possibly Slovenia apply beyond territorial waters due to the jurisdictional scope of their heritage and delimitation laws respectively. Slovenia's

[476] In its preamble it states that it is being promulgated in exercise of the powers laid down in Article 7(1) of the 2001 Convention, which relates to a State's exclusive right to regulate and authorise activities directed at UCH in their internal waters, territorial sea and archipelagic waters, Decreto 1208, Reglamento de Actividades Dirigidas al Patrimonio Cultural Subacuático 2008.

[477] ibid s 1.

[478] ibid s 4.

references the 2001 Convention and states that the Rules in the Convention's Annex govern archaeological research underwater.[479]

4.2.4 Maritime Laws

Maritime or admiralty laws are likely to contain a country's laws on salvage and finds, and sometimes include a reporting system for the discovery of shipwrecks. A small number of these have received relevant changes since 2001 (Table 11).

Spain's new Navigation Law (along with its older heritage law) applies to UCH beyond territorial waters.[480] It references the 2001 Convention in this regard, and in relation to foreign warships.[481] Often the Convention will become part of a State's law automatically through its process of ratification and so the definition of UCH will already be in law, and can be used by other legislation. Spain uses this technique as its new Maritime Navigation law mentions UCH a number of times.[482] It has to be assumed the Convention's definition is used in these cases, as the Convention forms part of Spanish law,[483] and the term is not defined elsewhere.

Wrecks and associated material are more usually the focus of these laws. Slovenia for instance provides that:

> The provisions of this section of the act shall apply to the salvaging of vessels, floating objects and aircraft, their parts and cargo, and other objects (hereinafter: sunken goods) that have sunk or run aground in the territorial sea and internal waters of the Republic of Slovenia.[484]

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[479] Pravilnik o arheoloških raziskavah 2013, Priloga 1(1).

[480] Ley 14/2014, s 383(1).

[481] Ley 14/2014, ss 382(3), 383(1). UCH is also referenced in its preamble which states that the law intends to end contradictions between various international agreements and Spain's national regulations, and ends shortcomings in the protection of various national interests, of which UCH is one.

[482] Ley 14/2014

[483] Constitución Española 1978, art 96(1).

[484] Maritime Code, 2001, s 775.

These have to be objects, and the definition is territorially limited, so this does not include all UCH.

Similarly Croatia updated its Maritime Code in 2013 so that a certain section relating to the removal of wreck applies to the Ecological and Fisheries Protection Zone (ZERP)[485] and on the continental shelf.[486] This was introduced to bring the law in line with the Nairobi Convention of 2007 and the Salvage Convention 1989.[487] The provisions apply to wrecks,[488] and also sunken goods.[489] The drafters intended to include every object except wreck in the term sunken goods, including parts of buildings and port installations, and aircraft or other vehicles and related cargo.[490] Again, it is restricted to objects and so does not cover all UCH.

Finally, the definition of derelicts is relevant in Mexican law.[491] It includes all objects, including of ancient origin, and applies in any waters where Mexico has jurisdiction.[492]

Table 11. Changes in maritime laws since 2001.

State	Year	Law	Amendments

[485] Set up by the Decision on the extension of the jurisdiction of the Republic of Croatia in the Adriatic Sea, 2003.

[486] Maritime Code 2004, as amended 2013, s 840b.

[487] Nacrt Prijedloga Zakona O Izmjenama I Dopunama Pomorskog Zakonika, S Konačnim Prijedlogom Zakona 2013, 3; Vesna Skorupan Wolff and Adriana Vincenca Padovan, 'Kritika Važećeg i Prijedlog Novog Pravnog Uređenja Vađenja i Uklanjanja Podrtina i Potonulih Stvari' (2012) 51 Poredbeno Pomorsko Pravo 11.

[488] Maritime Code, 2004, as amended 2013, s 840a(1).

[489] Maritime Code, 2004, as amended 2013, s 840a(2) A sunken good is any good except the wreck, which sank or was wrecked in the sea, or one which is expected to sink soon, if effective measures are not taken to rescue those goods.

[490] Skorupan Wolff and Padovan (n 487) 43.

[491] Ley de Navegación y Comercio Marítimos, 2006, as amended, s 172.

[492] This law replaced the Ley de Navegación of 1994, which had these provisions also: Ley de Navegación, 1994, as amended 2000, s 130. Any compliance these provide with the 2001 Convention is therefore coincidental.

Antigua and Barbuda	2006	The Antigua and Barbuda Merchant Shipping Act	
Croatia	2004	Maritime Code	2013
Cuba	2013	Ley de la navegación marítima, fluvial y lacustre	
	2013	Reglamento de la Ley de la navegación marítima, fluvial y lacustre.	
Mexico	2006	Ley de Navegación y Comercio Marítimos	
Nigeria	2007	Merchant Shipping Act	
Panama	2008	Ley No. 55 del Comercio Marítimo	
Saint Kitts and Nevis	2002	Merchant Shipping Act	
Saint Vincent and the Grenadines	2004	Shipping Act	2014
Slovenia	2001	Maritime Code	2003
Spain	2014	Ley 14/2014 de Navegación Marítima	

4.2.5 Maritime Delimitation

Maritime delimitation laws are also relevant. These set out the geographical extent of a State's maritime zones and list the rights the States consider that they have in them. Thus they usually follow the wording of UNCLOS. Of particular interest to this study are the laws that declare a country's rights in its EEZ and on its continental shelf. Some of these laws create ecological, fisheries or archaeological protection zones rather than full EEZs.

4.2.5.1 Changes since 2001

There have been a small number of such laws that have introduced relevant provisions since 2001 (Table 12). A number of other States have declared new EEZs since 2001,[493] but these are do not relate directly to the implementation of the 2001 Convention.

Slovenia's Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act 2005 purports to set up an Ecological Protection Zone, coterminous with its continental shelf, and provides:

> The legal order of the Republic of Slovenia and the European Union acquis in the areas of the protection and preservation of the marine environment, including the archaeological heritage, and the provisions of Part XII of the UN Convention on the Law-of the Sea shall apply to the ecological protection zone.[494]

Thus Slovenia's general heritage law would apply in its Ecological Protection Zone. However, Slovenia's entitlement to any maritime zones beyond its territorial waters is unclear.[495] The law of 2005 may therefore be ineffectual, but it remains formally in effect in Slovenian national legislation.[496]

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[493] For example France with Decree No. 2012-1148 of 12 October Establishing an Economic Zone off the Coast of the Territory of the Republic in the Mediterranean Sea; and Croatia with its Decision on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea, 2003.

[494] Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act, 2005, s 6(1).

[495] Slovenia declared a geographical disadvantage in 1993, however with amendments to its Maritime Code in 2003, the 2005 law, and a 2006 Decree, it began proclaiming sovereign rights beyond its territorial sea related to both a continental shelf and the Ecological Protection Zone. See: Memorandum o Piranskem zalivu of 07 April 1993; Act Amending the Maritime Code of 19 December 2003; Decree on the Determination of the Fisheries Sea Area of 5 January 2006; Tullio Scovazzi, 'Recent Developments as Regards Maritime Delimitation in the Adriatic Sea' in Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff Publishers 2006); Budislav Vukas, 'Maritime Delimitation in a Semi-Enclosed Sea: The Case of the Adriatic Sea' in Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff Publishers 2006); Davor Vidas, 'The UN Convention on the Law of the Sea, the European Union and the Rule of Law: What Is Going on in the Adriatic Sea?' (2009) 24 The International Journal of Marine and Coastal Law 1. Slovenia and Croatia agreed to submit these maritime disputes to arbitration in 2009. The Tribunal gave its verdict in June 2017, confirming that Slovenia has no entitlement to a continental shelf, but Croatia as stated that it will not accept the judgment as it left the arbitration process in 2015: Permanent Court of Arbitration, 'Arbitration Between the Republic of Croatia

Italy has also provided a framework law for ecological protection zones (ZPE) that claims jurisdiction over the archaeological and historic heritage.[497] One instrument established such zones in 2011 to the west of Italy (in the north-west Mediterranean, the Ligurian Sea and the Tyrrhenian Sea). These zones are subject to Italian laws and international conventions binding on Italy, including those related to UCH on the seabed.[498] The 2001 Convention is referenced in both laws, in the body of the framework law, and in the preamble of the decree establishing the ZPE.[499] No such influence is seen in Slovenia,[500] but these laws mean that Italy and Slovenia claim

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and the Republic of Slovenia' (*PCA Case Repository*, 2018) <www.pcacases.com/web/view/3> accessed 14 March 2018.

[496] Vidas (n 495) 38; Šošić, 'Konvencija UNESCO-a o Zaštiti Podvodne Kulturne Baštine i Jurisdikcija Država u Jadranskome Moru' (n 451) 132.

[497] Law 61 on the Establishment of an ecological protection zone beyond the outer limit of the territorial sea 2006, s 2(1) (*Legge* 61/2006).

[498] Presidential Decree 209/2011 Regulations establishing ecological protection zone in the north-west Mediterranean, the Ligurian Sea and the Tyrrhenian Sea, s 3(1).

[499] The law establishing the framework of the ZPE states that Italy exercises its jurisdiction in the ZPE relating to protection and conservation of the marine environment, including the archaeological and historic heritage, in compliance with the provisions of UNCLOS and the 2001 UNESCO Convention. Law 61 on the Establishment of an ecological protection zone beyond the outer limit of the territorial sea 2006, s 2(1); Presidential Decree 209/2011 Regulations establishing the ecological protection zone in the north-west Mediterranean, the Ligurian Sea and the Tyrrhenian Sea.

[500] Slovenia did not ratify the 2001 Convention until 2008, and the declaration of the Ecological Protection Zone in 2005, and its 2003 amendments to the Maritime Code (adding sovereign rights to s 1, and introducing s 4 which states that Slovenia may exercise sovereign rights, jurisdiction and control beyond the limits of State sovereignty), were more likely a response to Croatia declaring its ZERP in 2003 and the problems this caused to Slovenia in terms of delimitation of a territorial sea: Vidas (n 495). One of the reasons stated for the introduction of the bill was that Slovenia would be better placed in delimitation negotiations if it declared a zone in light of Croatia's recent, and Italy's impending, similar actions, although concern for the protection of the environment was also cited: Predlog Zakona O Razglasitvi Zaščitne Ekološke Cone In Epikontinentalnem Pasu Republike Slovenije, 2005, First Reading. The use of the term 'archaeological heritage' in this law, rather than any phrasing of the 2001 Convention such as UCH, demonstrates the Convention's lack of influence: Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act 2005, s 6(1).

jurisdiction over archaeological heritage in areas equivalent to EEZs through delimitation laws.[501]

The influence of the 2001 Convention is also apparent in Guyana's Maritime Zones Act of 2010, despite Guyana only ratifying the Convention in 2014. It provides that the Minister of Foreign Affairs may make regulations to regulate and authorise activities directed at UCH within the territorial sea and contiguous zone in accordance with Article 7 and 8 of the 2001 Convention, and that these shall in particular ensure that the Rules in the Annex are applied.[502] It does not apply to UCH beyond territorial waters and the contiguous zone.

Table 12. Maritime delimitation laws that have changed since 2001.

State	Year	Law	Amendments
Guyana	2010	Maritime Zones Act	
Italy	2006	Law 61 on the Establishment of an ecological protection zone beyond the outer limit of the territorial sea	
	2011	Presidential Decree 209/2011, Regulations establishing ecological protection zone in the north-west Mediterranean, the Ligurian Sea and the Tyrrhenian Sea	
Portugal	2006	Lei No. 34/2006, Zonas Marítimas sob Soberania ou Jurisdição Nacional	
Slovenia	2005	Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act	

[501] Both Italy and Slovenia's ecological protection zones, and Croatia's ZERP, are not full EEZs, rather they are 'new' types of maritime zones, relying on the customary status of EEZs and the principle of *in maiore stat minus* for their compatibility with international law. See: Erik J Molenaar, 'New Maritime Zones and the Law of the Sea' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 263.

[502] Maritime Zones Act 2010, s 44(5)-(6).

4.2.5.2 Unilateral extension of jurisdiction in the EEZ and continental shelf

Some States Parties' older legislation goes beyond the rights provided for by UNCLOS in the EEZ and continental shelf and are of relevance to heritage resources or archaeological research.[503] Barbados requires a permit for the exploration of 'any resources', or conducting 'any research' in the EEZ.[504] Guyana has similar provisions for the EEZ and continental shelf,[505] which were also in place in its previous 1977 Act,[506] as does Grenada,[507] originating in a 1978 Act.[508] Trinidad and Tobago similarly requires a permit for 'any other such activity' in its EEZ.[509] Belgium may have a similar provision relating to its EEZ and 'any marine scientific research of whatever nature.'[510] Romania claims sovereign rights over 'other' resources.[511]

Some other States more specifically assert rights over archaeology or the recovery of objects.[512] Iran has a provision which reads:

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[503] Kopela (n 68).

[504] Marine Boundaries and Jurisdiction Act 1978, as amended, s 6(1). Barbados also has provisions that allows the Governor-General to extend the application of any legislation to the EEZ, although this right does not have appeared to have been used for heritage protection yet. Marine Boundaries and Jurisdiction Act 1978, as amended, s 8(1).

[505] Maritime Zones Act 2010, ss 22(1), 29(1).

[506] Maritime Boundaries Act 1977, ss 11, 17.

[507] Grenada Territorial Sea and Maritime Boundaries Act 1989, s 25.

[508] Marine Boundaries Act 1978, s 6(1).

[509] Archipelagic Waters and Exclusive Economic Zone Ac, 1986, s 22(f).

[510] Act concerning the exclusive economic zone of Belgium in the North Sea 1999, s 40.

[511] Decree No. 142 of 25 April 1986 of the Council of State concerning the establishment of the Exclusive Economic Zone of the Socialist Republic of Romania in the Black Sea, s 3(a).

[512] Yugoslavia in 1987 claimed sovereign rights over natural and 'other' resources on its continental shelf, other resources explicitly included archaeological and other buried objects. This was repealed in Slovenia in 2001 by the Maritime Code, and by Croatia in 1994. It may still have an effect in Montenegro however, which has not passed any other delimitation laws, and still uses the Maritime and Inland Navigation Law 1998 of the Federal Republic of Yugoslavia. Its effect on Bosnia and Herzegovina is also unknown, but this

> Any sort of operation, aimed at recapturing the sunken objects, scientific research and investigation in Exclusive Economic Zone and continental shelf is dependent upon the approval of the related officials of Islamic Republic of Iran.[513]

Jamaica claims jurisdiction in its EEZ in respect of:

> …the authorisation, regulation and control of scientific research and the recovery of archaeological or historical objects.[514]

In Morocco:

> Any scientific or archaeological research or exploration undertaken by a foreign State or by nationals of a foreign State in the exclusive economic zone shall be subject to the prior authorisation of the Moroccan administration.[515]

These States presumably would not need to implement the procedures in Articles 9 and 10 of the 2001 Convention, as they already profess to unilaterally control all archaeological interventions on their continental shelves or in their EEZs.

4.2.5.3 Unilateral extension of territorial waters

Some States claim excessive territorial seas and so claim sovereignty over areas which would otherwise be considered EEZs or continental shelves. Ecuador had claimed an insular territorial sea around the Galápagos Islands, and, when measured from the

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is largely irrelevant as Bosnia and Herzegovina's territorial waters are completely surrounded by Croatia's internal waters and so it cannot claim an EEZ or any continental shelf. See: Act concerning the coastal sea and the continental shelf, 1987, s 24; Zakon o preuzimanju saveznih zakona u oblastima pomorske i unutarnje plovidbe koji se u Republici Hrvatskoj primjenjuju kao republièki zakoni 1991, s 1; Maritime Code, 1994, s 1053; Maritime Code 2001, s 992; Mirjam Skrk, 'The 1987 Law of Yugoslavia on the Coastal Sea and the Continental Shelf' (1989) 20 Ocean Development & International Law 501.

[513] Law of Marine Areas of the Islamic Republic of Iran in the Persian Gulf and Oman Sea, 1993, s 17.

[514] Exclusive Economic Zone Act 1991, s 4(c)(i).

[515] Act No. 1-81 of 18 December 1980, Promulgated by Dahir No. 1-81-179 of 8 April 1981, establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan coasts, s 5.

mainland territorial sea, this effectively extended to 200 M.[516] Ecuador's recent underwater archaeological regulations apply to all activities directed at UCH, in any part of its territorial sea.[517]

Benin has claimed a 200 M territorial sea.[518] Togo has claimed a 30 M territorial sea, as well as a 200 M protected economic maritime zone.[519] A number of States previously claimed territorial seas that extended to a distance greater than 12 M, but reduced them to 12 M in the 1980s and 1990s after the conclusion of UNCLOS.[520]

Finally, Panama's Constitution (which was amended in 2004), states:

> The territory of the Republic of Panama comprises the land surface, the territorial sea, the undersea continental shelf, the subsoil and the air space between Colombia and Costa Rica, in accordance with the boundary treaties concluded by Panama with those States.[521]

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[516] Civil Code as amended by Decree No. 256-CLP of 27 February 1970(1) s 628; Roach and Smith (n 175) 144–6 n 29. However, Ecuador ratified UNCLOS in 2012 and declared upon ratification that the territorial sea would extend to 12 M, the rest of the 200 M was to be made up of an EEZ and continental shelf. It also however, reaffirmed its straight baselines round the Galapagos and confirmed the full validity of the Declaration of Santiago on the Maritime Zone of 1952 in which Ecuador, Chile and Peru declared they had exclusive sovereignty and jurisdiction up to a minimum distance of 200 M from their coasts. Declaraciôn sobre Zona Maritima (Chile-Ecuador-Peru) (Adopted 18 August 1952) 1006 UNTS 323 (Declaration of Santiago); Ecuador, Declaration upon ratification of UNCLOS, 24 Sep. 2012. A number of objections were raised by States Parties to UNCLOS regarding the declaration, eg 'Objection by Belgium Related to the Declaration Made by Ecuador upon Accession, Effected on 22 October 2013' (2014) 83 Law of the Sea Bulletin 18. The situation therefore is still at present unclear.

[517] Decreto 1208 Reglamento de Actividades Dirigidas al Patrimonio Cultural Subacuático, 2008, s 5

[518] Decree No. 76-92 extending the territorial waters of the People's Republic of Benin to 200 nautical miles, 1976, s 1.

[519] Ordinance No. 24 delimiting the Territorial Waters and creating a protected Economic Maritime Zone, 1977

[520] These included the States Parties to the 2001 Convention: Albania, Argentina, Gabon, Haiti, Madagascar and Nigeria. Roach and Smith (n 175) 138–43.

[521] Constitution of Panama, 1972, as amended, art 3.

Panama's territory then, extends to its continental shelf, even though its territorial waters may only be 12 M.[522]

These are important as these States may use the notion of sovereignty to apply Article 7 of the Convention over areas that would usually be considered beyond national jurisdiction. There may be no need therefore, for these States to implement the provisions of Articles 9 and 10.

4.2.6 Other Relevant Laws

Finally a number of instruments from Croatia that do not fit into the above categories are also worth mentioning as they have been influenced by the 2001 Convention. The Croatian Coastguard Law of 2007 sets up a coastguard to protect Croatian interests in its ZERP, on its continental shelf and in the open seas, all beyond the territorial waters.[523] These duties include protection of cultural heritage in the ZERP and supporting the authorities responsible for protection of cultural heritage in the territorial and internal waters.[524] It is also responsible for overseeing archaeological research in cooperation with the competent authorities of the Ministry responsible for Culture.[525] The bill for the Coastguard Law does not reference the 2001 Convention directly but states that it is necessary to build a wide range of national capabilities and a comprehensive strategy in order to protect the natural, historical and cultural and economic value of the Adriatic Sea from various threats.[526] An ordinance was promulgated in 2009 elaborating on the cooperation between the coastguard and the

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[522] Panama also declared that it had sole sovereignty over the Gulf of Panama when it ratified the 2001 Convention. UNESCO, 'Declarations and Reservations Made by States Parties' (*Underwater Cultural Heritage*, 2016) <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/declarations-and-reservations/> accessed 15 March 2018.

[523] Zakon o Obalnoj Straži Republike Hrvatske 2007, s 1.

[524] ibid s 36(1)

[525] ibid s 38(2)

[526] Prijedlog Zakona O Obalnoj Straži Republike Hrvatske 2007, 4.

various authorities responsible for the protection of cultural heritage in the sea.[527] This ordinance contains Croatia's definition of UCH, which uses the text of the 2001 Convention, and shows the only clear example of the Convention's effect in Croatian law.[528] However, this definition is found in an instrument with a very narrow function: the relationship between the coastguard and cultural authorities. It does not place duties on any individuals. A separate definition of cultural objects still exists in Croatia's heritage regime in its territory, which relies on a significance criterion,[529] and which will be more relevant for most matters.

4.2.7 The Level of Implementation

4.2.7.1 Changes in law

Before remarking on the content of the laws it is first instructive to look merely at their type and their dates of promulgation and amendment. There are a number of different types of laws in which implementation measures can be contained, and there does not seem to have been a particular uniform method of implementation common amongst the States Parties. UCH specific laws would perhaps have been expected to be the main type of instrument used to implement the Convention, however, there have only been two of these introduced in the States Parties since 2001. There have been relevant changes to the general cultural heritage laws of seven States Parties since they ratified the Convention. These laws may in fact be where most implementation occurs, but again this is a relatively small amount of change. A further fifteen however, have altered their regimes since 2001, giving a larger number that have a chance of being affected by the Convention, but this still amounts to less than half of the States Parties. Another relevant date is 2009, when the Convention came into force, but only six States have altered their heritage laws since 2009. This suggests a relatively low level of implementation. The picture is the same with the archaeological regulations, maritime

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[527] Pravilnik O Suradnji Obalne Straže S Tijelima Nadležnima Za Zaštitu Kulturnih Dobara Na Moru, Morskom Dnu I Podmorju 2009

[528] The temporal criterion here has been reduced to 50 years. ibid s 2.

[529] Act on the Protection and Preservation of Cultural Objects 1999, s 2. The significance criterion is artistic, historical and anthropological value.

laws and maritime delimitation laws, there has been little change within these. However, not all archaeological regulations may have been identified. Also, despite there seeming to have been little change in relevant laws, this does not yet mean that the States Parties are not in compliance with the 2001 Convention, States may be coincidentally compliant through older legislation.

4.2.7.2 Jurisdiction

There is, however, an even greater lack of relevant legislation explicitly applying beyond the territory of the States Parties dating from either before or after the 2001 Convention. Nevertheless, through their delimitation laws many States claim sovereign rights or jurisdiction in their EEZ or on their continental shelf over underwater cultural heritage, or over archaeological research, going beyond the usual interpretation of what is permissible by UNCLOS. Some even specifically mention rights over archaeological objects. It is essential to note that all of these came into being before 2001. The exceptions are Slovenia, which in 2005 applied its legislation on archaeological heritage in its (disputed) ecological protection zone, and Italy, which claimed jurisdiction over archaeological objects in its ZPE in 2006. Three States also claim excessive territorial seas, however, the authority used to legislate in these areas is based on sovereignty, and so how they implement the 2001 Convention in these areas is largely irrelevant to others looking to implement it using the jurisdictional mechanisms of the EEZ and continental shelf.

Heritage laws have been applied directly on the continental shelf and in the EEZ also showing that some States are willing to exercise jurisdiction in these zones; Morocco's in 1980, Spain's in 1985, Romania's in 2000, Portugal's in 2001 and Mexico's in 2014. The two specific implementation laws from Italy and Belgium also exhibit this extraterritorial application. Finally, maritime laws from Spain and Croatia also apply beyond territorial waters and have relevant provisions.

What these show is not compliance with the Convention in itself, but rather they set the jurisdictional framework for compliance with other provisions, particularly the reporting and authorisation duties. To reiterate however, only a relatively small number of States have provided this framework. All others that have a continental shelf

or EEZ,[530] cannot have legislatively implemented certain sections of the Convention as they have no relevant legislation applying to UCH beyond their territorial waters.

4.2.7.3 Material Scope

The Convention's definition of UCH has had little impact in national legislation, its wording finding its way into the national legislation of only four States Parties.[531] Out of these States that use the Convention text only Belgium seems to be in full compliance with the definition.

The Convention's definition is incorporated by reference into the national law of two States Parties,[532] with a further State Party implicitly using the definition.[533] The definition of UCH and especially the temporal criterion found in the Convention, may have influenced other laws, in particular in Slovenia. All other States Parties do not use the Convention's text or reference its definition, but may still use definitional criteria that are compliant with the Convention.

Most of the States that attempt to regulate UCH in their EEZs or on their continental shelves use the text of the Convention to varying degrees. Some, particularly Italy, constrain the application of the definition to objects which impacts on the compliance. Most of the States include pipelines, cables and installations in UCH. Mexico unfortunately excludes foreign State vessels and aircraft subject to sovereign immunity, which, whilst separate measures of protection may be needed for these, should still be classed as UCH.

The exceptions are Morocco, Romania, and Tunisia whose laws were in place before the 2001 Convention, out of which only Romania includes as much UCH within its heritage definition as intended by the Convention. Slovenia is the only State that has altered its law since the advent of the Convention in order to apply it to its ecological protection

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[530] The landlocked States of Hungary, Paraguay, Bolivia and Slovakia, and geographically disadvantaged States such as Bosnia and Herzegovina can be discounted from this number.

[531] Belgium, Croatia, Ecuador and Mexico.

[532] Italy and Portugal.

[533] Spain.

zone and continental shelf yet which does not use the Convention's definition.[534] Its definitional criterion 'all items and any evidence' is suitable to meet the Convention's standard, as is the temporal selection criterion of 'assumed to have been under the soil or water for at least 100 years'. It also has an informational selection criterion[535] which is taken from the Valletta Convention. This is more problematic, as material can be UCH even if archaeological research is not the main source of information on it. However, for everything that has been submerged for over 100 years archaeological research will be at least *one* of the main sources. It is therefore very close to meeting the Convention's standard. It is certainly closer than Slovenia's previous definition of cultural heritage which had a significance criterion, and despite applying to archaeological monuments, archaeological sites, and archaeological research, had no definition of these.[536]

This material scope of legislation sets up the potential for compliance with the other duties that protect UCH. The following analysis will be coloured by States' compliance with this aspect of the Convention. For instance despite setting up an extensive reporting procedure, Italy still only applies it to objects ascribable as UCH, and not to all UCH, which affects its compliance level. Another problem could be that despite using the definition of the Convention in a law, a State still needs this definition to be the relevant definition for the further duties. Using the example of Croatia, its definition that uses the Convention text is in an instrument with limited scope, and its definitions of wreck,

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[534] Cultural Heritage Protection Act 2008, s 3(1): '"Archaeological remains" shall mean all items and any evidence of human activity over different historical periods on the surface of the land or below the soil and water, the conservation and study of which would enhance existing knowledge of the historical development of humankind and its connection with the natural environment, the main sources of information of which are archaeological researches or discoveries, and which may be assumed to have been under the soil or water for at least 100 years, and to have the properties of heritage. Archaeological remains shall also be those items connected with burial sites that are determined as such on the basis of laws governing war cemeteries, and also those items connected with the more general archaeological and natural context of war, which have been under the soil or water for at least 50 years. Professionally identified and registered archaeological remains shall become heritage.'

[535] '…the conservation and study of which would enhance existing knowledge of the historical development of humankind and its connection with the natural environment, the main sources of information of which are archaeological researches or discoveries…'

[536] Cultural Heritage Protection Act 1999.

sunken goods or cultural objects may in fact be more relevant for the Convention's other duties.

4.2.7.4 Convention Influence

The Convention has had limited influence on the law of the States Parties. There are of course notable exceptions. Even before Italy had ratified the Convention in 2010, the Convention was having significant effects in Italy's law, extending its jurisdiction in its ZPE and causing objects located in waters from 12 M to 24 M from Italy's baselines to be protected by the Rules in the Annex. At ratification, a law was introduced that implements a significant number of the Convention's duties, and uniquely, sets up an extensive reporting system for discovery of UCH beyond territorial waters. More limited influence is seen in Belgium, Croatia, Ecuador, Guyana, Mexico, Slovenia and Spain. This seems a very low amount of influence.

A number of States however, have attempted to bring in provisions implementing the Convention without success. In August 2003 Panama updated its heritage law so that all underwater research was included in archaeological research requiring a permit from the National Office of Historic Heritage.[537] This coincided with Panama's ratification of the 2001 Convention in May of 2003. A bill was brought forward in 2012 to revise Panama's heritage regime, and in it a definition of *patrimonio cultural subacuático* was included that largely followed the Convention's text.[538] This definition would have applied to the maritime territories that are part of the national territory as defined by the constitution, which includes the territorial sea and the continental shelf.[539] All exploration, intervention or exploitation of this UCH by anyone, domestic or foreign, would have had to have been carried out with authorisation from the Ministry of Culture.[540] UCH would have also fallen under the definition of *patrimonio arqueológico,*

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[537] Law No. 58 To Amend Articles in Law 14 of 1982, on the Custody, Preservation and Administration of the Historic Heritage of Panama and Issue other Provisions, 2003, s 1.

[538] Proyecto de Ley 416 General de Cultura 2012, s 61. It omitted the 'cultural, historical or archaeological character', and added a ship's crew to the example list of UCH.

[539] Constitution of Panama, 1972, as amended to 2004, Article 3.

[540] Proyecto de Ley 416 General de Cultura 2012, s 62.

and so would have been State property and so inalienable.[541] However, the bill was vetoed by the president of Panama for being unconstitutional as the executive branch of government has exclusive authority to propose laws involving the structure of the national administration, but here the legislature had attempted to set up a Ministry with no input from the executive.[542] There were also budgetary issues with the bill.[543] This shows an attempt at more fully implementing the Convention has failed in Panama, for political reasons unconnected to UCH.

Barbados introduced their Preservation of Antiquities and Relics Bill in 2006 which was to be the country's first general cultural heritage law.[544] However, there were concerns that the Bill would provide for seizure of private property by the Barbados Museum and Historical Society, and so the Senate sent it back for amendment in 2006. A revised version appeared in 2011, but the same concerns remained and it has not yet found its way into law.[545] This would have applied to 'antiquities' which would have been any immovable heritage of historical, cultural or archaeological interest located underwater, and 'relics', movable objects of at least 50 years old including objects of historical or archaeological significance and wrecks of archaeological or historical interest.[546] The usual authorisation was to be needed for excavation or searching for any antiquity or relic, and reporting of discoveries was provided for, but this was all within the territory

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[541] ibid s 54.

[542] Nota No. 330-2012-AL, de 4 de junio de 2012. See also: La Estrella, 'No Culture Law or Ministry for Panama' (*International Federation of Arts Councils and Culture Agencies*, 2012) <www.ifacca.org/en/news/2012/06/08/no-culture-law-or-ministry-panama/> accessed 10 July 2014; 'Martinelli Vetoes Culture Law' (*La Prensa*, 2012) <www.prensa.com/uhora/locales/martinelli-veta-ley-de-cultura/98567?en> accessed 10 July 2014.

[543] Nota No. 330-2012-AL, de 4 de junio de 2012.

[544] Kimberley J Peck, 'The Stewardship of a Nation: Heritage Preservation and Tourism in Barbados' (2006) 12 The Monitor Journal of International Studies 45, 52.

[545] 'Preserving Cultural Heritage' (*The Barbados Advocate*, 2011) <www.barbadosadvocate.com/newsitem.asp?more=&NewsID=20586> accessed 5 December 2015; 'Protecting Our Moveable Cultural Heritage' (*The Barbados Advocate*, 2012) <www.barbadosadvocate.com/newsitem.asp?more=editorial&NewsID=24442> accessed 12 May 2015.

[546] Preservation of Antiquities and Relics Bill 2011, s 2.

of Barbados. Again this has failed to become law due to issues unrelated to UCH, but unlike Panama, Barbados has no previous heritage law to fall back on. They do still however, require a permit for the exploration of 'any resources', or conducting 'any research' in their EEZ through an excessive claim of jurisdiction.[547]

All countries that have amended their relevant laws since 2001 have had the chance to implement the Convention. Very few of these have implemented provisions relating to the protection of UCH beyond territorial waters for whatever reason.

That is not to say that there has not been some effect by the Convention in these States. For instance Bulgaria set up an Underwater Archaeology Centre to assist in the implementation of policy for UCH, to coordinate the activities related to the management and study of UCH, and to maintain a UCH register.[548] These are some of the duties of a competent authority.[549] However, since ratifying in 2003, Bulgaria has still not communicated the name of the competent authority to UNESCO, and their Cultural Heritage Act from 2009 only applies in their territory.[550] So despite having a chance to include more of the duties of the 2001 Convention in a new cultural heritage act (in the year the 2001 Convention came into force), Bulgaria only implemented those needed to fulfil the duties relating to UCH within its own territory.

Similarly, while some States may have amended their acts to apply to underwater heritage, where before they were more terrestrially focussed,[551] this has been a trend anyway in the last few decades and it would be difficult to ascribe any change to the Convention (although for Panama the timing of the change, 2003, the year it ratified, may point to some influence).

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[547] Marine Boundaries and Jurisdiction Act 1978, as amended, s 6(1).

[548] Cultural Heritage Act 2009, as amended, ss 21-3.

[549] UNESCO 2001 Convention, art 22.

[550] Although the Minister of Culture has a duty to coordinate, organise and supervise the activities related to the protection of cultural heritage, which is connected to Bulgarian history and culture but located outside the territory of the Republic of Bulgaria. Cultural Heritage Act 2009, as amended, s 14(12)(b).

[551] For example, Panama: Law No. 14 'Measures on the Custody, Preservation and Administration of the Historic Heritage of Panama' 1982, s 8; Law No. 58 'To Amend Articles in Law 14 of 1982, on the Custody, Preservation and Administration of the Historic Heritage of Panama and Issue other Provisions' 2003, s 1.

4.2.7.5 Summary

For whatever reason, few States have applied their heritage regimes beyond their territorial waters in the ways needed to implement the 2001 Convention, and few show any evidence of having been influenced by the Convention. Whether this situation is intentional, or due to lack of capacity, knowledge, or perhaps need, is unknown at this point but is something this study will address in later chapters. However, first the level of compliance will be explored in greater detail.

The following section on compliance will focus on Belgium, Croatia, Italy, Mexico, Morocco, Portugal, Romania, Panama, Slovenia and Spain which have all set up the potential for compliance to varying degrees by applying their legislation beyond their territory and covering relevant cultural material. Tunisia is excluded as its laws cover heritage found outside its territorial waters, but only when it is then brought within them. Ecuador, Benin and Panama will be briefly considered as they have also changed relevant laws or regulations since 2001, but are of lesser interest as their laws do not apply beyond their territory. The other States such as Barbados and Jamaica mentioned above, that declared excessive sovereign rights or jurisdiction in their maritime zones before 2001, will also be considered briefly for coincidental compliance. All other States Parties are not in compliance with the indicators.

4.3 Compliance

The indicators in the relevant legislation will now be examined against the Convention standard to see whether they comply with the 2001 Convention.

For each of the indicators the relevant duty contained in the 2001 Convention will be outlined, followed by a summary of what can be expected in national law. This will be done by looking at the relevant literature on the subject, especially the two editions of O'Keefe's commentary on the Convention,[552] and Dromgoole's book on the subject.[553] In addition a guide for implementation of certain provisions has been provided by UNESCO

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[552] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 311); O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104).

[553] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129).

in the form of a model law.[554] Ostensibly this model act can apply to all cultural heritage, but it was tailored around the 2001 Convention. It is in no way mandatory, and acts as a suggestion only. It was also originally drafted specifically for use in the common law Caribbean States and so some of its provisions may not be able to be directly applied in the national law of other, especially civil law, States.[555] It does however, present an interesting benchmark for what type of provisions we can look for in national laws that implement the Convention's duties. Any indicators in the potential complying laws identified in the previous section will then be analysed for their compliance.

4.3.1 Reporting System in the EEZ, on the Continental Shelf and in the Area

4.3.1.1 Indicator

Fundamental to the protection regime of the 2001 Convention are the reporting systems set up by Articles 9 and 11, under which States must ensure their nationals and vessels, and possibly foreign nationals and vessels in their EEZ or continental shelf, report the discovery of UCH or the intention to engage in activities directed at UCH (section 2.3.2.4).[556] The procedures for discoveries in a State's own EEZ or on its continental shelf,[557] and in the Area,[558] are reasonably straightforward, however the

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[554] UNESCO, 'Model for a National Act on the Protection of Cultural Heritage' (*Underwater Cultural Heritage*, 2013) <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/> accessed 18 November 2014.

[555] The University of Queensland, 'UQ Expertise to Help Protect Caribbean Wrecks and Cultural Heritage' (*UQ News*, 2013) <www.uq.edu.au/news/article/2013/07/uq-expertise-help-protect-caribbean-wrecks-and-cultural-heritage> accessed 5 January 2015.

[556] The regime regarding the EEZ presupposes that the State has claimed an EEZ, it does not apply if it has not. The regime regarding the continental shelf is applicable in all cases.

[557] UNESCO 2001 Convention art 9(1)(a): '…a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it.'

[558] UNESCO 2001 Convention art11(1): '…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.'

procedures for UCH discovered in another State's EEZ or on its continental shelf are more abstruse.[559]

The system in 9(1)(b)(i) contains a constructive ambiguity. It can intentionally be read in two ways. 'States Parties' due to the lack of possessive adjectives, could include coastal and flag States, and so may require all States involved (the coastal State and the State or States whose vessel or nationals are concerned) to ensure reporting to themselves, and to the other State involved.[560]

The other interpretation requires reference back to the subject of Article 9(1)(a), meaning the coastal State cannot require any reporting, which is undertaken exclusively by the flag State. The coastal State therefore only receives reports as 'that other State Party',[561] but does not have the right to require them. This interpretation would be attractive to the major maritime powers as it does not requiring the coastal State to have any increased jurisdiction over the EEZ or continental shelf.

9(1)(b)(ii) provides an alternative. Under this section the flag State requires its vessels/nationals to report to it, and then transmits the report to all other States Parties. Conversely, again, 'a State Party' could be read as meaning the coastal State.[562] Possessive adjectives are absent from this clause also. For example indent (ii) provides that 'a State Party', which is potentially the coastal State, 'shall require *the* national or

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[559] UNESCO 2001 Convention art 9(1)(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.'

[560] Garabello (n 145) 144. As O'Keefe puts it: '"States Parties", since in the plural, would thus be interpreted as requiring each individual State Party to act regarding discoveries or activities on its own continental shelf or in its EEZ, as well as requiring the State of the flag of the vessel and of the nationality of the team leader to report to each of these States respectively.' O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 311) 82.

[561] Rau (n 90) 415–6.

[562] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 298.

master of *the* vessel', rather than *its* national or *its* vessel, 'to report such discovery or activity to it'.[563]

Neither option is therefore clear on the type of jurisdiction that is to be used to require the reporting.[564] Neither option is unambiguous but the difference between them is substantial, especially as to who is the beneficiary of the report.[565] In both cases however, the Director-General of UNESCO has to be notified of such reports, and should make this information available to all States Parties. The procedure in (ii) however, disseminates this information much more directly.

State Parties must declare which of the procedures in Article 9(1)(b) will be used when depositing their instruments of ratification.[566]

There may be issues with the enforcement of this system, as the UCH may be located extremely far away from the relevant State.[567] There may also be various different nationalities of people involved with any project or aboard a vessel, but requiring them all to report to their States would be impractical. The term national could be interpreted as only referring to the leader of the project, but this is not specifically stated.[568]

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[563] UNESCO 2001 Convention art 9(1)(b)(ii), emphasis added.

[564] Amendments to clarify these provisions were rejected in negotiations. UNESCO Doc. 31 C/COM.IV/DR.5; Garabello (n 145) 145; O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104) 64.

[565] A direct report is allowed to 'that other State Party' in (i), whereas in (ii) the number of immediate beneficiaries is increased, making the system more amenable to the declaration of a verifiable link. See: Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 196–7.

[566] UNESCO 2001 Convention art 9(2).

[567] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 311) 84.

[568] ibid.

4.3.1.2 Expected Standard

The model law initially seems to opt for the procedure in Article 9(1)(b)(i),[569] and tackles the ambiguity in a way that seems to that favour the flag States, as it is the flag State ensuring reporting to itself and the coastal State. However, rather strangely, another relevant provision is located later in the act which appears to give States the choice between the procedures in Article 9(1)(b).[570]

Notably the model law does not mention specific maritime zones, only a duty for everyone to report within national jurisdiction, and a duty on nationals and the masters of the vessels flying the State flag outside the limits of national jurisdiction.[571] The only further explanation of what the 'limits of national jurisdiction' entails appears earlier in the act,[572] and evades the question somewhat, as States will individually define what jurisdiction they have in each zone.[573] According to UNCLOS States do not have

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[569] UNESCO, 'Model for a National Act on the Protection of Cultural Heritage' (n 554) art 6(10). 'In case of discoveries or activities concerning underwater cultural heritage located in the Exclusive Economic Zone or on the Continental Shelf of another State, nationals and vessels flying the State flag shall also report to the authorities of the concerned State.'

[570] ibid art 11(2). 'In case of discoveries or intended activities directed at underwater cultural heritage located in the Exclusive Economic Zone or on the Continental Shelf of another State [Party to the UNESCO 2001 Convention] [that State shall be informed by the relevant national or vessel flying the State flag]/[all States Parties to the Convention shall be informed [by the Competent National Authority]].'

[571] ibid art 6(4), (7).

[572] ibid art 1(1). 'This Act applies to all land, whether covered by water or not, including the subsoil and airspace above such land, consistent with the limits of national jurisdiction.'

[573] The model law creates a distinction between areas beyond the limits of national jurisdiction, and those within these limits. In this way it seems to take the approach of the Valletta Convention as to its territorial scope, which defines archaeological heritage as all remains and objects and any other traces of mankind from past epochs which are located in any area within the jurisdiction of the Parties. Thus it leaves it to the States themselves to decide what maritime zones it applies to, depending on what jurisdiction they claim. Despite this, there are some hints that the model law considers EEZs and continental shelves to be beyond national jurisdiction, with their inclusion in some sections and titles relating to areas beyond national jurisdiction, but conversely there are also sections that suggest the opposite, particularly in the provisions relating to State vessels and aircraft. In some cases this would provide problems of compliance,

jurisdiction over UCH in the EEZ or on their continental shelf, so this limit, following this interpretation of UNCLOS, would be located at the edge of the territorial waters or the contiguous zone. States that unilaterally claim jurisdiction in the EEZ or continental shelf areas over UCH however, if they applied the model law, may require reporting from any individual or vessel in these areas, no matter their nationality or flag.

What can be expected from this indicator then is a duty on nationals and flagged vessels to report UCH in various maritime zones, including a State's own continental shelf and their EEZ, another State's continental shelf and EEZ, and in the Area. Possibly, through a different interpretation of the provision, coastal States may require reporting from everyone in their own EEZ or continental shelf. It should be clear who receives the report, and how the information is distributed to both other States Parties and UNESCO. States should also have indicated by a declaration which method they will use to transmit reports under Article 9(1)(b), and the system in their laws should obviously follow the method chosen.

4.3.1.3 Compliance

As there are relatively few definitions of UCH in national laws that apply beyond territorial waters, and only nine States Parties have declared the method they will use to transmit reports outlined in Article 9(1)(b),[574] it is to be expected that relatively few States will require the reporting of UCH located there. This is indeed the case.

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particularly in relation to Article 10(2) and 10(4). Implementing the national law verbatim therefore, without clearing up the issues of jurisdiction that run through it, may provide problems of its own.

[574] UNESCO, 'Declarations and Reservations Made by States Parties' (n 522). It seems where States have made this declaration the procedure in indent (ii) of Article 9(1)(b) is unanimously the preferred option. Algeria, Argentina, Guatemala, Italy, Portugal, Saudi Arabia and Ukraine are explicit about their choice. The choices of Cuba and Mexico are more ambiguous however. Cuba stated: 'The Republic of Cuba declares that, pursuant to Article 9, paragraph 2, of the Convention, it will transmit the relevant information on any discovery or activity relating to the underwater cultural heritage in the exclusive economic zone or on the continental shelf of another State Party by means of a document issued by the Office of the President of the National Commission of Monuments and endorsed by the National Cultural Heritage Council of the Ministry of Culture.' This does not indicate who will receive the document, the other State Party or all other States Parties, therefore a choice has not been made. Mexico declared 'The United Mexican States declare that, in respect of Article 9, paragraph 2 of the Convention on the

4.3.1.3.1 Italy

The most developed system is found in Italy's *Legge* 157/2009 which sets out the procedures in place outside Italian territorial waters.[575] It is worth discussing at some length. Those who find objects ascribable as UCH in Italy's ZPE or on its continental shelf:

> …must report within three days, including through communication sent by radio or by electronic means, the discovery to the closest maritime authority.[576]

This duty is placed on 'whoever finds' the objects rather than nationals and flagged vessels as is used for other zones, but the duty is stated to be in accordance with the provisions of Articles 9(1)(a) of the Convention which applies to just nationals and flagged vessels. Copies of the reports are forwarded by the maritime authority to the Ministry for Cultural Assets and Activities, the Ministry of Foreign Affairs and, if State vessels or warships are involved, the Ministry of Defence also.

When ratifying Italy declared that the procedure in Article 9(1)(b)(ii) would be used in the EEZ or on the continental shelf of another State Party.[577] So Italy should require the national or master of the vessel to report a discovery or activity to it and it shall then ensure the rapid and effective transmission of such reports to all other States Parties. In the *Legge* the reporting of the discovery by the national or master is indeed ensured to a

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Protection of the Underwater Cultural Heritage, it will transmit to the Director-General of UNESCO by means of the diplomatic channel the information on any discovery of underwater cultural heritage or activity directed at it by its nationals or vessels flying its flag in the exclusive economic zone or on the continental shelf of another State Party for communication to the other States Parties.' This merely states how the duty in Article 9(3) will be fulfilled, but may count as choosing indent (ii), as the information will eventually be disseminated to all States Parties by UNESCO, although this would still happen whether (i) or (ii) was chosen.

[575] For fortuitous discoveries In Italy's territory the Cultural Heritage and Landscape Code is the relevant law: Decreto Legislativo 42/2004, s 90(1).

[576] Legge 157/2009, s 5(1).

[577] There is no reporting duty for UCH discovered in the EEZ/continental shelf of a State that is not party to the 2001 Convention.

relevant Italian consular authority.[578] The consular authority then must transmit, in the shortest possible time, the information received to the competent authority of the State in whose exclusive economic zone or on whose continental shelf the discovery occurred, as well as to the Italian Ministry of Foreign Affairs who then in turn passes the information on to the Director-General of UNESCO.[579] This system, however, does not seem to ensure the rapid and effective transmission of such reports to *all other* States Parties, as only the coastal State is otherwise notified. It also seems that the Ministry for Cultural Assets and Activities is not informed when the discovery takes place in another State's jurisdiction, unlike in areas under Italian jurisdiction.

Similarly, in the Area, for objects attributable to UCH found, a report has to be made to the Ministry of Foreign Affairs, who then transmits the information to the Ministry for Cultural Assets and Activities, the Director-General of UNESCO, the Secretary-General of the International Seabed Authority and, if the property in question is a State vessel or warship, to the Ministry of Defence.[580]

Italy therefore has a fairly comprehensive system in place for reporting the discovery of UCH in various maritime zones, and then transmitting that to UNESCO and the ISA. There are a number of problems however. Firstly the phrase 'objects ascribable as UCH'[581] is continuously used, rather than just UCH itself, which in fact means that all UCH need not be reported, only UCH that are objects. However rare it may be that UCH is discovered that is not an object, especially in the deep sea, the possibility should still be anticipated. Similar lack of foresight is one reason why UNCLOS was very quickly seen as insufficient for protecting UCH.

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[578] Legge 157/2009, s 5(3): 'Pursuant to article 9, paragraph 1(b), of the Convention, Italian citizens or the master of a ship flying the Italian flag that find objects ascribable to underwater cultural heritage, located in the exclusive economic zone or on the continental shelf of another State Party to the Convention… must report it to the competent Italian consular authorities, respectively, within three days of the discovery, including through communication transmitted by radio or by electronic means.'

[579] ibid s 5(4), (7).

[580] ibid s 6(1).

[581] '*oggetti ascrivibili al patrimonio culturale subacqueo'.*

Secondly, for objects attributable as UCH on its own continental shelf or in its ZPE the duty to report applies to anyone that finds the object. Thus, Italy does not follow the exact wording of the Convention in Article 9(1)(a), as it requires reporting by anyone, not just its own nationals or flagged vessels.

Finally, for UCH located in another State's EEZ or on its continental shelf Italy declared it would use the procedure in Article 9(1)(b)(ii) but uses a system more akin to Article 9(1)(b)(i), as 'all other States Parties' are not directly informed, but merely Italy and 'that other State Party'.

No other States Parties have such a detailed reporting system, and nor have any legislatively placed a duty on their nationals or vessels to report in the Area or in the jurisdictional waters of other States. A small number have reporting duties for their own jurisdictional waters however, and the most developed of these is seen in Belgium.

4.3.1.3.2 Belgium

Belgium's implementation law requires that anyone who makes a discovery in the territorial sea, EEZ or on the continental shelf report it to the receiver of underwater cultural heritage.[582] The receiver then informs the Director-General of UNESCO.[583]

All discoveries of potential UCH in Belgium's territorial sea, EEZ or on the continental shelf have to be reported. There is no duty for Belgian nationals or vessels in another State Party's waters or the Area however, only a prohibition on Belgian vessels being used for activities not in conformity with the Convention.[584] Like Italy, Belgium goes beyond the wording of the Convention in Article 9(1)(a) by requiring the reporting by anyone, not just its own nationals or flagged vessels.

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[582] Loi du 4 avril 2014 s 5(1): 'Anyone who makes a discovery in the territorial sea or exclusive economic zone or on the continental shelf shall report the discovery immediately to the receiver of underwater cultural heritage appointed by the King.' No time limit is set in which to report the discovery, and this was a deliberate decision, in order not to deter those who might have missed the deadline from reporting. Projet de Loi relatif à la protection du patrimoine culturel subaquatique, 2014, 5.

[583] ibid s 9.

[584] ibid s 16. This appears to be an implementation of the duty in Article 16 of the 2001 Convention.

4.3.1.3.3 Other

No other States have the reporting duty to the Director-General of UNESCO set out in their legislation, and this impacts on the efficacy of the system of cooperation envisaged by the Convention. Other States do require reporting in their EEZ or on their continental shelves however, and these also invariably apply to everyone, and not just nationals or flagged vessels. These duties set out in heritage laws are seen in Morocco, Portugal, Romania, Slovenia and Spain. Portugal's dates from 2001, and applies on its continental shelf,[585] and Slovenia's heritage reporting system applies in its ecological protection zone due to the terms of its delimitation act.[586]

A number of older heritage laws also have reporting duties beyond territorial waters. Spain's general heritage legislation from 1985 applies a reporting duty for Spanish Historical Heritage found as far as the edge of the continental shelf,[587] Romania has a reporting duty for archaeological objects (including traces) found on State owned areas, which include the natural resources of the EEZ and continental shelf,[588] and in Morocco finds of monuments, coins, art objects or antiquities found in the course of an excavation for a non-archaeological purpose, have to be reported, including when this is in Morocco's exclusive fishing zone.[589]

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[585] Portugal requires anyone that finds archaeological evidence to report it to the competent administration of the cultural heritage or the police authority within forty eight hours: Lei 107/2001, s 78(1). Archaeological heritage, as defined, can be found on the continental shelf: Lei 107/2001, s 74(2). Strangely however, the reporting duty uses the phrase *testemunhos arqueológicos* which is closer to archaeological evidence, rather than *património arqueológico*.

[586] Slovenia's 2008 heritage law provides that anyone who finds any archaeological remains in water shall inform the relevant agency on the next working day at the latest (Cultural Heritage Protection Act, 2008, s 26(1)), this duty applies in its ecological protection zone due to the terms of its delimitation act (Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act 2005, s 6(1)).

[587] Ley 16/1985, s 44. This system is lacking as it assumes removal of the heritage, Mariano J Aznar-Gómez, 'Spain' in S Dromgoole (ed), *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (2nd edn, Martinus Nijhoff Publishers 2006) 285.

[588] Law No. 182 regarding the protection of the movable national heritage 2000, s 48. This again assumes removal of the heritage.

[589] Dahir No. 1-80-341 promulgating Law No. 22-80 concerning the conservation of historic monuments and sites, inscriptions, art objects and antiquities 1980, s 47.

Relevant duties are also apparent in maritime laws. Croatia's amendments to its maritime code in 2013 provide a reporting duty for wreck or sunken goods in the ZERP or on the continental shelf.[590] Similar provisions apply in Mexico.[591]

For those States with excessive territorial claims, there are also reporting duties.[592] Whilst covering the same area, these are not an implementation of Article 9 of the Convention, but rather Article 7 applied to an unusually large area.

Finally, in Mexico, despite the addition of section 28 ter in 2014, the pre-existing provision in section 29 of the Federal Law on Archaeological, Artistic and Historic Monuments and Zones 1972 relating to the reporting of archaeological objects still applies.[593] This only applies to archaeological goods in the Mexican territory and not to UCH, as section 28 ter provides that only the provisions on preservation and research apply to UCH. This means that there is a not reporting duty for anyone who finds UCH in Mexico's EEZ and on its continental shelf. Again, there is also no duty for UCH found in the Area or on other States EEZs/continental shelves. There was originally a reporting duty in the bill adding section 28 ter which would have added an extra paragraph to section 29 (as well as an extra provision relating to sanctions),[594] however, it was

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[590] Maritime Code 2004, as amended 2013, s 840č(3): 'Any person who acquires direct knowledge of the existence of a wreck or sunken good in a particular place shall notify the competent port master.' Prior to this Croatia did not have a reporting system for heritage located beyond its territorial waters: Šošić, 'Konvencija UNESCO-a o Zaštiti Podvodne Kulturne Baštine i Jurisdikcija Država u Jadranskome Moru' (n 451) 127.

[591] Ley de Navegación y Comercio Marítimos 2006, as amended, ss 172-173.

[592] For instance in Ecuador: Decreto 1208 Reglamento de Actividades Dirigidas al Patrimonio Cultural Subacuático, 2008, s 6; and Benin: Loi 2007-20 portant protection du patrimoine culturel et du patrimoine naturel à caractère culturel en République du Bénin ss 83-84; Decree No. 76-92 extending the territorial waters of the People's Republic of Benin to 200 nautical miles, 1976, s 1.

[593] Federal Law on Archaeological, Artistic and Historic Monuments and Zones 1972, as amended, s 29.

[594] Proyecto de Decreto que adiciona diversas disposiciones a la Ley Federal sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos, en materia de bienes culturales subacuáticos, 2013, Dictamen de las Comisiones Unidas de Cultura y de Estudios Legislativos, 11 February 2014. It would have stated: '*Quienes encuentren Patrimonio Cultural Subacuático dentro de la Zona Económica Exclusiva Mexicana deberán dar aviso a la autoridad civil más cercana. La autoridad correspondiente expedirá la constancia*

decided that Congress only had the power to legislate on archaeological, artistic, and historic monuments, the conservation of which is in the national interest,[595] and so could not create a new concept of protected heritage (i.e. UCH) broader than that set out in the constitution.[596] The definition of UCH had to be fitted within the existing scheme therefore, and could not be subject to all its relevant measures, only those relating to preservation and research. The reporting duty was therefore omitted. This shows that the provisions of a constitution may hamper attempts at implementation. Under the maritime navigation law however, any person who discovers a derelict must notify the port authorities.[597]

4.3.1.4 Summary

Most of these reporting systems are inappropriate for the purposes of the 2001 Convention. Only Italy has instituted a system where its nationals or vessels flying its flag have to report discoveries in the Area or in another State Party's EEZ or on its continental shelf. Even so, there is some problem with what Italy's reporting system applies to, only objects that are ascribable as UCH.

Another area of deficiency here is the reports to UNESCO of discoveries, which only Italy and Belgium provide for in legislation.

Finally all States that require reporting in their own EEZ or continental shelf,[598] appear to apply this duty to everyone, not just to their own nationals and vessels, as do the States that claim excessive territorial waters. This perhaps conflicts with the more obvious interpretation of the 2001 Convention, where States would only require this action from their own nationals and vessels, and suggests that the ambiguity is being

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oficial del aviso o entrega, en su caso, y deberá informar al Instituto Nacional de Antropología e Historia dentro de las 24 horas siguientes para que éste determine lo que corresponda.'

[595] Constitución Política de los Estados Unidos, 1917, as amended, art 73(XXV).

[596] Proyecto de Decreto que adiciona diversas disposiciones a la Ley Federal sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos, en materia de bienes culturales subacuáticos, 2013, Dictamen de las Comisiones Unidas de Cultura y de Estudios Legislativos, 11 February 2014.

[597] Ley de Navegación y Comercio Marítimos, 2006, as amended, s 173.

[598] Belgium, Croatia, Italy, Mexico, Morocco, Portugal, Romania, Spain and Slovenia.

interpreted in such a way as to give the coastal State the right to demand reports from all vessels and nationals. This raises questions of creeping jurisdiction that will be dealt with later in greater detail (Chapter 5).

There is therefore very little compliance with this indicator. It is no surprise that the UNESCO Secretariat reported in 2015 that only Italy has notified UNESCO of the discovery of UCH:

> While several cases of particularly severe looting in international waters have been reported, the State cooperation mechanism was not applied. To date, only one notification from Italy has been received by the Secretariat. Two others that were received, equally from Italy, were not confirmed by the competent national authority. [599]

4.3.2 Authorisations in the EEZ, on the Continental Shelf, and in the Area

4.3.2.1 Indicator

Under the 2001 Convention a State Party may authorise activities directed at UCH in an EEZ or on a continental shelf in four situations:

1. To prevent interference with its sovereign rights or jurisdiction (in this case activities can also be prohibited), [600]
2. To prevent immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting,[601]

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[599] UNESCO Doc. UCH/15/5.MSP/5, 8.

[600] UNESCO 2001 Convention art 10(2): 'A State Party in whose exclusive economic zone or on whose 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 international law including the United Nations Convention on the Law of the Sea.'

[601] UNESCO 2001 Convention art 10(4): '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.'

3. To conduct necessary preliminary research,[602]
4. To implement agreed measures of protection after consultations.[603]

The first of these applies to only the coastal State, the latter three in a State's capacity as Coordinating State, which may not necessarily be the coastal State. Only the final instance needs to necessarily take place after consultations with other interested States, so the first three 'amount to a powerful package of measures available to the coastal State if it wishes to use them'.[604] In general, the Rules will have to be applied in all these cases, although when sovereign rights are concerned this is not specified.[605]

These are again controversial provisions, as some of them arguably confer new rights on coastal States. Article 10(4) is particularly problematic, as it applies before consultations and the possible measures available are undefined.[606] In addition, the use of the phrase 'as provided for by international law *including* the United Nations Convention on the Law of the Sea' in Article 10(2) suggests that there are sovereign rights and jurisdiction that exist outside of the UNCLOS regime, so this may be referring

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[602] UNESCO 2001 Convention art 10(3): 'The Coordinating State: ….(c) may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefore, and shall promptly inform the Director-General of the results, who in turn will make such information promptly available to other States Parties.'

[603] UNESCO 2001 Convention art 10(3): 'The Coordinating State: (a) shall implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures;(b) shall issue all necessary authorizations for such agreed measures in conformity with the Rules, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations.'

[604] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104) 68. All these authorisation abilities exist in the Area also, except for those relating to the interference of sovereign rights and jurisdiction.

[605] ibid 69.

[606] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 300.

to unilateral extensions of jurisdiction and other treaties.[607] Like the ambiguities in Article 9 then, it will be interesting to see what form these rights take in national law.

This indicator is closely linked to the reporting system as beyond territorial waters reports are required from those who intend to engage in activities directed at UCH, as well as for discoveries.[608] Without these reports, the competent authority will struggle to authorise activities.

4.3.2.2 Expected Standard

In the model law the intention to engage in activities must be notified to the Competent National Authority before the activities start, and a period of six months is suggested.[609] This presupposes the existence of a competent authority.[610] Again this will apply to everyone within a State's jurisdiction, and only to its nationals and flagged vessels beyond this, with the boundary between the two still undefined by the model law. For authorisations beyond national jurisdiction the model law provides that:

> A permit for activities directed at underwater cultural heritage located beyond the limits of national jurisdiction may only be issued, if:

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[607] ibid.

[608] A further (possibly unintentional) ambiguity is located in this section due to reports being required from a national or flagged vessel that 'intends to engage in activities' in Article 9(1)(a), but merely reports of 'such… activity' in 9(1)(b), which may or may not include the intention. For consistency sake it would be expected that the report be submitted when the intention is first formed in both cases, which will usually be a good time before any activity actually occurs, and before any planning begins. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 311) 84–5.

[609] UNESCO, 'Model for a National Act on the Protection of Cultural Heritage' (n 554) art 6(6). 'Any person wishing to apply for permission to undertake an activity directed at cultural heritage, including underwater cultural heritage, must submit an application to the Competent National Authority at least [six months] prior to the intended activity commencing. In case of immediate danger of destruction or damage to such cultural heritage a shorter application time may be admitted. In the case of underwater cultural heritage, such an application must be submitted irrespective of whether the underwater cultural heritage is situated within, or beyond, national jurisdiction.'

[610] As required by Article 22 of the 2001 Convention.

a) [the enacting State] is the Coordinating State; or

b) an immediate danger threatens the concerned heritage; or

c) the concerned heritage is located in the Exclusive Economic Zone or on the Continental Shelf and the permit is granted in order to prevent interference with sovereign rights or jurisdiction.[611]

This Section does not prejudice State action to protect cultural heritage in case of immediate danger.[612]

Finally, for immediate danger:

> The [Competent National Authority] shall take all practicable measures, and/or issue any necessary permits, if necessary prior to any consultations, to prevent immediate danger to any cultural heritage. In taking such measures, the Competent National Authority may seek assistance from other States.[613]

The complexity of the jurisdictional issues at play here is manifested in the provisions of this model act.

Firstly, an application must be submitted irrespective of whether the underwater cultural heritage is situated within, or beyond, national jurisdiction, although again, who is required to submit it will depend on whether the area is subject to jurisdiction, and where this jurisdiction ends will depend on the State.[614]

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[611] UNESCO, 'Model for a National Act on the Protection of Cultural Heritage' (n 554) art 8(8).

[612] ibid art 8(9).

[613] ibid art 15(1).

[614] It is conceivable that the provisions for permitting within national jurisdiction would apply in an EEZ or on a continental shelf in some States' cases. However, in the model law the system for areas beyond national jurisdiction does mention the EEZ and continental shelf, and a State may permit activities in order to prevent interference with sovereign rights or jurisdiction. This provides the first hint that the model act considers these beyond national jurisdiction. Nevertheless, to be able to prevent interference with its jurisdiction in these areas, they must be subject to some jurisdiction, producing a contradiction in the model law. To make the issue clearer the model law could have provided a distinction between jurisdiction relating to UCH and other jurisdiction applicable in the EEZ and continental shelf that is not usually related to UCH. The areas beyond national jurisdiction would only refer to the former instance, and the jurisdiction that could be interfered with in the EEZ and continental shelf would be the latter.

The model law also distinguishes between the various circumstances in which a permit may be issued, and these reasons differ depending on the maritime zone.[615]

A final aspect in this indicator is the consultations between all States that have declared verifiable links to the UCH and the coordinating State. In particular, provisions stating who will represent a State in consultations, and when they wish to be consulted as an interested State, may be expected within national legislation. These provisions in the model law[616] include elements relating to declaring a verifiable link,[617] its actions in consultations,[618] and its role as coordinating State.[619]

Finally, examples are given by the model law and include search, intervention, recovery, displacement or excavation, as well as renovation and alteration. This is interesting as although activities directed at UCH are defined in the Convention, no examples are given.[620]

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[615] There is some ambiguity in the model law with these provisions also. Those relating to interference sovereign rights or jurisdiction are described above (n 609). The other two reasons for authorising a permit is if the State is a coordinating State, or if there is immediate danger to the UCH. The measures in Article 10(4) of the Convention for the prevention of immediate danger in an EEZ or continental shelf can only be undertaken by a coordinating State (although prior to consultations in some cases). However, in the Area under the equivalent provision any State can take these measures, and that is why there is this distinction. So the provisions on immediate danger have three distinct areas of application: within national jurisdiction, where the competent authority takes all practicable measures to prevent immediate danger to any cultural heritage; in the EEZ or continental shelf, where the State is acting as coordinating State; and finally beyond national jurisdiction. However, if the areas classed as beyond national jurisdiction by the model act include the EEZ and continental shelf, the model act would technically provide that permits for activities directed at UCH could be issued where immediate danger threatens the concerned heritage, but where the State was not acting as coordinating State. This goes beyond the terms of Article 10(4), and is another example of the problems the phrase 'beyond national jurisdiction' provides the model act.

[616] In a chapter of the act entitled 'Underwater Cultural Heritage beyond the Limits of National Jurisdiction', which includes provisions on the EEZ and continental shelf.

[617] UNESCO, 'Model for a National Act on the Protection of Cultural Heritage' (n 554) art 12(2).

[618] ibid art 13.

[619] ibid art 14.

[620] UNESCO 2001 Convention art 1(6).

Therefore, firstly, we can expect a State to have nominated a Competent Authority and to have communicated this to UNESCO under Article 22(2) of the Convention. To be expected in national legislation is a duty to submit to this authority a notification of intention to engage in activities affecting UCH. There should be provisions explaining in what circumstances this permit may be granted, especially beyond a State's territory where under the 2001 Convention these circumstances are limited. In most cases, the Rules of the Annex should be applied to these activities. Finally, there should be provisions relating to the procedures of consultations.

4.3.2.3 Compliance

A comparably low level of compliance is expected for this indicator as for the reporting system. This is because in Articles 9 and 11 of the Convention, along with discoveries of UCH, nationals and flagged vessels have to notify the competent authority of their intention to engage in activities directed at UCH. If this intention is not reported, it will be difficult for the competent authority to authorise or prohibit it. Nevertheless, it is possible that a State will have provisions prohibiting unauthorised intervention on UCH, without having properly implemented the reporting scheme, or having specified how to notify the intention to engage in interventions.

Similarly, like the notification of the reporting system under Article 9(2), there has been relatively few States that have notified UNESCO of their competent authorities under Article 22(2).[621]

4.3.2.3.1 Italy

Again, Italy has the most advanced system. The Rules of the Annex have to be applied to activities directed at archaeological and historical objects found within an 'archaeological zone' extending 12 M from the limits of Italy's territorial waters.[622] Beyond this the Rules, and also Articles 9 and 10 of the Convention, govern

[621] These States are Bosnia and Herzegovina, Italy, Lithuania, Mexico, Montenegro, Morocco, Nigeria, Panama, Paraguay, Saudi Arabia and Spain. Ukraine had previously declared a competent authority, but it is no longer listed as it was located in the Crimea. UNESCO, 'Competent Authorities' (*Underwater Cultural Heritage*, 2015) <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/competent-authorities/> accessed 15 March 2018.

[622] Decreto Legislativo 42/2004, s 94.

interventions in the ZPE.[623] This allows Italy to follow the Convention in the types of authorisation it can grant in its ZPEs. The continental shelf does not have an equivalent provision.[624] However, anyone who intends to engage in interventions on UCH located in the ZPE or on the Italian continental shelf must submit an authorisation request to the Ministry for Cultural Assets and Activities.[625] The Ministry for Cultural Assets and Activities then:

> …approves or denies the authorisation referred to in Article 10 of the Convention within sixty days of the request.[626]

This however, does not specify that the Ministry for Cultural Assets and Activities and Tourism (MiBACT) can prohibit any intervention it denies, and governed by Article 10 of the Convention as it is, it would appear they can only prohibit interventions in certain circumstances. However, Article 10(2) regarding prevention of interference with sovereign rights and jurisdiction is referenced at the start of s 5(1) of *Legge* 157/2009, suggesting that all authorisations on the continental shelf are seen by Italy as relating to its sovereign rights and jurisdiction.

For interventions in the Area, notification has to be given to the Ministry of Foreign Affairs.[627] For those in another State Party's EEZ or on its continental shelf a report must be made to the competent Italian consular authorities.[628] No mention is made in

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[623] Legge 157/2009, s 4(1): 'All interventions on the underwater cultural heritage in the areas of ecological protection, established under the law February 8, 2006, n. 61, more than 24 nautical miles from the base line of the Italian territorial sea, is governed by Articles 9 and 10 of the Convention and the Rules referred to in the Annex to the Convention.'

[624] Also where there is not a ZPE declared, there is no provision for the water column above the continental shelf. Thus Legge 157/2009 will apply only to UCH located on the continental shelf in these areas. See: Maria Mancini (ed), 'Agreements to Which Italy Is a Party and Agreements and Understandings to Which Italian Regions and Autonomous Provinces Are Parties' (2009) 19 Italian Yearbook of International Law 469, 471–2.

[625] Legge 157/2009, s 5(1).

[626] ibid s 5(2).

[627] ibid s 6(1).

[628] ibid s 5(3).

these zones of the Ministry for Cultural Assets and Activities approving or denying the authorisation as is seen when the UCH is located in Italy's ZPE or on its continental shelf. By providing this for its own zones, Italy is effectively stating that it will always act as the coordinating State in these areas, but not necessarily in the others, where a separate State's authorities may ultimately authorise the interventions. The *Legge* also sets out who Italy is to be represented by in the consultations in Articles 10(3) and 12(2) of the Convention,[629] and that it will make a declaration of a verifiable link when its nationals or flagged vessels discover UCH in the Area or in areas under the jurisdiction of another State Party.[630]

We still do not know exactly the form the consultations will take, but for those in its own zones Italy is limiting them to lasting sixty days, as authorisations must be given within this time. A separate time limit is seen in the Area and other States' zones, as reports of intention to engage in activities there have to be submitted three months before the start of activities.

4.3.2.3.2 Belgium

In Belgium the relevant authority is the receiver of UCH, and this role is fulfilled by the governor of Flanders.[631] All intentional raising of discoveries is forbidden without their prior authorisation,[632] as are interventions on UCH protected in situ.[633] Notably the Rules are specifically mentioned in the Belgian law, and so have to be followed in authorisations. Like the rest of the Belgian law, this applies to UCH submerged for over 100 years in the EEZ and on the continental shelf, and UCH of any age in the territorial waters. No mention is made of the Area.

The receiver of UCH has to prepare a report on the discoveries in which it states its opinion on whether the discovery is UCH, which the responsible Minister takes into

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[629] ibid ss 5(8), 6(2).

[630] ibid ss 5(7), 6(1).

[631] Arrêté royal relatif à la protection du patrimoine culturel subaquatique, 2014, s 1. This does not appear to have been communicated to UNESCO however.

[632] Loi du 4 avril 2014 s 6(1).

[633] ibid s 8(3).

account before making a decision on the matter.[634] Where the discovery was in the EEZ or on the continental shelf, the receiver has to confer with any States Parties that have given notification of a verifiable link under the terms of Article 9(5) of the Convention. The purpose of this report seems rather limited, focussing on only the discovery's identification as UCH. The consultations Belgium provides for therefore do not focus how best to protect the UCH, and so do not comply with the wording of the Convention. By making sure the receiver has to authorise all interventions in Belgium's maritime zones, it is implied that Belgium will always act as the coordinating State here. In Belgium there is also no indication of the different types of authorisation provided for in Article 10 of the Convention,[635] it would appear all interventions have to be authorised, no matter the circumstances, including in the EEZ and on the continental shelf.

4.3.2.3.3 Mexico

In Mexico works to discover or explore archaeological monuments can only be conducted by the *Instituto Nacional de Antropología e Historia* (INAH) or by scientific institutions or those of recognized moral standing after receiving prior authorisation,[636] and due to section 28 ter, this applies in the marine area of the United Mexican States to UCH. No provision is made for the consultations, and again, all interventions require authorisation.

4.3.2.3.4 Spain

Spain similarly requires the authorisation of excavation or archaeological prospecting,[637] and these both specifically include underwater interventions.[638] The appropriate administration is often an autonomous region, which also sets the

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[634] ibid s 8(1).

[635] Except in relation to State vessels and aircraft, considered in the next section.

[636] Federal Law on Archaeological, Artistic and Historic Monuments and Zones 1972, as amended, s 30.

[637] Ley 16/1985, s 42(1): 'Any excavation or archaeological prospecting shall be duly authorized by the appropriate Administration which, through appropriate procedures of inspection and control, shall check that the work is planned and carried out following a detailed, coherent program containing the requirements for appropriateness, professionalism and scientific interest.'

[638] ibid s 41.

prerequisites for authorisation.[639] The Andalusian authority for instance attempted to stop Odyssey from recovering property from the HMS *Sussex* from its waters between 2001 and 2007 despite Odyssey having a contract for recovery with the UK Ministry of Defence, as their project plan did not meet the standards in its regulations regarding archaeological activity.[640]

This applies in the contiguous zone and on the continental shelf as well as in the territorial waters, referring as it does to archaeological heritage. The position was reaffirmed in the recent Maritime Navigation Law:

> (1) The regulation and authorisation of activities directed at underwater cultural heritage in the Spanish contiguous zone and authorisation of activities directed at underwater cultural heritage in the exclusive economic zone and the continental shelf shall be governed in accordance with the provisions of the Convention on the Protection of the Underwater Cultural Heritage of 2 November 2001 and other treaties to which Spain is a party, as well as specific legislation.
>
> (2) In all cases, extraction of archaeological or historical objects on the seabed of the Spanish contiguous zone will require administrative approval. The recovery of such property without permission is punishable as an offence committed in Spanish territory.[641]

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[639] Aznar-Gómez (n 587) 282. The jurisdictional competencies of the Spanish State and the Autonomous Regions over UCH in territorial waters and on the continental shelf are complex. The State would appear to have jurisdiction over archaeological heritage in the territorial sea and on the continental shelf unless an autonomous region has authority over certain elements through its statute of autonomy and which have been implemented by their own legislation on cultural heritage, see: Elsa Marina Alvarez Gonzalez, 'Disfuncionalidades de La Protección Jurídica Del Patrimonio Cultural Subacuático En España: Especial Referencia Al Caso Odyssey' (2008) 175 Revista de Administración Pública; García-Revillo and Agudo Zamora (n 234) 23.

[640] Carmen Garcia Rivera and Milagros Alzaga Garcia, 'The Underwater Archaeological Heritage of Andalusia: Actions for the Protection of an Emerging Heritage' (2012) 15 European Journal of Archaeology 257, 268–70.

[641] Ley 14/2014, s 383.

This is interesting as section 1 suggests Spain will authorise activities in accordance with the 2001 Convention, and section 2 affirms its rights in the contiguous zone under UNCLOS.[642] Note how section 1 refers to regulation and authorisation in the contiguous zone, but merely authorisation in the EEZ and on the continental shelf. This follows the different rights conveyed by Articles 8 and 10 of the 2001 Convention, except Article 10(2) which also allows the State to prohibit activities. Prior to this law it was noted that Spain's regime went beyond what was allowed by the 2001 Convention as it related to all authorisations, and not just those related to its sovereign rights or jurisdiction.[643] Whether the situation now is any different due to the Maritime Navigation Law is questionable as the provision states that authorisations are to be governed in accordance with not just the 2001 Convention, but specific legislation also, which still would suggest that all authorisations are covered. In Spain's National Plan for the Protection of Underwater Cultural Heritage, known as the Green Paper, this situation was highlighted too and it was stated that the 'extra-territorial enforcement' of Spain's legislation should be maintained, despite the practices of other States,[644] so it is likely the Maritime Navigation Act was not meant to alter the situation. No specific provisions for consultations are made, outside the general statement that authorisations will be subject to the 2001 Convention.

4.3.2.3.5 Other

The heritage regimes of Morocco, Portugal, Romania and Slovenia again have relevant provisions.

Portugal's 2001 law defines archaeological work which needs authorisation, and as it applies to archaeological heritage it relates to interventions on the continental shelf.[645]

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[642] All of Spain's rights in the contiguous zone under UNCLOS, including to objects of an archaeological and historical nature, are also restated earlier in the Maritime Navigation Law: Ley 14/2014, s 23.

[643] Aznar-Gómez (n 587) 291.

[644] Grupo de Trabajo del Comité de coordinación Técnica del Consejo del Patrimonio Histórico, *Green Paper: National Plan for the Protection of Underwater Cultural Heritage* (Ministerio de Cultura 2009) 50.

[645] Lei 107/2001, s 77. The conditions for these works have been regulated by two successive decrees, whose definitions differ slightly from that in the general heritage law: Decreto-Lei 270/99; Decreto-Lei 164/2014.

There is no qualification here, all archaeological work on Portugal's continental shelf needs authorisation. When ratifying UNCLOS in 1997 Portugal declared that 'any objects of a historical or archaeological nature found in the maritime zones under its sovereignty or jurisdiction may be removed only after prior notice and subject to the consent of the competent Portuguese authorities.'[646]

Slovenia requires approval from the Agency for the Protection of the Cultural Heritage of Slovenia for research and removal of archaeological remains, and for searching for archaeological remains.[647] This applies in the ecological protection zone.[648] The conditions for this authorisation are set out in the regulations on archaeological research, which state that the Rules in the Convention's Annex have to be taken into account with underwater archaeology.[649]

Similarly in Romania systematic archaeological research, as well as preventive or rescue work, is authorised, coordinated and controlled by the National Commission of Archaeology and by the Ministry of Culture.[650]

In Morocco's maritime zones including its EEZ authorisations are needed for excavations.[651]

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[646] Declaration made by Portugal on 03 November 1997 on Ratification of UNLCOS. Reprinted in: Garabello and Scovazzi (n 131) 210. Similar declarations have been made by Bangladesh, Cape Verde and Malaysia, none of which are States Parties to the 2001 Convention.

[647] Cultural Heritage Protection Act 2008, ss 31-32.

[648] Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act 2005, s 6(1).

[649] Pravilnik o arheoloških raziskavah 2013, Priloga 1(1).

[650] Law No. 182 regarding the protection of the movable national heritage 2000, as amended, s 46. Due to the archaeological objects discovered as a result of this on State-owned areas (including the natural resources of the EEZ and continental shelf) being public property it would appear the authorisation is needed for interventions outside Romania's territory also: Law No. 182 regarding the protection of the movable national heritage 2000, as amended, s 45(1).

[651] Dahir No. 1-80-341 promulgating Law No. 22-80 concerning the conservation of historic monuments and sites, inscriptions, art objects and antiquities, 1980, as amended 2006, s 46: 'No unauthorized person may carry out excavations, or land or sea explorations with the aim of bringing to light monuments or movable objects which, are of historical, archaeological or anthropological interest to Morocco or which are relevant to the study of the past and the human sciences in general.'

Again Croatia's amended Maritime Code is also applicable, which provides that for the extraction of wrecks or sunken goods that have or may be presumed to have characteristics of cultural property requires the authorisation of the port authority with the prior approval of the Ministry of Culture.[652] This does not apply to all UCH, only wrecks and sunken goods. In addition they have granted powers of supervision and protection of UCH to the coastguard beyond territorial waters.[653] However, no provisions for the consultations have been laid out, a deficiency which has been remarked upon.[654]

For the excessive territorial claims, in Ecuador authorisation is needed in its territorial waters to perform any activity directed at underwater cultural heritage,[655] and in Benin any investigation aimed at the discovery of marine archaeological and historical property requires authorisation by the Minister in charge of culture.[656] Panama requires authorisation for archaeological research, excavation or recovery, which was amended in 2003 to include underwater research.[657]

As discussed above (section 4.2.5.2), some States will require authorisations in the EEZ or continental shelves for research or for interfering with their resources though unilateral extensions of the rights provided by UNCLOS. These include Barbados, Grenada, Guyana, Iran, Jamaica and Trinidad and Tobago. In Morocco the delimitation

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[652] Maritime Code 2004, as amended 2013, s 840ć(6). It is also forbidden to tamper with, move, or modify the condition of a wreck or sunken good: Maritime Code 2004, as amended 2013, s 840č(4).

[653] Zakon O Obalnoj Straži Republike Hrvatske 2007, s 36(1)

[654] Šošić, 'Konvencija UNESCO-a o Zaštiti Podvodne Kulturne Baštine i Jurisdikcija Država u Jadranskome Moru' (n 451) 136–7.

[655] Decreto 1208 Reglamento de Actividades Dirigidas al Patrimonio Cultural Subacuático 2008, s 7.

[656] Loi 2007-20 portant protection du patrimoine culturel et du patrimoine naturel à caractère culturel en République du Bénin, s 85

[657] Law No. 14 'Measures on the Custody, Preservation and Administration of the Historic Heritage of Panama' 1982, s 8; Law No. 58, to Amend Articles in Law 14 of 1982, on the Custody, Preservation and Administration of the Historic Heritage of Panama and Issue Other Provisions 2003, s 1.

law reinforces the provision already discussed in its heritage law.[658] These may all be coincidentally compliant with the 2001 Convention in certain regards, but it is unknown if these claimed authorisation rights have been used in practice. They certainly do not implement the duty fully as these are no provisions for consultations or reporting.

4.3.2.4 Summary

There are a number of points to take away from this section. The first is that only Italy and Belgium set out measures to notify other States of interventions on UCH, and so the consultations provided for in Article 10 only have a legislative basis in these two States. Only Italy provides such a basis for consultations in the Area and in other States' jurisdictional zones.

Secondly, where States require authorisation for activities directed at UCH on the continental shelves or in their EEZs, and there are perhaps a surprisingly large number of these, this generally applies to everyone, not just their own nationals or flagged vessels. Italy states that interventions in its ZPE have to be in line with Article 10 of the Convention, on its continental shelf however authorisations only have to be in line with Article 10(2). Despite this, everyone still needs to submit an authorisation request. Romania's archaeological works on State owned areas in the EEZ and continental shelf specifically relate to their sovereign rights. In all other States there is not this nuance in their application of jurisdiction in these zones. All interventions, in all circumstances, by all vessels and nationals of any State appear to require authorisation.

Very little compliance therefore is seen with the controversial authorisations for pre-consultation measures, only Italy, Belgium and Spain have such measures governed by the Convention. All others do not distinguish between the different types of authorisation allowed. In effect, all the States that require authorisations already have at their disposal pre-consultation measures as they have not provided for the consultations in the first place.

These developments can be seen as a territorialisation of these zones (section 5.1), much of it taking place before the advent of the Convention, but introduced in Belgium,

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[658] Act No. 1-81 of 18 December 1980, Promulgated by Dahir No. 1-81-179 of 8 April 1981, establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan coasts, s 5.

Croatia, Mexico, Slovenia and to a certain extent Italy since then. Spain's unilateral extension of jurisdiction over UCH, which was expected to be reined in by the Convention, also appears to have endured, as authorisations have to be in line with both the 2001 Convention, but also other Spanish legislation which includes the 1985 heritage law.

4.3.3 State Vessels and Aircraft

4.3.3.1 Indicator

A separate regime for State vessels and aircraft applies in each of the maritime zones (section 2.3.3.2).[659] State vessels and aircraft fall into two groups, both of which must also meet the definition of UCH. The first are warships, the definition of which must be taken from UNCLOS.[660] This is meant more for modern warships and so is of questionable relevance to UCH, and whether the term can even be applied to wrecks is debatable (section 2.3.3.1).

The second group is other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, and which are identified as such. Identifying such a vessel, and establishing a vessel's use at the time of sinking may be difficult, and will be more difficult the older it is.[661] The concept of 'State' and 'non-commercial purposes' will change through time and geographically, and this will also cause problems for categorising State vessels. The

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[659] UNESCO 2001 Convention art 1(8): '"State vessels and aircraft" means warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.'

[660] UNCLOS art 29: 'For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.' As O'Keefe points out, different States began to have warships at different times under this definition, the UK from 1780 for example when the first service list was published. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 311) 10.

[661] ibid 46.

onus of proof here is on the flag State, and where a vessel cannot be shown to meet the definition, the usual Convention regime will apply.[662] It may therefore be that the State vessel procedures are used very rarely, especially for vessels older than the 20th century.[663]

The separate procedure provides that if a State discovers any State vessels in its territorial waters it should inform the flag State of the discovery, in the EEZ and on the continental shelf the flag State's agreement is needed before activities directed at a State vessel are conducted,[664] and in the Area the flag State's consent is needed before undertaking or authorising such activities.

4.3.3.2 Expected Standard

The model law uses the Convention's definition of State vessels and aircraft.[665] The three maritime zones each get a separate treatment in the model law.[666] The distinct phrasing of 'should inform', 'agreement' and 'consent' are all kept in these provisions. For the EEZ and the Area, the rights in Article 10(4) regarding immediate danger are

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[662] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 156.

[663] Forrest, 'An International Perspective on Sunken State Vessels as Underwater Cultural Heritage' (n 227) 50. Privateers would not be classed as State vessels, neither would State owned vessels engaged in private service, so vessels such as the Dutch East Indiamen would not fall under the regime.

[664] This measure is subject to Article 10(2) and 10(4) where States may take measures to protect the UCH in case of immediate danger or prevent interference with their sovereign rights and jurisdiction.

[665] UNESCO, 'Model for a National Act on the Protection of Cultural Heritage' (n 554) art 2(4).

[666] ibid art 9. '(1) If any underwater cultural heritage is identified as a State Vessel or Aircraft of another State the national authorities should inform the Flag State and States with a Verifiable Link to such cultural heritage. (2) No activity shall be permitted or directed at such heritage if it is located in the Exclusive Economic Zone or on the Continental Shelf without the agreement of the Flag State and, if applicable, the collaboration of the States which have assumed the obligation to coordinate protection measures under international law other than to prevent immediate danger. (3) If the concerned heritage is located beyond the limits of national jurisdiction, no activity shall be directed at such heritage without the consent of the Flag State other than to prevent immediate danger.'

kept, but not those in Article 10(2) relating to sovereign rights and jurisdiction.[667] All this can be expected in relevant national laws.

4.3.3.3 Compliance

In line with the level of compliance seen in the previous two indicators, few of the national regimes of the States Parties provide different procedures for State vessels and aircraft.

4.3.3.3.1 Belgium

Belgium does provide a separate system, and defines State vessels and aircraft in their law using the definition from the Convention verbatim.[668] Usually discoveries of UCH (in the territorial sea or EEZ or on the continental shelf) become property of the Belgian State. However:

> …a State vessel or aircraft or any part thereof remain the property of the State which was the owner at the time of the sinking. The receiver of the underwater cultural heritage shall consult the flag State of the State vessel or aircraft with a view to its protection.[669]

Furthermore, any intervention on a State vessel or aircraft is prohibited without authorisation from the flag State,[670] which means that Belgium is respecting the flag State's claim to State vessels and aircraft to a greater extent than is required by the Convention, as they have to seek authorisation even when the vessel is in territorial waters. Belgium can however, before consultation, authorise interventions on a State vessel or aircraft if it is in immediate danger due to a human activity, or any other cause, including looting.[671] This is an implementation of Article 10(4), and uses its wording.

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[667] Again the model law is not clear on jurisdictional issues. The separation of the EEZ and continental shelf provisions from the provisions regarding areas beyond national jurisdiction runs contrary to the suggestion of the rest of the model law that these areas are also beyond national jurisdiction.

[668] Loi du 4 avril 2014 s 2(2).

[669] ibid s 5(2).

[670] ibid s 6(2).

[671] ibid s 6(2). It is interesting this right is only set out in Belgium's national law when it relates to State vessels and aircraft but this is because for other UCH the receiver could already authorise the necessary

This was one of the controversial possible extensions of coastal State rights in their EEZs and continental shelves, and it has found its way into law in Belgium.

4.3.3.3.2 Italy

Italy's implementation law is much less clear on the rights of Italy to authorise interventions on State vessels and aircraft. It does mention that requests for authorisation, when they relate to State vessels or warships, have to also be forwarded to the Ministry of Defence, and this Ministry is involved in other ways too when State vessels or warships are concerned.[672] In addition however, it is stated that all interventions on UCH in the areas of ecological protection (but more than 24 miles from the baselines) are governed by Articles 9 and 10 of the Convention (and the Rules) so Article 10(7) regarding the need to seek agreement of the flag State before any intervention is incorporated in this way, as are the provisions relating to measures before consultations in cases of immediate danger.[673] This is not the case for UCH on the continental shelf however.

4.3.3.3.3 Spain

Spain grants sovereign immunity to all foreign State vessels in its waters.[674] Specific provisions apply for their removal,[675] which suggests that Spain has also gone beyond the needs of the 2001 Convention in that it requires flag State agreement for interventions in its territorial waters as well as in the EEZ and on the continental shelf. It has the option to conduct pre-consultation measures in some circumstances. This provision however, only applies to warships, and not to all State vessels and aircraft

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measures to protect the UCH, but would not have been able to without the flag State's permission for State vessels without this extra provision.

[672] Legge 157/2009, ss 5(2), 5(8), 6(1), 6(2), 8.

[673] ibid s 4(1).

[674] Ley 14/2014, s 50.

[675] ibid s 382(3): 'The remains of foreign warships sunk or wrecked in Spanish maritime spaces enjoy immunity from jurisdiction under the provisions of Article 50. However, the exploration, tracking, localization and removal thereof shall be agreed between the competent bodies of its flag State and the Ministry of Defence. Where appropriate, such operations shall be subject to the provisions of the Convention on the Protection of Underwater Cultural Heritage of 2 November 2001.'

which affects the level of compliance. The same article provides that Spanish State vessels, wherever and whenever they were lost, remain State property, inalienable and indefeasible, and retain their sovereign immunity.[676] Interventions on them require authorisation of the Spanish Navy as well as what is required in heritage legislation.[677]

4.3.3.3.4 Mexico

Mexico's heritage law excludes ships and aircraft of foreign States, any part thereof, their cargo or other contents, which enjoy sovereign immunity under international law from their definition of UCH, and therefore from the heritage regime.[678] In the bill for the amendment adding this provision it was stated that these are covered by principles of international law relating to sovereign immunity and so do not need to be subject to heritage legislation.[679] This would suggest they are also not able to be classed as derelicts under Mexico's maritime law.[680] Under the Convention, these vessels are treated as UCH, and by not classifying them as UCH, and leaving them to general rules of international law, Mexico is leaving a large number of potential heritage sites unprotected to the standards of the 2001 Convention.

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[676] ibid s 382(1).

[677] Ibid s 382(2). The inclusion of this follows from the Green Paper which stated: '…a clear reference should be made to Spain's legal position concerning state vessels and aircraft in line with recent declarations made by Spain to the international community and before foreign courts where Spain has filed claims regarding its Underwater Cultural Heritage. Spain's position is that it maintains, indefinitely, all of its rights over its sunken vessels and aircraft in accordance with the rules of international law regardless of where these are located or the time elapsed since their demise. Under Spanish law, rights over any such vessels or aircraft may only be transferred or abandoned by an express act of public law.' Grupo de Trabajo del Comité de coordinación Técnica del Consejo del Patrimonio Histórico (n 644) 51.

[678] Federal Law on Archaeological, Artistic and Historic Monuments and Zones 1972, as amended, s 28 ter.

[679] Proyecto de Decreto que adiciona diversas disposiciones a la Ley Federal sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos, en materia de bienes culturales subacuáticos, 2013, Dictamen de las Comisiones Unidas de Cultura y de Estudios Legislativos, 11 February 2014.

[680] Ley de Navegación y Comercio Marítimos 2006, as amended, s 172.

4.3.3.3.5 Other

Some States provide that the permission of the owner of a site or object has to be granted before interventions can be authorised. Romania is one such example,[681] as is France.[682] In this way interventions on State vessels would need authorisation from the flag State provided that an express act of abandonment has not occurred.

4.3.3.4 Summary

There are relatively few States that require different standards for State vessels and aircraft. Belgium and Spain both require the authorisation of the flag State before any intervention, even in their territorial waters. Italy requires this only in its ZPE, not on its continental shelf. Mexico unfortunately excludes State vessels from its heritage regime, and allows the pre-existing principles of international law to govern their interventions, even when they are in territorial waters. Again there is very little compliance with this indicator but generally, where implementation has occurred, the trend is to respect the flag State's sovereignty over State vessels, in most cases even in territorial waters. However, the controversial pre-consultation measures are potentially applicable to them in Italy, Belgium and Spain also.

4.3.4 Salvage and Finds

4.3.4.1 Indicator

Article 4 of the Convention prevents the law of salvage and the law of finds applying to UCH, except in cases where three stringent and cumulative conditions have been met (section 2.3.4.3).[683] These are:

1. That it is authorised by the competent authorities.
2. That it is in full conformity with the Convention.

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[681] Law No. 182 regarding the protection of the movable national heritage, 2000, as amended, s 47(1).

[682] Ordonnance 2004-178, s L532-9.

[683] UNESCO 2001 Convention art 4: 'Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.'

3. That it ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

Thus salvage and the law of finds are not excluded completely by the Convention, but the conditions set out in Article 4 will detract from the usual content of the law of salvage so as to leave little left of the original concept.[684] The law of finds is less inherently deleterious to UCH, as it only confers ownership, and does not necessitate recovery of the heritage.

4.3.4.2 Expected Standard

This is a more amorphous obligation, as the concept of salvage law differs in various States. The model law simply provides:

> The law of finds does not apply to cultural heritage. The law of salvage does not apply to underwater cultural heritage.[685]

It also suggests that a person may receive a reward for discovering UCH.[686] This takes the most exclusionary approach to the law of salvage and the law of finds. This is a legitimate course, as these concepts do not have to apply. In national laws, this method may be seen, but a less exclusionary course, where one of the concepts is applied in some limited circumstances, may also be used. Finally, in national laws the law of salvage and the law of finds may be usually effectively excluded from UCH by the authorisation system, where States provide for State ownership of UCH or it may be that the concept of salvage never applied to UCH in the first place. It is therefore difficult to predict exactly what to expect for this indicator.

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[684] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (n 104) 50.

[685] UNESCO, 'Model for a National Act on the Protection of Cultural Heritage' (n 554) art 17(2).

[686] ibid art 17(3).

4.3.4.3 Compliance

Many of the States Parties are compliant with this indicator through their general heritage laws. Some of these automatically vest ownership of heritage in the State,[687] and some provide for State ownership where the owner cannot be identified.[688] In most cases, authorisation will be required before interfering with the heritage.

Some States have excluded historic wrecks from salvage explicitly for some time, and so will also be coincidentally compliant with the 2001 Convention. In France for instance abandoned wrecks of an archaeological, historic or artistic interest were excluded from the law of finds in 1961, and all *biens culturels maritimes* were excluded in 1989 from both the law of salvage and finds.[689]

Some more specific provisions of the national laws are still worth discussing as they are directly related to the 2001 Convention.

4.3.4.3.1 Belgium

In Belgium, the law of finds still applies to discoveries that are eventually deemed not to be UCH by the relevant Minister.[690] Furthermore, if UCH is not protected *in situ* and is

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[687] For example in Spain all remains that can be classified as Spanish historical heritage found as a result of excavations, earth moving or works of any type or by chance are considered of the public domain: Ley 16/1985, s 44(1). This means it is inalienable and so free from commercial exploitation: Constitución Española 1978 art 132. Its treatment as public domain is one of the characteristics of archaeological heritage which distinguishes it from other cultural heritage, see: Esther Zarza Alvarez, 'Spain' in Sarah Dromgoole (ed), *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (Kluwer Law International Ltd 1999) 145. The recent Maritime Navigation Law also provides for State ownership of wrecked vessels in the territorial sea after three years since the wrecking event, and ownership of Spanish owned wrecked vessels in the EEZ, high seas or on the continental shelf after the same period. This gives the Spanish State title by prescription to vessels sunk in (and some beyond) their waters, which are potential future UCH. Ley 14/2014, s 374.

[688] For example Portugal, Decreto-Lei 164/97, s 2(1).

[689] Décret 61-1547 fixant le régime des épaves maritimes 1961, ss 23-32; Loi 89-874; Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 158; Carducci, 'The Crucial Compromise on Salvage Law and the Law of Finds' (n 279) 194.

[690] Loi du 4 avril 2014 s 8(2).

not claimed by its previous owner, or by a public body or museum, ownership may be transferred to the discoverer, at the discretion of the King.[691] It is still subject to the same standards of protection and preservation however, so the right of ownership is not unrestricted. In this way the three conditions of Article 4 of the Convention are met when the law of finds is applied,[692] meaning Belgium, despite still applying the law of finds to UCH, is in compliance with this indicator.

4.3.4.3.2 Spain

The Spanish law on salvage has not applied to property outside free trade since 1962, which due to *Ley* 16/1985 included archaeological heritage (and therefore UCH).[693] The 1962 salvage act was largely repealed by the 2014 Maritime Navigation Act, which now contains the salvage regime. It provides that activities directed at UCH are not to be considered as salvage operations, rather these are to be governed by cultural heritage legislation and international treaties.[694] Salvage in Spain can only occur in certain situations (with an emphasis on assistance of vessels and recovery of goods in danger) and another system is in place for the recovery of wrecks that is not classed as salvage, but this is also not to be applied to UCH.[695] For the law of finds Article 351 of the Civil Code provides that half of any hidden treasure found on State property belongs to the discoverer,[696] however, it does not apply to archaeological heritage.[697]

4.3.4.3.3 Croatia

Croatia's provisions relating to UCH beyond its territorial waters are all contained within the maritime, rather than heritage, regime. Under its 1994 Maritime Code, a permit was needed from the Ministry of Culture for raising an object assumed to be

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[691] Ibid s 13.

[692] Projet de Loi relatif à la protection du patrimoine culturel subaquatique, 2014, 6-7.

[693] Ley 60/1962, de 24 de diciembre, por la que se regulan los auxilios, salvamentos, remolques, hallazgos y extracciones marítimos, 1962, s 22; Zarza Alvarez (n 687) 149; Aznar-Gómez (n 587) 283.

[694] Ley 14/2014, s 358(3).

[695] ibid ss 369(3), 381.

[696] Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil 1889, s 351.

[697] Ley 16/1985, s 44(1).

cultural property in Croatia's territorial waters.[698] In 2004 the Code was replaced, but this provision was retained.[699] Again it only applied to the territorial waters.[700] In 2013 however, a new chapter was added to the Code,[701] which applies in the ZERP and on the continental shelf.[702] It removes wrecks and sunken goods with a cultural character (or which are presumed to have one) from the salvage regime as authorisation is needed to remove them and they become property of the State after two years after loss or where the owner is unidentified.

4.3.4.3.4 Mexico

In Mexico derelicts are considered property of the nation.[703] This applies to all objects, including of ancient origin, over which the owner has lost possession, found in any waterway or water in which the United Mexican States exercise sovereignty or jurisdiction.[704] Equivalent provisions were also in the older 1994 Act, and this applied to EEZ and continental shelf as well, so Mexico was already compliant with this indicator in 1994.[705]

4.3.4.3.5 Cuba

Cuba altered its salvage laws in 2013. UCH was not excluded from salvage in the law,[706] but the regulations made under that law provide that authorisation is needed for any

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[698] Maritime Code, 1994, s 803.

[699] Maritime Code 2004, s 787(1) Salvage (*Spašavanje*) or extraction of property that has or may be presumed to have the status of cultural property, and is located on the seabed, should not be taken without the approval of the ministry responsible for culture.

[700] Maritime Code 2004, s 1.

[701] Zakona O Izmjenama I Dopunama Pomorskog Zakonika, 2013, s 109.

[702] Maritime Code 2004, as amended 2013, s 840b.

[703] Ley de Navegación y Comercio Marítimos 2006, s 174.

[704] Ley de Navegación y Comercio Marítimos, 2006, s 172

[705] Ley de Navegación, 1994, ss 129-130.

[706] Ley de la navegación marítima, fluvial y lacustre, 2013.

removal.[707] This only applies in inland waters, the territorial sea, and the contiguous zone.

4.3.4.4 Summary

Belgium appears to be the only State that still applies either the law of salvage or the law of finds to UCH after implementing the Convention, but since in those cases the three conditions of Article 4 of the Convention are met, this is a legitimate course of action. All other States that have introduced implementing measures either explicitly or implicitly exclude the law of salvage and finds from their UCH, or cultural property.

Five States have updated their salvage regimes since the advent of the Convention however, and have still not specifically excluded UCH from the regimes.[708]

Most States that claim some form of jurisdiction over UCH beyond their territorial waters either explicitly or implicitly exclude the law of salvage and finds from UCH, usually by superimposing their heritage regime over admiralty laws. Many civil law States will not have applied their salvage regime to wrecks in the first place.

4.4 Conclusion

The small number of potential implementation laws translates into a relatively poor compliance with the 2001 Convention.

For the reporting system laid out in Articles 9 and 11 of the Convention, only Italy has attempted to implement this fully. Its compliance is marred by only applying these duties when objects are discovered, but nevertheless, it is the only fully fleshed out reporting system for UCH discovered in the Area and in other States Parties' EEZs and on their continental shelves. A number of States have reporting systems applicable in their own EEZ and on their continental shelves, these are Belgium, Croatia, Italy, Mexico, Morocco, Portugal, Romania, Slovenia and Spain. A number of these do not comply due to deficient definitions of UCH. Crucially only Belgium and Italy have made provisions

[707] Decreto No. 317, Reglamento de la Ley de la navegación marítima, fluvial y lacustre 2013, s 212.

[708] Antigua and Barbuda, Antigua and Barbuda Merchant Shipping Act 2006; Nigeria, Merchant Shipping Act 2007; Panama, Ley No. 55 del Comercio Marítimo 2008; St Kitts and Nevis, Merchant Shipping Act 2002; St Vincent and the Grenadines, Shipping Act 2004.

for reporting to UNESCO and other States Parties, and for the subsequent consultations. All of these duties apply to all vessels and individuals, showing an increasing territorialisation of these zones (section 5.1).

A very similar level of compliance is seen for the authorisation indicator. This is partly because reporting is a vital component of this. Most of the States listed above require authorisation of archaeological research on their continental shelves or in their EEZs, as do the States that claim jurisdiction over this through their delimitation laws in place prior to the 2001 Convention, such as Jamaica. Again however, only Italy and Belgium (and to a certain degree Spain) are in compliance with the Convention as none of the others provide for the consultations needed to legitimise the interventions. All the others also, by default, provide for pre-consultation measures, due to having no provisions for consultations and due to them authorising all interventions already. They do not distinguish between the specific types of authorisation allowed by the Convention. This again suggests a territorialisation of these zones.

Very few States provide for a separate regime for State vessels and aircraft. Belgium and Spain both require the authorisation of the flag State before any intervention, even in their territorial waters. Italy requires this only in its ZPE, not on its continental shelf. Mexico unfortunately excludes State vessels from its heritage regime, and allows the pre-existing principles of international law to govern their interventions. Where implementation has occurred, the trend is to respect the flag State's sovereignty over State vessels, even in territorial waters, although the possibility of pre-consultation measures diminish this respect.

Finally, a range of standpoints is seen with regards to the law of salvage and finds. Mostly a heritage regime will serve to exclude these laws from applying to UCH. Belgium is the only State to have attempted implementation of the Convention and kept the law of finds applicable in some circumstances. This is in compliance with Article 4 of the Convention. A number of States have unfortunately updated their maritime regimes since 2001, without excluding UCH from them.

There is a low level of compliance with the 2001 Convention.[709] Italy and Belgium appear to have come closest to compliance with the Convention. It is perhaps no coincidence that these are the two States with UCH specific implementing laws, and thus far this would appear to be the most effective method of implementing the Convention, rather than fitting measures in to complex pre-existing heritage and maritime regimes. In addition, there is little uniformity in the implementation measures that have been introduced, and this will also negatively affect the functioning of the Convention.

Further, the Convention has so far had a very limited legal effect. Mostly, the limited compliance observed has not been caused by the Convention. Where the authorisation and reporting systems exist, they tend to have existed before the Convention except in very few cases. The States where the Convention can be said to have had most effect are again Italy and Belgium.

This conclusion however, needs qualified somewhat. Firstly, this study may be taking place too soon, and enough time has not been given to States since the Convention came into force to adequately implement the Convention (section 3.5.1). Many States have only joined the treaty since then and so have had even less time. Secondly, there may be implementation of the Convention that cannot be seen through this legal lens. Although this study of legislation was necessary as a first step, and because few other data sources were available, the study must go further, and consider the array of effects that the Convention may have had. The reasons behind the low level of implementation and compliance seen in the national legislation also have to be explained.

Attention will now turn to the legal implications of the implementation seen, before addressing the questions of political effectiveness, the reasons for the levels of implementation, and strategies to improve the effectiveness of the Convention.

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[709] Largely this has gone unremarked upon by States that are not in compliance. France has noted that some changes in its law would be necessary to implement the Convention properly, but these have not yet been introduced: Projet de Loi autorisant la ratification de la convention sur la protection du patrimoine culturel subaquatique: Etude d'Impact 2012.

Chapter 5 – Legal Implications

Some of the conclusions reached regarding compliance with the 2001 Convention feed into larger debates. In particular, the few instances where States have implemented the Convention may indicate that the Convention's States Parties are interpreting its ambiguous provisions in favour of the coastal State in relation to jurisdiction over UCH in their EEZs and on their continental shelves. This impacts on the question of whether the 2001 Convention departs from the regime of UNCLOS, and whether the 2001 Convention is causing creeping jurisdiction.

5.1 Territorialisation of the EEZ and Continental Shelf

Through their national legislation some States claim jurisdiction that is not available to them in international law. In many cases this involves extending a maritime zone beyond its usual limits, but it can also involve a 'territorialisation' of a particular zone. This territorialisation can take three forms:

- enhancement of competences and jurisdictions granted to the coastal State,
- addition of competences and jurisdictions not granted to the coastal State,
- restrictions upon the freedoms and rights explicitly recognised in favour of other States.[710]

This practice was taking place prior to UNCLOS, where States claimed excessive territorial waters or exclusive fishing zones going beyond what was set out in the prior law of the sea conventions.[711] UNCLOS to some extent validated this practice, and subsequently has not been able to preclude more of it. A number of studies have surveyed these excessive claims.[712] What is clear is that the EEZ in particular has

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[710] Kopela (n 68) 3.

[711] Brown (n 176).

[712] Lawrence Juda, 'The Exclusive Economic Zone: Compatibility of National Claims and the UN Convention on the Law of the Sea' (1986) 16 Ocean Development & International Law 1; Barbara Kwiatkowska, 'Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice' (1991) 22 Ocean Development & International Law 153; Franckx (n 176); Kopela (n 68); Roach and Smith (n 175).

acquired an 'inherent flexibility' as to its substantive content, and that States have been devising their own versions to suit their needs.[713] UCH is often included in these novel formulations (Table 13).

Table 13. Claims over UCH in the EEZ and on the continental shelf identified by Kopela in 2009.[714]

State	Instrument	Provision
Australia[715]	Australian Historic Shipwreck Act 1976	Jurisdiction over UCH on the Continental Shelf
Cape Verde	Law No. 60/IV/92 of 21 December 1992	Requires authorization for removal of UCH from all maritime zones
China	Underwater Cultural Relics Regulation 1989	Jurisdiction over UCH in all maritime zones
Dominican Republic	Act No. 66/07 on 22 May 2007, Decree No. 289/99	Jurisdiction over UCH in the EEZ and on the Continental Shelf
Iran	Law of Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993	Requires authorization for the recovery of any drowned object and for the conduct of any research
Ireland	National Monuments Act, No. 17 of 1987	Jurisdiction over UCH on the Continental Shelf
Jamaica	Exclusive Economic Zone Act, No. 33 of 1991	Jurisdiction for the recovery of archaeological or historical objects in the EEZ
Mauritius	Maritime Zones Act, No. 2 of 2005	Jurisdiction over UCH in the EEZ and on the Continental Shelf
Morocco	Act No. 1-81 of 18 December 1980	Requires prior authorisation for archaeological research
Portugal	Law Decree No. 117 of 14 May 1997	Jurisdiction over UCH on the Continental Shelf
Spain	Law 16/1985	Jurisdiction over UCH on the Continental Shelf
Tunisia	Law 21 of 22 February 1989	Jurisdiction over objects of UCH 'floating' in the EEZ

[713] Gavouneli (n 29) 94–5.

[714] Kopela (n 68) 8.

[715] A new 'Underwater Cultural Heritage Act' has been announced which will bring Australia's heritage regime in line with the requirements of the 2001 Convention. 'New Underwater Heritage Law Will Protect Even More of Our History' (*The Hon. Josh Frydenberg MP, Minister for the Environment and Energy*, 2016) <www.environment.gov.au/minister/frydenberg/media-releases/mr20161129.html> accessed 7 April 2017.

Yugoslavia	Act concerning the coastal sea and the continental shelf 1987	Sovereign rights over UCH on the Continental Shelf

As UNCLOS does not grant rights over UCH in the EEZ or on the continental shelf, these extensions of jurisdiction relating to UCH must be seen as creating new coastal State competencies.[716] In some cases however, the terminology of the legislation would suggest that the competences and jurisdictions granted to the coastal state by UNCLOS for other reasons are expanded to include UCH. Both these approaches necessarily restrict the rights and freedoms of other States.

National legislation is only a narrow concept of State practice and is therefore an insufficient foundation on which to base any conclusions about customary international law. However, the practice is seen only from a relatively small number of States, and it has been argued by others that it is not enough to produce a customary rule of international law.[717] In addition, it is thought that the laws that apply beyond territorial waters have not been enforced.[718]

Some commentators at the time thought that UNCLOS would limit this practice of extending jurisdiction,[719] but it seems that ambiguities in the EEZ regime, and the failure of UNCLOS to define key terms and provide specific obligations may have led to its continuation.[720] Strati states:

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[716] Kopela (n 68) 7–8.

[717] Strati (n 35) 269; Rau (n 90) 402. However, such a law may still develop in the future: Kwiatkowska (n 712) 164.

[718] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 265–6.

[719] Arend (n 25) 802.

[720] Felipe H Paolillo, 'The Exclusive Economic Zone in Latin American Practice and Legislation' (1995) 26 Ocean Development & International Law 105, 107–8; Bernard H Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100 American Journal of International Law 830, 839; Beckman and Davenport (n 77) 24, 31–3. Other reasons for these extensions could include its insufficiencies in regard to developing technologies, environmental concerns and political circumstances, the way the EEZ has always been seen in 'quasi-territorial terms', and even due to negotiating tactics, particularly prior to the third United Nations Conference on the Law of the Sea: Bennouna (n 180) 8; Beckman and Davenport (n 77) 16.

> If a jurisdictional zone is well defined and the attributed rights properly specified, the possibilities of "creeping" jurisdiction are minimised and the prospects of a minimum public order of the oceans are increased.[721]

The mess UNCLOS made of dealing with the problem of archaeological objects beyond territorial waters could have been expected to encourage both unilateral creeping jurisdiction, and an international will for extension through a different international instrument. Indeed, both of these have since materialised.

5.2 Jurisdiction and the Implementation of the 2001 Convention

Since the creation of the 2001 Convention, and in some cases arguably because of it, there have been a small number of national claims to jurisdiction over UCH beyond territorial waters that could be termed creeping jurisdiction. In addition, none of the States identified as exerting excessive jurisdiction over UCH prior to the 2001 Convention have revised their positions.

Of particular note are the rare instances where the reporting duties for UCH discovered in a State's own EEZ or on its continental shelf have been implemented (section 4.3.1.3). In Italy and Belgium's implementation laws these duties appear to be applied to all vessels and individuals, not just the State's own nationals and flagged vessels.[722] This is not in line with the more obvious interpretation of the 2001 Convention, where States would only require this action from their own nationals and vessels, and suggests that the ambiguity in Article 9(1)(b) is being interpreted in such a way as to give the coastal State the right to demand reports from all vessels and nationals, rather than coastal States using the provisions of 9(1)(a) in their own maritime zones.

For authorisations similar excessive jurisdiction is used, and very few States provide any nuance as to what can be authorised and prohibited in various situations as set out in Article 10 of the 2001 Convention (section 4.3.2.3). Slovenia and Italy have used delimitation laws to extend their jurisdiction in these areas also (section 4.2.5.1).

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[721] Strati (n 35) 192.

[722] *Legge* 157/2009, s. 5(1); *Loi du* 4 *avril* 2014, s. 5(1).

Jurisdiction has therefore expanded over UCH in the maritime zones of Italy, Belgium, Spain and Slovenia since the advent of the 2001 Convention. Through national law jurisdiction crept over UCH in the wake of UNCLOS, and appears to be continuing to do so after the 2001 Convention. However, this is a particular interpretation of the 2001 Convention, and so has a basis in international law. As we have seen (section 2.3.2.4), States could point to Article 3 of the 2001 Convention as justification as the vital phrase 'international law, including the United Nations Convention on the Law of the Sea' is used, which suggests that there is pertinent law on the matter of jurisdiction other than UNCLOS, and this (if it exists) could in part be made up by the increasing, but by no means universal, State practice of unilateral extension of jurisdiction over UCH and underwater archaeology in EEZs and on continental shelves. It is widely understood that the Law of the Sea Convention constitutes a codification of customary rules existing at the time, but it also contains instances of progressive development of international law, some of which have become in a very short period of time customary rules in their own right.[723] The status of the EEZ, or parts of it, as customary law is in doubt, as many national laws diverge from it in one way or another.[724] It would seem implementation of the 2001 Convention is adding to this confusion.

Further justification is provided by the general treaty interpretation rules of *lex specialis* and *lex posterior*,[725] or States could point to Articles 303(4) and 311 of UNCLOS which could be read as allowing States to conclude agreements relating to UCH that modify or suspend the operation of provisions of UNCLOS (section 2.3.2.3).[726]

The problem however, is that even if these actions are justifiable, on face of it they are departing from UNCLOS, and may cause some States to consider that their misgivings about the compatibility of the 2001 Convention and UNCLOS in 2001 were well placed.

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[723] Gavouneli (n 29) 4.

[724] Strati (n 35) 270.

[725] Carducci, 'The Expanding Protection of the Underwater Cultural Heritage: The New UNESCO Convention versus Existing International Law' (n 132) 142; Bautista (n 199) 59; Cogliati-Bantz and Forrest (n 88) 550.

[726] Cogliati-Bantz and Forrest (n 88) 556.

However, this behaviour could be argued to be legitimate through the development of UNCLOS also, and so would sidestep this issue of compatibility.

5.3 Developing UNCLOS

When examining national legislation a number of provisions pointed to a different basis for jurisdiction than merely a particular interpretation of the 2001 Convention. Italy, according to its 2006 law on the ZPE, may be using its jurisdiction over protection and preservation of the marine environment, which it states includes the archaeological and historic heritage.[727] Slovenia has taken a very similar action.[728]

Other States may base their excessive jurisdiction on 'scientific research', particularly those that claimed jurisdiction over archaeological research prior to the 2001 Convention. Jamaica claims jurisdiction in its EEZ in respect of:

> …the authorisation, regulation and control of scientific research and the recovery of archaeological or historical objects.[729]

Similar provisions are seen in Morocco and Iran.[730] The phrase 'marine scientific research', which States do have jurisdiction over in their EEZs, is not mentioned in these provisions.

In other States it is not so clear what the jurisdiction is based on. In Spain and Portugal the regulation of archaeological heritage used to only relate to their continental shelves, and not to any EEZ.[731]

In the EEZ then, the recent extensions of jurisdiction seem to be based on the preservation and protection of the marine environment, rather than scientific research

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[727] *Legge* 61/2006 s. 2(1).

[728] Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act 2005 s. 6(1).

[729] Exclusive Economic Zone Act 1991, s. 4(c)(i).

[730] Act No. 1-81 of 18 December 1980, Promulgated by Dahir No. 1-81-179 of 8 April 1981, establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan coasts, s. 5; Law of Marine Areas of the Islamic Republic of Iran in the Persian Gulf and Oman Sea 1993, s. 17.

[731] *Ley* 16/1985 s. 40(1); Lei 107/2001 s 78(1). As noted Spain altered this in 2014 with its Maritime Navigation Law: *Ley* 14/2014, s 383(1) (section 4.3.2.3.4).

as was more common in the late 20th century, prior to the 2001 Convention. There appears to be no legitimate reason to claim jurisdiction over UCH through scientific research, but if the jurisdiction was based on MSR or the protection of the marine environment, this would sidestep the claim that the 2001 Convention and its implementation is not in line with UNCLOS. The use of MSR for this purpose has been advocated in the literature,[732] but more recently some authors have also been noticing the potential of the jurisdiction related to the protection of the marine environment.[733] These three different bases for jurisdiction will be examined further, as they all have different consequences.

5.3.1 Scientific Research

Scientific research is not defined by UNCLOS, but must be a wider concept than marine scientific research which is usually taken to mean scientific research of the marine environment.[734] Any other scientific research conducted in the marine environment, including marine archaeology, will presumably fall under this wider concept.

Article 87 of UNCLOS lists scientific research as a freedom of the high seas, subject to Part VI on the continental shelf, and Part XIII on marine scientific research.[735] In the superjacent waters above a continental shelf, either where no EEZ has been declared or beyond 200 M from baselines, States are free to conduct such research, provided they conduct it with due regard for the interests of other States in their exercise of the freedoms of the high seas.[736] The EEZ however, being a sui generis zone and otherwise unrelated to the high seas, only retains some specific freedoms of the high seas, and

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[732] Lee (n 196); Croff (n 119); Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage' (n 119).

[733] Mariano J Aznar, 'The Legal Protection of Underwater Cultural Heritage: Concerns and Proposals' in Carlos Espósito and others (eds), *Ocean Law and Policy: Twenty Years of Development Under the UNCLOS Regime* (Brill Nijhoff 2016) 138–40.

[734] Alfred HA Soons, *Marine Scientific Research and the Law of the Sea* (Kluwer Law and Taxation Publishers 1982) 6; Giorgi (n 86) 571.

[735] UNCLOS art 87(1)(f).

[736] Ibid., art. 87(2).

scientific research is not listed amongst them.[737] By regulating such research in an EEZ therefore a coastal State is adding jurisdiction not granted to it and consequently restricting the freedoms and rights of other States.

5.3.2 Marine Scientific Research

A coastal State may however, regulate MSR taking place in its EEZ or on its continental shelf.[738] MSR is seen as research *of* the marine environment rather than just research *in* the marine environment, or put another way, research of the natural rather than man-made environment.[739] Traditionally therefore, archaeology has not been thought of as falling under the definition of MSR, despite some benefits this would have, particularly relating to certain types of remote surveying.[740]

Coastal States must 'in normal circumstances', grant their consent for marine scientific research.[741] These circumstances, according to some commentators, constitute 'pure' research.[742] If one of four specified conditions are met the research becomes 'applied' and the State may withhold their consent.[743] On the outer continental shelf, beyond 200 M from the baselines from which their territorial sea is measured, the coastal State has

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[737] Ibid., art. 58(1); Gavouneli (n 29) 66.

[738] UNCLOS Part XIII. See also: Soons (n 734); Marffy (n 117) 1127–46.

[739] Soons (n 734) 6; Giorgi (n 86) 571.

[740] Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage' (n 119).

[741] UNCLOS art 246(3).

[742] Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage' (n 119) 42.

[743] These are if the project: (a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living; (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment; (c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80; (d) contains information communicated pursuant to article 248 regarding the nature and objectives of the project which is inaccurate or if the researching State or competent international organization has outstanding obligations to the coastal State from a prior research project. UNCLOS art 246(5).

no discretion to refuse their consent except in certain designated areas.[744] It is unclear whether archaeological projects, and perhaps more pertinent to UCH protection, treasure hunting, would be classed as pure or applied research if included in the MSR regime, and therefore whether the State could withhold consent for such activities. It seems likely that treasure hunting activities would be applied research due to them having the exploitation of resources as their objective, and that consent could also be withheld when these activities are undertaken by a private company or individual, as only States have the right to conduct MSR.[745] This has obvious advantages for heritage protection. Archaeology, or some aspects of archaeology, may be able to be classed as pure research. If this were the case States may have little option but to grant their consent to all applications for archaeological interventions. This remains a theoretical debate however, as States, when extending jurisdiction over archaeological heritage on their continental shelves or in their EEZs, have not been citing the doctrine of MSR, despite the benefits this would bring in the views of some commentators.

5.3.3 The protection and preservation of the marine environment

States have jurisdiction with regard to the protection and preservation of the marine environment in their EEZs,[746] no equivalent jurisdiction is found on the continental shelf, although they do also have a general duty to protect and preserve the marine environment.[747] The 'marine environment' is not defined in UNCLOS, but would probably not be thought to include UCH, as so much of UNCLOS is based on natural resources, the only provisions intended to apply to heritage being Articles 149 and 303.[748] Very specific measures, including prescriptive and enforcement jurisdiction, are set out in Part XII of UNCLOS to prevent, reduce and control pollution of the marine

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[744] UNCLOS art 246(6).

[745] Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage' (n 119) 53–4.

[746] UNCLOS art 56(1)(b)(iii). For a detailed discussion of the concept see: René-Jean Dupuy, 'The Preservation of the Marine Environment' in René-Jean Dupuy and Daniel Vignes (eds), *A Handbook on the New Law of the Sea* (Martinus Nijhoff Publishers 1991).

[747] UNCLOS art 192.

[748] International Law Commission (n 115) 298.

environment.[749] Adding the protection of UCH to the protection and preservation of the marine environment, as Italy and Slovenia have done, therefore seems like a peculiar route for jurisdiction to creep down. But despite focussing on certain aspects of the protection of the marine environment, like pollution, the jurisdiction in the EEZ over this would not seem to be limited to these instances, and UCH is often inextricably associated with its natural environment.[750] Using this jurisdiction may provide States more scope to maintain a stricter regime than when using MSR, as there is no requirement that they always grant their consent as in cases of pure research.

A feature of the marine environment aspect of UNCLOS is that it provides a shared, rather than exclusive, jurisdiction, as it is limited by other international standards and also foresees a role for international organisations. Juda noted in 1986 that some States were eschewing this shared jurisdiction in favour of exclusive jurisdiction, another example of creeping jurisdiction.[751] The concept of the marine environment may again evolve in an unforeseen way, to include UCH, although at this stage indications from only two States is not nearly enough to be certain over this. This source of jurisdiction however, would appear to be the most favourable for those States seeking to regulate activities directed at UCH beyond their territorial waters, as it clear the coastal State has jurisdiction over it, unlike the concept of scientific research, and grants more discretion to the coastal State than MSR. This may be why this base of jurisdiction has been more recently seen in laws relating to archaeological heritage, and any mention of scientific research seems limited to the 20th century.

5.4 Enforcement

It must be noted that although some States have legislated for this jurisdictional extension, whether these laws can be enforced is another matter. Whether in practice all vessels discovering or interfering with UCH in these States' EEZs and on their continental shelves have to report and receive authorisation remains to be seen.

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[749] UNCLOS Part XII.

[750] Indeed some of the natural environment is included in the definition of UCH when it forms the 'natural context' to certain traces of human existence. 2001 Convention art. 1(1)(a).

[751] Juda (n 712) 40–1.

The *Mercedes* case is relevant here, as it shows the practical limits of coastal State legislation where coastal State capacities are lacking, and also the difficulties of regulating a covert and secretive practice like treasure hunting. It was originally stated by Odyssey that the wreck was unidentified and that it was located somewhere in Atlantic 'international waters', but in fact the wreck seems to have been located on the Portuguese continental shelf.[752] Despite Portugal's heritage laws applying to its continental shelf,[753] Odyssey removed the cargo from the Portuguese continental shelf, apparently without Portugal's knowledge, and in the following court proceedings Portugal was not involved. This demonstrates the difficulties of enforcing cultural heritage laws in a coastal State's EEZ and on their continental shelf, and that what may be more likely to determine the final destination of the UCH in these zones is often the location of the court in which a salvage petition is lodged, and the origins of the UCH itself, rather than where it was found.

5.5 Conclusion

There seems to be evidence of a continuing territorialisation of the EEZ and continental shelf by coastal States, which are expanding their control over UCH through national laws. This process was happening before the 2001 Convention, and has continued since. From the limited implementation of the 2001 Convention that has so far occurred, the first indications are that its ambiguous provisions are being interpreted in favour of the coastal State. This process can be justified as a legitimate departure from UNCLOS, or through developing the meaning of jurisdiction already apportioned by it to the coastal State, in particular over the protection of the marine environment.

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[752] Amy Strecker, 'Pirates of the Mediterranean? The Case of the "Black Swan" and Its Implications for the Protection of Underwater Cultural Heritage in the Mediterranean Region' in Ana Filipa Vrdoljak and Francesco Francioni (eds), *The Illicit Traffic of Cultural Objects in the Mediterranean* (European University Institute, Academy of European Law 2009) 72; Varmer (n 129) 67; Jesus Garcia Calero, 'La Foto de La Fragata Mercedes Que Ocultó El Expolio de Odyssey' (2015) <abcblogs.abc.es/espejo-de-navegantes/2015/08/25/la-foto-de-la-fragata-mercedes-que-oculto-el-expolio-de-odyssey/> accessed 16 March 2018.

[753] Lei 107/2001 s 78(1).

This may be just one facet of a larger, commonplace process, as States have pushed at the acceptable limits of their jurisdiction for other reasons when the need arose, and it should therefore not be arbitrarily obstructed. Coastal State control over UCH may in some respects even be desirable and beneficial for UCH, as a coastal State may have more interest, and be better placed, to protect UCH in its maritime zones, even if it has no other link to that heritage than its location. The extensions of jurisdiction may have occurred in the pursuit of noble and worthy objectives related to heritage protection.

Some of the international community attempted to give the coastal State control over UCH located on its continental shelf or in its EEZ on a number of occasions for precisely these motives, but for one reason or another, largely fears of creeping jurisdiction by powerful maritime States, this process was resisted at the international level (section 2.3.2.1). As a result the situation we find ourselves in is having a UCH regime based on two international instruments that is ambiguous and complex, but which seeks to protect UCH through cooperation and the uniform application of standards.

The first very limited indications of State practice related to the 2001 Convention show that States are eschewing its cooperation regime in favour of unilateralism. It is perhaps little wonder that the consultation systems set out in Articles 10 and 12 of the Convention have not yet been used, and that the UNESCO Secretariat has reported receiving only one notification, from Italy, through the reporting system set out in Articles 9 and 11.[754] Territorialisation of these zones bypasses the key cooperation duties of the 2001 Convention in favour of unilateral, national protection of UCH. The Convention itself is therefore undermined and becomes less relevant, which means States Parties are more likely to ignore it, and other States are less likely to join it.

Such unilateralism also arguably could be more directly prejudicial to UCH protection. As in protection of the environment, and of global fisheries stocks, protection of UCH will not be achieved by States empowered to act unilaterally as they see fit, but rather through 'strong and effective international measures that states are obliged and empowered to enforce.'[755] UCH already has such a system in the 2001 Convention and

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[754] UNESCO Doc. UCH/15/5.MSP/5, 8.

[755] Oxman, 'The Territorial Temptation: A Siren Song at Sea' (n 720) 844–5.

its cooperative, international mechanisms. Expanding the use of jurisdiction meant for protection of the environment for instance, would allow States not party to the 2001 Convention to unilaterally regulate activities directed at UCH in areas beyond their sovereignty, with no reason to cooperate with other interested States, and no obligation to apply the internationally recognised minimum standards of underwater archaeology contained in the 2001 Convention.

This is also not a helpful conclusion for those States currently eschewing the regime due to it upsetting the delicate balance of UNCLOS, and it may provide some justification for them remaining outside the regime. Conversely however, it adds weight to the argument that if these States want to influence the way the 2001 Convention is being interpreted, it may now be more effective to join it and drive implementation forward in their preferred way, than to remain on the side-lines while jurisdiction over UCH continues to creep.[756]

[756] British Academy / Honor Frost Foundation Steering Committee on Underwater Cultural Heritage, *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: The Case for UK Ratification* (2014) 3, 20 <www.britac.ac.uk/publications/2001-unesco-convention-protection-underwater-cultural-heritage-case-uk-ratification> accessed 31 October 2014.

Chapter 6 – Political Effectiveness

6.1 Introduction

Following an analysis of legal sources it can be said that there has been very little legal implementation of some of the provisions of the 2001 UNESCO Convention. This, however, is a one-dimensional conclusion, as it tells us only about the legal effects of the Convention rather than any other types of effects, and does not necessarily reveal the reasons behind the observed level of implementation. This is primarily due to limitations of the data, in only addressing legal sources only conclusions of a legal nature, or relating to legal effectiveness, are possible. It is desirable therefore to look deeper using different sources of data. Interviews are one such source. They allow a consideration of the other effects of the Convention and therefore let us move from legal to political effectiveness. They also allow investigation of the reasons behind the lack of legal implementation. This Chapter will set out case studies of five States Parties in which such interviews were conducted and will look at the possible other effects of the Convention in these States.

6.2 Cases

The case studies of the five States Parties are set out in turn. Each of these will give an introduction to the State and its UCH management system before looking at the possible effects of the Convention in that State. An event matrix of the major events since the adoption of the 2001 Convention in each State, and on the international stage, is included in Appendix 1.[757] This allows a comparison of the timeline of events in each State.

6.2.1 Albania

Only one interview was completed in Albania, and so its use as a case study is limited. What data there is however, will be laid out.

[757] Miles, Huberman and Saldana (n 360) 194–8.

Maritime archaeology is in its infancy in Albania. Under the government of Enver Hoxha, who was head of state from 1944 until 1985, diving, and other uses of the sea, was outlawed, and this led to the UCH off Albania's coast avoiding the large scale looting of shallow sites seen elsewhere in the Adriatic in the latter half of the twentieth century. However, it also meant that the heritage largely avoided scientific investigation.[758]

Albania ratified the 2001 Convention in 2009. As such, Albania's cultural heritage law from 2003 makes no mention of underwater archaeology or the sea,[759] but regulations were introduced in 2014 which set out areas in which diving is permitted and specified that underwater heritage constitutes property of the State and that chance discoveries by divers in these areas should be reported.[760]

In general the Institute of Archaeology within the Academy of Sciences is responsible for archaeological excavations. The first institution concerned with UCH in Albania was the Albanian Centre for Marine Research, which was founded as an NGO in 2010 and undertook a program of research and education. The National Coastal Agency was created in 2013 and is primarily concerned with integrated coastal zone management.

Table 14 Effects in Albania, case level display

Participant	Positive Effect	Negative Effect	Qualified Effect	No Effect
A1				No increased awareness of UCH

The sole interview participant thought that there had been no effects of the Convention in Albania (Table 14), with very few people aware of underwater archaeology or the Convention.

[758] Peter B Campbell and others, 'Developing Maritime Archaeology Education and Outreach in the Balkans: The Illyrian Coastal Exploration Program's Field Schools in Albania, Croatia, and Montenegro' (Forthcoming) 2.

[759] Law No. 9048 for the cultural heritage, 2003.

[760] Decision 321/2014, Për Sigurinë Në Det, Plazhe, Në Ujërat E Brendshme Në Thellësi Të Territorit Dhe Gjatë Ushtrimit Të Sporteve Ujore.

6.2.2 Croatia

Croatia has a long history of maritime archaeology.[761] As a soviet republic of Yugoslavia, the protection of UCH was ensured by Yugoslavian law, but unlike Montenegro and Slovenia, most of the infrastructure, archaeologists and thus research that took place in Yugoslavia was located in the Croatian territory. The development process was by no means one way, and some important institutional features were subsequently lost in Croatia.[762] Nevertheless today the country is among the world leaders in maritime archaeology, with a very high number of projects undertaken and maritime archaeologists in employment.

Croatia's current cultural heritage legislation was introduced in 1999, and amended in 2003, immediately prior to the ratification of the 2001 Convention in 2004.

Croatia has a number of institutions that deal with UCH including the Department for Underwater Archaeology at the Croatian Conservation Institute (CCI) in Zagreb, the UNESCO Category 2 International Centre for Underwater Archaeology (ICUA) in Zadar, and various universities and local museums including the University of Zadar.

Very few of the participants thought that there had been any positive effects of the Convention in Croatia (Table 15). Perhaps the most visible effect seen in Croatia is the formation of the ICUA in Zadar, and its establishment as a UNESCO Category 2 Centre in 2009. Its remit is to promote underwater archaeology in Croatia and the wider region. No participants mentioned this as an effect, perhaps as it was so obvious. However, the increase in international cooperation it has fostered, especially in the training of underwater archaeologists and conservators from the region and further afield, was highlighted.[763] Some problems with it remain, particularly with the funding of international projects by ICUA,[764] and also possibly with higher level cooperation often not happening when it should. This is not just a problem with ICUA in Croatia, as shown

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[761] Irena Radić Rossi, 'Underwater Cultural Heritage and Maritime Archaeology in Croatia: An Overview' (2012) 15 European Journal of Archaeology 285.

[762] ibid 293.

[763] C2, C5, also S3.

[764] C2.

by the discovery of the *Re d'Italia*, where Italy arguably should have been consulted by Croatia on its protection and research but was not.[765]

The Convention may also have had a negative effect in Croatia. ICUA was originally going to be a national centre, part of the CCI, with facilities for conservation, education and dissemination, but due to it becoming a UNESCO centre, it had to be made independent of the Croatian government.[766] Thus the CCI was left without its new conservation facilities, and now competes with ICUA for funding.[767]

Table 15 Effects in Croatia, case level display

Participant	Positive Effect	Negative Effect	Qualified Effect	No Effect
C1				Convention remains abstract and little known Cooperation not always respected, especially in sensitive archaeological projects
C2	More focus on inland waters, as the Convention stresses the importance of inland UCH Increase in collaboration, especially training of foreign archaeologists		Archaeological regulations altered to be in line with Annex, but also for terrestrial archaeology	No change to legislation, it was thought unnecessary

[765] C1; Vladimir Duro Degan, 'The Legal Situation of the Wreck of the Ironclad "Re D'italia" Sunk in the 1866 Battle of Vis (Lissa)' (2012) 51 Poredbeno Pomorsko Pravo 1.

[766] C4.

[767] C4.

	and conservators through ICUA			
C3			Some limited jurisdiction over UCH for coastguard and MoD beyond territorial waters set out on ordinances, but not thought used	Mechanisms related to EEZ, CS and Area not implemented Declarations in Article 9(2) and 22(2) not completed
C4		ICUA became independent from government when it came under auspices of UNESCO, duplicating institutional remits, reducing budgets of the institutions and leaving CCI without conservation facilities		Convention has not affected the work of underwater archaeologists Some laws are not enforced Convention has had no significant effect
C5	Makes situation with State vessels in territorial waters simpler Cooperation has increased, largely through ICUA			Some national legislation still incompatible with Convention, eg designations There has been some progress in UCH management, but no direct relationship with the Convention, more because of evolution

Croatia's legal system has seen very little effect from the 2001 Convention. Croatia had a comprehensive system in place prior to the Convention, and it was not thought necessary to change it. This is despite having no provisions for UCH beyond territorial waters, and the Croatian protection system being based on designation, rather than the blanket protection the Convention requires. To paraphrase a participant: all dolphins are protected because they are dolphins, all amphora should be protected because they are amphora.[768] However, the principles in the Rules in the Convention's Annex found their way into law through archaeological regulations, introduced just after ratification of the Convention,[769] which brought the practical procedures of archaeological research in Croatia into line with the Rules.[770] This may not have been a direct effect of the Convention though, as it covers both terrestrial and underwater archaeology.

For the enforcement of UCH legislation in Croatia, the Ministry of Culture cooperates with the Coastguard. The Coastguard law entered into force in 2007, and the Ministry of Culture created an agreement with them in 2009 for the protection of UCH at sea, which includes the 2001 Convention's definition of UCH.[771] The Coastguard is part of the Croatian Navy, created to ensure cooperation between various ministries that use the sea, and that all such ministries are able to send representatives on the Coastguard's vessels when they are performing their tasks. This has been helping the cultural heritage inspectorate,[772] as the cultural heritage inspectors can now go on harbour authority, naval or police boats, and dive with divers from the maritime police and navy. This allows the inspection of two or three UCH sites every month, and also the possibility to inspect other vessels using the sea. This is essential as the Ministry of Culture does not have its own vessel. Prior to this the Ministry of Culture was either unable to check sites, or visits were limited to one or two trips a year. There are also higher level meetings, known as the Central Coordination for Supervision and

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[768] C5.

[769] Ordinance on Archaeological Research 2005.

[770] C2.

[771] Zakon o Obalnoj Straži Republike Hrvatske 2007; Pravilnik O Suradnji Obalne Straže S Tijelima Nadležnima Za Zaštitu Kulturnih Dobara Na Moru, Morskom Dnu I Podmorju 2009, s2.

[772] C5.

Protection of Rights and Interests of the Republic of Croatia at Sea,[773] to oversee and plan such coordination, at which the Ministry of Culture is represented. Some archaeologists are sceptical of this, calling the Coastguard law just paper.[774] The main problem is that the navy only have three ships, and these are always focussed on other, seemingly more important duties. With the example of Palagruža, a Croatian island in the middle of the Adriatic, the navy only visits every one or two weeks, which is not thought enough to protect the island's rich UCH, threatened by Italian divers. It is seemingly rare that the cultural heritage inspectorate is present on a naval vessel however, much more commonly it's a harbour authority boat, and increasing the ability to inspect inshore, shallower wrecks must be an advantage.

The creation of the Coastguard and the subsequent agreement with the Ministry of Culture appears influenced by the 2001 Convention, as its language is contained within these instruments. However, the Ministry of Culture would likely have been involved in such cooperation anyway, considering Croatia's tradition of maritime archaeology and the fact that numerous other ministries and agencies were involved, seemingly all the possible ones that have an interest in the sea.[775] The 2001 Convention clearly did not cause all the relevant Ministries to cooperate. It may have slightly increased such cooperation therefore, but it arguably did not cause it.

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[773] Zakon o Obalnoj Straži Republike Hrvatske 2007, art 8.

[774] C4.

[775] The Ministries and agencies involved in the Central Coordination for Supervision and Protection of Rights and Interests of the Republic of Croatia at Sea are the ministry responsible for defence, the ministry responsible for maritime affairs, the ministry responsible for internal affairs, the ministry responsible for marine fisheries, the ministry responsible for environmental protection, the ministry responsible for the economy, the ministry responsible for finance, the ministry responsible for foreign affairs, the ministry responsible for culture, the ministry responsible for justice, the State Protection and Rescue Administration (DUZS), the State Inspectorate, the police, the Armed Forces, the Croatian Navy and the Coastguard. Coastguard law art 8(2).

6.2.3 Italy

Italy has a long and storied history of maritime archaeology. As long ago as the fifteenth century people were investigating two submerged Roman vessels in Lake Nemi,[776] and as early as the 1950s such underwater investigation began to be placed on a more scientific footing, with excavations of wrecks at Albenga and Spargi notable in this regard, and the archaeologists Gianni Roghi and Nino Lamboglia leading the way.[777]

This history of pioneering study, and also Italy's abundance of cultural heritage both on land and underwater, seems to still be forefront in the consciousness of the country, and plays a part in its identity. Italy was proactive in the negotiations of the 2001 Convention and was keen to ratify it after.[778] Despite this, due to political reasons, ratification did not take place until 2010.

This pioneering tendency is also seen in the legislative protection of UCH. As early as 1939 Italy had introduced innovative, for its time, legislative protection for its cultural heritage.[779] Italy now has the Cultural Heritage and Landscape Code, a comprehensive instrument dealing with heritage management and archaeology within Italy's territory, territorial waters, and 12-24 M from its baselines.[780] The law allowing ratification of the 2001 Convention, and implementation of some of its provisions beyond territorial waters, was introduced in 2009.[781] As seen previously, Italy has perhaps the most comprehensive legislative implementation of the 2001 Convention amongst all the Convention's States Parties (Chapter 1). This however, purely relates to the protection of UCH beyond the territorial sea. The framework otherwise for heritage protection and

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[776] George F Bass, 'The Development of Maritime Archaeology' in Alexis Catsambis, Ben Ford and Donny L Hamilton (eds), *The Oxford Handbook of Maritime Archaeology* (Oxford University Press 2011) 4.

[777] Peter Throckmorton (ed), *The Sea Remembers: Shipwrecks and Archaeology* (2nd edn, Chancellor Press 1996) 64–5.

[778] I1, I3.

[779] Legge 1089/1939, Protection of items of artistic and historical interest.

[780] Decreto Legislativo 42/2004.

[781] Legge 157/2009.

the practice of underwater archaeology was already in place prior to ratification of the Convention and is contained within the Cultural Heritage and Landscape Code.[782]

Due to the unified nature of Italy's cultural heritage regime, underwater archaeology and UCH management is subsumed in the general institutional structures in Italy, with the Ministry of Cultural Heritage, Activities and Tourism (MiBACT) at the centre, and its regional *Soprintendenze* (superintendecies) responsible for protection and research in their territories. In Sicily there is a degree of autonomy, and it has its own *Soprintendenza Del Mare* (Superintendency of the Sea), which has authority over underwater archaeology.

There appear to be a number of other effects of the Convention in Italy, aside from the direct legislative effect, and none of these were thought to be negative (Table 16). Despite the existence of *Legge* 157/2009 that protects UCH beyond territorial waters, enforcing these protection measures beyond 24 M still appears to be difficult. It is felt that there is little concrete power that can be used to stop looting in these areas, especially if other countries that have not joined the 2001 Convention are involved.[783] However, Italy has submitted the only notification under Article 9(3) of the Convention for UCH located in its EEZ or on its continental shelf.[784] This was in relation to a Roman wreck found beyond the Territorial Sea.[785] In this case, no other State specified that they had a verifiable link and so the Convention's protection mechanisms, including the consultations, were not initiated.[786] This seems therefore to be a particular problem for Italy, as one of the only States that has implemented these provisions of the Convention it is alone in attempting to apply the protection measures, and thus they are ineffective as they require the input of other States.

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[782] Decreto Legislativo 42/2004.

[783] I8.

[784] UNESCO Doc. UCH/15/5.MSP/5, 8.

[785] I2.

[786] I2.

Table 16 Effects in Italy, case level display

Participant	Positive Effect	Qualified Effect	No Effect	Unknown Effect
I1	Increased collaboration between MiBACT, Navy, *Guardia di Finanza* and *Carabinieri* for enforcement purposes Reporting system in EEZ/continental shelf working on their part Awareness of UCH has been raised The Rules in the Annex have improved the quality of the discipline, and how its viewed by others People less likely to loot UCH due to the reputation of the *Carabinieri* and *Guardia di Finanza* Increased international collaboration		Enforcement of legislation still a problem, better result with WWI UCH in Italy due to different law	
I2	Legge 157/2009 introduced Reporting system in EEZ/continental shelf working on their part Annex is important, Rules provides some indications on how an underwater archaeology research should be conducted	The ZPE law of 2009, and the declared zones, intended to protect the natural environment but competencies over UCH also included	No bearing on the resolution of the looting of the Ancona	
I3	Legislative implementing measures are in place	Rules have produced a more professional and measured approach to project planning in underwater archaeology, but this may be also to due to European funding requirements Increased collaboration between MiBACT, Navy, *Guardia di*		

		Finanza and *Carabinieri* for enforcement purposes was in place before the Convention, but may have been intensified since		
I4	More consciousness of the necessity to leave UCH *in situ*, less focus on recovery Convention can be used to ensure that an underwater archaeologist directs underwater archaeological work	Treasure hunting still a problem, but more consciousness that it's a bad thing, and the police, *Carabinieri* and *Soprintendenze* are focussing more on this type of crime	Rules have had no effect on practice of archaeology (except *in situ*)	
I5				Convention does not affect their work, so effects unknown
I6	Change in mentalities regarding UCH internationally Lends authority to underwater archaeology, used to justify scientific behaviour and helps in funding applications to organisations that do not know about underwater archaeology		UNESCO principles (Rules in Annex) have been used in Italy for a long time	
I7	More consciousness of the necessity to leave UCH *in situ*, less focus on recovery Convention can be used to ensure that an underwater archaeologist directs underwater archaeological work			

I8	*Soprintendenza del Mare* in Sicily was created using the Convention as justification Changing mentalities: 'It is becoming shameful to say that you are looting a wreck' Ensuring that underwater archaeology has a scientific basis, equal with terrestrial archaeology, including that an underwater archaeologist directs underwater archaeological work	Although there is unanimity on the need to follow the Rules, few organisations (worldwide) are doing this in practice	No bearing on the resolution of the looting of the Ancona	

It was also stated that *Legge* 157/2009 has not been consistently enforced.[787] A more effective law is the law protecting WWI heritage, which comes with much more severe sanctions than the Cultural Heritage and Landscape Code and *Legge* 157/2009.[788] In Liguria wrecks located beyond territorial waters are protected by other means.[789] The Coastguard has issued three ordinances protecting three wrecks.[790] The first two of these reference *Legge* 157/2009, Article 94 of the Cultural Heritage and Landscape Code which applies the Rules of the Convention in waters 12-24 M from baselines, and the two instruments related to the ZPEs.[791] In addition to the protection offered by the referenced legislation, the ordinances also forbid fishing of all types within a zone a certain distance around the wrecks. The third instrument does not reference any of the UCH related legislation, but prohibits fishing and any underwater activity or prospecting.[792] This shows that protection in Liguria of UCH is being enforced, but that the protections related to the 2001 Convention and its implementing law are not seen as enough to do this properly. It is obviously felt however, that the jurisdiction is in

[787] I1.

[788] Legge 78/2001, Tutela del patrimonio storico artistico della Prima guerra mondiale; I1.

[789] I5.

[790] Ordinanza 241/2012, Rinvenimento di un relitto di epoca romana; Ordinanza 148/2014, Relitto di epoca romana; Ordinanza 187/2016, Interdizione Area per Rinvenimento Sito di Interesse Archeologico.

[791] Ordinanza 241/2012; Ordinanza 148/2014.

[792] Ordinanza 187/2016.

place to allow the Coastguard to enforce these ordinances outside of territorial waters. Similarly when Odyssey recovered objects from the wreck of the SS *Ancona*, sunk in 1915 by a U-boat, and located on the continental shelf between Italy and Tunisia,[793] they were not stopped by the Convention.[794] They sought to gain a salvor's right from a court in Florida in 2007, in the same manner as they did with the *Mercedes*, this time by presenting a teacup with an inscription that demonstrated its province from the vessel.[795] The Italian government stepped in and in 2010 Odyssey declared it had no further interest in the wreck, and so the judge elected not to decide the case.[796] What deterred Odyssey is not known, but it is more likely to be due to the doctrine of sovereign immunity, by which Odyssey lost the first iteration of the *Mercedes* case immediately prior to this, or by the fact it is a war grave, which some Italian representatives involved in the case were going to argue.[797]

The Convention may have developed the cooperation between institutions in Italy for enforcement of UCH laws. The ratification process in Italy, leading to *Legge* 157/2009, took a long time, and included input from the Ministries of Finance, Foreign Affairs, Defence, the Environment, and Culture.[798] This also seems to have sparked increased cooperation between MiBACT and other bodies such as the Navy, which has made an official agreement with MiBACT.[799] An officer from the Navy now works for two days a week at MiBACT, and so the vessels of the Italian Navy, and significantly, their

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[793] It is unknown whether the wreck lies on the Italian or Tunisian continental shelf: Tullio Scovazzi, 'L'Approche Régionale à La Protection Du Patrimoine Culturel Sous-Marin: Le Cas de La Méditerranée' (2009) 55 Annuaire Français de Droit International 577, 582.

[794] I2.

[795] Scovazzi, 'L'Approche Régionale à La Protection Du Patrimoine Culturel Sous-Marin: Le Cas de La Méditerranée' (n 793) 582; 'Odyssey Marine Exploration Announces 2009 Financial Results' (*Odyssey Marine Exploration*, 9 March 2010) <www.shipwreck.net/pr198.php> accessed 3 August 2017.

[796] I2.

[797] I2, I8; Scovazzi, 'L'Approche Régionale à La Protection Du Patrimoine Culturel Sous-Marin: Le Cas de La Méditerranée' (n 793) 582.

[798] I1.

[799] I1.

hydrographic survey equipment, can be used in some instances for the protection or research of cultural heritage.[800] The Navy offered its resources in the ArcheoMar project, a project to map the UCH of Italy.[801] A further research program was initiated between MiBACT, the Navy and the Ministry of Defence in relation to WWI heritage, which discovered a number of new wrecks using the Navy's remote sensing capabilities.[802] Such direct help has been stalled by the European migrant crisis, which has recently been taking up most of the Italian Navy's resources. In addition, MiBACT works with the *Carabinieri*, which has an underwater unit within the *Comando Carabinieri per la Tutela del Patrimonio Culturale*, the *Guardia di Finanza* and the coastguard. This means that many vessels and aircraft are aware of the issue of UCH and can, for instance, check on vessels located near protected areas during their other activities.[803] This is vital for MiBACT which does not have its own vessel. However, this sort of help is effective in preventing the larger scale, international looting, and not smaller scale, shallow water looting.[804] In addition, this collaboration was taking place prior to the 2001 Convention,[805] but it seems to have increased somewhat since ratification.

The 2001 Convention has had some institutional effects in Italy as it was used to drive the creation of the S*oprintendenza del Mare* of Sicily.[806] It allowed an archaeologist to catch the attention of politicians and establish this institution. Similar effects were not seen in other parts of Italy. The creation of a S*oprintendenza del Mare* has twice been attempted, either for all of Italy, or for three larger regions, but these plans have never

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[800] I1.

[801] Ministero per i Beni e le Attività Culturali, 'The Archeomar Project' (2011) <www.archeomar.it> accessed 9 March 2018.

[802] I1.

[803] I1.

[804] I3.

[805] See for instance: Decreto Ministeriale 175/1989 Disposizioni per la tutela delle aree marine di interesse storico, artistico o archeologico.

[806] I8; Legge Regionale 21/2003, Legge Finanziaria 2004, art 28.

come to fruition (section 8.2.1). Worryingly, in the current reforms of MiBACT, UCH and underwater archaeology have not been mentioned.[807]

In Italy, private individuals can now see that archaeology is a complex, professional task.[808] Scientific principles were certainly being used in Italian underwater archaeology prior to the Convention, but now it is possible to say that they are UNESCO principles, which lends them authority.[809] This can help with funding, as people in various different funding organisations often do not have an awareness of underwater archaeology, but will be impressed by the status that the name of UNESCO confers.[810] One participant pointed out that now most archaeologists, when talking with journalists, always mention the Convention, justifying their research or protection decisions with reference to it.[811] The Convention therefore lends authority to the profession of underwater archaeology. Similarly it has brought about more stringent rules on who can run excavations and make decisions concerning underwater archaeology, halting the practice of unqualified people running underwater excavations or taking decisions without proper archaeological surveys.[812]

The Rules in the Convention's Annex may have improved the practice of underwater archaeology in Italy. It was stated that the Rules have 'fundamentally improved the quality of the discipline.'[813] More specifically, this relates to fieldwork and the way sites are approached. This is due to Rules such as the need to have funding in place to conserve, document, curate recovered material and disseminate the results in advance of research.[814] In the 1990s it was common for an archaeologist to start an excavation and leave it unfinished and move to another site, without any proper plan of what to do

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[807] I6.

[808] I1.

[809] I6.

[810] I6.

[811] I6.

[812] I4, I7, I8.

[813] I1.

[814] Rules 17-19.

with the recovered artefacts.[815] This mentality has changed, driven by an awareness of the principles of the Convention from the practitioners. This effect may be more apparent on a longer scale of time, as younger practitioners know of the Convention and accept it as the standard that they have to follow throughout their careers.[816]

Despite the Convention's cooperative protection measures not being initiated the Convention still seems to have helped with international cooperation is some respects. Numerous countries have been asking Italy for help and enquiring about its experiences with the Convention.[817]

6.2.4 Montenegro

Montenegro, following independence from Serbia in 2006, ratified a raft of treaties between 2006 and 2009, including in 2008 the 2001 Convention, along with all of UNESCO's other cultural heritage conventions. There is little history of maritime archaeology in Montenegro and as such little awareness of it or the Convention.

A new cultural heritage act was introduced in 2010, and the Ministry of Culture was reformed in 2011. It was planned to create a department of underwater archaeology in this reform, but this never materialised. Instead, the Centre for Conservation and Archaeology in Cetinje was created to research archaeology, and the Directorate for Cultural Heritage remains in the Ministry and is in charge of protection and administration.

There has been little legislative effect of the Convention in Montenegro (Table 17). The cultural heritage law of Montenegro introduced in 2010 mentions underwater heritage, but does not regulate protection in detail or the illicit trade of UCH.[818] Enforcement, perhaps, is a larger problem than the legislation itself. The cultural heritage inspectors have difficulty in knowing how to protect UCH. As one participant wryly explained:

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[815] I3.

[816] I6.

[817] I1.

[818] M1; Protection of Cultural Property Act 2010.

…someone has reported that amphoras have been taken out from a site in 70m depth and [the inspector] is like, "what now? I can't swim, I don't know how to dive."[819]

Table 17 Effects in Montenegro, case level display

Participant	Positive Effect	Qualified Effect	No Effect
M1	The Convention can be used to argue for a particular course of action Small number (3) archaeologists trained to dive One shipwreck has been designated	New laws (2010) brought in new provisions related to underwater archaeology, but do not implement the Convention fully	No way to enforce laws Very little awareness of Convention Planned institutional reform did not happen Rules not followed Little international cooperation No other effect
M2	Ministry of Culture is funding underwater archaeology projects Small number of archaeologists trained to dive Ministry more aware of underwater archaeology		

This shows that Montenegro is a step behind its neighbours. The cultural heritage inspectors understand little of how to protect UCH. In addition, it has not yet been decided which organisation is responsible for implementing the Convention, nor which body has jurisdiction over controlling the state of underwater heritage or imposing sanctions.[820] Some progress may be imminent in this regard, as immediately following

[819] M1.

[820] M1.

the interviews in 2016 the Montenegrin Navy met with the Directorate for Cultural Heritage and requested the coordinates of wreck sites.[821]

The largest effect of the Convention in Montenegro is the training of underwater archaeologists. It was originally planned to have an underwater archaeological department when the Ministry of Culture was reformed in 2011, but this never materialised and instead three archaeologists were trained to dive, taught some underwater archaeology methods and given diving equipment.[822] They remain working within the terrestrially focussed institutions, but sporadically undertake underwater research.

6.2.5 Slovenia

Slovenia, like Montenegro and Croatia, is a former Yugoslav Republic. Archaeological research was taking place during the Yugoslav period and Slovenia has been successful in pushing forward with underwater archaeology since.[823] Research has focussed primarily on its inland waters, especially the Ljubljanica River, rather than on its exceedingly short Adriatic coastline.[824]

Slovenia's older cultural heritage act of 1999 was replaced in 2008 by one that took account of underwater archaeology and UCH protection, at about the same time as Slovenia ratified the 2001 Convention in 2008.[825] A 'Group for Underwater Archaeology' was founded in 2002 within the Institute for the Protection for the Cultural Heritage of Slovenia and undertook preventative, developer-led research. However, Slovenia remains without a fully-fledged department of underwater archaeology with protection and research duties for UCH.

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[821] M1.

[822] M1.

[823] Andrej Gaspari, 'Underwater Archaeological Investigation in Slovenia: Historical Overview and Perspectives' in Andrej Gaspari and Miran Erič (eds), *Potopljena Preteklost: Arheologija vodnih okolij in raziskovanje podvodne kulturne dediščine v Sloveniji* (Didakta 2012).

[824] Andrej Gaspari, 'Archaeology of the Ljubljanica River (Slovenia): Early Underwater Investigations and Some Current Issues' (2003) 32 International Journal of Nautical Archaeology 42.

[825] Cultural Heritage Protection Act 2008.

Table 18 Effects in Slovenia, case level display

Participant	Positive Effect	Qualified Effect	No Effect
S1	Underwater archaeology mentioned in legislation (2008) for first time		Has not led to systematic research No other effect
S2		Some UCH provisions in law, and Convention applicable directly due to Article 8 of Constitution, but provisions of Convention not implemented Used to justify extension of jurisdiction in EEZ and continental shelf which were introduced for other reasons	
S3	Increased international collaboration, especially with ICUA and the University of Zadar	Institute for the Protection of Cultural Heritage of Slovenia established a Group for underwater archaeology, but only focussed on development-led archaeology Some legislative change, including the protection of the Ljubljanica River, but not all provisions implemented	No effect on archaeological practice

Slovenia saw some minor change in its legislation following the Convention, as heritage located underwater is now included in the scope of the general cultural heritage law, where it was not in the previous law (Table 18).[826] Archaeologists working in the Ministry of Culture were consulted on the creation of this new law, and pushed to have UCH included in it, and stated that they were influenced in this by the 2001

[826] Cultural Heritage Protection Act 2008, art 3(1); S1, S3.

Convention.[827] The detailed provisions of the Convention however, including the reporting systems for example, were not included. Another significant legislative change was highlighted in the interviews, the declaration of the riverbed of the Ljublianica River as a cultural monument of national importance in 2003.[828] This ordinance banned diving and other interventions in the river without prior consent from the Ministry of Culture.[829] This seems to have dramatically decreased looting that was taking place in the river, and some Italian divers, attracted to the river after an article in National Geographic, were caught and prosecuted.[830] Whilst this designation occurred earlier than ratification of the 2001 Convention, it was stated that the ratification process and the protection of the Ljublianica went hand in hand.[831] Archaeological regulations were also introduced in Slovenia which mention the 2001 Convention.[832] Regarding the jurisdiction over UCH in the sui generis zone beyond territorial waters, this was initiated due to Italy and to some extent Croatia having done so first, and was seen as more of 'a cut and paste exercise' than any effect of the Convention.[833]

Slovenia also arguably saw a slight institutional effect, as the Institute for the Protection of Cultural Heritage of Slovenia established a Group for underwater archaeology in 2002 which undertook development-led projects. Despite this being before ratification of the 2001 Convention, the formation of the group did have some impetus from the Convention.[834] As one member of the group said:

> We were more or less enthusiasts supported from time to time by the State.[835]

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[827] S3.

[828] Ordinance 5033/2003, o razglasitvi struge reke Ljubljanice ter njenega pritoka Ljubije, vključno z bregovi, in območja stare struge Ljubljanice, za kulturni spomenik državnega pomena.

[829] Ordinance 5033/2003, art 4.

[830] S3.

[831] S3.

[832] Pravilnik o arheoloških raziskavah 2013.

[833] S2.

[834] S3.

[835] S3.

The establishment of a permanent organisation for underwater archaeology with dedicated staff and equipment has failed to materialise, however.

6.3 Cross Case Effects

A number of different types of effects can be gleaned from the case studies. These can be said to fall within the categories: legislative, enforcement, institutional, practice of underwater archaeology, authority of underwater archaeology, awareness of underwater archaeology, and international cooperation. The interviews that mention these categories are shown in Table 19, and the evidence for them is displayed in more detail in the following sections (Tables 20-26). This evidence is coupled with a judgement by the author as to whether the evidence shows that the Convention's influence can be classified as high, medium, low or none.

Table 19 Effect meta-matrix[836]

	Positive Effect	**Qualified Effect**	**No Effect**	**Negative Effect**
Legislative	I2, I3, M1, S1	C2, C3, I2, M1, S2, S3	C2, C3, C5	
Enforcement	I1, I2	I3, I4	C4, I1, I2, I8, M1	
Institutional	I8, M1, M2	S3		C4
Practice of underwater archaeology	I1, C2, I2, I4, I7	I3, I8	C4, C5, I4, I5, I6, M1,S1, S3	
Authority of underwater archaeology	I1, I4, I6, I7, I8, M1			
Awareness of underwater archaeology and UCH	I1, I6, I8	I4	A1, C1, M1	
International Cooperation	C2, C5, I1, S3		C1, M1	

6.3.1 Legislative

It can be said that there has been a large effect of the Convention in legislation in Italy and Slovenia (Table 20). The legislative effects in Italy would certainly not have

[836] Miles, Huberman and Saldana (n 360) 135.

happened without the 2001 Convention, at least in their current form. Participants in Slovenia were also particularly clear that the 2001 Convention directly caused this change.[837]

One interesting aspect of this evidence is the difference in expectations between these States. Italy attempted to implement the full, complex procedures of the Convention, whereas the participants in Slovenia felt that merely introducing UCH into their cultural heritage law is a positive outcome. Also worth noting is the profession of the two Italian participants that noted this effect, a legal academic involved in drafting *Legge* 157/2009 and an archaeologist that worked at the central Ministry. No other archaeologists mentioned this law, as it does not seem to affect their work.

Little legislative effect is noted in Croatia and Montenegro. A Montenegrin participant only mentioned the positive effect of a shipwreck designation to highlight the dearth of effects elsewhere.[838] The Albanian diving regulations were not mentioned as an effect by the participant.[839]

Table 20 Construct Table of Legislative Effects[840]

Designation	Quotation from interviewees in relation to the legislative effects of the 2001 Convention	Effect of Convention
I2	[Legge 157/2009] is the law which authorises ratification of the Convention and includes some provisions for the implementation of the Convention in Italy… The starting point was that the Convention needs some provisions for being implemented in domestic jurisdiction. It is not really self-executing. Yes, that legislation [Legge 61/2006] which is basically intended to protect the natural environment, but among the competencies which have been granted to the coastal State also competencies for the protection of the UCH are included.	High
I3	In terms of the legislative framework, Italy has aligned with the implementing measures set up by the Convention	High
S1	*(Q. How influenced was [the Cultural Heritage Protection Act 2008] by the 2001 Convention?)* Yes, it was, by putting in all articles, before we had no mention of	High

[837] S3.

[838] M1.

[839] Decision 321/2014, Për Sigurinë Në Det, Plazhe, Në Ujërat E Brendshme Në Thellësi Të Territorit Dhe Gjatë Ushtrimit Të Sporteve Ujore.

[840] Miles, Huberman and Saldana (n 360) 171.

	underwater. So we pushed this. We had this Convention, so now we have in laws, we have mention. But that's all. If we are talking about protection, we have good protection.	
S3	*(Q. Did 2001 Convention influence the [the Cultural Heritage Protection Act 2008]?)* It influenced me, I was the only person at Ministry in archaeology. I had good bosses and leaders, they left me to my judgement to the appropriateness of some solutions and supported me and I think it worked really well. The ratification and Ljubljanica protection act went hand in hand.	High
S2	Let me put it like this. There is a juridical point of view and the first point that has to be raised is that Slovenia, according to Article 8 of our Constitution, ratified Conventions are applied directly. So it means there is no need to transpose its provisions into national law, this can be done, for example by guidelines clarifying it, but it is directly applicable. It's above Slovenian law. There is reference, not directly to the 2001 Convention, but to the protection of UCH, in the Act proclaiming or confirming the right of Slovenia to a continental shelf and proclaiming its zone of ecological protection from 2006. Otherwise we have not amended the Maritime Code in this regard. There is a specific law, which is the law about Cultural Heritage Protection, 2008, which I don't think, I haven't noticed, it is applicable also to UCH, so it means that it triggers the application of the UNESCO Convention, but on the other hand, I haven't noticed, I haven't read it entirely, but I don't think that actually it incorporates exactly the provision of the UNESCO Convention.	Medium
C2	So they felt that the law that we had at that moment was already so strict that we would need not to make any changes to our law, because everything that is required from the countries when they signed the Convention, sometimes when they ratify they also have to change the law, to make the protection on the higher level, so the Convention would really be in place, but we had this already so strict that it felt, they said to the Minister, look everything that the Convention wants of us we already have this here. We also had, this is not a law, it's called a '*Pravilnik*', I think the English would be 'rules', 'procedures', ok, but the State, the Ministry said what is the procedure when you do something, so these procedures were also changed at the signing of the Convention, which we more in line with the Annex, but this is also not something that I would directly connect to the Convention itself. It's also the raising of the standards for the field archaeology, for the land archaeology. And this is practically meaning everything that is written in the Annex, the money that has to be prepared for the conservation of the artefacts for example, things like this. So this is not on the letter of the law, because the law is more general than specific, but these rules or procedures that are sub-law document let's say. These are also the procedures that each archaeologist in Croatia has to follow, and this has also very strictly the things that is mentioned in the Annex to the Convention. Not with the same wording, but very, very similar. But also it's not just for the underwater archaeology as I said, it's also for the land archaeology in Croatia.	Low
C3	In Croatia we have a general cultural heritage law. We don't have a specific UCH act. The 1999 Cultural Heritage Act mentions UCH sites. And also encompasses cultural objects that have been removed. But nowhere the reporting and consultation procedures of Art 9 and 10 are mentioned.	Low

	According to Croatian constitution it is also doubtful how that works in practice. Treaties that were entered into by Croatia, and have been published, and are in force, they are above the acts of parliament. *Lex Superior*. So one could argue we can apply the Convention directly, but of course it doesn't work that way. As we need to implement it in some form, we need to know who is responsible. So that's a problem. But I think we're not alone there.	
M1	Our set of laws, our national laws, well they've, the new laws that are applying from 2011, regarding cultural heritage are just mentioning underwater archaeology, mostly through articles like you can do the research, maritime archaeology research if you have, you know, a staff member that has a licence and stuff like that. It doesn't regulate protection or illegal trade or anything like that. We don't have law regulations that have anything to do with maritime archaeology in that… They [the national laws] are not opposing the Convention, but they are just not using the Convention. You know what has been changed for, that's almost 10 years? One shipwreck has been put under legal protection and that's it. Nothing.	Low
C5	Some things are not compatible between Croatian law and the Convention. In all laws there are things that could be better. Croatian heritage is only things that have been designated. They are protected by law if there is an ID for the site. Unknown sites don't have this obviously. All dolphins are protected because they are dolphins, all amphora should be protected because they are amphora. All caves are protected in Croatia. But not all UCH is.	None

6.3.2 Enforcement

The success of legislation depends partly on the ability of a State to enforce it. There is disagreement in Italy as to the effect of the Convention in this matter (Table 21). Again, this is divided between the legal academic and the MiBACT archaeologist on one side, and academic archaeologists on the other.

With regards to the enforcement of *Legge* 157/2009 the MiBACT archaeologist noted that it had not really been enforced.[841] On the other hand, it was mentioned that Italy remains the only State Party to provide the notification to the Director General of UNESCO under Article 9(3) so it must be somewhat effective.[842] However in the case of the *Ancona* (section 6.2.3), which occurred immediately prior to the introduction of Legge 157/2009, the act would arguably not have helped, and the situation would have proceeded in the way it did anyway. Odyssey would have removed the remains and

[841] I1.

[842] I1, I2.

taken them to the US without notifying Italy. The very similar circumstances of the *Mercedes* case can be used as a comparator, in that case Spain was held to have sovereign immunity over the wreck, rather than Portugal being able to protect it through the Convention, as it was located on its continental shelf (section 5.4). In the media at the time, Italian archaeologists involved in the incident used the argument that the wreck of the *Ancona* is a war grave, and did not mention the 2001 Convention,[843] and this was also the argument they were going to pursue in court.[844]

The relationship of MiBACT and other bodies such as the Navy and the *Carabinieri*, was a topic related to enforcement that was discussed at greater lengths by the participants. The effects of the Convention in this regard are debatable. This cooperation was certainly in place prior to the 2001 Convention, but arguably increased because of it.[845] Other practitioners that spoke of this subject were unsure that the Convention had caused this increase.[846]

Similar cooperation is seen in Croatia, through in particular the Coastguard Law. One participant, a former heritage inspector, described the process in detail and was very positive about it.[847] As in Italy however, the effect of the Convention in this regard is debatable. In general, according to that participant, recent changes in Croatia were due to a natural evolution, rather than the Convention.[848] Another participant was very sceptical about the capacity to enforce laws in Croatia.[849]

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[843] John Hooper, 'Courts Curb Bounty Hunters Seeking Torpedoed Liner's £15m Bullion' *The Guardian (Online)* (12 January 2010) <www.theguardian.com/world/2010/jan/12/bounty-hunters-italy-ancona-courts> accessed 3 August 2017.

[844] I2, I8; Scovazzi, 'L'Approche Régionale à La Protection Du Patrimoine Culturel Sous-Marin: Le Cas de La Méditerranée' (n 793) 582.

[845] I1.

[846] I3.

[847] C5.

[848] C5.

[849] C4.

Montenegro has perhaps the greatest difficulty in enforcement, and although some steps in the right direction have been made, these are not linked to the Convention.[850]

Table 21 Construct table of enforcement effects

Designation	Quotation from interviewees in relation to the enforcement effects of the 2001 Convention	Effect of Convention
I2	*(Q. Do you think the law [Legge 157/2009] is effective, is it being enforced at the moment?)* I think so. Italy is the only State that has so far made a declaration relating to some UCH, I think it was a Roman wreck found in the Area beyond the Italian territorial sea. You know that under the Convention there is a machinery... The reporting system, you have an obligation to make a report and then all the States which have a verifiable link are entitled to participate in consultations. So, so far Italy is the only State, for only one wreck, that has made this notification which is an obligation under the Convention. Maybe something you don't know is there was a question between Italy and Odyssey on a liner, which was found in the Mediterranean, it was hit by a torpedo during WWI, and the name was Ancona, of the liner. And Odyssey asked the court in Tampa, Florida, to be granted salver rights, and Italy intervened in the case and the position by Italy was that Odyssey could not touch a liner with the Italian flag in the Mediterranean. The liner is located on the continental shelf between Italy and Tunisia, I think more on the Tunisian side than on the Italian side, but it had the Italian flag. And it was transporting people, mostly Italian migrants from Italy to the USA in 1914, so there were also American national on board. And we were discussing how to present our position to the American judge, but in fact during the proceedings Odyssey declared that it had no more interest in making activities on the wreck. That was an official declaration by Odyssey. And so the American judge decided not to decide the case. Unless Odyssey resumes activities.	High
I1	If you want to have something we made, like the Convention with the Italian Navy, it's a very important Convention because one officer of Italian Navy stay in the Ministry, two days a week in the Ministry of Culture, so we make all the problems together. They know what they can do, but now all the Italian ships are in the Sicilian channel for the migrants. But if they have, and they have also the hydrographic… so this is important, a typical Convention, so we have an official officer that stays with us for two days in a week to work on culture. This is also something that came from the Convention because the partnership is not to work together one time in a month, one time in a week, but something that I know how I work, and they know how I work. *(Q. How far would you say the law [Legge 157/2009] is enforced?)* I don't, this is no, no, there is a not very good result for this, because I don't know, but we have a result only for the WWI because in Italy we have a law also to protect WWI Italy will be the first State Party that said we find shipwrecks in	Medium

[850] M1.

	extraterritorial sea. You know for the Convention if you, each State Party that finds something outside, can communicate this… Italy was the first States Party that made this communication.	
I3	I think Italy we have been always pretty good in the sense that we have a lot of bodies, authorities, apart from the Ministry of Cultural Heritage, and I think I wrote it somewhere if you, no, it was in my thesis, ok basically the Ministries are backed up by the *Carabinieri*, which has an underwater section, that intervenes if called if people are smuggling or souveniring etc. There is the coastguard as a body as well that collaborates, we collaborate a lot in Sicily with the Coastguard and in Sardinia as well. And some of them are also well trained as underwater archaeologists… Then the customs police as well, and having so much bother, you know, they're always crossing the sea and they help a lot in preventing a lot of this looting. But again it's a bit, they, most of their help is in stopping big looting, looting coming from people with boats, with tools, with instrumentation, that still happens in Italy, more than it appears. Like in Sicily last September just stopped a German bunch of people stealing amphoras and stuff. But it's a bit more difficult I think with the individual looters, it's true that they do harms, but again I think that it, the web, the protecting web or control system is good, nearly, is good. *So the Convention maybe helped this collaboration a bit?* It was already in place actually. I think it's more a, it's getting more common, and is getting seen, more as a good practice in itself. If it's a matter of the Convention, I can't say.	Low (unsure of effect)
I4	If the question is 'did the Convention change these critical aspects of management of UCH in Italy', I can answer no. We had the problem of treasure hunters. We had it and we still have it. Probably something has changed because in general there is more consciousness that it is a bad thing, and probably also the police, *Carabinieri*, superintendencies are looking more on the typology of crime. So it is still a problem that has been reduced in the last 15 years for psychological reasons. And also there is another problem, there is not so much to loot. Majority of shipwrecks have been looted to 40m. The problem now is deeper wrecks.	Low
M1	We don't have even have a set of laws that can regulate something like that. So when we have a situation that we have recently protected a 15th Century shipwreck outside Boka Bay [Kotor]. And I have been working on that study and trying to, and we officially protected it, and I was just like ok what now? We have a piece of paper that's protecting it but that shipwreck is at 35m of depth and pretty much today everyone can dive on that depth. Around 50% of the shipwreck has already been looted in the past 20 years so, so what now. Ok we have to find a way to deal with this that we are protecting now. Oh well you know, we protected it by law and that's it. That's not the way you protect something. And then stuff like that happened from the beginning of my story where, well precisely for that shipwreck, that 15th century shipwreck, two years ago a guy told me an anchor that weighs around 2 tons has been lifted up from that shipwreck and it's now in someone's private property. And I'm like ok, so it's a 15th C shipwreck, it is under the jurisdiction of UNESCO's Convention. So I would go to the inspector, I would go to the Ministry and try to explain to them that we have to act and they are like but based on what? I mean how are sure that it happened, how are we sure that this, how are we, I mean what can we do in the end? What are the sanctions that we can apply? That is the main problem. First steps have been skipped. And we have ratified the Convention, but nothing has been done.	Low

	There is, I have a meeting next week with his director of Sea police, coastal police, so they've been last year, in cooperation with the Italians, they've been given this new system for monitoring the sea. But his prime mission is to control vessels. Illegal vessels and stuff like that. But also they asked us to send them the coordinates of all the shipwrecks so they can control them as well. So that should be put in course next month. I mean that sounds perfect but I'm kind of sceptical about it. It will be like, what are we doing? Oh hi, Mike! How's your mum and stuff like that? In Montenegro has 650,000 citizens. You know everyone is someone's cousin, everyone is someone's mother, so you can't really enforce anything here.	
C4	We have many laws. But they are not abided by. [The Coastguard law] is just paper.	Low
I8	Up to now the fight against treasure hunters has been based on the skills of single countries. The *Mercedes*, Spain succeeded. I succeeded in stopping the looting of the *Ancona*. It was a steamer full of gold, between Sicily and Sardinia. We won the case, not on the basis of UNESCO Convention, but because they convinced the judges that the Ancona is a war grave. UNESCO Convention could be improved in the field of international cooperation, and much more concern on the control of international waters.	Low

6.3.3 Institutional

There are some clear institutional effects of the Convention, but perhaps strangely, these were not often discussed (Table 22). The clearest effect is seen in Croatia with ICUA. Without the Convention this would have remained a national centre for underwater archaeology. If this had been the case the CCI would have had conservation and outreach facilities, but on the other hand hundreds of students and practitioners from neighbouring countries and further afield would not have been trained at ICUA.

The institutional effect in Italy concerns the *Soprintendenza del Mare* in Sicily, so perhaps this is not surprising that it was mentioned by only the participant from that institution.[851] The Convention was used by archaeologists to drive the attention of politicians which allowed the institution to be created, although another factor was the actions of Bob Ballard, which also contributed to the political will to both negotiate and ratify the Convention, and create the *Soprintendenza Del Mare.*[852] This effect of course only applies to Sicily, and wider attempts to create such an institution for the rest of Italy have failed (section 8.2.1).

[851] I8.

[852] I8.

In Slovenia a less formal organisation was created to undertake developer-led underwater archaeology work, and this was arguably caused by the Convention.[853] Similarly in Montenegro, some underwater archaeologists were trained, but a planned centre or department for underwater archaeology never came to fruition.[854] One participant, a field archaeologist, and one of those that was trained, thought this was a very positive step.[855] The other, an archaeologist that works at the Directorate for Cultural Heritage in an administrative capacity, was far less enthusiastic.[856]

Table 22 Construct table of institutional effects

Designation	Quotation from interviewees in relation to the institutional effects of the 2001 Convention	Effect of Convention
I8	I think that the UNESCO Convention was very, very important for us, because it gave the possibility to drive the attention of the politicians, that generally they are not so concerned with this heritage, to build this organisation [the *Soprintendenza del Mare*]. So for us it was very important the Convention.	High (but geographically limited)
S3	Then of course, the development was immediately after the ratification, or maybe even some months in advance, the Institute for the Protection of Cultural Heritage of Slovenia, of course, established a group for underwater archaeology, that was more or less discover... the intention was not so serious, but we had the opportunity to organise more in this, let's say, strict manner without any funding. But we executed many of these development-led projects, so this underwater archaeology got some impetus from the Convention as an immediate result when we ratified in 2008.	Medium
M1	In 2011, this Directorate [Directorate for Cultural Heritage] where I work has been formed and the Centre for Conservation and Archaeology has been formed, before that it was all one institution, and it covered the entire of Montenegro, and it was actually quite good, of course it didn't pay attention to UCH. And since the formation of these two institutions, especially the Centre for Conservation and Archaeology it was initially planned for it to have a department for underwater archaeology. So you can actually train people, you can update your capacities, buy a boat, equipment and stuff like that and do projects. But that was just put on paper, they trained three people, three archaeologists, and they gave them the diving equipment and that was pretty much it. Nothing happened... So we did get a chance to work on some smaller projects like every year we are doing 10 days of diving in Risan, which is yay, great, what can you do in 10 days, seriously? But the main problem is, I mean we are skipping steps.	Medium
M2	...funding for our courses comes from Ministry of Culture and the government, not from us. And that is a very big thing when you don't	Medium

[853] S3.

[854] M1.

[855] M2.

[856] M1.

	send mail to the government saying 'we want to do that, please help us', no, they give us the money and told us we must pay for diving archaeologists. That is super thing. And that is all in the name of, I understand it, the Convention. That was the main reason they pay us for finishing this course.	
C4	They [ICUA] used to be part of CCI. The general idea was we don't have a place for exhibition or publication or workshops or something. We just excavate, but then what? The other parts will be them. Conferences and so on. Politicians asked UNESCO about being under their auspices, UNESCO said 'be separate', and so they separated from the government. CCI lost the conservation facilities! So no department that conserves… (Q. *So UNESCO made it a bit worse?)* Maybe worse for our department.	Negative

6.3.4 Practice of Underwater Archaeology

A topic that arose a number of times was the effect of the Rules in the Convention's Annex on the practice of underwater archaeology (Table 23). It was stated, in particular in Italy, that the discipline had been put on a firmer scientific footing. For example UCH may be being left in situ now more often than was previously the case. However, again in Italy, there was disagreement on the effect of the Convention. The principles may already have existed in the Italian framework.[857] The example of Nino Lamboglia and the Spargi shipwreck was highlighted.[858] The wreck was excavated between 1961 and 1971, but one year, when the excavation was halted due to bad weather, the site was looted. The media were outraged and argued that everything should have been recovered quickly, but Lamboglia answered that he would rather have done scientific work on a small part of the wreck than recover it all unscientifically. These scientific principles were encoded in the 2001 Convention, and the Sofia Charter before it, but were clearly part of Italian archaeology before then, at least for some individuals. One participant stated that the Convention enters a system that mirrors its mandate.[859] The Convention may be driving up standards, but these standards existed before it, and other factors may also be involved. An example is the EU funding that underpins much of Italian underwater archaeological research, which necessitates a professional

[857] I3, I4, I6.

[858] I6.

[859] I3.

approach to project design that includes conservation and curation of recovered material, and publication and dissemination.

In Croatia the situation is remarkably similar. The archaeological regulations that mirror the Annex, introduced just after ratification, were not just for underwater archaeology, and so were also part of the raising of standards in terrestrial archaeology.[860] As one participant stated, there is progress, but no direct relationship to the 2001 Convention.[861]

In Slovenia a lack of programmatic research and an overarching vision has meant that any positive effects from the change in legislation are limited.[862] Similar sentiments about a lack of strategy were also expressed in Italy.[863] The theme of strategy will be discussed further later (section 8.4).

Table 23 Construct table of effects on the practice of underwater archaeology

Designation	Quotation from interviewees in relation to the effects of the 2001 Convention on the practice of underwater archaeology	Effect of Convention
I1	…when you see the Rules, the archaeologists make a report, a lot of things. In other times the people go underwater and they make just. So it's very beneficial also for the job because when I worked for preventative archaeology to deal with, I don't know, a pipeline or something, I say like the UNESCO Convention. So when the people work, the student or the graduate work, they're well paid. This is implementation for this to the quality of the work. It's very important, because without it, if not it's so underwater archaeology make a picture, make draw, its finished for the private enterprise.	High
I2	No, there is an effect. Also the Annex is important. The technical Rules, because it provides some indications on how an underwater archaeology research should be conducted. So it has an effect.	High
C2	Other than that I would say that also maybe a problem in Croatia is that we are not paying too much attention on inland waters because we have so much sea here and islands. And this has not been very in the focus of the, or attention of underwater archaeologists in Croatia… So this is something that we have to also do better in Croatia I would say. And Convention is also good for this because the Convention is stressing the importance of this inland water cultural heritage, underwater.	Medium
I7	Before it [UCH] was recovered a lot. Now I think that in the mind of the technician, but also of the people involved in management of archaeological sites, now they have in mind it is better to leave, in Italy yes. Because in Italy we have new phenomenon, which are marine parks,	Medium

[860] C2.

[861] C5.

[862] S1, S3.

[863] I3.

	marine protected areas. That when they started the people that lived near these areas didn't want the park, wanted to go everywhere, and fish everywhere. But now after some year, they understand that thanks to these parks they have a lot of tourists and fish, all is increased, and their economy is better now. Baia, in Sicily too, there are underwater itineraries thanks to the Soprintendenza del Mare, Sebastiano Tusa. So thanks to the hard work of Sebastiano Tusa, the mentality has changed in Italy. A lot of people, the lawyers, they prefer to leave underwater. Before, everybody, 'the anchors! I want in my office!' Now the mentality has changed I think thanks also to the Convention.	
I3	*Do you think the Conventions had any effect on this?* I think on the practice, that I haven't talked about, on the practice of underwater archaeology, so fieldwork and the way underwater sites are approached. *Through the Rules?* Yeah, through the Rules. The fact that we are, the approach to the excavations, and the research programs that includes an excavation is more informed, more reasoned, and planned. Because of the requirements, so the requirement to allow…, no how do you say, allocate funding for conservation and stuff, that obligated, in a way, to you know, sit down and reason a little bit more on how to allocate funding, and that is not only a matter of the Convention, it more of a generalised approach to project design that is connected with the European frameworks, funding systems, because with the, more often than not research is done through this funding system or scheme, it is not the European Council one, it is one that mirrors this system, the project proposal system and the evaluation system and the etc. So when you sit down for drafting a project for funding you already planned for allocating money for conservation of the material and its, how do you say, it's not because of the Convention. Probably also thanks to the Convention, but also because it enters a system that mirrors that mandate.	Medium (unsure of effect)
I8	In Italy, and other countries, the provisions of the Convention are not totally satisfied. There are many agencies, on one side they are in favour, on the other they don't follow the Rules of the Convention. For example the rule to report the discovery of UCH in international waters to the UNESCO Director General. We are one of the few organisations doing this. Most others in the world aren't doing this. Although there is unanimity to follow the Rules, in practice few organisations are following the Rules.	Medium
C4	The Convention doesn't affect us. It was the same before. It didn't change much.	Low
C5	*(Q. The 2001 Convention has had no effect on UCH management?)* There is progress, but no direct relationship. I can't be sure. The Minister of Culture tried to make conditions better at the same time as the Convention.	Low
I4	*(Q. Something that's come up in other interviews, the Rules in the Convention's annex has maybe changed things, increased the standard of underwater archaeology?)* I do not see any relation. I think that in some of my colleagues there is more consciousness of the necessity to maintain the archaeological site in situ. So we have a little changed our opinion on the recovery. This is probably a good, positive and original effect of the Convention, which arrived to everyone, institutions and symbols? So the in situ conservation and the problems of in situ conservation of course. Because in the past there a run to the excavation, so we made a lot of mistakes, especially of the recovery of wood, without any project. So also for this reason in part we have reduced activity because in the past, at the end of the 80s and in the 90s there was a run by the Ministry of Culture, to excavate and recover, also if there was no scientific reasons and also if there was not a project. So leaving then, after the recovery, big problems to someone else.	Low

	So I can show you a list of shipwrecks which have been recovered and which are still awaiting conservation, exposition, museum etc. So in this sense probably a very small consciousness that it is much better to leave underwater than to recover without the necessity to recover and without the project. But not the quality of documentation, if my colleagues now we are working better underwater and the methodology has moved because of the Convention, I cannot see any connection with the Convention.	
I6	Sometimes I think that we are using UNESCO principles since a lot of time. And now the different thing is that every time we use these principles, we can tell people why. We are taking these choices. But the big change in mentality in Italy I think it was earlier. If you read also some sport diving magazine on the 60s or the 70s, you see a world completely different. When the, I know Massimiliano probably told you about the shipwreck of Spargi in Sardinia, when they, Lamboglia, started to work in the shipwreck of Spargi, they started to make a scientific excavation, they stopped the excavation because of the bad weather in the winter, and they came back after one year and the shipwreck was completely gone! And all the newspapers attacked the archaeologists, they say 'you fool, why didn't you recover everything?' and Lamboglia was very good in this, in giving an answer in that time, because he said 'actually I prefer to have a scientific work on a little part of the shipwreck, than a complete recover with no scientific records'. And in that moment he was completely considered a fool by the divers. They just said 'ok we had 1000s of amphoras, and now we don't. This is our problem.' But now actually this is a UNESCO principle, it was in anticipation of the time. And now I think when you have good archaeologists, good talking for example with the journalists, you will always notice that they are mentioning the UNESCO Convention or the UNESCO principles. If you read the section, the news section of the *Soprintendenza del Mare* in Sicily, they always said we are making this underwater itinerary because we follow in situ preservation. Or we decided to not put this on this place because we are following this... This is giving an answer to people and its important. But I think the principles were already there. I think we will see the real good effects on a long scale of time. New people is now perfectly aware of the Convention. The new professionals, the people that will survive in this jungle, and that will become the new professionals, these people will know I think perfectly the kind of principle they will have to follow. For the people already working in underwater archaeology in Italy, people connected with UNESCO, they are applying this. And as was telling you most of the people was applying these principles. Even if they really didn't know it was a UNESCO principle, they were just thinking it was a good idea. But at least now we know that we have these guidelines to follow.	Low
I5	*(Q. Your work isn't affected by the 2001 Convention?)* No because I think we are not at the central level, we work in the region, and we don't take the connection with other countries. It is a local one. And we use the Italian law. Italian law is really complete.	Low
M1	*(Q. Would you say the Rules in the Annex are followed at all?)* Nada, nada. It's like we never ratified it. It's not just that one, it's every other Convention, of architectural heritage, of this, nothing.	Low
S1	This Political decision was not connected to the real wish, real idea to change something. This is why even after 15 years we have no real systematic researching. We have law protecting, and people understand this, and it functions in this way, but just in the protection side. Where we are protecting it is necessary to research, but not in other places. And we have for example 38 wrecks in the sea. We get this information from local divers. In 2008 we got bathymetric research. 20 [wrecks] from divers and	Low

	18 from bathymetry. Still now we don't know anything about them. No idea what we have, could be anything. No money to make this first step to see even which period they are from. It's problematic. This is what I expected from the Convention, but even now it doesn't change anything.	
S3	*(Q. Any other effects? On archaeological practice maybe?)* No, not really. The archaeological community is some 250 people in Slovenia, and 8 to 10 divers. So you can imagine, archaeology is not in the best skin as we say	Low

6.3.5 Authority of Underwater Archaeologists and the Status of Underwater Archaeology

A linked effect to the practice of underwater archaeology is the way that archaeology is seen by the public, and the way archaeologists can promote their profession. The UNESCO Convention can lend authority to underwater archaeology and to archaeologists. One participant stated:

> Sometimes I think that we are using UNESCO principles since a lot of time [sic]. And now the different thing is that every time we use these principles, we can tell people why.[864]

This increase in authority led to the creation of the *Soprintendenza Del Mare* in Italy in 2003 as archaeologists used the Convention to drive the attention of politicians in order to create this institution. [865] In a similar way it was used in Slovenia to include underwater heritage in the general heritage legislation and is used in Montenegro to refer to in order to try and increase the awareness and spur action relating to UCH protection, although so far this has been largely unsuccessful.[866] Would this authority have existed without the 2001 Convention? It is unlikely. Other soft law, such as the Sofia Charter, could arguably be used in the same way, but it was never mentioned once in the interviews, and does not have the same name recognition or authority that the brand of UNESCO seems to confer.

In Italy, one clear effect is that people performing or making decisions on underwater archaeology now need to be a qualified underwater archaeologist, due to Rule 22 in the Convention's Annex. This is not stated in Italian law, but the Convention can be used to

[864] I6.

[865] I8.

[866] M1.

ensure that it is followed.[867] Curiously this effect was mentioned mostly in Italy and not seen, for example, in Croatia.

A similar point was raised in Montenegro, but without the same success or widespread use. It was noted that since the Montenegrin cultural heritage law merely mentioned underwater archaeology, and did not flesh out any protection procedures, the Convention was usually pointed to, or held up as the standard, when something happened.[868] However, the efficacy of this is hindered by the interview participant being the only person aware of the Convention.

Table 24 Construct table of effects on the authority of underwater archaeology

Designation	Quotation from interviewees in relation to the effects of the 2001 Convention on the authority of underwater archaeology	Effect of Convention
I1	*(Q. So the Rules improved the quality of archaeology?)* Si. The Rules is very fundamentally improved the quality of the discipline, not for the archaeologists, but for the discipline for the archaeologists. So every people that are not archaeologists but private, they know that an archaeologist is a professional work, very complex.	High
I4	*(Q. Another problem you mentioned was that Italian law allows a non-archaeologist to direct underwater archaeological excavations.)* This has happened rarely but it has happened. I think that recently... This is another positive effect of the Convention because sometimes if these situations happened we have used the Convention to ask the institution to respect this rule, yes. But in my opinion this happened quite rarely, it was not a diffuse problem. So I can say this is a small effect. Because I was president of Association of Underwater Archaeologists in the past, I wrote a letter to a superintendency saying, no it was a private company so we didn't know if they had an archaeologist, and we mentioned the Convention asking them to respect the international rules. Because in Italian law this aspect of the necessity that an underwater archaeologist direct the work underwater is not expressed. So we have to mention the Convention.	Medium
I6	Probably it will help more for people outside archaeology, for example when we ask funding from politics, when we ask from the major of a little commune or some local institution, these people, they totally don't know about underwater archaeology and the UNESCO Convention, but these people will also probably be impressed by this kind of organisation and that can help. So for sure it was a good thing to ratify	Medium
I7	…it was important for the person of the archaeologist, the professional activity of the underwater archaeologist. Thanks to the Annex there was the process of excavation, the project of the restoration... so thanks to the words the excavation is directed by the underwater archaeologist. Has to be directed by. This is very important for us, because before a lot of archaeologists that don't	High

[867] I4, I8.

[868] M1.

	swim, they directed underwater archaeology. So thanks to this Convention now everyone thinks it's obvious that underwater archaeologist directs an underwater excavation.	
I8	Also important as before (and also now) when people are dealing with underwater archaeology, it is not treated the same as terrestrial. Rules in the Annex show scientific basis, best practice. It levels it with terrestrial. There is still the idea with some people that you can do research in the sea in a superficial way. Only rescuing objects. Convention very helpful in this field. In Italy all public works in the sea, must be done after archaeological survey. Underwater archaeology research here must be done by qualified archaeologists. Due to the Annex. In the past everyone was doing underwater archaeology, including unqualified people. Now there is a law. Of course volunteers, but they must work with qualified archaeologists.	High
M1	So basically the only law or Convention that I can hold up to when something happens is the UNESCO Convention, however the main problem with that is, well I'm the only one that is aware of it.	Medium

6.3.6 Public Awareness of UCH

Participants in Albania, Croatia and Montenegro were sceptical of the Convention's effects on the public's awareness of UCH and underwater archaeology generally (Table 25). In Italy however, it was noted a number of times that mentalities around treasure hunting are developing as people are becoming aware that it is not an appropriate use of their heritage, on a global scale as well as in Italy, possibly due to the Convention.[869]

Table 25 Construct table of effects on the awareness of underwater archaeology

Designation	Quotation from interviewees in relation to the effects of the 2001 Convention on the awareness of underwater archaeology	Effect of Convention
I1	*(Q. Has it raised awareness?)* Yes.	High
I6	…actually 15 years after the creation of the Convention you see that mentalities are changing, countries are moving in the same direction, and that was not so certain at the beginning. Now you see that its working, it's functioning well. I think we will see the real good effects on a long scale of time. New people is now perfectly aware of the Convention. The new professionals, the people that will survive in this jungle, and that will become the new professionals, these people will know I think perfectly the kind of principle they will have to follow. For the people already working in underwater archaeology in Italy, people connected with UNESCO, they are applying this.	Medium
I8	So I'm optimistic. There is no real tool to stop looting in international waters, but there is a psychological pressure. So the Convention has this important value, pressure to international cooperation. It is becoming shameful to say that you are looting a wreck.	Medium
I4	We had the problem of treasure hunters. We had it and we still have it.	Medium

[869] I4, I8.

	Probably something has changed because in general there is more consciousness that it is a bad thing.	
A1	*(Q. Do you think it's had any effect?)* I don't think anyone knows anything about it. At all. I've not met anyone who knows anything about it. I'm surprised.	Low
C1	I have to say I'm always surprised by how much students here have no idea about the Convention. It remains very abstract. Nobody cares about the Convention I can tell you, because we have clear legislation that says your duties and obligations etc.	Low
M1	So basically the only law or Convention that I can hold up to when something happens is the UNESCO Convention, however the main problem with that is, well I'm the only one that is aware of it. *(Q. So you would say it has not changed anything? Has it made anything worse do you think?)* No. No, just no one knows it exists.	Low

6.3.7 International Cooperation

Participants were largely positive about the effects of the Convention on international cooperation (Table 26). This cooperation was largely centred on ICUA in Croatia. The participant in Montenegro noted however, that they had to initiate this cooperation, as ICUA have some problems that will be explored later (section 8.2.2).

Table 26 Construct table of effects on international cooperation

Designation	Quotation from interviewees in relation to the effects of the 2001 Convention on international cooperation	Effect of Convention
C2	We have made also the manual, this is the manual how to conserve the underwater archaeological finds, it's in English, and this is for the students that come here to learn how to conserve, she's from Namibia, but we also have people from Mexico, from all of Europe, you know and from the... And they have been sent by, let's say their, either they are interested on their own or they were sent to us by some of the UNESCO national commissions for their countries to here, so we have been doing everything that is possible for us. Especially here in Zadar, because when they come to us in Zadar we have dormitory and we can have these people work here in our workshop or dive with us	High
C5	*(Q. Has cooperation with other countries increased?)* Yes, best example is ICUA in Zadar. But many cooperation's between different institutions from different countries. Can be sure but I'd say more than 50% of excavations are in cooperation with different countries. Because there are always money problems. It is one way to get more money. It is not only about this though. Technology and knowledge exchange also. According to law, many articles about this. Can't lead excavations or take finds if you are foreign, but can work. Very good cooperation and its increasing.	High
I1	So in Italy it's, I think it's effective, we work thinking for the Convention, and we, because for this also, Morocco, some NGOs from Morocco ask what the Convention, so they spread all over. Also from Japan now, Japan, I don't know if they're thinking about it, but they wrote to me also, they want to come to Italy to know if Italy's satisfied to the Convention. Because maybe I don't know but the Convention it's	High

	opened a window for this... *So it's helped collaboration within Italy, and its helped collaboration with other countries?* With other countries yes …we work very well with Croatia, because one of the presidents of the STAB was the Minister of Culture. So it was... *(Q. Jasen Mesic?)* Yes, so it's not money, but he create a lot of things in our region. So this is very important but it's a case, a very lucky case. For the other things we, I know that when we are all together people can share, and they say 'I have a restoration of a laboratory for restoration, we have another… we can communicate that. And if I need somewhere I think maybe I ask to France to have some people and we change, we are not, we share the information together, to work all together, because I don't know but when people work underwater it's so different to other things that there is the same thing when you work on a ship, we must cooperate because of the work of the people.	
S3	We are very Slovenian orientated, as we didn't make any progress in international collaboration. But in the research of for example Austro-Hungarian ships, my students linked closely to ICUA and Zadar University, so this collaboration between Croatia and Slovenia is very close. Good contacts with the Italians too. A little less with the Austrians and Hungarians recently. But this international collaboration is at the regional level quite ok. *(Q. Was that collaboration influenced by the Convention?)* Of course. First at personal level, and then also with the commitment of ratification. Our politics used it to show how good collaboration is, I think it works fine.	High
C1	We are not respecting cooperation in sensitive archaeological projects. It's something we forget.	Low
M1	I am trying to push the story, some other people are trying to push that story one way or another, regarding protection of UCH, so this year we should have a conference, like a workshop with Croatians. Because I have made a project application to our Minister, and he said it's no problem to finance it, to make a workshop that will last for a couple of days, we can meet Croatians like Luka Bekic from Zadar, and those guys that have thousands and thousands of projects behind them. So we can share experiences, and to start the pilot project together so we can actually, you know see how they're doing it, I mean I know how they're doing it but also some people don't know how they're doing it. And to try to start with that, because I think those are first steps that we should do. *(Q. But this is all your own initiative?)* Mostly yes *(Q. It isn't the Croatians that have come to you?)* No.	Low

6.4 Conclusion

The data is limited by the sample size and thus causation cannot be proven in any of these effects. This means that beyond the most obvious effects, such as ICUA becoming a UNESCO Category 2 centre, and the adoption of the *Legge* 157/2009 in Italy, it is not certain that the Convention was responsible for any of the outcomes discussed above.

The subjective opinions of the participants, and some limited counterfactuals, make us question even the limited effects that were noted. In most cases, such as an improvement in the practice of archaeology due to the Rules, or the increase in cooperation with enforcement agencies, the Convention was either one contributing factor among many, or did not contribute at all. A number of participants note their uncertainty in these cases. The efficacy of even the clearly influenced *Legge* 157/2009 is in question, as the wreck of the *Ancona*, targeted by Odyssey, and the Roman wreck that triggered the notification to the Director General of UNESCO, but which failed to initiate the consultations with other States, would have probably been treated the same with or without that law in place. Similarly in Slovenia and Montenegro, small changes in the law not backed up by wider institutional reform or national planning has meant that the Convention has not really improved the protection of UCH in those States. A Montenegrin participant felt it had not been worth ratifying the Convention in the conditions in which it was ratified, i.e. a lack of understanding of underwater archaeology and lack of legal and institutional frameworks.[870] They stated 'It's like we never ratified it'.[871]

Similarly even in Slovenia it was stated that the provisions of the Convention had not been followed and the institutional framework is lacking. The law had changed without any real world consequences.[872]

> This Political decision [to ratify] was not connected to the real wish, the real idea to change something.[873]

However, with these caveats in mind, some conclusions are possible (Table 27). Seven categories of possible effects were discussed in the interviews. These range from such concrete effects as legislative and institutional change, to more abstract effects such as providing something to which archaeologists can refer that legitimises their actions and their profession. Using the evidence set out in the above sections (Tables 20-26), the

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[870] M1.

[871] M1.

[872] S1, S3.

[873] S1.

countries can be ranked according to the degree of effect the Convention has apparently had over the seven categories. These values have been determined subjectively by the author. Most effect is seen in Italy, particularly relating to legislation, the authority of underwater archaeology and international cooperation. Croatia and Slovenia both have seen significant effects in international cooperation, with a noteworthy institutional effect in Croatia, and a (relatively) important legislative one in Slovenia. Montenegro has seen some limited institutional effects and Albania has seen little effect at all. Almost a decade after the 2001 Convention came into force, this does not seem to be a positive conclusion, but it fits with the conclusions seen earlier in this study (Chapter 1).

Table 27 Case ordered meta-matrix[874]

	Italy	**Croatia**	**Slovenia**	**Montenegro**	**Albania**
Legislative	High	Low	High	Low	Low
Enforcement	Medium	Medium	Low	Low	Low
Institutional	Medium	High	Medium	Medium	Low
Practice	Medium	Low	Low	Low	Low
Authority	High	Low	Low	Medium	Low
Awareness	Medium	Low	Low	Low	Low
Cooperation	High	High	High	Low	Low

It is interesting to briefly contemplate how the Convention has acted to cause these effects, although this is speculative at this stage. The means by which a treaty can cause effects are known as causal mechanisms or behavioural pathways. There are a number of models of the mechanisms that generate behaviour change.[875] These include the possibilities of the Convention acting as a utility modifier, a purely economic mechanism that means that the Convention has altered the costs and benefits of relevant actions or inaction,[876] or as an enhancer of cooperation, where cooperation is

[874] Miles, Huberman and Saldana (n 360) 214–9.

[875] Young and Levy (n 374) 19–28.

[876] ibid 22.

increased and problems related to collective action are solved.[877] Prior to this study, these were possibly the two mechanisms that could have been expected to be driving implementation. There is no evidence for these mechanisms in the interviews however. For the latter mechanism for instance, a few participants noted that international cooperation had increased due to the Convention, but what problems has this so far solved? Of the States investigated, Italy has tried to use this cooperation, but has not been successful due to the inaction of other States. Croatia did not cooperate in the protection of the *Re d'Italia* when it arguably should have. In addition, the Convention does not include the usual Systems of Implementation Review (SIRs), and so the increase in transparency and trust that is a hallmark of this causal mechanism, has not materialised. Cooperation to solve problems relating to UCH may have increased due to the Convention, but not in the ways, or to the extent, that might have been expected.

The mechanism that most closely resembles the effects discussed in the interviews however, is that the Convention is acting as an agent of internal realignment.[878] 'In the simplest cases, the establishment of a regime gives some of those involved in a behavioural complex new ammunition to use in their dealings with others.'[879] This has been clearly demonstrated. It was used to such an effect in the creation of the *Soprintendenza Del Mare* in Italy, in the alteration of legislation in Slovenia, to ensure that a qualified underwater archaeologist directs underwater archaeological research in Italy, and it has been attempted to be used in this way in Montenegro, to ensure protection for UCH despite deficient national laws.[880] Jasen Mesić, a maritime archaeologist that briefly became Croatia's Minister of Culture in 2010-11, pushed the ratification of the 2001 Convention in both Croatia and Slovenia, seemingly partly to advance his political career.[881] If this is the main mechanism by which the Convention is acting, something is truly amiss. States should be complying due to the Convention's authority, or because it is in their interests to do so as the Convention confers some

[877] ibid 23.

[878] ibid 26–7.

[879] ibid 26.

[880] I4, I8, M1, S3.

[881] C1, S3.

major benefit. If most of the effects of the Convention are created by individuals in the States using the Convention as an agent of internal realignment, it is no wonder such a low level of implementation is seen, and that the effects vary so much over similar States. The study must now turn towards an explanation of why so few concrete, certain effects of the 2001 Convention are seen in the States Parties.

Chapter 7 – Obstacles to Implementation

Little is currently known of why States are not implementing the Convention. Four types of factors that could be to blame have been identified in the literature relating to the effectiveness of environmental treaties.[882] These factors include: those involving the individual country, those involving the international environment, those involving the characteristics of the agreement, and those involving the characteristics of the activity. Determining which of these types of factors is causing non-compliance in the case study States will increase the knowledge of the problem and allow actions that could tackle these issues to be tentatively suggested. The participants that discussed each type of factor are listed in Table 28.

Table 28 Obstacles to implementation meta-matrix,

Type of Factor	Albania	Croatia	Italy	Montenegro	Slovenia
Characteristics of the agreement		C1, C3	I2, I4, I7, I8.	M1	S2, S3
International environment		C1	I8		S2
Characteristics of the activity		C3	I1, I4		
Individual country	A1	C1, C2, C3, C4, C5	I1, I3, I4, I5, I6, I7, I8	M1, M2	S1, S3

7.1 Factors involving the Characteristics of the Agreement

We could expect that a major factor affecting the Convention's implementation is the nature of the agreement itself.[883] Four particular points about the 2001 Convention are

[882] Jacobson and Brown Weiss, 'A Framework for Analysis' (n 327) 6–8; Victor, Raustiala and Skolnikoff, 'Introduction and Overview' (n 4) 8–15; Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 520–35; Vogel and Kessler (n 378).

[883] Jacobson and Brown Weiss, 'A Framework for Analysis' (n 327) 6.

salient. It is complex and ambiguous; it is imprecise; there are differential obligations; and there are no systems for implementation review (SIRs). Generally in the interviews, feelings were positive towards the Convention, but it was criticised on a few occasions. On these occasions however, the criticism was levelled at archaeological issues in the Convention, for instance it was thought that the Rule relating to in situ preservation was poorly drafted and could be used as an excuse for neglect by those that do not want to pay for conservation and research.[884] It was also remarked that the conflictual nature of negotiations and the contentious issues of jurisdiction and State vessels have hampered the rate of ratification.[885] The ratification rate does compare poorly to other UNESCO Conventions, as these are less controversial due to contentious issues being left out of negotiations, such as the heritage of indigenous populations and intellectual property rights in the intangible cultural heritage Convention.[886] However, this does not explain a lack of implementation from States that have already agreed to be bound by the Convention.

The complexity of the Convention's provisions arose only once, in an interview with an Italian international lawyer that was involved in both creating the Convention, and drafting Italy's implementation and ratification law.[887] The complexity and alternative reporting systems of Article 9 of the Convention, and also the vagueness of the sanctions provisions, it was noted, could cause problems when drafting implementation legislation. This is not an insurmountable obstacle though, as in this

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[884] C1; UNESCO 2001 Convention, Rule 1.

[885] I2.

[886] Janet Blake, 'On Developing a New International Convention for Safeguarding Intangible Cultural Heritage' (2003) 8 Art, Antiquity and Law 381; Richard Kurin, 'Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal' (2004) 56 Museum International 66, 74; Paul Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage' (2004) 1 Macquarie Journal of International and Comparative Environmental Law 111. See in particular the saving clause in Article 3 of the UNESCO 2003 Convention that states that nothing the Convention may be interpreted as affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights to which they are parties: UNESCO 2003 Convention, art 3(b).

[887] I2.

case in Italy, these were not barriers to implementation. Despite noticing the complexity, implementation in the form of *Legge* 157 was completed. Most States seem to not even have attempted implementation, rather than to have done it badly.

The 2001 Convention's obligations are imprecise (section 4.1). Some articles require the State Party to take 'measures' to achieve a certain goal or to regulate some behaviour. These measures are never defined and so it is left to the State to determine what measures are appropriate. It has been shown that, generally, the more precise the obligations in an agreement, the more likely they are to be complied with.[888] It also makes it easier to determine whether States are complying. This may be influencing the implementation of the 2001 Convention, but it was not mentioned in interviews.

The differential obligations may give some States an excuse not to implement the Convention to some degree. In particular Article 2(4) states:

> States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose *the best practicable means at their disposal and in accordance with their capabilities*.[889]

This means that different standards are expected of States with different capabilities. If some States feel that they have little capability in this regard, and few means at their disposal, they may be justified in taking few measures to protect UCH. This did not arise in the interviews.

Systems of implementation review (SIRs) also did not arise in the interviews (section 9.3.1).[890] This is to be expected perhaps as archaeologists are likely to know little of how other treaties operate, and so are less likely to raise it as a deficiency of the 2001 Convention. It may be likely that this is still a major factor hampering

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[888] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 524.

[889] UNESCO 2001 Convention, art 2(4). Emphasis added. Article 5 of the 2001 Convention contains similar language.

[890] Except M1.

implementation and addressing it could be a way to quickly achieve better implementation levels for the Convention, but data that would support this conclusion were not encountered using the present methodology.

7.2 Factors involving International Environment

Factors involving the international environment could hamper individual countries' implementation of the agreement.[891] In particular the action of other States may be significant, and if it is apparent that some countries are not implementing the Convention, it may mean that others are more reluctant to also. This, understandably, did not appear in the interviews. The actions of major or larger States may be particularly important in this regard,[892] and so the failure of certain important States, notably the USA, whose nationals are very active in the treasure hunting community, to join the treaty could be crucial. This arose only briefly in the interviews where a participant stated that it was difficult to stop looting by US companies in the Mediterranean as they are not party to the 2001 Convention.[893] The US has recently withdrawn from UNESCO,[894] and so there is little foreseeable chance that it will join the Convention in the future. The only hope, the participant felt, was that there is already concern over the matter from certain institutions in the US and that continued pressure may bring positive change in the future.[895]

Some also felt that it is becoming shameful to publicise that you are looting a wreck.[896] This is a change in public opinion, and if it continues, or gains some focus due to a

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[891] Jacobson and Brown Weiss, 'A Framework for Analysis' (n 327) 7.

[892] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 529.

[893] I8.

[894] Gardiner Harris and Steven Erlanger, 'U.S. Will Withdraw From Unesco, Citing Its "Anti-Israel Bias"' (*New York Times*, 12 October 2017) <www.nytimes.com/2017/10/12/us/politics/trump-unesco-withdrawal.html> accessed 1 November 2017.

[895] I8.

[896] I8.

particular event, it may put more pressure on certain States to implement, or join, the 2001 Convention.

The more States that join a treaty, the more impetus there is to implement it, and for some treaties implementation is easier for a State when all its neighbouring States are also parties.[897] The large number of States that border the Mediterranean, and more specifically, the Adriatic, that have joined the 2001 Convention should mean that it is easier for them to enforce their obligations. This does not seem to have occurred however as implementation in the case study States is limited. There also seems to be little international coordination of implementation or enforcement in the Adriatic. Despite the apparent beneficial international environment, there are ongoing issues related to the international environment that may impair international cooperation. One example is the delimitation dispute between Croatia and Slovenia.

As discussed earlier (section 4.2.5.1), there is an ongoing delimitation dispute between Croatia and Slovenia over their maritime boundaries.[898] In Slovenia the ratification of the 2001 Convention is tied up with these delimitation issues, and prior to ratification they promulgated their Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act in 2005 which claimed jurisdiction over archaeological heritage in ecological protection zones beyond their territorial waters.[899] This is a formal proclamation, and so is valid, but there is a policy of not enforcing it by Slovenia.[900] Once the arbitration between Slovenia and Croatia is concluded it is thought, Slovenia 'will be in a position to implement the provisions of the 2001 Convention'.[901] Croatia, also is refraining from exercising its jurisdiction in this way in

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[897] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 529.

[898] Scovazzi, 'Recent Developments as Regards Maritime Delimitation in the Adriatic Sea' (n 495); Vukas (n 495); Davor Vidas, 'The UN Convention on the Law of the Sea, the European Union and the Rule of Law: What Is Going on in the Adriatic Sea?' (2009) 24 The International Journal of Marine and Coastal Law 1.

[899] Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act, 2005, s 6(1).

[900] S2.

[901] S2.

the disputed area.[902] This is hampering implementation of the 2001 Convention according to a Slovenian legal academic:

> *[Q Do you think there is anything that hampers or is an obstacle to implementation of the 2001 Convention?]* Definitely the unsolved border issue between Slovenia and Croatia, because now we have a sort of vacuum, a mutual refraining from exercising jurisdiction.[903]

This was corroborated by a Slovenian archaeologist:

> *[Q How much do you work beyond territorial waters if at all?]* Nothing. We don't have even the resources for such things. No vessels, appropriate infrastructure. Now we are of course awaiting the arbitration between Slovenia and Croatia, because there is a large concentration of Roman shipwrecks, so I'm eager to collaborate when this is settled with Croatian colleagues because there is a lot of work north of the Savudrija Cape.[904]

A Croatian academic lawyer was not so certain however:

> I think the protection of UCH, if it is in danger, certainly has priority over delimitation issues. Anyone, as you know, has an obligation to protect the UCH, be it Italy, Slovenia, or Croatia. There cannot be an issue, the three of us can do it together. This is what the Convention wants, it wants that States cooperate. We just have to decide who will be the coordinating State, if we implement, of course. That is a mechanism provided for in Convention. And it would make it of course easier also financially if all three of them are interested in that case. I don't see any reason in holding off in that case because the mechanism is based in cooperation. It's not really an exclusive jurisdiction in that sense, because it is that compromise. So I don't see why one should hold off in that case.[905]

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[902] S2.

[903] S2.

[904] S3.

[905] S2.

So the Convention provides the means of protecting UCH in disputed areas, if the will to cooperate is present.[906] In addition Croatia already has instituted an interim regime of cooperation with Montenegro with respect to the disputed Prevlaka Peninsula and therefore the entrance to the Bay of Boka Kotorska. In 2002 a Protocol was concluded between the two States that temporarily regulates delimitation and that includes provisions dealing with the protection of the marine environment and fisheries, and an area of joint jurisdiction known as the 'Zone'.[907] For the protection of UCH however, the States so far have not felt the need to intervene in such a way to limit the negative effects of delimitation issues on UCH protection. So there are likely to be other factors that are influencing a lack of implementation of the 2001 Convention beyond the delimitation issues.

Along the same lines, another diplomatic issue affecting implementation is perhaps the political connotations of some shipwrecks. In particular the case of the *Re d'Italia* was mentioned.[908] The *Re d'Italia* was an Italian Ironclad sunk by the Austrian navy in 1866 near the island of Vis, now part of Croatia. As it was sunk in war, the *Re d'Italia* became property of Austria, then the Austro-Hungarian Empire, and finally, through other ensuing States, Croatia.[909] Located as it is in Croatia's territorial waters, Croatia has no duty to inform Italy of the discovery or any intervention on the wreck, but even if Italy is no longer the flag State, Croatia *should* inform Italy as it certainly has a verifiable link.[910] The wreck was rediscovered in 2005, after Croatia had ratified the 2001 Convention but before Italy had, and before it came into force. Nevertheless, Italy has apparently not been involved in its ongoing protection, and this may be due to the political nature of vessel, and its somewhat controversial ownership.[911] While this may

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[906] These means would of course involve the consultations and the implementation of measures of protection which have been agreed by the consulting States as set out in Article 10 of the 2001 Convention.

[907] Grbec (n 359) 162–6.

[908] C1.

[909] Degan (n 765).

[910] 2001 Convention, art 7(3).

[911] C1.

have hampered the spirit of cooperation of the Convention being applied in this case, it is unlikely to hinder cooperation in the discovery and protection of older or less politically charged UCH, which will be the majority of cases.

7.3 Factors involving the Characteristics of the Activity

There may also be factors involving the characteristics of the activity, factors inherent in the practice of underwater archaeology or relating to UCH itself that are impacting the effectiveness of the 2001 Convention.[912] For instance the costs and benefits of regulating an activity will alter depending on the nature of the particular activity, or the effects of a treaty can be easy or difficult to monitor depending on what it attempts to regulate. Underwater archaeology, and the protection of UCH, may influence the implementation of the 2001 Convention due to certain factors inherent to them. In particular, UCH is often unseen by the public, so if it is not protected it is often of no immediate or known consequence to the public, and therefore to politicians. It is extremely difficult to monitor UCH. In most cases all the seabed of a State's waters will not have been explored, and all UCH will not have been discovered. Some States will have taken a first step by attempting to systematically survey their seabed, but this will not always be followed by a continued monitoring of the state of any UCH found. Merely knowing that looting has happened may be difficult.[913] Related to this is the possibility that looting or destruction of UCH happens offshore and out of sight of land, and so it can be difficult to monitor actors that may be involved in this activity and enforce cases against looting. Some of this may be occurring on a very small scale, individual divers taking souvenirs when diving recreationally, or fishermen accidentally lifting amphora

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[912] Jacobson and Brown Weiss, 'A Framework for Analysis' (n 327) 6.

[913] A good illustration of this is the recent spate of looting of a number of wrecks of British and Dutch WWII warships from Indonesian waters. Looters had managed to recover these wrecks in their entirety completely undetected, leading the disappearance of the wrecks to be described as a mystery. Oliver Holmes, 'Mystery as Wrecks of Three Dutch WWII Ships Vanish from Java Seabed' *The Guardian (Online)* (16 November 2016) <www.theguardian.com/world/2016/nov/16/three-dutch-second-world-war-shipwrecks-vanish-java-sea-indonesia> accessed 10 March 2018; Oliver Holmes, 'British Second World War Shipwrecks in Java Sea Destroyed by Illegal Scavenging' *The Guardian (Online)* (16 November 2018) <www.theguardian.com/world/2016/nov/16/british-second-world-war-ships-illegal-scavenging-java-sea> accessed 10 March 2018.

and selling them on to supplement their income. At the other end of the scale, treasure hunting companies may be employing resources and technologies in their efforts that some States cannot match. It has been shown that regulating a small number of known actors in a particular activity is much easier than regulating a large number of potentially unknown ones.[914] This is an issue for the implementation of the 2001 Convention.

Related to these unseen aspects, underwater archaeology is often less well funded than terrestrial archaeology, due to its unseen nature, and because it's economic benefits are less immediately obvious. Compared to other traditional aspects of a Ministry of Culture's budget such as museums, or especially to other governmental areas, such as defence, finance, or even the environment, underwater archaeology is often of a much lower priority. All these are challenges inherent to maritime archaeology and heritage protection and will be familiar to practitioners the world over. They could be seen as a sort of underlying cause of the low capacity for underwater archaeology seen in the target States.

These issues were mentioned a few times by participants. For instance in Italy:

> Obviously underwater archaeology is more expensive than land archaeology, and it's much less evident if there is problem of protection, because it is underwater. Because of these two aspects it is suffering much more than other archaeology. If you are building a house and you find a graveyard, everyone can see it and can ask the institutions to do something. But what about if something is happening underwater? Nobody knows.[915]

One participant, when comparing the implementation of the Nairobi Convention and the 2001 Convention in Croatia, suggested that the different implementation seen may have been due to better coordination in the Ministry of Maritime Affairs than in the

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[914] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 521.

[915] I4. See also I1.

Ministry of Culture, and that it concerned something that was more of a pressing issue than UCH.[916]

In relation to environmental agreements it has been stated:

> Since the characteristics of activities that contribute to environmental degradation are more or less fixed, accords must address activities regardless of whether their characteristics facilitate implementation and compliance.[917]

The same is true for UCH protection. The 2001 Convention attempts to regulate an activity whose characterises do not easily facilitate regulation and enforcement. The inherent characteristics of underwater and maritime archaeology cannot be changed. Nonetheless other things, such as understanding of them can be. Parts of this then can be ameliorated by increasing capacity related to knowledge production and dissemination, as if knowledge about UCH is increased, or UCH is made more accessible, some of these drawbacks could be mitigated. UCH also has some inherent advantages too, which include a romantic and exciting image that could be cultivated, sites and artefacts that often surpass terrestrial finds in states of preservation and contemporaneity and possible long term economic benefits through tourism.[918] So maritime archaeology has advantages and disadvantages, and the disadvantages could be alleviated by increasing the ability of archaeologists to produce and disseminate information about UCH.

7.4 Factors involving the Individual Country

A major contributing set of factors to a lack of implementation could be related to the country itself.[919] Jacobsen and Brown Weiss argue:

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[916] C3.

[917] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 523.

[918] S3.

[919] Jacobson and Brown Weiss, 'A Framework for Analysis' (n 327) 7–8.

> The three clusters of factors that we have discussed are important, but countries are at the centre of the compliance process. Countries must take the actions that are required to fulfil their obligations under the accords.[920]

The usual factors related to the country looked for in such studies, such as broad political culture and economic development, are not as relevant in this study. Despite a range of economic performances (Table 29), all five States, except Italy to some extent, have seen little effect of the Convention. Also, all are democratic European States with market economies. Italy, Slovenia and, since 2013, Croatia, are members of the EU. Montenegro and Albania are both candidate countries to join the EU and are in the process of transposing EU legislation into national law. General, large scale issues such as these were not really raised in the interviews. What was more important than, for instance, the economy of the State, was the political will and understanding to properly arrange and finance underwater archaeological institutions and activities.

Table 29 Economic performance of the case study States in 2016

State	**GDP 2016 (millions of US $)**[921]	**GDP per capita 2016 (US $)**[922]
Albania	11,927	4,146.9
Croatia	50,425	12,090.7
Italy	1,849,970	30,527.3
Montenegro	4,173	6,701.0
Slovenia	43,991	21,304.6

A more relevant aspect of this type of factor is 'a country's policy history regarding the substance or activity being regulated'.[923] Jacobsen and Brown Weiss conclude:

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[920] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 529.

[921] 'GDP Ranking' (*The World Bank: Data*, 2017) <https://data.worldbank.org/data-catalog/GDP-ranking-table> accessed 1 November 2017.

[922] 'GDP per Capita (Current US$)' (*The World Bank: Data*, 2017) <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> accessed 1 November 2017.

[923] Jacobson and Brown Weiss, 'A Framework for Analysis' (n 327) 7.

> One very important factor shaping how well a country does in complying with the obligations it has accepted is what it traditionally did with respect to the issue being dealt with, and the legislation and regulations that it already had in place at the time it became a party to the accord.[924]

This expressed itself in a slightly different way in this study. A participant in Italy stated:

> I think it is more difficult for the Convention to really condition national status quos, particularly in those countries with a long tradition in heritage protection... The Convention, I believe, is way more valuable in countries like South East Asia where a framework for the protection of UCH is still to be put in place, helping to address the efforts, to set brand new standards and directing the path for a thorough protection of the UCH.[925]

In direct contrast to this statement, a participant in Montenegro stated:

> *[Q: Do you think it was worth ratifying the Convention?]*
>
> Not in the conditions in which it was ratified. No.
>
> *[Q: So it's more suited to more archaeologically developed countries?]*
>
> Yeah, yeah. You don't have people, you don't have anything to work with. It's just, well the thing I am constantly saying again, we skipped the first steps. You can just ratify a Convention and you don't know anything about maritime archaeology. You don't know anything about UCH, anything.[926]

Both participants were sceptical of the effects of the Convention, and both due to the past policy relating to UCH management. In Italy, it was thought, the system was too developed and entrenched for the Convention to come in and have any major effect, in Montenegro, there was not enough basic understanding or institutional framework for it to have effect. This factor is listed as a 'parameter' in Jacobsen and Brown Weiss's

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[924] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 530.

[925] I3

[926] M1.

study, along with others such as the physical size of a State and the number of neighbours it has.[927] More effect is caused by fundamental factors, such as the economy, political institutions and attitudes and values, but these effects are indirect, and operate through more proximate factors. The relevant proximate factors are listed as administrative capacity, leadership, non-governmental organisations and knowledge and information. In the interviews, it was both the fundamental and proximate factors that were continually discussed. This study therefore broadly agrees that these proximate and fundamental factors have been influential in causing the limited effect of the 2001 Convention.

Proving the exact pathways of causation has not been possible in this study, but it is worth setting out the attitudes of the participants to these factors in more detail, in order to illustrate the different concepts and the complex interactions between them, and to provide a foundation for further research. A more nuanced look will be taken in these case study States using the more detailed theoretical concept of 'capacity' which encompasses these proximate and fundamental factors, but also other aspects which are not considered by Brown Weiss and Jacobsen.

[927] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 535.

Chapter 8 – Capacity

Capacity is a broad concept, which can be defined as 'the ability of people, organisations and society as a whole to manage their affairs successfully.'[928] For the protection of UCH it could be said that it is the ability of people, organisations and society as a whole to manage UCH successfully, through research, protection and promotion. Indeed the 2001 Convention itself recognises the importance of capacity in both underwater archaeology and UCH management, and seeks to raise capacity in a number of ways, through for instance collaboration, training, the transfer of technology, and the establishment of competent authorities.[929] The Secretariat of the 2001 Convention have taken this further and have run numerous capacity building workshops, largely aimed at training individuals.[930] Capacity building is a term that is frequently used in maritime archaeology, but there is a surprising lack of literature in maritime archaeology and archaeology more generally about capacity development. Other subject areas (again environmental sciences and natural heritage protection), have a firmer theoretical footing in this regard, and so a framework for analysis can again be borrowed from them.[931] This framework suggests that perceived problems lead actors to develop solutions under systemic conditions and within situative contexts.[932] The outcome, the ability to solve these problems (i.e. capacity), is therefore influenced mainly by the following factors:

a) actors,

b) strategies,

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[928] OECD, *Greening Development: Enhancing Capacity for Environmental Management and Governance* (OECD Publishing 2012) 27.

[929] UNESCO 2001 Convention, arts 19, 21 and 22.

[930] UNESCO, 'UNESCO Capacity-Building Programme on Underwater Cultural Heritage Protection' (*UNESCO*) <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/education/capacity-building-programme/> accessed 6 November 2017.

[931] Jänicke (n 366).

[932] ibid 4.

c) systemic framework conditions,

d) situative contexts,

e) structure of the problems.

This framework is useful as it shows the objective limits to successful solutions, failure cannot just be explained by 'intervention failure', the structural conditions also matter.[933] These factors will be discussed in turn, with reference to the individual case studies when discussing the complex and interacting framework conditions. The structure of the problems is very similar to Jacobsen and Brown Weiss's factors involving the characteristic of the activity, considered above (section 7.3), and so will not be discussed further.

8.1 Actors

The first aspect of the conceptual framework is actors.[934] This is often termed individual capacity,[935] and focuses on the competencies of the individual, such as knowledge, skills and abilities. Actors is the aspect of capacity building that would probably seem most obvious to maritime archaeologists, and indeed it has been the focus of most capacity building efforts in maritime archaeology thus far, i.e. training individuals in order to improve their knowledge and skills.

As we have seen, actors are vital in this story, as they have apparently been driving most of the effects of the Convention, using the Convention as an agent of internal realignment, for instance in the creation of the *Soprintendenza Del Mare* in Sicily (section 6.4). The interview data give the impression that it is not the actors that are causing problems in the States Parties, generally they are skilled and have a high 'individual capacity'. This is true in Italy, Croatia, Slovenia and even Montenegro, but perhaps less applicable to Albania. As remarked upon by one participant, ordinary

[933] ibid 3.

[934] ibid 6.

[935] The OECD for instance separates the concept of capacity into individual capacity, organisational capacity and the enabling environment, OECD (n 928) 28.

archaeologists were committed and skilled, and often achieved remarkable things.[936] However, this exemplary work can be expressed in contrast to certain conditions that they were working in, and it is these framework conditions that deserve more focus.

8.2 Framework Conditions

The structural framework conditions are the 'systemic conditions of… action or the opportunity structure of the relevant actors'.[937] They can be described in three distinct, but interrelated and interacting groups. The first of these are the cognitive-informational framework conditions. These are the conditions under which knowledge is 'produced, distributed, interpreted and applied. Without knowledge there is no (perceived) problem, no public awareness and consequently no policy process'.[938] It thus, for maritime archaeology, has three levels, the ability of archaeologists to produce information, the dissemination of this information causing public awareness, and consequent political awareness. The political-institutional framework conditions are the constitutional, institutional and legal structures constituting the framework for interaction.[939] Finally, the economic-technological framework conditions are perhaps the most obvious, and include, amongst other things, the gross domestic product (GDP) of a State, and the availability of technology.[940]

These framework conditions are fundamental to the capacity of a country, and are fundamental to why actors in the five case-study States have reported little effect of the 2001 Convention. These framework conditions will be explored in each State in turn, to show how their complex interaction has limited the effectiveness of the Convention, thereafter cross case conclusions will be addressed.

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[936] I3.

[937] Jänicke (n 366) 6.

[938] ibid 7.

[939] ibid.

[940] ibid.

8.2.1 Italy

In Italy, a participant stated that there is a crisis in underwater archaeology.[941] This sentiment has recently started to be expressed in academic literature also.[942] The primary underlying factor type causing this can be said to be political-institutional. All archaeology in Italy is regulated by the Cultural heritage and landscape code,[943] so UCH management, despite its different challenges and specific issues, is subsumed in the general legal and institutional structures in Italy. These institutions include the central Ministry of Cultural Heritage, Activities and Tourism and its regional *Soprintendenze* which are responsible for both protection and research in their territories.

These disparate regional institutions rarely employ actors familiar with underwater archaeology.[944] To become a public servant in Italy you have to wait for an open competition. The last such competition for underwater archaeologists at the Ministry was held in the mid-1980s. This means that there has been no addition of maritime archaeologists to the central Ministry, or the regional *Soprintendenze* since 1986. There have been other, general calls, including one in the summer of 2016, but the selection of candidates is down to the quality of the candidates themselves and not for their subject interest.[945] The ability of a region therefore to research underwater archaeology, and proficiently assess permit and development applications, relies on the luck of someone with a background in underwater archaeology getting through the competition and being assigned to the region. In addition those that retire or move are not replaced until

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[941] I4.

[942] Massimiliano Secci and Michele Stefanile, 'Sailing Heavy Weather: Underwater Cultural Heritage Management in Italy', *Actas del V Congreso Internacional de Arqueología Subacuática (IKUWA V): Cartagena, 2014* (Ministerio de Educación, Cultura y Deporte 2016).

[943] Decreto Legislativo 42/2004.

[944] I3, I6, I8.

[945] One participant stated of the 2016 competition: 'You know this year there will be also be a new big public call for new people for the Ministry of Culture. 500 people. Why there is no mention of underwater archaeologists? We are calling in 500 people, there are I think 97 archaeologists. Why? Why 97 archaeologists? Why didn't you choose 70 archaeologists and 20 underwater archaeologists? You can put one for every region. You solve a problem.' I6.

the next competition. The generation of maritime archaeologists that was employed in the 1980s are all now retiring, leaving a knowledge vacuum which is being filled temporarily by re-employing some of them on a consultancy basis.[946] This cannot be a long term solution however. So the management of UCH in Italy depends on the skills and interests of individuals and their relationships with others, not on any uniformity in institutional practice. As one participant stated: 'this is not normal in an advanced country.'[947]

Further, authority over protection and promotion of the cultural heritage were separated in a constitutional amendment in 2001.[948] Power was devolved to the Italian regional governments over promotion activities, which include public outreach and public access, amongst others.[949] While this is arguably beneficial, as different regions have different cultures, different site types, and local knowledge is therefore required to understand and promote the heritage effectively, there is no set national standard for these enhancement activities, they depend on the whims of the regional governments.[950] This separation of competencies has been shown to affect the implementation of treaties in other situations.[951] Essential aspects of the implementation of the 2001 Convention, public access for instance, are affected by this.

This fragmentation of powers and geographical unevenness of expertise affects the implementation of the 2001 Convention's provisions, with responsibility for awareness

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[946] I1.

[947] I6.

[948] Constitution of the Italian Republic, as amended, arts 117(2)(s) and (3).

[949] The State has exclusive legislative authority over protection of the cultural heritage, and the State and Regions have concurrent legislative authority over the enhancement of cultural and environmental properties, including the promotion and organisation of cultural activities. See: Secci and Stefanile (n 942) 101.

[950] I3.

[951] Habib Slim and Tullio Scovazzi, 'Study of the Current Status of Ratification, Implementation and Compliance with Maritime Agreements and Conventions Applicable to the Mediterranean Sea Basin, With a Specific Focus on the ENPI South Partner Countries: Part 2, Regional Report' (AGRECO Consortium 2009) 73.

and access devolved to different regions, and the duties of the competent authority of protection, management and research of the UCH depending on the initiative and experience of individual maritime archaeologists that were lucky enough to gain positions in the government's institutions.

This problem of geographical unevenness has been identified previously:

> Such [regional] differences often derive from different sensibilities among appointed territorial officers, creating once again, a heterogeneous approach possibly ascribable to a limited central coordination, posing limits to the full and unvarying development of the discipline on the whole country.[952]

The limited central coordination was identified as the primary factor affecting Italy's capacity by the interviewees.[953] One participant stated:

> …there is a lack of interest in the Ministry of Culture, which I am not able to explain. Of course lack of a special superintendency, of a special unit working only on underwater archaeology can be one of the causes, as there are no archaeologists in the Ministry of Culture which are specialist and so which are responsible for what is happening. So there is a sort of simple ignorance of the problem. We can say the situation was very different 15 years ago. Because there was a debate on the programme of UCH. This debate is dead. And the causes are not so clear… So mainly the problem is the lack of special offices, special archaeologists working on it. It was all left to the initiative of a single archaeologist of the superintendency. And this doesn't work because now this lack of specialists has caused this empty space, lack of attention on the problem.[954]

This may all stem from UCH management being subsumed within the general legal and institutional structures.[955] Heritage managers take decisions according to their own initiative, and according to the very general Cultural Heritage and Landscape Code,

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[952] Secci and Stefanile (n 942) 102.

[953] I3, I4.

[954] I4.

[955] I3.

rather than some set of common standards or policy for underwater archaeology.[956] As one participant stated:

> …the law cannot be totally and universally comprehensive, but at the same time I think specific rules and generic rules that can be applied with just a little intervention of the individual I think will give more coherence to the overall system, and not so many different approaches from, I don't know, south, north, east, west, etc., etc. And it's not the fault of the individuals obviously, it's a matter of being programmatic. Of being systematic and programmatic.[957]

The situation was not always this way. There was a central governmental body, the *Servizio Tecnico per l'Archeologia Subacquea* (STAS), dedicated to underwater archaeology, but which mainly coordinated private archaeological companies and did not have its own equipment, boats or divers.[958] This was created in the 1980s by the Director General of the *Ministero per i Beni Culturali e Ambientali* (the forerunner to MiBACT), but when the Director General that championed the STAS left the Ministry, the remit and activities of STAS were severely reduced and the concept was largely abandoned.[959]

It has been suggested that a national *Soprintendenza Del Mare*, built along the same lines as Sicily's, would alleviate some of these issues and build cohesion in the way UCH is protected and underwater archaeology is practiced in Italy.[960] At two points recently such an idea found its way to being presented to the Italian parliament.[961] Firstly, in 2009, a bill was submitted which provided for the establishment of a National *Soprintendenza Del Mare*, with central offices in Rome and regional offices for the

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[956] I3.

[957] I3.

[958] I4; Secci and Stefanile (n 942) 101.

[959] Proposta di legge 470/2013, Organizzazione del settore dell'archeologia subacquea nell'ambito del Ministero per i beni e le attività culturali e istituzione dell'Istituto centrale per l'archeologia subacquea.

[960] Secci and Stefanile (n 942) 102.

[961] Michele Stefanile, 'La Soprintendenza Del Mare e l'importanza Dell'esempio Siciliano' (2014) 11 Archaeologia Maritima Mediterranea: An International Journal on Underwater Archaeology 168.

Tyrrhenian and Adriatic Sea at Orbetello and Venice.[962] In 2013 another bill was submitted which proposed the creation of a central Centre for Underwater Archaeology (ICAS), four regional *Soprintendenze* for underwater archaeology in Venice, Rome, Genova and Cagliari, and Cape Rizzuto Island, as well as three conservation laboratories and eleven museums of underwater archaeology.[963] Both bills failed for what seem to be reasons purely to do with the political process in Italy. The Ministry of Culture has been going through recent reforms, which notably separate museums from *Soprintendenze*, and merge the responsibilities for archaeology with those over fine art and the landscape. The 17 archaeological *Soprintendenze* are being incorporated into 39 unified offices with responsibilities for archaeology, fine arts and landscape.[964] The idea of a central institution for underwater archaeology has not been revived, and the interview participants noted their concern that underwater archaeology had not even been mentioned in the far reaching reforms.[965] This may exacerbate the existing problems, as now there are 39 regional offices that would ideally need to employ an underwater archaeologist, rather than 17. It also means that the lucrative touristic museums and archaeological parks are separate from the research and protection bodies.

This institutional problem extends to universities also. Primarily only the *Università Ca' Foscari* in Venice and *Università degli Studi di Sassari*, in Sassari, Sardina, teach postgraduate degrees in underwater archaeology, with some others offering undergraduate modules.[966] For a country such as Italy, with its 'position and heritage',

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[962] Proposta di legge 2302/2009, Istituzione della Soprintendenza del mare e delle acque interne e organizzazione del settore del patrimonio storico-culturale sommerso nell'ambito del Ministero per i beni e le attività culturali.

[963] Proposta di legge 470/2013, Organizzazione del settore dell'archeologia subacquea nell'ambito del Ministero per i beni e le attività culturali e istituzione dell'Istituto centrale per l'archeologia subacquea.

[964] Decreto 208/2016, Riorganizzazione del Ministero dei beni e delle attivita' culturali e del turismo ai sensi dell'articolo 1, comma 327, della legge 28 dicembre 2015.

[965] I1, I6, Secci and Stefanile (n 942) 102–3.

[966] I3, I8.

it is thought that this is not enough.[967] The university curricula is structured by the Ministry of Education, University and Research, with little scope for universities to adapt their courses to the developing discipline.[968] This again may stem from UCH being absent from the 'lexicon of cultural heritage in Italy.'[969] In addition, archaeology degrees are still often grounded in a culture-historical, or even art-historical or artefact based approaches, and so do not equip underwater archaeologists with the skills they need to competently work in the current climate, be these technological, ethical, theoretical or managerial.[970] Italian students intending to become underwater archaeologists often have to study abroad.[971] This institutional condition impacts the cognitive-informational framework, in that some underwater archaeologists have received an imperfect education in the subject, which affects their ability to adequately produce and disseminate information. This of course also impacts on the capacity of actors in Italy. However, there are already a large number of unemployed underwater archaeologists in Italy that cannot obtain State positions, so the training and education of more is of secondary importance to the problems caused by the institutional structures.

Another issue that arose numerous times was the regulation of scientific diving in Italy.[972] Scientific diving does not have its own regulations in Italy, and so if an issue were to occur, the commercial regulations may be relied upon by the authorities as an analogous standard that the archaeologists should have been working to.[973] In some areas however, commercial qualifications are needed, for archaeological work in harbour areas for instance.[974] This has the potential to exclude archaeologists without

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[967] I7, I8.

[968] Secci and Stefanile (n 942) 103.

[969] I3.

[970] I1, I3.

[971] I1.

[972] I1, I4. See also Secci and Stefanile (n 942) 103.

[973] I4.

[974] I3.

the means to undertake a commercial diving course, as these courses are often prohibitively expensive, from practicing underwater archaeology, and provides excessive logistical and economic barriers to those running projects. This is a common issue worldwide for archaeological practice.[975]

Of course economic factors also hamper heritage protection and research in Italy. The culture budget was greatly reduced following the financial crisis.[976] The *Soprintendenza Del Mare* in Sicily works round this by seeking funding from the EU, and by attracting international collaboration with institutions that can finance projects.[977] They are hampered by additional institutional factors though, as private donors cannot donate directly to the *Soprintendenza Del Mare*, only to the government, and if a private donor wants to pay for a specific project, a tender system has to be followed, where anyone can apply to do the work.[978] The economic-technological framework conditions present in Italy may influence the capacity of the State, but again the institutional framework also impacts on this.

8.2.2 Croatia

Croatia, like Italy, has a long tradition of maritime archaeology. On the face of it, its capacity is hindered largely by economic factors, however the cognitive-informational and political-institutional framework conditions also play their part. The Ministry of Culture have explained that the country has been affected by the financial crisis of 2007-2008, and this triggered austerity measures which heavily affected the Ministry of Culture.[979] Croatia emerged from recession only in late 2014/early 2015.[980]

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[975] Jonathan Benjamin and Robert MacKintosh, 'Regulating Scientific Diving and Underwater Archaeology: Legal and Historical Considerations' (2016) 45 International Journal of Nautical Archaeology 153.

[976] I8.

[977] I8.

[978] I8.

[979] Radu Florea and Ghica Gheorghiu, 'Review of the International Centre for Underwater Archaeology: Final Report' (Strategicus Consulting 2015) 13. See also: Veronika Ratzenböck, Katharina Okulski and Xenia Kopf, *Cultural Policy Landscapes: A Guide to Eighteen Central and South Eastern European Countries* (ERSTE Foundation and österreichische kulturdokumentation internationales archiv für kulturanalysen 2012) 22.

Due to this, the International Centre for Underwater Archaeology (ICUA) in Zadar, which was established in 2007 and became a UNESCO category 2 centre in 2009, with a remit of promoting underwater archaeology in the region, fostering cooperation, and undertaking education, conservation and research, has been consistently 'understaffed and underfinanced'.[981] The agreement between UNESCO and Croatia specified that the Ministry of Culture was to provide annually a minimum amount of 918,000 US dollars to ICUA.[982] This figure has not been met (Table 30).

Table 30 Total budget of ICUA between 2008 and 2014 (in US $, approximate figures)[983].

SOURCE	2008	2009	2010	2011	2012	2013	2014	TOTAL
State budget	0	19,564	15,427	110,714	141,143	199,448	306,367	792,663
UNESCO	0	0	0	7,469	8,742	22,888	47,616	182,756
Other sources	0	49,760	0	39,307	31,120	16,551	46,018	86,715
TOTAL	0	69,324	15,427	157,489	181,006	238,887	400,001	1,062,134

The UNESCO funding is only for particular projects or courses, in order that they include people from other States, especially in South Eastern Europe.[984] Understandably perhaps, Croatia has been unwilling to fund projects in other States, and those other States are also reluctant to fund ICUA to help.[985] International meetings are often held where interest is expressed in collaboration in the protection of UCH and building capacities, but even when followed up by staff from ICUA, little practical

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[980] C2.

[981] Florea and Gheorghiu (n 979) 3.

[982] 'Agreement between UNESCO and the Government of the Republic of Croatia Regarding the Establishment of the Regional Centre for Underwater Archaeology in Zadar, Croatia as a Category 2 Centre under the Auspices of UNESCO'. Signed 1 August 2008, art 13.

[983] Florea and Gheorghiu (n 979) 12.

[984] C2.

[985] C2.

results ensue.[986] ICUA has a dual nature, as it was originally conceived of as a national centre but then was given an international remit later. This has caused it problems, such as being expected by many parties to undertake projects in other countries, but not having the funding to deliver them.[987]

A basic and an advanced underwater archaeology course is offered at ICUA. Projects have been growing in scope as the centre has acquired more equipment, especially diving equipment.[988] After such courses ICUA attempts to maintain contact with its students when they leave, in order to establish a network of contacts, and as no other help can be offered once they are gone.[989] However, if the States of origin of the students do not provide any support or work for them after these courses, there is nothing more ICUA can do.[990] Bearing in mind the theoretical concept of capacity, these capacity building efforts only focus on raising the skills and knowledge of actors.

ICUA is also understaffed. It has five permanent staff members, and only one is a permanent underwater archaeologist.[991] There are around five more employed on a project basis. This number must be compared to the twenty or so that were originally envisaged.[992] This means that employees at ICUA take on dual roles, including the director having to dive and work as an archaeologist.[993] In addition, the centre employs many people on project based contracts, where they learn their job for the duration of a particular project and then leave. This means that a larger number of people can gain basic underwater archaeology skills, but it also means that just as staff are becoming useful to the centre (in that they are becoming proficient at diving and underwater archaeology, and so do not need so much supervision), they have to leave as there is no

[986] C2.

[987] C2.

[988] C2.

[989] C2.

[990] C2.

[991] C2.

[992] C2.

[993] C2.

other position, or money to them retain them.[994] The centre then has a gap of 6 or 12 months before this staff member is replaced and the training has to start again from the beginning.[995] If the centre is meant to help foster archaeology in other States, constantly having a novice on staff that cannot help or teach others is a drawback.[996] A participant stated the reason for this:

> …in underwater archaeology you need to have people who are very experienced divers. Because this is working underwater, and this is something that politicians don't understand.[997]

The centre has been doing excellent work with the resources it has been given, it trained 112 people in various courses between 2011 and 2014. Again however, this seems to be due to archaeologists working extremely hard in very difficult conditions. There were high expectations for the centre, but it may be unfair to judge the work of the centre against these, as it has not received the amount of funding or support that it was promised.[998] The ICUA is thus limited by these factors.

The problem is compounded by Croatia's institutional framework. There is also a Department for Underwater Archaeology in the Croatian Conservation Institute (CCI) in Zagreb, and while it mainly carries out rescue archaeology and research of endangered UCH,[999] their duties are similar to ICUA, and both compete for the same funding from the Ministry of Culture. The CCI are also hampered by ICUA's dual nature. The original plan was that ICUA be a national centre.[1000] When it was first conceived as such, it was intended that the CCI would undertake all archaeological research, and all the conservation, exhibition, publication and training work would take place at ICUA.[1001]

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[994] C2.

[995] C2.

[996] C2.

[997] C2.

[998] C2.

[999] C4.

[1000] C1, C2, C4.

[1001] C4.

When ICUA became a UNESCO centre however, it could no longer be a governmental body, and so separated from the CCI, which lost all its conservation facilities.[1002]

In relation to the ICUA changing from a national to international centre, one participant remarked:

> There is no plan. No one thinks a few steps ahead.[1003]

In addition to ICUA and the CCI, many museums employ underwater archaeologists, and there are also academic underwater archaeologists, most notably at the University of Zadar.[1004]

All the underwater archaeologists in Croatia are therefore in effect competing for funding. The disparate institutions all apply to the government each year for money, and everyone gets only a small amount.[1005] The Ministry tries to satisfy everyone.[1006] This was described as 'Solomon's solution', a reference to Solomon's judgement where he proposed cutting a baby in half, as nobody gets quite enough money to do anything properly.[1007]

This is compounded by there being no overarching State plan or research framework.[1008] This leads to sporadic, year by year funding.[1009] This means that some projects are left half finished, and sites left open for looters.[1010] If a larger sum was given in the first place, a site could be investigated properly and published (and then

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[1002] C4.

[1003] C4.

[1004] C2.

[1005] C4.

[1006] C1.

[1007] C4.

[1008] C4.

[1009] C4.

[1010] C4.

reburied and protected), rather than having a little money each year and having to return again and again, which ends up adding costs and taking more time.[1011]

Another frustration was with administrative issues.[1012] In particular contracts from the government will typically be issued in June, then permits have to be sought so that work can only really start in August, with the timing and likelihood of the project remaining uncertain before that. This impacts on international cooperation particularly, as set dates for projects can never be given until late on.[1013]

This all comes down to a lack of planning and also a lack of understanding of the logistics and needs of underwater archaeology from the Ministry, so that financially, regarding staffing and administratively the practice of underwater archaeology in Croatia is struggling. The frustration at this naiveté is evident in this statement from one of the participants at the ICUA:

> …maybe it's not going at the pace that the administration or politicians would want, because maybe they don't realise what are the problems. Sometimes they tell you, 'well you go and you should go there and excavate this wreck'. And then you say, 'well its 50 meters'. 'So?' 'Well you don't dive, you know. You are just working at the station, you don't understand what is connected with diving to 50 meters.' How can we do work on 50 meters practically? It's not so easy, you know, who can dive this? Students from your country who don't know how to dive? I mean, so sometimes they really don't understand that you need to be not just covering the story but if you are not inside this, if you are not diving, then how can you realise the risk? Because we don't want people to die working in underwater archaeology, this is, the security should be always at maximum, you know. And the security costs because you need to have the trained people and the training takes a lot of time. The equipment has to be perfect, and this costs a lot, to make the, you know the regulators and the tanks, to check them each year,

[1011] C4.

[1012] C2, C4.

[1013] C2.

> it costs a lot, and to whom can I explain this? To my superiors? To the Ministry? To UNESCO? They don't understand! These are the practical things.[1014]

Underwater archaeology, especially when it involves diving, can be a dangerous and exhausting job, with long periods of time spent away from home. But outsiders often do not realise this:

> A few years ago [a CCI staff member] had 120 diving days, and they don't want to give us 20% extra wage for diving. People at the Ministry think we are all doing sunbathing.[1015]

Another exchange progressed like this:

> *[Q Is this that the politicians don't care?]*
>
> Don't care
>
> *[Q Or they don't realise the work that goes into underwater archaeology?]*
>
> Both. They don't realise and don't care.[1016]

Jasen Mesic, an underwater archaeologist that became Minister of Culture, drove the underwater archaeology cause whilst he was Minister. During this period the problems were understood, but following his tenure, the understanding has seemed to have disappeared again.[1017]

There is also a lack of understanding about legislative need that is slightly harder to explain. Croatia apparently believes its laws are sufficient, but there are some major discrepancies between Croatian national law and the requirements of the 2001 Convention.[1018] The Convention has been translated into Croatian and published, so the government should know what its required duties,[1019] but basic duties such as

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[1014] C2.

[1015] C4.

[1016] C4.

[1017] C4.

[1018] C3.

[1019] C3.

indicating a competent authority or nominating a procedure under Article 9(2) have not been completed, as well as the more complex duties located in Articles 9 and 10.

This faith in their laws also causes a lack of interest in the Convention:

> Nobody cares about the Convention I can tell you, because we have clear legislation that says your duties and obligations.[1020]

So what on the face of it is an economic problem in Croatia, is maybe at its root a lack of political understanding. This lack of understanding is causing duplication of institutional remits, practical issues for archaeologists and ultimately, it is also causing the Convention not to be legally implemented properly.[1021]

8.2.3 Montenegro

Unlike Italy and Croatia, Montenegro has a shorter history of maritime archaeology, and so the main problem there is cognitive-informational. There is very little understanding of what maritime archaeology is, and little awareness of even the existence of the Convention.[1022] This may be due to Montenegro, which gained independence in 2006, ratifying all UNESCO's cultural conventions, as well as rafts of other treaties, between 2006 and 2009, with little thought of what each treaty meant.[1023] So the Ministry of Culture staff have little conception that it even exists. There is still confusion over which body is responsible for ensuring the implementation of the Convention and there is no official at the Ministry of Culture with responsibility for underwater archaeology.[1024] One employee, who happens to have studied underwater archaeology, is the only actor in the institution familiar with the subject, and so all UCH issues pass through their hands.[1025]

[1020] C1

[1021] C3.

[1022] M1

[1023] M1.

[1024] M1.

[1025] M1.

In Montenegro the cognitive-informational framework has either caused, or is maybe exacerbated by, the lack of a dedicated underwater archaeology institution. When the Ministry of Culture was reformed in 2011, it was initially planned for it to have a department for underwater archaeology within one of its centres. The furthest they got was training three archaeologists to dive, and giving them diving equipment.[1026] This training was provided by a diving centre in Bijela which specialises in clearing unexploded ordinance and has no archaeologists on staff.[1027] The course therefore focussed on teaching diving and some survey and excavation methods, rather than on underwater archaeology. Some smaller projects do get undertaken, which amount to around 10 days of diving a year.[1028] But this is dependant again on the initiative of the individuals.

There are some actors familiar with underwater archaeology in Montenegro, but they are working in an institutional vacuum. One participant constantly said that they have 'skipped the first steps'.[1029] They can research UCH to some extent, but there is no framework for protection, either legal or institutional. One 15th century wreck located in Boka Bay has achieved legal protection, but no further steps have been taken, and it is thought that it is still being looted, with no way to monitor or punish this.[1030] Looting can be reported to the heritage inspectorate, but those actors have little understanding of the Convention, and no concept of what practical measures they should take to remedy the situation.[1031]

There is enough money apparently to set up an institution to protect UCH, but a lot of money from the Ministry of Culture gets wasted each year on small projects that are not executed well.[1032] Even in terrestrial archaeology, there is little desire to invest in

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[1026] M1, M2.

[1027] M2,

[1028] M1, M2.

[1029] M1.

[1030] M1.

[1031] M1.

[1032] M1.

projects or heritage that will pay back in the long term, from increased tourism and research.[1033]

The UNESCO Convention has not helped this situation, as one participant said: 'It's like we never ratified it'.[1034] Because the decision makers, as well as many other actors, barely know it exists.

8.2.4 Slovenia

In Slovenia the public awareness of maritime archaeology, and consequent political knowledge, is reasonably high, as archaeologists there have worked hard over the past 25 years to make results highly visible, especially relating to the archaeology of the Ljublianica River.[1035]

The problem in Slovenia is primarily institutional. The 'Group for Underwater Archaeology' that was founded in 2002 within the Institute for the Protection for the Cultural Heritage of Slovenia, was 'not so serious'.[1036] It undertook development led projects, but with little funding.[1037] One participant stated: 'we were more or less enthusiasts supported from time to time by the State.'[1038] This may have been an outcome of Slovenia's move towards capitalism which meant that the State grew smaller, and less likely to both support existing institutions, and create anything new.[1039] The establishment of a permanent organisation for underwater archaeology with staff and equipment would be a major step forward.[1040] However, there appears to be little scope of establishing such an organisation now.[1041]

[1033] M1.

[1034] M1.

[1035] S1, S3.

[1036] S3.

[1037] S3.

[1038] S3.

[1039] S1.

[1040] S3.

[1041] S1, S3.

The State does not provide a lot of funding for underwater archaeology.[1042] Compared to other branches of government, the funding needed is extremely small, and yet is still not forthcoming.[1043] Most funding comes from developers, due to the requirements of the Valletta Convention, and from the European Commission, European structural funds, and also from Norwegian support for cultural heritage projects.[1044]

8.2.5 Albania

There is little to say of Albania, as only one interview was conducted and little data provided. But it appears Albania's problems are much like Montenegro's but perhaps more pronounced. Albania seems to have an almost complete lack of knowledge of underwater archaeology and no Albanian underwater archaeologists practicing in Albania.[1045] Foreign archaeologists working in Albania are often unsure of which institution has the authority to grant permits for underwater archaeology, the Institute of Archaeology or the National Coastal Agency, with some archaeologists opting to get permits from both. [1046] Again, the whole interest in underwater archaeology in the country appears to be driven by one actor, Auron Tare, a former Member of Parliament and current director of the National Coastal Agency.[1047]

8.3 Situative Contexts

It is important to remember that none of these framework conditions are static. They are subject to short term variable conditions, known as situative contexts.[1048] These are often events that spark public debate, such as the Chernobyl, Bhopal or Seveso disasters and the opportunities these offered for proponents of environmental protection. In the case of maritime archaeology, discoveries or destruction of famous

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[1042] S1.

[1043] S1.

[1044] S3.

[1045] A1.

[1046] A1.

[1047] A1.

[1048] Jänicke (n 366) 7.

shipwrecks often have a similar effect.[1049] Some examples arose in the interviews. These include Jasen Mesic, a maritime archaeologist, rising to the position of Minister of Culture for a short period of time in Croatia and the financial crisis of 2007-8. Another example was particularly illustrative of the problems that Italy faces. In Venice there was period of intensive underwater archaeological activity related to the construction of a system to protect Venice from flooding, known as the Mose system. The project provided a lot of money and opportunity to undertake underwater archaeology in the lagoon. At this time there was also an archaeologist employed by the regional *Soprintendenza* that was specialised in underwater archaeology. The conditions therefore were, for a short time, very conducive to underwater archaeological research, so much so that it 'seemed that underwater archaeology was all and land archaeology was secondary archaeology'.[1050] However, the project was subject to a scandal, in 2014 35 people including the Mayor of Venice were arrested on corruption charges related to the project. Therefore the building of the Mose, and the money related to it, stopped. Around the same time, the underwater archaeologist in the *Soprintendenza* moved to a different *Soprintendenza*. One participant expertly explained the effects of these situative contexts on capacity:

> Because of these two elements from the day to the night, underwater archaeology had a collapse, and now we have no works, no attention, to what is happening underwater. So it seems that underwater archaeology in the lagoon, in the sea of Venice, does not exist. So the question is did you joke me some years ago, telling me that there was archaeology everywhere? Or are you closing the eyes now? Because it's absent. So I think it's a particular situation of Venice. But in general, the management of cultural heritage, especially underwater archaeology, in Italy is related to some factors, temporary factors, which are the interest of one archaeologist to the topic. So if he moves, and it arrives, an archaeologist, a prehistorian, underwater archaeology closes. This is the same

[1049] For example the discovery and subsequent damage and dispersal of finds from the wreck of the *Association* in 1967 was one contributing factor leading to the Protection of Wrecks Act 1973 in the UK. David Blackman, 'Nautical Antiquities Legislation: A Progress Report by David Blackman' (1973) 4 Current Archaeology 147.

[1050] I4.

problem in other archaeology. And a problem of the management of archaeology in Italy.

The second aspect is the money. If you have money, ordinary funds for this problem, and you leave taking money from the private companies, it is normal that when the private companies stop, if big buildings stops or closes, you have no funds and you cannot do anything in archaeology. So you cannot manage, control the territory. Because you have not got regular funds, you have not got the structure with the specialist, you live according to the day, the weather. It's absurd. So I think underwater archaeology in Italy should have a permanent structure, permanent funds to this subject, or else it will always be in the history of peaks and troughs. It has no sense. It is not serious. So we should think in a completely new way… You need a special *Soprintendenza* with archaeologists working underwater with technicians, divers, and a laboratory for conservation. If you have not got this kind of structure, and special funds to do, you will live always according to various factors happening, crisis, availability of money, interest of the single... It's not a wonderful panorama, but this is the reality in Italy.[1051]

The Convention itself could be seen as a situative context. Its creation and the publicity surrounding it allowed certain actors to push for reform, such as the creation of the *Soprintendenza Del Mare* in Sicily.[1052] Like with other situative contexts, the situation has now changed, and the impetus for change introduced by the Convention has subsided.

8.4 Strategy

When considering the situative contexts and the reliance on the initiative and dedication of individual actors, a recurrent phenomena can be discerned in all cases. This is the absence of a fundamental aspect of the capacity conceptual framework, that

[1051] I4.

[1052] I8.

of the strategy. Strategy is a relatively unambiguous concept, it is the general, planned approach to a problem.[1053]

One participant in Croatia identified this lack of strategy as the root problem: 'the main problem here is no centralised or national plan'.[1054] And later: 'there is no plan. No one thinks a few steps ahead.'[1055] All other issues stem from this. The lack of a central controlling institution means all other institutions compete. It means that particular UCH is not prioritised for funding, meaning all projects get less than they need. It leads to sporadic funding, leading to excavations being half finished, and sites being left open for looters. It means ICUA was created as part of the CCI, and then made a UNESCO centre which removed all the facilities from the CCI. It means that no future change is envisaged, and requirements under the 2001 Convention are ignored, with no forum in which to identify these problems, and no proposals developed to rectify them.

For Italy, it was also cited as 'the main issue':

> I think specific rules and generic rules that can be applied with just a little intervention of the individual I think will give more coherence to the overall system, and not so many different approaches from, I don't know, south, north, east, west etc etc. And it's not the fault of the individuals obviously, it's a matter of being programmatic. Of being systematic and programmatic… So systematic rules that you can apply because otherwise it's like a far west where everyone is aiming to the best but does so many different things that especially when you want to have a career in an osmotic environment, it just starts to crash. That's the, I think, the main issue.[1056]

The regional unevenness of protection and research in Italy has been noted (section 8.2.1), but this is the case largely because there is no central strategy.[1057] There is no central guidance on the priorities of protection and research, and research is

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[1053] Jänicke (n 366) 6.

[1054] C4.

[1055] C4.

[1056] I3.

[1057] I3, I4, I6, I7.

driven largely reactively by the necessities of rescue excavations, so no informed choices can be made about what to concentrate time and resources on.[1058] There are no guidelines given by the Ministry about what level of protection UCH needs and the practical measures that can be taken to meet these standards.[1059] Production of such guidelines would go some way to alleviating the problem of institutional memory when an underwater archaeologist leaves the region. Where there is no underwater archaeologist employed in the region it would give very basic processes and requirements, such as note that an underwater archaeologist is required to undertake interventions on UCH and assess the impacts of developments. There is little communication and coordination between the central Ministry and its *Soprintendenze*. If underwater archaeology is neglected due to the choice or interests of an individual actor, the Ministry does not question this or attempt to ensure underwater archaeology is not ignored.[1060] 'But what it feels, most of the time, and I mean in my opinion, but I think lots of my colleagues will agree, is that you are left alone. You know?'[1061]

In Montenegro this lack of strategy has led to 'skipping steps', with research being attempted without the necessary institutional and legal frameworks in which to situate it.[1062] There is little forethought about the benefits that UCH, and even terrestrial heritage, could bring in the long term, if it was properly protected and valorised.[1063]

Finally, in Slovenia research again is reactive, and funding therefore sporadic. The underlying problem there has also been noted as the lack of any systematic plan.[1064] 'This political decision was not connected to the real wish, real idea to change something.'[1065]

[1058] I4.

[1059] 16.

[1060] I7.

[1061] I3.

[1062] M1.

[1063] M1.

[1064] S1.

[1065] S1.

While the framework conditions and situative contexts in each case study are complex and ever changing, this one common thread ran through them; there is always a lack of a programmatic approach to underwater archaeology. Underwater archaeology remains reactive, with sporadic funding, ill-conceived institutions, and regional variations. The strategy aspect of the capacity concept could be the variable common to all case studies, and allows the systems in each State to retain deep rooted problems, which largely remain unexamined and unspoken. It has been stated that 'environmental protection needs strategy also to compensate for the generally weak position of its proponents', [1066] and it is tempting to apply this to the protection of UCH too.

8.5 Causation

What is causing the lack of implementation of the 2001 Convention? It has not been possible to show causation in this study due to the sample size of participants and the nature of the data. To build an evidential chain for example, several participants, directly or indirectly, have to highlight the factors independently and suggest the causal links.[1067] With the limited number of participants, and the disparate issues they often highlighted, it would not be possible to build such a chain, except possibly for some aspects of the situation in Italy.

It has been possible, through close examination of some case studies, to outline some possible effects of the 2001 Convention, and to describe some aspects of the contexts relating to UCH management and research within some of the 2001 Convention's States Parties. This focus on the national contexts became necessary as these were the overwhelming concern of the interview participants. If the sample had been different, for instance if it had included members of the States' permanent delegations to UNESCO, the concerns may have been different, with perhaps more emphasis being placed upon on the influence of the international environment on implementation. As it is, with the data collected, it is possible to say that factors related to the individual country, particularly capacity, are possibly causing a lack of effect of the Convention.

[1066] Jänicke (n 366) 6.

[1067] Miles, Huberman and Saldana (n 360) 291.

Table 31 Example Causal Network Variable List[1068]

Antecedent/Start Variables	**Mediating Variables**	**Outcomes**
Political-Institutional Framework	Ratification of the 2001 Convention	Legislative
Economic-Technological Framework	2001 Convention enters into force	Institutional
Cognitive-informational Framework	National actors involved in negotiating and drafting the Convention	Enforcement
Actors	An actor interested in underwater archaeology gains political power	Awareness of UCH
Strategy	A famous shipwreck is discovered	Practice of underwater archaeology
	A famous shipwreck is destroyed	Authority of underwater archaeology
	A large infrastructure project begins funding extensive underwater archaeological research	

The case studies allowed examination of the antecedent, or start, variables in each State in detail. These consist of the framework conditions, the actors and the strategy already in place in the States. In a causal chain that sought to explain the effects of the 2001 Convention, the Convention could be considered as a mediating variable, i.e. it is supposed to initiate change in the antecedent variables. These changes would be termed outcomes. Table 31 shows a conjectural causal network variable list showing the antecedent variables, possible mediating variables and outcomes. The antecedent variables remain broad and could be partitioned into smaller concepts, for instance the political-institutional framework conditions could be split into: international legislation, national legislation, regional legislation, central institutions, regional institutions, competing institutions, universities, NGOs, type of political system and so on.

Why then, for instance, has Italy has seen more of an effect from the Convention than Croatia? It is not possible to definitively say, but hypothetical casual chains for the

[1068] ibid 241.

ratification of the 2001 Convention and the introduction of *Legge* 157/2009 may resemble those set out in Table 32. Italy is actually somewhat of an outlier case, in that it is one of the few States to attempt to regulate UCH interventions beyond territorial waters in line with the Convention. It is not clear what the proximate factors are in this chain. It may be that it was very important that there was a desire to be seen to care about UCH by the government in Italy, although this is to some extent true of Croatia too. Both States lacked existing legislation applying to UCH in the EEZ, continental shelf and Area, but in Croatia's case the existing national legislation was well regarded and thought to be strict and adequate in its regulation of UCH. Perhaps the important mediating variable in Italy's case was when Bob Ballard recovered UCH from Skerki Bank and shipped it to the USA, with the perception of some actors in Italy being that this was done without sufficient collaboration with Italy, or without the necessary authorisations. The *Ancona* being targeted in 2007 by Odyssey also no doubt kept the governments focus and ensured the ratification of the Convention and the promulgation of *Legge* 157/2009 in 2009. Croatia, while still having problems with looting, did not suffer this large scale and widely publicised looting, and therefore possibly did not have the same incentive to implement the 2001 Convention to an equivalent extent. A clearer picture is given when Italy is compared with Montenegro. The antecedent variables in those cases are very different, for instance in Montenegro there is a lack of a baseline knowledge of the existence and importance of UCH, little public awareness of UCH, no care for UCH from politicians and no government institutions that have a remit over UCH. Which of these factors has meant that the Convention has had little effect in Montenegro cannot be determined, but it is likely that all played a part to some degree.

Table 32. Hypothetical causal chain in Italy

Antecedent/Start Variables	**Mediating Variables**	**Outcomes**
A baseline knowledge of the existence and importance of UCH Public awareness of UCH A care for UCH, and a desire to be seen to care for UCH, from politicians Actors concerned about UCH	Previous and continuing threats to UCH beyond territorial waters (such as Odyssey with the *Ancona*) Perceived lack of control over UCH beyond territorial waters National actors were involved in negotiating and	Ratification of the 2001 Convention *Legge* 157/2009

and willing to pressure government The existence of government institutions that have a remit over UCH The economic means to properly fund national actors and government institutions to work in UCH research and management and in cultural heritage generally Democratic society A lack of existing legislation applying to UCH in the EEZ, continental shelf and Area A tradition or legal requirement of transposing international law into national law	drafting the Convention	

What is certainly shown by the case studies, and readily apparent in the above tables, is that the contexts are extremely complex, with a large number of antecedent variables which interact and change over time. It has been claimed that successful environmental protection 'is brought about by a complex interaction of influences and not by a single, isolated factor, nor a favourite instrument, nor a single type of actor, nor a particular framework condition or institution'.[1069] 'Mono-factorial' approaches to capacity development that see single policy instruments attempt to alter the structural framework conditions in a top down manner are decried in the literature.[1070] As wide in scope as it is, the 2001 UNESCO Convention is itself a mono-factorial approach. It recognises some of the framework conditions and alters the normative framework slightly, but it fits into a complicated, often decentralised, pre-existing system, and is often irrelevant to the day to day activities of the relevant actors, who are doing their best to research and protect UCH under difficult conditions. On its own, it has not been

[1069] Jänicke (n 366) 4.

[1070] ibid.

enough to cause deep and lasting positive changes to the protection of UCH in these case study States.

8.6 Conclusions

There is only so much a qualitative study with these particular actors can tell. It would be interesting to begin to research perhaps the effect of a culture of non-compliance on the implementation of individual States, or compare the effect of a lack of SIRs to say, UNESCO's other Conventions or other marine governance conventions. Perhaps understandably these issues were not ones that concerned the archaeologists and lawyers of the case study States when they were asked about the implementation of the Convention. What concerned them was almost universally issues to do with the capacity of their State. This suggests that a factor type, but perhaps not the only, or even most important, factor type, causing the lack of effect of the Convention are those to do with the individual States themselves, their capacity.

Through examination of the situations in the case study States, it became clear that the structural framework conditions were crucial to the capacity of each State. The Convention's mono-factorial approach to raising capacity, to changing the normative framework and initiating generative activities, needs to be supported by other initiatives that attempt to alter some of the other framework conditions, or even some of the other types of factors, hampering implementation of the Convention. Three such initiatives will be suggested in the next chapter. Fundamentally however, these framework conditions need to be understood. Without an understanding of the context that the 2001 Convention is entering into, and not just the legal context, its effects will always be limited.

Chapter 9 – Next Steps

Through a consideration of the legal effectiveness of the 2001 Convention worldwide, and an investigation of its other effects in a small number of its States Parties, it is possible to say that the 2001 Convention is not being implemented in the way it was intended. Even in Italy, where there has been specific legislative implementation, there remain issues with the protection and research of UCH that the Convention has not improved. For the many countries that have not legislatively implemented the Convention, it will have had little to no effect. The Convention however, should not be thought of as a moribund text. The regime around it, especially through its Meeting of States Parties and STAB, is continually evolving. The Secretariat of the Convention works tirelessly to promote it amongst States that have not yet ratified, and to increase capacities in States that have. This means that there is scope and opportunity to improve the functioning of the Convention, and there are strategies and activities that could achieve this that are already being undertaken, and others that could be introduced.

The different types of measures that could be suggested will be discussed, before looking at the efforts UNESCO are currently undertaking in this regard. Finally, recommendations will be made about how to improve the levels of compliance with the Convention, and how to develop the capacities of the States Parties to accomplish this.

9.1 Types of Strategies

9.1.1 Measures on an International Level

The types of strategies that could be used to improve the effectiveness of the 2001 Convention can be instigated on a number of levels, and driven by different actors or institutions. In the academic literature that addresses these questions as they relate to multilateral environmental agreements, the level of international law and the wider regimes, obligations and processes surrounding the international law is focussed on,

rather than for instance, strategies aimed at the individual countries.[1071] In the case of the 2001 Convention, such measures would relate to, and be undertaken by, the Meetings of States Parties, the STAB, and the Convention Secretariat. Such measures on an international level can be classed into three categories: [1072]

- positive incentives, such as financial or technical assistance or training;
- coercive measures, such as penalties and sanctions; and
- systems of implementation review (SIRs), which include activities such as monitoring, reporting, and other methods that increase knowledge of implementation and transparency between States Parties.

Based on the results of this study, i.e. that a lack of compliance is probably caused by a lack of capacity, it could be suggested that some of these strategies are more suitable than others for improving the situation. The literature relating to international environmental agreements tends to follow the managerial school for this same reason (section 3.4.3.1).[1073] This may be due to such multilateral environmental agreements focusing on problems that require scientific and technical expertise to understand and manage. For treaties that focus on other problems, such as human rights treaties, and trade agreements, breaches could be more easily attributed to calculated choices rather than capacity.

[1071] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 542; Victor Raustiala and Skolnikoff *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (n 322) 47–53; John Lanchbery, 'Long-Term Trends in Systems for Implementation Review in International Agreements on Fauna and Flora', *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (International Institute for Applied Systems Analysis 1998); Kal Raustiala and David G Victor, 'Conclusions' in David G Victor, Kal Raustiala and Eugene B Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (International Institute for Applied Systems Analysis 1998) 676–681.

[1072] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 542.

[1073] Chayes and Chayes, 'On Compliance' (n 382); Chayes and Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (n 382). Brown Weiss and Jacobson's 'Engaging Countries' for instance certainly follows this school of thought. Brown Weiss and Jacobson (n 318).

Coercive measures are rarely used in environmental treaties. Following a managerial analysis of the problem, this is because issues to do with capacity are causing non-compliance and so punishment would be counterproductive as it would reduce capacity further. Based on the results of this study, coercive measures would also be counterproductive in the case of the 2001 Convention, and probably for other cultural conventions too. The World Heritage Convention however, has the potential to use such a measure where World Heritage properties that have deteriorated, or where particular measures were not taken by a State Party to stop deterioration, can be removed from the World Heritage List.[1074] For the 2001 Convention however, no coercive measures will be suggested.

Positive incentives on the other hand recognise that capacity problems are a key factor in leading to non-compliance, and attempt to build the capacity in order to improve compliance by, for instance, training actors or providing technical or financial assistance. At first glance, because a lack of capacity may be causing a lack of effectiveness, these methods would be ideal for use in the 2001 Convention regime as they are intended to raise capacities and increase resources available to States. However, a number of positive incentive measures are already used in the 2001 Convention's regime, such as the provision of training courses and the production of training materials, and these cannot be said to have been, so far, very effective considering this study's conclusions on the Convention's national implementation levels. These positive incentives however, will still be discussed in further detail below (section 9.2.1).

At the international level, SIRs, such as monitoring and reporting, which increase knowledge and transparency, could prove vital in making progress with this problem. If the inexplicable lack of SIRs in the 2001 Convention regime could be addressed, the knowledge of the state of the Convention's implementation could rise, and many States' apparent inaction in transposing the Convention into their national laws could be made visible. Whilst this measure is not suggested as a direct result of the conclusions of this

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[1074] 'Operational Guidelines for the Implementation of the World Heritage Convention' (2013) UNESCO Doc. WHC 13/01 (UNESCO Doc. WHC 13/01), 53-4. This has happened for two sites, the Arabian Oryx Sanctuary in Oman in 2007, and the Dresden Elbe Valley in Germany in 2009.

study, the difficulty encountered in gathering sufficient data in order to reach those conclusions has persuaded the author that such a system is desperately needed. Much more needs to be done to increase knowledge of the state of the Convention's implementation.

9.1.2 Other Types of Measures

Moving away from the international level, away from the methods traditionally suggested to improve the effectiveness of environmental treaties, two other courses of action will be proposed which are more directly based on the results of this study, and which could be undertaken outside of the 2001 Convention regime. Firstly, regional agreements, covering for instance the Adriatic, could be pursued that put regional cooperation on a firmer footing, ensure a stricter level of protection of UCH than that offered by the 2001 Convention, and which would allow formal discussions to take place on how to raise capacities in the region and perhaps crucially, how to fund such efforts. Joint enforcement efforts, involving for instance the coordination of police and coastguard resources, could also be a benefit here.

Secondly, addressing the lack of national strategies (section 8.4), national plans for the management of UCH could set out the goals and pathways needed to properly implement the Convention, whether this includes legislative and institutional reform or the raising of individual, institutional and other types of capacities. Research frameworks could also be developed to inform heritage managers of what UCH is a scientific priority, helping to channel limited funding into priorities set by the archaeological community. Both national plans and research frameworks, while ideally State initiatives, could also be produced by interested archaeologists or NGOs if the State organisations seem unwilling to undertake them, and could be used to lobby for reform and drive up capacities.

These potential measures will be discussed in greater detail below (section 9.3), but first the strategies for improvement currently carried out by UNESCO will be outlined.

9.2 Current strategies for Improvement

9.2.1 UNESCO's Positive Incentives

There are already a number of positive incentives apparent in the 2001 Convention's regime. These are not built into the text of the treaty itself, but have rather developed later due to the efforts of the Secretariat and the Scientific and Technical Advisory Body (STAB). The Secretariat runs training courses, described as capacity building programs, to 'provide Member States with the first tools and capacities needed to identify, study, evaluate and manage the UCH in conformity with the Convention and the international scientific standards'.[1075] Excluding ICUA however, the Adriatic region has not been exposed to many of these training courses, which largely focus on African, Asian, Caribbean and Latin American States (Table 33). Currently therefore the attention of the Secretariat appears to be on less developed States, an interview participant in Italy thought these would be helpful even in the more developed States.[1076] The impact of the training is also helped by the production of materials, such as the Manual for Activities directed at Underwater Cultural Heritage, to complement the training and provide resources for educators, participants and also those unable to attend a course.[1077] Focussed similarly on training and education, the establishment of the UNESCO UNITWIN Network for Underwater Archaeology was also encouraged by UNESCO. This is a University twinning programme where universities involved in

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[1075] UNESCO, 'UNESCO Capacity-Building Programme on Underwater Cultural Heritage Protection' (n 930).

[1076] I4.

[1077] Martijn R Manders and Christopher J Underwood (eds), *Training Manual for the UNESCO Foundation Course on the Protection and Management of Underwater Cultural Heritage in Asia and the Pacific* (UNESCO Bangkok 2012); Thijs J Maarleveld, Ulrike Guerin and Barbara Egger (eds), *Manual for Activities Directed at Underwater Cultural Heritage: Guidelines to the Annex of the UNESCO 2001 Convention* (UNESCO 2013); Luka Bekic (ed), *Conservation of Underwater Archaeological Finds Manual* (2nd edn, International Centre for Underwater Archaeology in Zadar 2014); Dick Timmermans and Ulrike Guerin (eds), *Heritage for Peace and Reconciliation, Safeguarding the Underwater Cultural Heritage of the First World War: Manual for Teachers* (UNESCO 2015).

teaching underwater or maritime archaeology have created a network in order to harmonise teaching standards and raise capacity in education.[1078]

Table 33 Training courses on Underwater Cultural Heritage protection and underwater archaeology organized by UNESCO.[1079]

Region	State	Location	Year
Africa	Tanzania	Dar Es Salaam	2007
	South Africa	Robben Island	2010
	Kenya	Mombasa	2015
	Madagascar	Salary	2016
Asia and the Pacific	Sri Lanka	Colombo and Galle	2008
	Thailand	Bangkok	2009-11
Arab States	Turkey	Antalya	2011
		Kemer	2015
Europe and North America	Croatia	Zadar	2008 - 2016
	Poland	Gdansk	2010
	Spain	Cartagena	2011
Latin America and the Caribbean	Mexico	Campeche	2010
	Colombia	Bogota	2011
		Cartagena de Indias	2015
	Cuba	Guanabo	2012
	Jamaica	Port Royal	2012
	Argentina	Buenos Aires	2013
	The Netherlands	St. Eustatius	2014

[1078] 'UNESCO UNITWIN Underwater Archaeology Network' <www.underwaterarchaeology.net> accessed 21 January 2018.

[1079] UNESCO, 'UNESCO Capacity-Building Programme on Underwater Cultural Heritage Protection' (n 930); Ricardo L Favis, 'UNESCO Regional Capacity Building Programme on Safeguarding the Underwater Cultural Heritage of Asia and the Pacific' [2011] Asia-Pacific Regional Conference on Underwater Cultural Heritage Proceedings <www.themua.org/collections/items/show/1213> accessed 3 March 2018; Ricardo L Favis, Martijn R Manders and Christopher J Underwood, 'Introduction: The Development of the Regional Capacity Building Programme on Underwater Cultural Heritage' in Martijn R Manders and Christopher J Underwood (eds), *Training Manual for the UNESCO Foundation Course on the Protection and Management of Underwater Cultural Heritage in Asia and the Pacific* (UNESCO Bangkok 2012).

Another positive incentive is the work of the STAB. The STAB aids with particular problems when requested, providing technical assistance to States Parties that need it. Thus, it has undertaken missions to Panama, Haiti and Madagascar.[1080] A further mission has been requested by Guatemala.[1081] These have involved members of the STAB travelling to the requesting States to investigate particular UCH sites or instances of looting. Perhaps the most prominent example was when the US national Barry Clifford announced that he had discovered the remains of the *Santa Maria*, Christopher Columbus's flag ship, off the coast of Haiti. The Haitian government requested that the STAB verify the identification of the site and create a national plan for the protection of, and research into, UCH in the waters of Haiti. The STAB confirmed that the wreck was not that of the *Santa Maria*.[1082] Such technical, professional assistance on demand is a real draw of the Convention. As the Secretariat states:

[1080] UNESCO Convention on the Protection of the Underwater Cultural Heritage, 'Report and Evaluation: Mission of the Scientific and Technical Advisory Body to Haiti, Based on the Rapport Preliminaire de La Mission Effectuee Sur Cap-Haitien Par Les Experts de L'UNESCO, Du Ministere de La Culture et Du Bureau National d'Ethnologie, 5-15 September 2014' (UNESCO 2014) <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/advisory-body/missions/mission-to-haiti/> accessed 20 January 2018; UNESCO Convention on the Protection of the Underwater Cultural Heritage, 'Scientific and Technical Advisory Body: Report of the Mission to Panama (6-14 July and 21-29 October 2015) to Evaluate the Project Related to the Wreck of the San José' (UNESCO 2015) <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/advisory-body/missions/mission-to-panama/> accessed 20 January 2018; UNESCO Convention on the Protection of the Underwater Cultural Heritage, 'Report and Evaluation: 16-24 June 2015 Mission of the Scientific and Technical Advisory Body to Madagascar' (UNESCO 2015) <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/advisory-body/missions/mission-to-madagascar/> accessed 20 January 2018; Tullio Scovazzi, 'The Scientific and Technical Advisory Body for the Protection of the Underwater Cultural Heritage' in Pablo Antonio Fernández-Sánchez (ed), *New Approaches to the Law of the Sea (In Honor of Ambassador José Antonio de Yturriaga-Barberán)* (Nova Science Publishers, Inc 2017).

[1081] 'Convention on the Protection of the Underwater Cultural Heritage, Meeting of States Parties, Sixth session, Paris, UNESCO Headquarters, Room II 30-31 May 2017: Item 12, Resolutions'. (2017) UNESCO Doc. UCH/17/6.MSP/12 REV (UNESCO Doc. UCH/17/6.MSP/12 REV), resolution 10.

[1082] UNESCO Convention on the Protection of the Underwater Cultural Heritage, 'Report and Evaluation: Mission of the Scientific and Technical Advisory Body to Haiti, Based on the Rapport Preliminaire de La

> The Scientific and Technical Advisory Body (STAB) can play a major role in responding to the incapacity of States to respond to challenges related to their underwater heritage, which often prevents them from ratifying. It can also become a major incentive for States when considering ratifying the Convention.[1083]

A number of interview participants thought there needed to be more funding for certain activities relating to the Convention, for instance funding for experts or officials from the States Parties to travel to Paris for Convention meetings, either for the Meeting of States Parties or the STAB. Italy used to pay for two representatives to travel to Paris for such meetings, but stopped doing this recently.[1084] If Italy struggles to send representatives to these meetings, States further afield, and developing States, must really have difficulty.[1085] It is important that such representatives attend these meetings so that a variety of views are heard in the meetings, to allow all States Parties to feel that they have a say in the continuously developing regime, and to stop the Convention becoming stale, and holding little relevance to actors in the States Parties. As it stands there may be a disconnect between national practice and the activities of the Convention, with the meetings largely being attended by the national permanent delegations to UNESCO, if at all, rather than any government officials or archaeologists that actually know what is happening in the States Parties. Both spheres, the national delegations developing the Convention regime in Paris, and the archaeologists and officials working in underwater archaeology and heritage management in the States, end up knowing little of the actions and needs of the other, to the detriment of both. Additionally, international cooperation is fostered by actors meeting their counterparts

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Mission Effectuee Sur Cap-Haitien Par Les Experts de L'UNESCO, Du Ministere de La Culture et Du Bureau National d'Ethnologie, 5-15 September 2014' (n 1080) 21.

[1083] 'Convention on the Protection of the Underwater Cultural Heritage, Meeting of States Parties, Sixth session, Paris, UNESCO Headquarters, Room II, 30-31 May 2017: Item 7 of the Provisional Agenda - Information Document 7, Draft Ratification and Implementation Strategy' (2017) UNESCO Doc. UCH/17/6.MSP/INF.7REV2 (UNESCO Doc. UCH/17/6.MSP/INF.7REV2), 8.

[1084] I1.

[1085] I1, I8.

at these meetings: 'the best way of starting cooperation is to meet colleagues, to speak and have a beer. The direct contact with people is the base, the base for success in international cooperation.'[1086]

Funding also hampers the actions of the STAB and the efforts of the Secretariat to provide training. The STAB missions require that the States Party that requests them also pays for them, which, when it is mostly going to be developing States with a lack of capacity requesting them, seems less than ideal.[1087] The training courses are also limited by resources, whether this be funds or the staff of the Secretariat.[1088] The Secretariat stated:

> Thanks to considerable fundraising efforts, the Secretariat has been able, over the last few years, to organize some 35 regional and sub-regional meetings and produce extensive information material on the Convention (film, brochures, FAQ, website, etc.). It has also promoted the Convention and underwater archaeology through a university network, training manuals, publications, scientific conferences, exhibitions, and educational and media outreach. This has contributed to increasing ratifications and involvement among policymakers. National meetings and direct State assistance were greatly beneficial. However, this level of activity cannot be sustained, in view of the dramatic decrease in staff and funding of the Secretariat.[1089]

This is taking place against the background of difficulties for UNESCO, with the USA refusing to pay its membership dues since Palestine was admitted as a member in 2011, and more recently in 2017, the USA decided to leave the organisation. The USA

[1086] I8.

[1087] UNESCO Doc. UCH/15/5.MSP/5, 6. Although Spain has agreed to fund the mission to Guatemala: 'Convention on the Protection of the Underwater Cultural Heritage, Meeting of States Parties, Sixth session, Paris, UNESCO Headquarters, Room II, 30-31 May 2017: Item 3 of the Provisional Agenda: Summary Record of the Sixth Session of the Meeting of States Parties.' (2017) UNESCO Doc. UCH/19/7.MSP/3 (UNESCO Doc. UCH/19/7.MSP/3), 11.

[1088] Some individual States, including Norway which is not a State Party to the Convention, have funded some of these training courses. Favis, Manders and Underwood (n 1079) 3.

[1089] UNESCO Doc. UCH/17/6.MSP/INF.7REV2, 5.

contributed a large share of UNESCO's budget.[1090] The Meeting of States Parties consistently calls for more staff and resources for the Secretariat.[1091]

It is important to note however, that a fund does exist to support the work of the Convention, as set out in the Operational Guidelines to the Convention.[1092] States Parties, institutions and private entities can contribute to the fund, known as the Underwater Cultural Heritage Fund, and it will be used as directed by the Meeting of States Parties to finance, amongst other things, the functioning of the Convention, international cooperation projects, and the building of capacity in States Parties, but not staff costs for the Secretariat.[1093] Funds are another positive incentive that help build the perceived equity of treaties, and encourage more States to join them, as such these funds could be considered as positive incentives in their own right. However, as of 2015 no State had yet donated to this fund.[1094]

Despite sterling efforts by the Secretariat and the STAB, the potential positive incentives offered by the Convention are limited by certain factors, most notably financial resources. Because these positive incentives are already being undertaken, with varying degrees of success, further such measures will not be suggested again here, as these would likely suffer from the same problems. Solutions that can be implemented by actors other than the under resourced Secretariat, and that do not

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[1090] In February 2018 the USA's total unpaid contributions to the Regular Budget was just over 617 million US dollars. In 2016 UNESCO had a total revenue of 615 million US dollars and a total expenditure of 663.7 million US dollars. UNESCO, *Financial Statements 2016* (UNESCO 2017) 9; UNESCO, 'Status of Contributions to the Regular Budget as at 22 February 2018' (*Status of Contributions*) <www.unesco.org/new/en/member-states/mscontent/status-of-contributions/> accessed 3 March 2003.

[1091] Most recently at its sixth meeting in 2017. UNESCO Doc. UCH/17/6.MSP/12 REV, resolution 4bis, resolution 7(9).

[1092] 'Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage' (2015) UNESCO Doc. CLT/HER/CHP/OG 1/REV (UNESCO Doc. CLT/HER/CHP/OG 1/REV), chapter 4.

[1093] UNESCO Doc. CLT/HER/CHP/OG 1/REV, chapter 4(B).

[1094] 'Convention on the Protection of the Underwater Cultural Heritage, Meeting of States Parties, Sixth Session, 2017: Item 1 of the Provisional Agenda: Summary Record of the Fifth Session of the Meeting of States Parties'. (2015) UNESCO Doc. UCH/17/6.MSP/220/3 (UNESCO Doc. UCH/17/6.MSP/220/3), 14.

require such considerable funding would be of more use. These positive incentives already undertaken could also benefit from and be enhanced by other strands of action attacking the problem concurrently, such as the introduction of an SIR that would allow the Secretariat to better target its training sessions. Further measures for improving the implementation of the Convention have also recently been developed by the Secretariat.

9.2.2 The Ratification and Implementation Strategy

Immediately prior to the fifth Meeting of States Parties in 2015 an exchange day was held in which representatives of the States Parties discussed strategies to improve the implementation and ratification of the 2001 Convention.[1095] This led the Meeting of States Parties to request that the Secretariat 'draft a ratification and implementation strategy on the basis of the suggestions made in consultation with the States Parties and submit it for consideration to the next session of the Meeting of States Parties'.[1096] The Secretariat developed the strategy,[1097] holding a further working meeting of delegations in 2016 for this purpose, and the sixth Meeting of the States Parties discussed and adopted the Strategy in 2017.[1098] When discussing the Strategy the Meeting only seemed to focus on ratification rather than implementation, and discussed at length the promotion of the Convention in other international organisations such as the UN and the EU, although strengthening the resources of the Secretariat and the production of outreach manuals that could be distributed in diving schools in all Member States of UNESCO were also discussed.[1099] The Secretariat also encouraged the States Parties to 'think beyond ratification and towards implementation'.[1100]

[1095] The conclusions of UNESCO's six regional groups from the exchange day can be found in the Annex of UNESCO Doc. UCH/17/6.MSP/220/3.

[1096] UNESCO Doc. UCH/15/5.MSP/11, resolution 5(5).

[1097] UNESCO Doc. UCH/15/5.MSP/5; UNESCO Doc. UCH/17/6.MSP/INF.7REV2.

[1098] UNESCO Doc. UCH/17/6.MSP/12 REV, resolution 7.

[1099] UNESCO Doc. UCH/19/7.MSP/3, 7-8.

[1100] UNESCO Doc. UCH/19/7.MSP/3, 7.

The Strategy proposes the following general approaches to enhance implementation of the Convention:

- Increase legal implementation;
- Improve operational protection and capacities;
    - Increasing research capacity;
    - Increasing protection capacity;
    - Providing scientific and technical help and back-up;
    - Improving cooperation;
- Increase public involvement and public benefit of Underwater Heritage;
    - Facilitating heritage access initiatives;
    - Educating youth and public outreach;
- Reinforce and guide scientific underwater archaeology;
- Raise funds for operational work.[1101]

The institutions responsible for each approach, and more specific measures under each of these general headings, were also set out (Table 34). The strategy includes a number of valuable suggestions, and it is encouraging that different types of capacity are identified, and different framework conditions targeted. Cognitive-informational framework conditions, for instance, are recognised through actions relating to increasing public access to UCH and educating the youth. This framework condition, in particular how archaeologists produce information, would also be improved through suggestions relating to the reinforcement of scientific underwater archaeology, and increasing research capacity, although the way these would be achieved is mostly through training actors. Economic framework conditions are addressed through the suggestion that alternative funding should be sought, both for the Secretariat and for national institutions through raising impact assessment fees for activities indirectly affecting UCH. Direct technical assistance from the Secretariat, and through cooperation from other States Parties aimed at helping States to legally implement the Convention, would also constitute a major step forward and addresses capacities related to political-institutional framework conditions.

[1101] UNESCO Doc. UCH/17/6.MSP/INF.7REV2, 8-9.

Table 34 Strategies for improving implementation from the Ratification and Implementation Strategy[1102]

Protagonist	Objective	Action suggested
Increase legal implementation		
States Parties; Secretariat	Improving national law adaptation	State cooperation; use of Model Law; law workshops; outreach to regional entities
Improve operational protection and capacities		
Secretariat; UNESCO field offices; States Parties; UNITWIN network; NGOs; partners; Category 2 centres	Increasing research capacity	Improve training research capacities through regional training centres; field schools; Regional Centres (Cat. 2) and inventory projects; Secondment in exchange for implementation training
STAB; Secretariat	Providing scientific and technical help	Technical missions; enhancing STAB funding and expertise
States Parties	Increase protection capacity	Increase protection through inter-sectorial outreach (coast guards, frontier personnel, customs; Interpol; police; art market)
Secretariat	Improving cooperation	Cooperation with UN Oceans, IOC, UNESCO 1972 Convention, ICOM, Interpol, NGOs
Increase public involvement and public benefit of UCH		
States Parties; Secretariat; Partners	Increase responsible access to underwater cultural heritage and therewith its public benefit	Facilitating heritage access initiatives; Identification of Best Practice and their promotion; negotiation of Partnerships and research consortia
States; Secretariat; Associated Schools	Educating youth	Provision of common learning materials (informal and formal education); children programme
States Parties; Secretariat	Public outreach	Exhibitions, website, informational materials and cooperation with media partners

[1102] UNESCO Doc. UCH/17/6.MSP/INF.7REV2, 11.

Reinforce and guide scientific underwater archaeology		
Universities; Secretariat	Building scientific cohesion and sharing research data	UNESCO UNITWIN network on underwater archaeology; scientific conferences, publications and information materials
Raise funds for operational work		
States Parties; Secretariat; Partners	Alternative funding	Raise impact assessment fees; use of Underwater Cultural Heritage Fund; voluntary contribution of States Parties; partnerships with private sector; crowdfunding; indirect fundraising.

There are a number of issues with this strategy however. Ultimately it suggests carrying on with the positive incentives already undertaken by the Secretariat. In suggesting providing scientific and technical help and back-up, it is proposed the STAB continue its missions, with some reform as to its membership selection criteria and funding.[1103] Increasing research capacity merely suggests continuing the training of actors, although not only by the Secretariat, the States Parties themselves should take more responsibility.[1104] Reinforcement of scientific underwater archaeology, through fostering the exchange of data and methodologies, is to be achieved largely through the support of the UNESCO UNITWIN Network for Underwater Archaeology.[1105]

There is also a focus on the actor aspect of capacity, raising individual capacities in States, with the training of underwater archaeologists and police, frontier personnel and coast guards suggested in order to improve both research and protection capacity.[1106] There are however, few suggestions of ways in which institutional capacities could be raised.

[1103] UNESCO Doc. UCH/17/6.MSP/INF.7REV2, 8-9.

[1104] UNESCO Doc. UCH/17/6.MSP/INF.7REV2, 8.

[1105] UNESCO Doc. UCH/17/6.MSP/INF.7REV2, 9.

[1106] UNESCO Doc. UCH/17/6.MSP/INF.7REV2, 8.

It may be unlikely that this Strategy will lead to an improvement in the effectiveness of the 2001 Convention. Largely continuing with actions that are already being undertaken is unlikely to change the situation drastically. A large onus is put on the Secretariat in much of this Strategy, but without further resources its ability to pursue the approaches in the Strategy will be limited. States Parties are also encouraged to take certain actions, but their willingness or ability to do this may be questioned, especially in light of them failing to undertake other seemingly simple obligations that are contained in the Convention text and are therefore binding upon them. The Meeting of States Parties, when adopting the Strategy, called upon States Parties to increase the resources of the Secretariat, but did not appeal for them to ensure that they executed the Strategy, or undertake any other specific actions recommended by it.[1107] States therefore lack any impetus to implement the Strategy, beyond strengthening the Secretariat.

Finally, there is no baseline knowledge of either the current status of implementation or any knowledge of activities currently undertaken by the States Parties that are analogous to those suggested in the Strategy. There is therefore no way to measure whether the Strategy encourages any new activities, or what impact these are having. Like the 2001 Convention itself, there is no easy way to measure its effectiveness.

Due to these reasons, further courses of action are needed that increase knowledge of the situation, and that do not rely so heavily on an already stretched Secretariat. These will now be discussed.

9.3 Proposed Strategies

Three strategies are recommended by this study. The recommendations are:

- the introduction of systems of implementation review (SIRs),
- national plans,
- regional agreements.

[1107] UNESCO Doc. UCH/17/6.MSP/12 REV, resolution 7.

9.3.1 Systems of Implementation Review (SIRs)

Systems of Implementation Review are formal or informal mechanisms intended to increase transparency relating to compliance and the behaviour of States Parties.[1108] The resulting increase in information and scrutiny encourages compliance through identifying and publicising particular problems, assuring reluctant participants, and promoting learning about the obligations of the treaty and the problems of the activity.[1109] SIRs could be said to apply external pressure on the individual States to comply, but they will also increase the knowledge of potential problems that States are having and will allow the targeting of further external assistance, including the positive incentives already undertaken by the 2001 Convention Secretariat and STAB.

As noted before, SIRs are strangely lacking in the Convention's regime (section 2.4.1). There are not even any reporting systems, despite all of UNESCO's other cultural Conventions including them (Table 2). The Secretariat merely collects 'information through regional meetings, in which national reports are made available, as well as through direct feedback from States Parties, and partners, such as NGOs, its expert network and universities'.[1110] However, in many MEAs where SIRs are not incorporated into the original treaty, they have still tended to develop later.[1111] This means that there is an opportunity to introduce SIRs into the 2001 Convention's regime.

Reporting systems are the most basic SIR, and require the States Parties to submit reports on their actions regarding implementation. This would make available a basic level of information about implementation and compliance of the Convention. This system would also mean that there is at least one official in each State Party responsible for filing the report, and so by default is considering the issue of compliance with the

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[1108] Lanchbery (n 1071); Kal Raustiala, *Reporting and Review Institutions in 10 Multilateral Environmental Agreements* (UNEP 2001).

[1109] Victor, Raustiala and Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (n 322) 51–2.

[1110] UNESCO Doc. UCH/15/5.MSP/5, 7 n 3.

[1111] Victor, Raustiala and Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (n 322) 48.

Convention.[1112] In addition, the reports can be used to educate the State on the requirements of the Convention, as if a standard report structure was used, the necessary obligations can be clearly set out and information related to them requested.

Reporting systems however, are never perfect. For instance, States may be unwilling to self-report shortcomings such as their lack of capacity, or lack of effort in implementation; reports can contain uneven quality and quantity of data; and national officials may be forced to spend limited time and resources on compiling the reports when those resources would be more effectively spent elsewhere, such as in the direct protection and research of UCH.[1113] This appears to be the case at UNESCO generally, where there is a lack of a 'reporting culture' as seen in other international organisations such as the International Labour Association, and of the few reports that UNESCO does receive (in 2002 it was thought there was about a 20% response rate to requests for reports), many are incomplete or unusable.[1114] This has led the system to be questioned on a number of occasions.[1115]

A reporting system also requires effort beyond that of the States Parties. It also requires that other actors are available to review the information that the reports contain, whether that is a body related to the Convention regime, such as the Secretariat, another body created specifically for the task, or an NGO. Whilst NGOs are currently involved in the Convention's regime, they take part in STAB meetings and, to a lesser extent, Meetings of States Parties, and undertake educational and lobbying

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[1112] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 543.

[1113] ibid; Brown Weiss (n 306) 1574–5; Raustiala and Victor (n 1071) 680–1.

[1114] Laurence Boisson de Chazournes, 'Monitoring, Supervision and Coordination of the Standard-Setting Instruments of UNESCO' in Abdulqawi A Yusuf (ed), *Standard Setting in UNESCO: Volume 1, Normative Action in Education, Science and Culture* (UNESCO / Martinus Nijhoff Publishers 2007) 60; Pierre Michel Eisemann, 'Introduction' in Abdulqawi A Yusuf (ed), *Standard Setting in UNESCO: Volume 1, Normative Action in Education, Science and Culture* (UNESCO / Martinus Nijhoff Publishers 2007) 28.

[1115] UNESCO Doc. 164 EX/23, 3; Boisson de Chazournes (n 1114) 60; Eisemann (n 1114) 28.

activities,[1116] their roles are ill defined and they certainly do not undertake any monitoring role. This means that there needs to be some allocation of resources, notably staff time, dedicated to the undertaking.

It has been shown that in environmental treaties SIRs are widespread and effective, and, notably, often arise informally after the agreement has entered into force.[1117] These SIRs are also becoming more complex over time, moving far beyond just simple reporting, and allowing for review of the reported information; 'on-site' monitoring, where officials visit the State in question to monitor compliance and verify reports; assessment of the adequacy of the treaty obligations and the adjustment of these; and the participation of non-state actors and experts.[1118]

For example, SIRs relating to the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), developed long after the adoption of the treaty. An SIR, known as the 'national legislation project', was initiated in 1992 in order to encourage parties to enact implementing legislation.[1119] It has been developed through a number of decisions of the Conference of Parties (CoP, similar to the 2001 Convention's Meeting of States Parties), and was originally based on a CoP resolution that instructed the Secretariat to:

> …identify those Parties whose domestic measures do not provide them with the authority to:
>
> > i) designate at least one Management Authority and one Scientific Authority;
> >
> > ii) prohibit trade in specimens in violation of the Convention;
> >
> > iii) penalize such trade; or

[1116] UNESCO, 'Accredited Non-Governmental Organizations' <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/partners/accredited-ngos/> accessed 3 April 2018.

[1117] Raustiala and Victor (n 1071) 677.

[1118] ibid 679; Lanchbery (n 1071).

[1119] Reeve (n 324) 134–47; Reeve (n 389) 886–7.

iv) confiscate specimens illegally traded or possessed.[1120]

Legislation is then categorised as to whether it meets all, some, or none of these requirements.[1121] Compliance is then managed with plans for implementation and technical assistance, and if this fails sanctions may be imposed.[1122]

Since the national legislation project was introduced there has been an improvement in the number of parties that have sufficient legal implementation measures to comply with CITES. In 1992, the year the project was initiated, just 13% of parties had met all of the listed requirements, but by 2005 this had increased to 36%, and currently the figure is 48.3%.[1123] Of course this project will not have been the only reason for this increase in compliance, but it has no doubt helped, especially when combined with both positive incentives and coercive measures.[1124]

The CITES national legislation project takes as indicators implementation measures expected to be seen in national law for four of the Convention's substantive obligations, and assesses each Party's compliance against the standards of the Convention. In this way it uses a similar methodology to this study. It is arguably a stage above merely requiring national reports, in that it requires verification of information independent from the States Parties, and relies on the Secretariat having the means to review all States Parties national legislation.

A major problem that this study has faced is the lack of knowledge on the state of implementation. Outside of UNESCO's database on national laws, which is of course, not focussed on UCH, and some other morsels of information reported by the Secretariat, such as only Italy submitting a report under Article 9(3), there is no available

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[1120] 'National Laws for Implementation of the Convention' (2010) CITES Doc. Resolution Conf. 8.4 (Rev. CoP15).

[1121] Reeve (n 389) 886.

[1122] ibid 887.

[1123] ibid 893; CITES (n 389).

[1124] Reeve (n 324) 147.

information about the status of implementation.[1125] The 2001 Convention desperately needs even the most basic SIR, as it has deep problems with effectiveness that are currently going unaddressed and largely unspoken, because there is a lack of knowledge and transparency about these issues.

Designing an SIR for the 2001 Convention would be difficult. It would perhaps be sensible to first take the smallest step by introducing merely a reporting system, and increase the complexity of the SIR over time if possible. The type of data required in the reports would have to be determined to best suit the circumstances of the 2001 Convention, and the characteristic of the activity it seeks to regulate. Some SIRs can measure the state of the problem, pollution levels for example. In the case of the 2001 Convention that would not be possible, but more feasible suggestions could include implementing legislation, specific legal provisions implementing specific Convention duties (like the CITES national legislation project), information about national inventories, instances of sanctions or seizures and so on. This limited type of data is a problem when analysing effectiveness, which this study wrestled with in its early stages (section 3.2), and it is likely that the national reports would similarly have to aim at the level of legal effectiveness rather than address the state of the problem. Ensuring the reports are delivered and coherent is another obstacle, and may prove particularly difficult in the case of the 2001 Convention where so few States Parties have even informed UNESCO of the name of their competent authorities under Article 22(2), an obligation that is in the text of the treaty itself.

A body also needs to analyse these reports, or investigate the implementation without reports, like in the CITES examples. Currently the Secretariat does not have the resources to do this, and all NGOs involved in the regime are only tangentially interested in the implementation 2001 Convention, all have other tasks and objectives that sometimes overlap with the aims of the Convention. Whether one would expend the resources to monitor implementation is questionable.

Extensive SIRs have been developed for the World Heritage Convention. These include the obligation for States to produce national reports on both the implementation of the

[1125] UNESCO Doc. UCH/17/6.MSP/INF.7REV2; UNESCO, 'UNESCO Database of National Cultural Heritage Laws' (*UNESCO*) <www.unesco.org/culture/natlaws/index.php?&lng=en> accessed 8 May 2015.

Convention and the state of conservation of their World Heritage properties, the review of these reports by the World Heritage Committee (WHC), the development of long-term regional programmes based on the national reports, and the collation and publication of the reports by the Secretariat.[1126] Importantly, this format was only adopted in 1998, and it foresees the revision of this format if necessary. In addition to the reporting system, there are also systems for monitoring the state of World Heritage properties, through missions of qualified observers from the WHC's Advisory Bodies or other organisations.[1127] These show that UNESCO can implement SIRs if it chooses, however, the WHC is far more universally accepted, well known, and has far greater resources at its disposal than the 2001 Convention.

Introducing an SIR would be within the capability of the Meeting of States Parties. However, considering the meagre resources of UNESCO, and the 2001 Convention Secretariat in particular, whether it would be willing to do this may be doubtful. It would also mean that the States Parties are voting to place more obligations on themselves. While this has happened before, it is again in this case perhaps unlikely, considering the little capacity many States must realise that they have in relation to UCH protection. Despite this, however unlikely it would be to succeed, it must be advocated and attempted, as it is an essential step in increasing knowledge of the implementation of the Convention, and an important approach to augment the positive incentives already undertaken, and also, perhaps, to shame some States into improving the effectiveness of the 2001 Convention.

9.3.2 Regional Agreement

Article 6(1) of the 2001 Convention states:

> 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

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[1126] UNESCO Doc. WHC 13/01, 55-57.

[1127] UNESCO Doc. WHC 13/01, 52.

would ensure better protection of underwater cultural heritage than those adopted in this Convention.

Such a regional agreement, possibly focussing on the Adriatic Sea or the wider Mediterranean, was suggested by a number of the interview participants as a way of addressing a number of different problems that they saw in their countries. All three of the legal academics interviewed suggested this course of action.[1128] It has also been suggested in the literature numerous times.[1129] Even the *Institut de Droit Internationale*, in its recent resolution on the 'Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law' reiterates a duty of cooperation, and suggests that States bordering an enclosed or semi-enclosed sea should co-operate in the performance of their duties set out in the Resolution.[1130] It is therefore an idea that is in the consciousness of the legal minds working in this field.[1131] Such an idea also has support within the archaeological community.[1132] Some of the archaeologists interviewed however, particularly Slovenian archaeologists, were sceptical it would ever happen.[1133]

There are numerous benefits to this proposal. It follows the lead of treaties that protect the marine environment, where a global treaty is supplemented by regional, sub-regional or bilateral treaties that provide for more strict and specific protection than the general global treaty.[1134] These can take into account the specific circumstances of a

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[1128] C3, I2, S2.

[1129] Scovazzi, 'L'Approche Régionale à La Protection Du Patrimoine Culturel Sous-Marin: Le Cas de La Méditerranée' (n 793) 583–6; Slim and Scovazzi (n 951) 40, 74; Grbec (n 359) 235–6; Trpimir M Šošić, 'The 2001 UNESCO Convention and Protection of Underwater Cultural Heritage in the Adriatic and Ionian Seas' in Andrea Caligiuri (ed), *Governance of the Adriatic and Ionian Marine Space* (Editoriale Scientifica 2016) 135–6.

[1130] Ronzitti (n 248) art. 15(2).

[1131] C3.

[1132] I3, I8.

[1133] S1, S3.

[1134] Scovazzi, 'L'Approche Régionale à La Protection Du Patrimoine Culturel Sous-Marin: Le Cas de La Méditerranée' (n 793) 584.

particular body of water, and the States surrounding it. In addition, the 2001 Convention was a compromise, made imperfect by the need to address the wishes of certain powerful States (section 2.3). Creating a regional agreement, with a smaller number of States, and none of the 'like-minded' States such as the UK or USA, raises the possibility for more stringent protection of UCH in ways that were not possible with a global Convention.[1135] This may also provide an opportunity to bring States like Greece, Turkey and Cyprus, which have remained outside the 2001 Convention regime for various reasons, into a new agreement offering equal, or stricter protection than the 2001 Convention. Finally, archaeological marine protected areas could be arranged, that cross borders or maritime zones where one State would not have the jurisdiction to enforce such an area.[1136]

As an illustration, there are many wrecks in the waters between Italy and Tunisia. Joint efforts to investigate these led to talks about an agreement, but these talks have stumbled over the ownership, or at least control, over the recovered artefacts, with a committee being proposed to decide on partition of the recovered artefacts, but archaeologists were wary of dispersing the assemblage.[1137] Provisions for attributing or restating rights such as ownership and joint agreement on the disposition of UCH, could be a goal of a regional agreement. Such an agreement has worked before, in for instance, the agreement between the Netherlands and Australia over the wrecks of VOC ships in the waters off the coast of Western Australia, in which the Netherlands transferred ownership the wrecks to Australia, but retained an interest in the items recovered from the wrecks.[1138] Ownership was a topic that was avoided in the 2001 Convention due to its contentious nature, but is an issue that a smaller number of States may be able to address.

[1135] S2.

[1136] Šošić, 'The 2001 UNESCO Convention and Protection of Underwater Cultural Heritage in the Adriatic and Ionian Seas' (n 1129) 136.

[1137] I8.

[1138] Agreement between Australia and the Netherlands concerning Old Dutch Shipwrecks (adopted 6 November 1972, entered into force 6 November 1972) [1972] Australian Treaty Series 18.

There could also be benefits to archaeological capacity, as well as merely legal benefits. Collaborative efforts could be made to not only protect UCH, but research it, and even create a joint inventory of all UCH in a particular sea. A more formalised way to finance cooperative projects would certainly be a major benefit.[1139] This was a major complaint with ICUA, with States in the region expecting cooperation in research and training, but with no clear idea of who was supposed to fund this.[1140] Currently, like so much of underwater archaeology in the Adriatic, collaboration relies on individual initiative. At the very least, such an agreement would provide a new forum for archaeologists from different States to meet and collaborate, and provides reasons to share archaeological experience and even experience related to politics and capacity development.[1141]

Finally, as we have seen Italy and Croatia have taken steps towards national institutional cooperation for enforcement of UCH protection. A regional agreement could ensure coordination of a joint enforcement on an international level also.[1142]

One argument against the proposal could be that there is already enough law, the problem is a lack of implementation and enforcement rather than a governance gap. However, if the implementation gap is caused by a lack of capacity, and such an agreement would raise capacity in some ways, it will act towards addressing the problem. In addition, the issue would be brought back to the fore in the awareness of governments, and will address the issue in a way that is more relevant and therefore more attractive, to their particular situations.

It must be noted however, that there has been an attempt to create a regional Mediterranean Convention on UCH before. Before the 2001 Convention was adopted, on the 10 March 2001 the participants at an academic conference in Syracuse adopted the Declaration on the Submarine Cultural Heritage of the Mediterranean Sea, known as

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[1139] C3; Šošić, 'The 2001 UNESCO Convention and Protection of Underwater Cultural Heritage in the Adriatic and Ionian Seas' (n 1129) 136.

[1140] C2.

[1141] I3.

[1142] S2.

the Syracusa Declaration.[1143] This declaration invited Mediterranean States to 'study the possibility of adopting a regional convention that enhances co-operation in the investigation and protection of the Mediterranean submarine cultural heritage and sets forth the relevant rights and obligations'.[1144] It also suggested that they should cooperate in the training of marine archaeologists, establish submarine archaeological sites or parks, and establish a network of museums.[1145] The matter was discussed again in 2003 at another conference in Syracuse in which Italy presented a draft agreement, whose provisions included an obligation of cooperation relating to wrecks in territorial and internal waters that would have been stricter than the ambiguous responsibility in Article 7 of the 2001 Convention.[1146] It also suggested the consideration of the establishment of Specially Protected Areas of Mediterranean Cultural Importance, the institution of an international museum of Mediterranean underwater cultural heritage, and periodic training courses for the benefit of developing States in the region.[1147] Unfortunately these efforts came to nothing, but the context has changed in the intervening years, and revisiting the issue now may prove more successful.

Also worth mentioning is the Noto Statement which was born out of the 'EUPLOIA: Implementing Underwater Cultural Heritage 'Best Practices' in a Mediterranean Context' workshop held in Noto, Sicily in 2013. Practitioners and heritage managers from around the Mediterranean presented case studies and discussed concerns relating to UCH protection in the Mediterranean. They stated, *inter alia*:

> Although the 2001 UNESCO Convention and its Annex Rules provide a framework for UCH protection, research, and preservation, there is still a need to develop additional state-specific laws and governance in many parts of the

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[1143] English text reprinted in Tullio Scovazzi and Guido Camarda (eds), *La Protezione Del Patrimonio Culturale Sottomarino Nel Mare Mediterraneo* (Giuffrè Editore 2004) 353.

[1144] Syracusa Declaration art 10.

[1145] Syracusa Declaration arts 12, 13 and 14.

[1146] A provision that would actually be more appealing to major maritime States than Article 7 of the 2001 Convention.

[1147] Scovazzi, 'L'Approche Régionale à La Protection Du Patrimoine Culturel Sous-Marin: Le Cas de La Méditerranée' (n 793) 586.

> Mediterranean as well as formal cooperative agreements for research in non-territorial waters.[1148]

This showed some encouraging cooperation between archaeological practitioners who were conscious of the need for further formalised structures for cooperation.

There are already other cooperative structures in the Adriatic. Some of these have addressed UCH, at least on a declaratory level.[1149] On a Mediterranean level, the Barcelona Convention seeks to protect the natural environment of the Mediterranean,[1150] and has a number of protocols addressing specific issues. While UNEP were not interested in adding a cultural heritage protocol to the Barcelona Convention,[1151] the Integrated Coastal Zone Management (ICZM) Protocol contains a provision that states:

> The Parties shall adopt, individually or collectively, all appropriate measures to preserve and protect the cultural, in particular archaeological and historical, heritage of coastal zones, including the underwater cultural heritage, in conformity with the applicable national and international instruments.[1152]

[1148] Noto Statement, art 3.

[1149] S2.

[1150] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, adopted in Barcelona Entered (adopted 16 Feb 1976 as Convention for the Protection of the Mediterranean Sea against Pollution, entered into force 12 February 1978) 1102 UNTS 27, as amended 10 June 1995, in force 09 July 2004 (Barcelona Convention).

[1151] I2.

[1152] Protocol on Integrated Coastal Zone Management in the Mediterranean (adopted 21 January 2008, entered into force 24 March 2011), art 13(1). The Protocol also states that the Parties shall ensure the preservation in situ of the cultural heritage is considered as the first option, and that UCH removed from the marine environment are conserved and managed in a manner safeguarding their long-term preservation and are not traded, sold, bought or bartered as commercial goods (art 13(2) & (3)). These clearly show influence from the 2001 Convention.

This is not a means for further cooperation in itself, but again, expresses the need for States to cooperate. The Adriatic and Ionian Initiative,[1153] adopted the Ancona Declaration on 5 May 2010, which includes in its provisions a statement confirming the need for cooperation in archaeological underwater cultural heritage.[1154] Finally, the Trilateral Commission for the Protection of the Adriatic Sea and Coastal Areas, consisting of Croatia, Italy, Montenegro and Slovenia, has fostered agreements in areas not covered by other regimes like the Barcelona Framework, for instance in the prevention of ship-source pollution,[1155] and has also highlighted the need to protect UCH in a number of documents.[1156]

It is perhaps unlikely that cooperation could emerge out of these existing structures, and novel, heritage focussed agreements would probably be both more desirable and probable. Either way it is essential that the archaeological community is deeply involved in this process. In this way a regional agreement could be designed that could offer stricter protection of UCH, including with States that refuse to join the 2001 Convention, and could increase collaboration and capacities in the region. This step does not require any actions by the 2001 Convention bodies such as the Meeting of States Parties or the Secretariat. It would, however, require State action, at least if it is to be a formal international agreement. If such a regional or sub-regional instrument is not possible through a lack of desire or some other reason, then bilateral agreements should at the very least be encouraged, which may be easier to construct.[1157] On the other hand, a less formalised cooperative agreement between archaeologists and archaeological institutions could be instigated that focusses more on research and

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[1153] A body made up of eight Adriatic and Ionian States that was founded in 2000 to enhance cooperation in order to tackle common problems such as security and environmental protection of the Adriatic and Ionian Seas.

[1154] Ancona Declaration, 12th Adriatic and Ionian Council, Ancona, 5 May 2010, art. 8.

[1155] Grbec (n 359) 224.

[1156] S2.

[1157] Šošić, 'The 2001 UNESCO Convention and Protection of Underwater Cultural Heritage in the Adriatic and Ionian Seas' (n 1129) 135.

capacity. This is a tangible proposal that the archaeological community could campaign for.

9.3.3 National Strategies

A common theme discovered in the case studies is the concept of strategy. A strategy is 'the purposeful use of instruments, capacities, and situative opportunities to achieve long-term goals'.[1158] The theme was addressed by the participants in each State when they spoke of the lack of a strategy or programmatic approach to UCH management and the reactive nature of heritage protection and research.[1159] Much relied on the personal initiative of individual maritime archaeologists.

In all these cases building a strategy for improvement tailored for the particular context, made by people working in the country, which includes a close examination of the framework conditions, needs to be made. They need sub-goals, ways to measure progress and reflexively alter strategies, and need at all points to strive for the purposive improvement of capacities.[1160] This could be led by the States themselves, or by archaeologists working in those States. The STAB has even been promoting this tactic in its missions, alongside general capacity development and legal reform. For its mission to Haiti for example, it recommended:

> To implement the UNESCO 2001 Convention it is recommended to elaborate a national plan for underwater cultural heritage. In order to adopt a long-term sustainable plan for the management of underwater cultural heritage in Haiti a consideration of all possible types of heritage, all kinds of situations and all kinds of objectives is needed. This should also contain the aim of providing for the establishment, maintenance and updating of an inventory of underwater cultural heritage, the effective protection, conservation, presentation and management of underwater cultural heritage, as well as research and education and the creation of a competent authority. In the long term, it should also allow for an increase in the public benefits of underwater heritage sites, for instance,

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[1158] Jänicke (n 366) 6.

[1159] C1, C4, I3, I6, S1.

[1160] Jänicke (n 366) 6.

through the creation of underwater museums, museums on land, and heritage routes.[1161]

In some cases, it seems that States are specifically requesting help with these national plans.[1162] These strategies could be blueprints for changing the framework conditions in each State, making the legislation and institutions more suitable, and providing for regular funding and suitable equipment for instance. As an example, a strategy was produced by Spain's Ministry of Culture in 2007 through its National Plan for the Protection of Underwater Cultural Heritage and a strategy to ensure the standardised implementation of this plan by Spain's regions and institutions was produced by the Heritage Council in 2009.[1163] Of course these are not always successful. In Montenegro such a strategy was created in 2001, with an outline of how to create an underwater archaeological institution, examples of how this had been done in other States, costings for the proposal, and necessary legislative reform.[1164] This however, failed to materialise. There are some encouraging signs in Italy, with a conference being held in Udine in 2016 which included thematic roundtables on various aspects of Italian

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[1161] UNESCO Convention on the Protection of the Underwater Cultural Heritage, 'Report and Evaluation: Mission of the Scientific and Technical Advisory Body to Haiti, Based on the Rapport Preliminaire de La Mission Effectuee Sur Cap-Haitien Par Les Experts de L'UNESCO, Du Ministere de La Culture et Du Bureau National d'Ethnologie, 5-15 September 2014' (n 1080) 22.

[1162] Guatemala requested aid from the STAB in 2017 regarding Mayan underwater cultural heritage at Lake Atitlan. In addition however, 'The representative of Guatemala explained that the country had ratified the Convention at the end of 2015 and that the Ministry of Culture and Sports was now seeking to enhance their technical capacities in order to ensure the proper implementation of the Convention. Since the country does not have the necessary expertise, it requested the dispatch of a STAB mission to help elaborate a management plan.' UNESCO Doc. UCH/19/7.MSP/3, 11.

[1163] Ministerio de Cultura, 'Plan Nacional de Proteccion Del Patrimonio Arqueologico Subacuatico' (2007) <www.mecd.gob.es/cultura-mecd/eu/areas-cultura/patrimonio/patrimonio-subacuatico/plan-nacional-de-proteccion.html> accessed 30 November 2017; Grupo de Trabajo del Comité de coordinación Técnica del Consejo del Patrimonio Histórico (n 644).

[1164] Gordana Karović, 'Центар За Подводна Археолошка Истраживања Црне Горе: Оснивачки Пројекат [Centre for Underwater Archaeological Research of Montenegro: The Founding Project]' (Public Enterprise for Coastal Zone Management of Montenegro 2001).; M1.

underwater archaeology and heritage management that needed reformed, so actors in Italy are aware of the issues, and are striving to restart the dialogue.[1165]

Less ambitious strategies could be produced by those wanting to build capacities, not just State actors, which could still produce advantages whilst working within the existing framework conditions. In addition, the creation of guidelines and research frameworks would also produce some benefits. For instance a national set of guidelines and research framework could help archaeologists without a maritime archaeological background employed in the *soprintendenze* in Italy know how to approach UCH in their territories, and what standards need to be met.[1166] This would standardise to some extent research and protection efforts, and help maintain institutional knowledge when actors leave their roles.

Research frameworks are a tool used to lay out areas that need further research in order to inform other archaeologists, those that fund archaeology, and policy makers.[1167] A research framework in Croatia could help the Ministry prioritise projects which meet the recommendations in the research framework agreed upon by the archaeological community, allowing them to be completed to a fuller extent and to higher standards.

Building strategies and programmatic approaches to maritime archaeology and UCH protection can help produce long term gains, but only if they are tailored to the each States' unique amalgam of framework conditions. Again, ideally this initiative needs the backing of the State, but is something that the archaeological community could advocate or produce on their own if necessary.

[1165] 'Archeologia Subacquea 2.0: V Convegno Nazionale Di Archeologia Subacquea Udine' (*Università degli studi di Udine*) <asud.uniud.it> accessed 23 January 2018.

[1166] I3, I6.

[1167] Examples from the UK include Dan Atkinson and Alex Hale (eds), *From Source to Sea: Scottish Archaeological Research Framework Marine and Maritime Panel Report* (Society of Antiquaries of Scotland 2012); Jesse Ransley and Fraser Sturt (eds), *People and the Sea: A Maritime Archaeological Research Agenda for England* (Council for British Archaeology 2013).

9.4 Fitting Strategies to Countries

Different strategies will be more relevant to different countries depending on their circumstances, and this picture will change over time.[1168] A mix of strategies to build capacities and improve implementation of the 2001 Convention should be available to be used when the context requires.

The positive methods such as introductory training courses are essential for countries with little capacity. These methods are already being undertaken by the Secretariat but would be aided through extra funding from the States Parties and if the Secretariat could more accurately target them to States, regions and even institutions that needed them the most.

SIRs will provide a general benefit through the increased knowledge of the problem, but may also encourage States that have the capacity to comply, but for whatever reason, lack the intent.[1169] For instance SIRs could show that Croatia has not implemented the duties in Articles 9 and 10, and this may spur the Croatian government into action.

What was made clear in the case studies was that the situation in each State was complex and a State's capacity was affected by an intricate interaction of framework conditions and short term variables. The situation is complex therefore, but best understood by those working within those national contexts. The development of national strategies or research frameworks by such national actors would identify the problems in each State and allow more tailored action.

Both the SIRs and the national strategies therefore, increase knowledge of the problems on two different scales, one related to the specific aspects of the Convention, and one to the framework conditions in the States. Knowledge of these are essential in order to be able to target the existing positive incentives appropriately.

The 2001 Convention at its heart is about cooperation, but so far this cooperation has not led to formalised and lasting cooperative structures either in the Adriatic, or

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[1168] Jacobson and Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries' (n 377) 548–552.

[1169] ibid 548.

globally, except for the Meetings of States Parties and the STAB. A regional agreement could ensure collaboration, the sharing of solutions and the joint tackling of common problems, leading to the region raising its capacities and ensuring better protection of UCH.

This study suggests therefore that the States Parties to the 2001 Convention create an SIR through the Meeting of States Parties, that States create regional agreements to enhance the protection of UCH and increase cooperation, and that national institutions create national strategies for implementing the 2001 Convention, protection and management of UCH, and for raising their capacities. These efforts will augment the positive measures already undertaken by UNESCO, will help improve implementation of the 2001 Convention, and will raise national capacities. So far most change seen in the States Parties has been driven by individuals, and these three recommendations may again depend on the actions of individuals to encourage and realise them. If successful however, they would ensure more sustainable routes to improved protection through raised capacity, rather than the reliance of sporadic external help through positive incentives, or the formal cooperation structures of the 2001 Convention regime which have little bearing on the work of national actors.

Conclusion

The issues that provoked concern in 2001 in some major maritime States have proved to be a continued barrier to ratification for all these States with the exception of France. There are however, hints that other States are changing their positions. The government of the Netherlands has expressed its intention to ratify,[1170] and Germany also seems to be moving towards ratification.[1171]

There has also been sustained, concerted and considered calls for the UK to ratify the 2001 Convention. These efforts have included two seminars held in 2005 and 2010 organised by the Joint Nautical Archaeology Policy Committee (JNAPC),[1172] an impact review of the 2001 Convention for the UK funded by English Heritage and the Honor Frost Foundation (HFF) which showed that there is no great legal barrier to UK ratification,[1173] a briefing note prepared by the HFF and the British Academy which highlighted the advantages of ratification,[1174] and a policy brief prepared by the UK National Commission for UNESCO calling on the UK to re-evaluate whether it should ratify the Convention.[1175] This has led to the UK's Department for Culture, Media and

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[1170] Government of the Netherlands, 'The Netherlands Will Protect the Underwater Cultural Heritage' (*News*, 2016) <www.government.nl/latest/news/2016/05/19/the-netherlands-will-protect-the-underwater-cultural-heritage> accessed 6 October 2016; Martijn Manders, 'The Netherlands towards Ratification: Activities in the Light of the Convention' in Graeme Henderson and Andrew Viduka (eds), *Towards Ratification: Papers from the 2013 AIMA Conference Workshop* (Australian Institute for Maritime Archaeology 2014).

[1171] 'Petition for the UNESCO-Convention' (*Deutsche Gesellschaft zur Förderung der Unterwasserarchäologie e.V.*) <www.deguwa.org/?id=219> accessed 13 October 2016.

[1172] *The UNESCO Convention For The Protection Of The Underwater Cultural Heritage: Proceedings Of The Burlington House Seminar, October 2005* (Nautical Archaeology Society 2006); RA Yorke (ed), *Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK: Proceedings of the JNAPC 21st Anniversary Seminar, Burlington House, November 2010* (Nautical Archaeology Society 2011).

[1173] UK UNESCO 2001 Convention Review Group (n 108).

[1174] British Academy / Honor Frost Foundation Steering Committee on Underwater Cultural Heritage (n 756).

[1175] UK National Commission for UNESCO, 'UNESCO Convention on the Protection of Underwater Cultural Heritage: Next Steps for the UK Government' (UK National Commission for UNESCO 2015) Policy Brief 17.

Sport stating in a white paper in 2016 that they will review their position on ratifying the 2001 Convention.[1176]

Whereas in 2001 it was by no means certain that the Convention would enter into force,[1177] it now has and it continues to gain support, even amongst States that could not support it in 2001.[1178] States that may still have some qualms about its regime may now achieve more by joining the treaty and using their influence to shape its ongoing evolution from within its institutions, than by remaining outside its regime and having no influence on it at all.

> Ratification will help the UK to reinforce its interpretation of the international Law of the Sea, and enable the UK to make its case within the Convention's own institutions.
>
> The alternative to ratifying the 2001 Convention is for the UK's position to become increasingly isolated and irrelevant. Without ratification, the UK will be unable to influence how the new global standard is implemented; and the UK will remain largely incapable of offering effective protection to wrecks of UK origin lying beyond its own waters.[1179]

What sort of regime will these States be joining if they decide to proceed with their ratifications? Through application of a methodology not previously applied to cultural heritage treaties, this study has provided a clearer answer to this question than was previously possible.

Through an investigation of the presence or absence of certain indicators in the national legislation of States Parties to the 2001 Convention, it has become apparent that there is a low level of compliance with the 2001 Convention. Further, the Convention has so far had a very limited legal effect. There are notable exceptions to

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[1176] 'The Culture White Paper' (Department for Culture, Media & Sport 2016) 46 <www.gov.uk/government/publications/culture-white-paper> accessed 13 October 2016.

[1177] Dromgoole, *Underwater Cultural Heritage and International Law* (n 129) 366.

[1178] UK UNESCO 2001 Convention Review Group (n 108) 8.

[1179] British Academy / Honor Frost Foundation Steering Committee on Underwater Cultural Heritage (n 756) 3.

this statement however, as States such as Italy and Belgium have promulgated detailed laws that were specifically intended to implement the Convention. From this examination of legal effectiveness, conclusions about the interpretation of certain Convention provisions were also possible. In particular, there are a very small number of indications that the ambiguities in Articles 9 and 10 of the Convention are being interpreted in favour of the coastal State, leading to an increasing territorialisation of the EEZ. However, States may be using their jurisdiction over the protection and preservation of the marine environment as a basis for this, jurisdiction that is attributed by UNCLOS, rather than using the Convention itself. This is an ominous indication, as despite some short term benefits in heritage protection that unilateralism may provide, ultimately it undermines the need for the Convention and its cooperative regime. States Parties to the Convention must improve their implementation if the coordinated mechanisms for heritage protection in Article 10 of the Convention are to be initiated, which will ensure that cooperation is at the heart of the protection of UCH.

The study of legal effectiveness, whilst providing fascinating conclusions in its own right, and a level of knowledge about the implementation of the Convention that was hitherto unknown, also raised further questions. How to improve the level of implementation in order to, amongst other things, ensure the cooperation systems can function was one of these questions. To address this, the obstacles to implementation also needed to be explored. Finally, it was necessary to also consider the other effects that the Convention may have had outside of the legal sphere. A qualitative methodology was utilised to discover the opinions of archaeologists, heritage managers and legal academics that have experience of working in the Convention's States Parties, a viewpoint often overlooked in discussions of the Convention. From this source of data it was possible to address these further questions.

Firstly, the effectiveness of the Convention is not just limited to legislative change, the range of probable effects are much more diverse, and include other concrete impacts such as institutional change and improved enforcement, to more intangible effects such as increasing the authority, and the public's awareness, of underwater archaeology. Despite this, the extent of these effects is still more limited than could be expected, although this is a conclusion that is consistent with the analysis of the legal effectiveness already undertaken.

Secondly, the opinions of archaeologists and others were mined for what could be causing this lack of effect. The type of factors that were most discussed were those that related to the individual countries, such as regional inconsistency in Italy, institutional competition in Croatia, and a lack of awareness of UCH in Montenegro. This may be because these factors are those that archaeologists encounter every day, and so are more immediate and less abstract then other factor types, such as those related to the international environment, including whether there is a culture of compliance with the Convention globally and regionally. The factors related to individual countries could be classified as falling under the theoretical concept of capacity.

Carsten Lund, the Chairman of the meetings of governmental experts that drafted the 2001 Convention at UNESCO, stated five years after the Convention was adopted:

> UNESCO is a poor Organisation in terms of material resources; not in terms of quality but in terms of supporting resources, which means that their plan of action in the field was a plan with one negotiating meeting a year. This, in my experience, is not a very fruitful way of negotiating.[1180]

The 2001 Convention, before it was ever adopted at UNESCO, was hindered by problems of capacity. This issue, in relation to individual States, seems to continue to impede its progress, nearly a decade after it entered into force. The interviews allowed an exploration of the concept of capacity on the national level. The contexts of the individual States are complex and ever changing, and are made up of an interacting set of framework conditions. Top down, mono-factorial approaches like the Convention cannot be expected to have deep and lasting effects on the capacity of States without at least recognising their unique set of framework conditions. Ideally, the Convention would be augmented by other initiatives which seek to aid capacity development by altering some of the other, relevant framework conditions, such as a lack of awareness and legal framework in Montenegro, the lack of dedicated underwater archaeology institution in Slovenia, and a lack of a programmatic approach in all the case study States.

[1180] Lund (n 145) 17.

This conclusion forces the consideration of alternative activities that could help the Convention to prove more relevant to the individual circumstances of its States Parties. The actions that are recommended are, firstly, the introduction of a system of implementation review, such as a State reporting system, that will increase knowledge of the state of compliance of the 2001 Convention and increase transparency and trust between States Parties. Secondly, the production of national plans by States, or actors working in those States, to recognise the particular framework conditions present in their systems, lay out the measures needed to implement the Convention, and set out methods and goals for the development of their capacities. Finally, States should seek to initiate regional agreements, tailored to their regional circumstances, which could offer greater protection to the UCH and pathways to build capacities on a regional scale.

These alternative actions will augment the positive measures already undertaken by UNESCO, will raise national capacities, and will increase the knowledge of the circumstances in each State and the actions they have taken to implement the Convention. Taken together, these efforts will help to close the implementation gap and increase the effectiveness of the 2001 Convention.

The negotiations of the 2001 Convention faced great challenges such as limited time and the conflicting viewpoints of States. Kōichirō Matsuura, the then Director-General of UNESCO, said in March 2001 at the opening of the fourth meeting of governmental experts that drafted the 2001 Convention, that 'serious work therefore lies ahead, which will require all the attention, skill and commitment of everyone'.[1181] The difficulties then were overcome, the Convention was adopted. However, once again, serious work lies ahead. States Parties need to strive to build their capacities and implement the Convention in order for the Convention to achieve its goal of protecting the UCH, and ensure the survival of UCH for future generations. Only then could the Convention be said to be truly effective.

[1181] Kōichirō Matsuura, *Building the New UNESCO: Selected Speeches 2001* (UNESCO 2003) 431.

Appendix 1 – Event Matrix of the Case Study States

Table 35 Event matrix of the case study States.

	2001-3	2004-6	2007-9	2010-2	2013-5	2016-8
International	2001 Convention adopted (2001)		Financial crisis (2007-8) Odyssey filed in U.S. court for an arrest of the cargo of the *Mercedes* (2007) 2001 Convention in force (2009) US court rules it has no jurisdiction over case of *Mercedes* (2009)	Odyssey ordered to return cargo of *Mercedes* to Spain after appealing original decision (2011)		
Albania						
Convention			Ratification (2009)			
Institution				Albanian Centre for Marine Research created (2010)	National Coastal Agency created (2013)	
Legislation	Cultural Heritage Act No 9048 (2003)				Regulations regarding diving and UCH introduced (2014)	
Other			Albania applies to join the EU (2009)			

	2001-3	2004-6	2007-9	2010-2	2013-5	2016-8
Croatia						
Convention		Ratification (2004)				
Institution		Department of Archaeology at the Ministry of Culture transferred to the Croatian Conservation Institute (CCI) (2004)	International Centre for Underwater Archaeology (ICUA) formed as a national centre, as part of the CCI (2007) ICUA becomes UNESCO Category 2 centre and independent from CCI (2009)			
Legislation	Decision on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea (2003)	Maritime Code (2004) Ordinance on Archaeological Research (2005)	Law on the Coastguard of the Republic of Croatia (2007) Ordinance on the cooperation of the Coastguard and competent authorities in Protection of Cultural Property on the sea, seabed and subsea (2009)	Ordinance on Archaeological Research (2010)	Maritime Code amended to implement the Nairobi Convention 2007 and Salvage Convention 1989 (2013)	
Other		Discovery of the *Re d'Italia* (2005)		Jasen Mesic is Minister of Culture (2010 to 2011)	Croatia accedes to the EU (2013)	

	2001-3	2004-6	2007-9	2010-2	2013-5	2016-8
Italy						
Convention				Ratification (2010)		
Institution		*Soprintendenza del mare* created in Sicily (2004)	Bill suggesting the creation of a national *Soprintendenza del mare* (2009)		Bill suggesting the creation of a Central Institute for Underwater Archaeology (2013)	MiBACT reforms the structure of the *Soprintendenze* (2016)
Legislation	Constitutional amendment splitting jurisdiction over some heritage matters between the central government and the regions (2001)	Cultural heritage and landscape code (2004) Framework law on the establishment of Ecological Protection Zones (2006)	Ratification and implementation of the Convention on the Protection of Underwater Cultural Heritage law (2009)	Decree establishing ecological protection zones in the north-west Mediterranean, the Ligurian Sea and the Tyrrhenian Sea (2011)		
Other			Odyssey brings case in US courts for salvage rights over the wreck of the *Ancona* (2007) Italy intervenes in the *Ancona* case (2009)	Odyssey declares it has no more interest in the wreck of the *Ancona* (2010)		

	2001-3	2004-6	2007-9	2010-2	2013-5	2016-8
Montenegro						
Convention			Ratification (2008)			
Institution				Reform of Ministry of Culture, Centre for Conservation archaeology of Montenegro and the Directorate for Protection of Cultural Monuments of Montenegro are created (2011) State funds training in maritime archaeology and diving for a small number of archaeologists (2012)		
Legislation				Protection of Cultural Property Act (2010)		
Other		Montenegro declares independence from the State Union of Serbia and Montenegro (2006)	Montenegro applies to join the EU (2008) Montenegro ratifies all of UNESCO's cultural heritage conventions (2007-9)			

	2001-3	2004-6	2007-9	2010-2	2013-5	2016-8
Slovenia						
Convention			Ratification (2008)			
Institution	Underwater Archaeology Group formed as part of the Institute for the Protection of Cultural Heritage (2002)		Institute for the Protection of Cultural Heritage reorganised due to Cultural Heritage Protection Act (2008)			
Legislation	Maritime Code (2001) Act Amending the Maritime Code (2003) Ordinance declaring the riverbed of the Ljublianica River as a cultural monument of national importance (2003)	Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act (2005) Decree on the Determination of the Fisheries Areas of the Republic of Slovenia (2006)	Cultural Heritage Protection Act (2008)		Regulations on archaeological research (2013) Regulations on finding archaeological remains and the use of technical means for this purpose (2014)	
Other		Slovenia accedes to the EU (2004)				

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