

INTERNATIONAL LAW ASSOCIATION
NEW DELHI CONFERENCE (2002)
CULTURAL HERITAGE LAW COMMITTEE

Members of the Committee:

Professor Patrick J O'Keefe (Australia): *Chair*
Professor James A R Nafziger (USA): *Rapporteur*

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REPORT

At the 69th Conference of the International Law Association (2000), the Committee on Cultural Heritage Law prepared a First Report on A Blueprint for the Development of Cultural Heritage Law. It summarized procedural and substantive preparations of the Blueprint, including synopses of twelve submissions by committee members. To conserve space, this report will not reiterate the comprehensive information in the 2000 Report.

On November 8, 2001, the Committee met at Wolfson College of Oxford University. The agenda of this meeting included three items: an important development and prospective follow-up related to an earlier project of the Committee, the Blueprint project, and the future work of the committee.

1. THE PAST: THE UNESCO CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE.

On November 2, 2001, just six days before the Committee's meeting at Oxford, the General Conference of UNESCO adopted the Convention on the Protection of the Underwater Cultural Heritage, thereby concluding a project that the Committee began in 1990. The Committee's Buenos Aires Draft Convention, adopted by the ILA in 1994, served as the basis for the UNESCO Convention. Twenty ratifications, acceptances, approvals, or accessions will bring the new treaty into force. It is UNESCO's first treaty since 1989 and its first treaty on the cultural heritage since 1972. The Committee's Chair, Patrick O'Keefe, and Rapporteur, James A.R. Nafziger, participated in meetings of the UNESCO Committee of Experts as ILA Observers. For a summary of the Buenos Aires Draft Convention, see generally Patrick J. O'Keefe & James A.R. Nafziger, "The Draft Convention on the Protection of the Underwater Cultural Heritage," 25 *Ocean Dev. & Int'l. L.* 391 (1995) and 26 *Ocean Dev. & Int'l. L.* 193 (1995) (update).

In essence, the Convention:

- Establishes objectives and general principles, within the terms of the United Nations Convention on the Law of the Sea, to ensure and strengthen protection of the underwater cultural heritage.
- Requires parties to comply with detailed scientific rules concerning activities directed at heritage and to ensure compliance with these rules by their nationals.
- Provides that parties must cooperate with each other in protecting and reporting on underwater heritage discoveries and activities involving their offshore jurisdictions.
- Prescribes that parties seize and dispose of heritage recovered in violation of the Convention and impose effective sanctions for violations of measures under the Convention.
- Mandates scientific training, international cooperation, follow-up meetings, and peaceful settlement of disputes related to the Convention.

As accessibility to historic wreck and other underwater cultural heritage has increased dramatically, it has become clear that the laws of salvage and finds cannot adequately resolve transnational disputes among salvors and other commercial interests, the public, and sovereign states. The maritime law of salvage and finds was simply not intended for application to historic wreck, cargo or related debris. The Convention nevertheless provides for a continuing application of the law of salvage or the law of finds so long as particular activity to which it applies is authorized by competent authorities, conforms with the Convention, and ensures maximum protection of heritage during recovery. It should be noted that the Convention takes no position on ownership of heritage or the precise manner in which parties administer the Convention so long as they act as required.

To launch its 35 articles and 36 annexed rules, the Convention defines “underwater cultural heritage” as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.” Parties to the Convention will assume a responsibility to protect this heritage offshore, in some cases, consistent with international law, out to 350 nautical miles.

The required protection is defined in the annexed rules concerning activities directed at the heritage. For example, a qualified archaeologist must direct and control all such activities, which “must use non-destructive techniques and survey methods in preference to recovery of objects.” Also, the protection of heritage by on-site preservation must be considered as the first option, and public access to on-site heritage “shall be promoted, except where such access is incompatible with protection and management.” The rules also encompass standards for project design and scope of activity, preliminary work on a proposed activity, funding and duration of the activity, required safety and environmental measures, conservation and site management, curation, reporting and dissemination of information about discoveries.

Parties are obligated to ensure compliance with these requirements not only within their offshore jurisdiction but by their nationals and flag vessels on the seabed beyond their jurisdiction or wherever they may be engaged in activity directed at the underwater heritage. Within their territory, parties must take measures to prevent illicit import, trading or possession of underwater cultural heritage. The Convention provides a detailed process of consultation and cooperation among coastal states and other parties that have declared an interest in particular heritage. Parties also agree to impose and enforce sanctions for violation of measures they have taken under the Convention, to seize and properly dispose of contraband property, and to cooperate in information-sharing, public education, technical training and follow-up meetings organized by UNESCO. Disputes that may arise between parties are to be settled by prescribed procedures and institutions.

Given the inadequacy of general maritime law and other international authority to resolve questions of national jurisdiction and protection, it is not surprising that UNESCO negotiations were highly contentious. For seven years, UNESCO’s Committee of Experts that included the ILA’s two Observers grappled with several issues in particular. These issues included:

- A jurisdictional tug-of-war between flag states (especially Spain) and coastal states (especially in Latin America) in whose territorial waters flag-state vessels lie.
- The immunity of warships and other state vessels from activity unauthorized by the flag state.
- The balance of interests between scientists and private salvors.
- The extension of coastal state jurisdiction without explicit authorization by the 1982 Convention on the Law of the Sea.

Delegates worked particularly hard to overcome any conflict between the new UNESCO Convention and the 1982 United Nations Law of the Sea Convention. Requirements under the UNESCO Convention therefore fit within the general framework of coastal state jurisdiction, flag-state authority and state responsibility within the 1982 Convention. Unlike the International Law Association's Buenos Aires Draft Convention, however, the UNESCO Convention does not provide simply for exclusive flag-state authority over sunken warships and other vessels. Instead, it strikes a balance between coastal-state and flag-state authority but broadly requires flag-state consent to any activity directed at warships and other state vessels on the continental shelf and seabed.

For the most part, the negotiations succeeded in achieving consensus. In the end, however, the issues of coastal state jurisdiction and flag-state authority over state vessels remained contentious. Indeed, these issues best explain the opposition of two states to the Convention – Norway and Russia – and the abstention in voting on the Convention by a few of the European maritime states.

In sum, the Convention establishes a basic international framework for protecting and managing underwater heritage. It will come into force as soon as twenty states have ratified or acceded to it, with no deadline for doing so. Over time, the Convention's rules are likely to provide a framework of custom that will shape the general practice of both parties and non-parties in their maritime relationships with each other. It might be noted that the vote on adoption of the Convention was similar to that on the 1972 World Cultural and Natural Heritage Convention (75-1-17), which is now almost universally accepted. In any event, there is a growing awareness expressed in international agreements and national legislation, of the need for states to cooperate and agree on fundamental rules for protecting the underwater cultural heritage.

2. THE PRESENT: THE COMMITTEE'S BLUEPRINT PROJECT

The following studies for the Blueprint have been completed: Cultural Exemptions in International Trade Law, Cultural Property Export Controls, The Regime of Historic Preservation, The Regime of the 1954 Convention, Returns to Indigenous Peoples, and Toward a More Collaborative Regime of Transnational Cultural Property Law. Several other studies are nearly complete. The main themes of all of these studies were summarized in the Committee's 2000 Report. Although the studies have been substantially expanded and updated, none of the findings and recommendations have been materially modified since the 2000 Report. Upon completion of all the studies, they will be published as the final Blueprint of Heritage for the 21st Century, with some attention to prioritization of recommended action and institutional responsibility for it.

3. THE FUTURE:

At the Oxford meeting the Committee decided to undertake a new study and possibly a draft instrument on international protection of cultural diversity, with a possibility of encompassing both the tangible and intangible heritage. In follow-up communications, Committee members expressed particular interest in the emerging concept of "caring and sharing" heritage as a basis for protection. The Committee also decided to undertake a process of monitoring the progress of the new UNESCO Convention, as summarized in this report, and decisions under it.