Chapter 2


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1. INTRODUCTION

On 2 November 2001, the General Conference of UNESCO adopted its fourth heritage convention, the Convention on the Protection of the Underwater Cultural Heritage. The Convention was adopted by 87 affirmative votes, while four States (Norway, the Russian Federation, Turkey and Venezuela) voted against and 15 abstained from voting (Brazil, Colombia, the Czech Republic, France, Greece, Germany, Guinea-Bissau, Iceland, Israel, the Netherlands, Paraguay, Sweden, Switzerland, the United Kingdom, Uruguay). The Convention shall enter into force three months after the deposit of the twentieth instrument of ratification, acceptance, approval or accession. As yet, six States have ratified the Convention: Panama (20/05/03), Bulgaria (06/10/03), Croatia (01/12/04), Spain (06/06/05), Libyan Arab Jamahiriya (23/06/05) and Nigeria (21/10/05).

There has already been considerable delay in the adoption of legal rules to protect the underwater cultural heritage. The invention of the aqualung in 1943 made underwater sites accessible with the result that most archaeological remains in shallow water have been plundered. Modern advances in deep seabed technology and in particular the operations of salvage companies have proved to be equally detrimental to deepwater archaeological sites; unless proper precautions are taken, these too will be looted. The first legis-

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" See Annex I.

lative attempt to develop rules for the protection of the underwater cultural heritage was undertaken at the regional level by the Council of Europe. Regrettably, the Draft 1985 European Convention on the Protection of the Underwater Cultural Heritage (hereinafter cited as “Draft European Convention”) prepared by an Ad Hoc Committee of Experts, was not approved by the Committee of Ministers as there was no agreement on the crucial question of jurisdiction. Thus, no decision was taken to open the Convention for signature.

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2 Council of Europe, Ad Hoc Committee of Experts on the Underwater Cultural Heritage (CAHAQ), Final Activity Report, Doc. CAHAQ(85)5, Strasbourg, 23 April 1985 (not a public document). The Draft European Convention adopted a wide variety of measures, which encompass all aspects of the protection of underwater cultural heritage. The advocacy of the fundamental principle of the in situ protection of underwater cultural property is accompanied by the duty of the Parties to take all appropriate measures to conserve recovered property as well as to fully record finds. Discoveries of underwater cultural property within the ‘area’ of a contracting State should be reported to the competent authorities, the discoverers being required to leave the property where it is situated. In addition, contracting States may require their nationals to notify the competent authorities about discoveries made in places where no State exercises control over such property. Contracting States are also required to take appropriate measures to ensure the proper documentation of recovered property, to promote public appreciation of the underwater cultural heritage and the need to protect it, and to further underwater research. The control of traffic in underwater cultural property and the restriction of its illegal circulation is another fundamental objective of the Convention. In this respect, each party shall make available evidence of any lawful export of such property and notify the other contracting states about the illegal recovery or export of such property. The proposed regime shall not interfere with property rights, the law of salvage or laws and practices with respect to cultural exchanges; nor will it prejudice any jurisdiction or rights, which contracting States may otherwise have under international law in respect of the protection of the underwater cultural heritage. The implementation of the Convention is to be kept under review by a Standing Committee.

As far as the territorial scope of application of the Draft European Convention is concerned, article 2 adopted a provision similar to article 303(2) of the 1982 United Nations Convention on the Law of the Sea (hereinafter cited as “LOS Convention”). It reads: “1. For the purposes of this Convention, the ‘area’ of a contracting State means its territorial sea and, in respect of a contracting State which has established it, the zone referred to in paragraph 2; 2. A contracting State which has established a contiguous zone in conformity with international law may presume that removal of underwater cultural property from the seabed in that zone without its approval would result in infringement within its territory or territorial sea of laws and regulations applied in that zone”. There is, however, an important difference between the two articles. Article 2 requires the prior establishment of a general contiguous zone, while, as will be seen below, article 303(2) of the LOS Convention does not establish the declaration of the contiguous zone as a prerequisite for its application.

Finally, article 17 of the Draft European Convention enables contracting States to take all appropriate measures to protect underwater cultural property while exercising their resource-related jurisdiction on the continental shelf. Such measures should not be viewed as an expansion of coastal jurisdiction over the continental shelf, but rather as an expression of the duty to protect underwater cultural heritage.