

CONSIDERATION OF THE UNESCO CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

REPORT OF THE CMI WORKING GROUP¹

1. On November 2, 2001, the 31st General Conference of the United Nations Educational Scientific and Cultural Organization (“UNESCO”) adopted the Convention On The Protection Of Underwater Cultural Heritage (“UCH Convention”). The text of the UCH Convention can be found on the UNESCO website at: www.UNESCO.org (under the link for Legal Instruments).

The UCH Convention will enter into force three months after the deposit of the 20th instrument of acceptance, approval or ratification. As of the date this paper was completed, the UCH Convention had not entered into force.

2. The UCH Convention was approved by a vote of 87 in favor and 4 against, with 15 abstentions. The countries which voted against the Convention were Norway, Russian Federation, Turkey and Venezuela. The countries which abstained include Brazil, Colombia, Czech Republic, France, Germany, Greece, Guinea-Bissau, Iceland, Israel, Netherlands, Paraguay, Sweden, Switzerland, United Kingdom and Uruguay. The United States of America was not a voting member of UNESCO, but had observer status and its delegate advised the Conference that it opposed the Convention.

3. At its meeting in Singapore on 16 February, 2001, the Assembly of the CMI passed a resolution concerning the draft UNESCO convention and requested the Chairman of the International Working Group to continue to monitor progress of the draft convention and to seek ways of ensuring that the convention, in final form, does not conflict with existing international salvage law. Bearing this mandate in mind, the IWG has given careful consideration to the UCH Convention. For the reasons outlined below, the CMI opposes ratification of the Convention.

4. The UCH Convention has been under discussion in draft form since in 1995. Indeed, discussions about such a convention began several years earlier.

¹ The first report of the CMI Working Group is published in CMI Yearbook 2001-Singapore II, page 254. See also the report by John D. Kimball to the Singapore Conference, *ibidem*, page 615 and the letter of the President of the CMI to the Director General of UNESCO, *ibidem*, at page 620.

There were four extensive meetings of governmental experts from UNESCO members and observers which led to approval of the draft convention at the final session held in Paris from July 1–8, 2001.

5. The CMI supports the goal of the UCH Convention of protecting underwater cultural heritage. The CMI recognizes that there are certain shipwrecks which have great historical, archaeological, cultural or other importance and, if at all possible, should be protected and preserved. In addition, the CMI agrees with certain parts of the annex to the Convention to the extent they set forth generally accepted archaeological principles which should be followed in protecting underwater cultural heritage. Nonetheless, there are several fundamental aspects of the Convention which cause us to be concerned and which should be given careful consideration by any country which may be considering whether to accept it.

6. The CMI questions Article 2 and Rule 1 of the annex to the extent they state that in situ preservation shall be considered a first option. In situ preservation is only one of several options which should be considered and in some cases may be entirely inappropriate and lead to the destruction and loss of property which might have been preserved.

7. The CMI also questions Rule 2 of the annex. In many instances, there should be no objection to the sale of property which is found underwater. Indeed, in our view, having the ability to sell some or all of the property may be the only viable way of obtaining adequate funding to protect UCH. This is a section of the Convention which conflicts with the law of salvage.

8. With respect to the main body of the convention itself, the CMI has the following primary objections:

a) The CMI objects to the definition of UCH contained in Article 1(A). The definition is far too broad and may have the unintended consequence of making enforcement of the convention impossible as a practical matter. The CMI would prefer a definition which restricts the coverage of the Convention to underwater property which is recognized to have historic, cultural, archaeological or other significance. We also question the 100 year time rule, which, for example, would exclude some important shipwrecks, including the wreck of the Titanic, as part of the underwater cultural heritage.

b) Notwithstanding Article 3, the Convention appears to be at variance with the Law of the Sea Convention (“UNCLOS”) in creating greatly expanded coastal state jurisdiction over ship wrecks on the continental shelf. There are serious questions as to whether the notification and approval schemes outlined in Articles 9 – 12 are in conflict with UNCLOS.

- c) 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. There is no reason why the law of salvage should be deemed a threat to the protection and preservation of underwater cultural heritage. The law of salvage has long had international recognition and is explicitly recognized in Article 303 of the Law of the Sea Convention. We further consider it most important to recognize a conflict between the UCH Convention and the Salvage Convention. The UCH Convention cannot “abrogate” the Salvage Convention: pursuant to Article 30 of the Vienna Convention, the Salvage Convention prevails over the new UCH Convention if it comes into force. It is a fact that in view of the very wide notion of “property” in the Salvage Convention, any UCH may be the subject of salvage operations. The matter was discussed during the International Conference of 1989 and while there was a suggestion that UCH should be excluded from the scope of the Convention, it was ultimately decided that it should be the subject of a reservation. If, therefore, States have availed themselves of the provision in Article 30(1)(d) and have notified a reservation in that respect, they are free to adopt the UCH Convention. If, on the contrary, they have not made such reservation, they can not adopt the UCH Convention unless they previously denounce the Salvage Convention.
- d) The CMI opposes Article 9 to the extent it contains an option which may require a flag state to give direct prior notification to a coastal state of any activity to be directed at UCH in its exclusive economic zone or on its continental shelf. This provision is objectionable because it is intended to expand the jurisdiction of coastal states over UCH in a manner which conflicts with UNCLOS.
- e) The CMI also opposes Article 10 which creates a right of the coastal state, acting as the coordinating state, to take unspecified and unlimited protection measures to prevent immediate danger to underwater cultural heritage located in the EEZ or on its continental shelf. Under the text of the Convention, coastal states are permitted to take such protective measures prior to consultations with other states on whose behalf they are intended to be coordinating. The CMI opposes this expansion of the jurisdiction of coastal states over UCH in a manner which conflicts with UNCLOS. There is a further objection in respect of Article 10, coordinated with Article 9(5): in fact even though the declaration of interest of other States parties must, pursuant to Article 9(5), be based “on a very verifiable link especially a cultural, historical or archaeological link, to the underwater cultural

Report of the CMI Working Group

heritage concerned” it is not clear how such a link may be verified and by whom. It may happen, therefore, that a number of other States may declare interest in being consulted and that would create an impossible burden to the State in the EEZ or continental shelf of which the UCH is located.

9. Shortly before his death, Geoffrey Brice, QC drafted a protocol to the Salvage Convention, 1989 to deal with the application of the convention to historic wrecks. We consider that the draft protocol presented a workable solution for dealing with the salvage of historic wrecks and should be taken into consideration in any future deliberations in this area. A copy of the Brice protocol is included in CMI Yearbook 2000, at page 412.

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Respectfully submitted,

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