

DEVELOPMENTS IN CULTURAL HERITAGE LAW: WHAT IS AUSTRALIA'S ROLE?

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INTRODUCTION

Cultural heritage law is a rapidly expanding field little known to outside practitioners. National law in this area has existed for centuries although substantial development has occurred only since World War II. Over this same period there have been major developments in international law. In the main these have followed philosophical changes in the concept of cultural heritage and technical innovations raising new issues.

Philosophical changes in what constitutes the built heritage illustrate this. For example, last century much effort in France and England went into securing legislative protection of monuments. This meant cathedrals, churches, grand public buildings and the remains of all of these. This was later extended to private buildings and those, individually of no great significance, but representative of a type of architecture or possessing other historical importance. Then it was realised that heritage value sometimes resided, not in individual buildings, but in the collectivity of these and so whole precincts and districts came to be protected. Nevertheless, buildings are only part of the story of humanity's relationship to the environment. Landscapes play a major role in what we perceive of our past. Much effort has gone into defining these as a concept and establishing forms of protection. Finally, the latest philosophical development links the built environment with movables. Buildings are much more significant if they contain objects related to their use, such as furniture and machinery. The maintenance of that connection is now a significant issue.

These developments are reflected in a number of international instruments:

- Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites, 11 December 1962 (UNESCO)

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- Convention concerning the Protection of the World Cultural and Natural Heritage, 1972
- Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas, 26 November 1976 (UNESCO)
- Convention for the Protection of the Architectural Heritage of Europe, 1985
- Draft Recommendation on Measures to Promote the Integrated Conservation of Historic Complexes and Their Movable Heritage (Council of Europe – in preparation)

Australia's main involvement has been with the second instrument above. Following ratification of that Convention in 1974, Australia now has eleven sites on the World Heritage List – all of them natural sites. Moreover, Australia is the only country where the Convention has been subject to judicial analysis¹ – in *Commonwealth v Tasmania*,² *Richardson v Forestry Commission*³ and *Queensland v Commonwealth*.⁴ Unfortunately, these very significant decisions, which represent a major contribution to jurisprudence on the Convention, appear to be little known outside Australia.⁵

There is no space here to discuss the Convention further nor would it be appropriate to consider the Council of Europe Recommendation on Measures to Promote the Integrated Conservation of Historic Complexes and Their Movable Heritage which is still a draft. The remainder of this article will therefore concentrate on recent, current and proposed developments in three areas: theft and unlawful trade in cultural heritage; protection of the underwater cultural heritage; and protection in time of armed conflict.

¹ The Convention has been referred to in an arbitration, *SPP v Government of Egypt* (1993) 32 International Legal Materials 933. See O'Keefe, "Foreign investment and the World Heritage Convention" (1994) 2 International Journal of Cultural Property 259.

² [1983] 158 Commonwealth Law Reports 1.

³ [1987-1988] 164 Commonwealth Law Reports 261.

⁴ [1989] 167 Commonwealth Law Reports 232.

⁵ For example, no reference is made to them in the *SPP v Government of Egypt* award nor in most of the literature on the Convention.

THEFT AND UNLAWFUL TRADE

No one really knows the volume of trade in stolen and smuggled heritage objects. Some estimates range as high as US\$6 billion per year. Others say it is the largest international crime problem after drug dealing. Whatever the true dimensions, it constitutes a major problem, not only in terms of loss to those who possessed the objects and the states in which they were located, but also in terms of destruction, breakdown of societal values and loss of revenue earning attractions. For example, a significant proportion of the unlawful trade is composed of antiquities coming from excavations made solely for the purpose of extracting whatever the site contains of commercial value. As observed by S Melikian:⁶

Those of you who have never seen a site destroyed by plunderers have no idea of the amount that gets destroyed. I would say roughly that what comes out of a commercial dig is between five and ten percent of what was to be found, without even considering the destruction of documentation, which is, of course, a catastrophe.

1970 UNESCO Convention

UNESCO first attempted to deal with this problem in the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention).⁷ As at 15 June 1996, there were 85 states party to that Convention. Australia acceded to it in 1989 following passage of the 1986 Protection of Movable Cultural Heritage Act.

There are significant problems with this Convention, arising from its drafting history. It was adopted at the 1970 General Conference of UNESCO. There the UNESCO Secretariat presented a draft as did the delegation of the United States of America. The result is an unhappy amalgam of the two, one which is capable of differing interpretations. In their implementing legislation Australia and Canada have taken a broad view of what the Convention requires while the United States has taken a

⁶ See "A degree of destruction unprecedented in the history of the world – and yet I support collecting" 52 *The Art Newspaper*, October 1995, 27.

⁷ 823 United Nations Treaty Series 231.

very narrow one. However, at least these States have become party to the Convention. The other so-called "market" states, France, Germany, Japan, Netherlands, Switzerland and the United Kingdom, have not.

1995 UNIDROIT Convention

It was against this background, and in order to supplement the 1970 Convention, that the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects⁸ (the UNIDROIT Convention) was adopted at a diplomatic conference in Rome on 23 June 1995. Among the states which signed the Convention at the diplomatic conference were France and Italy. Most significantly, The Netherlands and Switzerland both signed just before the deadline of 30 June 1996. This sends a clear message that major market states consider the UNIDROIT Convention to be of great importance.

Australia played a major role in bringing about this Convention. In a report to UNESCO in 1982, the author and Dr Lyndel V Prott⁹ recommended that certain rules of private international law be changed by international convention in so far as they affected cultural heritage, and that UNIDROIT be asked to do this.¹⁰ The General Conference of UNESCO endorsed the proposal and UNIDROIT took up the task. Following two major reports by the Austrian jurist, Reichelt, the Governing Council of UNIDROIT decided to proceed with the preparation of a Convention. A study group of experts was appointed to prepare a draft which was then worked over at four meetings of governmental experts and finally considered by the Diplomatic Conference. Dr Prott attended all these meetings. At the Diplomatic Conference, Dr Balkin, leader of the Australian delegation, occupied the difficult and crucial position of chair of the Drafting Committee.

Australia has not indicated whether it will accede to the UNIDROIT Convention. There is no good reason why it should not. The Australian 1986 Protection of Movable Cultural Heritage Act is modelled on the

⁸ Reproduced in [1996] NS-1 Uniform Law Review 110; (1995) 34 International Legal Materials 1330.

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¹⁰ Prott and anor, "National Legal Control of Illicit Traffic in Cultural Property" UNESCO Doc CLT-83/WS/16, 11 May 1983.

Canadian 1975 Cultural Property Export and Import Act. Canada is actively considering accession. As a senior Canadian official recently said:

As you know, we already have the Cultural Property Export and Import Act. It was put in place in 1977 after Canada became party to the 1970 UNESCO Convention mentioned earlier, and it is the implementing legislation for that Convention. What you will find if you look through that Act is that its general lines are similar to the general lines of the UNIDROIT Convention. There are some differences, some more significant than others. We would have to make some changes to it to implement the UNIDROIT Convention. But Canada does not need to adopt an entirely new law since we have the basis for implementing the UNIDROIT Convention in the Cultural Property Export and Import Act. ...Should Canada become party to the UNIDROIT Convention? Yes, I think we should.¹¹

Would major changes be necessary in the 1986 Protection of Movable Cultural Heritage Act for Australia to become party to the UNIDROIT Convention?

Scope

The UNIDROIT Convention applies to stolen or illegally exported cultural objects. These must be of "importance for archaeology, prehistory, history, literature, art or science" and belong to one of the categories listed in the Annex to the Convention. These are basically the objects listed as "cultural property" in the 1970 UNESCO Convention and as such would be prohibited exports from Australia under the 1986 Protection of Movable Cultural Heritage Act. If exported without a licence they would be forfeited. Consequently, no amendment of the legislation would be necessary for Australia to seek the return of a cultural object from another member state under the UNIDROIT Convention. But what of the situation where a Party to the Convention is seeking to recover such an object in Australia?

¹¹ Hughes, "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects", paper presented at the Legal Affairs and Management Symposium, Canadian Museums Association, Ottawa, 1-2 March 1992, 205 at 219.

Stolen Cultural Objects

The UNIDROIT Convention requires the possessor of any stolen cultural object to return it. The Convention thus adopts the basic common law maxim *nemo dat qui non habet* which is enshrined in the Sale of Goods Acts although these themselves contain exceptions to the rule.¹² It would have to be assessed whether the exceptions would be likely to apply to cultural objects stolen in other countries and found in Australia and, if so, how to deal with the situation.

Under the common law, the possessor of a stolen object is not entitled to any compensation, but must seek recompense from the person who supplied the object. The UNIDROIT Convention in Article 4 provides for the possessor to be paid "fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object". However, it was never intended that states that did not require compensation would change the rule and this is provided for in Article 9(1):

Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention.

Under Article 9(1) the Australian Government should continue not to require payment of compensation for the return of a stolen cultural object.

Another problem could be limitation periods. The UNIDROIT Convention requires any claim for restitution to be brought "within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft".¹³ A claim for restitution of a cultural object forming part of an identified monument or archaeological site, or belonging to a public collection, is only subject to the three year period. The impact of this on state legislation in Australia would need to be studied.

¹² O'Keefe and anor, "Movement" in Volume III, *Law and the Cultural Heritage* (1989, Butterworths, London) 397.

¹³ Article 3(3).

Finally, there is a provision dealing with objects stolen from archaeological sites:

For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the place where the excavation took place.

This appears to mean that, where a state has legislation declaring its ownership of undiscovered cultural objects, if they are excavated without a permit, they shall be considered stolen. Moreover, they are to be regarded as stolen when they are lawfully excavated but not disclosed to the appropriate authority as, for example, where a cultural object is found during ploughing by a farmer who sells it to a dealer without notifying anyone.

Illegally Exported Cultural Objects

Under Article 5 of the UNIDROIT Convention, a contracting state could request a "court or other competent authority" of Australia to order the return of a cultural object illegally exported from its territory. Not all such cultural objects have to be returned. The requesting state must prove that removal of the particular object:

from its territory significantly impairs one or more of the following interests:

- (a) the physical preservation of the object or of its context;
- (b) the integrity of a complex object;
- (c) the preservation of information of, for example, a scientific or historical character;
- (d) the traditional or ritual use of the object by a tribal or indigenous community;

or establishes that the object is of significant cultural importance for the requesting State.

The 1986 Protection of Movable Cultural Heritage Act is broader than this. Section 14 refers to the importation into Australia of "a protected object of

a foreign country". This is defined to mean "an object forming part of the movable cultural heritage of a foreign country",¹⁴ which is a broader category of material than the limited range covered by Article 5(3) of the UNIDROIT Convention.

Where such an object has been exported from a foreign country, and its export prohibited, and it is imported into Australia, then it is liable to forfeiture under Section 14 of the 1986 Act. Objects falling under Article 5 of the UNIDROIT Convention are thus covered. They may be seized by an inspector who has reasonable grounds to believe they are liable to forfeiture. The Act then sets out various proceedings that may take place leading to forfeiture of the object.¹⁵

At this stage, the current Australian legislation and the UNIDROIT Convention diverge slightly, although there would seem to be no overwhelming reason of principle why they could not be reconciled. Under the 1986 Act, when a protected object is forfeited, the Commonwealth becomes the owner and its disposition is at the discretion of the Minister,¹⁶ although that discretion is subject to the international obligations of the 1970 UNESCO Convention. Presumably, where an object has been forfeited following a request for its return by a foreign state, the Minister would order that it be returned. On the other hand, the UNIDROIT Convention is predicated on the return of cultural objects to the requesting state because "[t]he court or other competent authority of the State addressed *shall order the return...*" (italics added). This matter would have to be addressed in implementing the Convention.

The 1986 Act does not provide for payment of any compensation to the possessor of an object which is forfeited, even though that person was completely unaware of the object having been illegally exported and had exhausted all available means of inquiry. The Act left it open to the Minister to claim compensation under the 1970 UNESCO Convention if this was felt to be justified. In fact, amendment of the Act to provide for payment of

¹⁴ Section 3(1).

¹⁵ Sections 36, 37.

¹⁶ Section 38.

compensation was recommended in the last review of its operations¹⁷ but has not been implemented. The UNIDROIT Convention states that compensation shall be paid to such a purchaser¹⁸ but, once again, Australia may consider that non-payment of compensation would be permissible under Article 9 as being more favourable than the return of illegally exported cultural objects. This would require a policy decision on the part of the Government.

Finally, the 1986 Act does not specify any time limits for bringing recovery proceedings. It may be that a judge would import these from state legislation. This would have to be taken into account in implementing the UNIDROIT Convention as it requires any request for return to be made "within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export". On the other hand, the Government may be prepared to continue the existing situation on the ground that, under Article 9, it is more favourable to states seeking return of cultural objects.

Commonwealth Scheme

In 1983, the Commonwealth Law Ministers met in Sri Lanka. They stated that the "protection of significant items of the cultural heritage was a legitimate concern of the State". Further, they stated it was desirable for the Commonwealth to facilitate that protection, in particular by combating "the unhealthy market in smuggled and stolen cultural objects". This decision followed a suggestion to the meeting by the Attorney-General of New Zealand that the Commonwealth should take an initiative to deal with the many issues raised in the case *Attorney-General of New Zealand v Ortiz*.¹⁹ There, the House of Lords had decided that New Zealand had no standing in the English courts to recover a Maori carving smuggled out of New Zealand.

¹⁷ Ley JF, *Australia's Protection of Movable Cultural Heritage: Report on the Ministerial Review of the Protection of Movable Cultural Heritage Act 1986 and Regulations* (1991, Australian Government Publishing Service, Canberra) 132.

¹⁸ Article 6.

¹⁹ [1983] 2 Weekly Law Reports 809.

A paper²⁰ was prepared and circulated to member countries of the Commonwealth. It presented governments with a range of options which could be combined to form a Scheme²¹ implementing the wishes of Ministers. On the basis of their answers and further consideration by officials and Ministers themselves over a seven year period, a Scheme was eventually prepared. This was agreed to by the Law Ministers at Mauritius in 1993.²²

At that meeting, Britain indicated that it could not join the Scheme then, citing difficulties arising from its obligations as a member of the European Union and the placing of bureaucratic burdens on its large art trade. The British Attorney-General stated that Britain welcomed the Scheme. It did not "close the door" on eventual participation; and it would give informal support through diplomatic and other channels. Australia offered to help the Secretariat develop model legislation for implementing the Scheme. This was done and a Model Bill was considered by the Commonwealth Law Ministers at their meeting in Kuala Lumpur in April 1996.

UNDERWATER CULTURAL HERITAGE

Shipwrecks constitute the largest part of this aspect of the heritage although also to be found are the remains of submerged settlements and individual objects. Wrecks are of great importance since there is normally a relationship between everything on board at the time of sinking. This enables more accurate assessment of the history behind the wreck, life on board and trade patterns being two aspects of this.

Until the invention of the aqualung in the late 1940s, underwater cultural heritage was beyond reach. Some attempts had been made to retrieve it using sponge divers and grabs but these were sporadic and largely unsuccessful. Certainly, the archaeological investigation of sites was impossible. But the advent of scuba equipment changed all this. Many sites

²⁰ O'Keefe P and anor, *Protection of the Cultural Heritage Within the Commonwealth: Consultative Document* (1984, Commonwealth Secretariat, London).

²¹ A Scheme, a non-binding arrangement, is the preferred way of providing for intra-Commonwealth relations. Schemes establish a framework within which member countries of the Commonwealth agree to work to deal with a particular problem.

²² O'Keefe, "Protection of the material cultural heritage: the Commonwealth Scheme" (1995) 44 *International and Comparative Law Quarterly* 147.

were now accessible by anyone with the necessary expertise to use it. Treasure and souvenir hunters caused extensive destruction. At the same time, as Bass demonstrated on wrecks off Turkey, it was possible to excavate to the archaeological standards used on land. Recent years have seen further advances in techniques for accessing the seabed. The use of various gas mixtures such as TriMix allows free divers to go deeper than 500 feet. Newtsuits allow divers to descend to 1,000 feet for up to 48 hours. Submersibles can operate in depths of up to 21,000 feet.²³ This means that rules should be put in place now to establish standards for the treatment of newly discovered underwater cultural heritage.

Existing Law

Within the territorial sea, most coastal states have laws controlling activities in relation to underwater cultural heritage. In some cases there are specific laws applying to particular aspects of the heritage, for example, the 1973 Protection of Wrecks Act (United Kingdom). Other states have just extended their laws which control the discovery of sites on land to those underwater. An example is the 1935 Antiquities Law of Cyprus.

It is noteworthy that the first attempt world-wide to deal specifically with problems raised by historic wrecks occurred in Western Australia which, in 1964, passed the Museum Act Amendment Act. This was repealed by the 1969 Museum Act, Part V of which dealt with "Historic Wrecks". Problems in implementing this legislation led to the Agreement between Australia and The Netherlands Concerning Old Dutch Shipwrecks²⁴ whereby The Netherlands transferred "all its right, title and interest in and to wrecked vessels of the VOC lying on or off the coast of the State of Western Australia and in and to any articles thereof to Australia". The Agreement does not state that The Netherlands had title to the wrecks and thus does not constitute an acknowledgment of this claim by the Australian Government. Rather, whatever title The Netherlands did in fact have under its own law and/or any other system of law, was transferred to Australia. The Agreement was the first bilateral international instrument to deal with

²³ Delgado, "High tech tools: SCUBA to submersibles" (May/June 1996) 49 *Archaeology* 44, as amended (July/August 1996) 49 *Archaeology* 9.

²⁴ 1972 Australian Treaty Series No 18.

underwater cultural heritage and is still the most extensive and innovative in its operation.²⁵

In order to meet Australia's obligations under the Agreement and resolve certain defects in its existing legislation, Western Australia passed the 1973 Maritime Archaeology Act. This was struck down by the High Court of Australia in *Robinson v The Western Australian Museum*²⁶ on 31 August 1977. On 3 September that year, the Governor-General of the Commonwealth of Australia issued a proclamation declaring that the 1976 Historic Shipwrecks Act (Cwth) applied in relation to waters adjacent to the coast of the state of Western Australia.

In this legislation Australia asserts jurisdiction over historic shipwrecks on the continental shelf. It was the first state to make this claim specifically. A number of others, notably Ireland and Spain, have done so since. However, some states, in particular the United Kingdom and the United States of America, are vehemently opposed to this assertion of jurisdiction.

The issue of underwater cultural heritage beyond the territorial sea was raised during the negotiations for the 1982 United Nations Law of the Sea Convention by a small group of states led by Greece. They sought inclusion in the Convention of a provision giving coastal states jurisdiction over "objects of an archaeological and historical nature" on the continental shelf. Strong opposition came from the delegations of The Netherlands, United Kingdom and United States of America, with the last taking the lead.

Archaeological considerations appear to have been given little attention during the ensuing discussions. Opposing states seemed to be mainly concerned with notions of "creeping jurisdiction" and a belief that, if the

²⁵ A detailed study of the Agreement and its history is contained in O'Keefe and anor, "Australian protection of historic shipwrecks" 6 Australian Yearbook of International Law 119. More recent bilateral instruments include the Agreement providing for protection and scientific control of the site of the *CSS Alabama* entered into by the governments of France and the United States of America in 1989: [1989] 93 *Revue générale de droit international public* 975, and an Exchange of Notes in 1989 between the British and South African governments which stated, inter alia, that the wreck of the *HMS Birkenhead* "shall, as a military grave, continue to be treated at all stages with respect": Cm 906.

²⁶ (1977) 16 Australian Law Reports 623.

proposal were adopted, over time their view of the conceptual character of the regime applicable to the continental shelf would change.²⁷ In the end, under intense pressure of time, the current text of Article 303 was accepted. Australia appears to have played no role in these proceedings.

Article 149 is the only other provision of direct relevance in the 1982 Convention. Its origins can be found in the early reports and draft texts for the Convention. The principal proponents were Greece and Turkey. However, it appears that discussion was desultory and Article 149 came into existence with little consideration of its meaning or how it was to be implemented.

The 1982 United Nations Convention on the Law of the Sea thus contains two provisions of limited value for protection of the underwater cultural heritage, namely, Articles 149 and 303. The former reads:

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 or cultural origin.

As Strati states: "The significance of article 149 is limited to a considerable extent by the failure to establish an international agency to implement the proposed regime".²⁸ Moreover, the terminology used is confused. What is meant by the phrase "shall be preserved or disposed of"? Surely it is not intended to dispose of these objects? And what are the "objects of an archaeological and historical nature" that are the subject of the Article? According to Oxman, an earlier version of this, namely, "archaeological objects and objects of historical origin", was intended to apply to objects which were a few hundred years old.²⁹ There is little to support this conclusion apart from a reference to what must have been the confused arguments of one delegation. In any event, it is completely contrary to

²⁷ Generally, see Strati A, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (1995, Martinus Nijhoff, The Hague) 162.

²⁸ *Ibid* at 300.

²⁹ 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.

current archaeological and historical scholarship as well as contrary to the practice of states in their territorial seas.

Article 303 reads:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed 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.
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.

Paragraph 2 creates a fictional jurisdiction in what is known as the contiguous zone, the area between the territorial sea and 24 nautical miles. The laws and regulations referred to in Article 33 are those dealing with customs, fiscal, immigration or sanitary matters. To presume that removal of "objects of an archaeological and historical nature" from the zone infringes such laws makes no sense. One finds that the few states that have sought to implement the fictional jurisdiction under Article 303(2) have just extended the application of their basic legislation to 24 nautical miles, for example, Denmark and France.

Secondly, the provisions leave a gap. The "area" referred to in Article 149 consists of the "sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction". Consequently, the only provision applying between the outer edge of the contiguous zone and the limits of national jurisdiction is Article 303(1). This is obviously inadequate. We are in effect dealing with the continental shelf where many important wrecks are to be

found. For example, as Germany has noted, this geographical gap in coverage needs to be bridged.³⁰

Article 303(3) of the 1982 United Nations Convention on the Law of the Sea refers to salvage. Several states, including Australia, have specifically excluded the law of salvage from applying to historic wrecks. Salvage has as its aim the saving of property in danger of loss at sea. Only by a stretch of the imagination can historic wrecks be regarded as being in danger. They have reached a state of equilibrium with their surroundings that ensures their preservation. Moreover, successful salvage is met with a reward based on the commercial value of what is saved. Archaeological research is painstaking and often greatly concerned with material of no commercial value. Consequently, the trend is to exclude salvage law and principles where heritage values are uppermost.

Article 303(3) should not be interpreted to prevent later conventions from modifying or excluding the law of salvage. It refers specifically to the operation of Article 303 and would appear to have been inserted as a safeguard in case of any derogation in that Article. This interpretation is consistent with the reservation allowed states in the 1989 International Convention on Salvage, namely, that the Convention not apply to maritime cultural property of prehistoric, archaeological or historic interest situated on the seabed. By allowing such a reservation the Salvage Convention specifically recognises that the 1982 United Nations Convention on the Law of the Sea does not prevent exclusion of salvage law.

Article 303(4) recognises that the treatment accorded underwater cultural heritage in the United Nations Law of the Sea Convention is rudimentary; that the subject would have to be amplified and treated in greater depth in a specialised international instrument.

Proposed International Instrument

The Cultural Heritage Law Committee of the International Law Association (ILA) was formed at the initiative of the Australian Branch following the

³⁰ UNESCO Doc 28 C/39, 4 October 1995, Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, Annex, Observations by States 1.

1988 63rd Conference in Warsaw. It took as its first task the preparation of a draft Convention on the Protection of the Underwater Cultural Heritage. The text of the draft was adopted at the 1994 66th Conference of the ILA in Buenos Aires, and forwarded to UNESCO for consideration.

In 1993, the Executive Board of UNESCO had invited the Director-General of UNESCO to make a study of the technical and legal aspects of an instrument on underwater cultural heritage. A feasibility study was prepared with considerable reference to the ILA Draft and the matter placed on the agenda of the October 1995 General Conference of UNESCO. The Conference reacted favourably but decided that further discussion was needed.³¹

In accordance with that decision, a meeting of experts representing expertise in archaeology, salvage and jurisdictional regimes was held in Paris, 22-24 May 1996. The views of the experts present will be sent to all member states of UNESCO and to those with observer status. The latter includes the United Kingdom and the United States of America. A report on state attitudes will then be presented to the next session of the General Conference in October 1997 so that the latter may determine "whether it is desirable for the matter to be dealt with on an international basis and on the method which should be adopted for this purpose".

The ILA Draft

The ILA Draft will be one of the documents used as a basis for the preparation of any international instrument. The issue of jurisdiction is dealt with in a number of ways. States party are given the option of creating what is called a "Cultural Heritage Zone" co-extensive with the continental shelf. Debate in the Executive Board and General Conference of UNESCO shows that the use of this terminology was perhaps unfortunate. Some states may well be prepared to see the coastal state exercising jurisdiction over underwater cultural heritage on the adjacent continental shelf but not through the creation of a special zone. A simple extension of jurisdiction

³¹ UNESCO Doc 28 C/39, 4 October 1995, Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage 9.

using the terminology of the United Nations Law of the Sea Convention might be sufficient.

The ILA Draft also resorts to nationality jurisdiction by requiring a state party to prohibit its nationals and ships of its flag from activities affecting underwater cultural heritage "in respect of any area which is not within a cultural heritage zone or territorial sea of another State Party", namely, the deep seabed and any continental shelf not covered by a cultural heritage zone. The use of a member state's territory for any activity affecting underwater cultural heritage is also prohibited. Both prohibitions do not apply to activities that are consistent with the Charter for the Protection and Management of the Underwater Cultural Heritage. That document was prepared by the International Council for Monuments and Sites (ICOMOS) as an agreed statement of principles on treatment of the underwater cultural heritage.

The Future

All states that addressed the UNESCO Executive Board and General Conference indicated the necessity for urgent action to protect the underwater cultural heritage. Nevertheless, there will be much debate over the precise form this action should take. Australia, having pioneered legal techniques to protect the heritage in waters off its own coast, can play a major role in this debate. All it needs is the will to do so.

ARMED CONFLICT

World War II saw unprecedented destruction, damage and theft of cultural heritage.³² As a consequence, many states decided that there should be basic rules for the protection of cultural heritage in time of war. Moreover, to be effective, national and international measures of protection needed to be organised in time of peace. These considerations were incorporated in the

³² Detailed information is available in such European publications as Nicholas LH, *The Rape of Europa* (1994, Alfred A Knopf, New York) and Akinsha K and anor, *Stolen Treasure: The Hunt for the World's Lost Masterpieces* (1995, Weidenfeld and Nicolson, London). Nothing appears to have been written on what happened in Asia.

1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict³³ (the 1954 Hague Convention) and its Protocol.

The Convention

The Hague Convention now has 87 states party. During the Cold War era, it was largely moribund. Neither the United Kingdom nor the United States of America was party.³⁴ However, in recent years it has taken on a new importance. In part this is due to the realisation that it applies not only to major international conflicts but also to "conflicts not of an international character".³⁵ Thus, as Yugoslavia was a party to the Hague Convention, it applied to the events of the past few years in that country. Cyprus is another example.

There are other reasons for the new significance of the Hague Convention. One concerns the advent of more accurate weapons. When it seemed that war would be waged by nuclear weapons, it was argued that sites and monuments likely to be protected by the Convention could not escape destruction when a target was selected and thus the Convention had little point. With the possibility of nuclear war receding this argument is losing its power. Moreover, the introduction of selective methods of destruction (for example, the so-called "smart" bombs) has meant that military commanders have the ability to take out targets very close to protected sites and monuments without damaging them.

Another reason for renewed interest in the Hague Convention is the realisation that it is not enough for peacekeeping forces to protect people in the areas of operations. Their cultural heritage must survive for fast rehabilitation after the conflict. Further, the foreign forces involved in peacekeeping must be able to recognise local cultural heritage in order to avoid giving offence through inappropriate behaviour. They must also have the means of

³³ 249 United Nations Treaty Series 240.

³⁴ The United States of America has been reconsidering its position: see Eirinberg, "The United States reconsiders the 1954 Hague Convention" (1994) 3 *International Journal of Cultural Property* 27.

³⁵ Article 19.

establishing what are likely targets for opposing groups.³⁶ Identification through the methods provided by the Convention can assist in this.

The end of the Cold War has meant that many armed forces have had the opportunity to reassess their role in the life of the state. In some cases this has brought about a realisation that they hold sites and movables of great importance for their nation's history. The concentration of effort on identifying and preserving this has increased their interest in the Hague Convention and the ways in which it can assist them.

For states party to the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage there is an obligation to identify, protect, conserve, present and transmit to future generations the heritage covered by that Convention. This applies in war as well as in peace. States can meet that obligation in part by implementing the Hague Convention.

Finally, there is the increasing public interest in cultural heritage. In part this is reflected in the greater attention states are paying to management of the heritage, including resources devoted to its preservation. There is also the recognition that heritage is a valuable economic resource particularly through tourism. States are concerned to promote this and the Hague Convention is one way of bringing it about.

Action in UNESCO

In 1992, UNESCO and the government of The Netherlands commissioned a consultant to review the working of the Hague Convention.³⁷ His report³⁸ in 1993 made many recommendations for political and practical development of the Convention. Since then three meetings of experts have been held and

³⁶ Recent conflicts have emphasised that the age old practice of destroying cultural icons as a way of destroying the morale of one's enemies is not dead.

³⁷ A major problem for UNESCO in improving the implementation of the 1954 Convention has been lack of funds for analysis of its operation and promotion of its objectives through education of both states and military forces: Clément, "Some recent practical experience in the implementation of the 1954 Hague Convention" (1994) 3 *International Journal of Cultural Property* 11, 22.

³⁸ Boylan P, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict: The Hague Convention of 1955*, UNESCO Doc CLT-93/WS/12 (1993, UNESCO, Paris).

a one day meeting of states parties. The latter meeting decided that the draft provisions formulated by the experts should be considered by a representative group of experts from states party to the Convention. It is expected that 20 experts will meet in December 1996 to review the draft provisions so that a draft Protocol can be presented to the states parties at the time of the 29th General Conference of UNESCO in October-November 1997.

Technical Changes

The Hague Convention contains a general duty on behalf of contracting states who have to:

respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict: and by refraining from any act of hostility directed against such property.³⁹

However, that duty is immediately qualified by Article 4(2) under which it is waived "in cases where military necessity imperatively requires such a waiver". This exception was inserted at the insistence of the United Kingdom and United States of America⁴⁰ but has always been controversial. At the meeting of experts held at UNESCO in December 1994, it was clear that some of the military experts themselves favoured its removal. One military lawyer said that if officers in the field asked for his advice as to what was "military necessity", he did not have an answer, as this had never been defined.⁴¹

³⁹ Article 4(1).

⁴⁰ Boylan note 38 at 56.

⁴¹ Prott, "Saving the Heritage; Saving the Peace", Keynote Address to the NATO PIP Conference on Cultural Heritage Protection in Wartime and in State of Emergency, Cracow, 18-21 June 1996.

Moreover, Protocol I to the Geneva Conventions⁴² creates an absolute prohibition against any acts of hostility "directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples".⁴³ As there are now 146 states party to that Protocol, this undermines arguments for retention of the "military necessity" qualification in the Hague Convention.

In addition, there is a proposal to establish a supervisory body to oversee the Hague Convention's operation in practice. This could be an inter-governmental committee or an advisory committee of the principal non-governmental organisations working in the field, for example, the International Council of Museums, the International Council for Monuments and Sites, the International Council of Archives, and the International Federation of Librarians' Associations.

Yet another proposal is to simplify the procedure of inscribing sites and refuges on the International Register of Cultural Property Under Special Protection by placing the decision in the hands of the proposed supervisory body instead of, as at present, requiring the consent of every party to the Convention. Improved sanctions procedures are suggested along with increased cooperation in criminal matters, in particular with existing or future international criminal tribunals.

The World Heritage Convention has been one of UNESCO's greatest public relations successes. As a result, suggestions are made from time to time that there should be closer integration of that Convention with the Hague Convention. This would be difficult to achieve in practice. The coverage of the two Conventions is different and even sites of outstanding international significance may not qualify for "special protection" under the Hague Convention if, for example, they are close to legitimate military targets. Boylan suggested that:

All States Parties to the 1954 *Hague Convention* should therefore be RECOMMENDED to review all of their important cultural sites and monuments inscribed on the World Heritage List, or proposed by them

⁴² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977 (1977) 16 International Legal Materials 1391.

⁴³ Article 53.

for inclusion, and consider proposing them for "Special Protection" under the *Hague Convention* as well, where the other criteria, such as their adequate separation from potential legitimate military targets can be met.⁴⁴

Political Changes

Numerous political steps can be taken to improve the operation of the Hague Convention. Not least of these is improvement in the flow of information to the world community. States need to engage in greater education, not only of the military, but of the populace in general regarding the policies underlying the Convention and its implementation. The United Nations and its peacekeeping forces must realise that protection of cultural heritage is an essential part of preserving a people's identity and even its very existence. Persons who act contrary to the Hague Convention should be subjected to proceedings before international criminal tribunals.

The Protocol

At the Inter-governmental Conference in The Hague to draft the Convention, many states wanted to include provisions prohibiting all trafficking of movable cultural property from occupied territories. This would have included theft or other misappropriation by members of the occupying or invading force as well as that by civilian criminal elements. The United Kingdom and United States of America⁴⁵ led the opposition which succeeded in having the matter dealt with by a separate Protocol.

Under the Protocol, a contracting state undertakes to prevent exportation of cultural property from territory occupied by it during an armed conflict; to take into custody any cultural property imported into its territory whether directly or indirectly from any occupied territory; and to return cultural property found in its territory following exportation from occupied territory. These are strong provisions but appear to have had little effect in practice. Boylan states:

⁴⁴ Note 38 at 112.

⁴⁵ Alford KD, *The Spoils of World War II: The American Military's Role in Stealing Europe's Treasures* (1994, Birch Lane Press, New York) is a study of theft and misappropriation of cultural property by members of the armed forces of the United States of America in occupied Europe.

Although I may have missed some positive examples, during the course of this study I have not seen or received evidence of a single example of States Parties to the *Protocol* taking action of any kind in order to bring its provisions into practical effect in order to "freeze" trade in, or other transfers or movements of, cultural property from areas affected by either international or internal armed conflicts. On the contrary, regularly over the past few decades the showrooms of dealers and auction salesrooms on the major art "importing" nations have seemed to be full of material that should have raised grave suspicions that they had originated from countries and regions of the world afflicted by international and civil wars.⁴⁶

The major reason for the Protocol's lack of effect would appear to be lack of knowledge on the part of all persons affected by it. Until recently, few were aware of its wide-ranging significance. Now, as part of the general emphasis by UNESCO and a number of governments on improving the performance of the Hague Convention, the obligations of the Protocol are becoming more widely known. There is at least one recent instance of a major European state party embarrassed by a demand for return of cultural heritage taken during armed conflict and found on its territory. The potential of the Protocol is considerable. Switzerland, a major transit⁴⁷ country for cultural heritage, is a party as are Belgium, France, Germany and The Netherlands – all significant market states and members of the European Union.

Australia's Role

Australia ratified the Hague Convention in 1984 but is not party to the Protocol. In fact, Australia was one of a handful of states attending the 1954 Diplomatic Conference that signed the Hague Convention but refused to sign the Protocol.⁴⁸ In part this accorded with a policy of supporting the United Kingdom and the United States of America. In part there was a concern that, even though the Protocol is not retroactive, Australian troops may have brought "souvenirs" home from their theatres of operation during World War II and would be regarded as "criminals" and possibly required to

⁴⁶ Note 38 at 101.

⁴⁷ The implications of this designation are explained in O'Keefe note 12 at 532.

⁴⁸ The others were Andorra, Hungary, Ireland, Israel, New Zealand, Portugal, Romania, United Kingdom and United States of America.

surrender up their holdings. Now is surely the time for a reconsideration of Australia's attitude to the Protocol, particularly in light of the 1986 Protection of Movable Cultural Heritage Act, which would catch much material removed in future conflict anyway, and the UNIDROIT Convention.

CONCLUSION

Australia has played a significant role in contributing to the establishment of principles underlying cultural heritage law. This is a rapidly developing field and Australia should be taking an even more active stance. It has a group of cultural heritage specialists in conservation and management of the heritage the equal of any in the world. They have contributed greatly to the philosophical underpinnings of cultural heritage.⁴⁹ It has a legal profession whose expertise and probity can bear comparison with any other. It would be highly desirable if persons from these two fields could be brought together to formulate proposals and advise the various Australian state governments on how best to proceed. As is well known, cultural heritage matters are usually not a major government priority and it may well be of use to administrators if governments are aware that the wider public is actively concerned. A developed Australian expertise could also be of assistance to neighbouring countries whose resources do not allow detailed attention to such a rapidly developing area as cultural heritage law.

⁴⁹ The Burra Charter (Australia ICOMOS Charter for the Conservation of Places of Cultural Significance), for example, has received worldwide acknowledgment for its contribution to the philosophy of historic preservation.