

ARTICLE 16 UNESCO CONVENTION AND THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

ANNA PETRIG  AND MARIA STEMMLER*

Abstract Deep-water technology and commercial interests have put the protection of underwater cultural heritage under considerable pressure in recent decades. Yet the 2001 UNESCO Convention has the potential to fend off the threat—if fully implemented. This article sets out the legislative duties States Parties have under one of the Convention's core provisions: Article 16. It requires States Parties to take a triad of legislative measures: they must enact prohibitions, impose criminal sanctions and establish corresponding jurisdiction over their nationals and vessels. In addition, the comprehensive protection of underwater cultural heritage also necessitates measures covering acts of corporate treasure hunters, even though this is not required by the Convention itself.

Keywords: public international law, underwater cultural heritage, UNESCO Convention on the Protection of the Underwater Cultural Heritage, shipwreck, treasure hunt, measures, implementation, criminal law, jurisdiction.

I. INTRODUCTION

The protection of underwater cultural heritage¹ remains a major challenge. The controversy surrounding the legendary Spanish galleon *San José*, which sank in 1708 during a battle off the coast of Colombia, is illustrative of this. The 2015 discovery of the wreck, said to be loaded with silver, gold and gems worth more than a billion US dollars today,² resulted in an argument concerning the conditions of the salvage operation: should the corporations involved receive large parts of the trove as remuneration for their services or should the

* Professor of International Law and Public Law at the University of Basel (Switzerland), anna.petrig@unibas.ch; Researcher at the University of Basel (Switzerland), maria.stemmler@unibas.ch. They would like to sincerely thank Dr Maria Orchard for her instrumental research assistance on the topic and editorial work on the article. The usual disclaimer applies.

¹ Defined in the Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3 (hereinafter UNESCO Convention or Convention), art 1(1)(a) 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'.

² J Daley, "Holy Grail" of Spanish Treasure Galleons Found Off Colombia' *Smithsonian* (25 May 2018) <www.smithsonianmag.com/smart-news/holy-grail-spanish-treasure-galleons-found-colombia-180969171/>.

integrity of the find be maintained?³ The debate exemplifies the highly contradictory stakes involved in underwater cultural heritage, ranging from the long-term preservation of objects as ‘an integral part of the cultural heritage of humanity’⁴ to the realisation of commercial interests.⁵

It is against this backdrop that this article examines the potential of the UNESCO Convention on the Protection of the Underwater Cultural Heritage, which marks a milestone in the endeavour to preserve and protect underwater cultural heritage.⁶ The focus is on Article 16, which requires States Parties to adopt measures ensuring that both their nationals and vessels flying their flag do not participate in activities directed at underwater cultural heritage that violate the standards of the Convention. The provision is particularly comprehensive in three respects: first of all, it covers a wide range of activities that potentially have detrimental effects on underwater cultural heritage. Second, it obliges States Parties to adopt a triad of legislative measures—concretely, to enact prohibitions, to adopt criminal sanctions, and to establish jurisdiction over the respective offences. Third, as regards the latter aspect, States Parties must establish jurisdiction over the conduct of their nationals and of persons on board vessels flying their flag wherever it occurs, which creates a global jurisdictional shield for the protection of underwater cultural heritage.⁷

Article 16 is a powerful tool for the protection of underwater cultural heritage—if implemented in a robust way.⁸ Yet the implementation of the provision by States Parties remains fragmentary, as evidenced by the examples of France⁹ and Switzerland, the latter of which has failed to assess correctly the Convention’s scope and content.¹⁰ Insufficient implementation

³ In more detail, see Part II.

⁴ UNESCO Convention preamble para 2.

⁵ On the various positions in the debate, see J Kitt, ‘Sunken Treasure Trove off the Coast of Cartagena Inches Closer to the Surface’ *The Bogotá Post* (4 August 2018) <<https://thebogotapost.com/sunken-treasure-trove-off-the-coast-of-cartagena-inches-closer-to-the-surface/31373/>>.

⁶ S Dromgoole, ‘Preface’ in S Dromgoole (ed), *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (2nd edn, Martinus Nijhoff 2006) xiii.

⁷ See on all three aspects, Part IV, notably Section A. ⁸ In order to fully implement art 16, States Parties are also required to take non-legislative steps. Of particular importance are prevention and dissemination measures, such as the distribution of information material to persons engaging in underwater explorations, see eg PJ O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (Institute of Art and Law 2002) 109–10. Despite the practical significance of such steps, the present article focuses solely on the heart of art 16, that is, its legislative measures.

⁹ Notwithstanding the fact that France plays a particularly active role in the preservation of underwater cultural heritage, it has not fully implemented the Convention. So far, the criminal provision in the *Code du patrimoine* only covers underwater cultural heritage in waters subject to French sovereignty (internal and territorial waters) or where France exercises sovereign rights (contiguous zone); see *Code du patrimoine*, version consolidée au 1 janvier 2020, arts L532-1 to L532-14 read together with arts L544-5 to L544-11.

¹⁰ Switzerland ratified the Convention on 25 October 2019, see UNESCO <www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha>. On the implementing legislation passed by the Swiss Federal Assembly before ratification, which is fraught by major deficiencies, see A Petrig and M Stemmler, ‘UNESCO-Übereinkommen über den Schutz des

is also documented by a resolution adopted by the Convention's Scientific and Technical Advisory Board (STAB)¹¹ in April 2018, which recommends that the Meeting of States Parties 'draw attention to the problem of the participation of nationals of States Parties or vessels under the flag of States Parties in the pillage or exploitation of historic shipwrecks in non-State Parties'.¹²

So far, Article 16 has not received much scholarly attention. Mentioned only briefly in a number of writings,¹³ most publications discussing the protection of underwater cultural heritage remain conspicuously silent on the norm.¹⁴ This is striking since Article 16 has been described as 'pivotal to the scheme the Convention establishes'.¹⁵ Moreover, during the drafting process, the provision that ultimately became Article 16 was labelled a 'core' provision of the Convention by both UNESCO and leading experts in the field.¹⁶

It is for these reasons that the present article seeks to cast light on Article 16 and to demonstrate that States Parties must take a triad of legislative measures under this not very clearly worded provision. It proceeds in four steps: after

Unterwasserkulturerbes: Unvollständige Umsetzung durch die Schweiz' (2020) 139(I) ZSR 47–94; and below text relating to (n 115).

¹¹ On the STAB, which assists the Meeting of States Parties to the UNESCO Convention with the implementation of the Convention's Annex, see UNESCO Convention art 23(4) and (5).

¹² UNESCO, 'Convention on the Protection of the Underwater Cultural Heritage, Ninth Meeting of the Scientific and Technical Advisory Body, 24 April 2018, Resolutions and Recommendations' (24 April 2018) UNESCO Doc UCH/18/9.STAB/10, RESOLUTION 8 / STAB 9.

¹³ See eg M Rau, 'The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea' (2002) 6 Max Planck Yrbk UNL 422–4; S Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press 2013) 283–5, 292, 296, 305; O'Keefe, *Shipwrecked Heritage* (n 8) 109–10; PJ O'Keefe, "'Commercial Exploitation": Its Prohibition in the UNESCO Convention on Protection of the Underwater Cultural Heritage 2001 and Other Instruments' (2013) 18 Art Antiquity and Law 141; G Carducci, 'The Expanding Protection of Underwater Cultural Heritage: The New UNESCO Convention Versus Existing International Law' in G Camarda and T Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Legal Aspects* (Giuffrè Editore 2002) 176.

¹⁴ See eg L Bautista, 'Ensuring the Preservation of Submerged Treasures for the Next Generation: The Protection of Underwater Cultural Heritage in International Law' (Law of the Sea Institute, UC Berkeley – Korea Institute of Ocean Science and Technology Conference, Seoul, May 2012) <www.law.berkeley.edu/files/Bautista-final.pdf>; LB Bautista, 'Gaps, Issues, and Prospects: International Law and the Protection of Underwater Cultural Heritage' (2005) 14 Dalhousie J Legal Stud 57; C Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51 ICLQ 511; CR Bryant, 'The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historic Shipwrecks' (2001) 65 AlbLRev 97. Especially in transnational criminal law doctrine, the focus seems to be rather on the trafficking of cultural property and thus on UNESCO Convention arts 14 and 17; see eg A Visconti, 'Cultural Property Trafficking' in N Boister and RJ Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 275; N Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 224.

¹⁵ Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 305.

¹⁶ P Fletcher-Tomenius and C Forrest, 'The Protection of the Underwater Cultural Heritage and the Challenge of UNCLOS' (2000) 5 Art Antiquity and Law 151; see also Cultural Heritage Law Committee, 'Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage – Final Report' in International Law Association Report of the Sixty-Sixth Conference (Buenos Aires 1994) (International Law Association, London 1994) 440.

presenting current challenges in the protection of underwater cultural heritage (Part II), it briefly outlines the Convention's structure and main content (Part III). It then undertakes an in-depth analysis of Article 16 in accordance with recognised methods of treaty interpretation and, additionally, by relying on insights gained from relevant domestic legal instruments (Part IV). Finally, it moves beyond the scope of the Convention and argues that the effective protection of underwater cultural heritage can, at present, only be achieved if measures taken by States Parties apply equally to natural persons *and* to corporations engaged in treasure hunting at sea (Part V).

II. THE CHALLENGE: ENDANGERED UNDERWATER CULTURAL HERITAGE

The threat to underwater cultural heritage is real and the endangerment of historic shipwrecks is a paradigmatic example of this.¹⁷ Over the last few decades, the capabilities of underwater technology have dramatically increased.¹⁸ Depths that were once considered beyond human reach are now accessible due to advanced diving techniques and the use of underwater vehicles, notably research submarines and remote-controlled diving-robots.¹⁹ While this technological progress has opened up new possibilities in underwater archaeology, it has also paved the way for detrimental interference with previously untouched shipwreck sites.

The legal and political quagmire surrounding the salvage of the *San José* exemplifies the challenges involved in the protection of underwater cultural heritage. In 2018, Colombia unveiled plans to recover objects from the wreck through a public-private partnership.²⁰ The prospect of corporations potentially participating in the endeavour and ending up with large parts of the trove as remuneration for their services²¹—thereby compromising the integrity of the find—raised concerns. In its April 2018 meeting, the STAB considered the issue and did not shy away from criticising core aspects of the planned

¹⁷ From UNESCO Convention art 1(1)(a)(i), (ii) and (iii) accrues that underwater cultural heritage is not limited to historic shipwrecks and their cargo; but as per Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 1, 'shipwrecks are the predominant form of [underwater cultural heritage]', on the basis of which we explain the challenges for the protection of underwater cultural heritage.

¹⁸ O'Keefe, *Shipwrecked Heritage* (n 8) 4; see also G Hutchinson, 'Threats to Underwater Cultural Heritage: The Problems of Unprotected Archaeological and Historic Sites, Wrecks and Objects Found at Sea' (1996) 20 *Marine Policy* 287–8.

¹⁹ The fleet of vehicles at the disposal of the *Woods Hole Oceanographic Institution* offers insights into today's technological capabilities: Woods Hole Oceanographic Institution, 'Underwater Vehicles' <www.whoi.edu/main/underwater-vehicles>.

²⁰ See OL Martínez Ante, 'Así se va a Rescatar el "Tesoro" del Galeón San José' *El Tiempo* (25 April 2018) <www.eltiempo.com/cultura/arte-y-teatro/como-se-ve-el-galeon-san-jose-y-como-sera-rescatado-209298>.

²¹ A share of 50 per cent of the parts of the trove not considered to be national heritage was reported as being the reward for involved corporations; see Martínez Ante (n 20).

project. In both a resolution²² and an open letter to the Colombian Government,²³ it categorised the salvage as ‘commercial exploitation’, which is prohibited under the UNESCO Convention.²⁴ It warned that ‘similar salvage operations had an extremely negative result for the countries concerned and caused heritage destruction, as well as legal disputes and displeasure’.²⁵ Moreover, the STAB stressed that ‘all elements of the *San José* shipwreck represent cultural heritage’,²⁶ noting that ‘several members of the proposed project team’ were previously ‘involved in treasure-hunt operations and have worked in constant disregard of best archaeological standards’.²⁷ A lawsuit filed by a concerned citizen aimed at halting the public–private partnership salvage was unsuccessful.²⁸ Eventually, the current Colombian government reconsidered the position of its predecessor: after having repeatedly suspended the salvage operation,²⁹ it announced in October 2019 that none of the wreck’s objects would be used to finance the recovery operation.³⁰

The original salvage plan for the *San José* is not an isolated case, but fits into a larger pattern of instances where governments have teamed up with corporate ‘treasure hunters’³¹ and were left with very little in the end; the salvage of the *Belitung*, *Cirebon* and *Florida Key* wrecks provide further examples.³²

²² UNESCO, ‘Convention on the Protection of the Underwater Cultural Heritage, Ninth Meeting of the Scientific and Technical Advisory Body’ (n 12) RESOLUTION 4 / STAB 9.

²³ On file with the authors.

²⁴ UNESCO Convention art 2(7) and Rule 2 of the Annex.

²⁵ UNESCO, ‘Convention on the Protection of the Underwater Cultural Heritage, Ninth Meeting of the Scientific and Technical Advisory Body’ (n 12) RESOLUTION 4 / STAB 9, para 2(d).

²⁶ *ibid* para 2(c).

²⁷ *ibid* para 2(b).

²⁸ ‘Tribunal da luz Verde al Rescante del Galeón San José’ *Semana* (Bogotá, 31 July 2018) <www.semana.com/nacion/articulo/tribunal-de-cundinamarca-deniega-medidas-cautelares-contrarescate-del-san-jose/577229>.

²⁹ See R Emblin, ‘Colombia Extends Suspension of Partnership to Salvage San José Galleon’ *The City Paper* (14 June 2019) <<https://thecitypaperbogota.com/news/colombia-extends-suspension-of-partnership-to-salvage-san-jose-galleon/22320>>.

³⁰ See on this R Emblin, ‘Galleon San José’s Treasure Will Not Finance Salvage, claims VP Ramírez’ *The City Paper* (10 October 2019) <<https://thecitypaperbogota.com/news/galleon-san-joses-treasure-will-not-finance-salvage-claims-vp-ramirez/22910>>.

³¹ On the risks associated with treasure hunters, see C Forrest, *International Law and the Protection of Cultural Heritage* (Routledge 2010) 287–8; activities of treasure hunters have been a driving force for the adoption of the Convention; see S Dromgoole, ‘2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage’ (2003) 18 *International Journal of Marine and Coastal Law* 65. The term ‘corporate treasure hunters’ is also used by Y Winter and J Chambers-Letson, ‘Shipwrecked Sovereignty: Neoliberalism and a Disputed Sunken Treasure’ (2015) 43 *Political Theory* 297. Other terms are, *inter alia*, ‘treasure-hunter companies’ (MJ Aznar-Gómez, ‘Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage’ (2010) 25 *International Journal of Marine and Coastal Law* 211–12) and ‘treasure-salvaging companies’ (UNESCO, ‘The UNESCO Convention on the Protection of the Underwater Cultural Heritage’ 7 <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/>).

³² UNESCO, ‘Submerged Archaeological Sites: Commercial Exploitation Compared to Long-Term Protection’ 3 <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/access/culture-and-development/>; UNESCO, ‘The Threat of the Commercial Exploitation of Underwater Cultural Heritage’ <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/>.

Moreover, there are many well-known instances of pillage by treasure hunters, which have resulted in the destruction of large quantities of underwater cultural heritage.³³ Overall, there is strong evidence that the recovery or in situ preservation of historic shipwrecks under the direction of public rather than private entities is more advantageous for archaeological and public interests. Salvage corporations may, for example, try to claim exclusive access to the site,³⁴ while recovery or preservation by public entities is more conducive to general access. Further, public involvement is more likely to produce desirable side effects, notably a boost in tourism due to the establishment of fascinating museums or the possibility of non-intrusive diving experiences.³⁵

The destructive force of private underwater treasure hunting, whether conducted by recreational divers or commercial excavation enterprises, paradoxically even affects items that are at the very centre of search operations: ancient arts and craft objects, precious metals or gemstones. Such items can be damaged if not treated in accordance with accepted archaeological standards upon their recovery,³⁶ and there has been at least one instance of deliberate destruction of numerous precious items in order to increase the market value of the preserved objects.³⁷ Moreover, a good number of such items have been lost for public appreciation and further scientific research because they have been auctioned off into private collections.³⁸

Since underwater cultural heritage encompasses ‘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’,³⁹ it not only includes archetypal ‘treasures’ but also other objects that are of outstanding scientific interest. Among them are notably the wrecks

[protection/threats/commercial-exploitation/](#)>. On the Belitung, see also O’Keefe, ‘Commercial Exploitation’ (n 13) 142–3.

³³ UNESCO, ‘Pillage’ <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/protection/threats/pillage/>.

³⁴ See, on the particularly illustrative case of the *Titanic*, Forrest, *International Law and the Protection of Cultural Heritage* (n 31) 298–9. The salvage corporation’s claim was ultimately unsuccessful in US courts, *RMS Titanic Inc v Haver*, 171 F.3d 943, 969–70 (4th Cir, 1999); see also S Dromgoole, ‘The International Agreement for the Protection of the *Titanic*: Problems and Prospects’ (2006) 37 *Ocean Development & International Law* 25, n 74.

³⁵ UNESCO Secretariat and STAB, ‘The Benefit of the Protection of Underwater Cultural Heritage for Sustainable Growth, Tourism and Urban Development’ (2001) passim <www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO_UCH_Development_Study.pdf>; see also Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 224.

³⁶ O Varmer, ‘The Case against the “Salvage” of the Cultural Heritage’ (1999) 30 *JMarL&Com* 288–9; see in general TJ Maarleveld, U Guérin and B Egger (eds), *Manual for Activities Directed at Underwater Cultural Heritage: Guidelines to the Annex of the UNESCO 2001 Convention* (UNESCO 2013) 179–200.

³⁷ See UNESCO, *The Impact of Treasure-Hunting on Submerged Archaeological Sites* (UNESCO 2016) 7.

³⁸ R Frost, ‘Underwater Cultural Heritage Protection’ (2004) 23 *AustYBIL* 25, 31.

³⁹ UNESCO Convention art 1(1)(a).

themselves, which show how ships were construed at the time,⁴⁰ preserved cargo,⁴¹ and everyday items reflecting conditions on board.⁴² Indeed, various commentators refer to historic shipwrecks as ‘time capsules’.⁴³ Due to their position on or in the seabed, they are less exposed to the elements—particularly oxygen, which would likely accelerate their decay on land—and thus tend to be particularly well-preserved.⁴⁴ They provide unmatched insights into the technical advances of seafaring, trade routes and everyday life at sea and on land⁴⁵ at a particular moment in human history: the time of their sinking.⁴⁶ In short, shipwrecks play a crucial role in understanding human history, provided they are properly studied and preserved.

Commercial treasure hunting has enormous potential to clash with the preservation of underwater cultural heritage. The search for and excavation of shipwrecks located in the depths of the oceans is costly.⁴⁷ Treasure hunting operations are therefore often funded by private investors and, as a consequence, carried out as expeditiously as possible in order to generate the promised dividends.⁴⁸ The ensuing time pressure makes it virtually

⁴⁰ LV Prott and PJ O’Keefe, ‘International Legal Protection of the Underwater Cultural Heritage’ (1978) 14 Rev BDI 90–1.

⁴¹ MZ Mohd Nor and A Zahid, ‘Competing Interests in the Underwater Cultural Heritage: A Question of Balance’ (2016) 9 Journal of East Asia and International Law 123–4.

⁴² Varmer, ‘The Case against the “Salvage” of the Cultural Heritage’ (n 36) 289; see also Hutchinson (n 18) 288.

⁴³ See eg Mohd Nor and Zahid (n 41) 123; Hutchinson (n 18) 288. ‘Time capsules’ can also exist on land, eg where a settlement has been buried by a natural disaster. However, on land the protection of these sites against intrusions is considerably more difficult than at sea. This is evidenced by sites such as Herculaneum and Pompeii: preserved as of the time of the eruption of Mount Vesuvius 79 AD, they were subject to subsequent plundering; their status as ‘time capsules’ accordingly disputed by eg AE Cooley and MGL Cooley, *Pompeii and Herculaneum: A Sourcebook* (2nd edn, Routledge 2014) 1–2. Maritime ‘time capsules’ are of particular interest because they are ‘single period’ time capsules and thus differ from land sites, which generally include artefacts from different time periods, see Varmer, ‘The Case against the “Salvage” of the Cultural Heritage’ (n 36) 288.

⁴⁴ Varmer, ‘The Case against the “Salvage” of the Cultural Heritage’ (n 36) 280–1; Frost (n 38) 26. On stunning examples in the Black Sea, see T Embury-Dennis, ‘Explorers Accidentally Find 41 Shipwrecks Thousands of Years Old in Black Sea’ *The Independent* (London, 25 October 2016) <www.independent.co.uk/news/world/europe/shipwrecks-discovery-black-sea-bulgaria-thousands-years-old-a7379691.html>.

⁴⁵ See Mohd Nor and Zahid (n 41) 123; C Henn, ‘The Trouble with Treasure: Historic Shipwrecks Discovered in International Waters’ (2012) 19 University of Miami International and Comparative Law Review 147; Prott and O’Keefe (n 40) 90–1; Varmer, ‘The Case against the “Salvage” of the Cultural Heritage’ (n 36) 288.

⁴⁶ Henn (n 45) 147; Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 1.

⁴⁷ Bryant (n 14) 110; Varmer, ‘The Case against the “Salvage” of the Cultural Heritage’ (n 36) 289; see also SR Nicholson, ‘Mutiny as to the Bounty: International Law’s Failing Preservation Efforts Regarding Shipwrecks and Their Artifacts Located in International Waters’ (1997) 66 UMKC Law Review 138.

⁴⁸ Varmer, ‘The Case against the “Salvage” of the Cultural Heritage’ (n 36) 289; T Villegas Zamora, ‘The Impact of Commercial Exploitation on the Preservation of Underwater Cultural Heritage’ (2008) 60 Museum International 20; on funding patterns, see also I Rodríguez Temiño and A Roma Valdés, ‘Fighting Against the Archaeological Looting and the Illicit Trade of Antiquities in Spain’ (2015) 22 IJCP 116–18.

impossible for such operations to abide by relevant archaeological standards, which require a more cautious, and thus more time-consuming, approach.⁴⁹ A state-of-the-art exploration and documentation of a single wreck may take years,⁵⁰ since a full understanding of the significance of individual objects and the complete trove can generally only be achieved if the context of the trove is studied extensively prior to recovery.⁵¹ Corporate treasure hunters tend to portray their operations as *archaeological* endeavours, yet their commercial focus is clearly antithetical to archaeological standards and they often fail to live up to this claim.⁵² In fact, their brisk undertakings seriously endanger underwater cultural heritage.⁵³

Treasure hunting not only occurs in territorial waters, over which a State exercises sovereignty,⁵⁴ but also in other maritime areas, such as on the continental shelf or in the Area.⁵⁵ In these latter zones, the ability of a State to protect endangered cultural heritage is considerably restricted since, unlike on their territory, States are not free to exercise their jurisdiction.⁵⁶ In order to preserve underwater cultural heritage in these zones, States have to rely on jurisdictional bases that allow them to intervene in extraterritorial matters, notably the well-established active nationality and flag State principles.⁵⁷ These principles allow States to address the conduct of both their nationals and of persons on board vessels flying their flag regardless of where the conduct took place.⁵⁸ The higher the number of States establishing and exercising jurisdiction over their respective nationals and ships, the more global the protective shield for underwater cultural heritage becomes. It is at this juncture that the UNESCO Convention, and specifically Article 16, comes into play.⁵⁹

⁴⁹ See eg MP Montero in S Williams, 'Underwater Heritage, A Treasure Trove to Protect' (1997) 87 UNESCO Sources 7. ⁵⁰ Montero *ibid.*

⁵¹ See Varmer, 'The Case against the "Salvage" of the Cultural Heritage' (n 36) 289–90.

⁵² See Rodríguez Temiño and Roma Valdés (n 48) 116–18.

⁵³ Mohd Nor and Zahid (n 41) 124; see also Frost (n 38) 25, 31.

⁵⁴ S Wolf, 'Territorial Sea', *Max Planck Encyclopedia of Public International Law* (last updated August 2013) para 1 <<http://opil.ouplaw.com>>.

⁵⁵ O'Keefe, *Shipwrecked Heritage* (n 8) 2; for definitions of these zones, see United Nations Convention on the Law of the Sea (UNCLOS) (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, arts 76 and 1(1)(1) respectively.

⁵⁶ See BH Oxman, 'Jurisdiction of States' *Max Planck Encyclopedia of Public International Law* (last updated November 2007) paras 13–14 <<http://opil.ouplaw.com>>.

⁵⁷ See, on these bases of jurisdiction, Oxman (n 56) paras 18, 29–30; and D König, 'Flag of Ships' *Max Planck Encyclopedia of Public International Law* (last updated April 2009) paras 16–17, 25 <<http://opil.ouplaw.com>>. Regarding underwater cultural heritage in or on the seabed in the contiguous zone, UNCLOS art 303(2) transfers certain competences to coastal States, yet its scope is rather obscure, see T Scovazzi, 'Article 303' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck 2017) 1953–5.

⁵⁸ See again Oxman (n 56) paras 18, 29–30.

⁵⁹ Regarding the different jurisdictional elements of the Convention, see Rau (n 13) 437–45.

III. THE CONVENTION: STRUCTURE AND MAIN CONTENT

The Convention follows a classic structure. Its operative part commences with a series of general stipulations,⁶⁰ which, *inter alia*, define the Convention's key terms.⁶¹ They further clarify the Convention's relationship with other legal instruments⁶² and declare its openness to the conclusion of further agreements on the protection of underwater cultural heritage by States Parties, provided they are in conformity with the Convention and do 'not dilute its universal character'.⁶³

Of particular interest for present purposes is Article 2, which sets out the '[o]bjectives and general principles' of the Convention.⁶⁴ This provides that the aim of the Convention is 'to ensure and strengthen the protection of underwater cultural heritage'.⁶⁵ States Parties are specifically required to 'preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention'.⁶⁶ Article 2 further determines how States Parties shall achieve the protection of underwater cultural heritage: by taking adequate measures using the best means available to them.⁶⁷ The provision decisively shapes the Convention's protective regime by prescribing that 'preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage'⁶⁸ and by prohibiting the commercial exploitation of underwater cultural heritage.⁶⁹ At the same time, Article 2 makes it clear that the Convention does not regulate all aspects relevant in the realm of underwater cultural heritage. It includes a savings clause stipulating that 'nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities'.⁷⁰ Another issue the Convention does not govern is ownership questions regarding underwater cultural heritage.⁷¹

The next part of the Convention sets out the rights and obligations of States Parties in the various maritime zones.⁷² In particular, they must prescribe under domestic law that the Rules of the Convention's Annex apply to activities

⁶⁰ UNESCO Convention arts 1–6. ⁶¹ *ibid* art 1. ⁶² *ibid* arts 2(8), 3 and 4.

⁶³ *ibid* art 6. ⁶⁴ *ibid* art 2 heading. ⁶⁵ *ibid* art 2(1). ⁶⁶ *ibid* art 2(3).

⁶⁷ *ibid* art 2(4).

⁶⁸ *ibid* art 2(5), further elaborated in Rule 1 of the Annex; on the relevance of this principle, see Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 24. Yet it is important to note that according to both stipulations of the Convention, the preservation in situ of underwater cultural heritage is not an irrefutable dogma, but merely the first option to be considered. As per Rule 1 of the Annex, salvage activities are generally permissible if they make 'a significant contribution to the protection or knowledge or enhancement of underwater cultural heritage'.

⁶⁹ UNESCO Convention art 2(7), further elaborated in Rule 2 of the Annex.

⁷⁰ *ibid* art 2(8); questions relating to the sovereign immunity of State vessels thus remain governed by other rules of international law, notably by UNCLOS arts 95 and 96.

⁷¹ See S Dromgoole, 'Editor's Introduction' in S Dromgoole (ed), *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (2nd edn, Martinus Nijhoff 2006) xxxii; see also O'Keefe, *Shipwrecked Heritage* (n 8) 115.

⁷² UNESCO Convention arts 7–13.

directed at underwater cultural heritage in their internal, archipelagic and territorial waters.⁷³ The same applies if they choose to ‘regulate and authorise activities directed at underwater cultural heritage’ in their contiguous zone.⁷⁴ Regarding the exclusive economic zone, the continental shelf and the Area, the Convention obliges States Parties, *inter alia*, to require their nationals and the masters of their vessels to report the discovery of underwater cultural heritage and the intention to engage in activities directed at underwater cultural heritage located in these zones.⁷⁵ It also regulates how States Parties must proceed with actual discoveries of underwater cultural heritage in these maritime zones.⁷⁶

The next part of the Convention sets out its enforcement regime.⁷⁷ Articles 14 to 18 oblige States Parties to take measures to prevent and impede violations of the Convention—regardless of where the interference with underwater cultural heritage took or takes place.⁷⁸ Article 14 aims at preventing the import, trade and possession of underwater cultural heritage that has been illicitly exported or recovered in contravention to the Convention. Article 15 obliges States Parties to enact prohibitions regarding the use of their territory (notably ports) in support of activities directed at underwater cultural heritage that are not in conformity with the Convention. Article 16 pertains—as we will see in more detail later⁷⁹—to activities that endanger underwater cultural heritage, are not in conformity with the Convention, and emanate from States Parties’ nationals or persons acting from vessels flying their flag. Article 17 provides an obligation to impose sanctions for the violation of measures implemented by States Parties according to the Convention.⁸⁰ Finally, Article 18 obliges States Parties to take measures allowing for the seizure of underwater cultural heritage located in their territory, the recovery of which violated the Convention.⁸¹

The final part of the Convention consists of provisions pertaining to, *inter alia*, cooperation and information-sharing between States Parties.⁸² Further, it requires the setting up of competent domestic authorities to ensure the proper implementation of the Convention⁸³ and establishes two treaty organs—a Meeting of States Parties and a Secretariat—for the implementation and further development of the treaty.⁸⁴ Finally, annexed to

⁷³ *ibid* art 7; the provision merely refers to ‘the Rules’; this, at first sight cryptic, reference is clarified by arts 1(9) and 33 from which accrues that the capitalised ‘Rules’ are the rules contained in the Convention’s Annex. ⁷⁴ *ibid* art 8.

⁷⁵ *ibid* arts 9(1) and 11(1); as regards the exclusive economic zone and the continental shelf, however, the reporting requirement is limited to zones of States Parties, see *ibid* art 9(1)(a) and (b).

⁷⁶ *ibid* arts 10 and 12.

⁷⁷ See Rau (n 13) 407, 422. Forrest, *International Law and the Protection of Cultural Heritage* (n 31) 350–6 uses the term ‘enforcement regime’ in a less comprehensive way; Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 283–5 categorises arts 14–16 as general ‘control mechanisms’ of the Convention relevant for all maritime zones.

⁷⁸ See Dromgoole *Underwater Cultural Heritage and International Law* (n 13) 288 for arts 14–16. For further details on arts 14–18 of the Convention, see below Part IV, Section C.

⁷⁹ See below Part IV.

⁸⁰ UNESCO Convention art 17(1).

⁸¹ *ibid* art 18(1).

⁸² *ibid* arts 19 and 21.

⁸³ *ibid* art 22.

⁸⁴ *ibid* arts 23 and 24.

the Convention are the ‘Rules concerning activities directed at underwater cultural heritage’, which are the least controversial part of the Convention, yet very important as they contain binding standards for the handling of underwater cultural heritage sites.⁸⁵ The Rules regulate the management of underwater cultural heritage in greater detail than the main text of the treaty, and their content is even followed by States not party to the Convention.⁸⁶

IV. AT THE HEART OF ARTICLE 16: PROHIBITIONS, SANCTIONS AND JURISDICTION

As set out in the Introduction, Article 16 is a powerful tool for achieving the Convention’s aim since it requires States Parties to adopt a triad of legislative measures in their domestic law: prohibitions, criminal sanctions and jurisdictional rules.⁸⁷ The following section considers this obligation in more detail, in accordance with recognised methods of treaty interpretation as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties⁸⁸ and drawing on insights gained from comparative inquiries into domestic legal instruments pertaining to the protection of sunken military vessels and aircraft.

A. Ordinary Meaning: The Interpretive Starting Point

Article 16 reads as follows:

Article 16 – Measures relating to nationals and vessels

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.

This wording raises questions as to what tasks States Parties must carry out under Article 16, how such tasks are to be accomplished and, in particular, what types of legislative measures⁸⁹ they must adopt.

⁸⁵ On the emergence of this part of the Convention, see Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 57–9.

⁸⁶ Among them even staunch critics of main aspects of the Convention, such as the US and the UK: MJ Aznar and O Varmer, ‘The Titanic as Underwater Cultural Heritage: Challenges to its Legal International Protection’ (2013) 44 *Ocean Development and International Law* 101; see also O Varmer, ‘United States of America’ in S Dromgoole (ed), *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (2nd edn, Martinus Nijhoff 2006) 384–5. As per Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 307, the Rules ‘embody internationally accepted standards for the conduct of underwater archaeological activities’.

⁸⁷ See above Part I.
⁸⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. See, on these methods in general, O Dörr, ‘Article 31: General Rule of Interpretation’ and ‘Article 32: Supplementary Means of Interpretation’ in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 559–614 and 617–32.

⁸⁹ On the necessity to adopt legislative measures under art 16, see O’Keefe, *Shipwrecked Heritage* (n 8) 109 and Rau (n 13) 423–4.

From the ordinary meaning of the words ‘shall take’—and even more clearly from the French ‘prennent’⁹⁰—it follows that States Parties do not have discretion as to whether to take measures at the domestic level; rather, they are obliged to do so.⁹¹ The provision is equally straightforward as regards the objective States Parties must pursue under Article 16: they must ‘ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage’ contrary to the Convention. In order to achieve this goal, they must adopt ‘measures’.

Article 16 also specifies the type of conduct that measures taken by States Parties must address: ‘any activity directed at underwater cultural heritage in a manner not in conformity with this Convention’. The words ‘activities directed at underwater cultural heritage’ are defined by Article 1(6) of the Convention as activities ‘having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage’. This definition entails two important consequences: first, States Parties are only obliged to install measures for activities that specifically *target* underwater cultural heritage.⁹² Second, these activities need not actually damage the concerned items, rather it suffices that they *may* ‘disturb or otherwise damage’ them. Read together with the remainder of Article 16, measures must thus extend to all activities that target underwater cultural heritage in a manner incompatible with the Convention and which could cause damage.

As regards the types of measures States Parties must take, the wording of Article 16 is not very explicit but the phrase ‘all practicable measures to ensure’ nonetheless provides important clues. First of all, the term ‘all’ requires the adoption of a comprehensive set of implementing measures. The word ‘practicable’ does not change this assessment in a fundamental way since States Parties must ‘ensure’ that certain activities do not occur and thus work towards a particular outcome. Consequently, the term ‘practicable’ does not inject a great deal of leeway for States Parties and must mean that they are required to take feasible and result-yielding measures, but are not required to adopt measures which impose an undue burden—especially if they do not yield any discernible effects for the protection of underwater cultural heritage. Such an interpretation is in line with the ordinary meaning of the term ‘opportunes’ used in the French version of Article 16, which stems from the Latin term *opportunus*—and translates to ‘leading into port’.⁹³

⁹⁰ See Convention sur la Protection du Patrimoine Culturel Subaquatique (adoptée le 2 novembre 2001, entrée en force le 2 janvier 2009) 2562 UNTS 72, art 16: ‘Les États parties prennent toutes les mesures opportunes’ (emphasis added).

⁹¹ See on this O’Keefe, *Shipwrecked Heritage* (n 8) 109 and Rau (n 13) 423–4.

⁹² This finding is also bolstered by UNESCO Convention art 1(7), which defines ‘[a]ctivities incidentally affecting underwater cultural heritage’ as activities which ‘despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage’.

⁹³ Larousse, Dictionnaires de français, ‘opportun’: ‘latin *opportunus*, qui conduit au port’ <www.larousse.fr/dictionnaires/francais/>.

States Parties are therefore obliged to prevent problematic activities with all the means at their disposal which contribute to the objective set out in Article 16. Since the objective consists of the prevention of a particular kind of conduct, the adoption of prohibitions under domestic law is the necessary first step.⁹⁴ The second step follows from the first: as the observance of prohibitions depends considerably on the dissuasive effect of sanctions, and since Article 16 requires the taking of ‘all practicable measures’, States Parties are obliged to buttress their prohibitions with sanctions.⁹⁵ What is more, the wording ‘all practicable measures’ also determines the kind of sanctions States Parties must adopt. They are not only required to take *some* practical measures, but rather ‘all’ measures serving the objective ‘to ensure’ the prevention of illicit conduct. Since the endangerment of underwater cultural heritage is often driven by the prospect of significant monetary gain,⁹⁶ the strongest sanctions available to States Parties are also the most appropriate: criminal penalties.

The third and last form of legislative measures States Parties must adopt—the establishment of criminal jurisdiction over the enacted offences—arises from a combined reading of three textual elements of Article 16: once more, the duty to take ‘all practicable measures’ is decisive and demands the use of all expedient options. It is complemented by the obligation of States Parties ‘to ensure that their nationals and vessels flying their flag do not engage’ in problematic conduct. By referring to ‘nationals’ and ‘vessels flying their flag’, the provision mentions two classic grounds of jurisdiction.⁹⁷ Further, Article 16 does not contain any limit regarding the geographical scope of the measures to be implemented. Taken together, this suggests that Article 16 requires States Parties to establish jurisdiction over the conduct of their nationals as well as activities on ships flying their flag—regardless of where they occur.⁹⁸

The triad of legislative measures States Parties must implement is not an end in itself. Since Article 16 requires the prevention of activities that are carried out ‘in a manner not in conformity with this Convention’, it allows for the enforcement of substantive provisions of the Convention that regulate the handling of underwater cultural heritage, but for which there are no specific enforcement measures in place. It therefore functions as a mechanism ensuring compliance with large parts of the Convention, most notably with

⁹⁴ See on this also Rau (n 13) 423–4.

⁹⁵ See on this also O’Keefe, *Shipwrecked Heritage* (n 8) 109, who states that ‘measures to be taken must ensure that nationals and vessels do not engage in the activity’; and Rau (n 13) 424, who acknowledges the obligation of the States Parties to take ‘further legislative action’ (emphasis added) in addition to prohibitions.

⁹⁶ See eg Bryant (n 14) 107; N Gibbs, ‘The Ocean Gold Rush’ *Time* (Amsterdam, 25 October 1993) 66–9.

⁹⁷ See on this above Part II.
⁹⁸ See, for a similar reasoning, Rau (n 13) 424; see also E Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters: Public International Law and What It Offers* (T.M.C. Asser Press 2002) 174–5 who underlines the jurisdictional component of art 16; Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 62.

the Rules contained in the Annex.⁹⁹ In the words of O’Keefe: ‘Article 16 is directed at the fulfilment of a State’s obligations under other provisions of the Underwater Convention’.¹⁰⁰ This function greatly benefits from the fact that Article 16’s geographical scope of application is not restricted to any particular maritime zone.¹⁰¹ By requiring domestic measures covering acts contrary to the Convention regardless of where they take place,¹⁰² it provides for a global protective shield for underwater cultural heritage.

B. Object and Purpose: Article 16 in Light of the Convention’s Aim

What follows is an object-and-purpose based interpretation of Article 16, reading the provision in light of the overall goal of the UNESCO Convention and in a way that furthers its aim.¹⁰³ This exploration confirms the previous findings.

Article 2 of the UNESCO Convention contains particularly clear references to the Convention’s object and purpose, setting out that the ‘Convention aims to ensure and strengthen the protection of underwater cultural heritage’.¹⁰⁴ Accordingly, it requires States Parties to ‘preserve underwater cultural heritage’.¹⁰⁵ What is more, Article 2 instructs States Parties to ‘take all appropriate measures ... necessary to protect underwater cultural heritage’ and obliges them to use ‘the best practicable means at their disposal’.¹⁰⁶ The provision thus provides strong indication of the Convention’s object and purpose, which consists in the protection of the underwater cultural heritage through measures to be taken by States Parties conforming to the requirements set out in Article 2.

When interpreting Article 16 in light of this object and purpose, the adoption of prohibitions backed with criminal sanctions is a first and indispensable step of any implementation scheme. States Parties can hardly protect underwater cultural heritage without the criminalisation of acts that endanger it and doing so is clearly included within ‘the best practicable means at their disposal’. As regards the conduct to be prohibited, Article 16 only requires the prohibition of activities ‘directed at’ underwater cultural heritage.¹⁰⁷ While the best way of furthering the Convention’s aim would certainly be the prohibition of *all* kinds of intrusions with underwater cultural heritage by means of criminal law, the unequivocal wording of the provision does not allow for such an expansive interpretation.¹⁰⁸ Yet States Parties are free to go beyond their obligations stemming from the Convention and to also prohibit other types of

⁹⁹ Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 62 reaches the same result but based on a slightly different argument.

¹⁰⁰ O’Keefe, *Shipwrecked Heritage* (n 8) 109.

¹⁰¹ See also Rau (n 13) 424.

¹⁰² Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 285.

¹⁰³ See, on this in general, Dörr (n 88) 584–5.

¹⁰⁴ UNESCO Convention art 2(1).

¹⁰⁵ *ibid* art 2(3).

¹⁰⁶ *ibid* art 2(4).

¹⁰⁷ See above Part IV, Section A.

¹⁰⁸ See, on this in general, Dörr (n 88) 586–7.

conduct that may be detrimental to underwater cultural heritage.¹⁰⁹ Such a course of action would certainly be in furtherance of the Convention's aim.

The Convention's object and purpose also require the establishment of States Parties' criminal jurisdiction over the activities of their nationals or persons on board their vessels. As underwater cultural heritage can be found in all maritime zones, the protective regime foreseen by the Convention needs to extend to all of them. Absent territorial jurisdiction in the majority of these zones, it is necessary that States Parties establish their jurisdiction based on the nationality of the person and the flag of the vessel,¹¹⁰ a course of action which is clearly 'at the disposal' of States and 'appropriate' in light of the specific factual and jurisdictional context in which treasure hunting occurs. In short, only if States Parties enact criminal offences *and* establish their jurisdiction based on both the active nationality and the flag State principles is it possible to suppress illicit activities on a worldwide scale and achieve a truly global protective regime.¹¹¹

The extraterritorial reach of domestic prohibitions and penal power is essential, not least because many activities directed at underwater cultural heritage can only be carried out with advanced technical equipment. It is thus more likely that nationals of so-called 'maritime States', where cutting-edge technology is available, engage in such ventures.¹¹² They may do so in waters under the sovereignty of States lacking the resources to enforce the Convention¹¹³ or in maritime zones under no State's jurisdiction. In such situations, the active personality principle allows for nationals involved in treasure hunting activities abroad to be brought within the reach of their State's penal power and therefore closes an important enforcement gap.¹¹⁴

Yet awareness about the importance of this aspect of Article 16 for attaining the Convention's goal is still lacking among certain States Parties. For instance, Switzerland's implementing legislation only addresses conduct by persons on board ships flying the Swiss flag, but does not extend to problematic conduct by Swiss nationals on board foreign-flagged vessels¹¹⁵—which is the far more

¹⁰⁹ See, for a similar reasoning regarding other problematic occurrences, O'Keefe, *Shipwrecked Heritage* (n 8) 109.

¹¹¹ This trait of art 16 is mentioned by Boesten (n 98) 174–5.

¹¹² See Dromgoole, 'Editor's Introduction' (n 71) xxvii–xxviii; see also UNESCO/DOALOS, 'Draft Convention on the Protection of the Underwater Cultural Heritage' (April 1998) UNESCO Doc CLT-96/Conf.202/5, reproduced in S Dromgoole and N Gaskell, 'Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998' (1999) 14 *International Journal of Marine and Coastal Law* 201. Many of these capabilities are associated with corporations: see eg Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 6; Mohd Nor and Zahid (n 41) 134.

¹¹³ See, on the exploitation of insufficient State protection of underwater cultural heritage by treasure hunters, Villegas Zamora (n 48) 22.

¹¹⁴ Regarding the necessity of such action by maritime States, see Dromgoole, 'Editor's Introduction' (n 71) xxvii–xxviii; see, on the corresponding feature of art 16, Boesten (n 98) 174–5.

¹¹⁵ See Arrêté fédéral portant approbation et mise en œuvre de la convention sur la protection du patrimoine culturel subaquatique (modification de la loi sur le transfert des biens culturels et de la loi fédérale sur la navigation maritime sous pavillon suisse) (translation: Federal decree regarding the

likely scenario.¹¹⁶ To establish criminal jurisdiction solely based on the flag State principle is obviously insufficient to ensure that activities contrary to the Convention do not take place and is thus at odds not only with the wording of Article 16,¹¹⁷ but also with the object and purpose of the Convention as a whole. Absent ratification of the Convention by all or most States, potential offenders can easily evade the exercise of flag State jurisdiction by operating from a ship registered in a State which is not party to the Convention or by a State known for its casual approach to such activities (or to the enforcement of the law more generally). Conversely, not establishing the flag State principle under domestic law is not an option either: a vessel could then be manned exclusively with nationals of non-States Parties, thus putting all of its activities beyond the reach of the Convention. The effective enforcement of the Convention therefore hinges on the establishment of jurisdiction based on the nationality of vessels *and* of persons.

C. Context: The Immediate Normative Setting of Article 16

The context of Article 16 also contributes to an understanding of its content; the focus is on its immediate normative environment, in particular the enforcement regime contained in Articles 14 to 18 of the Convention.¹¹⁸

Similar to Article 16, Articles 14, 15 and 18 require States Parties to adopt implementing ‘measures’;¹¹⁹ yet each of these provisions addresses a different type of conduct. Article 14 aims ‘to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered’. Article 15, in turn, requires States Parties ‘to prohibit the use of their territory, including their maritime ports’ in support of activities which contravene the Convention. Finally, Article 18 obliges each State Party to ‘take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention’.¹²⁰ Taken together, these three norms cover a substantial number of practices linked to the destruction

adoption and implementation of the Convention on the Protection of the Underwater Cultural Heritage), Feuille Fédérale (CH) 2019 4385, 4388. This clearly amounts to a violation of the UNESCO Convention from the moment it enters into force for Switzerland in January 2020.

¹¹⁶ Petrig and Stemmler (n 10) 77–8 along with 75–6.

¹¹⁷ See also Rau (n 13) 437–9.

¹¹⁸ On the interrelation between these articles: Rau (n 13) 407; see also Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 62 and 283–5.

¹¹⁹ Other provisions of the Convention that refer to the taking of measures are art 2(4), which requires States Parties to take ‘all appropriate’ and ‘necessary’ measures to protect underwater cultural heritage in general, see above Part IV, Section B; arts 10(4)–(6) and 12(3), (4), (6), which concern the adoption of protective measures regarding specific finds of underwater cultural heritage; art 13, which aims at measures securing the compliance of government ships with the provisions of the Convention in the different maritime zones; arts 19(4) and 20, which oblige States Parties to disseminate various kinds of information related to underwater cultural heritage.

¹²⁰ UNESCO Convention art 18(1).

and endangerment of underwater cultural heritage, but none requires implementing measures that address the potentially detrimental *direct* interference with underwater cultural heritage. This central role is assigned to Article 16, making it the lynchpin of the Convention's enforcement regime.

As regards the types of measures States Parties must adopt, Article 15 is particularly explicit by obliging States Parties 'to *prohibit* the use of their territory ... in support of any activity directed at underwater cultural heritage'.¹²¹ Article 18 is similarly straightforward in demanding a particular kind of sanction—that is, the seizure of illicitly recovered underwater cultural heritage. Article 17 has the same degree of clarity, requiring the introduction of sanctions for the violation of implementing measures.¹²² According to Article 14, States Parties must adopt measures to 'prevent' the entry, dealing in and possession of illicitly recovered underwater cultural heritage, which certainly remains a vain endeavour absent norms prohibiting such conduct. Reading Article 16 in this context demonstrates that prohibitions and sanctions are key components of the Convention's enforcement regime—a fact that supports the previous findings.

One of the neighbouring provisions of Article 16 also provides guidance regarding the character of the sanctions to be adopted under the Convention: Article 17(2) specifies that sanctions imposed by States Parties for the violation of implementing measures 'shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur'.¹²³ This finding resonates with the argument that the implementation of Article 16 necessitates sufficiently dissuasive sanctions—that is, sanctions under criminal law¹²⁴—and that the words 'all practicable measures to ensure' must be understood in such a way.

As regards jurisdiction, Articles 14, 15 and 18 are—either explicitly or implicitly—based on the idea that States Parties have recourse to their territorial jurisdiction in order to enforce the Convention. By contrast, Article 16 is the only provision that references two grounds of jurisdiction that have extraterritorial reach—the active nationality and flag State principles. From this comparison, it becomes clear that Article 16 is intended to have a global reach. What is more, both grounds of jurisdiction mentioned in Article 16 are not unique within the framework of the Convention. Articles 9(1) and 11(1) also rely on the active nationality and flag State principles, making their use a general feature of the Convention.¹²⁵ The fact that the enforcement regime of the Convention exhibits a global approach is also illustrated by Article 17(2) specifying that sanctions must 'discourage violations wherever they occur'. Such a contextual reading of Article 16 bolsters the conclusion that it

¹²¹ Emphasis added.

¹²² UNESCO Convention art 17(1).

¹²³ See on this also O'Keefe, *Shipwrecked Heritage* (n 8) 112, who discusses *inter alia* imprisonment as a suitable punishment under art 17(2).

¹²⁴ See on this Part IV, Section A.
¹²⁵ Rau (n 13) 437, as per whom both principles are arguably also inherent in UNESCO Convention arts 10(4) and 12(3).

requires the establishment of criminal jurisdiction based on the nationality of persons and vessels.

D. Systemic Integration: Article 16 in the Context of Similar Treaties

Further support for the claim that Article 16 requires States Parties to adopt a triad of measures can be gained from systemic integration as foreseen by Article 31(3)(c) VCLT.¹²⁶ For such an analysis, two kinds of treaties are of particular interest: those regulating the protection of particular shipwrecks and so-called ‘suppression conventions’.¹²⁷ A survey of these instruments suggests that the enactment of prohibitions backed by criminal sanctions and the establishment of jurisdiction with extraterritorial reach are the usual steps taken to tackle unwanted activities that transcend national borders—regardless of whether it is shipwrecks or other interests that are at stake.

The Agreement regarding the M/S Estonia (M/S Estonia Agreement), concluded between Estonia, Finland and Sweden, pertains to the protection of the wreck and the surrounding area of the sea bed ‘as a final place of rest for victims of the disaster’.¹²⁸ It further requires that the ‘Contracting Parties undertake to institute legislation, in accordance with their national procedures, aiming at the criminalisation of any activities disturbing the peace of the final place of rest’.¹²⁹ They are, moreover, obliged ‘to make it possible to punish the commission of an offence ... by imprisonment’.¹³⁰ The wording of the M/S Estonia Agreement is much more explicit than Article 16 (even if read together with Article 17(2)) in terms of the types of measures States Parties must adopt. The Agreement displays in an exemplary way the kind of measures that must be adopted in order to protect underwater sites effectively; it is therefore helpful for identifying the types of implementing measures required under Article 16.¹³¹

¹²⁶ See, on this approach in general, Dörr (n 88) 603–5. Doctrine is divided whether it is necessary that the ‘external’ treaty is ratified by all States party to the treaty subject to interpretation: C McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 313–15, discusses various meanings that could be given to the words ‘applicable in the relations between the parties’ in art 31(1)(c) VCLT; M Herdegen, ‘Interpretation in International Law’ *Max Planck Encyclopedia of Public International Law* (last updated March 2013) para 24 <<http://opil.ouplaw.com>> argues for complete identity between the States parties to an ‘external’ treaty and to the treaty subject to interpretation. Since we do not adhere to this view, but rather to the broader reading of the requirement ‘applicable in the relations between the parties’, it does not matter that the two external international agreements of interest here—those regarding the M/S Estonia and the RMS Titanic—have not been ratified by any State Party to the UNESCO Convention.

¹²⁷ On the term ‘suppression convention’, see Boister (n 14) 19–20.

¹²⁸ Agreement Regarding the M/S Estonia (adopted 23 February 1995, entered into force 26 August 1995) 1890 UNTS 175, art 1.

¹³⁰ *ibid* art 4(2).

¹³¹ See on this also Boesten (n 98) 174, who deems art 16 suitable to assist in the enforcement of the M/S Estonia Agreement.

The Agreement Concerning the Shipwrecked Vessel RMS Titanic (Titanic Agreement), which was finalised in 2000¹³² but has not yet come into force,¹³³ also provides insights for the interpretation of Article 16. The Titanic Agreement strives to protect the wreck as ‘a memorial to those ... who perished and whose remains should be given appropriate respect’ and describes the Titanic as ‘an underwater historical wreck of exceptional international importance’.¹³⁴ Due to this twofold focus, the Titanic Agreement features an even closer thematic link with the UNESCO Convention than the M/S Estonia Agreement.¹³⁵ It requires each State Party to ‘take the necessary measures, in respect of its nationals and vessels flying its flag’ to regulate their conduct at the site in accordance with other stipulations of the Agreement.¹³⁶ Moreover, each State Party ‘shall take appropriate actions with respect to its nationals and vessels flying its flag to enforce the measures it has taken pursuant to this Agreement’.¹³⁷ The United Kingdom has already adopted corresponding regulations in The Protection of Wrecks (RMS Titanic) Order 2003, which will enter into force with the Agreement.¹³⁸ Article 6 of the Order imposes criminal offences for violations of the Agreement’s standards,¹³⁹ which according to the UK Merchant Shipping and Maritime Security Act 1997 applies to acts on board a ‘United Kingdom ship’ and, in international waters, to acts of British citizens and other persons (including companies) with specific, enumerated relationships to the UK.¹⁴⁰ Taken together, these regulations exemplify the types of implementing measures the Agreement and the protection of underwater cultural heritage more generally require: a triad of measures, that is, prohibitions, sanctions and the establishment of jurisdiction over

¹³² S Dromgoole, ‘United Kingdom’ in S Dromgoole (ed), *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (2nd edn, Martinus Nijhoff 2006) 344, n 161.

¹³³ Agreement Concerning the Shipwrecked Vessel RMS Titanic (2000), retrievable at US Department of State Archive <<https://2001-2009.state.gov/g/oes/rls/or/2004/33709.htm>>. According to art 11(2), the Agreement enters into force as soon as two States consent to be bound by it. So far, the UK consented, while the US signed the Agreement subject to the enactment of implementing legislation. The US Congress has not yet acted upon this: see US National Oceanic and Atmospheric Administration, Office of General Counsel, ‘R.M.S Titanic – Legislation’ (30 May 2018) <www.gc.noaa.gov/gcil_titanic-legislation.html>; see also the ‘Status List’ on the Agreement available at UK The National Archives, Foreign and Commonwealth Office, ‘Depositary’ (27 July 2008) <<https://webarchive.nationalarchives.gov.uk/tna/20080727163407/http://www.fco.gov.uk/en/about-the-fco/publications/treaties/depositary>>.

¹³⁴ Titanic Agreement art 2.

¹³⁵ On the obvious similarities between the Titanic Agreement and the enforcement regime of the UNESCO Convention: Dromgoole, ‘Editor’s Introduction’ (n 71) xxxvi.

¹³⁶ Titanic Agreement art 4(1).

¹³⁷ *ibid* art 4(4).

¹³⁸ The Protection of Wrecks (RMS Titanic) Order 2003 art 1(2).

¹³⁹ On the criminal character of the provision, see Dromgoole, ‘The International Agreement for the Protection of the *Titanic*’ (n 34) 14–15.

¹⁴⁰ Merchant Shipping and Maritime Security Act 1997 section 24(3).

extraterritorial occurrences.¹⁴¹ Article 16 should be interpreted in line with this wider, relevant normative context.

In order to determine the types of implementing measures States Parties are required to adopt under Article 16, so-called ‘suppression conventions’ in the sphere of transnational criminal law are also worth considering. Like the UNESCO Convention, these treaties aim at tackling crimes that evade territorial jurisdiction due to their transnational nature, such as the crime of hostage taking,¹⁴² transnational organised crime,¹⁴³ and acts endangering the safety of maritime navigation.¹⁴⁴ Yet the transnational nature of the activities in question is not the only common feature that these treaties share with the UNESCO Convention. In an attempt to address problematic conduct, the suppression conventions explicitly state what types of implementing measures State Parties must take and generally oblige them (i) to prohibit the respective conduct under domestic law, (ii) to make the relevant offence(s) subject to appropriate penalties, and (iii) to establish jurisdiction over the offence(s) in question.¹⁴⁵ Hence, suppression conventions not only combat conduct that poses transnational challenges similar to the endangerment of underwater cultural heritage, but, moreover, provide a mirror image of the measures that Article 16 requires, according to the above interpretations.

E. The Broader Legal Landscape: Comparative Insights from Domestic Legislation

Taking account of comparative insights from enquiries into domestic legal instruments is not part of the traditional interpretative canon for treaties.¹⁴⁶ Nonetheless, considering domestic acts in the interpretive exercise has the potential to further inform the understanding of an international norm.¹⁴⁷ For

¹⁴¹ On jurisdiction in this context, see also Dromgoole, ‘The International Agreement for the Protection of the *Titanic*’ (n 34) 7.

¹⁴² International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostages Convention).

¹⁴³ United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNTOC).

¹⁴⁴ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201 (SUA).

¹⁴⁵ Eg SUA arts 3, 5 and 6; UNTOC arts 5, 6, 8, 11, 15; Hostages Convention arts 1, 2, 5; see in general Boister (n 14) 19–20; for doctrine on the protection of cultural property by means of transnational criminal law, see (n 14).

¹⁴⁶ The comparison of international norms with domestic rules is, however, not foreign to international law; the most prominent example is the identification of general principles of law in the sense of art 38(1)(c) of the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 21: see P de Cruz, ‘Comparative Law, Functions and Methods’, *Max Planck Encyclopedia of Public International Law* (last updated April 2009) paras 51–54 <<http://opil.ouplaw.com>>; another example for gaining insights from a comparison of domestic rules is the identification of ‘constitutional traditions common to the Member States’ pursuant to art 6(3) of the consolidated version of the Treaty on European Union [2016] OJ C202/13; see U Kischel, *Comparative Law* (Oxford University Press 2019) 84–5.

¹⁴⁷ Kischel (n 146) 871.

current purposes, relevant comparative insights can, *inter alia*, be gained from two domestic statutes: the United Kingdom's Protection of Military Remains Act 1986¹⁴⁸ and the United States' Sunken Military Craft Act of 2004.¹⁴⁹ Both instruments demonstrate that the triad of measures—offences, sanctions, and jurisdiction—is a common feature for the legal protection of underwater sites.

The UK Act strives 'to secure the protection from unauthorised interference of the remains of military aircraft and vessels that have crashed, sunk or been stranded and of associated human remains'.¹⁵⁰ Despite the fact that the Act defines the protected objects differently from the Convention,¹⁵¹ it is of interest for two reasons. First, because it comprises detailed offence definitions.¹⁵² Second, it has a jurisdictional provision that is very similar to Section 24 of the UK Merchant Shipping and Maritime Security Act 1997,¹⁵³ covering offences committed within the UK and its waters, on board a 'British-controlled ship' or in international waters on board a foreign-flagged ship by British citizens and other persons (including companies) with specific, enumerated relationships to the UK.¹⁵⁴ It thus exemplifies the need for provisions pertaining to the enforcement of substantive rules relating to the protection of underwater sites—provisions similar to the types of implementing measures required under Article 16.

The US Sunken Military Craft Act of 2004 prohibits persons from engaging or attempting to engage in 'any activity directed at a sunken military craft that disturbs, removes, or injures any sunken military craft' unless covered by an exemption, such as a permit.¹⁵⁵ Violations of the respective provisions are sanctioned by civil penalties¹⁵⁶ and liability may arise for damages and

¹⁴⁸ On the comparability of the Convention's provisions and the Act, see A Strati, 'Draft Convention on the Protection of Underwater Cultural Heritage: A Commentary Prepared for UNESCO' (April 1999) UNESCO Doc CLT-99/WS/8, 42–3.

¹⁴⁹ 10 USC section 113 (2019).

¹⁵⁰ Introductory Text to the Protection of Military Remains Act 1986. While the protection of *human* remains has been the driving force behind the adoption of the Act, this is not reflected by its wording since the term 'remains' also covers 'cargo, munitions, apparel or personal effects'; see S Dromgoole, 'Military Remains on and Around the Coast of the United Kingdom: Statutory Mechanisms of Protection' (1996) 11 *International Journal of Marine and Coastal Law* 33–4.

¹⁵¹ Compare Protection of Military Remains Act 1986, section 1, with UNESCO Convention art 1.
¹⁵² Protection of Military Remains Act 1986, section 2.

¹⁵³ See (n 140) and relating text.

¹⁵⁴ Protection of Military Remains Act 1986, section 3(1); section 3(1)(b)(iv) was amended by The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, sched 1, section 69, with the effect that companies 'registered under the Companies Act 2006' became liable under the Act. Notwithstanding the specific rules of the Protection of Military Remains Act 1986, the UK government only began to designate shipwrecks as controlled sites or protected places in 2002; seemingly, the mere existence of the Act was a sufficient deterrent for a considerable period of time: Dromgoole, 'United Kingdom' (n 132) 330–1.

¹⁵⁵ Sunken Military Craft Act, 10 USC § 113, section 1402(a); for further insights on the Act: DJ Bederman, 'Congress Enacts Increased Protections for Sunken Military Craft' (2006) 100 *AJIL* 653–9.
¹⁵⁶ Sunken Military Craft Act, 10 USC § 113, section 1404.

enforcement costs.¹⁵⁷ The application of the Act is restricted to US nationals and resident aliens unless the application to further persons is supported by ‘generally recognised principles of international law’ or a particular international agreement.¹⁵⁸ Thus, the Act provides a further example of the protection of underwater sites through the establishment of prohibitions equipped with sanctions and the use of the active nationality principle in order to enforce substantive rules beyond territorial limits—a finding that further bolsters the interpretation of Article 16 offered above.

F. Travaux Préparatoires: *The Route towards a Robust Provision*

The findings made so far also receive support from the preparatory works relating to Article 16.¹⁵⁹ The provision did not figure among the most controversial drafting points.¹⁶⁰ Consequently, discussions regarding Article 16 were rather scarce and mainly centred on its jurisdictional component; other aspects, notably the kinds of activities to be addressed, the types of implementing measures and their geographical scope, received considerably less attention.

1. *ILA Draft of 1994*

Since the 1950s, a number of steps have been taken to bring the protection of underwater cultural heritage within the reach of international law.¹⁶¹ An influential contribution was made by the International Law Association (ILA), which in 1994 issued the Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage (ILA Draft)¹⁶²—a document that provided the basis for the subsequent UNESCO Convention drafts.¹⁶³

¹⁵⁷ *ibid* section 1405.

¹⁵⁸ *ibid* section 1402(c)(2).

¹⁵⁹ The negotiations were not recorded in detail, but can be retraced by having recourse to UNESCO documents and relevant scholarly writings; on UNESCO documents, see R 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 the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff 2003) 92–3 and 159–61.

¹⁶⁰ On particularly contentious points, see T Scovazzi, ‘The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage’ in G Camarda and T Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Legal Aspects* (Giuffrè Editore 2002) 120–30.

¹⁶¹ O’Keefe, *Shipwrecked Heritage* (n 8) 14–16. UNCLOS contains provisions on the protection of underwater cultural heritage (especially arts 149 and 303); however, it does not establish a comprehensive protection regime comparable to the UNESCO Convention. UNCLOS is not considered any further here, but see T Scovazzi, ‘Article 149’ in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck 2017) 1052–8; Scovazzi, ‘Article 303’ (n 57) 1950–61.

¹⁶² International Law Association, ‘Resolutions Proposed by International Committees’ in International Law Association Report of the Sixty-Sixth Conference (Buenos Aires 1994) (International Law Association, London 1994) 15–21.

¹⁶³ Strati (n 148) 1; as per O’Keefe, *Shipwrecked Heritage* (n 8) 23, ‘the ILA Draft did indeed act as a blueprint for the development of the UNESCO Convention on the Protection of the Underwater Cultural Heritage’ (*italics omitted*).

Article 8 of the ILA Draft is of particular interest since it served as the model for today's Article 16.¹⁶⁴ It reads as follows:

Article 8: Prohibition of Certain Activities by Nationals and Ships

Each State Party shall undertake 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. The prohibition shall not apply to activities affecting the underwater cultural heritage that comply with the Charter.

The provision requires each State Party to adopt prohibitions regarding activities of 'its nationals and ships of its flag ... affecting underwater cultural heritage' in areas not subject to the jurisdiction of another State Party.¹⁶⁵

While the thrust of Article 8 of the ILA Draft and Article 16 of the UNESCO Convention is the same, the former provision is narrower in three respects. First, it requires only one type of implementing measure—the prohibition of relevant conduct. The fact that this narrow wording has not been retained in Article 16 supports the view that a triad of measures must be taken. Second, Article 8 of the ILA Draft only requires that activities comply with the annexed ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage that was subsequently adopted by the International Council of Monuments and Sites.¹⁶⁶ The ICOMOS Charter essentially corresponds to what later became the Rules in the Annex;¹⁶⁷ States Parties were thus not required to comply with the Convention as a whole at this point. Third, Article 8 of the ILA Draft applies only in those areas of the sea that are 'not within a cultural heritage zone or territorial sea of another State Party',¹⁶⁸ while Article 16 does not contain such a geographical limitation and thus has—as argued before—a global reach. In one respect, however, the material scope of Article 8 of the ILA Draft is wider than that of Article 16: it extends to all activities 'affecting' underwater cultural heritage. Hence, it includes any kind of interference, whereas Article 16 is restricted to activities that are 'directed at' underwater cultural heritage.¹⁶⁹

¹⁶⁴ On the substantive linkage between the provisions: Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 283–4; Rau (n 13) 438, n 208.

¹⁶⁵ Art 5 ILA Draft featured a particular kind of coastal State jurisdiction: the 'cultural heritage zone', which States Parties would have been free to establish and which, as per art 1(3) ILA Draft, paralleled the extent of the continental shelf: Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 50; Cultural Heritage Law Committee (n 16) 436–7, 439.

¹⁶⁶ See Bautista, 'Gaps, Issues, and Prospects' (n 14) 65–6; for the content of the ICOMOS Charter, see <www.icomos.org/en/faq-doccen/179-articles-en-francais/ressources/charters-and-standards/161-charter-on-the-protection-and-management-of-underwater-cultural-heritage>.

¹⁶⁷ See Garabello (n 159) 180.

¹⁶⁸ On the cultural heritage zone, see above (n 165). In essence, prohibitions under art 8 must cover activities in maritime zones under the jurisdiction of non-States Parties, on the continental shelf of States Parties that chose not to establish a cultural heritage zone, and in areas beyond relevant State jurisdiction.

¹⁶⁹ See above Part IV, Section A.

In terms of the addressees of the implementing measures—States Parties’ nationals and vessels—there is full accordance between the two provisions. The ILA drafters stressed that Article 8 is ‘a core’ provision of the ILA Draft and underlined the necessity of both jurisdictional grounds: the active nationality and flag State principles.¹⁷⁰ To rely solely on the latter was in their view ‘too uncertain’ since the vessel in question may be too small for registration or may be registered under a flag of convenience not effectively enforcing the law. Going a step further and subjecting the protection of underwater cultural heritage to universal jurisdiction was at that time deemed too controversial¹⁷¹ and is arguably still so today.

2. UNESCO 1998 Draft

In 1998, UNESCO submitted a first draft of the Convention as the basis for further negotiations.¹⁷² Article 7 of the UNESCO 1998 Draft retained the title of Article 8 of the ILA Draft and largely reflects its content. The provision reads as follows:

Article 7 Prohibition of Certain Activities by Nationals and Ships

1. A State Party shall take such measures as may be necessary to ensure that its nationals and vessels flying its flag do not engage in any activity affecting underwater cultural heritage in a manner inconsistent with the principles of the Charter.

2. Measures to be taken by a State Party in respect of its nationals and vessels flying its flag shall include, among others, the establishment of regulations:

(a) to prohibit activities affecting underwater cultural heritage in areas where no State Party exercises its jurisdiction under Article 5 otherwise than in accordance with the terms and conditions of a permit or authorisation granted in compliance with the provisions of the Charter;

(b) to ensure that they do not engage in activities affecting underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises its jurisdiction under Article 5, in a manner contrary to the laws and regulations of that State.

Unlike Article 8 of the ILA Draft, the provision requires States Parties to ‘take such measures as may be necessary to ensure’ that nationals and vessels flying their flag do not engage in activities affecting underwater cultural heritage. This shift in content was foundational for the evolution of today’s Article 16.

As regards the types of implementing measures, Article 7 of the UNESCO 1998 Draft is helpful for understanding Article 16. Its second paragraph

¹⁷⁰ Cultural Heritage Law Committee (n 16) 440.

¹⁷¹ *ibid.*

¹⁷² Reprinted in Dromgoole and Gaskell (n 112) 193–206. As per O’Keefe, *Shipwrecked Heritage* (n 8) 29, the draft was not subject to negotiations until April 1999; the first meeting of governmental experts in 1998 solely served as an exchange of views. The draft was jointly presented by UNESCO and DOALOS; but due to criticism regarding DOALOS’ authority to participate in the process, it assumed a fairly restrained role in the ensuing discussions.

requires ‘among others, the establishment of regulations ... to prohibit’ illicit activities in certain areas. By using the words ‘among others’, the drafters made it very clear that whilst the adoption of prohibitions is important, this alone is insufficient to ensure that no acts affecting underwater cultural heritage are undertaken. This finding supports the interpretation of Article 16 made above.

In terms of the addressees of implementing measures, Article 7 of the UNESCO 1998 Draft follows in the footsteps of Article 8 of the ILA Draft: measures must extend to States Parties’ nationals and vessels. Explanatory comments on the draft provision emphasised the need of a combination of these two grounds of jurisdiction in order to deter illicit activities.¹⁷³ This view was shared during meetings, where drafters expressed their concerns that neither the flag State principle nor the active personality principle alone would have the potential to ensure effective protection.¹⁷⁴ Particularly as regards vessels flying the flag of a State not party to the Convention, enforcement was considered to be impossible.¹⁷⁵ Hence, the inclusion of both grounds of jurisdiction was a deliberate choice at this point in the drafting process and this approach was ultimately retained. The geographical scope of application of Article 7 of the UNESCO 1998 Draft is broader than in Article 8 of the ILA Draft: the latter only covers maritime areas which are not under the jurisdiction of a State Party, while Article 7(2)(b) of the UNESCO 1998 Draft also applies to areas in which States Parties exercise jurisdiction. Hence, the scope of application of the provision was considerably extended at this point — a step towards the geographically unrestricted nature of today’s Article 16.

3. *UNESCO 1999 Draft*

The UNESCO 1999 Draft¹⁷⁶ contains three different proposals, all of which retain the title of Article 8 of the ILA Draft:

OPTION 1

Article 7 Prohibition of certain activities by nationals and ships

1. States Parties shall take all practicable measures to ensure that [their nationals and] vessels flying their flag refrain from engaging in any [activity directed at] underwater cultural heritage in a manner inconsistent with the Rules of the Annex.
2. Measures to be taken by a State Party in respect of [its nationals and] vessels flying its flag shall include:

¹⁷³ Reprinted in Dromgoole and Gaskell (n 112) 201.

¹⁷⁵ *ibid* 161.

¹⁷⁴ Garabello (n 159) 160–1.

¹⁷⁶ UNESCO, ‘Draft Convention on the Protection of the Underwater Cultural Heritage’ (July 1999) UNESCO Doc CLT-96/CONF.202/5 Rev.2, 5, 6, 8. This draft was the result of negotiations that took place in Paris in April 1999: PJ O’Keefe, ‘Second Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural Heritage’ (1999) 8 *IJCP* 568. Of the numerous differences between the three proposals, we only discuss those that are particularly helpful for understanding today’s art 16.

- (a) prohibition of [activities directed at] underwater cultural heritage in areas where no State Party exercises control under Article 5(2) otherwise than in accordance with the Rules of the Annex;
- (b) all practicable measures to ensure that they do not engage in [activities directed at] underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises control under Article 5(2) in a manner contrary to the laws and regulations of that State.

OPTION 2

Article 7 Prohibition of certain activities by nationals and ships

1. States Parties shall require that any discovery relating to underwater cultural heritage by their nationals or through the activities of vessels flying their flag in the exclusive economic zone or the continental shelf of another State be reported to the competent authorities of that State or the State of origin, or the State of cultural origin, or the State of historical and archaeological origin.
2. Measures to be taken by a State Party in respect of [its nationals and] vessels flying its flag shall include:
 - (a) to prohibit [activities directed at] underwater cultural heritage in areas where no State Party exercises sovereignty or control in a manner contrary to the Rules of the Annex;
 - (b) to ensure that they do not engage in [activities directed at] underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises sovereignty or control in a manner contrary to the Rules of the Annex.

OPTION 3

Article 6 Prohibition of certain activities by nationals and ships

All 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 inconsistent with this Convention and its Annex, or the laws and regulations of the State Party in whose exclusive economic zone or on whose continental shelf such underwater cultural heritage is located, as appropriate.

In terms of the goal to be achieved by States Parties, all three of the proposals submitted provided that the adopted measures must ‘ensure’ that particular groups of persons refrain from engaging in problematic conduct.¹⁷⁷ This underlines the importance the drafters attached to the idea.

As regards the types of implementing measures, the three options vary to some extent but share certain features. Options 1 and 3 require States Parties to ‘take all practicable measures’, which is the approach ultimately taken in Article 16. Similar to Article 7 of the UNESCO 1998 Draft, Options 1 and 2 specify that measures shall include the prohibition of problematic activities. By contrast, the more condensed Option 3 does not explicitly require doing so, yet nothing in the *travaux* suggests that this wording was chosen to

¹⁷⁷ It should be noted that Option 2 limits this obligation to particular maritime areas.

exclude prohibitions; rather, this more open wording allows for the inclusion of various measures. In sum, the three options demonstrate the drafters' intent to oblige States Parties to implement a variety of measures, including prohibitions—a finding that supports the interpretation of Article 16 made above.

Compared to earlier drafts, all three options are less demanding as regards the kind of conduct States Parties are required to prevent; as in Article 16, States Parties are only obliged to address activities 'directed at' underwater cultural heritage. The change from 'affecting' to 'directed at', which keeps incidental infractions outside the scope of the Convention, goes back to a Canadian proposal.¹⁷⁸ The new wording was, however, put in brackets, which indicates a willingness on the part of the drafters to reconsider the issue. Further, in all three proposals the standard against which relevant conduct has to be assessed was changed from 'the Charter'¹⁷⁹ to 'the Annex' to the Convention.¹⁸⁰ Option 3 goes slightly further by requiring compliance with both the Convention and the Annex.¹⁸¹

In terms of the addressees of the implementing measures, all three options pursue the path taken in earlier drafts: States Parties must take measures extending to both 'their nationals'/'its nationals' and 'vessels flying its flag'/'vessels flying their flag'. However, in all three provisions, the term 'their nationals'/'its nationals' was put in square brackets. At this stage, it seemed possible that the active personality principle might not be relied upon.

4. UNESCO 2000 Draft

In the written submissions following the 1999 meeting, Canada and Italy suggested the incorporation of a provision codifying the obligation of States Parties 'to make it an offence for its nationals to engage in any activity directed at underwater cultural heritage' without a permit awarded in compliance with the Annex—a proposal that highlights the need for prohibitions and sanctions under the Convention's regime.¹⁸² The final report

¹⁷⁸ O'Keefe, 'Second Meeting of Governmental Experts' (n 176) 573; UNESCO, 'Second Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural Heritage, 19–24 April 1999, Synoptic Report of Comments on the Draft Convention on the Protection of the Underwater Cultural Heritage' (April 1999) UNESCO Doc CLT-99/CONF.204/5.

¹⁷⁹ On the ICOMOS Charter, see above Part IV, Section F, Subsection 1.

¹⁸⁰ The content of this annex was still subject to negotiations, O'Keefe, *Shipwrecked Heritage* (n 8) 152.

¹⁸¹ Options 1 and 3 even required that relevant conduct be in keeping with 'the laws and regulations' of a State Party in whose exclusive economic zone or continental shelf it occurs.

¹⁸² UNESCO, 'Third Meeting of Governmental Experts to Consider the Draft Convention on the Protection of the Underwater Cultural Heritage, 3–7 July 2000, Synoptic Report of Comments on the Draft Convention on the Protection of the Underwater Cultural Heritage' (April 2000) UNESCO Doc CLT-2000/CONF.201/3, 10–1.

on the draft consultations of July 2000—here referred to as the UNESCO 2000 Draft—contains two versions¹⁸³ of what ultimately became Article 16:

Art[icle] A Prohibition of certain activities by nationals and ships

The States Parties shall take all practicable measures to ensure that physical or legal persons having their nationality or vessels flying their flag refrain from engaging in activities in a manner inconsistent with this Convention, wherever these activities take place.

Article 7 Deterrence of certain activities by nationals and vessels

States Parties shall take all practicable measures to ensure that their nationals and vessels flying or entitled to fly their flag refrain from engaging anywhere in any [activity directed at] underwater cultural heritage in a manner inconsistent with the Rules of the Annex.

While Article A maintains the title of all previous draft provisions, Article 7 has a slightly different heading: ‘Deterrence of certain activities by nationals and vessels’—one that accentuates the provision’s purpose, which is to prevent harmful activities. The obligation to take ‘all practicable measures to ensure’, as found in previous drafts, was kept and ultimately incorporated into Article 16. Article 7, in addition, relies on language from earlier drafts by stating that the activities in question must be ‘directed at underwater cultural heritage’. Since the words continued to be bracketed, it seems that there was not yet unanimity on the issue. As regards the standard against which relevant conduct is assessed, Article 7 refers to the ‘Rules of the Annex’ and Article A to the Convention as a whole—the latter being the benchmark ultimately retained in Article 16.

Unlike previous drafts, both provisions abandoned the idea of distinguishing between the areas where potentially harmful conduct, which is to be addressed by measures, must occur; rather, wording that emphasised the provision’s worldwide reach was chosen. As in Article 7, measures must prevent the addressees ‘from engaging anywhere’ in any problematic activity, and Article A demands that measures extend to activities ‘wherever’ they take place. Arguably, this broader geographical scope of application made the provision more acceptable to negotiating States, like the US, which were fundamentally opposed to granting new jurisdictional powers to coastal States, notably in the EEZ and the continental shelf. These States insisted that the jurisdictional framework established under the UNCLOS should be relied on and supported provisions with worldwide application, allowing for far-reaching enforcement measures without broadening the jurisdictional powers of coastal States.¹⁸⁴

¹⁸³ UNESCO, ‘Final Report of the Third Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage, 3–7 July 2000’ (August 2000) UNESCO Doc CLT-2000/CONF.201/7, 10, 14.

¹⁸⁴ RC Blumberg, ‘International Protection of Underwater Cultural Heritage’ in MH Nordquist, JN Moore and K Fu (eds), *Recent Developments in the Law of the Sea and China* (Martinus Nijhoff 2006) 494–5; Drongooole, *Underwater Cultural Heritage and International Law* (n 13) 281–2.

As regards the addressees of the implementing measures, both draft provisions enshrined the active nationality and flag State principles. This time, the words ‘nationality’ and ‘nationals’ respectively were no longer put in brackets, which is evidence of the clear support for the inclusion of the active personality principle in this draft and ultimately in Article 16. Article A even went one step further by requiring that measures encompass the conduct of ‘physical or *legal* persons having their nationality’,¹⁸⁵ which brought corporations within the draft Convention’s reach.

5. Consolidated Working Paper of 2001

At the final round of consultations on the draft Convention in 2001, a Consolidated Working Paper was presented.¹⁸⁶ This paper included the three versions of Articles 6 and 7 of the UNESCO 1999 Draft respectively as well as Articles A and 7 of the UNESCO 2000 Draft.¹⁸⁷ Further negotiations took place on the basis of an ‘Informal draft negotiating text’,¹⁸⁸ Article 15¹⁸⁹ of which was largely based on Option 1 of Article 7 of the UNESCO 1999 Draft:

Article 15 ... Prohibition of certain activities by nationals and ships

1. States Parties shall take all practicable measures to ensure that their nationals and vessels flying their flag refrain from engaging in any activity directed at underwater cultural heritage in a manner inconsistent with the Convention.

2. Measures to be taken by a State Party in respect of its nationals and vessels flying its flag shall include:

(a) prohibition of activities directed at underwater cultural heritage otherwise than in accordance with the Convention in areas where no State Party exercises control under Article 12;

(b) all practicable measures to ensure that they do not, in a manner contrary to the laws and regulations of a State Party which exercises control under Articles 11 or 12, engage in activities directed at underwater cultural heritage within the continental shelf of that State.

The wording of Article 15(1) differs from today’s Article 16 only slightly. Like Article 16, it demands that ‘States Parties shall take all practicable measures to ensure’ that no problematic conduct directed at underwater cultural heritage occurs. In Article 15, the words ‘directed at underwater cultural heritage’

¹⁸⁵ Emphasis added.

¹⁸⁶ UNESCO, ‘Fourth Meeting of Governmental Experts on the Draft Convention on the Protection of the Underwater Cultural Heritage, 26 March–6 April 2001, Consolidated Working Paper’ (March 2001) UNESCO Doc CLT-2001/CONF.203/INF.3. For a detailed description of the proceedings, see PJ O’Keefe, ‘Fourth Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural Heritage’ (2002) 11 IJCP 168–9.

¹⁸⁷ UNESCO Doc CLT-2001/CONF.203/INF.3 (March 2001) (n 191) 22, 24, 26, 30.

¹⁸⁸ See section ‘Informal draft negotiating text’ of UNESCO Doc CLT-2001/CONF.203/INF.3 (March 2001) (n 186) starting at 3; see also O’Keefe, *Shipwrecked Heritage* (n 8) 30, who refers to this part of the document as ‘Single Negotiating Text’.

¹⁸⁹ UNESCO Doc CLT-2001/CONF.203/INF.3 (March 2001) (n 186) 43.

were no longer bracketed, which suggests that their inclusion was now agreed upon. Furthermore, activities must now comply with the content of the Convention as a whole. In terms of the addressees of the implementing measures, Article 15 names—without any reservation—the ‘nationals and vessels’ of States Parties. At this stage of the drafting process, there is no doubt left about the deliberate inclusion of both jurisdictional grounds: the active nationality and flag State principles.

In sum, the analysis of the *travaux* supports the earlier findings based on Article 16’s ordinary meaning in light of the object and purpose as well as the normative context of the Convention and comparative insights gained from domestic law. The main insight from the *travaux* is that Article 16 had been strengthened through the drafting process. As regards the types of measures, the enactment of prohibitions was no longer considered sufficient; rather, States Parties must adopt a variety of measures,¹⁹⁰ most importantly the triad of legislative measures that has been the focus of this article. It also follows from the *travaux* that the inclusion of both the active nationality and flag State principles was the result of a deliberate choice, and that the provision’s geographical scope was steadily broadened until it was given global reach. Last but not least, the standard with which activities must comply expanded from the content of the Charter/Annex to that of the Convention as a whole. Just one single element of the provision was narrowed down in the course of the drafting process: only activities ‘directed at’ and not all activities affecting underwater cultural heritage are covered by Article 16. The drafters’ intent was clearly the establishment of a robust enforcement provision with global reach, which requires a variety of measures that are able ‘to ensure’ the protection of underwater cultural heritage.

However, even if States Parties fully implement Article 16, a significant loophole persists. As the content of Article A of the UNESCO 2000 Draft regarding legal entities was not retained, the provision only covers natural persons. Salvage corporations, which are key actors in the realm of excavation and recovery of underwater cultural heritage, were left outside the scope of the Convention.

V. MOVING BEYOND THE CONVENTION: MEASURES AGAINST CORPORATE TREASURE HUNTERS

Since the search for and the excavation of artefacts on the seabed is a costly yet lucrative business, which requires substantial funding and specialist equipment, it should not come as a surprise that corporations are major players in the field. The UNESCO Convention does not prohibit the involvement of commercial entities in underwater cultural heritage projects as such; however, it rules out both the ‘commercial exploitation of underwater cultural heritage for trade or

¹⁹⁰ See also Rau (n 13) 423–4.

speculation' and 'its irretrievable dispersal' because they are 'fundamentally incompatible with the protection and proper management of underwater cultural heritage'. In particular, underwater cultural heritage 'shall not be traded, sold, bought or bartered as commercial goods'.¹⁹¹ Briefly, it aims at deterring a specific kind of commercial actor: corporate treasure hunters¹⁹² recovering underwater cultural heritage for the primary purpose of generating high profits through its sale.¹⁹³ The *San José* is again exemplary in this respect: commercial entities were heavily involved in the search for the ship¹⁹⁴ and the government of Colombia had initially planned to collaborate closely with corporations in the recovery of the trove through a public-private partnership.¹⁹⁵

The involvement of corporations in the exploitation of underwater cultural heritage is presumably motivated by the same economic reasons that speak in favour of corporate structures in general, notably attractive financing options as well as favourable tax regulations and liability frameworks. In many cases, their financial and thus operational resources transcend those of other actors.¹⁹⁶ This enables corporations to engage in large-scale projects which—if not undertaken in accordance with scientific standards—present a particularly serious threat to the preservation of underwater cultural heritage.

At the same time, our understanding of Article 16 of the UNESCO Convention is that it covers only natural persons, with powerful corporate treasure hunters remaining beyond its reach. This may lead to absurd results: a State Party may fully implement Article 16 and still be the seat of a treasure hunting corporation run by nationals of non-States Parties. Unless the State Party introduces legislation covering corporations, it will be unable to enforce the Convention's standards if the corporation operates in areas outside its territorial jurisdiction and does not use ships flying its flag. Hence, an indispensable precondition for a robust and effective protection scheme is the extension of the measures required under Article 16 to legal persons—at least until the Convention is ratified and fully implemented by a large majority of States.¹⁹⁷ Absent (almost) global adherence to the Convention, the inclusion of corporations within the scope of implementing measures can close the gaps in the protective regime that persist due to a lack of action by non-States Parties.

The idea of extending the measures required under Article 16 to corporations is neither new nor far-fetched, as evidenced by two UNESCO documents:

¹⁹¹ UNESCO Convention Rule 2 of the Annex.

¹⁹² On activities of corporate treasure hunters, see above Part II.

¹⁹³ On the downsides of commercial exploitation of underwater cultural heritage, see UNESCO, 'Submerged Archaeological Sites' (n 32) 1-3; and UNESCO, *The Impact of Treasure-Hunting on Submerged Archaeological Sites* (n 37) 3-13.

¹⁹⁴ W Drye, 'Fight for "World's Richest Shipwreck" Heats Up' *National Geographic* (20 July 2018) <www.nationalgeographic.com/science/2018/07/news-san-jose-shipwreck-colombia-salvage/>.

¹⁹⁵ Kitt (n 5).

¹⁹⁶ See eg Bryant (n 14) 109.

¹⁹⁷ As of December 2019, 63 States have ratified the Convention, yet many 'maritime States', notably Russia and the US, are not among them: up-to-date list of States Parties (n 10).

Article A of the UNESCO 2000 Draft included measures aimed at legal persons of the nationality of a State Party;¹⁹⁸ and suggestion No. 22 of the UNESCO Model for a National Act on the Protection of Cultural Heritage foresees an extensive sanctions regime for conduct of natural persons *and* corporations.¹⁹⁹

At least three avenues could be pursued to achieve such an extension. First, the word ‘nationals’ in Article 16 could be interpreted as encompassing both natural and legal persons. While various treaties include corporations in the definition of the term ‘national’,²⁰⁰ this does not seem to be the case for the UNESCO Convention. In fact, apart from above-mentioned draft Article A, there is—to the authors’ best knowledge—nothing to be found in the *travaux* that supports such a reading.²⁰¹ Second, Article 16 could be amended to include commercial entities; however, the Convention’s amendment procedure is rather cumbersome²⁰² and its reopening unlikely at this stage. The third and most realistic path is to convince States Parties to use their sovereign powers to extend implementing measures to corporations. That is, to draft definitions of offences which apply to natural and legal persons alike, to include sanctions suitable for both types of offenders, and to establish jurisdiction over corporations incorporated in their territory.

Corporate treasure hunters tend to take advantage of international disparities by setting up headquarters in wealthy States with favourable legal and economic conditions in order to exploit underwater cultural heritage in less prosperous regions of the world.²⁰³ By extending implementing measures to include corporations, States Parties, especially those of the global North, could put an end to such practices. Admittedly, the creation of a liability framework for corporate treasure hunters runs the risk of them transferring their seat to more permissive States. Yet other considerations—such as the benefits of a stable business environment—might dissuade corporations from taking this step. Hence, there is at least a chance that corporations might take the high road and bring their business models in line with the Convention.

¹⁹⁸ See above Part IV, Section F, Subsection 4; UNESCO Doc CLT-2000/CONF.201/7 (August 2000) (n 183) 10.

¹⁹⁹ UNESCO Model for a National Act on the Protection of Cultural Heritage, available at <www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/publications-resources/legal-documents/> No. 22. ‘Infringements and Sanctions’.

²⁰⁰ JR Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press 2012) 528.

²⁰¹ The observations of Garabello (n 159) 111 substantiate this finding. As per Dromgoole, *Underwater Cultural Heritage and International Law* (n 13) 242, 244, the nationality principle allows for ‘legal entities’ to be brought within protective schemes for underwater cultural heritage, but she does not refer to the UNESCO Convention in this context.

²⁰² See UNESCO Convention art 31.

²⁰³ See Henn (n 45) 159 who qualifies the US salvage industry as ‘the strongest, largest, best funded, and most technologically advanced in the world’; and Villegas Zamora (n 48) 22 describing the regional shift in commercial pillage activities. The *San José* is, again, illustrative as the two corporate treasure hunters involved in the search for its wreck off the coast of Colombia have their seats in the US and Switzerland respectively, see Drye (n 194); see on the issue also above Part IV, Section B.

VI. CONCLUSION

This comprehensive analysis of Article 16 has yielded clear results. As submitted at the outset, the provision obliges States Parties to take a triad of legislative measures under their domestic law: they must adopt prohibitions in order to protect underwater cultural heritage, make breaches liable to criminal sanctions, and establish their jurisdiction over extraterritorial acts committed by their nationals and persons on board vessels flying their flag. It is this combination of measures of deterrence coupled with a worldwide scope of application that makes Article 16 a key provision of the enforcement regime and of the UNESCO Convention as a whole. Implemented in such a robust way, it has the potential to protect the underwater cultural heritage of the many from the misconduct of a few.