

**ADVISORY COMMITTEE
ON ISSUES OF PUBLIC INTERNATIONAL LAW**

**ADVISORY REPORT
ON THE UNESCO CONVENTION
ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE**

TRANSLATION

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1. INTRODUCTION

In his letter of 16 September 2011 (see Annexe 1) the Minister of Foreign Affairs, together with the State Secretary for Education, Culture and Science, asked the CAVV (Commissie van advies inzake volkenrechtelijke vraagstukken) to prepare an advisory report on the UNESCO Convention on the Protection of the Underwater Cultural Heritage ('the UNESCO Convention').¹

The crux of the problem submitted by the ministers to the CAVV is how the UNESCO Convention relates to the international law of the sea and, in particular, to the United Nations Convention on the Law of the Sea (UNCLOS).² UNCLOS contains few rules on the protection of underwater cultural heritage. The conclusion of a multilateral convention on this subject was considered necessary because technological advances that, for example, allow access to deepwater sites are resulting in undesirable activities such as the commercial exploitation of underwater cultural heritage and the looting of wrecks.

The aim of the UNESCO Convention is to protect and preserve objects of archaeological or historical value found at sea.³ It views the underwater cultural heritage as an integral part of the cultural heritage of humanity and as an important element in the history of peoples and nations. Article 2 of the Convention sets out objectives and general principles that emphasise that the aim of concluding the Convention is to introduce a special regime for the preservation of the underwater cultural heritage and that the States Parties must cooperate for this purpose. This obligation to cooperate is also laid down in general terms in article 303, paragraph 1 of UNCLOS.

The four questions submitted by the ministers to the CAVV are answered in the same order in the following sections.

¹ United Nations Treaties Series I-45694.

² Montego Bay, 10 December 1982; Dutch Treaty Series 1983, 83; 1984, 55.

³ www.unesco.org/en/underwater-cultural-heritage

2. ARTICLES 9 AND 10 OF THE UNESCO CONVENTION

2.1 General

Question 1 of the request for advice asks, in the light of article 3 of the UNESCO Convention, how articles 9 and 10 of the UNESCO Convention relate to the United Nations Convention on the Law of the Sea (UNCLOS), and how the competences of the coastal State as Coordinating State in article 10 relate to the division of jurisdiction between flag and coastal States in UNCLOS. It also asks,

Does it, in your view, make any difference whether the coastal State exercises the competences on its own behalf or on behalf of the international community of States and for the benefit of the international protection of underwater cultural heritage?

Article 3 of the UNESCO Convention reads:

Relationship between this Convention and the United Nations Convention on the Law of the Sea

Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.

Article 9 concerns mutual notification duties of the States Parties and article 10 specifies measures to protect underwater cultural heritage on the continental shelf and in States Parties' exclusive economic zone (EEZ). UNCLOS does not contain any specific provisions on underwater cultural heritage in relation to these maritime zones.⁴ However, article 303, paragraph 1 of UNCLOS does contain a general provision on this subject. The title of article 303 is 'Archaeological and historical objects found at sea'. Paragraph 1 reads as follows:

States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

⁴ Article 149 of UNCLOS concerns the Area and article 303 (2) the contiguous zone.

As will be seen below, article 303, paragraph 1 is of great importance in interpreting articles 9 and 10 of the UNESCO Convention, as these two provisions also make clear that the protection of underwater cultural heritage must be achieved through cooperation between States.⁵

In interpreting articles 9 and 10 the CAVV applies article 31 of the Vienna Convention on the Law of Treaties (VCLT).⁶ Its basic principle is that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. As inquiries made of UNESCO in Paris reveal that no general practice has yet emerged in applying the relevant provisions of the UNESCO Convention, VCLT article 31, paragraph 3(b) concerning subsequent practice in the application of a treaty as an instrument for interpretation cannot be applied.

The 'relevant rules of international law applicable in the relations between parties' referred to in VCLT article 31, paragraph 3(c) naturally include UNCLOS, as confirmed in article 3 of the UNESCO Convention. As regards the relationship between the UNESCO Convention and UNCLOS, it should be noted that it is apparent from the preparatory documents and the literature on the UNESCO Convention that article 9, paragraph 1 (b) of the UNESCO Convention embodies the principle of 'constructive ambiguity'.⁷ When used in connection with the drafting of a treaty, this expression means that a provision is worded in such a way as to be open to more than one interpretation. Where consensus cannot be reached during the negotiations, this is a way of deferring resolution of a problem in the belief that progress can be made in other fields or that the ambiguity will induce States to become parties to the convention on the basis of the interpretation most favourable to them.⁸

⁵ See also the preamble and article 2 (2).

⁶ Dutch Treaty Series 1972, 51; 1985, 79; 1996, 89. UNTS 1155, p. 332.

⁷ For interpretations see for example: C. Forrest, *A New International Regime for the Protection of Underwater Cultural Heritage*, *International and Comparative Law Quarterly*, 2002, 51(3) (2002), pp. 511-554; P. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester, 2002); M. Rau, *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, J. A. Frowein and R. Wolfrum (eds.) 2002 Kluwer, pp. 387-472.

⁸ As the ambiguous nature of the provision concerned originates in the negotiations, there is no point in consulting the preparatory documents as described in VCLT article 32.

However, the CAVV would point to the importance for subjects of international law of having clear rules govern the political and legal relationships between them. It recognises the problems that confronted the negotiators of the UNESCO Convention. Nonetheless, it considers that by international standards for drafting treaties the wording of the Convention is unclear in a number of places, even allowing for the need to resort to constructive ambiguity.

In the CAVV's opinion, the most important consideration when formulating rights and obligations is to ensure that they are clear and unambiguous, particularly where the impression could exist that they may derogate from other rights and obligations. In view of article 3 of the UNESCO Convention, this means that where various interpretations of provisions of the UNESCO Convention are possible, the CAVV prefers the interpretation that is most consistent with UNCLOS.

2.2 Article 9 of the UNESCO Convention

The introductory sentence of article 9, paragraph 1 reads as follows:

All States Parties have a responsibility to protect underwater cultural heritage in the exclusive economic zone and on the continental shelf in conformity with this Convention.

This generally worded obligation emphasises the responsibility of all States Parties to protect underwater cultural heritage and thus reflects, albeit in somewhat different words, UNCLOS article 303, paragraph 1. This obligation forms the context for the other paragraphs of article 9.

Article 9, paragraph 1 (a) and (b) sets out the requirements to be met by the States Parties in relation to the discovery of or activities pertaining to underwater cultural heritage. Article 9, paragraph (1)(a) reads as follows:

Accordingly:

(a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;

This imposes an obligation on the coastal state to require its nationals or vessels flying its flag to report to it discoveries of and activities directed at underwater cultural heritage in its EEZ or on its continental shelf. This obligation is an application of jurisdiction founded on the active personality principle.⁹

Article 9, paragraph 1 (b) reads as follows:

- (b) in the exclusive economic zone or on the continental shelf of another State Party:
 - (i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;
 - (ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.

Article 9, paragraph 1 (b), opening words

The words ‘another State Party’ in the opening words of this provision can only be understood as referring to a *coastal* State. Article 9, paragraph 1 (b) is intended to cover situations in which persons who do not have the nationality of the coastal State concerned or vessels that do not fly its flag engage in activities directed at underwater cultural heritage located in the coastal State’s EEZ or on its continental shelf.

The constructive ambiguity referred to in section 2.1 of this advisory report concerns the interpretation of article 9, paragraph 1 (b) (i) and (ii).

Article 9, paragraph 1 (b) (i)

The constructive ambiguity in article 9, paragraph (b) (i) concerns the interpretation of the words ‘States Parties’ and ‘that other State Party’. The most obvious interpretation based on the text is that the words ‘that other State Party’ refer back to ‘another State Party’ in the opening words and therefore to the coastal State in whose EEZ or on whose continental shelf the discovery or activity takes place. On this basis the term ‘States Parties’ then means the States whose nationals are involved or whose flag is flown by the vessel concerned. Both these States (‘them’)

⁹ The active personality principle establishes jurisdiction over nationals abroad.

and the relevant coastal State ('that other State Party') must be informed of the activities or discovery in keeping with a duty imposed by the State of nationality or the flag State, as the case may be. The State of nationality and the flag State have jurisdiction under the active personality principle. On the basis of this principle, States are entitled to impose obligations on their nationals or on vessels that fly their flag even when such nationals or vessels are not within their territory.

A less obvious interpretation – but one that cannot be excluded – is that 'States Parties' includes the coastal State concerned, so that not only the States of nationality or the flag States but also the coastal State can or must impose the reporting obligation on '*the* national' and '*the* master' (i.e. not '*its*') to report to it ('that other State Party') and to the flag State concerned and/or the State or States of nationality concerned ('them').

The latter interpretation attributes a new competence to the coastal State in its EEZ and on its continental shelf, in addition to the competences laid down in UNCLOS. This would, after all, grant the coastal State the right to impose obligations on non-nationals and on masters of vessels flying a foreign flag to report on activities and discoveries relating to underwater cultural heritage in its EEZ or on its continental shelf. This implies a certain shift in the distribution of competences between the coastal State and other States, since expanding the coastal State's competences necessarily limits to some extent the exercise by other States of the freedom of the seas. Although this is not the CAVV's preferred interpretation, it could be seen as upholding the duty to protect and cooperate as laid down in UNCLOS article 303, paragraph 1 and therefore remains within the scope of article 3 of the UNESCO Convention.

It should also be noted that paragraphs 3 and 4 of article 311 UNCLOS provide for a special procedure for the conclusion of agreements modifying or suspending the operation of UNCLOS provisions. This procedure was not followed during the negotiations on the UNESCO Convention. This suggests that all States involved in the negotiations on the UNESCO Convention, including the Netherlands, considered that the UNESCO Convention did not in any event modify or suspend the operation of any UNCLOS provisions.

As regards the interpretation of article 9, paragraph 1 (b) (i), the CAVV concludes that the interpretation by which only the flag States and States of nationality have an obligation to impose a reporting duty is preferable. First, for the reasons explained in section 2.1, the CAVV chooses the interpretation most consistent with the law of the sea. Second, this interpretation is most consistent with the wording of article 9, paragraph 1 (b) (i).

Article 9, paragraph 1 (b) (ii)

The interpretation of article 9, paragraph 1 (b) (ii) most consistent with the law of the sea is that the words ‘a State Party’ mean a flag State or a State of nationality. Such State or States must then inform ‘all other States Parties’, i.e. including the coastal state in whose EEZ or on whose continental shelf the activity is taking place or the discovery has been made.

Here too, however, in view of the constructive ambiguity an alternative interpretation cannot be excluded. In this provision ‘a State Party’ could mean not only the State of nationality or the flag State but also the coastal State to which the discovery or activity must be reported (‘to it’) and which then has a duty to inform all other States Parties. Here too, this interpretation is supported by the fact that (b) (ii) provides that the duty to report rests on ‘*the* national or master of *the* vessel’ and not ‘*its* national or master of *its* vessel’. What has been said above about article 9, paragraph 1 (b) (i) concerning a certain shift in the distribution of competences between the coastal State and other States also applies here.

As in the case of article 9, paragraph 1 (b) (i), the CAVV concludes that it is preferable to interpret article 9, paragraph 1 (b) (ii) as meaning that the reporting duty rests only on the flag State or the State of nationality.

Summary and advice on article 9, paragraph 1 (b) of the UNESCO Convention

Article 3 of the UNESCO Convention requires that article 9 of that Convention be interpreted and applied in a manner consistent with the law of the sea.

According to one interpretation of article 9, paragraph 1 (b) (i) and (ii), a coastal State obtains the right to impose a duty on nationals of other States or on masters of vessels flying a different flag to report the discovery of or activities directed at underwater cultural heritage in its own EEZ and on its own continental shelf. This would result in a certain shift in the distribution of competences between coastal and flag States. However, as this is only a minor shift and could be regarded as an implementation of UNCLOS article 303, paragraph 1, the requirements of article 3 of the UNESCO Convention are fulfilled.

The CAVV prefers to interpret article 9, paragraph 1 (b) (i) and (ii) as meaning that only the State of nationality or the flag State has the obligation to impose a reporting duty on its nationals or the masters of vessels flying its flag. Not only does this interpretation of the text of article 9, paragraph 1 (b) (i) and (ii) stay closer to the 'ordinary meaning' of the terms (VCLT article 31, paragraph 1), but it is also consistent with the law of the sea, independently of the catch-all provision of UNCLOS article 303, paragraph 1. This interpretation is based, after all, on the active personality principle as a generally accepted principle of international law.

The CAVV would also point out that, given the different interpretations by States Parties of article 9, paragraph 1 (b), it is possible that no State Party whatever will impose a duty to report the discovery or of activities directed at underwater cultural heritage.

The CAVV advises the ministers that if the Kingdom becomes a party to the UNESCO Convention they should choose, when making the declaration required by article 9, paragraph 2, to apply either article 9, paragraph 1 (b) (i) or article 9, paragraph 1 (b) (ii), and that in either case they should adopt the interpretation that the reporting duty applies only to the State of nationality and the flag State. The CAVV does not express a preference for either alternative. The consequence of

making an express declaration to this effect when becoming a party to the UNESCO Convention is that the Kingdom, as a coastal State, should leave it to other States Parties to impose the duty to report on activities in the Dutch EEZ or on the Dutch continental shelf with regard to underwater cultural heritage by nationals of other States or masters of vessels flying another flag. The CAVV also recommends that the Dutch representatives in international discussions of the UNESCO Convention should remain alert to the possibility that a gap in the reporting duty may arise and that the Dutch authorities should hold consultations with the other parties if there is a danger of this happening.

2.3 Article 10 of the UNESCO Convention

As regards article 10 the request for advice focuses on the competences of the coastal State as Coordinating State, i.e. the competences which this State derives from article 10, paragraphs 3 to 7.

The CAVV would point out in this connection that article 10, paragraph 1 contains an obligation binding on all parties to grant an authorisation for an activity directed at underwater cultural heritage located in the EEZ or on the continental shelf only in conformity with article 10. Article 10, paragraph 2 concerns the right of a coastal State to prohibit or authorise activities directed at underwater cultural heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law, including UNCLOS.¹⁰ This provision therefore describes the competence of the coastal State to act in its own interests and not its competence as Coordinating State. In the CAVV's opinion, article 10, paragraph 2 is of a declaratory nature.

Article 10, paragraph 3 (a) imposes an obligation on the Coordinating State, where there is a discovery of underwater cultural heritage, to consult all other States Parties that have declared an interest under article 9, paragraph 5 on how best to protect the underwater cultural heritage concerned. Article 10, paragraph 4 also gives the Coordinating State the right to take practicable measures in accordance with the Convention to prevent immediate danger to the underwater cultural heritage. If necessary, it need not consult the other interested States Parties

¹⁰ Articles 56 and 77.

beforehand. Paragraph 5 of article 10 describes the measures of protection in the abstract, with points (a) and (b) providing that the consulting States, including the Coordinating State, may decide that a State other than the Coordinating State will implement such measures. Article 10, paragraph 6 creates a framework for the competences of the Coordinating State and provides that it acts 'on behalf of the States Parties as a whole and not in its own interest' and that such action does not constitute a basis 'for the assertion of any preferential or jurisdictional rights not provided for in international law', including UNCLOS. Finally, article 10, paragraph 7 concerns wrecks of State vessels and aircraft. Activities directed at such wrecks require the agreement of the flag State and the collaboration of the Coordinating State, unless paragraph 2 or paragraph 4 of Article 10 is applicable.

The CAVV notes that paragraph 1 and paragraphs 3 to 7 of article 10 give more substance to the obligation to protect underwater cultural heritage in an EEZ and on the continental shelf through cooperation. It is the obligation to cooperate, and not an increase in the unilateral competence of the coastal State, that underlies these provisions of article 10. This is apparent not only from the notion of consultation entailed by the concept of the Coordinating State and from article 10, paragraph 6, which is expressly intended to prevent the assertion of rights by the coastal State solely in its own interest, but also from the fact that the Coordinating State need not be the coastal State (see article 10, paragraph 3 (b)) and that the interested States may agree that a state other than the coastal State, if it acts as Coordinating State, may take action (see article 10, paragraph 5 (a)).

Summary and advice on article 10 of the UNESCO Convention

In the CAVV's opinion, the competences granted to the coastal State as Coordinating State under paragraphs 3 to 7 of article 10 represent only a minor shift in the balance of competences between coastal and flag States. The system described in article 10, in particular in paragraph 6, of the UNESCO Convention provides sufficient safeguards against abuse. As the CAVV considers that article 10 can be regarded as implementing UNCLOS article 303, paragraph 1, this justifies the minor shift in the balance of competences in favour of the coastal State not provided for in the existing law of the sea.

As regards the question of the relationship between the competences of a coastal State as Coordinating State in article 10 and the division of jurisdiction between coastal and flag States in UNCLOS, the CAVV would note that if a coastal State acts as Coordinating State pursuant to article 10, paragraph 3 et seq. it exercises this competence on behalf of the States Parties as a whole. In the CAVV's opinion, article 10, paragraph 6 excludes the possibility that a coastal State that is acting as Coordinating State could exercise these competences in its own interest. It follows that article 10, paragraph 3 et seq. of the UNESCO Convention can be regarded as implementing UNCLOS article 303, paragraph 1.

3. POSSIBLE PRECEDENT SET BY THE UNESCO CONVENTION

In answer to the second question, namely:

Can you express an opinion on whether and, if so, to what extent the UNESCO Convention will set a precedent for the division of jurisdiction at sea?

the CAVV considers it unlikely that the UNESCO Convention will set a precedent for the division of jurisdiction at sea in other areas. There is no evidence of any attempts to extend what, as noted above, is only a minor shift in the distribution of competences between coastal and flag States in the UNESCO Convention to areas other than the protection of underwater cultural heritage.

4. THE NETHERLANDS' ACTIONS AS THE OWNER OF DUTCH EAST INDIA COMPANY WRECKS

The request for advice also raises a third question, namely:

How would ratification of the UNESCO Convention affect the ability of the Netherlands to act as the owner of Dutch East India Company (VOC) wrecks?

The CAVV has learned from official sources that the Netherlands has halted the practice of concluding contracts for the salvage of VOC wrecks. The emphasis is now on the public interest in conserving these wrecks or their contents rather than on the economic value of salvaging them. Ownership is currently therefore important not so much in order to exercise title to the VOC wrecks as to ensure their protection through international frameworks.

The CAVV notes that the Kingdom, as a party to the UNESCO Convention, would have an instrument for blocking unilateral claims of coastal States (possibly based on national laws). Article 9, paragraph 5 gives each State Party the right to declare to a coastal State in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located its interest, on the basis of a verifiable link, in being consulted on how to ensure the effective protection of that underwater cultural heritage. Under article 9, paragraph 5 a verifiable link means especially a cultural, historical or archaeological link. In the CAVV's opinion such a link can easily be shown by the Netherlands in the case of VOC wrecks.

5. OTHER WAYS OF PROTECTING UNDERWATER CULTURAL HERITAGE INTERNATIONALLY

The last question put by the ministers is:

Are there, in your opinion, ways in which the Netherlands can adequately protect underwater cultural heritage internationally other than under the UNESCO Convention?

The CAVV has studied the following possibilities.

One way of protecting underwater cultural heritage when unacceptable activities are discovered is to request the coastal State to take protective measures in its EEZ or on its continental shelf. Under UNCLOS, however, the coastal State is only competent to act against its own nationals and vessels flying its own flag or to prevent infringement of its sovereign rights or jurisdiction in these maritime zones. It could also act as authorised representative for the Netherlands, in so far as the Netherlands itself would be competent to act under international law. The coastal State would also have to be willing to cooperate and able to take protective measures under its own legislation.

In the case of VOC vessels it would also be possible to institute legal proceedings before a court of competent jurisdiction, in the State of the person or organisation carrying out the unacceptable activities or elsewhere.

Another possibility would be to conclude a bilateral treaty with a coastal State. Even then, however, the Netherlands would be dependent on the cooperation of the State concerned and would have to take account of the limitations on the jurisdiction of the coastal State under the international law of the sea. Where speed is of the essence, an unacceptable delay could occur before the treaty enters into force owing to the need to follow legislative and constitutional procedures.

ANNEXE 1

Ministry of Foreign Affairs

Professor M. Kamminga
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Our ref.
DJZ/IR-177/2011

Date: 16 September 2011
Re: Request for advice on the UNESCO Convention on the Protection of
the Underwater Cultural Heritage

Dear Professor Kamminga,

The State Secretary for Education, Culture and Science and I would like to request an advisory report on the UNESCO Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001, UNTS I-45694).

The Convention entered into force on 2 January 2009. It was drawn up in response to the increasing looting and destruction of underwater cultural heritage by treasure hunters. It also regulates cooperation in the management and protection of underwater cultural heritage between States with different interests.

The Convention was adopted by the UNESCO General Conference in the autumn of 2001, with 87 countries voting in favour, four (Norway, the Russian Federation, Turkey and Venezuela) voting against and fifteen (including the Netherlands) abstaining. There are now 37 States Parties to the Convention, of which 34 are also party to the United Nations Convention on the Law of the Sea (UNCLOS).

The main reason why the Netherlands abstained was that the Convention, especially articles 9 and 10, may possibly be inconsistent with the balance of jurisdictional rights and duties between coastal and flag States under the international law of the sea in general and UNCLOS in particular. Although the Netherlands attaches great importance to and has an interest in the international protection of underwater cultural heritage, it has not ratified the Convention.

The Netherlands National Commission for UNESCO will publish a report in the third quarter of 2011 advising the Ministry of Education, Culture and Science on the

possible added value of becoming party to the UNESCO Convention for Dutch efforts to protect underwater cultural heritage.

We should like to receive an advisory report from the CAVV on the relationship between the UNESCO Convention and the law of the sea, as laid down for example in UNCLOS. I have the following specific questions:

- 1) Article 3 of the Convention states, 'Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea' and that the Convention 'shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.'
In the light of this provision, I am particularly interested in the relationship of:
(a) the reporting and notification obligation in article 9 to the reporting rules in UNCLOS;
(b) the competences of the coastal State as Coordinating State in article 10 to the division of jurisdiction between flag and coastal state as provided for in UNCLOS. Does it, in your view, make any difference whether the coastal State exercises the competences on its own behalf or on behalf of the international community of States and for the benefit of the international protection of underwater cultural heritage?
- 2) Can you express an opinion on whether and, if so, to what extent the UNESCO Convention will set a precedent for the division of maritime jurisdiction at sea?
- 3) How would ratification of the UNESCO Convention affect the ability of the Netherlands to act as owner of Dutch East India Company (VOC) wrecks?
- 4) Are there, in your opinion, ways in which the Netherlands can adequately protect underwater cultural heritage internationally other than under the UNESCO Convention?

I would appreciate receiving your advisory report before 1 November 2011 if possible.

Yours sincerely,

Uri Rosenthal
Minister of Foreign Affairs

ANNEXE 2

List of members of the CAVV

M.T. Kamminga, chair

K.C.J.M. Arts

A. Bos

C.M. Brölmann

M.M.T.A. Brus

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M.A.J. Hector