

CONFERENCE PAPER

Underwater cultural heritage: an international law perspective

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Preamble

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Abstract

The present international law regime leaves doubts as regards the objective of protection of the underwater cultural heritage. A provision included in the 1982 treaty of general codification of international law of the sea can be understood in a counterproductive meaning, as implying freedom of fishing for this heritage under a first-come-first-served approach. The 2001 treaty that could specifically ensure the effective protection of the heritage has not yet received sufficiently broad participation by States.

Keywords

underwater cultural heritage · international law · treaty law · admiralty law · looting · State ships or aircraft

1 Introduction

The aqualung, an automatic compressed air diving device, was used for the first time in 1943 and allowed the inventors, Émile Gagnan and Jacques Cousteau, to explore and film underwater. Since then, seabed exploration has taken advantage of more and more advanced and sophisticated technology. To give only two examples, in 1969 the wreck of an aircraft was located in Santa Monica Bay by towing from a ship for ten days a side-looking sonar through dark waters to find patterns of small objects and by plunging television cameras to check the nature of them (Bascom, 1987). The expedition that Robert Ballard organized in 1997 to explore the seabed in an area of the Mediterranean Sea between Italy and Tunisia (Skerki Bank Deep Sea Project), utilised a support ship, a nuclear-powered research submarine of the United States Navy and a remotely operated vehicle (Ballard, 1998).

Technological developments have greatly improved human knowledge of the sea and have facilitated awareness of all historical information to be

drawn from underwater cultural heritage. They have increased the interest of the general public for this kind of heritage and widespread appreciation of it. However, at the same time, as the seabed has become more easily accessible, technological developments have determined a new threat for the preservation of underwater cultural heritage.

The greatest exhibition of human civilization lies on the seabed. According to some estimates, in the past centuries almost 5 % of all seagoing ships were lost every year, be it for acts of God, human errors, naval battles or other causes (Throckmorton, 1987). Today the capacity of several States and private entities to use very sophisticated technological means to explore the seabed at increasing depths not only allows access to a unique cultural heritage, but also entails the risk of such heritage being looted or used for private commercial gain under a first-come-first-served approach. Given this general picture, the questions may be asked whether we have an international legal regime addressing underwater cultural heritage and, if so, whether it is sufficient to ensure its protection.

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2 The UNCLOS regime

The present international law regime for the protection of underwater cultural heritage (Strati, 1995), as resulting from the United Nations Convention on the Law of the Sea (Montego Bay, 1982)¹, is disappointing, to say the least. Out of 320 articles and nine annexes, the UNCLOS devotes to the subject only two provisions, namely Arts. 149 and 303, that show gaps and contradictions.

Art. 303, para. 1, sets forth a general obligation of protection and cooperation which applies to all archaeological and historical objects, wherever at sea they are found:

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

Despite its broad content, some legal consequences can be drawn from this provision. First, a State that knowingly destroys or allows the destruction of objects belonging to underwater cultural heritage can be held responsible for a breach of an international obligation. Second, a State that persistently disregards the requests by other States to negotiate about forms of cooperation aimed at protecting underwater cultural heritage can be held responsible for an internationally wrongful act as well.

As regards the maritime zones falling under the sovereignty or jurisdiction of the coastal State, it is implied in the UNCLOS that the full sovereignty granted to the coastal State within the internal maritime waters and the 12-mile territorial sea also covers underwater cultural heritage. Beyond the territorial sea, Art. 303, para. 2, UNCLOS allows the coastal State to prevent the removal of archaeological and historical objects in the waters between 12 and 24 nautical miles (the so-called archaeological contiguous zone) (Aznar, 2014)².

The main problem with Art. 303 is that the UNCLOS does not establish any regime relating to underwater cultural heritage found in the space located between the external limit of the 24-mile contiguous zone and the 200-mile external limit of the exclusive economic zone or continental shelf. The rights granted to the coastal State within this space relate to the exploration and exploitation of its natural resources and cannot be extended to man-made artifacts, such as those belonging to underwater cultural heritage³. This legal vacuum greatly threatens the protection of cultural heritage, as it brings into the picture the principle of freedom of the seas that could easily lead to a first-come-first-served approach. Availing himself of this

principle, any person on board a ship could explore the exclusive economic zone or the continental shelf adjacent to any coastal State, bring archaeological and historical objects to the surface, become their owner under a domestic legislation (in most cases, the flag State legislation), remove the objects for his or her own benefit and sell them on the market. If this were the case, there would be no guarantee that the objects would be disposed of for public benefit rather than for private commercial purposes and personal gain.

The danger of freedom of fishing for underwater cultural heritage under the UNCLOS regime is multiplied by Art. 303, para. 3, that subjects the whole of Art. 303 to the law of salvage and other rules of admiralty:

"Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges".

The mysterious expression "the law of salvage or other rules of admiralty" refers to a body of customary domestic law that, lacking specific legislative provisions, is applied in some countries, in particular the United States. In many countries, the notion of salvage is only related to the attempt to save a ship, or property carried by it, from imminent marine peril. However, United States courts apply it, as a part of the so-called admiralty law, also to ancient sunken ships and to objects removed from wrecks, which, far from being in peril, lay on the seabed, having been lost since many years.

For example, the United States Court of Appeals for the 4th Circuit in the decision *RMS Titanic Inc. v Haver* of 24 March 1999 stated that the law of salvage and the law of finds, which are both parts of admiralty law, constitute a "venerable law of the sea". It is supposed to apply in all the oceans and seas of the world, to have arisen from custom among "seafaring men" and to have "been preserved from ancient Rhodes (900 BCE), Rome (Justinian's Corpus Juris Civilis) (533 CE), City of Trani (Italy) (1063), England (the Law of Oleron) (1189), the Hanse Towns or Hanseatic League (1597), and France (1681), all articulating similar principles"⁴. Coming to the practical result of such an outstanding display of legal erudition, the law of salvage, applying where the owner of the wreck or objects is known, gives the salvor a lien (or right *in rem*) over the object. The law of finds, applying where the owner of the wreck or objects is not known, means that "a person, who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession,

¹ Hereinafter: UNCLOS.

² "In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article [= the contiguous zone] without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article". In fact, the wording of Art. 303, para. 2, is far from clear.

³ In 1980, during the negotiations of the UNCLOS, an informal proposal was submitted by seven States (Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia) to extend the jurisdiction of the coastal State to the underwater cultural heritage found on the continental shelf (doc. C.2/Informal Meeting/43/REV. 3). However, the proposal was not adopted.

⁴ In *International Legal Materials*, 1999, p. 807.

becomes the property's owner"⁵. In fact, the American model leads to a first-come-first-served or freedom-of-fishing approach based on the destination of underwater cultural heritage for the purpose of personal commercial interest. Private appropriation and sale are the most likely destiny of the removed artefacts which are considered as goods on the market.

The fact remains that such exorbitant, although "venerable", bodies of law are complete strangers in the legislation of the several States that follow a model based on the public interest to preserve the cultural heritage for the general benefit, in particular for research and exhibition purposes. For example, in Italy, according to the 2004 Code of Cultural Properties and Landscape, research in the field of archaeological and cultural properties is reserved for the Ministry for Cultural Properties and Activities or to the public or private subjects who have been authorized by the Ministry. Anyone who fortuitously discovers cultural properties is bound to inform the competent public authority within 24 hours. The removal and taking into custody of the properties are permitted only where there is no other means to ensure their security until the intervention of the public authorities. All the cultural properties found by anyone in the subsoil or on the seabed belong to the State *domesne*, if immovable, or to the inalienable patrimony of the State, if movable. The finder is entitled to a reward which is paid by the Ministry and cannot exceed one-fourth of the value of the properties (if the properties are found at sea, the reward corresponds to one-third of their value)⁶. The Italian legislation applies within the 12-mile territorial sea and, at least according to some judgments, to ships flying the Italian flag.

Coming back to the UNCLOS, if there is a conflict between the general objective to protect underwater cultural heritage (Art. 303, para. 1), on the one hand, and salvage law and other rules of admiralty, on the other, the latter does prevail (Art. 303, para. 3). This is really astonishing and worsens the picture of Art. 303. Does this provision, while apparently protecting underwater cultural heritage, strengthen a regime which results in the use of much of this heritage for commercial purposes, regardless of its importance from the cultural point of view? Does Art. 303 give an overarching status to a body of rules that cannot provide any effective means for the protection of the heritage in question and could be understood as a covert invitation to the looting of underwater cultural heritage? This doubt is far from being trivial, especially for those countries where national legislation gives priority to the State's duty to preserve cultural heritage for purposes of public interest.

The concerns are not substantially attenuated by the

fact that, because of the lack of corresponding concepts, the very words "salvage" and "admiralty" could not be properly translated into languages different from English. In the French and Spanish official texts of the UNCLOS they are rendered with expressions – "droit de récupérer des épaves et (...) autres règles du droit maritime"; "las normas sobre salvamento u otras normas del derecho marítimo" – which imply a broader and quite different meaning⁷.

Some prospective remedies for the unsatisfactory regime of the UNCLOS could be drawn from Art. 303, para. 4. It provides that Art. 303 does not prejudice "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature". The UNCLOS itself seems to allow the drafting of more specific treaty regimes which can ensure better protection of the underwater cultural heritage, filling the gaps and eliminating the contradictions that it has generated.

The second UNCLOS provision on underwater cultural heritage (Art. 149) deals only with the heritage found in the so-called Area, that is the seabed and ocean floor beyond the 200-mile limit of national jurisdiction. It provides that "all objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin".

The provision appears devoid of details that could ensure its practical application. However, it embodies two promising ideas. First, Art. 149 shows a preference for uses of archaeological and historical objects that promote the "benefit of mankind as a whole". Private interests, such as the disposal of the objects for trade and personal gain, are given little weight, if any. Second, some categories of States which have a link with the objects are given preferential rights, although Art. 149 does not specify either the content of these rights or the manner in which they should be harmonized with the concept of "benefit of mankind as a whole". Despite its vague wording, Art. 149 seems in conceptual contradiction with the freedom of fishing regime implied in Art. 303, para. 3.

It is true that the subject of underwater cultural heritage was taken into consideration only in the last period of UNCLOS negotiations, which lasted for about ten years overall. However, the lack of time and the need to bring complex negotiations to an end cannot be seen as a justification for such a contradictory and counterproductive regime.

⁵ Ibidem, p. 808.

⁶ The reward may be paid either in money or through the cession of part of the properties.

⁷ Indeed, the meaning of Art. 303, para. 3, UNCLOS is completely different in the English text, on the one hand, and in the French and Spanish texts, on the other (the Arab, Chinese and Russian official texts should also be checked). This is an interesting instance for the application of Art. 33 of the Convention on the Law of Treaties (Vienna, 1969), relating to the interpretation of treaties authenticated in two or more languages.

3 The CPUCH regime

3.1 General aspects

On 2 November 2001, the Convention on the Protection of the Underwater Cultural Heritage⁸ (O’Keefe, 2002; Garabello & Scovazzi, 2003; Aznar, 2004; Dromgoole, 2006; Dromgoole, 2013; Lowther et al., 2025) was adopted in Paris within the framework of the United Nations Educational, Scientific and Cultural Organization (UNESCO). It entered into force on 2 January 2009, after the deposit of the twentieth instrument of ratification or accession. At the time of writing, it has been ratified by 81 States.

The CPUCH applies to “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”⁹. It can be included among the “other international agreements” which States are allowed to conclude under the already mentioned Art. 303, para. 4, UNCLOS.

The CPUCH, which was the outcome of a complex negotiation, was adopted by vote (87 States in favour, 4 against and 15 abstentions). However, the lack of *consensus* at the moment of its adoption should not be considered as an irreparable flaw. Not only did the great majority of developing countries vote in favour, but also several among the industrialized countries and maritime powers were satisfied with the outcome of the negotiations. Looking at its content, the CPUCH can be understood as a reasonable defence against the results of the contradictory and counterproductive regime of the UNCLOS. The basic defensive tools are the elimination of the undesirable effects of the law of salvage and finds, the exclusion of a “first come, first served” approach for the heritage found in the exclusive economic zone or on the continental shelf and the strengthening of regional cooperation.

3.2 The exclusion of law of salvage and finds

While most countries participating in the negotiations for the CPUCH concurred in rejecting the application of the law of salvage and finds to underwater cultural heritage, a minority of States were not prepared to accept an absolute ban. To achieve a reasonable compromise, Art. 4 provides as follows:

“Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection”.

This provision is to be understood in connection with Art. 2, para. 7 (“underwater cultural heritage shall not be commercially exploited”) and with the Annex, which forms an integral part of the CPUCH. In

particular, under Rule 2 of the Annex:

“The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods”.

While not totally excluding the application of law of salvage and law of finds, the CPUCH regime has the practical result of preventing all the undesirable effects of the application of these kinds of rules. Undisclosed activities and freedom of fishing for archaeological and historical objects are clearly banned.

3.3 Jurisdiction in the Exclusive Economic Zone

The majority of the States participating in the negotiations were ready to extend the jurisdiction of the coastal State to underwater cultural heritage found in the exclusive economic zone or on the continental shelf. However, a minority of States assumed that the extension of the jurisdiction of coastal States beyond the limit of the territorial sea would have altered the delicate balance embodied in the UNCLOS between the rights and obligations of the coastal State and those of other States. As a compromise, the CPUCH provides for a three-step procedural mechanism (reporting, consultations and urgent measures), which involves the participation of all the States linked to the heritage.

As regards reporting, the CPUCH bans secret activities or discoveries. States Parties must require their nationals or vessels flying their flag to report activities or discoveries to them. If the activity or discovery is located in the exclusive economic zone or on the continental shelf of another State Party, the CPUCH sets forth two alternative solutions:

“(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”¹⁰.

States Parties must also notify the Director-General of UNESCO who must promptly make the information available to all States Parties.

As regards consultations, the coastal State is bound to consult all States Parties which have declared their interest in being consulted on how to ensure the effective protection of the underwater cultural heritage in question. The CPUCH provides that any State Party may declare such an interest and that this “declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link,

⁸ Hereinafter: CPUCH.

⁹ Art. 1, para. 1, a.

¹⁰ Art. 9, para. 1, b.

to the underwater cultural heritage concerned”¹¹. The coastal State is entitled to co-ordinate the consultations, unless it expressly declares that it does not wish to do so, in which case the States Parties having declared an interest in being consulted shall appoint another coordinating State.

As regards urgent measures, the CPUCH provides as follows:

“Without prejudice to the duty of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage, including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties”¹².

The right of the coordinating State to adopt urgent measures is an important aspect of the CPUCH regime. It would have been contradictory to subordinate a right to act urgently to the conclusion of consultations that are normally expected to last for some time. It would also have been illusory to grant this right to the flag State, considering the risk of activities carried out by vessels flying a flag of convenience. The CPUCH clearly provides that in coordinating consultations, taking measures, conducting preliminary research and issuing authorizations, the coordinating State acts “on behalf of the States Parties as a whole and not in its own interest”¹³. Any such action cannot in itself constitute a basis for the assertion of any preferential or jurisdictional rights. It is regrettable that, despite all the efforts to reach a reasonable compromise, a consensus could not be achieved on the CPUCH as a whole, because of the fear of some maritime powers that the right to adopt urgent measures could be seen as an instance of “creeping” coastal State jurisdiction.

The procedural mechanism envisaged in the CPUCH has been put in effect for the first time in the case of the submarine heritage of the Skerki Bank. Located at the western entrance of the Sicilian Channel and connecting the western and eastern Mediterranean basins, the Skerki Bank has been since ancient times one of the busiest shipping routes in the world. Rocky elevations reaching almost the surface of the sea and invisible to navigators make it

a particularly dangerous seaway and the place where hundreds of ships have been wrecked. In 2018, Italy notified the discovery of ancient and modern shipwrecks in the area of the Skerki Bank, located on the continental shelf of Italy and Tunisia. Seven other Mediterranean States (Algeria, Croatia, Egypt, France, Morocco, Spain and Tunisia), declared their interest in being consulted and a Coordination Committee was established. In 2022, an international underwater archaeological mission under the aegis of UNESCO was organized, using a French research vessel¹⁴. The results of the mission confirm that the area in question is full of historical, archaeological and geographical information (UNESCO, 2023). Moreover, the mission can be seen as a model to be replicated, *mutatis mutandis*, in other seas of the world within the CPUCH framework.

3.4 Sunken State ships and aircraft

The question of sunken State ships and aircraft, including warships, was much discussed during the negotiations for the CPUCH. Some States took the position that no special regime should be granted to such ships and aircraft. According to other States, the flag State retains title indefinitely to its sunken craft, wherever it is located, unless title has been expressly abandoned or transferred by it.

While the UNCLOS does not deal with this question, the CPUCH makes a distinction, depending on where such heritage is located. In the exclusive economic zone or on the continental shelf, “no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State”¹⁵. On the contrary,

“within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft”¹⁶.

The hortatory character of this provision (“should inform”) has attracted the criticism by States which are in favour of the indefinite retention of title by the flag State on State craft.

Notably, in deciding a case to which the CPUCH was not applicable, the United States District Court for the Middle District of Florida, Tampa Division

¹¹ Art. 9, para. 5. The concept of “verifiable link” is not defined in the CPUCH (incidentally, it would be very difficult to draft any definition in this regard).

¹² Art. 10, para. 4.

¹³ Art. 10, para. 6.

¹⁴ Tunisia acted as coordinating States for the part of the mission taking place on the Tunisian continental shelf and Italy for the part of the mission taking place on the Italian continental shelf.

¹⁵ Art. 10, para. 7.

¹⁶ Art. 7, para. 3.

(order of 22 December 2009) and the United States Court of Appeals for the Eleventh Circuit (judgment of 21 September 2011) found that the frigate *Nuestra Señora de las Mercedes*, which sunk in 1804 during a battle with a British squadron, was a State ship belonging to Spain. Consequently, the ship and its cargo enjoyed sovereign immunity from United States jurisdiction (Aznar, 2019; Scovazzi, 2019).

4 Specific agreements

The CPUCH devotes one of its provisions to bilateral, regional or other multilateral agreements:

1. States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention.
2. The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements¹⁷.

The provision paves the way to a multiple-level protection of underwater cultural heritage. The key to coordination between treaties applicable at different levels is the criterion of “better protection” (or “added value”), in the sense that regional and sub-regional treaties are concluded to ensure a better level of protection than that granted by treaties adopted at a more general level.

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¹⁷ Art. 6.

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