

Comments on the question of the harmony of the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage with the UN Convention on the Law of the Sea¹

The Convention on the Protection of the Underwater Cultural Heritage was adopted by the Member States of UNESCO in 2001 to combat the extensive pillage, commercial exploitation and illicit or unethical traffic of underwater cultural heritage. It is a comprehensive instrument, which fully addresses these issues in all waters. It considerably increases the legal protection of sites *in situ* and prohibits the illicit or unethical recovery and traffic of artefacts. The Convention also responds to the need for scientific guidance and the facilitation of State cooperation. It does not address the ownership of heritage nor does it change maritime zones.

The 2001 UNESCO Convention is the conclusion of a long and laborious effort made by the international community to adopt a comprehensive and effective framework of rules that can achieve the preservation of underwater cultural heritage. In its overall approach the Convention functions in a similar way to a protection plan of a historic city centre. It provides a blanket protection of cultural heritage, setting ethical and scientific rules, but does not take a 'best of approach'. It also does not touch the rights of owners, in any other issue than in the question of the need to protect cultural values of interest to humanity.

While the Convention is highly welcomed by the scientific community and already ratified and effectively implemented by a large number of States, the Convention is still not adhered to by some States, among others those, which fear a possible discordance with a treaty of great standing, the United Nations Convention on the Law of the Sea 1982 (UNCLOS).

Consequently, and in order to facilitate the adherence of these States to the 2001 Convention, it is of importance to fully explain and illustrate the harmony of the 2001 UNESCO Convention with UNCLOS.

The following text will:

- Comment on the complementary relationship between the 2001 Convention and UNCLOS;
- Explain why the 2001 Convention does not regulate any issue in contradiction to UNCLOS and why it is fully compatible, also due to the obligation to always interpret it in a positive manner, i.e. in harmony with UNCLOS; and
- Explain why the 2001 Convention does not contain any creeping jurisdiction.

¹ *Disclaimer: Note that this text is provided by the UNESCO Secretariat and reflects only experiences and expert opinions. It is in no way binding, as only States Parties and appropriate arbitral institutions can bindingly interpret the Convention.*

The complementary relationship between the 2001 Convention and UNCLOS

The first question that shall be addressed, even if it has been treated over the last decades more and more openly, is, whether there can be a Convention on issues touching the oceans beyond UNCLOS and whether one Convention would be superior over the other.

As the subject of the UNESCO 2001 Convention is underwater cultural heritage, which is located in large parts in the ocean, the Convention necessarily interrelates with the law of the sea. It applies in an area in which the question of who has the legal authority over a territory or a vessel is organized by this law of the sea. Primarily, the law of the sea is codified by the United Nation's Convention on the Law of the Sea (also called 1982 Convention, Montego Bay Convention or, as hereinafter, UNCLOS).

Some legal experts, doubting the 2001 Convention, seemed, especially in the first days of the Convention, to proceed from the implicit premise that the provisions of UNCLOS are of a quasi "constitutional" nature and that they enjoy a superior status to other treaties or agreements, including the 2001 Convention. The 2001 Convention would hence have a subordinated status and could not regulate anything regulated by UNCLOS or even come close to its content.

To be noted here first are the general rules of treaty interpretation, such as the rule of *lex specialis* or *lex posterior*. These provisions provide that a more specific treaty or a later treaty, between the same Parties, will have priority over a more general or earlier treaty on the same subject. From the viewpoint of the opponents of the 2001 Convention, such treaty interpretation rules would not come into operation in the relations between UNCLOS and the 2001 Convention. According to the opponents to the UNESCO Convention, all other international agreements or treaties on the protection of the underwater cultural heritage should operate within the framework of rules circumscribed by UNCLOS. Therefore, what they can do is limited to the clarification or supplementation of UNCLOS. In this scenario, subsequent agreements or treaties should and could not attempt to amend or abrogate the provisions of UNCLOS. UNCLOS would be "the constitution of the oceans" not only figuratively but also normatively.

Professor Keun-Gwan Lee remarked already in 2001, that no treaty or convention should be immune from change when facing ever changing real life and facts. There is no such thing as "permanent treaties". Secondly, UNCLOS itself contains a series of provisions relating to its amendment (Articles 312-316). Thirdly, Article 303(4) provides for the role of other (future) international agreements and rules of law regarding the protection of objects of an archaeological nature. Therefore, the opposition to the 2001 Convention, which proceeds from the (often unstated) premise of UNCLOS being a closed-end system, is untenable.²

The next question is whether UNCLOS is on a normatively superior level compared to other "ordinary" treaties or agreements including the UNESCO 2001 Convention. Article 311.2 UNCLOS addresses this question when it provides that "*This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with*

² An Inquiry into the Compatibility of the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 with UNCLOS 1982, Prof. Keun-Gwan Lee

this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.” Notwithstanding this provision, there remained especially in the first years of the existence of the 2001 Convention substantial uncertainties over the question mentioned. If it is answered in the affirmative, only a very limited role or function (i.e., that of clarification or supplementation) is accorded to other treaties or agreements subsequent to UNCLOS. In this scenario, the normative legitimacy or tenability of the 2001 Convention would be addressed only from the narrow angle of its compatibility or complementarity to UNCLOS, in particular, Article 303.³

It is generally agreed that the controversial category of “peremptory norms” allowing of no derogations has little relevance to the law of the sea and UNCLOS. The concerns in this regard came in 2001, the year of the adoption of the 2001 Convention, mainly from lawyers that had been much involved in the process of the elaboration and adoption of UNCLOS and were influenced by their past experiences.

The refusal of the idea of any exclusivity of UNCLOS in matters of underwater cultural heritage does not mean that there could be no difference in terms of relative importance among the provisions of UNCLOS. For instance, the articles providing for the fundamental legal structure of the oceans, e.g., those providing for the territorial sea up to 12 nautical miles or the 200-mile exclusive economic zone, are the end result of a series of long and arduous negotiations, or “the Herculean labours of the many distinguished lawyers and statesmen”.⁴ As such, it could be argued, within the framework of UNCLOS these provisions “of a fundamentally norm-creating character” enjoy a higher level in the hierarchy of rules than other provisions. In other words, it is arguable that there exists some element of normative hierarchy within UNCLOS. This however certainly does not apply to underwater cultural heritage, which was included in UNCLOS as a last-minute compromise between a group of seven States represented respectively by Greece and the United States.

From this fact alone, one can argue that the provisions of UNCLOS concerning underwater cultural heritage are not entitled to the same normative authority as is enjoyed by other UNCLOS provisions of more general and fundamental import. Secondly, as was pointed out by some leading commentators, some parts of Article 303 are “clumsy” in terms of logic or systematic coherence or “counterproductive” in their practical effect on the protection of the underwater cultural heritage.⁵ This also negatively affects the normative status of the provision.

Thirdly and more importantly, paragraph 4 of Article 303 stipulates that “This article is *without prejudice* to other international agreements” (emphasis added). The italicized part of the provision does not proceed from the normative superiority of the given article to the provisions of other (future) international agreements. Rather, it is premised on the normatively equal status of Article 303 and the relevant provisions of other international agreements.⁶

³ *idem*

⁴ Churchill, R.R. and Lowe, A.V. *The Law of the Sea*, (Manchester University Press, Manchester, 3rd ed. 1999) 22.

⁵ See Tullio Scovazzi, UCH

⁶ Compare Article 303(4) with article 103 of the UN Charter (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”) and Article 20 of the League of Nations Covenant (“The Members

The main implication is that the substantive part of Article 303 (in particular, paragraphs 2 and 3) is susceptible to the rules of treaty interpretation, in particular the *lex specialis* and *lex posterior* rule. It is hence legally fully possible to also regulate the issues regulated by them through another, later, international Convention, such as the UNESCO 2001 Convention.

The compatibility of the 2001 Convention with UNCLOS and its Regulations on Underwater Cultural Heritage

After having established that the 2001 Convention can indeed regulate issues in the realm of the law of the sea and in particular underwater cultural heritage, it shall however also be underlined, that all items regulated by the 2001 Convention are in full harmony with UNCLOS and do not constitute any contradiction.

UNCLOS says little about the protection of the underwater cultural heritage.⁷ It contains only two regulations referring to underwater cultural heritage, Articles 149 and 303. As already said, both were last minute introductions into its text and remained general in their formulations. When UNCLOS was formulated, the field of underwater archaeology was still very young and the importance of underwater cultural heritage was underestimated.

- Art. 149 UNCLOS⁸ stipulates - without giving details - the protection of underwater heritage in the "Area", i.e. "*the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction*".
- Art. 303 UNCLOS⁹ sets a general obligation for States to protect their underwater cultural heritage. However it gives them only effective protective powers up to the limits of the Contiguous Zone, i.e. up to 24 miles from the coast and not beyond.¹⁰

In the large space between the Area and the Contiguous Zone, i.e. the remaining Exclusive Economic Zone and on the Continental Shelf, underwater cultural heritage remains hence mostly unprotected by UNCLOS. Even worse, Art. 303 paragraph 3 stipulates that "*Nothing in*

of the League of Nations severally agree that this Covenant is accepted as abrogating all obligations or understanding *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.").

⁷ "For some of its aspects ... it can even be considered not only insufficient, but also counterproductive and corresponding to an invitation to the looting of the heritage in question." Tullio Scovazzi in Wolfrum (Ed.) *The Max Planck Encyclopaedia of Public International Law* (2008)

⁸ Article 149 UNCLOS Archaeological and historical objects: *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.*

⁹ Article 303 UNCLOS Archaeological and historical objects found at sea:

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

2. *In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.*

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

4. *This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.*

¹⁰ See Art. 303 para. 2

this article affects ... the law of salvage or other rules of admiralty...". While in many States with a civil law tradition "salvage" is only related to the efforts of saving a ship in danger and not to wrecks, particularly if these have lain under water for over one hundred years, some common law countries have developed a concept of salvage law that extends to commercial exploitation operations of submerged archaeological sites. The UNCLOS regime therefore leaves with this formulation room for the commercial destruction of underwater heritage and has in consequence been criticized as containing a "legal vacuum" and as representing an "invitation to looting".¹¹ It is to be underlined that UNCLOS leaves a legal vacuum in stating that its regulations are 'without prejudice' to salvage law. This however does not mean a regulation of the issue, but only a refusal to regulate an issue, leaving room for another Convention to regulate it.

The wording of Art. 303. 2 of UNCLOS also leaves a need for further regulation. The coastal State, which is empowered to prevent and sanction the "removal from the sea-bed" of objects of an archaeological and historical nature, is according to this article defenceless if such objects, instead of being removed, are simply destroyed in the place where they have been found (for instance, if they are destroyed by a company holding a license for oil exploitation).

This legal vacuum is rectified by the 2001 Convention, for which UNCLOS leaves express room in its Art. 303.4. The 2001 Convention explicitly refuses the intervention with and destruction of underwater cultural heritage sites for commercial exploitation and without respect for the need to protect and preserve such sites. Furthermore, the 2001 Convention covers all waters and maritime zones, greatly extending the legal protection of submerged sites against all kinds of damaging actions. It also contains strong anti-pillaging measures and gives the States the right to close ports to pillagers, to seize materials and to apply sanctions to the destruction of heritage.

The 2001 Convention however expressly does not alter UNCLOS, but only complements it, and is thus in full harmony with it.¹² It says very expressly in its Article 3:

"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."

This means that the 2001 Convention regulates issues that UNCLOS leaves open, but it does not contradict it in any way. Any other interpretation is against the very text of the 2001 Convention and is thus incorrect.

¹¹ See Fn 1.

¹² See Article 3 of the Convention: Article 3 – 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.*

The 2001 Convention does not contain any ‘creeping jurisdiction’

Another question, posed by some legal advisors, is the issue of a potential extension of jurisdictional rights by the State cooperation system foreseen in the 2001 UNESCO Convention. Admittedly, the regulations of the 2001 Convention on the protection of underwater cultural heritage outside of the territorial seas are quite complex and often misinterpreted. The reason is that the Convention’s regulations in this regard have been forced into the complicated framework of UNCLOS. Every single detail of UNCLOS was taken into account in a lengthy and hotly negotiated drafting process that was conducted under the presence of the UNCLOS Secretariat.

The underlying idea of the State cooperation mechanism of the 2001 Convention is that each State collects from its vessels and nationals information on activities concerning underwater heritage in the EEZ or in the Area. The State then distributes the information to the other States Parties, which can then declare if the issue is of interest to them and if they wish to be consulted and to be included in a group of coordinating States discussing protection measures. A coordinating State then leads the discussions on the measures to be taken and is charged with implementing them, this is usually the State closest to the site.

The accusation that this function of a coordinating State would extend jurisdictional rights of States departs from an erroneous understanding of this system. The coordinating State expressly does not receive more jurisdictional rights. It only coordinates actions and implements what all States have decided together. That means that it does not receive any special powers from the 2001 Convention, but from the other States Parties in a form of jurisdictional help. The jurisdiction remains always with the State Party that initially held it.

The 2001 Convention states very clearly in its Article 10.6: *“In coordinating consultations, taking measures, conducting preliminary research and/or issuing authorizations pursuant to this Article, the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest. Any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea.”*

The Convention could not be clearer. If a coordinating State for instance relies on the 2001 Convention to prevent a pillager from another State Party accessing a site, the powers to intervene in this immediate danger can only be a pre-agreed legal help from the other States Parties to prevent the pillaging or destruction of a site. They are not a lasting transferral of jurisdictional rights.

Even if a State Party that holds jurisdictional powers over a vessel of pillagers does not declare its interest in being consulted and is not member of the consulting group of States, by ratifying the 2001 Convention it has undertaken an obligation to cooperate with the other States Parties. It has to help in the protection of underwater cultural heritage and to give help through its jurisdictional powers. Hence this legal help enables the pursuit of the pillager, but is not *a per se* constitution of a newly existing jurisdictional power.

Finally, and in conclusion of the above it can be said that since its adoption in 2001 no legal disputes resulting from the application of the Convention have arisen. States have shown to have the strongest will to cooperate in the protection of their underwater cultural heritage. There has not been a single instance of an accusation or suspicion of an abuse of any of the provisions of the 2001 Convention.

The great importance of underwater cultural heritage and the concern about the threats faced by it have indeed been at heart of all States that have already ratified the Convention. The rising number of States Parties indicates that the legal concerns about the interrelation of the 2001 Convention and UNCLOS have been overcome and that the main issue looked at by the States today is indeed the care for the due implementation of the Convention in the interest of the safeguarding of humanity's common sunken legacy.