

## **What benefits can States derive from ratifying the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001)?**

The UNESCO Convention on the Protection of the Underwater Cultural Heritage (“the 2001 Convention”) aims at achieving heritage protection in the respect of high ethical and scientific standards as well as effective State cooperation.

Ratifying the 2001 Convention provides several advantages to a State:

- It helps to protect underwater cultural heritage from pillaging and commercial exploitation and achieves legal safeguarding wherever a site is located.
- The Convention brings protection to the same level as the protection of land based sites and enables States Parties to adopt a common approach to preservation and ethical scientific management.
- States Parties benefit from cooperation with other States Parties in practical and legal terms.
- The Convention provides effective professional guidelines on how to intervene with and research underwater cultural heritage sites.

### **In detail:**

#### **1. A tool to protect heritage from pillaging and looting**

Underwater cultural heritage is defined by the 2001 Convention as all traces of human existence that lie or have been lying under water for at least one hundred years and that have a cultural or historical character as well as their context. This includes not only shipwrecks, but also submerged caves, ruin sites and ancient ports.

While this heritage is increasingly attracting the interest of the public and of archaeologists, it has also become the object of a focused search by commercial enterprises intending to exploit submerged archaeological sites to sell the retrieved artefacts for a minimum investment cost and maximum profit. They do so in benefitting from a low level of legal protection and site monitoring, as well as from the lack of the awareness of the cultural value of the concerned sites within some national authorities. A minimum of 330 major shipwrecks containing up to 500.000 artefacts each have been destroyed in this way in the last twenty years and thousands of other sites have been severely damaged.

The UNESCO 2001 Convention represents the answer of the international community to this pillaging and commercial exploitation. It provides the “largest museum of the world”, which is represented in the seabed of the oceans, with guardians, an alarm system and legal safekeeping.

The Convention will ensure that this precious underwater heritage will be protected and conserved by its States Parties. It sets a legal framework for the related measures and establishes a system of reporting and consultations on activities directed at submerged sites. It permits States Parties to agree on a common strategy and protection standard to take a firm stand against the pillaging, commercial exploitation and destruction of sites. The Convention furthermore contains regulations on sanctions for pillaging and the prevention of the illicit trafficking of illegally recovered artefacts<sup>1</sup>.

## 2. Legal protection afforded to underwater cultural heritage wherever located

### a. More effective protection by the 2001 Convention than afforded by the pre-existing law of the sea:

As the subject of the 2001 Convention is underwater cultural heritage, which is located in large parts in the oceans, the Convention touches on issues regarding the law of the sea. Primarily, this law of the sea is codified in the United Nation's Convention on the Law of the Sea<sup>2</sup> (also called 1982 Convention, Montego Bay Convention or, as hereinafter, UNCLOS).

This existing law of the sea however does not yet sufficiently protect the underwater cultural heritage and leaves a need for a more specific international treaty<sup>3</sup>.

UNCLOS contains only two regulations referring to underwater cultural heritage, Articles 149 and 303. Both were last minute introductions into its text and remained general in their formulations. Art. 149<sup>4</sup> stipulates a –not nearer detailed- 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<sup>5</sup> sets a general obligation for States to protect their underwater cultural heritage - it gives them however only effective protective powers up to the limits of the Contiguous Zone, i.e. up to 24 miles from the coast<sup>6</sup>.

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 in fact

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<sup>1</sup> See Art. 14 of the 2001 Convention: “*States Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention*”, as well as Articles 17 and 18 on sanctions and seizure.

<sup>2</sup> This Convention has currently 157 States Parties. It sets also in large parts the standards for the common law respected by most non-States Parties including the USA, Venezuela, Equator, Iran, Syria, and others (status March 2009).

<sup>3</sup> “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)

<sup>4</sup> 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.*

<sup>5</sup> 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.*

<sup>6</sup> See Art. 303 para. 2

unprotected by UNCLOS. Even worse, its Art. 303 para. 3 stipulates that “*Nothing in this article affects ... the law of salvage or other rules of admiralty...*”. While in many States with 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 its 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”<sup>7</sup>.

This legal vacuum is rectified by the 2001 Convention, for which UNCLOS leaves express room in its Art. 303 para. 4. The 2001 Convention explicitly refuses the intervention with and destruction of underwater cultural heritage sites for commercial exploitation and without respect to 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.

#### **b. Wider protection than possible through national legislation:**

The 2001 Convention also offers considerable advantages in comparison to a purely domestic regulation of the protection of underwater cultural heritage.

National law only applies as far as a State has jurisdiction. While States have full jurisdiction in their Territorial Sea, this is much more limited in their Exclusive Economic Zone. The dispute is ongoing as to whether the protection of underwater cultural heritage falls under the term “marine scientific research”, for which States have jurisdiction in that zone<sup>8</sup>. On the High Seas and in the Area, States have in general only a jurisdiction over their own nationals and vessels flying their flag.

The further away from the coast a submerged archaeological site is located, the more difficult it therefore becomes for a State to prohibit any intervention which may be undertaken on the site by a vessel sailing under another State’s flag.

Outside of a State’s Territorial Sea the cooperation with Flag States therefore becomes crucial – and is regulated in a practical and effective way in the UNESCO 2001 Convention.

#### **c. An answer to immediate danger to sites**

The 2001 Convention in its Articles 10 para. 4<sup>9</sup> and 12 para. 3<sup>10</sup> contains regulations that permit the prevention of an immediate danger threatening a submerged archaeological site, including in particular looting. Within the Exclusive Economic Zone and on the Continental Shelf the vicinity of the Coastal State has been taken into consideration, which will in general intervene in such

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<sup>7</sup> See Fn 1.

<sup>8</sup> At least for UNCLOS States Parties according to Article 56 para. 1 (b) ii UNCLOS

<sup>9</sup> “*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.*”

<sup>10</sup> “*All States Parties may take all practicable measures in conformity with this Convention, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause including looting.*”

cases in the function of a Coordinating State. In the Area the right to take immediate protection measures to prevent pressing danger falls to all States.

Such a right to prevent an immediate danger to sites is of immense practical value. A State Party does not need to wait for the conclusion of consultations, which usually take some time, and therefore allow the completion of acts of pillaging, before taking preventive measures.

Regrettably some States expressed fears that this right to adopt urgent measures, in cases of immediate danger, could in particular within the Exclusive Economic Zone be seen as an instance of the extension of coastal States sovereignty rights and represent a “creeping jurisdiction”. It is however important to note that the 2001 Convention expressly states in its Article 10 that in taking measures in cases of immediate danger, the coordinating State acts “on behalf of the States Parties as a whole and not in its own interest” and that its “actions do not constitute a basis for the assertion of any preferential or jurisdictional rights”.

The right to prevent immediate danger to a site is in effect indispensable, if a reasonable and effective protection of submerged archaeological sites against looting should be achieved and represents an added value to the 2001 Convention.

### **3. Protection at the same level as the protection of land based sites**

Until now, underwater cultural heritage is in most cases much less protected than land based heritage. Many legislative efforts concentrate in fact only on heritage located within the land territory of a State. This is due to its higher visibility and – until recently – easier accessibility. While archaeology on land has some 200 years of history, underwater archaeology and with it the scientific appreciation of underwater cultural heritage has only become possible since the 1940's.

The 2001 Convention harmonizes protection standards for all kinds of heritage, wherever they may be located.

It stipulates as a general rule that States should protect their underwater cultural heritage. Furthermore it sets principles for States to respect in their interventions directed at underwater cultural heritage, such as the preference given to *in situ* preservation or the objection to commercial exploitation and dispersal of heritage.

These standards and principles will in the long term assure the preservation of underwater cultural heritage in a similar fashion to sites on land. The Convention represents therefore, a logical and indispensable progress of the currently existing law for the protection of underwater cultural heritage.

### **4. Adoption of a common approach to heritage protection**

It is in particular underwater cultural heritage that represents a common heritage of humankind, as it was ships that connected civilisations over the centuries. It is therefore also a duty and a responsibility for all States to ensure the protection of this common heritage and to share the

knowledge it can provide. The 2001 Convention allows States to adopt a common approach to the protection of underwater heritage according to mutually recognized standards.

Such a common approach means also the respect of certain basic ethical principles regarding the consideration to be given to submerged heritage, which is more extensive than the simple respect of legal obligations *inter partes*, among States Parties.

A ratification of the 2001 Convention means not only a firm statement towards other States and entities, but also the public of a State and society as a whole as to the value given to underwater heritage and its context. It is a statement against commercial salvage operations as far as the influence of the States Parties reaches and the expression of a will to protect submerged archaeological sites in the frame of an international community.

This expression of the will to protect and of a defence offered to the fragile legacy that is submerged archaeological sites helps to establish an international ethical standard. It discourages not only pillaging, but also the trading in artefacts recovered in pillage operations and raises awareness in society in general that archaeological sites, even if submerged, do not represent exploitable treasures, but a cultural inheritance.

As such the 2001 Convention fulfils the function of setting an international ethical standard and is the expression of a common attitude and resolve.

## **5. The benefit of cooperation**

Cooperation between States is the only way to assure the comprehensive protection of underwater cultural heritage. As explained above, the limits of State jurisdiction make it necessary for all States to work hand in hand in the protection of submerged archaeological sites.

In joining the 2001 Convention, States join a very practical and operational cooperation system.

They agree to prohibit their nationals and vessels from looting underwater cultural heritage, regardless of its location, requesting that they report finds and activities and informing other States of their undertakings. The interested States can then cooperate in the protection of these archaeological sites. The Flag State sets legal regulations for its nationals and vessels and other States help it – through a coordinating State - in implementing them as agreed between the concerned States and in accordance with the Convention.

This cooperation between States, regulated by the 2001 Convention, and the common effort to achieve a legal protection of underwater heritage sites will ensure that in the future wrecks, ruins and other sites outside the Territorial Sea of a State will also be protected.

The enhancement of effective legal protection is however not the only benefit of improved cooperation. States pledge to co-operate and assist one another also in capacity-building, the operational protection and the management of the underwater cultural heritage and to exchange, in so far as possible, information. Furthermore, they will provide the contact details of the responsible competent authority in their country to the other States Parties and facilitate interaction.

The cooperation available under the 2001 Convention, which is of a very practically applicable nature, will therefore be a considerable asset and of great value to States Parties.

## **6. The Convention provides practical guidelines on how to intervene with and research underwater cultural heritage**

The best-known and most widely applied part of the 2001 Convention is certainly its Annex. It is one of the most important professional guidelines available for underwater archaeologists today.

The Annex of the 2001 Convention contains the detailed practical “Rules concerning activities directed at underwater cultural heritage“. They include regulations as to how a project envisaging an intervention is to be designed; guidelines regarding the competence and the qualifications required for persons undertaking activities; and methodologies on conservation and site management.

The 36 Rules of the Annex present a directly applicable operational guideline scheme for underwater interventions. Over the years, they have become a reference document in the field of underwater excavations and archaeology, setting out regulations for a responsible management of such cultural heritage.

They provide archaeologists and national authorities worldwide with very reliable rules on how to work on underwater cultural heritage sites and issues to consider when doing so.

These Rules are one of the main reasons for the very large support the 2001 Convention has found amongst underwater archaeologists. They represent also a considerable normative advantage for every State adhering to the Convention and can guide national authorities in their day to day decisions.

## **7. Financial implications of ratification**

Ratification of the 2001 Convention does not oblige a State to any obligatory financial contribution. The harmonisation of national laws with the Convention might however be needed and Article 22 encourages States to establish competent authorities or reinforce the existing ones where appropriate. States will also face certain costs for the implementation of the Convention in terms of heritage protection, awareness raising and education. Nevertheless, the Convention expresses explicitly that States Parties need to take these measures using for this purpose the best practicable means at their disposal and in accordance with their capabilities.