What Law for Underwater Cultural Property?

Laurent Bordereaux
Law PhD, 1999, University of Nantes, CDMO
Professor at the University of La Rochelle

From the treasure hunt in the Florida Sea to the exploration of mythical wrecks in every ocean of the planet, the urgency for legal protection for wrecks and historical remains has given rise to a legislation which, despite its indisputable contribution, reveals the great complexity of underwater cultural property law (the recent case of the galleon San José is a good example). Latin American States, among others, are especially concerned with their numerous ancient shipwrecks.

The national level was a first response, in which some countries, such as France, chose a high degree of protection (Act of December 1st, 1989 on maritime cultural property). But the extreme heterogeneity of national policies and the limits of the competence at sea of the States made it necessary to set an international framework. The long awaited Convention of November 2nd, 2001, adopted under the auspices of UNESCO and ratified by sixty States (including Costa Rica, Cabo...
This international convention is seductive in many respects. First of all, it generously defines (despite a questionable time limit) underwater cultural heritage as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years" (Article 1), including sites, wrecks and objects. Secondly, we can only welcome the break with the "treasure law", the general obligation of States to protect this heritage and to cooperate to this end, as well as the priority given to its in situ conservation (Article 2). Finally, the compilation of the legal logic that it expresses, between State sovereignty, flag law and the protection of the cultural heritage, is undoubtedly the result of wisdom, anchored in the history and the great principles of the law of the sea.

But this is precisely where the problem lies: the protection purpose is totally dependent on these principles, in all the waterspaces as they are recognized and governed by the famous Montego Bay Convention of 19825. Consequently, in territorial seas, the sovereignty of the coastal State is the only cardinal point since it has "exclusive right to regulate and authorize activities directed at underwater cultural heritage"; The flag State should (at least) be informed in the event of the discovery of an identifiable State vessel (or aircraft) (Article 7). Further offshore, in the exclusive economic zone and on the continental shelf, reconciling the prerogatives of the coastal State with those of the flag State in respect of underwater cultural property becomes particularly sensitive, since, subject to the (vague) provisions allowing the coastal State to prohibit or authorize "any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law", it is clearly stated that "no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State" (Article 10).

With regards to the international zone of the deep seabed, an area beyond the limits of national jurisdiction and which constitutes the "common heritage of mankind", compromise and prudence have prevailed: the concerned States are invited by the Director-General of UNESCO "to consult on how best to protect the underwater cultural heritage" and, where appropriate, to appoint a "State Party to coordinate" the operations, knowing that they "may take all practicable measures (...), if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage" (such as looting - Article 12). The International Seabed Authority, which plays a fundamental part for mineral resources under the Montego Bay Convention, is certainly invited to participate in the consultations, but the legal boldness which has led, not without difficulty, to the creation of this true international conductor for the exploration and exploitation of the deep sea zone is lacking for the protection of submarine cultural assets.

It is therefore a little exaggerated to call the UNESCO Convention a "gift from heaven". It is a concession made by the States in the exercise of their claims at sea, appreciable but quite perfectible. However, all things considered, given the progress made, States should ratify the 2001 UNESCO Convention.

Article 2 – Objectives and general principles
1. This Convention aims to ensure and strengthen the protection of underwater cultural heritage.
2. States Parties shall cooperate in the protection of underwater cultural heritage.
3. States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.

5 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”.
4. States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.

5. The preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.

6. Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation.

7. Underwater cultural heritage shall not be commercially exploited.

8. Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State’s rights with respect to its State vessels and aircraft.

9. States Parties shall ensure that proper respect is given to all human remains located in maritime waters.

10. Responsible non-intrusive access to observe or document in situ underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management.

11. No act or activity undertaken on the basis of this Convention shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction.

**Article 2 - Objectifs et principes généraux**

1. La présente Convention vise à assurer et renforcer la protection du patrimoine culturel subaquatique.

2. Les États parties coopèrent à la protection du patrimoine culturel subaquatique.


4. Les États parties prennent, individuellement ou, s’il y a lieu, conjointement, toutes les mesures appropriées conformément à la présente Convention et au droit international qui sont nécessaires pour protéger le patrimoine culturel subaquatique, en employant à cette fin les moyens les mieux adaptés dont ils disposent, et selon leurs capacités respectives.

5. La conservation in situ du patrimoine culturel subaquatique doit être considérée comme l’option prioritaire avant que toute intervention sur ce patrimoine ne soit autorisée ou entreprise.

6. Les éléments du patrimoine culturel subaquatique qui ont été récupérés sont mis en dépôt, gardés et gérés de manière à assurer leur conservation à long terme.

7. Le patrimoine culturel subaquatique ne doit faire l’objet d’aucune exploitation commerciale.


9. Les États parties veillent à ce que tous les restes humains immergés dans les eaux maritimes soient dûment respectés.

10. Il convient d’encourager un accès responsable et inoffensif du public au patrimoine culturel subaquatique in situ à des fins d’observation ou de documentation, afin de favoriser la sensibilisation du public à ce patrimoine, ainsi que sa mise en valeur et sa protection, sauf en cas d’incompatibilité avec sa protection et sa gestion.

11. Aucune action ni activité menée sur la base de la présente Convention ne peut autoriser à faire valoir, soutenir ou contester une revendication de souveraineté ou juridiction nationale.
Bibliographical References: