

## What Law for Underwater Cultural Property?

**Laurent Bordereaux**

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

### French Summary

*Quel droit pour les biens culturels sous-marins<sup>1</sup> ? La récente affaire du galion « San José », opposant l'Espagne à la Colombie, a bien rappelé toute la difficulté d'une problématique fondamentalement internationale, aux enjeux multiples. Les ravages de la chasse aux trésors dans les mers riches en épaves à haute valeur commerciale et l'extrême diversité des législations étatiques ont logiquement conduit à l'élaboration d'un cadre international adéquat. La Convention de l'Unesco de 2001 relative à la protection du patrimoine culturel subaquatique est entrée en vigueur le 2 janvier 2009. Aujourd'hui ratifiée par 61 Etats (dont la France), elle exprime un compromis délicat entre la nécessité de parvenir à un degré de protection satisfaisant concernant ce qu'on appelle en France les biens culturels maritimes et le respect des grands principes du droit de la mer, issus de l'incontournable Convention de Montego Bay du 10 décembre 1982. Il résulte de cet esprit de conciliation une tension permanente entre les prérogatives de l'Etat côtier et celles de l'Etat du pavillon, que les dispositions de la Convention Unesco de 2001 peinent à accorder. D'aucuns n'ont pas manqué de soulever les limites du texte, lesquelles n'exonèrent pas pour autant le bloc des Etats maritimes qui n'ont pas encore ratifié la Convention d'une réflexion sérieuse en la matière. La richesse de certains textes nationaux (comme, dernièrement, l'« Australian Underwater Cultural Heritage Act » de 2018) ne saurait en effet compenser les lacunes évidentes de l'unilatéralisme juridique, notamment liées aux limites de compétence en mer des Etats. Les grands principes exprimés par l'article 2 de la Convention Unesco et l'apport indéniable des règles « techniques » annexées (relatives aux interventions sur le patrimoine culturel subaquatique) méritent assurément un rayonnement beaucoup plus large que celui - certes non négligeable - impulsé par les 61 Etats ratificateurs (dont le Cap-Vert depuis mars 2019).*

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<sup>2</sup>.

The national level was a first response, in which some countries, such as France, chose a high degree of protection (Act of December 1<sup>st</sup>, 1989 on maritime cultural property)<sup>3</sup>. 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 2<sup>nd</sup>, 2001, adopted under the auspices of UNESCO<sup>4</sup> and ratified by sixty States (including Costa Rica, Cabo

---

<sup>1</sup> L. Bordereaux, "Quel droit pour les biens culturels sous-marins?", *Archéologia*, n° 553, avr. 2017, p. 10.

<sup>2</sup> See in particular: Margaret E Leshikar-Denton and Pilar Luna Erreguerena, *Underwater and Maritime Archaeology in Latin America and the Caribbean* (Left Coast Press, Walnut Creek, California, 2008). As of today, Argentina, Paraguay, Bolivia, Ecuador, Panama, Costa Rica, Honduras, Guatemala, Cuba and Mexico have ratified the 2001 UNESCO Convention.

<sup>3</sup> See also the Australian Underwater Cultural Heritage Act 2018.

<sup>4</sup> Convention on the Protection of the Underwater Cultural Heritage.  
<https://unesdoc.unesco.org/ark:/48223/pf0000126065>

Verde and Federated States of Micronesia since 2018), was enforced in 2009.

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 1982<sup>5</sup>. 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.**

---

<sup>5</sup> 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.
3. Les États parties préservent le patrimoine culturel subaquatique dans l'intérêt de l'humanité, conformément aux dispositions de la présente Convention.
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.
8. Conformément à la pratique des États et au droit international, notamment la Convention des Nations Unies sur le droit de la mer, aucune disposition de la présente Convention ne peut être interprétée comme modifiant les règles du droit international et la pratique des États relatives aux immunités souveraines, ou l'un quelconque des droits d'un État, concernant ses navires et aéronefs d'État.
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:**

- BEURIER J.-P. (dir.), *Droits Maritimes* (Dalloz Action, Paris, 2014).
- DROMGOOLE S., *Underwater Cultural Heritage and International Law* (Cambridge University Press, 2013).
- LE GURUN G., *La métamorphose encore inachevée du statut des biens culturels sous-marins*, Law thesis (University of Nantes, 2000).
- O'KEEFE P., *A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (Institute of Art & Law, 2014).
- PALLARES BOSSA J., “El caso del Galeón San José en el marco del Derecho Internacional”, *Revista Jurídica Mario Alario D’Filippo*, Vol. X, N° 20 (2018).
- SCOVAZZI T., « La protection du patrimoine culturel sous-marin », in CÉRINO C., L’HOUR M. et RIETH E., *Archéologie sous-marine - Pratiques, Patrimoine, Médiation*, Presses Universitaires de Rennes (PUR), p. 19 (2013).
- THEY M., *La protection internationale du patrimoine culturel et naturel de la mer: les compétences de l’Etat sur les biens culturels submergés*, Law thesis (University of Paris 1, 2016).
- VARMER O., “Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf”, vol 33, *Stanford Environmental Law Journal* 251 (2014).