Legal Remarks on the Independence of the 2001 Convention and UNCLOS

Introduction

The UNESCO Convention on the Protection of the Underwater Cultural Heritage (hereinafter "**the Convention**") was adopted in 2001 in order to combat the extensive pillage, commercial exploitation and illicit or unethical traffic of underwater cultural heritage. It is a comprehensive treaty, which fully addresses these issues regarding all waters. It increases the legal protection of sites *in situ* and prohibits the illicit and/or unethical recovery and traffic of artefacts. The Convention is thus very relevant at a time when the pillage and commercial exploitation of underwater cultural heritage as well as the industrialization of the seabed constitute major issues that have not yet found an appropriate solution in most regions of the world.

The Convention, however, goes further than that. It also responds to the need for scientific guidance and the facilitation of State cooperation. Underwater archaeology is still a developing discipline. 71 % of the earth is covered by oceans and the majority of the global seabed has not yet been researched for heritage. Research capacities are still lacking and awareness of the immense patrimony lying on the ocean beds, rivers and lakes is very low. Only through exchange of knowledge and training can this situation be improved and bring the important underwater cultural heritage to benefit the public.

Last but certainly not least, the Convention addresses the needs to mitigate the impact of industrial seabed activities, such as trawling, dredging, mineral extraction and so on, with the protection of submerged archaeological sites. These impacts are considerable, but with wise planning and collaboration, not only excellent results for heritage protection and the development of underwater archaeology can be achieved, but also the enterprises concerned can benefit in terms of corporate responsibility and public image.

By character the 2001 Convention has been drafted exclusively as a heritage protection treaty. It provides a blanket protection to all traces of human existence of a cultural, historical or archaeological character, which have been partially or totally under water, periodically or continuously, for at least 100 years. It does not address the ownership of heritage nor does it change maritime zones or jurisdiction.

Today the Convention is much supported by the scientific community and a large number of States has already ratified it.

Some States do however still require more clarifications on the question of the relation of the 2001 UNESCO Convention with the United Nations Convention on the Law of the Sea (UNCLOS)

Independent Status of the 2001 and UNCLOS Conventions

There is a complementary relationship between the 2001 Convention and UNCLOS and the first does not regulate any issue in contradiction to the latter. The 2001 Convention and

UNCLOS are fully compatible and Article 3 of the first contains an express obligation to always interpret the 2001 Convention in a positive manner, i.e. in consistency with UNCLOS.

A question that should however be considered separately from the consistency of the 2001 Convention with UNCLOS, is whether a State that is not Party to UNCLOS – and does not wish to be bound to it in the future – can join the 2001 Convention without becoming bound to the UNCLOS regulations. The answer is yes and some States have already done so (for instance Cambodia, Iran and Libya). More explanations shall be given below:

The use of terms

The first question is that of the definition of the various maritime zones used in both UNCLOS and the 2001 Convention. In its provisions, the 2001 Convention uses the same terms for the various maritime zones as UNCLOS. However, and this is important, it does *not* link their definition to UNCLOS (or any other legal treaty, for that matter). Only one of the terms used is defined by the 2001 Convention. The 2001 Convention defines in its Article 1.5 the term "Area" (*"seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction"*), but uses, without defining, the terms "territorial waters", "continental shelf" and "exclusive economic zone". Therefore, it remains unregulated how these terms should be defined, i.e. according to UNCLOS or any other treaty, the 2001 Convention only regulating in its Article 3 on the 'Relationship between this Convention and 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 use of 'including' means that it includes UNCLOS, but at the same time does not exclude any other international law applied by States not Party to UNCLOS and objecting to this latter.

The flexibility of the definition of terms used to describe the various maritime zones speaks clearly for an independent relation between the 2001 Convention and UNCLOS. The various maritime zones (with exception of the "Area") have to be interpreted by each State concerned according to the law of the sea applicable to itself.

Settlement of disputes

Article 25 of the 2001 Convention, which regulates the peaceful settlement of disputes, merits moreover a closer look in what regards the question of a link between UNCLOS and the 2001 Convention. Since the adoption of the 2001 Convention, no such dispute has yet arisen, but evidently, every State wishes to be fully aware of its obligations before any ratification, even if a certain situation is relatively unlikely to arise.

The 2001 Convention foresees the negotiation in good faith, an optional mediation by UNESCO, and – if those do not bear fruit - the use *mutatis mutandis* of the dispute settlement procedures provided for in Part XV and Article 287 of UNCLOS.

It must be underlined that this is only a reference to the choices of arbitrage opened to the States, it is not a referral *in rem* to UNCLOS. UNCLOS itself specifies in its Article 291.2 "*The*

dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in this Convention." Hence, even if the 2001 Convention would hypothetically regulate this, the UNCLOS procedures would not be open to States not Parties to UNCLOS. The concerned regulations of UNCLOS are thus clearly only applied *mutatis mutandis* and not directly.

The 2001 Convention, after requesting efforts for a peaceful settlement, gives a State a large choice for compulsory procedures entailing ultimately a binding decision. A State Party to the 2001 Convention, which is not a Party to UNCLOS, is free to choose one or more of the means set out in Article 287 paragraph 1 of UNCLOS. That means it can choose the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal or a special arbitral tribunal constituted according to the UNCLOS regulations.

Overall these regulations leave a lot of space for choice and flexibility. Only the possibility to address the question in the International Tribunal for the Law of the Sea could link the 2001 Convention (however loosely) to UNCLOS. The Tribunal is an independent judicial body established by UNCLOS to adjudicate disputes arising out of the interpretation and application of UNCLOS. The Tribunal has however also jurisdiction over all matters specifically provided for in any other agreement, which confers jurisdiction on the Tribunal, such as done here through the 2001 Convention. The Tribunal is open to States Parties to UNCLOS, but also to States or intergovernmental organizations, which are not parties to UNCLOS "*in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case*".[1] That means that there is no need for a State to adhere to UNCLOS in order to call on the Tribunal (and in any case, there is also no obligation to choose the Tribunal as arbiter to begin with, as explained above).

The choices given by the 2001 Convention and using the offers listed in UNCLOS do not mean that the 2001 Convention is 'linked' to UNCLOS. They just refer to the same set of choices for dispute settlements.

All the above illustrates, that the 2001 Convention can be ratified by a State without binding this State to UNCLOS.

Exclusion of certain Areas from Application

An additional issue shall be mentioned. Some States may face challenging legal disputes concerning the jurisdiction to be applied to certain of their territories or may consider it preferable to wait with ratification in what regards certain frontier situations. Article 29 of the 2001 Convention gives here the choice to such a State to ratify the Convention, while installing temporary limitations to geographical scope by issuing a reservation.

At the time of ratifying, accepting, approving or acceding to the 2001 Convention, a State or territory may make a declaration to the depositary, which is the Director General of UNESCO, that it shall not be applicable to specific parts of its territory, internal waters,

[1] Statutes of the International Tribunal of the Law of the Sea, article 20

archipelagic waters or territorial sea, and shall identify the reasons for the declaration. The concerned State shall, however, as much and fast as possible, promote conditions under which the 2001 Convention will apply to the areas specified in its declaration. It shall then withdraw its declaration in whole or in part as soon as that has been achieved.

This possible reservation allows States to ratify the 2001 Convention, while excluding certain areas until a possible dispute has been resolved.