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THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE

(Provisional Text)

1. A New Concern

The greatest exhibition of human civilization lies on the seabed. According to some evaluations, in the past centuries almost 5% of all seagoing ships were lost every year, be it for acts of God, human errors or naval battles. Today the capacity of some States and private entities to use very sophisticated technological means to explore the seabed at increasing depths not only allows access to a huge historical and cultural heritage, but also entails the risk of such heritage being looted or used for private commercial gain under a first-come-first-served approach. This explains why the exploitation or, much better, the protection of the underwater cultural heritage can be seen as a new concern of mankind.

2. Different Models in National Legislation

Two radically different models are followed in national legislation on underwater cultural heritage, based on the priority given to, respectively, public or private interests. For the sake of brevity, only two instances are hereunder presented (Italy and the United States).

In Italy, the underwater cultural heritage found within the 12-mile territorial sea falls under the regime provided for the cultural heritage in general by Legislative Decree 22 January 2004, No. 41 (Code of Cultural Properties and Landscape)[1]. Research in the field of archaeological and cultural properties is reserved to the Ministry for Cultural Properties and Activities or to the public or private subjects who have been authorized by the Ministry. Anyone who fortuitously discovers cultural properties is bound to inform within 24 hours the competent public authority. The removal and taking into custody of the properties are permitted only where there is no other means to ensure their security until the intervention of the public authorities. All the cultural properties found by anyone in the subsoil or on the seabed belong to the State demesne, if immovable, or to the inalienable patrimony of the State, if movable. The finder is entitled to a reward which is paid by the Ministry and cannot exceed one-fourth of the value of the properties (if the properties are found at sea, the reward

[1] *Gazzetta Ufficiale della Repubblica Italiana*, suppl. to No. 45 of 24 February 2004.

corresponds to one-third of their value, as set forth by the 1942 Navigation Code[2]). The reward may be paid either in money or through the cession of part of the properties.

The State and any other public institution are bound to ensure the use of cultural properties for the public benefit. Initiatives for the preservation and promotion of cultural properties may be sponsored through contributions by private subjects.

The Italian regime is an example of legislation based on priority given to the interest of the State to preserve the cultural heritage for the public benefit, in particular research and exhibition purposes. Private activities are given little emphasis and are subject to State authorization.

A different model is followed in the United States of America. The American courts apply to the underwater cultural heritage the law of salvage and law of finds, belonging to the body of admiralty law. In many countries, the notion of salvage is only related to the attempts to save from imminent marine peril a ship or property carried by it. But United States courts apply this notion also to ancient sunken ships and to objects removed form wrecks which, far from being in peril, have been lost since long time. For example, the United States Court of Appeals for the 4th Circuit in a decision rendered on 24 March 1999 (*R.M.S. Titanic, Inc. v. Haver*) stated that the law of salvage and finds is a "venerable law of the sea". It is supposed to be applicable in all the oceans and seas of the world. It is said to have arisen from the custom among "seafaring men" and to have "been preserved from ancient Rhodes (900 B.C.E.), Rome (Justinian's *Corpus Juris Civilis*) (533 C.E.), City of Trani (Italy) (1063), England (the Law of Oleron) (1189), the Hanse Towns or Hanseatic League (1597), and France (1681), all articulating similar principles"[3]. Coming to the practical result of such an outstanding display of legal erudition, the law of salvage, which applies when the owner of the wreck is known, gives the salvor a lien (or right *in rem*) over the object. The law of finds, which applies when the owner of the wreck or the removed objects is not known, means that "a person who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession becomes the property's owner".

The fact remains that the body of "the law of salvage and other rules of admiralty" is today typical of a few common law systems, but is a complete stranger to the legislation of the majority of other countries. For instance, no Italian lawyer (with the laudable exception of a few scholars) would today know what the "law of salvage and finds" is, despite the fact that the cities of Rome and Trani, which are said to have contributed to this body of "venerable law of the sea", are located somewhere in the Italian territory. Nor is it clear how a "venerable" body of rules, that is believed to have developed in times when nobody cared about the underwater cultural heritage, could provide any sensible tool today for dealing with the protection of the heritage in question. Yet, looking at the conclusions

[2] Royal Decree 30 March 1942, No. 327 (*Gazzetta Ufficiale del Regno d'Italia*, No. 93 of 18 April 1942).
[3] *International Legal Materials*, 1999, p. 807.

reached in their decisions on underwater cultural heritage, it would seem that some American judges are much better than normal human beings: they do have an access to all the ancient sources from where such a "venerable law of the sea" can be inferred, they do know all the mysterious languages in which the relevant rules have been written, they are able to interpret such rules correctly, they do seize the intrinsic consistency between one source and the other and, finally, they can explain to the rest of the world why salvage law is the best way to deal with the subject of underwater cultural heritage. This is impressive indeed.

However, the people who are not impressed by such a display of legal erudition are inclined to think that the lofty and almost theological expressions employed by the American supporters of the law of salvage and the law of finds (such as "return to the mainstream of commerce", "admiralty's diligence ethic", "venerable law of the sea", etc.) are doubtful euphemisms. They disguise a "first-come-first-served" or "freedom-of-fishing" approach based on the destination of underwater cultural heritage for the purpose of private interest or gain of the finders. Private appropriation and commercial sale are the most likely destiny of the artifacts removed from the wrecks which are considered as good on sale on the market. The non-commercial value of such properties and their use for the public benefit have very little relevance.

3. The UNCLOS Regime

The regime provided by the United Nations Convention on the Law of the Sea (Montego Bay, 1982)[4] on underwater cultural heritage is far from being satisfactory. 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.

Only two provisions of the UNCLOS (Arts. 149 and 303) deal with the underwater cultural heritage. Art. 303, para. 1, sets forth a general obligation of protection and cooperation which applies to all archaeological and historical objects, wherever at sea they are found:

> "States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose".

It follows that a State which knowingly destroys or allows the destruction of objects belonging to the underwater cultural heritage can be held responsible for a breach of the obligation to protect it. Likewise, a State which persistently disregards any request by other States to negotiate on forms of cooperation aiming at the protection of the underwater cultural heritage could also be held responsible for an internationally wrongful act.

[4] Hereinafter: UNCLOS.

Apart from the general obligation of protection and cooperation, different regimes apply to underwater cultural heritage, depending on where it is located. Within marine areas falling under the sovereignty of the coastal State, namely internal maritime waters, archipelagic waters and the 12-mile territorial sea, the heritage is subject to the jurisdiction of such State.

Under Art. 303, para. 2, a special regime applies to archaeological and historical objects located within the 24-mile contiguous zone:

"In order to control traffic in such objects, the coastal State may, in applying article 33 [= the contiguous zone], presume that their removal from the sea-bed 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 [= customs, fiscal, immigration or sanitary laws and regulations]".

If literally understood, this provision suggests that the removal of archaeological and historical objects located in the so-called archaeological contiguous zone determines a violation of domestic provisions relating to matters which have little or nothing to do with the cultural heritage, such as smuggling, public health and immigration. Under the UNCLOS logic, it is only as a consequence of the competences that it can already exercise in dealing with cigarette smugglers, clandestine immigrants and infectious patients that the coastal State can exercise also a competence for the protection of the underwater cultural heritage located within 24 n.m. from the shore. The wisdom of such a logic, which implies that underwater cultural heritage cannot be protected *per se*, is not convincing, to say the least.

Other problems arise from the wording of Art. 303, para. 2, if literally understood. 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 apparently defenceless if such objects, instead of being removed, are simply destroyed in the very place where they have been found (for instance, if they are destroyed by a company holding a license for oil exploitation). Again, it is difficult to subscribe to the logic of such a result.

The complications of Art. 303, para. 2, are probably due to the desire of its drafters to avoid any words that might give the impression of another extension of coastal State rights beyond the territorial sea (*horror jurisdictionis*). Rather than laying down a substantive regime to deal with a new concern, such as the protection of the underwater cultural heritage, the UNCLOS seems more interested in paying tribute to the reluctance of certain States to accept what they consider forms of creeping jurisdiction.

A specific provision of the UNCLOS (Art. 149) deals with the underwater cultural heritage found in the so-called Area, that is the seabed and ocean floor beyond the 200-mile limit of national jurisdiction (continental shelf):

"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".

This provision appears vague in its content and devoid of details that could ensure its practical application. However, it shows a preference for those uses of archaeological and historical objects that promote the "benefit of mankind as a whole". Private interests, such as the search for and use of the objects for trade and personal gain, are given little weight, if any. Some categories of States which have a link with the objects, namely, the State of cultural origin, the State of historical and archaeological origin, the State or country of origin *tout court*, are given preferential rights, although Art. 149 does not specify the content of these rights nor the manner in which they should be harmonized with the concept of "benefit of mankind as a whole".

While specific provisions apply to the space between 12 and 24 n.m., on the one hand, and to the Area, on the other, UNCLOS does not define a regime relating to the underwater cultural heritage found on the continental shelf, that is the space located between the external limit of the archaeological zone and the Area, that is between the 24 and the 200 n.m. It is however clear that the rights of the coastal State on the continental shelf are limited to the exploration and exploitation of the relevant "natural resources", as explicitly stated in Art. 77, para. 1, and that they cannot be easily extended to man-made objects, such as those belonging to the underwater cultural heritage.

The legal vacuum left by the UNCLOS greatly threatens the protection of cultural heritage, as it brings into the picture the abstract idea of freedom of the seas. It could easily lead to a "first come, first served" approach. Availing himself of the principle of freedom of the sea, any person on board any ship could explore the continental shelf adjacent to any coastal State, bring any archaeological and historical objects to the surface, become their owner under a domestic legislation (in most cases, the flag State legislation, including States granting flags of convenience), carry the objects into certain countries and sell them on the private market. If this were the case, there would be no guarantee that the objects are disposed of for the public benefit rather than for private commercial gain or personal benefit. Nor could a State which has a direct cultural link with the objects prevent the continuous pillage of its historical heritage. Under the UNCLOS regime, the danger of freedom of fishing for underwater cultural heritage is far from being merely theoretical.

The risk of uncontrolled activities is aggravated by Art. 303, para. 3, which subjects the general obligations of protection of archaeological and historical objects and international cooperation to a particular set of rules:

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

In fact, salvage law and other rules of admiralty are given an overarching status by the UNCLOS. If there is a conflict between the objective to protect the underwater cultural heritage (Art. 303, para. 1), on the one hand, and the provisions of salvage law and other rules of admiralty, on the other, the latter prevail (Art. 303, para. 3).

UNCLOS does not clarify the meaning of "the law of salvage and other rules of admiralty". In many countries, the notion of salvage (*sauvetage*, in French) is only related to the attempts to save a ship or cargo from imminent marine peril on behalf of its owners. But it is never intended to apply to submerged archaeological sites or to ancient sunken ships which, far from being in peril, have been definitively lost. On the contrary, in a minority of common law countries, and in particular in the United States, the concept of salvage law has been enlarged by some court decisions to cover activities which have very little to do with the traditional sphere of salvage.

The fact remains that the body of "the law of salvage and other rules of admiralty" is today typical of a few common law systems, but remains a complete stranger to the legislation of other countries. Because of the lack of corresponding concepts, the very words "salvage" and "admiralty" cannot be properly translated into languages different from English. In the French official text of the UNCLOS they are rendered with expressions (*droit de récupérer des épaves et (...) autres règles du droit maritime*) which which give to the provision a broader and very different meaning. Yet the expression "the law of salvage and other rules of admiralty" simply means the application of a first-come-first-served or freedom-of-fishing approach which can only serve the interest of private commercial gain.

This worsens the already sad picture of Art. 303. Is this provision to be interpreted as referring to cases in which archaeological or historical objects are not involved? Or, on the contrary, does this provision, while apparently protecting the underwater cultural heritage, strengthen a regime which results in the destination of much of this heritage for commercial purposes, regardless of its importance and value as cultural heritage? Does Art. 303 give an overarching status to a body of rules that cannot provide any effective means for the protection of the heritage in question? The doubt is far from being trivial.

Some prospects to find some remedy to the unsatisfactory regime of the UNCLOS could be drawn from Art. 303, para. 4. It provides that Art. 303 does not prejudice "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature". The UNCLOS itself seems to allow the drafting of more specific treaty regimes which can ensure a better protection of the underwater cultural heritage. The UNCLOS itself seems to encourage filling in the gaps and eliminating the contradictions that it has generated.

4. The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage

On 2 November 2001, the Convention on the Protection of the Underwater Cultural Heritage[5] was adopted in Paris within the UNESCO framework. The CPUCH applies to "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". It can be included among the "other international agreements" which States are allowed to conclude under Art. 303, para. 4, of the UNCLOS.

The CPUCH, which was the outcome of lengthy negotiations, was adopted by vote (87 States in favour, 4 against and 15 abstentions). However, the lack of consensus at the moment of its adoption should not be considered as an irreparable flaw. Not only did the great majority of developing countries vote in favour, but also several among the industrialized countries and maritime powers were satisfied with the final outcome of the negotiations. The CPUCH can be seen as a reasonable defence against the results of the contradictory and counterproductive regime of the UNCLOS. The basic defensive tools are the elimination of the undesirable effects of the law of salvage and finds for the heritage found on the continental shelf and the strengthening of regional cooperation.

4.A. The Elimination of the Undesirable effects of Law of Salvage and Finds

While most countries participating in the negotiations for the CPUCH concurred in rejecting the application of the law of salvage and finds to underwater cultural heritage, a minority of States were not prepared to accept an absolute ban. To achieve a reasonable compromise, Art. 4 provides as follows:

> "Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection".

This provision is to be understood in connection with Art. 2, para. 7 ("underwater cultural heritage shall not be commercially exploited") and with the Annex which form an integral part of the CPUCH. In particular, under Rule 2 of the Annex,

> "the commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods".

While not totally excluding the application of law of salvage and law of finds, the CPUCH regime has the practical result of preventing all the undesirable effects of the application of this kind of rules. Freedom of fishing for archaeological and historical objects is definitely banned.

The majority of the States participating in the negotiations were ready to extend the jurisdiction of the coastal State to the underwater cultural heritage found on the continental shelf. However, a

[5] Hereinafter: CPUCH.

minority of States assumed that the extension of the jurisdiction of coastal States beyond the limit of the territorial sea would have altered the balance embodied in the UNCLOS between the rights and obligations of the coastal State and those of other States. As a solution of compromise, the CPUCH provides for a three-step procedural mechanism (reporting, consultations, urgent measures) which involves the participation of all the Sates linked to the heritage.

As regards reporting, the CPUCH bans secret activities or discoveries. States Parties must require their nationals or vessels flying their flag to report activities or discoveries to them. If the activity or discovery is located in the exclusive economic zone or on the continental shelf of another State Party, Art. 9, para. 1, sub-para. b, sets forth two alternative solutions:

"(i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party; (ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such report to all other States Parties".

States Parties must also notify the Director-General of UNESCO who must promptly make the information available to all States Parties.

As regards consultations, the coastal State is bound to consult all States Parties which have declared their interest in being consulted on how to ensure the effective protection of the underwater cultural heritage in question. The CPUCH provides that any State Party may declare such an interest and that this "declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned". The coastal State is entitled to coordinate the consultations, unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared an interest in being consulted shall appoint another coordinating State.

As regards urgent measures, Art. 10, para. 4, provides as follows:

"Without prejudice to the right 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".

The right of the coordinating State to adopt urgent measures is an important aspect of the CPUCH compromise solution. It would have been illusory to subordinate this right to the conclusion of consultations that are normally expected to last for some time. It would also have been illusory to grant this right to the flag State, considering the risk of activities carried out by vessels flying the flag of non-Parties or a flag of convenience. The CPUCH clearly provides that in coordinating consultations, taking measures, conducting preliminary research and issuing authorizations, the coordinating State

acts “on behalf of the States Parties as a whole and not in its own interest”. Any such action cannot in itself constitute a basis for the assertion of any preferential or jurisdictional rights.

It is regrettable that, despite all the efforts to reach a reasonable compromise, a consensus could not be achieved on the CPUCH as a whole, because of the fear of some maritime powers that the right to adopt urgent measures could be seen as an instance of “creeping jurisdiction”.

4.B. Regional Co-operation

The CPUCH devotes one of its provisions (Art. 6) to bilateral, regional or other multilateral agreements:

> “1. States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention.
>
> 2. The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements”.

Art. 6 paves the way to a multiple-level protection of underwater cultural heritage. The key to coordination between treaties applicable at different levels is the criterion of the better protection, in the sense that regional and sub-regional treaties are concluded to ensure better protection than the protection granted by treaties adopted at a more general level[6].

For instance, on 10 March 2001, the participants at an academic conference held in Palermo and Siracusa, Italy, adopted a Declaration on the Submarine Cultural Heritage of the Mediterranean Sea. It stresses that “the Mediterranean basin is characterized by the traces of ancient civilisations which flourished along its shores and, having developed the first seafaring techniques, established close relationships with each other” and that “the Mediterranean cultural heritage is unique in that it embodies the common historical and cultural roots of many civilizations”. The Mediterranean countries were consequently invited to “study the possibility of adopting a regional convention that enhances cooperation in the investigation and protection of the Mediterranean submarine cultural heritage and sets forth the relevant rights and obligations”.

4.C. State Ships and Aircraft

Some States take the position that no special regime should be granted to sunken State ships and aircraft. According to other States, the flag State retains title indefinitely to its sunken craft, wherever it is located, unless title has been expressly abandoned or transferred by it. While the UNCLOS does not deal with this question, the CPUCH makes a distinction depending on where such

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heritage is located. In the exclusive economic zone or on the continental shelf, “no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State” (Art. 10, para. 7). On the contrary, “within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and air craft” (Art. 7, para. 3). The hortatory character of the latter provision (“should inform”) raises the criticism of the States which are in favour of the indefinite retention of title on State craft.

5. The Present Uncertain Situation

The CPUCH entered into force on 2 January 2009. 32 States are now (August 2010) parties to it.

Sadly enough, it appears that the sensible message coming from the CPUCH has not yet been appreciated by a sufficiently great number of States. In particular, it was really disappointing to see that, by Resolution 59/24 (“Oceans and the Law of the Sea”) adopted on 17 November 2004, the United Nations General Assembly

> “urges all States to cooperate, directly or through competent international organizations, in taking measures to protect and preserve objects of an archaeological and historical nature found at sea, in conformity with article 303 of the Convention [=the UNCLOS]” (para. 7).

Not only is the CPUCH not even mentioned, but also Art. 303 UNCLOS, that is the provision which includes the invitation to looting (para. 3), is emphasized as a model!

The United Nations General Assembly took a more balanced approach in Resolution 60/30 on oceans and the law of the sea, adopted on 29 November 2005[7], where it did not refrain from “mentioning” the CPUCH and it noted

> “the effort made by the United Nations Educational, Scientific and Cultural Organization with respect to the preservation of underwater cultural heritage, and notes in particular the rules annexed to the 2001 Convention on the Protection of the Underwater Cultural Heritage that address the relationship between salvage law and scientific principles of management, conservation and protection of underwater cultural heritage among parties, their nationals and vessels flying their flag” (para. 8).

Some doubts that the “venerable” salvage law can be the best way to protect the underwater cultural heritage seem implied in another paragraph of the resolution, where the General Assembly urges

[7] The same approach is repeated in the resolutions on “Oceans and Law of the Sea”, adopted by the General Assembly in 2006, 2007, 2008 and 2009.

"... all States to cooperate, directly or through competent international bodies, in taking measures to protect and preserve objects of archaeological and historical nature found at sea, in conformity with the Convention [= LOSC], and calls upon States to work together on such diverse challenges and opportunities as the appropriate relationship between salvage law and scientific management and conservation of underwater cultural heritage, increasing technological abilities to discover and reach underwater sites, looting and growing underwater tourism" (para. 7).

The word "looting", which makes its appearance in the resolution, clearly shows what is the most serious danger. Time will tell whether the CPUCH, which is the appropriate instrument for a fight against looting, is fully appreciated.

Bibliographical Note

Migliorino, *Il recupero degli oggetti storici e archeologici sommersi nel diritto internazionale*, Milano, 1984; Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, The Hague, 1995; Camarda & Scovazzi (eds.), *The Protection of the Underwater Cultural Heritage - Legal Aspects*, Milano 2002; Cornu & Fromageau (eds.), *Le patrimoine culturel et la mer*, Paris, 2002; O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester 2002; Garabello & Scovazzi (eds.), *The Protection of the Underwater Cultural Heritage - Before and After the 2001 UNESCO Convention*, Leiden, 2003 ; Aznar Gomez, *La protección internacional del patrimonio cultural subacuático con especial referencia al caso de España*, Valencia, 2004; Garabello, *La Convenzione UNESCO sulla protezione del patrimonio culturale subacqueo*, Milano, 2004; Scovazzi (eds.), *La protezione del patrimonio culturale sottomarino nel Mare Mediterraneo*, Milano, 2004; Dromgoole (ed.), *The Protection of the Underwater Cultural Heritage – National Perspectives in Light of the UNESCO Convention 2001*, Leiden, 2006.