Underwater Cultural Heritage and International Law

The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001, which entered into force internationally in 2009, is designed to deal with threats to underwater cultural heritage arising as a result of advances in deep-water technology. However, the relationship between this new treaty and the UN Convention on the Law of the Sea is deeply controversial.

This study of the international legal framework regulating human interference with underwater cultural heritage explores the development and present status of the framework and gives some consideration to how it may evolve in the future. The central themes are the issues that provided the UNESCO negotiators with their greatest challenges: the question of ownership rights in sunken vessels and cargoes; sovereign immunity and sunken warships; the application of salvage law; the ethics of commercial exploitation; and, most crucially, the question of jurisdictional competence to regulate activities beyond territorial sea limits.

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Underwater Cultural Heritage and International Law

Sarah Dromgoole
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Preface

My interest in the legal protection of underwater cultural heritage dates back to the mid 1980s. At that time I wrote an undergraduate dissertation examining what was then the very inadequate UK domestic law on the topic. In the early 1990s, I went on to write a Ph.D. thesis building on this work, which included one chapter exploring international law on the subject. That chapter referred to the nascent legal framework for 'objects of an archaeological and historical nature' enshrined in the UN Convention on the Law of the Sea of 1982 (a treaty which only came into force a year after my doctorate was awarded in 1993).

Since that time, interest in the subject of shipwrecks and underwater cultural heritage has grown enormously and a great deal has changed from a legal perspective, not least at the international level. The Law of the Sea Convention is now a mature treaty (its thirtieth anniversary is being celebrated as I write) and is not too far from universal acceptance. A UNESCO-sponsored treaty on underwater cultural heritage is also in place, which elaborates upon the skeletal framework on the matter established in 1982. The subject-specific treaty is controversial, not least because of its complex relationship with the 1982 Convention. Nonetheless, it came into force internationally on 2 January 2009 and seems set to become an influential instrument in the years to come.

At the time of writing, the states parties to the UNESCO treaty are still in the process of working out how to implement its complex regulatory framework. Other states are reflecting on the fact that it has come into force and are actively considering their position with respect to it, or at least maintaining a 'watching brief'. This juncture therefore seems a timely one to take stock of the subject. This book endeavours to do that by reflecting on how the current international legal framework took shape, how it stands at the present time and how it may develop in the
future. The discussion is arranged thematically and the principal focus is on the issues that have posed the greatest challenges for those seeking to develop a satisfactory global legal framework in this field. While the book is by no means solely about the UNESCO Convention, the Convention provides its frame of reference. One of the purposes of the book is to encourage those who have concerns about the Convention to give it some further consideration; the other is to promote greater interest in, and understanding of, the subject as a whole.

Given its fascinating nature, it is perhaps surprising that there are relatively few monographs in this subject area. The most notable is Anastasia Strati’s seminal work, published in 1995, which provides an excellent analysis of the development of international law up to that time (The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea). Another valuable work is Patrick O’Keefe’s handbook on the UNESCO Convention 2001, published in 2002, which provides a succinct article-by-article commentary on the Convention and affords rare personal insight into its negotiating history (Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage). The present volume is designed to complement these books and to be read alongside them. As well as including copious references to these works, it also draws on the wealth of other literature on the subject that has been published over the last forty years or so. (In order to provide as many examples of state practice as possible, it draws quite extensively on two volumes of national perspectives published under my editorship: see the bibliography. In some instances, the authors or other individuals have kindly supplied updates.)

I have been keen to produce a book that will be of some practical value, as well as of academic interest, and I have therefore endeavoured to make the volume as accessible as possible to archaeologists, heritage managers and other readers who may not have a legal background. To this end, the General introduction includes sections providing some basic information about matters such as the nature and sources of international law, treaty interpretation, the background to the Law of the Sea Convention and the nature of the internationally recognised maritime zones. I have tried to avoid using technical legal jargon where possible; where it is used, I have tried to explain it.

One of the challenges of writing a book on this subject is that it cuts across a number of very different legal areas, ranging from general public international law to domestic private law. My background is in maritime law and, specifically, private maritime law. This means that
my focus has tended to be on aspects of the subject that are directly maritime-related; it also means that there may be some clumsiness in my handling of matters relating to general public international law. Where this is the case, I hope that other aspects of the book may go some way to making up for it.

As far as possible the book represents the state of affairs as at July 2012.
Acknowledgements

In the course of writing this book I had the benefit of a great deal of support and assistance and I would like to express my thanks to all those named below for the help they gave me. Many are friends and colleagues in the field with whom I have collaborated over many years. Among other things, I would like to acknowledge that much of what is in this book originates in things I have learned from them, including through their own writing.

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