Briefing for the Director-General
on the Background and Status of the 2001 Convention

(Briefing updated, based on briefing transmitted in March 2009)

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I. General Information about the current status of the 2001 Convention

The 2001 Convention entered into force three month after the deposit of the twentieth instrument of ratification, on the 2nd January 2009. As of 10 August 2009, the Convention counts 26 States Parties (Albania, Barbados, Bosnia and Herzegovina, Bulgaria, Cambodia, Croatia, Cuba, Ecuador, Grenada, Iran (Islamic Republic of), Lebanon, Libyan Arab Jahimira, Lithuania, Mexico, Montenegro, Nigeria, Panama, Paraguay, Portugal, Romania, Saint Lucia, Slovakia, Slovenia, Spain, Tunisia, Ukraine). At least 15 States prepare currently to ratify. (see list on page 9)

In its first session, on 26 and 27 March 2009 the Meeting has adopted the Rules of Procedure of the Meeting and established a Scientific and Technical Advisory Body of which it decided to consist of twelve members. This Body is to provide expertise during the Meeting of States parties on a scientific and technical nature regarding the implementation of the Rules (Annex of the Convention).

The second session of the Meeting will take place from 1 to 3 December 2009. Its Agenda foresees principally the election of the experts for the Scientific and Technical Advisory Body, respecting an equitable geographical distribution and gender balance and the conception of Operational Guidelines.

According to Rules 21 and 22 of the Rules of Procedure, State Parties may nominate an expert for election to the Advisory Body. Proposed experts should have a scientific, professional and ethical background at the national and/or international level, in conformity with the objectives of the 2001 Convention.

The Secretariat was by RESOLUTION 7 / MSP 1 requested to prepare, on the basis of a consultation with the States Parties, a preliminary draft of Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage, and to submit at the second ordinary session of the Meeting of States Parties the results of its work for consideration and approval. In its second session, the Meeting will discuss and decide about a draft of Operational Guidelines.

II. Problems related to hesitations of some Member States to join the 2001 Convention

A. General Summary

There have been and there still remain several issues, which affect the readiness of certain Member States to ratify the 2001 Convention. Some events and trends have however occurred within the last two years that are now possibly changing the tendency towards a wide-spread ratification:

1. Legal issues

Especially States with a certain maritime power are very prudent in the consideration of all legal issues in connection with the still very young law of the sea, laid down in 1982 in the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”)\(^1\). The resulting apprehensions influence their readiness to ratify the 2001 Convention, even if the makers of the Convention text had given profound consideration to such issues. Points include the:

   a. Issue of the compatibility of the 2001 Convention with UNCLOS
   b. Interconnection of the 2001 Convention with UNCLOS
   c. Issue of the immunity of the remains of warships

Several of these issues begin however to become obsolete by the wider implementation of UNCLOS, in others a solution by the issuance of interpretive declarations by States intending to ratify the 2001 Convention is about to be found.

\(^1\) UNCLOS had been negotiated over 50 years and entered only into force after 12 years of efforts from the UN Secretariat in 1994. Its detailed implementation is still in development.
Remark: The 2001 Convention does not regulate the ownership of submerged remains (see for the reasons in detail on page 7).

2. Non-availability of Capacities
A second issue retaining States from joining the 2001 Convention is the lack of trained experts on underwater cultural heritage (archaeologists, conservationists, administrative personnel). They can neither explore nor treat such heritage and see themselves therefore not in a position to implement the 2001 Convention. From this lack of experts results also a lack of information - many States face the problem of the non-existence or incompleteness of information on the existing underwater cultural heritage sites in their waters. The issue of funding of such activities may therefore be raised in the second session of the Meeting of States Parties.

An issue for States considering ratifying is also the extent of the protection granted to underwater heritage by the 2001 Convention (“all traces of human existence”). The UK did for instance express fears to be forced to take care of its entire submerged heritage (which is very extensive), when ratifying. The Convention asks however only for measures to be taken “within the capacities” of a State.

3. Influence of Special Interest Groups
Third, many States\(^2\) are not ready to ratify the 2001 Convention due to a considerable political influence of commercial enterprises interested in the exploitation of underwater cultural heritage (this influence is not always mentioned and sometimes an alleged incompatibility with the 2001 Convention is cited instead).

Vice versa some States see no need for a ratification of the 2001 Convention due to the fact that there is no pressure from the community of archeologists or divers to do so\(^3\).

The activities of the US American firm *Odyssey Marine Explorations* may however have changed in the last two years the opinion of several major States towards the 2001 Convention in a positive way. *Odyssey* pillaged 17 tons of artefacts from a Spanish wreck as a ‘side event’ of its operations in search of the English ship *HMS Sussex* under a contract with the English government. This event brought the UK in a delicate position with regard to Spain. The UK might therefore in future refuse to sell its submerged heritage, which it did until now on a quite considerable scale (the value of the *Sussex* cargo was estimated at 4 billion Euro).

B. The legal issues in detail\(^4\)

a. Issue of the compatibility with UNCLOS
Especially Member States with a considerable maritime influence have until now opposed the 2001 Convention because they considered that there was

- an incompatibility with the *1982 United Nations Convention on the Law of the Sea* (hereinafter “UNCLOS”), which would not permit any other treaty on issues touched by it, and a there from resulting illegitimacy of the 2001 Convention in the context of international law; and
- a danger of a “creeping jurisdiction”, i.e. that the 2001 Convention changed their jurisdiction and sovereignty rights in the different maritime zones as originally granted by UNCLOS.

a.a. The legality of the 2001 Convention

\(^{2}\) This is for instance the case with Vietnam, Malaysia, Indonesia, Philippines, but also the UK, the USA and the Netherlands.

\(^{3}\) For instance New Zealand.

\(^{4}\) Norway, Russia, Turkey, Venezuela and the USA (the latter not being Member of UNESCO at that time) voted against the 2001 Convention. Turkey, Venezuela, and the USA were not party to UNCLOS and claimed the *mare liberum* right (freedom of the seas), while the other States claimed an incompatibility of the Convention with UNCLOS. Also for France, Germany, and the Netherlands an alleged incompatibility of the 2001 Convention with UNCLOS was until now the main reason for a non-ratification of the 2001 Convention. Remark: The USA have not ratified UNCLOS, but adhere to its standards.
It is obvious that the subject matter of the regulations of UNCLOS is at least in part overlapping with the subject matter of the 2001 Convention\(^5\). The question that poses itself therefore for many States, parties to UNCLOS, is whether UNCLOS allows for other and above all for diverging regulations on the same subject matter by other, later treaties.

The general rule is that a treaty is valid *inter partes*, i.e. among the States Parties to the treaty. According to the *lex specialis* and the *lex posterior* rules, provisions of a more specific treaty or a later treaty between the same Parties will have priority over a general or earlier treaty on the same subject. States can therefore usually agree to change their obligations towards each other. That is why it might be supposed that it would not be a problem for a State already State Party to UNCLOS to later join the 2001 Convention\(^6\).

There is however the problem that due to its large number of Member States, the lengthy negotiations at highest level and the general acceptance of its rules UNCLOS is widely considered as the “Constitution of the Seas”. In consequence the opinion is in partly raised that this “Constitution” could not be changed by a simple, later treaty as there would be a hierarchy (or even superiority) existing between UNCLOS and for example the later adopted 2001 Convention.

Such an opinion on the normative status of the provisions of UNCLOS can be doubted. UNCLOS itself contains regulations opening it for changes. Especially Article 303 para. 4\(^7\) allows for a future, more specific international agreement on the subject of underwater cultural heritage. Furthermore those parts of UNCLOS that deal with such heritage have not been subject to so lengthy negotiations to justify the claimed “constitutional status” as they were in fact only the result of a last-minute introduction.

Even if however the alleged superiority of UNCLOS would exist, this would not forbid a later treaty on the same subject, but would only limit its scope of regulations to the framework set by UNCLOS. The makers of the 2001 Convention regulated therefore cautiously that the Articles of the 2001 Convention shall be interpreted and applied in a manner consistent with UNCLOS\(^8\). If nevertheless the contents of Articles 9 and 10 of the 2001 Convention are criticized as not compatible with UNCLOS (as – arguably - the protection of the underwater cultural heritage does not fall within “marine scientific research” for which coastal States have jurisdiction according to Art. 56 (1)(b)(ii) UNCLOS\(^9\) in the Exclusive Economic Zone) it can be claimed that the 2001 Convention presents for its States Parties the “equitable resolution” of the

\(^{5}\) UNCLOS was drafted with a view to offering general provisions on the law of the sea. It includes two provisions - its Articles 149 and 303 - that refer specifically to archaeological and historical objects and establish an obligation for its States Parties to protect them. In its further rules it regulates sovereignty rights and jurisdiction of States at sea as well as certain rights and obligations concerning warships.

\(^{6}\) This opinion is apparently shared by the Office of Legal Affairs of the Division for Ocean Affairs and the Law of the Sea of the United Nations, stating that the agreements meant by Article 303 paragraph 4 of UNCLOS “include notably the three UNESCO-sponsored Conventions on the protection of cultural property, as well as other treaties that may be concluded in the future on the subject.” - Comments by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, 21.08.1995, page 2.

\(^{7}\) Article 303 on “Archaeological and historical objects found at sea” states in its para. 4: This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.


\(^{9}\) Article 56 UNCLOS on “Rights, jurisdiction and duties of the coastal State in the exclusive economic zone” states: *In the exclusive economic zone, the coastal State has:*

(a) …; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; …
conflict over the jurisdiction of a Coastal State to which Article 59 UNCLOS refers to and which is called for by it.

a.b. Creeping jurisdiction

Sovereignty rights and jurisdiction on sea have been subject to very hard discussions in the negotiation process of UNCLOS. Most States fear therefore any re-opening of these discussions and any questioning of the compromise obtained.

As a general rule the 2001 Convention does not define or change maritime zones and does not modify State jurisdiction within the different maritime zones. It focuses on heritage protection issues. There would therefore not be any conflict arising. However, a very limited change of sovereignty rights by the 2001 Convention occurs in the cases of immediate danger to submerged archaeological sites.

In the cases of pillaging or other immediate danger-events coastal States obtain through the 2001 Convention the right for a ‘first aid’ intervention. Such regulation was however necessary, as UNCLOS does not guarantee such right and the effort to protect heritage without granting a right for immediate danger prevention would have been ineffective.

b. Interconnection with UNCLOS

Other Member States, which are not Party to UNCLOS, are opposing the regulations of the 2001 Convention concerning State jurisdiction and sovereignty rights, which they do not want to accept due to their mare liberum (freedom of the sea) approach. They mind that the 2001 Convention relies allegedly or in reality in its regulations on provisions from UNCLOS, which they are not bound to.

As the adherence to UNCLOS is increasing, this issue will certainly become obsolete in a near future.

c. Issue of the immunity of the remains of warships

The regulations of the 2001 Convention concerning the protection of the remains of warships create an obstacle to ratification for some Member States (in particular France), which raise the claim of immunity of such remains of their ships also when located in the Territorial waters of other States and also when already older than 100 years.

The basic problem is that the question if immunity of ancient remains of warships exists or not is not entirely decided and clarified in international law and among States.

The 2001 Convention protects the wrecks of such ancient State vessels and aircraft (which include warships) as cultural heritage against looting and destruction in stating that:

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10 Article 59 UNCLOS “Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone” states: In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

11 Article 10.4: Without prejudice to the duty 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.

12 The regulations of UNCLOS regarding underwater heritage are very general and leave room for commercial salvage (Art. 303 UNCLOS).
The Convention does not modify existing international law concerning sovereign immunities or States’ rights regarding their State vessels (Article 2.8)\textsuperscript{13};

- If a wreck of a State vessel is found outside territorial waters the consent of the Flag State is also required before interventions are undertaken within the framework of the Convention\textsuperscript{14};

- The Convention stipulates that the Flag State should be informed if such a wreck is found within Territorial waters and other existing international law has of course to be respected\textsuperscript{15}. 

The formulation chosen by Article 7 para. 3 of the 2001 Convention “should inform” (instead of the binding “shall”) has raised fears in maritime powers to loose the control over such remains when located in Territorial waters of other States as the 2001 Convention might create a precedent not recognizing their State immunity.

These apprehensions are not always founded on military considerations\textsuperscript{16}, but also often on the consideration to be able to protect those remains from pillaging or looting\textsuperscript{17}. The inclusion of a immunity-clause in the 2001 Convention was discussed, but did not find a majority.

Many States felt that this issue had little to do with the object of the 2001 Convention, the protection of cultural property. The 2001 Convention, as adopted, is inspired by the assumption that a ship that has been under water for a hundred years no longer contains State secrets and should therefore fall under the usual cultural heritage protection like any other wreck\textsuperscript{18}. 

\textsuperscript{13} Article 2 para. 8 of the 2001 Convention regulates: “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.”

\textsuperscript{14} Article 10 para. 7 regulates for the exclusive economic zone and the continental shelf: “Subject to the provisions of paragraphs 2 and 4 of this Article, 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.”

\textsuperscript{15} The Convention stipulates that this regulation has not to be interpreted as modifying already existing international law (see Art. 2.8 and Fn 9); Article 7 paragraph 3 regulates for archipelagic waters and territorial sea: “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 aircraft.”

\textsuperscript{16} Spain used the claim of immunity to protect for instance the Galga and Juno wrecks as well as now, in a law case begun in 2007, to protect the Nuestra Senora de la Mercedes wreck.

\textsuperscript{17} The issue of the immunity of warship wrecks had already been discussed during the negotiations of UNCLOS. Some parties were arguing that the minimal provisions on warships now included in Articles 32 and 236 UNCLOS should apply equally to sunken as well as to surface warships. However, this argument has not been accepted by many States (indeed the definition of warships in UNCLOS appears to exclude it: Article 29 “For the purposes of this Convention, “warship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.”), since a sunken warship is no longer under the command of an officer and therefore does not meet the UNCLOS definition.

\textsuperscript{18} See insofar Articles 32 and 236 of UNCLOS which foresee a sovereign immunity of warships: Article 32 UNCLOS “Immunities of warships and other government ships operated for non-commercial purposes”: “With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes”. Article 236 UNCLOS “Sovereign immunity”: “The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.”; See also the case of a German submarine from WWII that was loaded with chemical substances that now threaten to pollute Scandinavian waters.
As the 2001 Convention does only apply to its States Parties and as such States Parties are kept to protect underwater cultural heritage and to cooperate with the other States, the above-explained concern of the maritime-powers seems to be relatively oversized in comparison to the real danger to their warship remains. If a Coastal State Party should indeed commercially exploit such remains, without giving regard to the ethical guidelines of the 2001 Convention and without cooperating, it would be in violation of its legal obligations similarly as it would be if it would have recognized a State immunity of such remain and intervened without permission.

III. The issue of the ownership of submerged archaeological remains

Since the notion of “shipwreck” is often connected with the term “treasure”, the general public and journalists tend to focus on the issue of “who owns it?” The 2001 Convention does however not change or regulate the ownership of wrecks and submerged ruins. This issue was considered too delicate and complicated as to be resolved by a Convention.

There are too many practical and legal issues to be considered and it might in some cases be altogether impossible to clarify the issue of ownership. In answering the issue, to whom a shipwreck belongs, a question-chain similar to the following might need to be answered:

1. Which shipwreck is this?
2. Who owned it at the time of sinking?
3. Who owned the cargo at the time of sinking?
4. Who are the successors of the owners of shipwreck and cargo? Are there any?
5. Which’s State legislation applies on the zone where the wreck was found?
6. Is there any State legislation applying that would foresee a State ownership?
7. Are there any moral rights impeaching restitution to one or the other party?

Often it is already very difficult to clarify the identity of a shipwreck, especially when it is very ancient. Even when the wreck can be identified it is usually still questionable, who was its last owner and who is its successor (given that one speaks here about wrecks older than 100 years). In case of State ships this question is easier to be answered, the Netherlands are for instance now owner of all VOC shipwrecks, but such an easy “answer” is not always at hand. In case of merchant shipwrecks the concerned enterprises may not exist any more, may have lost ownership to an insurance company or may have been split in an inheritance.

Even if the hull of the wreck has an owner, there remains the question who owned the cargo it contained at the time of its sinking. This might be difficult to prove if there remain no written records. Even if they exist the original owners are, in case of physical persons, dead, in case of moral persons, they may be already inexistent. So again a search for the owner is necessary.19

Even if all these riddles can be resolved there may remain a question of applicable law. France has for instance a law regulating that all ancient shipwrecks in its waters that have not a clear owner belong to France. However, sometimes the extend of maritime zones is still under discussion – in cases of similar laws as the cited French one the question becomes therefore crucial to whom a certain maritime zone belongs.

And last but not least there may remain the question of moral rights to certain artefacts, for instance if they had been taken in an events of occupation, colonialisation or war.

19 Often the solution is found that a certain time-span is set for the successor of the owner to claim his ownership, after which’s end the ownership falls to the State.
Example:

The *Nuestra Señora de las Mercedes* wreck, pillaged by the US American enterprise *Odyssey Marine Explorations* in 2007, was a ship owned by the Spanish Navy. At the time of its sinking it contained a valuable cargo of gold and silver from Peru, which was owned in parts by private merchants, who had obtained this silver in exploiting the Inca population.

The Kingdom of Spain now reclaims the looted cargo remains in court from the American enterprise, which pillaged the wreck, claiming its ownership. It does however do so together with the Republic of Peru as conditional claimant, recognizing the difficult issue of the ownership of the concerned artefacts. Some of the successors of the private merchants, which owned originally the cargo, have also already raised their claim with the Spanish government.

IV. The current trend regarding the ratification of the 2001 Convention

Currently the hesitations of States to ratify the 2001 Convention seem to decrease. In January 2009 Grenada and Tunisia and in June, Iran joined the Convention. Other States prepare to follow this trend.

Especially influential will be the recent development in Europe. As a result of a regional meeting, which took place on 9 July 2008 in London and intensive Secretariat assistance several bigger European States have indicated to consider the ratification of the 2001 Convention.

This changed intention is also due to the above-mentioned activities of the US American firm *Odyssey Marine Explorations*, which pillaged 17 tons of heritage from a Spanish wreck and wishes to exploit the UK wreck the *Sussex*. A third wreck, the *HMS Victory* has been found in UK waters by *Odyssey*, and it also contacted the Italian authorities for the commercial exploitation of the Italian *Ancona* wreck and the French government for the French wreck *la Vierge* raising increasing opposition in archaeological and government circles.

France considers now ratifying the 2001 Convention to increase its chances to effectively protect *la Vierge* in joining an interpretative declaration to its ratification instrument upholding its immunity rights on warship remains.

Germany does as well consider ratifying, with the explanation that it does so ‘in order to join the general trend’. The same kind of indications came from the Netherlands. Italy has reinforced its preparations for ratification.

Several regional Meetings and an international Conference will take place in the following months; an exhibition about the underwater cultural heritage is planned to ‘travel around the world’ and will be exhibited in some UNESCO field offices to foster knowledge and to advance the ratifications of the Convention.

States currently preparing to ratify:

1. Algeria
2. Australia
3. Argentina
4. Belgium
5. Brunei
6. China (?)
7. Denmark
8. Germany
9. **France**
10. Guatemala
11. Honduras
12. Hungary
13. India
14. Ireland
15. **Italy**
16. Jamaica
17. Jordan
18. Namibia
19. **Netherlands**
20. Poland
21. Philippines
22. South Africa
23. Sri Lanka
24. Tanzania
25. Thailand
26. Trinidad & Tobago