HERITAGE AT RISK

SPECIAL EDITION

HERITAGE UNDER WATER AT RISK

THREATS – CHALLENGES – SOLUTIONS

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HERITAGE UNDER WATER
AT RISK
THREATS – CHALLENGES – SOLUTIONS

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LE PATRIMOINE SOUS L'EAU
EN PERIL
MENACES – DÉFIS – SOLUTIONS

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PATRIMONIO BAJO EL AGUA
EN PELIGRO
AMENAZAS – DESAFÍOS – SOLUCIONES

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CULTURAL HERITAGE: ITS INTERNATIONAL LEGAL PROTECTION

Mariano J. Aznar, Spain

Fig. 1 The UNESCO Convention on the Protection of the Underwater Cultural Heritage was adopted in 2001. At the time of writing 66 states have subsequently ratified it, with other states using the Rules in the Annex to the Convention as an operational framework. © UNESCO.

Introduction

The international legal protection of the underwater cultural heritage (UCH) offers a clear example of its legal complexities given the nature, the location, and the uses of that heritage. Cultural objects, sometimes of the greatest importance, deserve to be properly preserved for future generations, and are thus governed by international heritage law mainly codified by the United Nations Educational, Scientific, and Cultural Organization (UNESCO). As cultural objects located at sea[1], other corpuses of law may apply, mainly the law of the sea generally codified in the 1982 United Nations Law of the Sea Convention (UNCLOS)[2] and sometimes maritime law mainly conformed by private law rules occasionally codified by treaties.[3] Depending on its location, whether under the sovereignty or jurisdiction of the coastal state or not, the domestic legislation of the latter may also apply. Finally, as objects, UCH may also have a private or public owner, may be a marine peril — for navigation or for the environment — or deserve to be protected or managed for other reasons, for example as artificial reefs which became ecosystems, or marine gravesites transformed into venerated places.

UCH is thus governed by a complex canvas of domestic and international rules, the latter sometimes expressed in recommendatory soft language and nature; sometimes in hard conventional texts with compulsory and hortatory language; and some others transformed in general principles, applicable to all states, irrespective of their conventional obligations, because a particular rule has gained customary status opposable to the entire international community. Attending to its terms, to a longstanding practice of states and the object and purpose of its content — and its context, including the general duty to protect cultural heritage in broad terms, deduced from numerous treaties —, Art. 303(1) UNCLOS can be considered among those general universal rules when saying that 'States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.'

Keywords: Legal Protection – Law of the Sea – Underwater Cultural Heritage – Maritime Law – UNCLOS

This twofold obligation imposed by UNCLOS is echoed in the special agreement states have adopted on the subject: the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage[4] (2001 UNESCO Convention). To complete the sometimes contradictory and ambiguous (even counterproductive) regime for the UCH created by UNCLOS[5], states decided to negotiate this new international agreement around four main ideas:

(a) the enhancement of this general duty to protect and the organization of the duty to cooperate,
(b) the prohibition of commercial exploitation of UCH,
(c) the importance of a scientific approach to UCH avoiding the discussion on title upon that heritage, and
(d) the incardination of this new convention into a more ample and diverse canvas of laws and policies trying to preserve cultural heritage, in general, and underwater heritage, in particular, for future generations.

This new convention has provoked, however, some criticisms, most of them due to misunderstandings generated around its terms and purposes. There are also some problems still existing which deserve a close legal scrutiny; and some challenges that need to be evaluated and, if possible, resolved.
This contribution will briefly address some of these questions in legal terms, i.e. focusing only on the legal aspects of these misunderstandings, problems, and challenges that may of course have some other profiles including historical, archaeological, and technical.

Misunderstandings

Three main misunderstandings can be discussed here: the concept of UCH as defined in Art. 1(1)(a) of the 2001 UNESCO Convention; the exact meaning and purpose of the *in situ* preservation rule outlined in art. 2(5) and rules 1 and 4 of the Annex[6]; and the relationship between the 2001 UNESCO Convention and UNCLOS.
1. Art. 1(1)(a) definition of UCH includes '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 such as:

(i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
(ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
(iii) objects of prehistoric character.'[7]

Two questions may be discussed: the first, for some states — particularly the United Kingdom —this would propose the 'blanket protection' of millions of objects located at sea, creating an impractical regime that might protect all and any remains of human traces. This concern, however, forgets that these traces must have 'a cultural, historical or archaeological character', thus implying a scientific identification and valorisation of the object before labelling it as UCH. The second is the time limit of 100 years which was adopted due to two intertwined motives: to leave aside, for the moment, recent human traces beneath the waters — therefore also avoiding the problems of the title of recent sunken vessels, for example — and because that threshold was predominantly adopted by the majority of domestic legislations imposing age limits in their heritage laws.[8] However, it must be underlined that the 2001 UNESCO Convention time limit does not prohibit domestic legislation from protecting more recent UCH in their respective waters under sovereignty or jurisdiction. Again, as with the 'blanket protection concern', it will depend on the relevance of the archaeological site and the objects within it.
2. The *in situ* preservation concept has been misused by politicians, lawyers and, even, archaeologists, as an excuse for inaction or as an absolute rule provoking an overzealous desire to protect, regardless of the specific needs of each underwater site. However, the 2001 UNESCO Convention in its art. 2(5) and rules 1 and 4 of the Annex clearly define *in situ* preservation 'as the first option before allowing or engaging in any activities directed at this heritage.' *In situ* preservation is not necessarily the best underwater archaeological solution, nor is it legally required in all circumstances. Rather, it is the first and, perhaps, the most technically desirable option, when archaeological, legal, and political circumstances — in that order — so advise. The removal of an historical object or objects found under the sea and their conservation outside the marine environment is another plausible option, provided the archaeological standards accepted by the international scientific community are met (Aznar 2018).
3. Perhaps the most problematic misunderstanding is that regarding the relationship between the 2001 UNESCO Convention and UNCLOS. This concern was generated by what has been qualified as 'constructive ambiguities' of the Convention, needed for its final adoption.[9] The misunderstanding derives from the negotiating days of the Convention when some states (prominently Norway) understood it to be a 'subordinated text' to UNCLOS, i.e. a treaty on the law of the sea instead of a treaty on cultural heritage, as was widely understood by the rest of the states' delegations at UNESCO. This derives from the fact that UNCLOS, as already said, is the 'Constitution of the Oceans', and thus was apparently carved in stone. However, both UNCLOS and 2001 UNESCO Convention preambles declare 'the need to codify and progressively develop' international rules; and the latter does it regarding the protection and preservation of underwater cultural heritage in conformity with international law and practice, including UNCLOS and other cultural heritage conventions already in force.

Actually, this special relationship with the UNCLOS is anticipated in art. 3 of the Convention, which plainly states that '[n]othing 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'; and that the 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'.

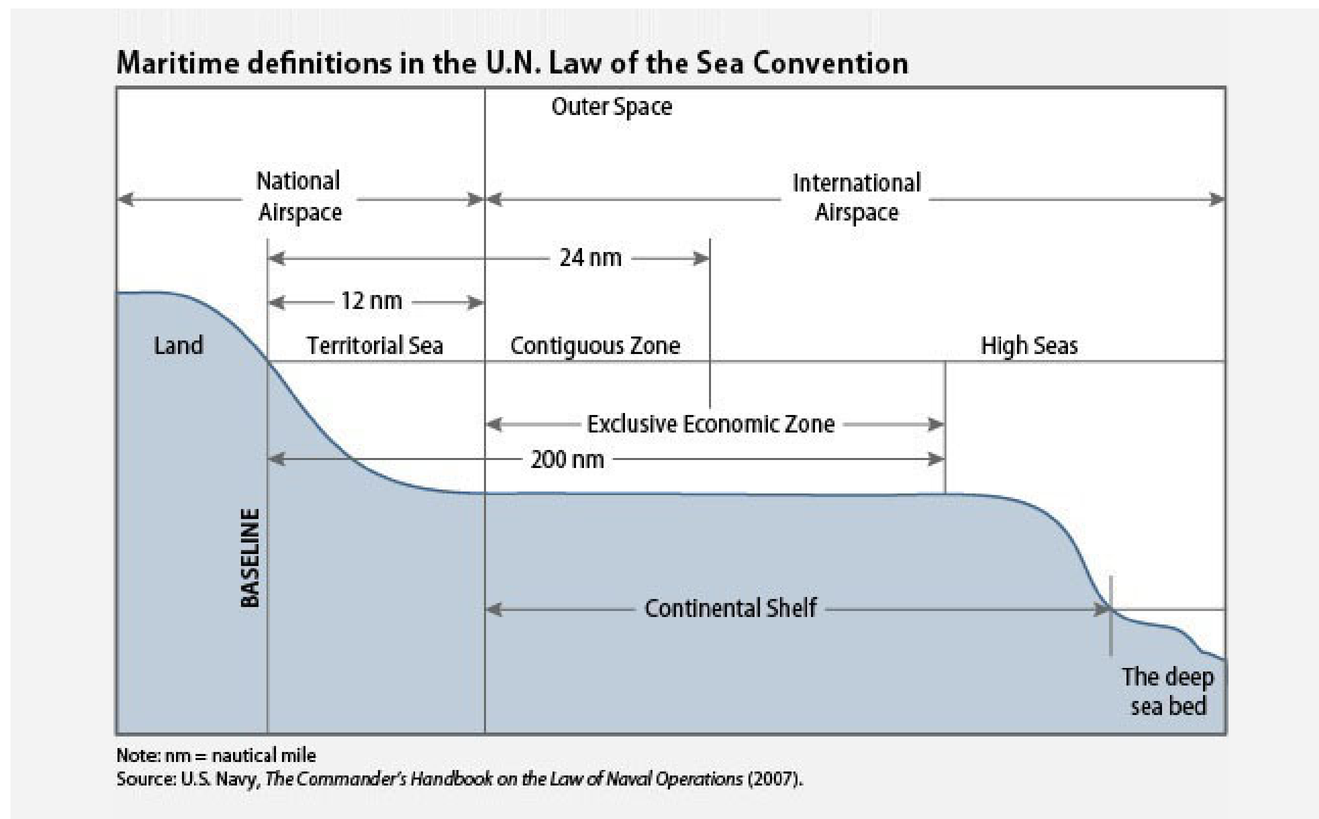

Fig. 2 Maritime zone definitions in the United Nations law of the Sea Convention. © US Navy. The Commander's Handbook on the Law of Naval Operations (2017).

The misunderstanding, and consequently the concern, mostly arrived with the regime established in the Convention for the exclusive economic zone (EEZ) and the continental shelf (CS) in arts. 9 and 10. However, on the one hand, and with regard to the activities directed at UCH in these zones, art. 10(2) clarifies that '[a] State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right 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 including the United Nations Convention on the Law of the Sea.' In addition, under art. 10(6), any decision or measure adopted by the so-called 'coordinating state' implementing those activities 'shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea.'[10] On the other hand, some misunderstanding was created with regard to the notification process foreseen in art. 9 for UCH discoveries in those zones. Its paragraph 1 establishes an alternative system to report them by the discoverer (a person or a vessel) either to the coastal state — which implies for some states a new obligation not provided for by UNCLOS — or to its national/flag state, which would transmit the information to the rest of the States parties, including the coastal state (a reporting obligation peacefully nested in UNCLOS). Surprisingly, concerned states seem to forget that this reporting system only applies to the States parties to the 2001 UNESCO Convention. It is not compulsory for third party states, nor has it changed the text of UNCLOS.[11]

Problems

There are three problematic issues that originated some discussions and, to some extent, still generate concerns among states: the legal regime of sunken state vessels as UCH; the applicability of the law of finds and, most particularly, the law of salvage relating to UCH; and the regime provided for the UCH located beyond national jurisdiction.

1. With regard to the legal status of sunken state vessels (and aircraft)[12], the problem derives from two facts and two negotiated decisions: first, that states jealously preserve the immunity of those vessels as public property, most time in-

volved in sovereign and sensitive activities, both today and in the past[13]; second, that a relevant number of these vessels – again: today and in the past – when sunk, accidentally or in combat, become marine gravesites, thus deserving a special protection given by the law of nations (Forrest 2015); third, that states considered however that those vessels and their archaeological submerged sites are undeniably good examples of UCH, thus meriting to be protected by the 2001 UNESCO Convention; and, fourth, notwithstanding this, that should not discuss or affect the ownership of these sunken vessels.[14] Rather, with another 'constructive ambiguity', the Convention tries to solve this question with a typical non-prejudice clause in its art. 2(8), saying that '[c]onsistent 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'. The Convention thus moves the question to general international law (including UNCLOS), but practice and doctrine have not yet settled this problem definitively (IDI 2015; Aznar 2010). In any case, what might be underlined is not so much the question of ownership but that of responsibility in the best protection of those fragile pieces of UCH and the cooperation between nations under strict scientific standards.

2. This is also urgently needed with regard the applicability to UCH — and particularly to old state vessels sunk while carrying precious metals or valuable cargoes — of the law of finds and the law of salvage.[15] This is because treasure hunters are using the law of salvage as a legal conceptual framework to recover UCH and commercialize it without any scientific care (Varmer and Blanco 2018). Therefore, the 2001 UNESCO Convention, after sound discussions, opted for a non-total exclusion of the application of the law of finds and the law of salvage to UCH. Rather, the reference text — its art. 4 — was precisely drafted in negative tense, as an exception, and imposing cumulative conditions in its application: '[a]ny 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: 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.'

3. Finally, the third problem relates to the protection of UCH in the Area, that is, the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, i.e. beyond the habitual outer limit of 200 nm of states' EEZ/CS. As submarine technologies advance, deeper marine sites are accessible to human activities. As these (and coastal) activities increases, threats to marine environment intensify quantitatively and qualitatively.[16] Exploitation of marine resources — ancient like fishing, recent like submarine mining, including hydrocarbons, and even more recent like the profit of energies or biogenetic marine resources — created new and renewed threats to that fragile environment, including its intimately linked natural and cultural resources. The problem is that natural heritage (environment) has already been in the agenda of the policy- and law-makers during the last decades. How to expand this concern to the cultural heritage located in the Area and, perhaps, to mirror and expand to UCH the legal regime already existing for the protection of natural resources should be a thought-provoking task for the coming years (Aznar 2017).

Challenges

Having addressed some misunderstandings and problems still existing with regard to the international legal protection of UCH, some challenges ahead must also be faced in order to make workable the effective protection of this heritage proposed by the 2001 UNESCO Convention (read in context with other international and domestic texts): 1. to underline that the major threat to UCH comes from activities indirectly affecting this heritage; 2. to realise that the protection unfailingly is a cooperative task and 3. that most states and, what is even more dangerous, the general public still ignore what UCH is and how it should be preserved for future generations.

1. From my point of view, the most important but rarely discussed proviso of the 2001 UNESCO Convention is art. 5, which states that '[e]ach State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.' This is a wide-ranging duty imposing both obligations of result (to protect UCH) and of behaviour (to use best practicable means) against licit, day-by-day and generalized activities performed at sea by different stakeholders, including states: from fishing to coastal development, from laying submarine cables or pipelines to installing off-shore wind farms, from creating new artificial reefs to draining coastal wetlands. This also relates to art. 16 of the Convention (See Petrig and Stemmler 2020). Along with the impact of climate change and natural events, the Anthropocene era characterized by a deep impact in all kind of environments, with global effects. To inoculate the 'UCH-DNA' into any policy and law-making process — as it was gradually done with the (natural) environmental variable — is the main challenge we have in the very near future, both at international and domestic level.[17]

2. This should be done properly through a more cooperative approach since challenges to UCH cannot usually be spatially reduced to one or two adjacent states. Moreover, UCH sites cannot be totally explained only from a national

perspective: old Phoenician or Roman routes, for example, intensively used by different cultures transporting products, languages, ideas, artistic artefacts, technical solutions, faiths and gossips, did not end at sea. They crossed the waves and opened new trading and cultural routes. The Manila Galleon enterprise (1565–1821) — the most fabulous, longest, and longstanding maritime route linking for centuries three continents and four oceans — implied that cargoes and people bound for the Indian Ocean coasts and South China and Philippines Sea were loaded in Manila in a Spanish vessel which, guided by the newest state-of-the-art technologies of that period, arrived to Mexico by the safest and fastest route crossing the Pacific Ocean. Some cargo and people disseminated from Mexico throughout the Americas. The rest arrived to the Caribbean where, from Havana, crossing the Atlantic Ocean in new vessels to the route, were finally downloaded at Cádiz, Spain, from where people and cargo disseminated throughout Europe. Add to this incredible voyage the returning route, with people and cargo from Europe to America and Asia.[18] If the remains of one of these galleons were found, how many countries would be therefore involved as what the 2001 UNESCO Convention denominates as 'interested states'?[19] Cooperation is the landmark of the Convention, as expressed in its arts. 2 and 19 — echoing art. 303 (1) UNCLOS — [20] and establishing in arts. 10 and 12 a perhaps perfectible system of collaboration. But cooperation may be also sought through new hard and soft agreements (art. 6) and including both information sharing and training in underwater archaeology (art. 21).

3. However, all these normative and institutional efforts must be directed to the main purpose of the Convention, summarised in its art. 2(3) when saying that 'States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.'[21] Unfortunately, due to the spatial location of UCH and the special characteristics of its preservation (preferably *in situ*), the general public very often ignores the richness of its heritage beneath the waters. The Convention is 'convinced of the public's right to enjoy the educational and recreational benefits of responsible non-intrusive access to *in situ* underwater cultural heritage, and of the value of public education to contribute to awareness, appreciation and protection of that heritage' (Preamble); and its art. 2(10) calls for a '[r]esponsible 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'. Because the public protects what they appreciate, and appreciate what they know, the most challenging task for historians, archaeologist, curators, and policy- and law-makers acting through NGOs like ICOMOS and intergovernmental institutions like UNESCO is to imagine and perform all kinds of dissemination, education, outreach and research efforts to fulfil the mandate to adequately preserve UCH for future generations imposed by UNCLOS, the 2001 UNESCO Convention, and general international law.

1 Objects located in continental waters (rivers, lakes, inlets, wetlands, etc.) are ultimately governed by the domestic law of the territorial state and do not offer (unless special cases) 'international' problems.

2 UN Convention of the Law of the Sea (UNCLOS), adopted in 1982 and in force since 1994. As for today, UNCLOS has 168 States Parties, that is, the vast majority of states which consider UNCLOS — even those nonparties like the US — as the 'Constitution of the Oceans'.

3 The 1989 London Salvage Convention or the 2007 Nairobi Wreck Removal Convention may be good examples.

4 Adopted 2 November 2001, in force since 2nd January 2009. As for today, the UNESCO Convention has 66 States parties: Albania, Algeria, Antigua and Barbuda, Argentina, Bahrain, Barbados, Belgium, Benin, Bolivia, Bosnia-Herzegovina, Bulgaria, Cambodia, Cabo Verde, Costa Rica, Croatia, Cuba, DR Congo, Ecuador, Egypt, Estonia, France, Gabon, Ghana, Granada, Guatemala, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, the Islamic Republic of Iran, Italy, Jamaica, Jordan, Kuwait, Lebanon, Libya, Lithuania, Madagascar, Mexico, Micronesia, Montenegro, Morocco, Namibia, Nigeria, Niue, Oman, Palestine, Panama, Paraguay, Portugal, Romania, San Kitts & Nevis, Saint Lucia, San Vincent & the Grenadines, Saudi Arabia, Senegal, Slovakia, Slovenia, South Africa, Spain, Switzerland, Togo, Trinidad & Tobago, Tunisia and Ukraine.

5 Most particularly, paragraph 3 of art. 303 UNCLOS is really counterproductive for the protection of UCH when it says that '[n]othing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges', mixing public and private law rules without hierarchizing the public and private interest also included.

6 The negotiating States decided to include in the Convention (as an integral part of it, under art. 33) a set of 36 rules (the Annex) which constitutes the archaeological protocol widely accepted by the scientific community and seminally drafted by ICOMOS in its Charter of Sophia (1996).

7 Subparagraphs (b) and (c) of this same article leave aside the concept of UCH the pipelines and cables placed on the seabed as well as installations other than pipelines and cables, placed on the seabed and still in use. I consider the later exception inconsistent with some underwater heritage (fish traps, old harbor structures, for example) which merit to be consider UCH but, because they may be (and actually are) still in use, are not technically protected by the Convention.

8 There are numerous domestic legislations which do not impose any kind of time limit trying to be as protective as possible when addressing cultural heritage through archaeological methods.

9 Adoption according to the typical procedure in UNESCO, that is, vote of the states present in its General Conference, showing a positive result of 87 votes in favor, 15 abstentions and 4 against (Norway, Russia, Turkey, and Venezuela). The United States of America did not vote since they were (and are) not a UNESCO member.

10 The 'coordinating State' for these activities in the EEZ/CS — normally the coastal State — acts always 'on behalf of the States Parties as a whole and not in its own interest' when organizing and conducting the measures to protect UCH in these zones.

11 Actually, most States parties which have declared what reporting procedure they do prefer have select the second option, more aligned with UNCLOS.

12 For the 2001 UNESCO Convention, those are 'warships, and other vessels or aircraft that were owned or operated by a state and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage' (art. 1(8)). Art. 29 UNCLOS defines (only) warship as '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.'

13 Art. 32 UNCLOS recognizes that 'nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.' See further art 16(2) of the UN Convention on Jurisdictional Immunities of States and Their Property, adopted in 2004, not yet in force but codifying customary law.

14 From the earlier drafts of the Convention and during the negotiating meetings, the questions of abandonment and title upon these wrecks were explicitly avoided in order to prevent a deadlock among two opposite group of States: those strictly defending the supremacy of the immunity rule (derived from the public property of the flag States) and those giving prominence to the territorial sovereignty (derived from the assumption that everything located in its territory, including maritime territory, belongs to the coastal state). As long as the immunity argument diminishes, the immunity argument increasingly applies, as can be seen in the Convention in arts. 10(7) and 12(7) where, for the EEZ/CS and the Area (respectively), no activity directed at state vessels and aircraft shall be adopted without the agreement or consent of the flag state.

15 Although rooted in ancient law, including roman law, the law of salvage as discussed here has been mainly conceptualized in common law doctrine and admiralty courts. The latter has asserted, for example, that the law of salvage and the law of finds are mutually exclusive [R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 961 (4th Cir. 1999)]. Both set of rules are different indeed: 'Granting title to artefacts under a salvage award is different from granting title to the salvor as a finder; in the former case but not the latter, the court may retain jurisdiction and continue to supervise the salvage operations.' (Schoenbaum 2018, 802).

16 As a reaction, UNESCO has decided to revisit its 1972 World Heritage Convention and discuss the possibilities to expand its regime beyond the outer limit of the territorial seas of States parties. See the special website of UNESCO at http://whc.unesco.org/en/highsea; accessed 30th September 2020.

17 Unfortunately, the 2021-2030 Sustainable Development Agenda (see https://www.un.org/sustainabledevelopment/development-agenda/; accessed 30th September 2020, does not specifically refer to the protection of UCH in its Sustainable Development Goal (SDG) 14 on oceans, seas and marine resources. However, the United Nations Conference to Support the Implementation of SDG 14 of the 2030 Agenda that took place in June 2017 expressly recognized that the ocean forms an important part of our cultural heritage and called on all stakeholders to develop comprehensive strategies to raise awareness of the natural and cultural significance of the ocean. See https://oceanconference.un.org/callforaction; accessed 30th September 2020. On the contrary, the UN General Assembly, during the last annual sessions has constantly urged all States 'to cooperate, directly or through competent international bodies, in taking measures to protect and preserve objects of an archaeological and historical nature found at sea […]' See A/Res/72/73, 4th January 2018, on 'Oceans and the law of the sea', for its last mention.

18 The same could be said about the maritime 'silk route' across Asia or any west African cabotage nautical routes along the centuries.

19 That is, those States with 'a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned' (art. 9(5)) (Maarleveld 2014).

20 Completed for the Area with art. 149 UNCLOS, which establishes that '[a]ll 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, with 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'.

21 The Preamble of the Convention further acknowledges the importance of UCH 'as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage.'

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Further reading

Along with the cited references in this article, a complete general overview of the international legal protection of UCH and the making of the 2001 UNESCO Convention may be seen in these five books in five different languages:

Aznar Mariano J (2004) La protección internacional del patrimonio cultural subacuático. Tirant, Valencia.

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