

**THE NOTIONS OF ‘PREFERENTIAL RIGHT’  
AND ‘INTEREST’ OF STATES  
IN THE PROTECTION OF  
THE UNDERWATER CULTURAL HERITAGE**

***LAS NOCIONES DE “DERECHO PREFERENTE” E  
“INTERÉS” EN LA PROTECCIÓN DEL PATRIMONIO  
CULTURAL SUBACUÁTICO***

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Summary: I. INTRODUCTION. II. PREFERENTIAL RIGHTS: 1. UCH IN LOSC: A) THE DRAFTING OF ARTICLE 149 LOSC; B) A TEXTUAL INTERPRETATION OF ARTICLE 149 LOSC; 2. UCH BEYOND LOSC: A) DEFINING UCH; B) THE MANAGEMENT OF UCH IN THE AREA; C) THE SUBJECTS OF THE PREFERENTIAL RIGHTS; D) REMAINING OPEN QUESTIONS. III. INTEREST: 1. THE NOTION OF INTEREST...: A) ...IN INTERNATIONAL LAW...; B) ...AND IN INTERNATIONAL HERITAGE LAW; 2. INTEREST AND THE PROTECTION OF UCH; A) DETERMINING INTERESTS AND IDENTIFYING THE INTERESTED SUBJECTS; B) IDENTIFYING INTERESTED SUBJECTS AND THEIR RESPECTIVE LEGAL CAPACITIES; C) CONSEQUENCES OF THE EXISTENCE OF THESE INTERESTS. IV. CONCLUDING REMARKS.

ABSTRACT: The notions of *preferential right* and *interest* of states are not alien to general international law or the law of the sea and, as hypothesis, there is a subtle and plausible trend to prefer the later before the former when addressing the legal regime of global commons. Considering the underwater cultural heritage (UCH) as a possible component among these commons, this article discusses how to build up a legal regime protecting UCH progressively abandoning the presence of *rights* and its substitution by the notion of *interest*. A quest for the holders of this interest and their identification *in casu* through the revisited notion of verifiable link, the content and extent of their legal capacities and the responsibilities these stakeholders may have—particularly states—and the legal regime governing all these issues are the purpose of these pages. This article will discuss first the notion of preferential right as used in international law and the law of the sea, in general, followed by the study of the presence and projection of that notion in current international legal texts governing UCH. The same scheme of analysis will be followed when addressing the notion of legal interest and its performance as an operative concept both at the general level of international law and the law of the sea and, later, how this notion may be creating a new legal and political canvas for the protection of UCH.

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*RESUMEN: Las nociones de derechos preferentes e intereses de los estados no son ajenas al derecho internacional general o al derecho del mar y, como hipótesis, existe una tendencia sutil y plausible de preferir los últimos a los primeros al abordar el régimen jurídico de los bienes comunes globales. Considerando el patrimonio cultural subacuático (PCS) entre estos bienes comunes, este artículo analiza cómo construir un régimen jurídico que proteja el PCS abandonando progresivamente la presencia de derechos y su sustitución por la noción de interés. Una búsqueda de los titulares de este interés y su identificación in casu a través de la noción revisada de vínculo verificable, el contenido y el alcance de sus capacidades jurídicas y las responsabilidades que los actores interesados puedan tener (particularmente los Estados), y el régimen jurídico que rige todos estos temas son el propósito de estas páginas. Este artículo discutirá primero la noción de derecho preferente como se usa en el derecho internacional y el derecho del mar, en general, seguido por el estudio de la presencia y proyección de esa noción en los instrumentos jurídicos internacionales actuales que rigen el PCS. Se seguirá el mismo esquema de análisis cuando se aborde la noción del interés jurídico y su desempeño como un concepto operativo tanto a nivel general del derecho internacional como en el derecho del mar para, más adelante, estudiar cómo esta noción puede estar creando una nueva estructura de análisis para la protección del PCS.*

KEYWORDS: preferential right, interest, law of the sea, underwater cultural heritage

PALABRAS CLAVE: derechos preferentes, interés, derecho del mar, patrimonio cultural subacuático

## I. INTRODUCTION

As in any other legal system, international law has a threefold function: to protect, rank and solve the contradicting interests among its subjects. In the particular case of the law governing underwater cultural heritage (UCH) —mainly the 1982 UN Law of the Sea Convention and the 2001 UNESCO Convention—,<sup>1</sup> different variables may operate: because of its location, coastal state(s) may have an interest; due to its cultural value, not only its crafters but humankind may also have an interest in its protection; giving its still economic value, some stakeholders may claim some right upon it or be interested in its legal regime. UCH (particularly some wrecks) may also pose a danger to navigation or to the marine environment. Flag states may claim some title upon their sunken state vessels. Last but not least, along with its material value, an immaterial significance may also be vested in an underwater site as a venerated place or as maritime grave.

As cultural objects, UCH is governed by the law of cultural heritage; as objects located at sea, both law of the sea and maritime law may be also applicable.<sup>2</sup> The continuing interaction between international and domestic laws, and between hard and soft rules make this question an always multifaceted object of legal analysis. Law governing UCH is therefore complex, multi-layered and sometimes contradictory. It also has some lacunas

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<sup>1</sup> Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 *UNTS* 397 (hereinafter ‘LOSC’) and Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009), 2562 *UNTS* 1 (hereinafter ‘UNESCO Convention’ or ‘the Convention’).

<sup>2</sup> This paper will address maritime cultural heritage only, thus leaving aside underwater heritage located in inland waters like rivers, lakes and wetlands. The term *underwater* instead of *maritime* or *submarine* is used because its general acceptance as a term of art and its inclusion in recent international and domestic legal texts.

which neither current international nor domestic rules are capable to properly filling-in. Recourse to analogy, fairness, progressive interpretation and legal reasoning may be then necessary.

Furthermore, that law must accommodate quite different interests which have been modulated throughout the last decades: from a predominantly private-interest approach to a more public regime where stakeholders involved are numerous and different,<sup>3</sup> and from the political and legal environment presiding in the second half of the 20<sup>th</sup> Century to current challenges that appear in the new millennium, including new (or renewed) threats to UCH<sup>4</sup>.

This paper analyses the content and applicability to UCH of the notions of *preferential rights* and *interest* of states involved, embodied in current international law governing that heritage. These concepts are not alien to general international law or the law of the sea and, as hypothesis, there is a subtle and plausible trend to prefer the later before the former and, even, to build up a legal regime protecting UCH progressively abandoning the presence of *rights* and its substitution by the notion of *interest*. A quest for the holders of this interest and their identification *in casu* through the revisited notion of verifiable link, the content and extent of the legal capacities and the responsibilities these stakeholders may have —particularly states—, and the legal regime governing all these issues are the purpose of these pages.

This article will discuss first the notion of preferential right as used in international law and the law of the sea, in general, followed by the study of the presence and projection of that notion in current international legal texts governing UCH. The same scheme of analysis will be followed when addressing the notion of legal interest and its performance as an operative concept both at the general level of international law and the law of the sea and, later, how this notion may be creating a new legal and political canvas for the protection of UCH.

## **II. PREFERENTIAL RIGHTS**

In very broad terms, a preferential right implies the preeminent legal position of a subject of law with regard the existence or performance of a specific subjective right in relation with other subjects and their competing, albeit opposing subjective or collective rights. It means a vantage position as defined by law, either customary or conventional.

The notion of preferential rights is not alien to international law, particularly in the law of the sea but mainly limited to fisheries rights: its legitimacy was partially accepted

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<sup>3</sup> Among others, these stakeholders may include states, peoples, international organisations vested by states with cultural or maritime interests, private persons (both individuals and companies), the international community of states and humankind.

<sup>4</sup> For the latter, see R. GRENIER, D. NUTLEY & I. COCHRAN (eds.), *Underwater Cultural Heritage at Risk: Managing Natural and Human Impacts*, UNESCO, Paris, 2006.

during the First UN Conference on the Law of the Sea (1958) and succeeded during the Second UN Conference (1960) as a timely solution to the problem of fixing outer limit of the territorial sea.<sup>5</sup> Introduced by Iceland in 1958 and evoked by Kenya and some Caribbean states in 1972, the origin of the concept as a *right* was preceded by the acceptance of the existence of a *special interest*, the former linked with the exploitation of fisheries and the later related to the conservation of the natural resources of waters adjacent to the territorial sea.

In the *Fisheries Jurisdiction* case (1974), the International Court of Justice (ICJ) had the occasion to discuss the concept of preferential rights. For the Court, the recognition of preferential rights (1) ‘necessarily implies the existence of other legal rights in respect of which that preference operates’;<sup>6</sup> (2) ‘[t]he characterisation of the coastal State’s rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of the other States’;<sup>7</sup> and that (3) ‘it is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of these rights.’<sup>8</sup> However, this decision was taken before the adoption of LOSC, which finally endorsed a new maritime zone that encapsulated the purpose of the notion of preferential rights: the exclusive economic zone (EEZ). As a consequence, the notion of preferential rights on fisheries in the law of the sea became limited both materially and historically. As recently recalled in an arbitral award, ‘this decision from 1974 must be understood in the context of the law of the sea as it then was, which differs from the law prevailing under the Convention or in the emergent customary law of the exclusive economic zone in effect at the time of *Gulf of Maine* [thus making] the reasoning exhibited in *Fisheries Jurisdiction* to be inapplicable under the present law of the sea.’<sup>9</sup>

The notion of preferential rights on fisheries thus remained at LOSC but with a quite limited and different scope: it was mentioned in articles 69(5) and 70(6) and implying no more than the possibility, by arrangements agreed upon in sub-regions or regions, to grant to land-locked or geographically disadvantaged states of these sub-regions or regions equal or preferential rights for the exploitation of the living resources in the exclusive economic zones.<sup>10</sup> But the term ‘preferential rights’ was also mentioned in other article not related to fisheries, but to the ‘Archaeological and historical objects’ found in the Area. This was article 149, with the following wording:

<sup>5</sup> See NGUYEN QUOC DINH, “La revendication des droits préférentiels de pêche en haute mer devant les Conférences des Nations Unies sur le droit de la mer de 1958 et 1960”, *Annuaire français de droit international*, vol. 6, 1960, p. 77.

<sup>6</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Merits), *ICJ Rep 1974*, p. 24, para. 54.

<sup>7</sup> *Ibid* pp. 27-8, para 62.

<sup>8</sup> *Ibid* p. 32, para 74.

<sup>9</sup> *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)* (Award), 12 July 2016, pp. 108-9, para 258 (<<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>>). For the reference to the *Gulf of Maine* case, see *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)* (Judgment), *ICJ Rep 1984*, pp. 341-2, para 235.

<sup>10</sup> The practice regarding preferential rights however has continued around the concept of the ‘presential sea’ (*mar presencial*) adopted by some Latin-American states (particularly Chile). See F ORREGO VICUÑA, “The ‘Presential Sea’: Defining Coastal States’ Special Interests in High Seas Fisheries and other Activities”, *German Yearbook of International Law*, vol. 35, 1992, p. 264ff.

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.

How is this article to be interpreted and applied? How is the notion of preferential rights—mainly related to fisheries—to be understood regarding the protection of UCH?<sup>11</sup>

## 1. UCH in LOSC

Along with article 149, LOSC includes a second article dealing with UCH: article 303. Located among the final clauses of LOSC, it applies to all maritime zones<sup>12</sup> where, as a general mandate, 'States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose' (paragraph 1). After establishing in its paragraph 2 an obscure regime for the UCH located in the contiguous zone—based on a presumption and a legal fiction—<sup>13</sup> and before saving with a non-prejudice clause 'other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature' in its paragraph 4,<sup>14</sup> article 303(3) saves 'the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.' It is to be recalled that this paragraph refers to possible *rights* (not necessarily preferential) of other stakeholders (not necessarily states). It also allows the application of private international law (like some rules of admiralty) to the protection of the UCH in all maritime zones. This is a fundamental divide in our analysis since article 149 LOSC, contrary to article 303(3), does not necessarily refer to ownership of UCH which expressly refers to that kind of legal title when mentioning to identifiable owners and admiralty law (including

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<sup>11</sup> Some authors have found limited room to adapt the ICJ's reasoning as to preferential rights with reference to UCH. See S. DROMGOOLE, *Underwater Cultural Heritage and International Law*, Cambridge University Press, Cambridge, 2013, pp. 122-5; or A. STRATI, "Deep Seabed Cultural property and the Common Heritage of Mankind", *International & Comparative Law Quarterly*, vol 40, 1991, pp. 883-6.

<sup>12</sup> The question of whether art 149 is a *lex specialis* for the Area, making inapplicable art 303 as *lex generalis* has been proposed by some authors. See, for example, A. STRATI, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, Brill, Leiden, 1995, p. 312; cf. L CAFLISCH, "Submarine Antiquities and the International Law of the Sea", *Netherlands Yearbook of International Law*, vol. 13, 1982, p. 29.

<sup>13</sup> Art 303(2) LOSC says: "In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed 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." For a critical appraisal, see M J AZNAR, "The contiguous zone as an archaeological maritime zone", *International Journal of Marine and Coastal Law*, vol. 29, 2014, pp. 1ff.

<sup>14</sup> Negotiators were here thinking about the then already concluded agreement between Australia and the Netherlands on the Old Dutch Shipwrecks located in Australian waters: *Agreement between Australia and The Netherlands concerning old Dutch shipwrecks and arrangement* (adopted 6 November 1972, entered into force 6 November 1972) ATS No. 18. On 15 September 2017, the Australian Department of the Environment and Energy entered into a Memorandum of Understanding with the Cultural Heritage Agency of the Netherlands, superseding the management arrangement of the 1972 Agreement. See its texts at <<http://www.environment.gov.au/system/files/pages/7e5adec7-b7a0-4d42-9cd4-11d99c2b733f/files/mou-netherlands-australia-2017.pdf>>.

salvage law).<sup>15</sup>

Both articles are by-products of the complex negotiation of LOSC in the Third UN Conference on the Law of the Sea (UNCLOS)<sup>16</sup> and have been plausibly qualified as contradictory and counterproductive.<sup>17</sup> A look of the drafting of article 149 LOSC before analysing its content seems thus necessary to elucidate what the notion of preferential rights means with regard the protection of UCH at LOSC.

#### A) THE DRAFTING OF ARTICLE 149 LOSC

Current article 149 may be traced back to several Greek and Turkish proposals of 1972 and 1973. The last ones, quite similar in their texts, granted the ‘state of cultural origin’ the preferential right to salvage or acquire the archaeological or historical objects, also recognising the future Sea-Bed Authority a subsidiary right to ‘dispose’ of these objects without prejudice to the rights of the possible owner.<sup>18</sup> This was reflected in article 19 of the 1975 Informal Single Negotiating Text (ISNT), which paragraph 3 directed any

<sup>15</sup> See generally J REEDER (ed.), *Brice on maritime law of salvage*, 4<sup>th</sup> ed Sweet & Maxwell, London 2003, para 4-163: ‘For the law of “finds” to apply it must be proved that *title* to the property has been lost. In “salvage” it is assumed that the property still belongs to another even if it is classed as “derelict”. The “salvor” is compensated by an award of salvage for preserving that other’s property. Under the law of “finds”, however, it is title to the property which is in issue. The court has to determine whether the property belongs to the finder or to another and, if it does not belong to the finder, whether the finder is entitled to an award of salvage.’ 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)]. As explained, ‘Granting title to artifacts 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.’ TJ SCHOENBAUM, *Admiralty and Maritime Law*, 6<sup>th</sup> ed West Academic, St Paul MN 2018, p. 802.

<sup>16</sup> For the drafting of Articles 149 and 303 LOSC during UNCLOS, see among others A C AREND, “Archaeological and Historical Objects: The International Legal Implications of UNCLOS III” (1982) 22 *VJIL* 777; T TREVES, ‘La nona sessione della Conferenza sul diritto del mare’ (1980) 63 *Riv DI* 432; and L B SOHN, ‘The Greek Contributions to the Development of the International Law of the Sea’, in Th C KARIOTIS (ed.), *Greece and the law of the sea* (Kluwer, The Hague 1997) 3. Particularly on Article 149, see Strati (n 12) 297-300; and for Article 303 see BH OXMAN, ‘The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)’ (1981) 75 *AJIL* 211, 239-241. Most of the documents discussed below on the negotiations of Articles 149 and 303 LOSC may be retrieved from the UN Codification Division Publications – Diplomatic Conferences website (<<http://legal.un.org/diplomaticconferences/>>).

<sup>17</sup> T SCOVAZZI, “A Contradictory and Counterproductive Regime”, in R GARABELLO & T SCOVAZZI (eds.), *The Protection of the Underwater Cultural Heritage, Before and After the 2001 UNESCO Convention*, Brill, Leiden, 2003, pp. 3ff. See further BH OXMAN, “Marine Archaeology and the International Law of the Sea”, *Columbia-VLA Journal of Law & the Arts*, vol. 12, 1988, pp. 353ff; C LUND, “Protection of the Under-Water Cultural Heritage” in U LEANZA (ed.), *Il regime giuridico internazionale del Mare Mediterraneo*, Editoriale Scientifica, Naples, 1987, pp. 351ff; A STRATI, “Protection of the underwater cultural heritage: from shortcomings of the UN Convention on the law of the sea to the compromises of the UNESCO Convention”, in A STRATI (ed.), *Unresolved Issues and the New Challenges to the Law of the Sea*, Brill, Leiden, 2006, pp. 21ff; or MJ AZNAR, ‘The legal protection of underwater cultural heritage: concerns and proposals,’ in C ESPÓSITO, J KRASKA, HN SCHEIBER & MOON-SANG KWON (eds.), *Ocean Law and Policy. 20 Years under UNCLOS*, Brill, Leiden, 2017, p. 124ff.

<sup>18</sup> UN Doc. A/AC.138/SC.I/L.25\*, 14 August 1973 (Greece) and UN Doc. A/AC.138/SC.I/L.21, 28 March 1973 (Turkey).

dispute with regard to a preferential right or a right of ownership to the procedure for settlement of disputes provided for in the future Convention.<sup>19</sup> Originally drafted, current article 149 LOSC then foreseen both rights for states and for identifiable owners as current article 303 does.

However, in 1976, the Revised Single Negotiating Text (RSNT) dropped any reference to the Authority and to any dispute settlement mechanism to resolve conflicting preferential rights of states or ownership rights, whatever they mean, reducing its wording to paragraph 1 of article 19 ISNT.<sup>20</sup> That text remained unchanged with the only exception of the term 'international community', substituted by 'mankind as a whole' in the final version.

Some proposals during the Eighth (1979) and Ninth Sessions (1980) by the US, Greece and a joint text by Cape Verde, Italy, Malta, Portugal, Tunisia and Yugoslavia discussed conflicting views about reducing their scope only to cases of sale or disposal.<sup>21</sup> None of them, however, were reflected in current article 149, which drives some commentators to state that the rule 'fall short of confirming any particular right of proprietary interest.'<sup>22</sup> For others, 'article 149 is of little practical value. It is a leftover provision that has lost its original thrust.'<sup>23</sup> Finally, a more 'internationalist' approach may be seen offering a plausible, maybe naive view: 'Certains Etats, particulièrement liés aux objets retrouvés [in the Area], semblent être investis d'une sorte de priorité dans la mise en oeuvre de l'intérêt general.'<sup>24</sup>

Hence, preparatory records do not shed too much light about the intention of the negotiators at UNCLOS, thus offering no clear information about the content and extent of preferential rights referred to in article 149 LOSC. However, as we will see immediately, its interpretation following the general rule of the law of treaties, as codified in article 31(1) of the 1969 Vienna Convention,<sup>25</sup> only gives some further partial

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<sup>19</sup> UN Doc. A/CONF.62/WP.8/Part I, Article 19: '1. All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of by the Authority for the benefit of the international community as a whole, particular regard being paid to the preferential rights of the State of country of origin, or the State of cultural origin, or the State of historical and archaeological origin. 2. The recovery and disposal of wrecks and their contents more than 50 years old found in the Area shall be subject to regulation by the Authority without prejudice to the rights of the owner thereof. 3. Any dispute with regard to a preferential right under paragraph 1 or a right of ownership under paragraph 2, shall, on the application of either party, be subject to the procedure for settlement of disputes provided for in this Convention.'

<sup>20</sup> UN Doc. A/CONF.62/WP.8/Rev. 1/Part I, Article 19: 'All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of the international community 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.'

<sup>21</sup> See AREND (n 16), pp. 793-9.

<sup>22</sup> OXMAN, (n 16), p. 240, footnote 143.

<sup>23</sup> AREND (n 16), p. 800.

<sup>24</sup> T SCOVAZZI, "Liberté de la mer: vers l'affaiblissement d'un principe vénérable?", *Annuaire du droit de la mer*, vol. 26, 1998. See also R GARABELLO, *La Convenzione UNESCO sulla protezione del patrimonio culturale subacqueo*, Giuffrè Editore, Milano, 2004, p. 274.

<sup>25</sup> Article 31(1), Vienna Convention on the law of treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (hereinafter 'VCLT').

information.

## B) A TEXTUAL INTERPRETATION OF ARTICLE 149 LOSC

As already mentioned, article 149 LOSC refers to ‘Archaeological and historical objects’ found in the Area. LOSC does not give any definition of ‘objects of an archaeological and historical nature’, nor can be implied from its text.<sup>26</sup> They were early excluded from the concept of ‘resources’ of the Area<sup>27</sup> and, as a consequence, activities directed to UCH in the Area are not to be considered as ‘activities in the Area’ as defined in article 1(3) LOSC, i.e. ‘all activities of exploration for, and exploitation of, the resources of the Area.’ Preparatory works confirm this assumption.<sup>28</sup>

Art 149 LOSC says that UCH 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 several possible states. Leaving aside the limited spatial application of article 149 to the Area,<sup>29</sup> its terms are rather unclear:

- (a) Although ‘preserved or disposed’ appear as an alternative, ‘preservation’ may be understood as a general obligation to protect UCH—both *in situ* or outside the original underwater context—<sup>30</sup> while the ‘disposal’ of the archaeological or

<sup>26</sup> As we have seen, Article 303 also refers to ‘archaeological and historical objects found at sea’ but without giving any definition. The notion is not included in G K WALKER, *Definitions for the Law of the Sea. Terms Not Defined by the 1982 Convention*, Brill, Leiden, 2012. As this book defines ‘object’ as ‘an identified set of information’, it goes without saying that this definition ‘does not include archaeological and historical “objects” protected by UNCLOS Article 303.’ (*ibid*, p. 261).

As such, the concept is misleading since it mixes the methodology to be used with (archaeological) and the character of (historical) the objects, even more when other authentic text of LOSC—the French one—refers to archaeological *or* historical objects (*objets de caractère archéologique ou historique*), but not the Spanish and Russian texts. An authorised comment maintains that ‘it seems clear from the *travaux préparatoires* that they refer to all kinds of wrecks and related objects of archaeological and/or historical importance found at sea.’ M HAYASHI, “Archaeological and historical objects under the United Nations Convention on the Law of the Sea”, *Marine Policy*, vol. 20, 1996, p. 291.

Further, it should be noted that Article 149 LOSC uses the wording ‘objects of an archaeological and historical nature’ rather than ‘of an archaeological and historical interest’. Almost every object that has been submerged for over a number of years will be of a historical nature. This says nothing about the historical interest or importance of that object. It can therefore be considered that Article 149 potentially applies to a large number of objects. Since no further interpretation is provided under LOSC, it was left up to States Parties to interpret and apply this provision in practice.

<sup>27</sup> As the International Law Commission affirmed in 1956 (referred to the continental shelf but perfectly applicable *a fortiori* to the Area), ‘[i]t is clearly understood that the rights of the coastal State do not cover objects such as wrecked ships and their cargoes (including bullion) lying in the seabed or covered by sand in the subsoil.’ *Ybk Int L Commission*, vol. II, 1956, p. 298. Under Article 133 LOSC, ‘resources’ means ‘all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules.’

<sup>28</sup> See n 16.

<sup>29</sup> That is, ‘the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction’ (Article 1(1)(1) LOSC).

<sup>30</sup> On *in situ* preservation as a legal concept, it may be seen MJ AZNAR, “In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle”, *Journal of Marine Archaeology*, vol. 13, 2018, pp. 67ff.



historical objects may imply, to some extent, an act of *dominium* (including sale and dispersal, which is conceptually contrary to preservation). This is exemplified by the case of the wreck of the RMS *Titanic*—still located in the Area—a good test-case to show the contradictions between these two terms.<sup>31</sup>

- (b) The benefit of humankind as a whole is first envisaged when preserving or disposing of UCH; and preferential rights of some states will be taken into account within that prior decision in favour of humankind as a whole. Does it mean that article 149 LOSC pre-empts humankind's benefit, and the preferential rights of some states must accommodate that benefit?<sup>32</sup> The context does not give too much help either: whereas UCH is not a 'resource' of the Area—declared 'common heritage of mankind' in article 136 LOSC—it cannot enjoy the legal regime of the Area and its resources, whatever it means.

## 2. UCH beyond LOSC

When the text and context do not shed light on the meaning of the text, the general rule of interpretation codified in article 31(3)(c) VCLT permits taking into account 'any relevant rules of international law applicable in the relations between the parties.'<sup>33</sup> Although there are some universal treaties protecting cultural heritage in general (which might also be applicable to UCH),<sup>34</sup> none of them refer to any heritage located in the Area,<sup>35</sup> except the 2001 UNESCO Convention. Irrespective of whether this Convention

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<sup>31</sup> The *Titanic* rests in the slope of the Canadian geological continental shelf, around 350 nm southeast Halifax, Nova Scotia. See MJ AZNAR & O VARMER, "The Titanic as Underwater Cultural Heritage: Challenges to its Legal International Protection", *Ocean Developments and International Law*, vol. 44, 2013, pp. 96ff.

<sup>32</sup> What seems quite clear is that the wording of Article 149 (*shall be*) 'certainly suggests that ownership rights—at least in so far as these are held by *private* interests—should be subordinated to, and restricted in, the public interest.' DROMGOOLE (n 11), p. 122. See further E ROUCOUNAS, "Sub-marine archaeological research: Some legal aspects", in U LEANZA (ed.), *Il regime giuridico internazionale del Mare Mediterraneo*, Editoriale Scientifica, Naples, 1987, pp. 327-8.

<sup>33</sup> Regarding LOSC and UCH, there is no 'agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty' nor 'any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty' (Article 31(2) VCLT); nor does it exist any 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' nor 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' (Article 31(3)(a)-(b) VCLT).

<sup>34</sup> The best example should be the Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975), 1037 UNTS 151 (hereinafter 'WHC'). UNESCO has begun to discuss the possibility to negotiate an amendment (or a Protocol) to make it applicable to the high seas. See the report for UNESCO by D FREESTONE, D LAFFOLEY, F DOUVERE & T BADMAN, *World Heritage in the High Seas. An Idea Whose Time Has Come* (2016), available at <<https://whc.unesco.org/en/news/1535/>>.

<sup>35</sup> Treaties do ultimately refer to heritage located within the territory of their state parties, thus excluding the high seas and the subsoil thereof (and eventually also the EEZ/CS except for the exercise of the sovereign rights recognised at LOSC). An exception might be the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and, particularly, its Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (adopted 10 June 1995, entered into force 12 December 1999), 2102 UNTS 203.

is an agreement ‘compatible with [LOSC] and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under [LOSC]’ (article 311(2) LOSC) or ‘expressly permitted or preserved by other articles of this Convention’ (article 311(4) LOSC), it contains relevant rules of international law applicable in the relations between, at least, its states parties.<sup>36</sup> But, at the same time, under article 3 UNESCO Convention, the latter ‘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.’

#### A) DEFINING UCH

Unlike LOSC, a more detailed definition of UCH —prepared by the scientific community—<sup>37</sup> is given in article 1(1)(a) of the UNESCO Convention:

“Underwater cultural heritage” means 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.

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<sup>36</sup> When writing this paper, among the 63 state parties to the UNESCO Convention, 60 states are also parties to LOSC: Albania, Algeria, Antigua and Barbuda, Argentina, Bahrain, Barbados, Belgium, Benin, Bolivia, Bosnia-Herzegovina, Bulgaria, Cabo Verde, Costa Rica, Croatia, Cuba, DR Congo, Ecuador, Egypt, France, Gabon, Ghana, Granada, Guatemala, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Italy, Jamaica, Jordan, Kuwait, Lebanon, Lithuania, Madagascar, Mexico, Micronesia, Montenegro, Morocco, Namibia, Nigeria, Niue, Palestine, Panama, Paraguay, Portugal, Romania, San Kitts & Nevis, Saint Lucia, San Vincent & the Grenadines, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Switzerland, Togo, Trinidad & Tobago, Tunisia y Ukraine. Cambodia, Libya and the Islamic Republic of Iran are parties to the UNESCO Convention but not to LOSC.

<sup>37</sup> The work of two scientific NGOs has had a deep impact on the legal regulation of UCH: the International Law Association (ILA), endowed with a Committee on Cultural Heritage Law since 1988, and the International Council on Monuments and Sites (ICOMOS), grouping archaeologist, curators and historians. ILA drafted a first proposal for a future convention in 1990, revised in 1992 and 1993 and sent to UNESCO in 1994, and was the first version of the future 2001 Convention. Its Article 1(1) defined UCH as ‘all underwater traces of human existence including: (a) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural contexts; and (b) wreck such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context.’ Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage, August 1994, commented and reproduced in P O’KEEFE & J NAFZIGER, “The Draft Convention on Underwater Cultural Heritage”, *Ocean Developments and International Law*, vol. 25, 1994, pp. 391ff. ICOMOS adopted in 1996 its Charter on the Protection and Management of Underwater Cultural Heritage (<<https://www.icomos.org/18thapril/underwater-eng.pdf>>) including a definition of UCH as ‘the archaeological heritage which is in, or has been removed from, an underwater environment. It includes submerged sites and structures, wreck-sites and wreckage and their archaeological and natural context.’ The text of the Charter was adapted and adopted as the Annex of the UNESCO Convention.

Nothing impedes the identification of 'archaeological and historical objects' referred to in LOSC with the definition given in the UNESCO Convention.<sup>38</sup>

## B) THE MANAGEMENT OF UCH IN THE AREA

Articles 11 and 12 of the UNESCO Convention govern UCH located in the Area, mirroring the system provided for the EEZ and the continental shelf (CS) in articles 9 and 10. It is based on a 'reporting and notification' scheme (article 11) and the protection system as such (article 12). However, all these mechanisms are subject to LOSC and its article 149: as expressed in article 11(1), 'States Parties have a responsibility to protect underwater cultural heritage in the Area in conformity with this Convention and article 149 of the United Nations Convention on the Law of the Sea.'

The system then establishes the obligation upon states parties to require their nationals or the vessels flying their flag to report any discovery of, or any activity directed to,<sup>39</sup> the UCH in the Area to their respective state (article 11(1)). The state shall then notify the Director-General of the UNESCO and the Secretary-General of Authority of such discoveries or activities reported to them (article 11(2)). The Director-General shall promptly make available to all states parties any such information supplied by states parties (article 11(3)). It is then that the notion of preferential rights may play a significant role, if any: any state party having declared 'its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage' become an *interested state*, but its declaration shall be necessarily based 'on a verifiable link to the underwater cultural heritage concerned, particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin' (article 11(4)). The term *interested state* thus includes two possible meanings: (1) states with a verifiable link but no preferential rights; and (2) states whose preferential rights are, precisely, that verifiable link.

The exercise by any state party of its preferential rights is reduced, then, to its inclusion among the 'interested states' under article 11(4) and to participate in the consultations to better protect the UCH found in the Area (article 12(2)), as well as being particularly regarded by the 'coordinating state'<sup>40</sup> —elected by the interested states among all states

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<sup>38</sup> Leaving aside the temporal limit included in the later and adopted to avoid the inclusion of too recent submerged objects. It reflects the average of time limits, if any, existing in domestic legislation when negotiating the Convention.

<sup>39</sup> The UNESCO Convention distinguishes between 'activities directed' at UCH, i.e. those 'having underwater cultural heritage as their *primary object* and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage' (Article 1(6), emphasis added); and 'activities incidentally affecting' UCH, i.e. those 'which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage' (Article 1(7)). Mining in the Area may be included in the latter, thus posing new significant challenges to the protection of UCH. See MJ AZNAR, "Exporting Environmental Standards to the Protection of Underwater Cultural Heritage in the Area", in J CRAWFORD, A G KOROMA, S MAHMOUDI & A PELLET (eds.), *The International Legal Order: Current Needs and Possible Responses – Essays in Honour Djamchid Momtaz*, Brill, Leiden, 2017, pp. 255ff.

<sup>40</sup> The figure of the 'coordinating state' is regulated in Arts. 10(5) (for the EEZ/CS) and 12(2) and (4) (for the Area) of the UNESCO Convention. In the first case, the default state is to be the coastal state unless it expressly declares that it does not wish to do so, in which case the interested states parties shall appoint one

parties to the Convention— when coordinating consultations, taking measures directed to the UCH, conducting preliminary research, and/or issuing authorizations (article 12(6)). These rules thus only give states with preferential rights a procedural or institutional role: to be declared an interested state with all consequential rights under the Convention. But do not apparently give any material, distinctive right or capacity in comparison with other states parties, including other interested states with just a verifiable link.

The problems arise when neither ‘verifiable link’ nor ‘preferential rights’ are defined in the Convention. Recourse to preparatory works become, as with LOSC, futile.<sup>41</sup> Neither the ILA draft nor the first negotiating sessions at UNESCO paid too much attention to UCH in the Area since the focus was more on the UCH located in the EEZ/CS. A first proposal arrived in 1996 willing to declare UCH in the Area as common heritage of humankind, thus going beyond LOSC.<sup>42</sup> However, the first Draft Convention did not include it<sup>43</sup>. After a Spanish proposal including the respect of preferential rights, a joint Canadian-British proposal<sup>44</sup>—repeating for the Area the notification scheme provided for the EEZ/CS— was generally accepted and, once it included a reference to the preferential rights, it became the current texts of articles 11 and 12 of the UNESCO Convention. No sound discussions were thus held about the meaning and scope of the verifiable link or the preferential rights.

At least the former is referred to in article 9 of the Convention, which may give further guidance: it governs the ‘reporting and notification’ system for the EEZ/CS, with strong similarities with that foreseen for the Area. Paragraph 5 of said article establishes that

Any State Party may declare to the State Party in whose exclusive economic zone or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link, *especially a cultural, historical or archaeological link*, to the underwater cultural heritage concerned. [emphasis added]

The verifiable link then needs to be a cultural, historical or archaeological link, demonstrated by —as clarified in the Operational Guidelines of the Convention—<sup>45</sup> the

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among them, as it ever occurs if the situation refers to the Area. Once elected, the ‘coordinating state’ takes over the control of the site, coordinating the cooperation and consultations among interested states parties and implementing their decisions, while acting on behalf of all interested states parties (and for the benefit of humanity, in the case of the Area) and not in its own interest.

<sup>41</sup> For these preparatory works, see GARABELLO (n 24), pp. 291-4.

<sup>42</sup> UNESCO Doc. CLT-96/CONF.605/6, May 1996, para 43. The UNESCO Convention’s preamble finally declared that UCH is ‘an integral part of the cultural heritage of humanity’, which cannot be equated with the common heritage of humankind. See T M ŠOŠIĆ, “The common heritage of mankind and the protection of the underwater cultural heritage”, in B. VUKAS and T M ŠOŠIĆ (eds.), *International Law: New Actors, New Concepts – Continuing Dilemmas; Liber Amicorum Božidar Bakotić*, Brill, Leiden, 2010, pp. 319ff.

<sup>43</sup> UNESCO Doc. CLT-96/CONF.202/5, April 1998.

<sup>44</sup> WP 56, 5 July 2001.

<sup>45</sup> The Operational Guidelines of the Convention, adopted by the state parties in 2015, do not add any relevant information for a better interpretation of what preferential rights mean. UNESCO Doc CLT/HER7CHP/OG 1/REV (<<http://unesdoc.unesco.org/images/0023/002341/234177E.pdf>>). With regard the verifiable link, they simply say that the link must be demonstrated by ‘the results of scientific

results of scientific expertise, historic documentation or any other adequate documentation. Nothing in the Convention—particularly its contextual interpretation—prevents understanding this qualification of the link to the UCH located in the EEZ/CS in a way that is different from the link to the UCH located in the Area. However, the legal meaning of *link* remains unresolved.

### C) THE SUBJECTS OF THE PREFERENTIAL RIGHTS

The Convention adds further interpretative problems when identifying those states having preferential rights. Upon article 11, these rights are those 'of States of cultural, historical or archaeological origin', which recalls the qualification just seen of the verifiable link but differs from and reduces what article 149 LOSC says. The latter refers to 'the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin', suggesting that these somehow overlapping alternatives were included in LOSC to ensure that all states linked to UCH had a legal basis for claiming their tentative rights.<sup>46</sup> However, a close look at the preparatory works at UNCLOS show a more prosaic reason for that confusing wording in article 149:<sup>47</sup> a mistake with brackets in the successive Greek and Turkish proposal already mentioned, and the final disjunctive between state and country instead of the original Turkish proposal mentioning the 'State of country of origin'.<sup>48</sup> Therefore, again, preparatory works do not shed light on the interpretation of who are the subjects of the preferential rights.

The UNESCO Convention simplifies the list, mentioning in article 11(4) only the 'States of cultural, historical or archaeological origin'. Its preparatory works do not offer further interpretative guidance either on this alternative list.<sup>49</sup> Its text is perhaps clearer than that of article 149 LOSC—deleting the notion of *country* of origin—<sup>50</sup> but still does not clarify a general idea of which states are those with a preferential right, nor solves any conflict (1) among them, (2) between them and other interested states with a verifiable link, and (3) between them and the interest of 'humanity as a whole' when coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations pursuant to article 12(6) of the UNESCO Convention. A need for a case-by-case approach thus emerges from analysed texts.<sup>51</sup>

### D) REMAINING OPEN QUESTIONS

Both LOSC and the UNESCO Convention thus leave certain issues without clear

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expertises', 'historic documentation' or 'any other adequate documentation' (*ibid*, pp. 8-9 para 28). The 'strength' of the link may be measured by states parties when considering the financing of protection of UCH, both in the Area or elsewhere (*ibid*, p. 14 para 62).

<sup>46</sup> ROUCOUNAS (n 32), p. 328.

<sup>47</sup> See CAFLISCH (n 12), p. 30, footnote 98.

<sup>48</sup> In its proposal, Turkey tried to keep in record the possible situations created by the succession of states and the current presence of different *countries* and peoples (and their cultural objects) in one of different modern states.

<sup>49</sup> GARABELLO (n 41), pp. 291-4.

<sup>50</sup> For a possible interpretation, see Strati (n 11), pp. 886-9.

<sup>51</sup> See M THEY, *La protection internationale du patrimoine culturel de la mer*, Brill, Leiden, 2018, p. 500.

answers: among others, the criteria to become an interested state, either by verifiable link or preferential right; the difference between *link* and *right*; the allocation of the responsibility to act in the interest of the ‘humanity as a whole’; or how to solve the differences before competing rights. In this sense:

- (a) Both verifiable link and preferential rights seem to be based on a cultural, historical or archaeological link, demonstrated by the results of scientific expertise, historic documentation or any other adequate documentation. Thus, for example, a Phoenician shipwreck located in the Skerki Bank,<sup>52</sup> excavated by a US scientific institution may be linked to all cultural and historical current states linked with the Phoenician culture (from Lebanon, Syria, Israel and Palestine, through to Italy, Libya or Tunisia, up to Spain and Morocco) but also the US as archaeological operator. Indeterminacies in the texts and ambiguities in their drafting, but also the current generalised purpose to open consultations and cooperation to more states with a possible interest in the UCH, make it desirable to include among interested states (with verifiable link or preferential right) as many as possible.
- (b) *Link* is legally softer than *right*. While the first only implies the capacity of participating in consultations under the UNESCO Convention, the second has a sounder legal implication. Both are subjective positions with regard UCH but rights are *preferential* and may imply a potential overarching legal position derived also from other rules and principles of international law: for example, a flag state may claim a right upon its sunken state vessels as public property and consequently also its alleged immunity before foreign states’ courts against civil actions;<sup>53</sup> and under article 12(7) of the UNESCO Convention ‘[n]o State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.’
- (c) Under LOSC, ‘activities’ in the Area are under the responsibility of the Authority (article 157(1)) since ‘[a]ll rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act’ (article 137(2) LOSC). Under the UNESCO Convention, the Authority shall be notified of ‘activities directed’ to UCH located in the Area but not about ‘activities incidentally affecting’ that UCH.<sup>54</sup> The

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<sup>52</sup> Skerki Bank is a geographical feature in the western Mediterranean Sea, located along the route between ancient Carthage (in current Tunisia) and Ostia (in current Italy). Successive archaeological projects have discovered different shipwrecks and their cargo from the Roman period and before, several medieval wrecks, modern sailing vessels and mapped different possible archaeological sites containing the remains of WWII sunken vessels. See further below n 91.

<sup>53</sup> A reduced but consistent practice show this as a general rule in current international law. Authorised doctrine also points that line: see the Resolution on “The Legal regime of Wrecks of Warships and Other State-owned Ships in International Law”, adopted by the *Institut de droit international* on 29 August 2015, Tallinn Session (<[http://www.justitiaetpace.org/idiE/resolutionsE/2015\\_Tallinn\\_09\\_en.pdf](http://www.justitiaetpace.org/idiE/resolutionsE/2015_Tallinn_09_en.pdf)>). However, the flag as a criterion may also pose complex legal questions: in the *Admiral Nakhimov* case —a Russian imperial vessel lost in combat in 1905—, it was alleged by Japan that, before its sinking, the Russian vessel surrendered and was boarded by the Japanese warship *Sadomaru*. Therefore, following Japan’s contention, ‘[i]n accordance with international law, the rights with respect to the captured enemy warships and property aboard them [were] transferred immediately and finally to the captor State, therefore, all the rights of the Russian side with respect to “Admiral Nakhimov” became extinct at the time when the vessel was captured by the Japanese Imperial Navy.’ See S ODA & H OWADA, “War and neutrality right to a captured vessel—S.S. Admiral Nakhimov”, *Japanese Annals of International Law*, vol. 29, 1986, pp. 185-187.

<sup>54</sup> See n 39.

latter may coincide with the 'activities' in the Area under LOSC. The Authority shall be invited by UNESCO's Director-General to participate in consultations with interested states on how best to protect UCH in the Area (article 12(2)). But no other responsibility is allocated on the Authority.<sup>55</sup> LOSC's preparatory works show how states decided this, notwithstanding the initial Greek and Turkish proposals.<sup>56</sup> Consequently, the UNESCO Convention, in a manner consistent with LOSC, does not allocate any new responsibility to the Authority, thus mirroring the 'serious deficiency' of article 149 LOSC.<sup>57</sup>

- (d) The solution of possible differences between preferential rights is another missing point. Under article 187 LOSC, a special Seabed Dispute Chamber of the International Tribunal for the Law of the Sea (ITLOS) shall have jurisdiction in disputes with respect to activities in the Area. As already seen, the discovery of or the activities directed to UCH located in the Area are not 'activities' in the Area to which LOSC refers. Therefore, it seems clear that the identification and the pre-eminence, if any, of preferential rights to UCH are not under the jurisdiction of that ITLOS Chamber.<sup>58</sup> Both LOSC and the UNESCO Convention then simply refer to the general obligation to settle disputes by peaceful means chosen by states as organised in Part XV LOSC, to which article 25(3) of the UNESCO Convention—on the peaceful settlement of disputes—expressly refers.<sup>59</sup>

The notion of preferential rights is thus ill equipped both normatively and procedurally in LOSC and the UNESCO Convention. Hence, only a teleological interpretation keeping in mind the object and purpose of both treaties may give a progressive vision of what the notions of *preferential rights* and *interests* of the states of cultural, historical and archaeological origin may be used in relation to the protection of UCH.

### **III. INTEREST**

The previous section has tried to show that the notion of preferential rights is not well suited to protect UCH. Its content, possible subjects and operability do not offer the best legal tool to address the complex protection of that heritage. As already mentioned, the last decades seem to witness a change of paradigm in this protection: from a more 'private

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<sup>55</sup> And, in principle, '[t]he powers and functions of the Authority shall be those expressly conferred upon it by this Convention...' (Article 157(2) LOSC). This article, however, continues saying that '[t]he Authority shall have such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area.'

<sup>56</sup> AREND (n 16), p. 800; HAYASHI (n 26), p. 293; and GARABELLO (n 41), p. 271. Some states—particularly the US—firmly opposed such a possibility. See STRATI (n 11), p. 877.

<sup>57</sup> DROMGOOLE (n 11), p. 122.

<sup>58</sup> *Cfr.* L MIGLIORINO, *Il recupero degli oggetti stocirici ed archeologici sommersi nel Diritto internazionale*, Giuffrè Editore, Milano, 1984, p. 103.

<sup>59</sup> Paragraphs (1) and (2) of this article—on the peaceful settlement of disputes—says that '[a]ny dispute between two or more States Parties concerning the interpretation or application of this Convention shall be subject to negotiations in good faith or other peaceful means of settlement of their own choice'; and that '[i]f those negotiations do not settle the dispute within a reasonable period of time, it may be submitted to UNESCO for mediation, by agreement between the States Parties concerned', respectively.

approach’ —based on title and ownership— to a more ‘public understanding’ of cultural heritage based on sharing responsibilities. This new paradigm is not alien to other questions of international law and, particularly, of the law of the sea: the creation of marine protected spaces in the high seas,<sup>60</sup> the management of marine pollution, the impact of climate change and sea-level rise or the preservation or the use of marine biological diversity of areas beyond national jurisdiction are just but a few examples. The concept of common heritage of humankind is inextricably linked to all these changes; and all these questions incapsulate different *interests* of different stakeholders, particularly states, the international community and the humankind.

The protection of UCH may be perfectly included among these new interests of stakeholders, particularly states: it focuses on fragile objects, easily destructible; threats are multiple and increasingly pressing; it needs a cooperative and multi-layered approach to provide an efficient protection; and its purpose is inter-generational. A national, instead of international, solution does not provide an effective level of protection. The problem is to find how to conciliate all the interests present in such a complex issue.

This section will analyse the possibilities offered by the legal notion of interest in the protection of UCH, without completely abandoning the presence of preferential rights (otherwise imposed by law). After reviewing the general notion of interest in international law, particularly in the law of the sea, its presence and operability in the protection of UCH will be elaborated on before trying to conclude with some proposals.

## 1. The notion of interest...

### A)...IN INTERNATIONAL LAW...

As an old vintage legal notion, the concept of interest in international law was discussed during the long process of codification of the rules governing the international responsibility of states for wrongful acts. These were codified in the articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>61</sup> The sound discussion of the notion among several distinguished members of the International Law Commission (ILC) along with several relevant *dictums* of the ICJ during those years, offers guidance about the place and play of interests in between primary and secondary norms of international law.

Broadly speaking, the concept of interest sketched by Jules Basdevant is still pertinent: ‘Terme designant ce qui affecte materiellement ou formellement une personne physique ou juridique, l’avantage materiel ou moral que présente pour elle une action ou une

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<sup>60</sup> Although some authors warned about the possible privatization of the seas through these areas: see N ROS, “Modern Law of the Sea: From Governance to Privatization”, *Waseda Bull of Comparative Law*, vol. 37, 2018, p. 11ff.

<sup>61</sup> ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’, Report of the International Law Commission on the work of its fifty-third session (2001-II), *Ybk Int L Commission*, Part Two, 31 (UN Doc. A/56/10). For a complete appraisal, see J CRAWFORD, A PELLET & S OLLESON (eds.), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010.



abstention, le maintien ou le changement d'une situation.'<sup>62</sup> In international law, traditionally, the notion of legal interest and subjective right has been habitually equated, so that the holder of the interest protected by the legal system is recognized as a subjective right. In principle, only the interest protected by the right becomes the subjective right of its owner, and only with respect to those subjective rights appear legal obligations for the rest of subjects, which must respect that subjective right. On the other hand, only the holder of that legal interest—and therefore of the subjective right—is qualified in international law to demand the fulfilment of the legal obligations derived from it and to claim for the violation of the rules, if applicable.

However, this basic scheme—a subjective right and a consequential capacity to react protecting it—does not contemplate other possible scenarios in which different stakeholders may have legal interests that are not automatically translated into the traditional notion of subjective right. This may be seen both at a material and at a procedural level:

- *Materially*, the notion of interest has been intimately linked also to the complex notion of *erga omnes* obligations. In its well-known *obiter dictum* in the *Barcelona Traction* case, the ICJ defined these obligations as those which, '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection [...]'<sup>63</sup> From there, a distinction has been drawn between obligations *erga omnes*, those held toward the international community as a whole,<sup>64</sup> and obligations *erga omnes partes*, those held toward a group of states conventionally linked.<sup>65</sup> Both types share a fundamental tenet (the relevance of the protected interest) but differs on the origin of the rule (customary or conventional, respectively) protecting that interest.<sup>66</sup>

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<sup>62</sup> J BASDEVANT, *Dictionnaire de la terminologie du Droit international*, Sirey, Paris, 1960, p. 342. See also J CARDONA, "Interés, interés jurídico y derecho subjetivo en Derecho internacional público", in *Estudios en recuerdo de la Profesora Sylvia Romeu Alfaro*, vol. 1, Universitat de València, Valencia, 1989, pp. 231ff.

<sup>63</sup> *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (Second Phase), *ICJ Rep* 1970, p. 32, para 33. Since then, and even before, the ICJ has elaborated and projected the concept in other landmark cases like *Reservations to the Convention on Genocide* (1951), *Namibia* (1970); *Genocide* (Bosnia v Yugoslavia, jurisdiction, 1996), *Wall* (2004), *Obligation to Prosecute or Extradite (Belgium v Senegal)*, 2012) or *Legal Consequences of the Separation of the Chagos Archipelago* (2019). See, among others, G I HERNÁNDEZ, "A Reluctant Guardian: The International Court of Justice and the Concept of International Community", *British Yearbook of International Law*, vol. 83, 2013, pp. 13ff.

<sup>64</sup> Which sometimes may further derive from a cogent rule of imperative nature. These peremptory norms protect essential interests of the community of states as a whole (*ad ex.* interdiction of the use of force, protection of humanitarian rules or respect of peoples' self-determination). Both the ICJ and international arbitrators have profiled the existence and content of peremptory norms in several cases: *Diplomatic Staff* (1979), *Maritime Frontier Guinea-Bissau v Senegal* (1989), *Nuclear Weapons* (1996), *Arrest Warrant* (2002), *Wall* (2004), *Congo v Rwanda* (2006), *Genocide* (2007) or *Immunity* (2012) cases, among others.

<sup>65</sup> In some cases, the same obligation has both legal natures. In the law of the sea, for example, all states are obliged to respect in their territorial seas the innocent passage of vessels of all other states (a customary rule codified in Article 17 LOSC). If state 'A' impedes the correct exercise of this right to a vessel of state 'B', the latter states has had its subjective right, violated, but the rest of the states have a common interest—the right of innocent passage—has been violated by state 'A'.

<sup>66</sup> See particularly Article 48(1) ARSIWA and the ILC comment on it at UN Doc. A/56/10 (2001) (n 61) at 126-7. It may be possible the existence of a particular (regional) customary rule with *erga omnes* nature opposable to the *partes* of the region.

- *Procedurally*, the question offers other complex profiles since not every interest provides individual states with the possibility to appear before international adjudicative bodies: only those with ‘juridical expression and clothed in legal form’—using ICJ’s words<sup>67</sup>—are considered to be claimed effectively. It is thus a question of procedural admissibility (not of jurisdiction) which needs to be a legal interest that may perfectly derive from an *erga omnes* obligation, either due to the entire international community or to a group of states. This was perfectly acceptable by the ICJ in the *Obligation to prosecute or extradite* case, referring to the 1984 Convention against Torture, not requiring a ‘special interest’ but the mere existence of that legal interest to comply with what the particular convention demands.<sup>68</sup> The existence of a ‘sufficient link’ between the state concerned and the legal rule that forms the subject matter of the enforcement action may suffice.<sup>69</sup>

An interest may thus exist when an international rule, either customary or conventional, protects a shared collective value. This imposes on the states concerned both the obligation to prevent any damage to those values and the right to react even if the damage is not ‘subjectively’ suffered. This is particularly evident with obligations the breach of which must be considered as affecting *per se* every other State to which the obligation is owed—the so-called ‘integral’ obligations. Some treaties are of such a character that ‘a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations.’<sup>70</sup> However, the procedure to react—including a compulsory adjudication—may be foreseen or not by the rule but would be then a question of jurisdiction—and not of admissibility—if a *sufficient link* is properly provided.

## B) ...AND IN INTERNATIONAL HERITAGE LAW

Leaving aside the cases of intentional destruction of cultural heritage as a crime of war and its possible link with the crime of genocide,<sup>71</sup> the protection of cultural heritage (including UCH) is not (yet) covered by any peremptory norm of international law, but

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<sup>67</sup> *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)*, ICJ Rep 1966, para 51. In this disputed decision, the ICJ seemed to close the possible existence of an *actio popularis* in international law.

<sup>68</sup> For the Court, ‘[t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.’ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment), ICJ Rep 2012, p. 450, para 69.

<sup>69</sup> Ch TAMS, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge, 2005, p 26.

<sup>70</sup> Article 60(2)(c) VCLT.

<sup>71</sup> See recently ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Trial Chamber VIII Judgement, 27 September 2016. For the link with genocide, see ICTY, *Prosecutor v. Radislav Krstić*, Case No.: IT-98-33-T, Trial Chamber Judgement, 2 August 2001, para 580, accepted by the ICJ in the *Genocide* case (ICJ Rep 2007, para 344).

the notion of interest and *erga omnes (partes)* may be extremely useful for that protection. The analysis must then shift from the mere search of title and ownership rights to the nature of international obligations and duties in order to specify whether, besides the ordinary obligations corresponding to a subjective right with a specific holder, there are others situations —legal interests— held by a plurality of states and, even more, the international community as a whole. Because *erga omnes* obligations are mainly based on the interest they try to protect and not only on the legal capacity to react by states subjectively concerned, a complex analysis of both primary and secondary norms thus arises.<sup>72</sup>

If anything becomes clear in the last decades, it is the progressive assumption of the existence of general interests around key issues protecting humankind and its natural and cultural environment. The protection and enhancement of cultural heritage—sometimes inextricably linked to the natural heritage—<sup>73</sup> is one of its building-blocks.<sup>74</sup> A quick review, for example, of the preambles of the main universal conventions protecting tangible or intangible heritage show that assumption:<sup>75</sup> the 1954 Hague Convention intimates that ‘that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world’;<sup>76</sup> the WHC considers that ‘parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole’; and the 2003 Intangible Heritage Convention recalls ‘the universal will and the common concern to safeguard the intangible cultural heritage of humanity.’<sup>77</sup> Last but not least, in its quasi-legislative function, the UN Security Council has also stressed ‘that Member States have the primary responsibility in protecting their cultural heritage and that efforts to protect cultural heritage in the context of armed conflicts should be in conformity with the Charter, including its purposes and principles, and international law, and should respect the sovereignty of all States.’<sup>78</sup> To this quick review of international texts, ratified by (or

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<sup>72</sup> See S A GREEN MARTÍNEZ, “Locus Standi Before the International Court of Justice for Violations of the World Heritage Convention”, *Transnational Dispute Management*, vol. 5, 2013 (available at <<https://www.transnational-dispute-management.com/article.asp?key=1995>>).

<sup>73</sup> In the World Heritage List, created by the WHC, 35 sites around the Globe are inscribed as ‘mixed’ (natural and cultural). See <<http://whc.unesco.org/en/list/?&type=mixed>>.

<sup>74</sup> See, in general, F FRANCONI, “Principi e criteri ispiratori per la protezione internazionale del patrimonio culturale”, in F FRANCONI, A DEL VECCHIO and P De CATERINI (eds), *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*, Giuffrè Editore, Milano, 2000, p. 11ff.

<sup>75</sup> This trend to the *universalist* approach (or ‘cultural internationalism’, using famous John Merryman’s dichotomy) may be traced back to the *Roerich Pact* (157 *LNTS* 290). See E CLÉMENT, “Le concept de *responsabilité collective* de la communauté internationale pour la protection des biens culturels dans les conventions et recommandations de l’UNESCO”, *Revue Belge du Droit International*, 1993, pp. 534ff. See, previously, J H MERRYMAN, “Two Ways of Thinking About Cultural Property”, *American Journal of International Law*, vol. 80, 1986, pp. 831ff.

<sup>76</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 *UNTS* 215.

<sup>77</sup> Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 *UNTS* 3.

<sup>78</sup> UN S/Res/2347 (24 March 2017), para 5. See further the Report of the UN Secretary-General on this

opposable to) an overwhelming majority of states, it may be added the fact that the protection of cultural heritage as a matter of public interest, and not only as part of private property rights, is recognized in most of the advanced domestic legal systems in the world. To that extent, culture conventions are examples of treaties creating *integral* obligations.<sup>79</sup>

The protection of cultural heritage (including UCH) thus concerns the international community as a whole (addressing states) and humankind (going beyond states). Although declared in a particular trial of individual criminal responsibility, the following International Criminal Court's words in the *Al Mahdi* case may be recalled here:

all the sites but one [under attack in Mali since 2012] were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali *and the international community*.<sup>80</sup>

Aside individual responsibility, Mali may be seen as a *directly injured* state under article 42 ARSIWA; but what about the international community also mentioned as *affected* in the ICC decision?<sup>81</sup> Art 48 ARSIWA governs these situations and, under the ILC commentary, this article

is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42.<sup>82</sup>

Three questions thus arise in order to determine how the notion of interest interplays (particularly in relation of the protection of UCH): *first*, that the notion of interest encompasses the notion of preferential right, i.e. any holder of a preferential right has an interest (but not the contrary); *second*, as with preferential rights, it must be identified with the subject of the interest (a state, a group of states, the community of states as a

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Resolution in UN Doc S/2017/969 (17 November 2017).

<sup>79</sup> See FFRANCIONI, "The Human Dimension of International Cultural Heritage Law: An Introduction", *European Journal of International Law*, vol. 22, 2011, p. 13ff. See further A RODRIGO & M ABEGÓN, "El concepto y efectos de los tratados de protección de intereses generales de la Comunidad Internacional", *Revista Española de Derecho internacional*, vol. 69/1, 2017, pp. 167ff.

<sup>80</sup> ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Trial Chamber VIII Judgement, 27 September 2016, p. 38 para 80 (emphasis added).

<sup>81</sup> It is to be underlined that the ICC mixed in its *affected* subjects the 'inhabitants of Timbuktu, but also people throughout Mali'—i.e. not Mali as such—and the international community. What does this mean? The international community of states as a whole, as usually mentioned in international law (e.g. Article 53 VCLT) or the humankind, having previously mentioned the 'inhabitants' and the 'people throughout Mali'?

<sup>82</sup> ILC, above 61, 126. The Commission cites the ICJ *obiter dictum* in the *Barcelona Traction* case. However, it is warned that '[a]lthough the Court noted that "all States can be held to have a legal interest in" the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as "interested States". The term "legal interest" would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.' *Ibid.*

whole and/or humankind); and *third*, it must be outlined the capacity recognized to the holders of the protected legal interest. How these questions may be answered in the particular case of the UCH will be discussed in the next section.

## **2. Interest and the protection of UCH**

As we have seen, article 303(1) LOSC imposes on all states parties 'the duty to protect objects of an archaeological and historical nature found at sea' and the duty to 'cooperate for this purpose'. It thus establishes an inter-state twofold duty which eventually endorses a general obligation to protect UCH at large. For its part, article 149 LOSC says that heritage 'shall be preserved or disposed of for the benefit of mankind as a whole', thus going beyond an inter-state obligation but only for the UCH located in the Area although (1) not declaring it as part of the common heritage of humankind — as done with the resources in that zone under article 136—; and (2) saving the possible 'preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.' LOSC thus mainly addresses inter-state rights and duties, and this is still the general regime applicable to UCH since the UNESCO Convention is only opposable to its current 61 states parties.

Going beyond LOSC's inter-state framework, the UNESCO Convention declares from its very first preambular line 'the importance of underwater cultural heritage 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.' The Convention thus follows the path of other cultural conventions as integral regimes in the sense that its breach may affect the position of every party with respect to the further performance of its obligations. It also transcends a simple inter-state relationship since states are obliged to preserve UCH 'for the benefit of humanity' (article 2(3)). However, obliged by LOSC and general international law by its article 3, the Convention requires the respect of certain rights in particular cases:

- In internal waters, archipelagic waters and territorial sea, sovereignty of coastal states is to be respected as a principle of current international law<sup>83</sup>, thus respecting coastal state's 'exclusive right to regulate and authorize activities directed at underwater cultural heritage' in these zones (article 7(1)).<sup>84</sup>
- In the EEZ/CS, states cannot conduct any activity directed at state vessels and aircraft 'without the agreement of the flag state' unless they were (i) activities adopted by a coastal state in exercise sovereign rights or jurisdiction in its EEZ/CS as provided for by international law, including LOSC; or (ii) a practicable measure or other activity authorized by the 'coordinating state' to prevent any immediate danger to the UCH, whether arising from human activities or any other cause, including looting (article 10(7)).

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<sup>83</sup> Both customary (*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits)*, ICJ Rep 1986, p. 111, para 212) and conventional (Art. 2(1) LOSC).

<sup>84</sup> In the contiguous zone, practice crystallized on Article 8 of the Convention might have generated a regime like that of the territorial sea, thereby altering the provisions of Article 303 (2) LOSC, but based not on sovereign but on functional rights of the coastal State. See AZNAR (n 13).

- In the Area, no state party may undertake or authorize activities directed at state vessels and aircraft ‘without the consent of the flag State’ (article 12 (7)).<sup>85</sup>
- Finally, and only for the Area, in the process of consultations for the protection of the UCH there located, a particular regard would be paid to the preferential rights of States of cultural, historical or archaeological origin (article 11 (4)).

Sovereignty, immunity, jurisdiction (territorial and functional) and preferential rights are thus present in the new regime created by the UNESCO Convention. How do they interplay with the notion of interest?

#### A) DETERMINING INTERESTS AND IDENTIFYING THE INTERESTED SUBJECTS

As discussed at the end of the previous section, to organise a logical answer to the place the notion of *interest* may have in the protection of UCH, and recalling the *rights* present in that protection, it is necessary to identify the different interests which may eventually be legally vested, i.e. having a ‘juridical expression and clothed in legal form’. These may be:

- (a) The *protection of UCH*: This is the overarching interest, embodied in article 303(1) LOSC, which imposes on all states ‘the duty to protect objects of an archaeological and historical nature found at sea [...]’. It is assumed that this duty also has a customary *erga omnes* nature. Explicitly, the UNESCO Convention only imposes the obligation to cooperate in the protection of UCH (article 2(2)). The obligation to protect as such is to be induced from the entire text of the Convention. The obligation imposed in its article 2(3) —‘States parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention’— seems to focus more on the addressee/beneficiary of the obligation than on its content. This scheme is also followed in article 149 LOSC when referring to objects of an archaeological and historical nature found in the Area, which ‘shall be preserved or disposed of for the benefit of mankind as a whole’. As Sarah Dromgoole notes, ‘article 149 gives expression to the notion that UCH is a matter of public interest and assumes that mankind *as a whole* has an interest in all such material.’<sup>86</sup> Therefore, *all* stakeholders (leaving perhaps aside private persons with only private commercial interests) seem to have an interest in the duty to protect.
- (b) The *cooperation on the protection* is governed by the general duty to cooperate that international law,<sup>87</sup> and, particularly, by articles 303(1) LOSC and 2(2) of the

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<sup>85</sup> It is not clear—and the preparatory works do not shed light on—the difference between ‘without the agreement’ and ‘without the consent’ of the flag state in these two provisos of the Convention. It is to be supposed a similar meaning.

<sup>86</sup> DROMGOOLE (n 11), p. 121.

<sup>87</sup> Still a general legal proposition which needs conventional and/or institutional arrangements to display all its virtues, the duty to cooperate has been mainly discussed and accepted in international environmental law cases—from the *Gabčíkovo-Nagymaros Project* (1997), the *Whaling* case (2014), the ITLOS Advisory Opinion on IUU (2015) or the *Chagos* arbitral award on Marine Protected Areas (2015)—; but is also a constitutional purpose of current international law as expressed in Article 1(3) of the UN Charter and its profiling in A/Res/2625 (XXV), 24 October 1970. In any case, as the ICJ recently reminded, the existence of an obligation to negotiate—as a procedural by-product of cooperation— ‘has to be ascertained in the

UNESCO Convention which hortatory wording says similarly that state parties 'shall cooperate in the protection' of UCH.<sup>88</sup> States are thus the main addressees of this duty as well as other duties intimately linked: 'to share information with other States Parties concerning underwater cultural heritage' (article 19(2))<sup>89</sup>—including the possible information concerning any seizure of UCH made under the Convention (article 18(3))— and to cooperate 'in the provision of training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to underwater cultural heritage' (article 21). But cooperation also governs the particular protection among the so-called 'interested' or 'consulting' states. These are, as we have already seen, those states with a *verifiable link* with the UCH at stake, 'especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned' (article 9(5)) in the case of UCH located in the EEZ/CS. For the heritage located in the Area, as we have also seen, article 11(4) just mentions 'a verifiable link to the underwater cultural heritage concerned'—which may be supposed to also be a cultural, historical or archaeological link—, but adds the style clause obliged by article 149 LOSC which states that 'particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin.' Once all these 'interested' states demonstrate the existence of that link,<sup>90</sup> they become 'consulting' states which, organized by the 'coordinating state',<sup>91</sup> may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefore,<sup>92</sup> shall adopt implement agreed measures of protection, and issue all necessary authorizations for such agreed measures (articles 10(5) and 12 (4)-(5)). Interestingly, UNESCO also participates in this information-sharing cooperative scheme, with different intensity, as the Secretary-General of the International Seabed Authority in cases involving UCH located in the Area.

- (c) The *respect of sovereignty* is obviously present when sovereignty applies: in their internal waters, archipelagic waters and territorial sea, states parties have the

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same way as that of any other legal obligation.' *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, ICJ Rep 2018, para 91.

<sup>88</sup> Under Article 19(1), which develops the general mandate of Article 2(2), 'States Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage under this Convention, including, where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage.'

<sup>89</sup> Including discovery of heritage, location of heritage, heritage excavated or recovered contrary to this Convention or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage. This information could be 'kept confidential and reserved to competent authorities of States Parties as long as the disclosure of such information might endanger or otherwise put at risk the preservation of such underwater cultural heritage' (Article 19(3)).

<sup>90</sup> See n 45.

<sup>91</sup> In this context, Italy notified UNESCO in 2018 of the important cultural heritage sites located on the Skerki Bank located in the Tunisian continental shelf (see above n 52). Spain and France have notified their intention to be declared as "interested States" and Tunisia has assumed the role of "coordinating State" according to Articles 9 and 10 of the UNESCO Convention. More information available at <[http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/dynamic-content-single-view/news/cooperation\\_in\\_international\\_waters\\_first\\_information\\_me/](http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/dynamic-content-single-view/news/cooperation_in_international_waters_first_information_me/)>.

<sup>92</sup> On these decisions, the coordinating state shall promptly inform the Director-General of the results, who in turn shall make such information available to other States Parties.

‘exclusive right’ to regulate and authorize activities directed at underwater cultural heritage ‘in the exercise of their sovereignty’ (article 7(19)). However, this does not exclude the obligation of these states parties to require that the annexed rules of the Convention be applied to activities directed at underwater cultural heritage in these waters under sovereignty (article 7(2)).

- (d) The regulation of *ownership* is a complex issue involving different opposing interests and rights. At the very outset, it must be said that the drafters of the UNESCO Convention early decided not to deal with the question of title in the future text. Noticing the legal minefield before them when discussing the questions of ownership and abandonment of UCH, particularly wrecks, they realized that ‘is problematic, it should not have any effect on the preservation of the archaeological values of the wreck and the deletion of the abandonment criteria was widely welcomed.’<sup>93</sup> Therefore, and focusing on wrecks, the Convention organizes a regime with one assumption —if the wreck may be characterized as UCH under the definition provided for in article 1(1) of the Convention, the latter is fully applicable—resulting in a double (sometimes overlapping) regime depending on the nature of the vessel:
- For sunken state vessels and aircraft,<sup>94</sup> the Convention makes in its article 2(8) a *réenvoi* to general international law, 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 legal status and title upon sunken states vessels and aircraft are thus not governed by the Convention. However, if declared UCH, interests of different states may appear: if located in the internal waters, archipelagic waters and territorial sea, the coastal state *should* inform the flag state party to the Convention ‘in the exercise of their sovereignty and in recognition of general practice among States [and] with a view to cooperating on the best methods of protecting State vessels and aircraft’. But it should also inform ‘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’ (article 2(8)). Sovereignty thus supersedes any other interest, reminding (*i*) that there is no general obligation in international law upon states to disclose information occurred in their territory, unless otherwise conventionally accepted; and (*ii*) that any activity directed to anything (including UCH) located in the marine areas under the sovereignty of a state needs its express authorization for any activity. But this does not necessarily implicate any change in title to the wrecks: they (and their cargoes) still are, unless previously abandoned, the public property of the flag state.<sup>95</sup> Actually, this is confirmed when we move to other maritime areas: as we have seen, under articles 10(7) and 12(7) no activity will be directed at State vessels and aircraft without the

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<sup>93</sup> C FORREST, “A New International Regime for the Protection of Underwater Cultural Heritage”, *International & Comparative Law Quarterly*, vol. 51, 2002, p. 525.

<sup>94</sup> Under Article 2(8) of the Convention, these 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.’

<sup>95</sup> See n 53.



agreement or the consent of the flag state when located in the EEZ/CS or the Area, respectively.

- The second question is the applicability of the law of salvage and the law of finds to UCH. Irrespective of the nature of the sunken vessels, salvors —particularly treasure-hunters— have targeted wrecks loaded with precious cargoes or valuable materials and have argued both the law of finds and the law of salvage to acquire title upon or a reward on recovered items.<sup>96</sup> A room for this was given in article 303(3) LOSC which, as seen, preserved ‘the law of salvage or others rules of admiralty’. However, salvage law has been demonstrated to be completely inadequate to manage UCH;<sup>97</sup> admiralty courts have limited its possible application, both targeting public<sup>98</sup> or privately-owned vessels;<sup>99</sup> conventional practice also shows a quite limited potential;<sup>100</sup> and domestic legislation is increasingly leaving aside salvage law when governing UCH.<sup>101</sup> The UNESCO Convention addresses the applicability of the law of salvage and the law of finds from a very restrictive perspective: its article 4 —drafted in the negative tense and imposing cumulative conditions— says that ‘[a]ny activity relating to underwater

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<sup>96</sup> There are tons of literature arguing salvage law as a plausible set of rules governing the recovery of old wrecked vessels. See a critical appraisal at O VARMER & CM BLANCO, “The case for using the law of salvage to preserve underwater cultural heritage: The integrated marriage of the law of salvage and historic preservation”, *Journal of Maritime Law & Commerce*, vol. 49, 2018, pp. 401ff [available electronically at <<https://www.gc.noaa.gov/pdfs/Blanco.pdf>>. For the evolving ‘treasure’ salvage law as applied by US admiralty courts, see SCHOENBAUM (n 15), pp. 797-804.

<sup>97</sup> For a general overview, see T SCOVAZZI, “Sunken Spanish Ships before American Courts”, *International Journal of Maritime & Coastal Law*, vol. 33, 2018, pp. 1ff.

<sup>98</sup> For three recent landmark cases, see *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4<sup>th</sup> Cir. 2000), cert. denied, 148 L. Ed. 2d 956, 121 S.Ct. 1079 (2001); *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11<sup>th</sup> Cir. 2011); and *Global Marine Exploration, Inc., v. The Unidentified, Wrecked and (for Finders-right Purposes) Abandoned Sailing Vessel*, Case No: 16-1742, 29 June 2018 (2018 AMC 1603). See MJ AZNAR, “Treasure hunters, sunken State vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage”, *International Journal of Maritime & Coastal Law*, vol. 25, 2010, pp. 209ff.

<sup>99</sup> The final judicial fate of the RMS *Titanic* is also self-explaining: see *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 804 F. Supp. 2d 508 (E.D. Va. 2011), which subject any title ‘to the covenants and conditions that the United States, through the United States Attorney, negotiated and finalized with RMST and the court (the “Revised Covenants and Condition”).’ These ‘Covenants & Conditions’ are attached as Exhibit A to a previous same court’s decision of 12 August (742 F.Supp.2d at 809–824); and, surprisingly enough, they mirror the basic rules annexed to the UNESCO Convention, not ratified —although accepted as best practices— by the US.

<sup>100</sup> The International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165, includes a proviso in its Article 30(1)(d) upon which a State party may reserve the right not to apply the provisions of the Convention “when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.” This reservation has been already made by 23 out 70 of States parties, including specially interested States such as Australia, Bulgaria, Canada, China, Croatia, Ecuador, Estonia, Finland, France, Germany, Iran, Jamaica, Mexico, the Netherlands, New Zealand, Poland, Russia, Spain, Sweden, Tunisia, Turkey, Ukraine and the United Kingdom.

<sup>101</sup> For example, Australia decided not to apply salvage rules to property involving ‘maritime cultural property of prehistoric, archaeological or historic interest [...] situated in the seabed’ in its Navigation Act 2012 (section 240(3)(c)). In the case of Spain, Law 14/2014 on General Navigation also expressly excludes the application of salvage law to UCH (Article 258(3)).

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.’ (emphasis added)

- (e) *Not interference with other rights* is another interest in motion, particularly addressing two questions: *First*, the right of the coastal state to prohibit or authorize any activity directed at UCH located in its EEZ/CS ‘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’ (article 10(2)). As another case of subordination of the UNESCO Convention to the law of the sea and its codified version at LOSC, states parties may prefer the exercise of these rights (namely exploration and exploitation of natural resources) to activities directed at UCH. In this case, the addressees of the interest are the coastal states. *Second*, the protection of operational activities of warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes. If these vessels are not engaged in activities directed at UCH, they shall not be obliged to report discoveries of that heritage as provided for in the Convention (article 19).<sup>102</sup>
- (f) *Research on UCH* was not discussed as a topic related to marine scientific research (MSR) during UNCLOS.<sup>103</sup> It has been plausibly argued, however, that contemporary marine archaeology is a full scientific discipline and, that marine scientific research implies an indiscriminate collecting of data that may be used either for environmental or archaeological purposes.<sup>104</sup> Modern underwater technology —particularly the use of remote sensing equipment and different unmanned submersible vehicles—permits the gathering of massive information for the bottom of the seas which may be directly transformed in a tradeable commodity. How to reconcile the different types of MSR with activities directed at underwater cultural heritage may then be subject to coastal State’s discretion depending on the nature and purpose of that activity.<sup>105</sup> Coastal

<sup>102</sup> However, as Article 19 continues saying, ‘States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.’

<sup>103</sup> See, among others, A SOONS, *Marine Scientific Research and the Law of the Sea*, Cambridge University Press, Cambridge, 1982, p. 275. This decision was mainly due to a twofold argument: the limited recognition of marine archaeology as an independent scientific discipline in the 1970-1980s, and the fact that marine scientific research was mainly confined to the natural environment and resources.

<sup>104</sup> See S DROMGOOLE, “Revisiting the relationship between marine scientific research and the underwater cultural heritage”, *International Journal of Maritime & Coastal Law*, vol. 25, 2010, pp. 33ff.

<sup>105</sup> As a matter of distinction, commentators generally agree to distinguish between pure or ‘fundamental’ research, which is conducted exclusively for peaceful purposes and to increase scientific knowledge for the benefit of all humankind, and ‘applied’ research, which is of direct significance for the exploration and exploitation of natural resources. Therefore, while pure research does not imply direct economic revenue, applied research is primarily focused on future and foreseeable commercial activities. The information gathered by modern underwater technology, when directed at an archaeological target (for example, a shipwreck), is likely not characterized as pure marine scientific research. In its territorial sea, under Article 245 LOSC the coastal state ‘have the exclusive right to regulate, authorize and conduct marine scientific research’ and the latter ‘shall be conducted only with the express consent of and under the conditions set forth by the coastal State.’ In the EEZ/CS, under Article 246 LOSC, coastal State has a similar discretion to regulate both types of research: hence, coastal States, ‘in the exercise of their jurisdiction, have the right

States should grant its consent in normal circumstances on projects carried out exclusively for peaceful purposes and to increase scientific knowledge for the benefit of all humankind. Commercial activities, however, directed at underwater cultural heritage, such as work performed by treasure hunters, is not pure research notwithstanding the recent (fake) efforts of some companies to introduce themselves as archaeological endeavours. Furthermore, the regime of marine scientific research grants research rights only to States, not private actors. Private companies like treasure hunters' companies are not inherently entitled to be granted such kind of permits.

## B) IDENTIFYING INTERESTED SUBJECTS AND THEIR RESPECTIVE LEGAL CAPACITIES

From what has been said so far in this paper, different stakeholders are identified in LOSC and the UNESCO Convention as having an interest in UCH. Undoubtedly, states are the main stakeholders and may have different (sometimes overlapping or cumulative) interest depending on the recognized link with UCH. Table 1 tries show these and to summarize their respective competencies under both legal texts.<sup>106</sup> The rest of interested stakeholders will be analysed after the Table.

**Table 1: Interested states and their capacities**

Link	Rights / Interests / Capacities
State with a cultural, historical or archaeological	In <u>all maritime zones</u> :
	- To cooperate in the protection of UCH [303(1)]
	- To be notified of the seizure of UCH [18(3)]
	- To consider its interest in the disposition for the public benefit of seized UCH [18(4)]
	In <u>internal waters, archipelagic waters and territorial sea</u> of another state:
	- To be informed, if the coastal state so decides, on the discovery of state vessels and aircraft [7(3)]
	In the <u>exclusive economic zone / continental shelf</u> (and the contiguous zone) of another state:
	- To receive information from the UNESCO Director-General on discoveries of UCH [9(4)] and on implemented measures of protection of UCH [10(5)(c)]
	- To be consulted on the effective protection of UCH [9(5) and 10(3)(a)]
	In the <u>Area</u> :
	- Preferential right when preserving or disposing UCH for the benefit of humankind as a whole [149][12(6)]
	- To be consulted on the effective protection of UCH [11(4)]
	- To be appointed as 'Coordinating state' [12(2)]. As such authorize and implement measures of protection (unless otherwise decided to be done by other interested states) [12(4)] and authorize and conduct preliminary research [12(5)]
	- To adopt urgent measures to prevent any damage to UCH [12(3)]
	- To receive information from the UNESCO Director-General [12(5)]

to regulate, authorize and conduct marine scientific research in their [EEZ] and on their continental shelf in accordance with the relevant provisions of [LOSC]' (paragraph 1) and that research 'shall be conducted with the consent of the coastal State.' Whereas coastal States 'shall, in normal circumstance, grant their consent' for pure research (paragraph 3), in cases of applied research, coastal States 'may ... in their discretion withhold their consent.' (paragraph 5)

<sup>106</sup> The Table leaves aside the habitual rights or faculties that states parties to both treaties have as such, relating to the general application of the text (participation in the meetings of states parties, peaceful settlement of disputes, conclusion of subsequent agreements, conventional rights on reservations, amendments and denunciation, etc.). All cited articles in the Table are those of the UNESCO Convention, except for Articles 149 and 303 that refer to LOSC.

Coastal state	<p>In <u>internal waters, archipelagic waters and territorial sea</u>:</p> <ul style="list-style-type: none"> <li>- To prevent damage to UCH arising from activities under its jurisdiction [5]</li> <li>- To regulate and authorize activities directed at UCH [8(1)]</li> <li>- To require the application of the Rules of the Annex to the activities directed at UCH [8(2)]</li> <li>- To inform the flag state, if so decided, on the discovery of its state vessels and aircraft [7(3)]</li> </ul> <p>In the <u>contiguous zone</u>:</p> <ul style="list-style-type: none"> <li>- In order to control traffic in UCH, to presume that its removal from the seabed without its approval would result in an infringement within its territory or territorial sea of its customs, fiscal, immigration or sanitary laws and regulations [303(2)]</li> <li>- To regulate and authorize activities directed at UCH [8]</li> </ul> <p>In the <u>exclusive economic zone / continental shelf</u>:</p> <ul style="list-style-type: none"> <li>- To be declared by another state party of its interest in being consulted on how to ensure the protection of UCH [9(5)]</li> <li>- To prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction [10(2)]</li> <li>- To consult with other interested states on the effective protection of UCH [10(3)(a)]</li> <li>- To have a preference to be the ‘Coordinating state’ [10(3)(b)]. As such, to authorize and implement measures of protection (unless otherwise decided to be done by other interested states), including urgent measures to prevent any damage to UCH [10(4)], to authorize and conduct preliminary research [10(5)] and to collaborate with the flag state in activities directed to the latter’s state vessels and aircrafts [10(7)]</li> </ul>
Flag State	<p>In <u>internal waters, archipelagic waters and territorial sea</u> of another state:</p> <ul style="list-style-type: none"> <li>- To be informed, if the coastal state so decides, on the discovery of its state vessels and aircraft [7(3)]</li> </ul> <p>In the <u>exclusive economic zone / continental shelf</u> (and the contiguous zone) of another state:</p> <ul style="list-style-type: none"> <li>- To receive information from the UNESCO Director-General on discoveries of UCH [9(4)]</li> <li>- To consent on activities directed to its state vessels or aircrafts [10(7)]</li> </ul> <p>In the <u>Area</u>:</p> <ul style="list-style-type: none"> <li>- To be reported by its vessels on discoveries of UCH [11(1)]</li> <li>- To be informed by the UNESCO Director-General on discoveries of UCH [11(3)]</li> <li>- To be consulted on the effective protection of UCH [11(4)]</li> <li>- To consent on activities directed to its state vessels or aircrafts [12(7)]</li> </ul>

It should be noted that the group of ‘states parties as a whole’ is mentioned as having an *integral* interest in article 10(6) since ‘[i]n coordinating consultations, taking measures, conducting preliminary research and/or issuing authorizations pursuant to this article, the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest.’ The same is said with regard to these activities performed in the Area by the coordinating state, which ‘shall act for the benefit of humanity as a whole, on behalf of all States Parties’ (article 12(6)). It is then supposed that all these activities are collective activities assumedly performed by a single state party representing the rest of parties to the UNESCO Convention and not only the interested states.

Along with states, some other stakeholders also have a declared interest both in LOSC or the UNESCO Convention:

- *Humankind as a whole / humanity*. As we have seen, article 149 LOSC establishes that UCH ‘shall be preserved or disposed of for the benefit of mankind as a whole’ while the UNESCO Convention imposes that its states parties ‘shall preserve underwater cultural heritage for the benefit of humanity’ (article 2(3)).<sup>107</sup> Nothing

<sup>107</sup> As we have seen, Article 12(6) complements this idea with the fact that, in the Area, the coordinating states ‘shall act for the benefit of the humanity as a whole.’

impedes to interpret both terms as synonymous.<sup>108</sup> The Convention departs from the idea, expressed in its preamble, that UCH, is 'an integral part of the cultural heritage of humanity', going beyond what other UNESCO Conventions had affirmed hitherto; but, as already said, not declaring UCH as part of the common heritage of humankind enshrined in Part XI LOSC.<sup>109</sup>

- *UNESCO and the International Seabed Authority*. Both institutions —through their respective higher representatives: the UNESCO Director-General (DG) and the Secretary-General of the Authority (SG)—<sup>110</sup> have an interest in participating in the protection system established by the UNESCO Convention (absent in LOSC) and is manifested through the notification and reporting system summarized in Table 2.<sup>111</sup>

**Table 2: Communications of the protection system**

Communication on the:	DG		SG
	EEZ/CS	Area	
Discovery and activities by the state parties to the...	9(3)	11(2)	11(2)
Discovery and activities to the rest of state parties by the...	9(4)	11(3)	
Results on preliminary research by the coordinating states to the...	10(5)(c)	12(5)	
Results on preliminary research to the state parties by the...	10(5)(c)	12(5)	
Declaring an interest to participate in the consulting system by a state party to the...		11(4)	
Invitation to participate in the consulting process to the state parties by the...		12(2)	
Invitation to participate in the consulting process by the DG to the...			12(2)
Seizure and disposition of UCH by the state parties to the		18(3)	

The DG and the SG thus participate in the consulting process around UCH located in the Area.<sup>112</sup> None of them, however, participate in that process when the UCH is

<sup>108</sup> See L SAVADOGO, "La convention sur la protection du patrimoine culturel subaquatique (2 novembre 2001)", *Revue générale de droit international public*, vol. 31, 2003, pp. 45-47; and GARABELLO (n 41), pp. 109-110.

<sup>109</sup> None of the three defining elements of this heritage —non-appropriation, sharing of the benefits and institutional management— can be totally and peacefully applicable to UCH. However, as said by Dromgoole, 'rather than envisaging the sharing of *economic* benefits, the notion envisages the sharing by humanity of broader —non-economic— benefits deriving from protective measures, as well as the sharing of *responsibility* for ensuring that such measures are put in place notwithstanding the economic and technical disparities that arise on a national and regional basis.' DROMGOOLE (n 11), p. 121.

<sup>110</sup> While the former becomes the focal point of all and every communication among the state parties, the latter only participates when the activities are developed in the Area.

<sup>111</sup> As agreed in the Operative Guidelines (n 45), all these communications must be done 'through diplomatic channels' (para 26). It will not be mentioned here the communications related to capacity of the UNESCO Director-General as depositary of the Convention.

<sup>112</sup> The notification process may be also analyzed from the Authority's side: in its *Mining Code* —composed of the Regulations adopted so far: the 'Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area' (as revised) (PNR), the 'Regulations on Prospecting and Exploration for Polymetallic Sulphides' (PSR) and the 'Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts' (CCR) (all available at the Authority's webpage at <<https://www.isa.org.jm>>— section 8 of the three Regulations says in a similar wording that '[a] prospector shall immediately notify the Secretary-General in writing of any finding in the Area of an object of actual or potential archaeological or historical nature and its location. The Secretary-General shall transmit such information to the Director General of the United Nations Educational, Scientific and Cultural Organization' (see further sections 35 PNR and 37 PSR/CCR). If the contractor is a national of any UNESCO Convention state party, the latter should stop its prospection or exploration activities and initiate the consultation system provided for under the Convention. If not, and so as not to disturb the human remains, object or site in question, no further prospecting or exploration shall take place, within a reasonable radius, until the Authority's Council decides

- located in the EEZ/CS, which remains among the state parties alone.
- Finally, the Preamble of the UNESCO Convention also mentions ‘other interested parties’ beyond states, international organizations, scientific institutions, professional organizations, archaeologists, divers and the public at large as possible cooperators in the protection of UCH.<sup>113</sup> However, nothing is clarified about all these other stakeholders and their possible interest. It may be presumed that, among them, might be included the ‘identifiable owners’ referred to in article 303(3) LOSC but, again, nothing is said about the extent of their probable interest.

### C) CONSEQUENCES OF THE EXISTENCE OF THESE INTERESTS

Once identified the subjects with an interest in UCH under both LOSC and the UNESCO Convention, the last remaining question is that of the legal consequences which derive from the existence and nature of each interest, and may be defined as ‘material’ and ‘administrative’ consequences. These would depend on whether the eventual damage has been suffered ‘directly’ (or subjectively) or ‘indirectly’ (or objectively).

With regard to material consequences, a State may be directly injured when UCH linked with its sovereignty —spatial or functional— is damaged. If a submerged archaeological site located in the territorial sea or the contiguous zone of state ‘A’ (or, wherever its location, a sunken state vessel of this state) is damaged by state ‘B’ (for example, from a vessel flying its flag), then state ‘A’ is directly injured under article 42(a) or (b)(i) ARSIWA and, therefore, could invoke against state ‘B’ the consequences listed in article 29-31 ARSIWA, that is: the continued duty to perform the obligation breached, the obligation to cease the wrongful act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, and its obligation to make full reparation for the injury caused by the internationally wrongful act. The same could be said for state ‘C’ if considered an interested state because it has declared a cultural, historical or archaeological link with the UCH damaged.

If the UNESCO Convention is considered as establishing an ‘integral regime’,<sup>114</sup> the rest of the state parties —and, even, states non-parties— could also be qualified as directly injured states because ‘the obligation breached is owed to [...] a group of States [...] or the international community as a whole, and the breach of the obligation [...] is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.’ (article 42(b)(ii) ARSIWA). The consequences would be then exactly the same, i.e. continued

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otherwise after taking account of the views of the UNESCO Director-General or any other competent international organisation. If the UNESCO Convention applies, the views of the Director-General are supposed to be the result of the consultations held by the latter, the interested States under Article 11(4) of the UNESCO Convention, and the Authority Secretary-General. If not, the ISA Council shall only decide on the views received from the UNESCO Director-General or from any other competent organisation. See further AZNAR (n 39), pp. 265-267.

<sup>113</sup> The Preamble of the Convention also mentions, as one of the main reasons behind its adoption, the ‘growing public interest in and public appreciation of underwater cultural heritage.’

<sup>114</sup> See n 70 and accompanying text.

duty of performance, cessation and non-repetition and reparation.

If the UNESCO Convention is not considered as establishing an 'integral regime', then the rest of states could be considered as indirectly injured states if:

- they are not party to the UNESCO Convention but the damage to the UCH is considered as a breach of an obligation 'owed to the international community as a whole', under article 48(1)(b) ARSIWA; or
- they are party to the UNESCO Convention and, indeed, the damage is considered as a breach of an obligation 'owed to a group of States including that State, and is established for the protection of a collective interest of the group', under article 48(1)(a) ARSIWA.

This basic scheme might solve these kinds of consequences for states, although some problems still remain. Among others, for example, with regard the 'spatial' injured state: if the UCH is located beyond the outer limit of the contiguous zone<sup>115</sup> and up to the outer limit of the EEZ/CS, the state with the only link of being the coastal state should be considered injured only indirectly for damages affecting that heritage.<sup>116</sup> Another problem arises with regard to who damages UCH: sometimes the damage comes from a treasure hunter activity, but some others come from diverse legitimate activities at sea which incidentally damage that heritage. In both cases, the damage is usually caused by private actors authorized (or not) to perform marine activities. The vessel's flag from which the activity is performed may help in the identification of the responsible state but, as practice adamantly shows, flags of convenience obscure the effective possibilities of reaction against the actual actors behind that conduct.<sup>117</sup> Last but not least, the regime for the Area also offers some problems with regard the attribution of possible responsibility. Hence, when discussing the responsibilities of States sponsoring activities in the Area in accordance with Part XI LOSC and its 1994 Implementation Agreement, and notwithstanding the efforts made by UNESCO,<sup>118</sup> in its Advisory Opinion of 1 February

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<sup>115</sup> It is assumed—in line with that previously explained (n 84)— that in the contiguous zone, when declared, the coastal state has similar rights on UCH that those accepted in the territorial sea. Article 303(2) LOSC also give a guidance for those cases of illicit traffic of UCS located in the contiguous zone.

<sup>116</sup> Of course, this, notwithstanding other activities linked to UCH and both directly or incidentally affecting it, can affect other sovereign rights of the coastal state in its EEZ/CS as, for example, an unauthorized marine research or the drilling of the seabed without permits.

<sup>117</sup> Some cases affecting Spain's UCH could be mentioned here: the looting of that heritage in Spanish territorial sea from a vessel flying St. Vincent and the Grenadines flag (which ended before ITLOS in 2010-2013: the *M/V Louisa* case) but eventually performed by persons with US nationality; or the suspected action of looting in the Spanish EEZ/CS in 2012-2013 from vessels flying the Togo flag but owned and acting for a Swedish company.

<sup>118</sup> The Intergovernmental Oceanographic Commission of the UNESCO appeared before the Tribunal in the oral proceedings and, among other issues, its representative expressly cited Articles 149 and 303 LOSC, as well as the 2001 UNESCO Convention, and reminded the Tribunal that '[t]he oceans are filled with the traces of human existence. This includes some millions of shipwrecks, prehistoric dwellings, ruins and artefacts. Many of them are located in the Area and are of immense importance for the comprehension of the development of humanity. Unfortunately, many cases arise, where such submerged archaeological sites are damaged or destroyed by negatively-impacting activities. These range from pipeline laying, drilling, mineral extraction, trawling and dredging to international treasure hunt.' ITLOS/PV.2010/4/Rev.1, 16 September 2010, p. 12 (all ITLOS documents are available electronically at <http://www.itlos.org>).

2011, the ITLOS Seabed Dispute Chamber did not mention, even tangentially, any obligation or duty of States regarding the general protection of UCH in the Area as provided for under articles 149 and 303 LOSC.<sup>119</sup> The Chamber envisaged only an environmental responsibility on the part of sponsoring States, basically, ‘due diligence’, but said not a word on the diligence likewise imposed with regard to UCH found in the Area.<sup>120</sup>

If all these questions remain open, when other material interests of different stakeholders are not respected, even more complex problems arise. How any decision, adopted by any stakeholder (mainly states but also private persons or international institutions like the Authority, for example), which infringe the protection of UCH for the benefit of the humanity, could be addressed? Akin to some other situations affecting global commons or interests affecting the humanity, the lack of procedures and of institutions acting in the interest of humankind make futile the defence of that interest of humanity against infringements. Leaving aside the social reprobation which may be voiced by both governmental and non-governmental organisations (for example, UNESCO and ICOMOS, respectively),<sup>121</sup> the *mise en œuvre* of the classical international responsibility mechanisms foreseen in international law may become useless. However, some new paths might be explored:

- *First*, it may be supposed that the links to UCH located in the internal waters, archipelagic waters, territorial sea and contiguous zone are so strong that there will always be a state willing and able to protect it, obliged either by article 303(1) LOSC or, if applicable, article 2 of the UNESCO Convention;
- *Second*, with regard UCH located in the EEZ/CS, if article 10(6) of the UNESCO Convention warns that in coordinating consultations, taking measures, conducting preliminary research and/or issuing authorizations, the ‘coordinating state’ shall act *on behalf of the States Parties as a whole and not in its own interest*, nothing impedes the possibility that this vicarious responsibility also extends to reclamations for damages also ‘on behalf of the States Parties as a whole’ (emphasis added). As that article continues saying, any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including LOSC.
- *Third*, a quite similar approach could govern the reaction to damages to UCH in the Area. Art 12(6) of the UNESCO Convention, in a similar wording, identifies the ‘coordinating state’ as acting ‘for the benefit of humanity as a whole, on behalf of all

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<sup>119</sup> *Responsibilities and obligations of States with respect to activities in the Area*, ITLOS Case No 17, 2011, para 242.

<sup>120</sup> It is true that the scope of the question submitted to the Chamber limited its possible answer since the ‘activities directed at underwater cultural heritage’ are not envisaged among those that may entail the responsibility of States sponsoring activities in the Area. But a reference would have been very welcome.

<sup>121</sup> This was the case, for example, when the Colombian Government announced in 2015 the find of the *San José*, a Spanish galleon sunk in 1708 allegedly in Colombian waters, and the decision to excavate and commercialize some of the remains with the collaboration of private companies under a public-private contract. Along with the vast majority of domestic scientific institutions, both the UNESCO and the Committee on UCH of ICOMOS made public their criticisms against the approach to the case decided by Colombia, non-party to LOSC and the UNESCO Convention.



States Parties.' As discussed earlier, the Authority does not have (because was not expressly given in UNCLOS) any power of reaction in terms of international responsibility. Beyond the notification system analyzed in the previous section, neither the Authority nor the UNESCO or any other international institution has it.

In the absence of some institution characterized as a steward or custodian of the UCH—like the World Heritage Committee for the WHC—, state parties to the UNESCO Convention should react vicariously. Interestingly enough, the WH Committee may react to protect UCH if included in the WH List, today limited to those sites located up to the outer limit of the territory of each WHC's state party. To close the gap in the protection of UCH beyond that outer limit, i.e. the heritage located in the EEZ/CS and on the Area, will be a challenging discussion in the near future which has already begun.<sup>122</sup>

Finally, along with these material interests and the consequences of their breach, the UNESCO Convention also recognises some procedural interests which may also be negatively affected. These mainly refer to the interest on being notified of different activities and to participate in the consultation process, generally recognized to the states with a demonstrated interest (including a preferential right) and to the Director-General of the UNESCO and the Secretary-General of the Authority depending on the location of UCH. In these cases, there is no distinction between 'directly' or 'indirectly' injured subject, since the interests always derive from a subjective right. The consequences are qualitatively different from those appearing after a material breach, but are not to be neglected since one of the cornerstones of the protective canvas created by the UNESCO Convention is, precisely, its reporting and notification system.

The way all these possible claims may be given effect include the general system of peaceful settlement of disputes available in general international law (indicatively listed in article 33 of the UN Charter) and, for those parties to the LOSC, the system so provided for in its Part XV (if accepted). For those states parties to the UNESCO Convention, its article 25 (which cannot be reserved) includes a three-step process: (1) compulsory submission of the dispute to negotiations in good faith or other peaceful means of settlement of their own choice; (2) if those negotiations do not settle the dispute within a reasonable period of time, it may be submitted to UNESCO for mediation, by agreement between the states parties concerned; and (3) if mediation is not undertaken or if there is no settlement by mediation, the provisions relating to the settlement of disputes set out in Part XV LOSC should apply *mutatis mutandis* to any dispute between states parties, whether or not they are also parties to LOSC.<sup>123</sup>

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<sup>122</sup> See n 34.

<sup>123</sup> So far, only Cuba (state party to LOSC) has made a declaration when ratifying the UNESCO Convention with following wording: 'The Republic of Cuba, in regard to Article 25, paragraph 3, relating to the application *mutatis mutandis* of the provisions on the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea, declares that it reaffirms the declaration made under Article 287 [LOSC], concerning its non-acceptance of the jurisdiction of the International Court of Justice and, consequently, its non-acceptance of the Court's jurisdiction over the provisions of Articles 297 and 298 [LOSC].' Source: <<http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/declarations-and-reservations/>>.

#### IV. CONCLUDING REMARKS

This article has tried to go beyond the allocation of subjective rights and discuss the legal nature of international obligations as applied to the protection of UCH, today governed by two main treaties: the 1982 UN Convention on the Law of the Sea and the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. Both treaties, albeit normatively linked, were drafted and adopted in a completely different political environment: if LOSC was negotiated during the Cold War in a diplomatic conference, the UNESCO Convention's drafting developed in a more scientific and culturally-oriented process. If LOSC was adopted as a package deal, with a fine-tuned description of rights and duties of the different stakeholders, the UNESCO Convention included several constructive ambiguities and some open clauses linked with other conventions—including LOSC—and customary rules. But the latter, as all UNESCO conventions, tries to go beyond sovereignty, territoriality and inter-state diplomatic relations, and propose a transnational dialogue, based on scientific cooperation, backed by an institutional framework of both inter-governmental and non-governmental organizations and for the benefit of humanity.

If LOSC barely and perhaps inconsistently regulated the protection of UCH, the UNESCO Convention tries to complete (and correct) the legal framework for that protection. It tries to go beyond the limited (although complex) notion of preferential rights included in article 149 LOSC for the UCH located in the Area, as well as supersede the limited and conflictive performance of private rights not prejudiced by LOSC under its article 303(3). For this, there is a sliding argument in favour of the notion (complex as well) of interest through the demonstration of a 'verifiable link'. This link—which may translate a preferential right—may be manifold for states: mainly a cultural, historical or archaeological link, an ownership link (including the flag link as evidence of public property) or a spatial link.

In a recent published paper, Professor Jie Huang states that the verifiable link is 'an important question that has not been well explored in the current literature' and that it merits a fresh approach when addressing the protection, and not simply the ownership, of UCH.<sup>124</sup> This paper precisely departs from the idea that most of the discussions around UCH—and the *Mercedes* case was paramount—<sup>125</sup> obsessively focuses on

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<sup>124</sup> JIE HUANG, "Chasing provenance: Legal dilemmas for protecting states with a verifiable link to underwater cultural heritage", *Ocean & Coastal Management*, vol. 84, 2013, p. 220. Unfortunately, trying to defend the right of Perú over some silver cargo aboard the *Mercedes* (see following footnote), the author misinterpreted some historical facts: claiming only the 'treasure' (but not the importance of the archaeological site), Perú simply argued that the coins were minted at Lima but obviated that the coins were mainly mined at Potosí, Bolivia, as demonstrated by Spain's numismatic researchers during the case.

<sup>125</sup> This well-known case initiated when a US treasure-hunting company—Odyssey Marine Exploration Inc.—recovered in 2007 from the Portuguese continental shelf a cargo of around 600,000 coins (mainly silver Spanish *Reales de a Ocho*) and some other artifacts from the remains of a Spanish Royal Navy frigate sunk in October 1804 while in combat against a British squadron. The recuperation of the cargo was made without any permit from Spanish or Portuguese authorities and without any scientific care of the submerged remains—including human remains—, thus 'irreparably' disturbing the archaeological site, as the admiralty decision which decided the case plainly said (see n 98).

title/ownership to that heritage and not around the collective responsibility to protect such a fragile integral part of the cultural heritage of humanity. But that case demonstrates how the notion of interest may be well suited to accommodate all the historical, cultural and archaeological claims of different stakeholders beyond the limited notion of preferential right: Spain, Portugal, Perú, Bolivia, Uruguay and —why not— the UK might claim to have such a kind of interest because all of them can demonstrate the existence of a verifiable link: Spain as flag state (as well as culturally, historically and archaeologically linked), Portugal as coastal state, Perú and Bolivia as the possible origin of the recovered cargo (and also historically linked), Uruguay as the last departing point in the Americas and, even, the UK because its unfair naval attack against a nation then still in peace provoked the declaration of war by Spain in December 1804. Some months later, the Trafalgar naval battle occurred.

A similar group of states could be found around other underwater sites: as already mention, in the Skerki Bank, Tunisia, Italy, France and Spain have already declared their interest in being consulted under the terms of the UNESCO Convention. Around the wreck of the *RMS Titanic* several nations have also demonstrated an interest: Canada, France, the UK and the US signed in 2000 an agreement to protect it,<sup>126</sup> inviting other states to join the club. Imagine —to complete this quick *tour d'horizon*— how many and how precious interest may be in motion around the remains of any of the sunk galleon of the *Manila Route* (1565-1821),<sup>127</sup> a Viking *drakkar* wrecked in a Scottish firth or any underwater remains of Chinese Admiral Zheng He's seven fleets sent in the XV Century to the Indian Ocean<sup>128</sup>.

Irremediably, the notion of preferential rights does exist for UCH in the Area, both in LOSC and in the UNESCO Convention. However, the notion of interest in the protection of that heritage may offer new paths for the international community:

- If a collective interest, confirmed by an increased number of states with a link to UCH, this may be included in the WH List if complying with the conditions established henceforth;<sup>129</sup>

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<sup>126</sup> Agreement concerning the Shipwrecked Vessel R.M.S. *Titanic*, 5 January 2000, available electronically at <[www.gc.noaa.gov/documents/titanic-agreement.pdf](http://www.gc.noaa.gov/documents/titanic-agreement.pdf)>. The United Kingdom signed the Agreement on 6 November 2003; the United States signed on 18 June 2004, subject to acceptance upon the enactment of legislation from the U.S. Congress providing authority for authorizations and enforcement. The Agreement is to enter into force with just two parties. It is not in force. See generally, S DROMGOOLE, "The International Agreement for the Protection of the Titanic: Problems and Prospects", *Ocean Developments & International Law*, vol. 37, 2006, pp. 1ff; and P H OPPENHEIMER & O VARMER, "Implementing the International Agreement to Protect RMS Titanic", *ABA International Environmental Newsletter*, vol. 8, 2006 [available electronically at <[https://www.gc.noaa.gov/documents/gcil\\_titanic\\_article.pdf](https://www.gc.noaa.gov/documents/gcil_titanic_article.pdf)>].

<sup>127</sup> See, among others, M ALFONSO MOLA & C MARTÍNEZ SHAW, *El Galeón de Manila*, Ministerio de Educación, Cultura y Deporte, Madrid, 2000; or J L GASCH TOMÁS, *The Atlantic World and the Manila Galleons. Circulation, Market, and Consumption of Asian Goods in the Spanish Empire, 1565–1650*, Brill, Leiden, 2018.

<sup>128</sup> It may be seen L LEVATHES, *When China ruled the seas*, Oxford University Press, Oxford, 1994; and H R CLARK, "Frontier Discourse and China's Maritime Frontier: China's Frontiers and the Encounter with the Sea through Early Imperial History", *Journal of World History*, vol. 20, 2009, pp. 1ff.

<sup>129</sup> See among others J B MARTIN, "Protecting Outstanding Underwater Cultural Heritage through the World Heritage Convention: the *Titanic* and *Lusitania* as World Heritage Sites", *International Journal of*

- The notion of collective interest also implies widening the number of states involved in the notification and consultation process foreseen in the UNESCO Convention, which could be echoed outside the treaty-club by states not willing or not able to ratify the text but aligned with its principles and the scientific rules annexed;
- The acceptance of a collective interest, based on sincere wills to collaborate, might supersede the discussion over title among stakeholders, thus avoiding (or, at least, tempering) the always bitter re-openings of long-lasting discussions on historical facts and rights;
- A collective interest may also include the clear decision to expel treasure-hunting and the commercialization of UCH from the equation of cooperation under scientific parameters, for the benefit of humanity and not only for private collectors and speculative opaque companies;
- A collective interest permits the widening of the number of states willing and able to protect UCH even beyond national jurisdictions through different legal approaches: (1) extending the spatial scope of the WHC, as proposed,<sup>130</sup> and the possible interaction between WHC and the UNESCO Convention;<sup>131</sup> (2) exploring the possibilities offered by two ocean governance and marine planning tools for a more comprehensive protection of UCH and its natural context: the marine protected areas and the integrated coastal management;<sup>132</sup> or (3) accepting the existence of objective regimes applicable to important UCH sites beyond the national jurisdictions, thus compromising all states in the protective regime of relevant sites located beyond the national jurisdiction of states.<sup>133</sup>

While finishing this article, another session of the Intergovernmental Conference on an international legally binding instrument under the LOSC on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, will

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*Maritime & Coastal Law*, vol. 33, 2018, pp. 1ff; and S KHAKZAD, “Underwater Cultural Heritage Sites on the Way to World Heritage: To Ratify the 2001 Convention or not to Ratify?”, *Journal of Anthropology and Archaeology*, vol. 2, 2014, pp. 1ff.

<sup>130</sup> See above n 34. See further R CASIER and F DOUVÈRE (eds), *The Future of the World Heritage Convention for Marine Conservation: Celebrating 10 years of the World Heritage Marine Programme*, UNESCO, Paris, 2016.

<sup>131</sup> As expressly foreseen in the WHC Operational Guidelines, paras 41-44 (available electronically at <<http://whc.unesco.org/en/guidelines/>>).

<sup>132</sup> See for different perspectives, T SCOVAZZI, “Marine Protected Areas on the High Seas: Some Legal and Policy Considerations”, *International Journal of Maritime & Coastal Law*, vol. 19, 2004, pp. 1ff; F MAES, “The international legal framework for marine spatial planning”, *Marine Policy*, vol. 32, pp. 797ff; C EHLER & F DOUVÈRE (eds), *Marine Spatial Planning: a step-by-step approach toward ecosystem-based management*, UNESCO, Paris, 2009; Y TANAKA, *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea*, Routledge, Surrey, 2009; T DUX, *Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ)*, Lit Verlag, Berlin, 2011; or S JAY *et al.*, “Transboundary dimensions of marine spatial planning: Fostering inter-jurisdictional relations and governance”, *Marine Policy*, vol. 65, 2016, pp. 85ff. See also A BLANCO-BAZÁN, “The IMO guidelines on Particular Sensitive Sea Areas (PSSAs). Their possible application to the protection of underwater cultural heritage”, *Marine Policy*, vol. 20, 1996, pp. 343ff.

<sup>133</sup> See AZNAR & VARMER (n 31). See also J JACOBSSON & J KLABBERS, “‘Rest in Peace?’ New Developments Concerning the Wreck of the M/S Estonia”, *Nordic Journal of International Law*, vol. 69, 2000, pp. 317ff.

be held<sup>134</sup>As the commemoration of the centennial of First World War gave a momentum to discuss on UCH, so 2019 may be another good moment to link both ideas: that of protecting UCH as another global commons, even beyond national jurisdictions, for the benefit of humanity thus protecting a collective interest and not only particular rights.

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<sup>134</sup> Decided by UN General Assembly resolution 72/249, 24 December 2017.