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Looking for "Submerged Commons": Towards a New Era for Underwater Cultural Heritage?

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Abstract

Even if not originally conceived of as related to cultural heritage, the common heritage of mankind (CHM) principle progressively makes its way into this field too. International norms regulating underwater cultural heritage (UCH) fit in the same evolving trend. However, they have to relate to an existing legal framework that has a completely different - and possibly opposite - primary objective. Indeed, the United Nations Convention on the Law of the Sea (UNCLOS) provided for archaeological and historical objects found at sea, prior to the adoption of an international convention specifically for UCH. Nevertheless, the related provisions of this convention have raised many doubts. The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage would seem to intend to fill the vacuum, but it has not yet received the necessary acceptance and this surely impacts on the promotion of the UCH towards a more 'common' interest. This paper retraces the evolution of the protection of UCH as perceived through the prism of the CHM doctrine, wondering whether a tangential route is the best means to reconcile these two doctrines.

Keywords: underwater cultural heritage – 2001 UNESCO Convention – UNCLOS – common heritage of mankind

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1. The Common Heritage of Mankind: an Overview of the Origins of the Doctrine

The doctrine of the Common Heritage of Mankind (CHM) is a unique exception to Westphalian sovereignty. The first reference[1] is attributed to Arvid Pardo, the Maltese ambassador, who in 1967 promoted the discussion on the adoption of a declaration concerning reserving the seabed and the

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1 A very 'primordial' reference is to be found in Hugo Grotius's *Mare liberum* (1609), where the High Sea is identified as '[w]hatever cannot be seized or enclosed […] not capable of being a subject of property […] meaning that the vagrant waters of the ocean are necessarily free'.

ocean floor exclusively for peaceful purposes, 'underlining [that] the seas beyond the limits of present national jurisdiction and the use of their resources [should be managed] in the interest of mankind'[2] Indeed, the first theorization on CHM referred to the ocean floor and the exploitation of its resources.[3] Although in 1967 CHM doctrine was also associated with outer space and Antarctica,[4] some authors believe that the law of the sea is the sole discipline in which the CHM is implemented.[5] Part XI of the United Nations Convention on the Law of the Sea (UNCLOS) is devoted to '[…] the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction', so-called 'Area'(art. 1). From articles 133 to 191 the Convention regulates what is Common Heritage of Mankind and, as such, excluded from appropriation. Humanity, whose interests in the Area are represented by the International Seabed Authority, is the exclusive holder of this area (art. 137) and any activity in it must be carried out for the benefit of mankind as a whole (art. 140).

The essential elements of the CHM, as defined by the General Assembly Declaration,[6] are: the *common sovereignty*, meaning the non-appropriation principle;[7] the *common benefit*, meaning the need to exploit the CHM and its resources for 'the benefit of mankind as a whole'; the *common management*, meaning establishing a suitable international regime responsible for controlling and organising the exploitation activities; the *peaceful use* of the CHM. The clear equality and distributive approach means that 'the common heritage of mankind had an intrinsic *emotive* (emphasis added)

2 UNGA Res 2340 (XXII) (18 December 1967) A/RES/22/2340.

3 UNGA Res 2574 (XXIV) (15 December 1969); UNGA Res 2749 (XXV) (17 December 1970) A/RES/2574 (XXIV).

4 Elena Sciso, *Le risorse dell'Antartide e il diritto internazionale* (Cedam 1990); Durante, *Spazio atmosferico e cosmico* (*Enciclopedia giuridica* vol. XXX 1993); Francesco Francioni, Fausto Pocar (eds), *Il regime internazionale dello spazio* (Giuffré 1993); Francesco Francioni, Tullio Scovazzi (eds), *International Law for Antarctica* (Martinus Nijhoff 1996); Karen Scott, 'Institutional developments within the Anctartic Treaty System' (2003) International & Comparative Law Quarterly 473; Patrizia Vigni, *Concorrenza fra norme internazionali: il regime giuridico dell'Antartide nel contesto globale* (Giuffré 2005); Daniel A Porras, 'The "Common Heritage" of Outer Space: Equal Benefits for Most of Mankind' (2006) 37(1) California Western International Law Journal 143; Carol R. Buxton, 'Property in Outer Space: the Common Heritage of Mankind Principle vs. the "First in Time, First in Right" Rule of Property Law (2004) 69(4) Journal of Air and Commerce 689; Jennifer Frakes, 'The common heritage of mankind principle and the deep seabed, outer space, and Antartica: will developed and developing nations reach a compromise? (2003) 21(2) Wisconsin International Law Journal 409.

5 Christopher C. Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind' (1986) 35 International & Comparative Law Quarterly 190 but also Natalino Ronzitti, *Introduzione al diritto internazionale* (Giappichelli 2013) 85; Prue Taylor, 'The Earth Charter, the Commons and the Common Heritage of Mankind Principle' in Laura Westra, Mirian Vilela (eds), *The Earth Charter, Ecological Integrity and Social Movements* (Routledge 2014); Maria Fernanda Millicay, 'The Common Heritage of Mankind: 21st Century Challenges of a Revolutionary Concept' in Lilian Del Castillo (ed), *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea : Liber Amicorum Judge Hugo Caminos* (Martinus Nijhoff 2015); Surabhi Ranganathan, 'Global Commons' (2016) 27(3) The European Journal of International Law 693; Nico Schrijver, 'Managing the Global Commons: Common Good or Common Sink?' (2016) 37(7) Third World Quarterly 1252; Prue Taylor, 'The Concept of the Common Heritage of Mankind' in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Elgar 2016).

6 A/RES/2574 (XXIV) (n 3).

7 '*En effet, les biens qui font partie de l'ensemble du patrimoine commun de l'humanité en droit International entraînent des obligations qui non seulement engagent les Etats et les organisations Internationales, mais interdisent également aux individus ou aux particuliers, ainsi qu'à tout autre sujet de droit International, de s'en approprier à des fins exclusive* […] *Si l'on admettait qu'il y a dans ce monde un ensemble de biens, avoirs, droits et intérêts, qui n'appartient et ne peut appartenir à personne, à aucun Etat en particulier, mais qui demeure propriété de l'ensemble de la communauté Internationale, ou mieux encore, qui appartient à l'homme en tant que membre de l'espèce humaine, ou à l'humanité tout entière, cet ensemble de biens, avoirs, droits et intérêts devrait correspondre aux caractéristiques du patrimoine commun de l'homme*'. Sompong Sucharitkul, 'Evolution continue d'une notion nouvelle le patrimoine commun de l'humanité' (1989) Publication Paper 668 https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1665&context=pubs> accessed 12 February 2018.

appeal'.[8] Its 'importance sociale' is the reason behind the international interest.[9] In view of this, UNCLOS regulates the equitable sharing of financial and economic benefits and the use for peaceful purposes together with the non-appropriation principle, making the Area the first heritage explicitly recognized as a CHM by an international instrument.

Nevertheless, due to the reluctance of industrialised countries, the Implementation Agreement, and the subsequent 1994 Agreement,[10] toned down this approach limiting, for example, the sharing principle to mineral resources founded in the Area and restricting the so-called 'parallel system' for exploration and exploitation.[11]

The frameworks for the systems governing respectively Antarctica and outer space are similar: both the Protocol on Environmental Protection to the Antarctic Treaty and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies recognize 'the benefit and the interest of mankind as a whole'.[12] But neither of these systems has been able to establish an operational organisation guaranteeing equitable management and exploitation of resources,[13] nor firmly supporting other CHM elements which, actually, give the impression here of having been markedly tempered.[14]

Nevertheless, the CHM doctrine, even if toned down or adjusted, and thus not in its 'pure form', has progressively extended its application to include the cultural dimension.

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8 Moragoage Christopher Walter Pinto, 'The Common Heritage of Mankind: Then and Now' (2013) 361 Collected Courses of the Hague Academy of International Law 9, 24.

9 Alexandre Kiss, 'La notion de patrimoine commun de l'humanité' (1982) 175 Collected Courses of the Hague Academy of International Law 99.

10 The 1994 Agreement relating to the Implementation of Part XI of UNCLOS was adopted when it became clear that the majority of industrialised countries were not willing to sign the convention with such a 'progressive' approach. This additional instrument introduced a more 'diluted' version (Tullio Scovazzi, 'The Concept of Common Heritage of Mankind and the Resources of the Seabed Beyond the Limits of National Jurisdiction' (2006) 25 Agenda International 11) of the CHM doctrine, stating that some '[…] political and economic changes, including in particular a growing reliance on market principles, have necessitated the re-evaluation of some aspects of the regime for the Area and its resources'.

11 According to the original UNCLOS version, a 'parallel system' was to have been established for exploration and exploitation of the international seabed area. All activities in this area were to have been under the control of an International Seabed Authority, to be established under the Convention. The authority was to conduct its own mining operations via its operating arm, called the 'Enterprise', and contract with private and state ventures to give them mining rights in the Area, so that they could operate in parallel with the authority. Nevertheless, the 1994 Agreement modified this system, stating that: the Enterprise will be established when mining operations are concretely feasible. Mandatory technology transfer, as well as the preferential regime originally accorded to the Enterprise were abolished with the result that, the Enterprise is now on a par with any other commercial enterprises. For a brief and introductory analysis, Natalino Ronzitti, *Introduzione al diritto internazionale* (Giappichelli 2013).

12 Protocol on Environmental Protection to the Antarctic Treaty (adopted October 4, 1991, entered into force January 14,1998) UNTS 2941 (Environmental Protocol or Madrid Protocol); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted January 27, 1967, entered into force October 10. 1967) UNTS 610 (p. 205) (Outer Space Treaty).

13 The Outer Space Treaty makes no reference to an international administration system, not even as future possibility.

14 The Outer Space Treaty limits peaceful use to the moon and other celestial bodies alone (ignoring any other parts of outer space) and meaning 'non-aggressive use'. Most importantly, it does not deal with the equitable sharing of benefits derived from potential resource exploitation.

2. The 'Cultural' Heritage of Mankind

When considering the cultural dimension, the CHM doctrine proves even more elusive.[15] Nevertheless, the idea that cultural heritage belongs to everyone rather than being a *domain reservée* of states arose in the eighteenth century. The very first legal reference to it is to be found in the international rules of war adopted during the twentieth century, such as, for example, the regulations annexed to the 1907 Hague Conventions on the Laws and Customs of War on Land, which contain several provisions regarding the protection of cultural heritage during armed conflict.[16] The regional Treaty for the Protection, in Time of War and Peace, of Historic Monuments, Museums and Institutions of Arts and Science, adopted by states of the Pan American Union in 1935, is worthy of attention in this regard.[17]

Events during the Second World War demonstrated that only multilateral cooperation between states could preserve cultural heritage. The United Nations Educational, Scientific and Cultural Organization (UNESCO) began codification efforts, progressively adopting several conventions, recommendations and declarations aimed at protecting cultural heritage, recognized to be a common *concern* of mankind.[18] Unfortunately, most instruments adopted under the auspices of UNESCO avoid explicit reference to CHM. Only the 1978 Recommendation for the Protection of Movable Cultural Property, in the 5th recital of the Preamble, states that 'movable cultural property representing the different cultures forms part of the *common heritage of mankind* (emphasis added) and that every State is therefore morally responsible to the international community as a whole for its safeguarding'. The other instruments prefer a more ambiguous allusion to the 'outstanding *interest* […] of mankind as a whole'[19] (emphasis added) or a slightly braver reference to the '*cultural* heritage of all mankind (emphasis added)', the preservation of which 'is of great importance for all the people of the world'.[20] The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions,

15 Trpimir Šošić, 'The common heritage of mankind and the protection of underwater cultural heritage' in Budislav Vukas, Trpimir Šošić (eds), *International Law: New Actors, New Concepts - Continuing Dilemmas. Liber Amicorum* (Martinus Nijhoff Publishers 2010) 319.

16 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

17 Maja Seršic, 'Protection of Cultural Property in Time of Armed Conflict' (1996) 27 Netherlands Yearbook of International Law 5 as mentioned by Šošić, ibid 33.

18 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted May 14, 1954, entered into force August 7, 1956) UNTS 249 (p. 215); The Convention on the Means of Prohibiting and Preventing the Illicit Traffic of Cultural Property (adopted November 11, 1970, entered into force April 24, 1972) UNTS 823 (p. 231) (1970 UNESCO Convention); The Convention for the Protection of the World Cultural and Natural Heritage (adopted November 16, 1972, entered into force December 17, 1975) UNTS 1037 (p. 151) (1972 UNESCO Convention); The Convention on the Protection of the Underwater Cultural Heritage (adopted November 2, 2001, entered into force January 2, 2009) UNTS 2562 (2001 UNESCO Convention); UNESCO (General Conference, 31st, 2001 p. 61) "The Universal Declaration on Cultural Diversity" 31 C/Resolutions + CORR; The Convention for the Safeguarding of the Intangible Cultural Heritage (adopted October 17, 2003, entered into force April 20, 2006) UNTS 2368 (p. 3) (2003 UNESCO Convention); The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted October 20, 2005, entered into force March 18, 2007) UNTS 2440 (2005 UNESCO Convention).

19 6th recital 1972 UNESCO Convention.

20 2nd and 3rd recital of the 1954 UNESCO Convention.

proposes that the 'common heritage of humanity' (rather than mankind) should be preserved 'for the benefit of all'.[21]

Almost all of these instruments reveal some evidence of a CHM principle. Most notable in this regard are the 1954 Hague Convention[22] and the so-called World Heritage Convention of 1972.[23] The former is permeated with the idea that cultural heritage impacted by armed conflict should be preserved in the interest of all mankind. The Preamble states that 'cultural property belong[s] to any people' and, as such, when damaged its loss affects 'all mankind'.[24] Furthermore, article 1 defines cultural property as one that is 'of great importance to the cultural heritage of *every people*'; however, none of the articles determines how this great importance should be protected.[25]

Nonetheless, the 1954 Convention laid the foundations for the 1972 World Heritage Convention's more inclusive and fully-developed approach. In addition to recognising the great importance of cultural heritage for 'all the nations of the world',[26] this Convention has two relevant impacts: In article 6 it formalises 'the duty of the international community as a whole to '*co-operate*' to preserve cultural heritage; on the other hand in article 11 it provides for a system of international protective measures (consisting of two different Lists, the World Heritage List and the List of World Heritage in Danger) under the supervision of the World Heritage Committee.

The Committee may be compared with other international administrative agencies (such as the Financial Committee organised into the International Seabed Authority) and its powers remain under the control of states parties (with the remarkable exception of the measures arranged for the World Heritage in Danger[27]) but regardless cultural heritage protection is, in some way, subtracted from the 'domestic affair' realm of the state, which is no longer '[…] free to actively demolish or passively impoverish cultural heritage which is considered to be of outstanding universal value'.[28]

Article 4 of the Convention adds a further element which shows the extent to which the CHM approach is reflected within it, namely that state parties must ensure the 'identification, protection, conservation, presentation and transmission to future generations' of world heritage.

Therefore, UNESCO would appear to be the promoter of the concept of a 'cultural heritage of mankind' and states are under a general obligation to protect and preserve such a heritage in the interest

21 2nd recital 2005 UNESCO Convention.

22 The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.

23 That is the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage.

24 2nd recital.

25 This lacuna leads the doctrine to affirm that this Convention only contains a 'proclamation of an idea' and should have been more assertive. Genius-Devime, *Bedeutung und Grenzen des Erbes der Menschheit im völkerrechtlichen Kulturgüterschutzen* (Nomos 1996) as quoted by Trpimir Šošić (n 15) 318.

26 2nd recital of the Preamble.

27 Article 11.4 states that "[…]The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately".

28 Šošić (n 15) 339.

of all humanity, present and future.[29] Such an awareness surely brings the cultural dimension into contact with the pure and highly theoretical CHM discipline, even if an adjustment enabling the former to make use of the latter is unavoidable.[30]

3. At the Bottom of the Sea: the CHM Principle to the Test of Underwater Cultural Heritage Law

As evidenced above the law of the sea, through UNCLOS, is the high point for the CHM. However, UNCLOS probably does not represent the best reference to underwater cultural heritage (UCH). The two dimensions are closely linked, however, and the question becomes how best to reconcile them. The answer is to be found in the relevant legal frameworks which consist of two different conventions: UNCLOS and the 2001 UNESCO Convention on the protection of the UCH.[31] The latter is the most recent progress regarding underwater cultural heritage, but the former, while not exclusively UCH focused, was the only legal reference for some time – at least from 1994 to 2009 (when the UNESCO convention came into force) – and therefore its influence cannot be underestimated. Indeed, a number of eminent authors have argued that UNCLOS represents '[…] the main obstacle to the full recognition of a public interest in the protection of the UCH'.[32] The two systems overlap and therefore both are analysed here.

3.1 UNCLOS: Articles 149 and 303

UNCLOS devotes two articles to underwater cultural heritage: articles 149 and 303. The former belongs to Part XI of the Convention, dedicated to the Area, while the latter is included in Part XVI, listing the General Provisions.

Article 149 introduces two ideas: first of all '[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of *for the benefit of mankind as a whole* (emphasis added) […]'; secondly '[…] the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin […]' has a *preferential right* regarding these objects.

29 As Šošić (n 15) 341 recalls, '[…] cultural heritage of mankind concept involves more than a mere moral duty […] there are also evident legal implications'.

30 Neglecting the undeniable organisational and structural differences that emerges at a comparison with the CHM doctrine as stated by UNCLOS, when applied to the cultural dimension, the CHM doctrine needs to be adjusted essentially because of the marked and (for the moment) undeniable presence of state sovereignty. States retain control over their cultural heritage: whilst they are not allowed to intentionally destroy cultural properties, theirs is the exclusive input in protection. The sole exception consists in the protection of endangered cultural heritage that the World Heritage Committee has the power to add to the List of the cultural heritage in danger with or without states' consent.

31 United Nations Convention on the Law of the Sea (adopted December 10, 1982, entered into force November 16, 1994) UNTS 1833 (p. 3), 1984 (p. 3), 1985 (p. 3) (UNCLOS).

32 Tullio Scovazzi, 'Underwater Cultural Heritage as an International Common Good' in Federico Lenzerini, Filipa Vrdoljak (eds), *International Law for Common Goods* (Hart Publishing 2014) 219.

Although allusion to CHM doctrine clearly emerges, the concrete meaning of these two principles is left 'vague and ambiguous'.[33] Indeed, the Convention does not specify how archaeological and historical objects should be preserved or disposed of,[34] nor does it indicate the content of the preferential right enjoyed by certain states and its position regarding benefits to mankind as a whole.[35]

Another challenge with regard to article 149 pertains to its relationship with the CHM regime. Indeed, even if physically placed in part XI of UNCLOS and according to article 136, '[t]he Area and its resources *are* (emphasis added) the common heritage of mankind', cultural objects found in there cannot be considered a 'resource' as defined by article 133 of UNCLOS. As a matter of fact, this definition refers to mineral resources alone and it is thus clear that the intention of those drafting the convention was to exclude cultural heritage from the regime of Part XI.[36] As a consequence of this exclusion, the CHM regime, as stated by part XI of UNCLOS, cannot be applied to the UCH. Therefore, the cultural objects located in the Area are thus not covered by the jurisdiction of the International Seabed Authority (ISA) and no international administration or agency is responsible for preserving them. The obligation to preserve mineral resources lies with individual states alone.[37]

A final aspect to reflect on concerns underwater cultural heritage-related activities encompassed by the provision of article 149 which makes no reference whatsoever to archaeological research or exploration in the Area implying that only archaeological and historical objects '*found* in the Area shall be preserved or disposed of for the benefit of mankind as a whole (emphasis added)', with the exclusion of any other related activities.[38]

Its limits and vagueness notwithstanding, the regime established by article 149 of UNCLOS represents the first legally binding regulation on underwater cultural heritage considered as a sort of 'common interest' of mankind.

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33 Craig Forrester, *International Law and the Protection of Cultural Heritage* (Routledge 2010) 322.

34 Although, as Šošić (n 15) 343 has correctly observed, UNCLOS was adopted before the consolidation of many principles concerning cultural heritage preservation, including the well-established principle of preservation *in situ*.

35 Apparently, the various categories of states encompassed by the final part of article 149 – 'the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin' – was conceived of as a negotiating alternative. Inexplicably, they were all left in the final version of the convention. Craig Forrester (n 32)

36 See Šošić (n 15) 342.

37 As a distinguished doctrine notes '[c]*ette disposition de la Convention manqué malheureusement de précision et sa mise en oeuvre est laissée à la discrétion des Etats. Elle omet par ailleurs de reconnaitre une quelconque responsabilité à l'Autorité internationale du fond des mers pourtant charge par la Convention des Nations Unies sur le droit de la mer d'organiser et de contrôler les activités menées dans cette partie du fond des mers*', Djamchid Momtaz, 'La convention sur la protection du patrimoine culturel subaquatique', in Tafsir Malick Ndiaye, Rudiger Wolfrum, Chie Kojima (eds), *Law of the sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 444. See also Lucius Caflisch, 'Submarine Antiquities and the International Law of the Sea' (1982) 13 Netherlands Yearbook of International Law 3, 26; Roberta Garabello, *La convenzione UNESCO sulla protezione del patrimonio culturale subacqueo* (Giuffré 2004);.

38 Šošić (n 15) 343.

However, this article must be read in light of article 303, which appears to move in a completely contrary direction.[39] Article 303 Paragraph 1 provides that '[s]tates have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose'.[40] Whilst it does contain a mere invitation to cooperate, article 303 does not reference the CHM, preferring a more general approach.[41] Paragraph 2 contributes to the uncertainty by its manifestly extending some coastal state rights beyond the external limits of their territorial sea, but neither the content nor the geographical limits of its application are clear.[42] Indeed, article 303 paragraph 2, references article 33; article 33 concerns the contiguous zone, the zone where the coastal state '[…] may exercise the control necessary to […] prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations [and to] punish infringement of the above laws and regulations committed within its territory or territorial sea'. The protection afforded to cultural objects found in this zone is thus merely collateral: the coastal state obviously has no rights over this cultural heritage and may intervene only as a consequence of its jurisdiction over matters that 'have little or nothing to do with underwater cultural heritage'.[43] Furthermore, coastal states have the right to intervene to protect cultural heritage only when 'removal from the seabed in the zone referred to' contradicts one of the cited norms. The risk of 'in situ' destruction is not addressed.

Further uncertainty relates to the geographical limits of the application of article 303. The norm defines no regime relating to archaeological and historical objects found on the continental shelf or

39 According to a distinguish doctrine '[t]he two provisions are in conceptual contradiction with one another, as one (Article 149) aims at the benefit of mankind and the other (Article 303) at the benefit of finders and salvors'. Tullio Scovazzi, 'The Relationship Between Two Conventions Applicable to Underwater Cultural Heritage' in James Crawford, Abdul Koroma, Said Mahmoudi, Alain Pellet (eds), *The International Legal Order: Current Needs and Possible Responses Essays in Honour of Djamchid Momtaz* (Martinus Nijhoff 2017) 518.

40 The content of such a duty is unclear, as the convention in no way specifies. Some authors have argued that it should be interpreted broadly: to embrace a range of activities such as the maintenance of known sites, archaeological excavation in accordance with accepted standards, material conservation and displayed of,, etc. (Patrick O'Keefe, 'The Draft Convention on the Protection of the Underwater Cultural Heritage' (1994) 25 Ocean Development and International Law 391, 393); to encompass national legislation provisions on the obligation to preserve, conserve and protect UCH (Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (Martinus Nijhoff 1995)); to imply the obligation not to destroy, damage or mutilate UCH and also presume the *in situ* preservation (Luigi Migliorino, '*In Situ* Protection of Underwater Cultural Law under International Treaties and National Legislation' (1995) 10 International Journal of Marine and Coastal Law 483).

41 Part of the doctrine implies the existence of some legal obligations from this 1 paragraph. Professor Scovazzi, for example, considers that '[a]n obligation to cooperate can be seen as implying a duty to act in good faith in pursuing a given objective and in taking into account the position of the other interested states'. Tullio Scovazzi, 'Underwater Cultural Heritage as an International Common Good' (n 32) 219.

42 The paragraph states that '[i]n 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'.

43 On this point see Scovazzi (n 32) 220. Scovazzi declares himself unconvinced by UNCLOS logic, which '[…] implies that underwater cultural heritage does not deserve be protected *per se* […]'.

in the exclusive economic zone (EEZ),[44] which remain unprotected.[45]

Nevertheless, the main concern relates to article 303 paragraph 3, which states that '[n]othing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges'. As the doctrine strongly underlines, the openness to the law of salvage or other rules of admiralty 'greatly threaten the protection of cultural heritage',[46] as these evoke a 'first come first served' approach.[47] Article 303 paragraph 3 gives it overarching status: in the event of conflict the UCH protection goal is overridden by the law of salvage or other rules of admiralty. A distinguished scholar has highlighted the fact that '[t]he danger of freedom of fishing for underwater cultural heritage is far from being merely theoretical'[48] arguing that the application of the law of salvage or other rules of admiralty '[…] gives the salvager a lien over the object', leading to the application of the so-called 'freedom of fishing approach'.[49]

The UCH protection offered by UNCLOS would thus appear to be incomplete and fragmented. The connection between the CHM and underwater cultural heritage is weak and, above all, limited to a restricted geographical area. The 2001 UNESCO convention represents a more explicit and comprehensive approach to underwater cultural heritage of mankind.

3.2 The 2001 UNESCO Convention

The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage represents a significant development for UCH protection. The 2001 treaty succeeded 1954 and 1972 conventions which themselves succeeded earlier CHM principle provisions.

This trend emerges from the text of the 2001 UNESCO Convention, notably from the Preamble, which states that UCH is 'an integral part of cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their

44 According to article 55 '[t]he exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention'. It includes the Contiguous zone and it extends up to 200 nautical miles.

45 Nevertheless, an other part of the doctrine considers that '[t]he fact that article 303(1) imposes duty to protect archaeological and historical objects 'found at sea' would reinforce the conclusion that article 303(1), (3) and (4) apply to all the maritime zone [while] article 149, being specifically drafted for application in the Area, would take preference over the general provision set out in [the previous] article'. See Forrester (n 33) 325.

46 Scovazzi (n 32) 221.

47 Accordingly, the freedom of the sea principle that is at the base of this approach gives no guarantees that the object would be disposed of for the benefit of mankind as a whole.

48 Scovazzi (n 32) 221.

49 Scovazzi (n 32) 222-223. Other commentators do not share this view arguing that 'coastal states custom, fiscal and sanitary law should be extensively constructed so as to include the coastal state cultural heritage regulation'. Bruce E. Alexander, 'Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendation' (1989) 20 Journal of Maritime Law and Commerce 1-20, 17. Others argue that 'the effect of article 303 is to establish an archaeological zone which is not necessarily dependent on the coastal state having declared a contiguous zone'. Anastasia Strati (n 40) 225.

common heritage', and from article 2, providing that 'States Parties shall preserve [it] for the benefit of humanity […]'. Paragraph 2 of the same article introduces the obligation to '[…] cooperate in the protection of underwater cultural heritage', which can be viewed as an additional echo of the CHM doctrine.[50]

The path to the adoption of this Convention was not straightforward: the final text was adopted with a considerable number of abstentions and the Convention only entered into force eight years after its adoption. Despite these difficulties and whilst undoubtedly inspired by its article 149, the 2001 UNESCO Convention tried to address the gaps left by UNCLOS.[51]

Firstly, the 2001 convention's range of action is much more extensive and includes all maritime zones. Thus, the protection afforded to UCH in the interest of humanity as a whole is not limited to the Area, which is the geographical scope of application of UNCLOS article 149.

Secondly, state of origins' preferential rights are not included in the list of general principles in article 2 of the convention. However these are not entirely excluded, as they are dealt with in several other provisions pertaining to the EEZ, the continental shelf and the Area,

The most innovative provisions, as compared with UNCLOS, are threefold: the elimination of the negative effects of the law of salvage and finds; the exclusion of the "first-come-first-served" approach to the continental shelf and in the EEZ; the strengthening of regional cooperation.

Concerning the elimination of the negative effects of the law of salvage and finds, the 2001 UNESCO Convention article 4 provides that '[a]ny activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds […]'. The progress implied by this provision is undeniable even considering the second part of the same article 4 which came to a necessary compromise solution in which states participating in the negotiations had to agree to reach agreement with the minority of states not ready for an absolute ban on the law of salvage.[52] Indeed, article 4 does not rule out the application of the law of salvage when 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'. Nevertheless, this provision has to be read in conjuction with paragraph 7 of article 2 and with rule 2

50 Whilst the Convention specifies no concrete measures that states can take to cooperate with it.

51 An eminent scholar has argued that '[t]he CPUCH may be seen as a reasonable defence of the underwater cultural heritage against the results of the counterproductive regime of UNCLOS'. Scovazzi (n 32) and the same author in 'La notion de patrimoine culturel de l'humanité dans les instruments internationaux', Académie de droit international de La Haye (Martinus Nijhoff, 2008) 3; '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', in Nafziger, Nicgorski (eds), *Cultural Heritage Issues The Legacy of Conquest, Colonization and Commerce* (Martinus Nijhoff, 2009) 287; 'The entry into force of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2010) 1 Aegean Review of the Law of the Sea and Maritime Law 19; 'The Law of the Sea Convention and Underwater Cultural Heritage' (2012) 27 The International Journal of Marine and Coastal Law 753; as well as Vincent Cogliati Bantz, Craig J. Forrest, 'Consistent: the Convention on the Protection of the Underwater Cultural Heritage and the United Nations Convention on the Law of the Sea', (2013) 2(3) Cambridge Journal of International and Comparative Law 536; Sorna Khakzad, 'Underwater Cultural Heritage Sites on the Way to World Heritage: To Ratify the 2001 Convention or not to Ratify?' (2014) 1(2) Journal of Anthropology and Archaeology 1.

52 See Scovazzi (n 32) 224-225.

of the Annex, which explicitly excludes any commercial exploitation of the UCH.[53]

Regarding the 2001 UNESCO Convention's second innovative provision, it is noteworthy that the Convention introduces a procedural mechanism designed to involve all states linked to the UCH, wherever the latter is found. This mechanism, once again a compromise, nonetheless has a positive outcome in that it represents a step in the direction[54] of extending the jurisdiction of coastal states to UCH found on the continental shelf or in the EEZ. The first part of this procedural mechanism consists of the reporting obligation, provided in article 9(4) upon nationals or vessels flying a flag of a state party in UCH-related activities, or when an artefact is found on the continental shelf or in the EEZ of another state that is party to the convention. Reports received by the states must be transmitted to the UNESCO's Director-General. The second part of the mechanism, comprised in articles 10(3) and 9(5) involve the coastal state assuming the role of 'coordinating state'[55]. As such it is obliged to consult all states parties declaring an interest in being consulted, to determine togetherthe most effective way to protect the UCH in question. Finally, Article 10(4) provides that the coordinating state has the right to adopt 'all practicable measures […] to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting'.

The third innovation is the encouragement in article 6 of the 2001 UNESCO Convention to states parties to conclude 'bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage'. The approach of this article is a multilevel one, similar to the approach generally used in the environmental field, where general agreements are, in a way, integrated and specified by regional and sub-regional ones[56].

Article 2(3) of the 2001 UNESCO Convention states that UCH found in the Area must be 'preserve[d] […] *for the benefit of humanity* (emphasis added)'. Nevertheless, articles 11 and 12 retain some form of a preferential right for the state of origin (even if excluded from article 2): states with a 'verifiable link' to this heritage have a right to be consulted on how to protect it.

The 2001 UNESCO Convention potentially represented a giant leap forward for UCH protection and its relationship with the CHM. Unfortunately, its low implementation reflects its overlap with UNCLOS and the limited attention provided to the 'common nature' of UCH. Assuming then, that interaction is inevitable, should we consider other means of achieving the desired result?

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53 As the Annex states 'the commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is *fundamentally incompatible with the protection and proper management of underwater cultural heritage*. Underwater cultural heritage *shall not be traded, sold, bought or bartered as commercial goods* (emphasis added)'.

54 In any event, Scovazzi regrets that '[…] despite all the efforts to reach a reasonable compromise, a consensus could not be achieved at the moment of the adoption of the CPUCH on the procedural mechanism envisaged for the heritage located on the continental shelf or in the exclusive economic zone'. See Scovazzi (n 32) 227.

55 Unless another state has an interest in assuming this role.

56 Scovazzi (n 32) 227. For a practical example see Mariano J Aznar, 'The *Titanic* as Underwater Cultural Heritage: Challenges to its Legal International Protection' (2013) 44 Ocean Development & International Law 96.

3.3 New Perspectives: Protecting Cultural Heritage in Tangential Ways? Looking for an Interaction with other Disciplines

UNCLOS's vagueness, difficulties in implementing the 2001 UNESCO Convention, and the challenges concerning the coexistence of the two has prompted consideration of alternative ways of protecting UCH.[57]

A feasible path would seem to be an environmental protection approach. Indeed, archaeological objects lying under the sea are very frequently completely embedded into the marine ecosystem surrounding them with multiple species of flora and fauna living in them. Thus, the two dimensions are inextricably linked and any activity affecting the UCH in question or surrounding natural resources, may have dangerous consequences for both.

Article 56 of UNCLOS states that, within the limits of its EEZ, '[…] the coastal State has […] sovereign rights for the purpose of *exploring and exploiting, conserving and managing the natural resources*, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds […](emphasis added)'. Whilst, as we have already underlined, UCH cannot be considered a 'natural resource' *per se*,[58] this reference to the duty to conserve natural resources is worthy of attention as it may potentially leave space for collateral protection of connected UCH.

Regarding the continental shelf, article 77 of UNCLOS states that '[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources'. It specifies also that '[t]he natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil'. UCH would again seem to be explicitly excluded from this, nevertheless any exploration or exploitation in this area potentially affects both dimensions and should necessitate a proper protection system.

Finally, considering the Area, some commentators have speculated whether the norms applicable to the protection of the environment in this sector could fill any existing gaps in the protection of UCH

57 According to Aznar, ' […] some of the complaints about the vagueness and limited guidance of Article 303 ignore how the treaty is a framework convention and that detail about rights and responsibilities in article 303 may be found in other provisions of the Convention'. The UCH discipline should then be complemented with other norms of the same convention, even if not directly and specifically consecrated to the cultural dimension. Mariano J Aznar, 'The Legal Protection of Underwater Cultural Heritage: Concerns and Proposals' in Carlos Espósito, James Kraska, Harry Scheiber, Moon-Sang Kwon (eds), *Ocean Law and Policy Twenty Years of Development Under the UNCLOS Regime* (Martinus Nijhoff, 2016) 124, 137.

58 Indeed, as explicitly explained by the International Law Commission (ILC), the rights the coastal states can exercise over the natural resources located on their continental shelf '[…] do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil' (in this case the Commission was commenting art. 68 of its report on the law of the sea, published in 1956. Yearbook of the International Law Commission – vol. II (1956), 298). This exclusion can be seen as referring to the underwater cultural heritage category as a whole.

located here.[59] Articles 11 and 12 of the 2001 UNESCO Convention, which, as we have already seen, provide for a complex system of notifications and coordination between interested states, govern the activities *directed* at the UCH. Nevertheless, some activities, such as mining, for example, incidentally affect underwater cultural heritage, potentially disturbing or damaging it. The system would thus appear to be incomplete. In this context the environmental protection regime established under UNCLOS may be of assistance. The solutions proposed by the doctrine include: the application of a similar monitoring system to that foreseen for the marine environment that involves the Authority;[60] the establishment of 'preservation reference zones' to protect UCH located there too;[61] the use of emergency orders, such as suspending or adjusting operations endangering UCH in the Area;[62] the general inclusion of the 'archaeological variable' in the idea of 'serious harm to the marine environment' so as to allow for the application of all related norms.

In this latter sense, the 2001 UNESCO Convention can be seen as having a more open approach, which includes explicit references to the 'natural environment' or 'context' that surrounding the underwater cultural heritage in question.[63] The Annexed Rules, more proactively, consider the two dimensions together, rule 10(1) providing that any archaeological project submitted to the competent authorities for authorisation '[…] shall include […] an environmental policy'. Rule 29 sets out: This policy should be '[…] adequate to ensure that the seabed and marine life are not unduly disturbed'. Rule 10(a) provides that an evaluation 'of previous or preliminary studies' shall also be included into the project and further, through rule 14, it '[…] shall include an assessment that evaluates the significance and vulnerability of the underwater cultural heritage *and the surrounding natural environment* [emphasis added] to damage by the proposed project […]'.

Nevertheless, such references cannot be considered satisfactory. Their implementation does not achieve the expected results. Indeed, as noted in several academic works, activities directed to the UCH unfortunately still usually imply the destruction of the natural environment surrounding archaeological heritage sites.[64]

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59 A very recent reference is Mariano J Aznar, 'Exporting Environmental Standards to Protect Underwater Cultural Heritage in the Area', in James Crawford, Abdul Koroma, Said Mahmoudi, Allain Pellet (eds), *The International Legal Order: Current Needs and Possible Responses Essays in Honour of Djamchid Momtaz* (Martinus Nijhoff 2017) 253.

60 See Regulation 5(2) PNR/PSR/CCR; Regulation 31(6) PNR/CCR; Regulation 33(6) PSR; Regulation 32 PNR/CCR; Regulation 34 PSR as cited in Aznar (n 59) 253.

61 Prior ISA regulations established this kind of protected areas in order to safeguard biodiversity and the marine environment from mining.

62 This kind of remedy already exists to protect the environment of the Area and was adopted by the ISA.

63 Article 1(1)(a), lists some examples of the 'traces of human existence having a cultural, historical or archaeological character' that constitute the underwater cultural heritage protected by the Convention, also encompassing the 'sites, structures, buildings, artefacts and human remains, *together with* their archaeological and *natural context* [emphasis added]' (art. 1(1)(a)(i)) as well as 'vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, *together with their* archaeological and *natural context* [emphasis added]' (art. 1(1)(a)(ii)).

64 Aznar is waiting for '[…] a return route from the environment to archaeology [as] both questions are inextricably linked: most historical wrecks, for example, have become artificial reefs deserving not only archaeological but also environmental protection' (Aznar (n 59) 271).

According to the same doctrine, the norms regulating Marine Scientific Research (MSR) could constitute another tool.[65] Even if it is accepted that archaeological activities were not encompassed by marine scientific research during UNCLOS negotiations, recent commentators have argued that the sole fact that articles 149 and 303 exist demonstrates that UCH protection was one of the original purposes of UNCLOS and hence, the convention as a whole should be read in this light.[66] According to this doctrine, MSR could allow a collection of data useful for UCH and also for environmental protection.[67] Therefore, when research is related to UCH located in the EEZ or on a state's continental shelf, pursuant to article 246 of UNCLOS, this state should have the right to give or withhold its authorisation in order to protect such heritage.[68] The main advantage of resorting to this discipline is that it applies prior to intervention taking place, thereby avoiding site destabilisation, as well as potential enforcement challenges. It could also represent an important legal reference for states which at present have no intention of ratifying the 2001 UNESCO Convention, but are nonetheless concerned about UCH related activities.[69]

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65 Sarah Dromgoole, 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage' (2010) 25 The International Journal of Marine and Coastal Law 33; Aznar (n 57); Tullio Scovazzi, 'Is the UN Convention on the Law of the Sea the Legal Framework for All Activities in the Sea? The Case of Bioprospecting', in Davor Vidas (eds), *Law, Technology and Science for Oceans in Globalisation IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Martinus Nijhoff 2010) 309; Tullio Scovazzi, 'The Negotiations for a Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity Beyond National Jurisdiction' (2016) 70 Marine Policy 188. See also Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, (TMC Asser Press 2002) 65; Keun-Gwan Lee, 'An Inquiry into the Compatibility of the UNESCO Convention 2001 with UNCLOS 1982', in Prott (eds), *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Institute of Art and Law 2006) 20; Katherine Croff, 'The Underwater Cultural Heritage and Marine Scientific Research in the Exclusive Economic Zone' (2009) 43 Marine Technology Society Journal 93.

Dromgoole at 38 argues that the gap in the UNCLOS provisions is due to the fact that, at the time of this convention was been negotiated and adopted, marine archaeology '[…] was barely a scientific discipline at all and understanding of the potential historical and archaeological value of the underwater cultural heritage (UCH) was limited and undeveloped'.

66 Ibid.

67 Sarah Dromgoole (n 65) 33.

68 The coastal state has various levels of discretion depending on the nature of the research project. A so-called 'pure' project implies research carried out 'exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind' (art. 246(3)). In this case coastal states usually consent. When a so-called 'applied' project is concerned, on the other hand, 'of significance for the exploration and exploitation of natural resources' (art. 246(5)(a)), coastal states may withhold their authorisation.

When considering UCH related activities in which research is being supervised by scientific institution and follows archaeological protocols internationally recognized by the scientific community, for example, a project may be classified as 'pure'. On the contrary, where activities such as treasure hunting or other commercial activities are concerned and considered an 'applied' project coastal states surely have the right to reject them. On this point see Aznar (n 57) 141.

69 Dromgoole(n 55) at 61 argues even that the application of MSR rules 'would help to bolster the regulatory mechanisms set out in the UNESCO Convention which – in respect of the continental shelf and EEZ – are complex and imperfect'.

4. Concluding Remarks

Both UNCLOS and the 2001 UNESCO Convention are the products of their time.[70] As far as the former is concerned, the cultural dimension pays the price of scarce technology which has placed the UCH as an 'exotic subject of interest'.[71] While the latter embodies an interest in humanity as a whole its concrete protection is difficult to apply. After lengthy debate on which of the two conventions should prevail over the other, contemporary doctrine has reached the conclusion that only constructive cooperation can achieve the desired result.[72] On one hand, an extended interpretation of UNCLOS, which includes the clauses referring to marine environment or regulating marine scientific research, would provide the effectiveness that the 2001 UNESCO Convention lacks.[73] On the other hand promoting the adoption of bilateral, regional or multilateral agreements with a higher standard of protection and rooted in its same principles, the latter convention is capable of granting a more extensive and modern interpretation of UCH. The result from such a complex and multilevel interaction would also perfect the existing links between the common heritage of mankind and the cultural heritage of humanity: two sides of the same coin, but not yet supplied with the same legislative tools.

70 Aznar (n 57) 144.

71 Aznar (n 57) 144.

72 Aznar (n 57) 145 argues that the concerns and the criticisms that the 2001 UNESCO Convention has attracted '[…] may be dispelled with an evolving and contextual interpretation of the UNESCO Convention as its 'constructive ambiguities' are being implemented consistent with international law *including* (emphasis added) UNCLOS'.

73 UNCLOS and the ISA Mining Code include an effective enforcement mechanism that the 2001 UNESCO Convention lacks. See Aznar (n 59) 272.